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BY

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INTRODUCTION BY

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CHICAGO

T. H. FLOOD & CO., PUBLISHERS

1914

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THIS WORK
IS DEDICATED TO
JOHN HENRY WIGMORE
WHO ENCOURAGED THE AUTHOR IN ITS PREPARATION
MAY IT SERVE TO UNITE
THE MEMBERS OF THE MEDICAL AND LEGAL PROFESSIONS
IN THE INTEREST OF
GOOD GOVERNMENT



INTRODUCTION

BY JOHN H. WIGMORE¹

This book is a sign and a product of the times. Community health as a public function is a novel institution, scarcely adult. In a time within my memory, the only law that one heard of for public health was the quarantine rule that ships coming up the bay from a plague-rumored Oriental port must lie at anchor for forty days, detaining all their passengers and crew on board.

It is modern science that has vastly enlarged the scope of modern law. We have found that the scope of measure necessary for common defence calls for this enlargement of function.

The law has become involved in the necessities of applied science. Is it yet equal to the task? Will old and settled principles serve? Do the new measures call merely for new applications of old principles, or for their destruction and the creation of new ones? Is it merely a changed phase of the conflict between individual liberty and general welfare—between executive discretion and fixed law,—between officialism and *laissez faire*? This book answers these great questions.

The three typical groups of legal principles involved take us into the midst of common law,

¹ Professor of Law in Northwestern University; Illinois Commissioner on Uniform State Laws, etc.

statutes, and constitutions alike. One question is the efficient organization of executive and administrative officers and boards; this is a matter of improved statutory framing. Another is the extent of the liability of officers in the use of their powers; this harks back to great common law principles. And another is the legislative power to restrict individual liberty; this involves settled constitutional principles. Around these three groups cohere a host of minor principles and problems.

The last generation has seen a slow working out of these new applications of principles. The slowness has been worth while; because science itself during that period has forged ahead so rapidly that the law could not safely have fixed itself at any one stage. Now that the main trend of scientific demands can be plainly seen in a future outline of some permanence, it is possible to analyze the conditions to which the law will be asked to adjust itself.

I believe that on the whole the existing principles of law will be found adequate for just demands. The main pre-requisite for that adjustment is intelligent mutual understanding. Law and Science must become better acquainted. They *are* becoming better acquainted; witness (as a single example only) the superb opinion of the Chancery Court of New Jersey (by Vice Chancellor Stevens) in the litigation over the Jersey City water supply.² But this acquaintance must extend all along the line. Judges, lawyers, and health officers must make it a duty to become familiar with each other's everyday principles and assumptions.

² Mayor of Jersey City v. Flynn, 74 N. J. Eq. 104.

This book does that service to both. Its author is a remarkable instance of a medical practitioner versed in the law. His experience early introduced him to the problems of public health in its legal aspects.³ His published essays have shown that his views are original, carefully studied, practical, well-balanced, and progressive.⁴ His proposals for the reorganization of

³ Dr. Hemenway's professional record is thus summarized: Northwestern University, A. B. 1879; M. D. 1881; A. M. 1882. Health Officer, City of Kalamazoo, Michigan, 1884-5. Secretary Kalamazoo Board of U. S. Examining Surgeons, Jan., 1887, to Sept., 1890. Secretary and Librarian, Kalamazoo Academy of Medicine, 1883-90. Vice-President, Michigan State Medical Society, 1886-7; Treasurer Michigan State Medical Society, 1887-90. Member of Finance Committee, Ninth International Medical Congress, 1887. Vice President, American Academy of Medicine, 1910-11. Acting Professor Preventive Medicine, College of Physicians and Surgeons, Chicago, 1900.

⁴ The following is a partial list of his articles on topics relating to preventive medicine or governmental problems:

"Diphtheria in Kalamazoo, 1884." (A study of the relationship of sewage and water supply to the disease.) (Jour. American Medical Association, Vol. VI., p. 225.)

"The Relationship of Atmospheric Conditions to Intermittent Fever." (Jour. A. M. A., June 13, 1891, Vol. XVI., p. 848.)

"Pharyngo-Mycosis." (The first

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"Executive Methods in Preventive Medicine." (Jour. Am. Public Health Assn., p. 251, April, 1911, Vol. I, N. S.)

"Legal Aspect of Public Health Work in Illinois." (Illinois Law Review, Vol. V, p. 157.)

the executive in Illinois, if adopted, would alone entitle him to the gratitude of the community. A generation from now the advanced wisdom of those proposals will, let us hope, figure as realized truisms throughout the country.

The task, in this book, of stating the law and exhibiting its lines of contact with the demands of science, as well as of pointing out the necessary adjustment of medical methods to the fundamental restrictions of law, is a difficult and a delicate one. No doubt, to the legal profession some passages will seem platitudes, and others more than disputable. Possibly the medical profession could find similar points of disagreement. But the task of welding together the two bodies of learning needed to be done. Even in the hands of one uniting rarely the requisite accomplishments of learning in both sciences, it may be that to satisfy in every detail two professions of such vast scope of learning is more than could humanly be expected.

The needful thing today is that the two professions should avail themselves of these materials to learn each of the other,—that each should set itself conscientiously to re-examine its own postulates in the light of the other's. My advice to all lawyers, judges, and health officers is to read and ponder every chapter of this book.

Northwestern University, Chicago, March 4, 1914.

“The Organization of the State Executive in Illinois.” (Illinois Law Review, Vol. VI, p. 112.)

FOREWORD

The reception which has been accorded, both by sanitarians and members of the bar, to certain articles upon the legal aspects of public health work has encouraged the writer to extend his labors in that field. The hunger evidenced for definite information upon the subject, and the absence of any authoritative American treatise have emboldened him to attempt to produce such a work. (It is very apparent that most health officials have only a very limited comprehension of the principles of law. Orders and ordinances are passed which are totally lacking in constitutionality, and authority is frequently usurped without a reasonable excuse. On the other hand, a realization of the personal liability, without a clear idea as to its limits, may deter well meaning men from performing their duty. As an efficient state official once remarked to the writer, "We issue our orders. If they are obeyed, all right. If they are vigorously opposed, we run home like a whipped dog.") It must be apparent to all that, no matter how satisfactory the average result happens to be, such a course does not exemplify good government.

In attempting to produce an "authoritative" manual, the writer does not claim that his opinion is authoritative, in the sense that it is always a safe guide. Judge Dillon says in the introduction to his work on municipal corporations: "No writer on our jurisprudence is authorized to speak oracularly, to

excogitate a system, or to give his views in any authoritative sanction. * * * No author can alter this inexorable condition; and any author ought to be content, and certainly will be fortunate, if he can leave on the imperishable structure of our jurisprudence some visible imprint, some lasting touch, some embodied memorial, however slight, of his labors." With this spirit, conditions have been studied, and decisions have been examined, to develop therefrom, if possible, some reasonable basis of action. It shall be the aim in the following pages to show the nature and the limits of legal authority, and thus strengthen the service.

We have reached a transition period, when a reorganization of the work is demanded. The probabilities are that there will be much public health legislation in the near future. It is hoped that these studies as to the principles of public health law in the United States may aid in perfecting proposed statutes. Whereas most commentaries in law aim purely at a statement of the law as found in the statutes and court decisions, the writer of these pages craves permission to make suggestions as to the future. In the days of small ships shallow streams might be sufficient for the transportation of commerce. So long as the ships remained small, all that was necessary was to chart the streams, showing the shallows and the rocks. With the increase in the size of the boats, it may become necessary to abandon the old water courses, and dig anew. Ship canals are not dug at random. Surveys must be made, and often the first course proposed must be abandoned. Like the plats of the engineers, the suggestions here made may prove to be impracticable

and inadvisable, but it is hoped that even if so, they may still aid in finding the true solution of the problems.

Recognizing the fact that the work is for the use of widely differing classes of readers, it has seemed necessary to rehearse in the earlier chapters certain elementary principles, that sanitarians and members of the bar may meet upon a common ground of understanding. In the past, laws proposed by sanitarians have often failed through neglect of the principles of law; likewise those drafted by lawyers, have fallen short of their purpose because they have not comprehended the present advance, and the discovered facts in science. Legislators have neglected to act because they have not realized their responsibilities. The science of public health has advanced far beyond the administration. It needs the co-operation of all to attain the results which by right belong to the nation.

Today, much of the work which properly belongs to the public health service, is being done by private enterprise. It could, and should, be better done by the recognized forces of government. Private enterprise has been stirred by the weakness of administration. Witness the hysterical efforts of citizens' committees in the past in the presence of epidemics; and the present crusade against the white plague. These unofficial movements would be unnecessary if the authorized officers of government were doing their duty. The fault may be partly with the officers of health; but more especially it is due to the weakness of the law, and the lack of appreciation of the necessities on the part of the citizens of the land.

Assistant Surgeon General Rucker has emphasized the need for greater care relative to sanitary legislation. In the United States Health Reports, he says: ¹

“There is in this country a wealth of sanitary legislation which is impractical of administration and which lacks uniformity and logical basis. The epidemiologist whose business it is to study disease in the light of prevention has long ago learned that one law in operation is worth ten unenforced laws on the statute books. More than this, an idle law casts discredit upon the legislators who begat it and the officials whose business it is to enforce it. It encourages a disregard of laws which it is desired to enforce, and therefore acts as a general hinderance. Many of the public health activities in this country would be further advanced today were they not hampered by impractical laws passed by the overzealous. It must be admitted in all justice that the public health authorities have to a certain extent aided and abetted in the passage of these laws. The enthusiasm of which we have been speaking has led to the formation of a large number of societies having for their object the prosecution of some particular form of public health activity.” (The old adage “Too many cooks spoil the broth,” applies perfectly here. With the multiplication of these separate activities there results confusion and conflict.) Rucker goes on to say: “Two general sets of faults may be found in the sanitary laws of this country. The most common of these is a scatteration of ideas, and loading down the health officer with more power than he could possibly use. This is just as great a fault as giving him too little power. Frequently a law errs in the opposite direction, and endeavors to be too

¹ Reprint No. 173.

specific, in which event it becomes the victim of legal quibbles which prove its utter undoing. Most of these laws are drawn up by amateurs, and even the very wisest professional is sometimes hard put to it to draft a proper law. In this connection, it may be pointed out that the profession of law is becoming highly specialized. We have corporation lawyers for the mining industry, the banking industry, and for the various other classes of corporations. As a matter of fact, there is a specialty for every kind of law from crime to real estate, excepting sanitary law, and there is great need, indeed, for men who can combine with a knowledge of the law a knowledge of the fundamentals of epidemiology."

The importance of the technical drafting of acts is better recognized in England than in this country. A great deal of the law enacted there is offered in form by the government; and for many decades the government has employed expert drafters, holding office under the Treasury. Mr. Courtenay Ilbert, who formerly held that post, and more recently has been Clerk of the House of Commons, in 1913, October, gave a course of lectures under the Carpentier Foundation, at Columbia University. These lectures, slightly amplified, have been published under the caption "The Mechanics of Law Making." These are the practical suggestions which he makes relative to the preparation for the drafting of a statute. The statute will be desired to supply a deficiency or correct a wrong. The general subject having been given to the draftsman he must first review and compare the various statutes enacted, in that or other jurisdictions, relating to the problem in hand. Next he must review the court decisions

upon the statutes, and consider the common law principles applicable. Thirdly he must consider the facts of science applicable. In the case of sanitary laws this third point must include a knowledge of the science of sanitation, with a knowledge of sociology and of commercial life. It may also be considered to include administrative experience. We find practically that when sanitary ordinances are drawn up by lawyers they are liable to be inefficient because the draftsman misses the main point, in the same way that a drawing, intended to represent a dislocation of a vertebra, was once rendered meaningless by the artist. He removed the irregularity of outline which he considered an accident due to the inexperience of the original draftsman. When ordinances are drafted by amateurs they are likely to be greatly overloaded with unessential details, and not seldom they omit some important, but not prominent point. When drafted by sanitary officers they are frequently nullified by some legally technical error. If the health officer be competent, all sanitary legislation should originate with him, and the legal expert should assist him in the drafting. The amateur should aid, but not originate, legislation. The enthusiastic amateur sanitarian should expend his strength in insisting that competent officers be appointed and supported, and that they be given sufficient funds with which to work. If the officer be competent he must know better than the amateur lay citizen as to the needs of legislation, and as to the degree to which it is best to press action.

In considering the drafting of statutes and ordinances it is well to remember that much that is here done by direct legislation, in England, for example,

would be left to executive rules and orders. Even here it is wise to so draft a law that the executive is given latitude of action within certain limits. The general terms of the statute are made definite by executive orders and regulations. (§ 95.)

Finally, since wise legislation must be the result of the union of a knowledge of the facts of science and of law, it has been the aim of the writer to set forth the guiding principles as shown by the opinions of those best able to decide upon the application of our governmental ideas in this branch of the police of protection.



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Part I
General Principles



CALIFORNIA

LEGAL PRINCIPLES OF PUBLIC HEALTH ADMINISTRATION

CHAPTER I

RELATIONSHIP OF PUBLIC HEALTH TO BODY POLITIC—SCIENTIFIC BASIS OF PUBLIC HEALTH EFFORTS

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§ 1. Health the basis of success. Good health lies at the foundation of success, either for the individual, or for the community. It matters not how well educated a man may be, nor how amply supplied with the coin of the realm, if his body is tortured with disease, or if his brain is deadened by the toxins of infection, his activities will be restrained, and his usefulness may be paralyzed.

We are told that in 1348 and 1349 about one-half of the population of England died of the plague, which was spoken of as the Black Death. The immediate effect of this calamity was to decrease the demand for the products of the land; but what was more marked, and more lasting, since the disease attacked especially the laboring portion of the population, wages were greatly raised, so that the profits to be obtained from the land were decreased. In fact, so independent did the laborers become, and so extortionate were they as to wages, that special laws were passed limitive to the amount of wages to be paid, and requiring laborers to work when offered the stipulated wage. Even that statute was not sufficient, for the workmen refused to work unless they were given such pay as they might demand, and many fertile estates were ruined.

So, too, it matters not how rich the soil of a country may be, nor how perfectly the air may be fitted for the growing of crops, if the region is so beset with disease that men can not harvest those crops, the land is valueless. If the inhabitants are so weakened by malaria or tropical anaemia that they can do but partial work, the money value of the land is reduced proportionally.

§ 2. Necessity for public health service. The two

diseases mentioned,—malaria and tropical anaemia, are very good illustrations of the necessity for a public health service. Whereas an efficient warfare against dyspepsia, for example, may be made by individual hygienic effort, malaria must be met by a coöperative campaign for the greatest success. Measures must be taken to prevent the introduction of the disease into the community, by either excluding patients, or by effectually protecting them from the bites of mosquitos; and the breeding places of the anopheline mosquito must be exterminated, or rendered unfavorable for the larvae. Tropical anaemia, or ankylostomiasis, demands concerted action to prevent the pollution of the soil by the offending worm. (§ 452.)

§ 3. Illustrative results of health protection. The Suez Canal Company built a model city, Ismailia, for the residence of its officials, and for the chief port. It soon had a population of 10,000 souls. Then malaria appeared, and the growth of the place was checked. Port Said became the port. Gradually the amount of malaria in Ismailia increased until in 1891, 2,500 patients were there treated for the disease. In 1902 Major Ross of the British Army was called to Ismailia to study the conditions. He devised plans for mosquito extermination. These were carried out at the expense of the Canal Company. Immediately the number of cases of malaria decreased, and the reports for 1906, 1907 and 1908 were that no new cases had developed in Ismailia.¹ Cuba was ever a hotbed of disease until the American Army eradicated malaria and yellow fever. The construction of the Panama Canal,

¹ Ross, 1910, p. 499 et seq.

or of the Madeira-Mamore railroad in Brazil were practical impossibilities until science demonstrated how the workmen could be protected from malaria and yellow fever, by the general sanitary precautions of the construction force. At Ismailia, and on the Mamore railroad, the sanitary power was exerted by a commercial corporation. In Panama and in Cuba the authority was governmental. Whether governmental or commercial, the action was communal, and like results were only possible by communal action.

Another excellent illustration of the commercial importance of communal sanitation is found in the experience of the United Fruit Company, which has plantations in Cuba, Nicaragua, Spanish Honduras, Costa Rica, Columbia, etc. When this company began its work in Panama it had no trained sanitarians, and not less than eighty per cent of its men were on the sick list. About 1900 it secured sanitarians from the far east. The death rate on its Panama plantations now is about 7.5 per 1,000. The company adopted rigid sanitary rules. It assisted in founding a school of tropical medicine at New Orleans in which its sanitarians could be trained. In 1913 it opened up new fields in a pestilential section of Spanish Honduras. The sanitarians were sent first into the field to prepare the way. As a result the operations during the first year, with the building of 250 miles of railroad, and the planting of 50,000 acres of bananas, showed an amount of sickness and death in this former hotbed of disease comparing favorably with that of an agricultural section in the United States. We are told further that during 1913 not a single case of "quarantinable" diseases occurred on any of its plantations, at any of its ports, or upon any of its ships, although

both plague and yellow fever were present at various ports on the Carribean shores.^{1*}

§ 4. Governmental or commercial control. Communal action may be secured through the agencies of government, either national, state, sectional (county), or municipal. In such cases the action should be in conformity with established law. Corporations, or large landed proprietors, by virtue of the rights of ownership, have authority in the use of their property beyond that which the state might compel. The communal action might therefore arise through the territorial interest, as in the case of the Suez Canal Company, or through its authority over its employees. An illustration of the latter case is where a company requires all its employees to be vaccinated, even though there be no statute demanding such vaccination. Either of these methods has its influence beyond those directly affected, by power of example, and thus the way may be paved for enactment. Again, communal action may result through voluntary coöperation, as where the residents of a section unite to drain a swamp.

§ 5. Health preservation a motive for municipal organization. This necessity for coöperation in the protection of the public health furnishes a motive for organizing municipal corporations.² It has been claimed that a desire to protect the citizens from cholera was a prime object in the organization of the township of Chicago, a few months after the epidemic of 1832. The reason for this surmise is that among the earliest ordinances passed were those relating to sanitary affairs.³

^{1*} Adams, Conquest of the Tropics, Chap. XIV.

² Chicago v. Ice Cream Co., 252 Ill. 311; Elliott, 91.

³ Moses and Kirkland, Vol. II, p. 232.

Dillon says of police powers as related to health:⁴ "This is indeed one of the chief purposes of local government, and reasonable bylaws in relation thereto have always been sustained in England as within the incidental authority of corporations to ordain."

§ 6. Science of public health of recent origin. The science of public health is of very recent origin, though public health measures have long been recognized and used. Thus, the primitive Mosaic Code contains many such provisions. With the advance of the science, methods have been altered. Formerly cases of yellow fever were strictly isolated from healthy individuals, and the results were very disappointing. Today the healthy individuals are permitted to associate freely with the sick, but the patient is protected from the stegomyia mosquito, and the breeding places of those insects are destroyed, or rendered deadly for the larvae. (§ 400.) Formerly malaria was supposed to be the result of some miasm, and not infectious. Today it is known that the disease is similar to yellow fever in production, and similar means are used for its control. The morbidic imps who spread those diseases laughed at fences and military cordons, but they are vanquished when the bushes are cut down, when ponds are drained, and streams are trained, and stocked with "millions" fish; and when, moreover, necessary receptacles for water are screened effectually or treated with petroleum oil.

§ 7. Local versus state supervision. Formerly the efforts at the restriction of disease were essentially local in nature and operation. Local nuisances were abated,

⁴ Municipal Corporations, Sec.
369.

and quarantine was simple, though inefficient. Communities were scattered, and the intervening spaces were thinly populated. Travel was slow, and not freely undertaken. Today a man may contract small pox in San Francisco, and first show its symptoms in Chicago or New York. The country is thickly populated, and an infectious disease may spread through a large area like a prairie fire. The problems are general, not local, and the methods which are successful in one locality are equally useful in others. Even when the actual work is performed by municipal or town officials, the authority therefor may better be derived from the state or nation, and it is essential that the supervision should be by officers with wide jurisdiction.

§ 8. Economic changes alter problems. Changes in economic conditions have altered the necessity for public health supervision. Whereas formerly the cities were relatively small, today a large proportion of the population is crowded within urban walls. Formerly dairy herds were small, and the majority of people were close to the cows from which the milk which they consumed was obtained. Today the milk for our large cities is collected from a wide territory, often embracing several states, and it is from twenty-four to sixty hours old before it is used. (§ 423, 466.) This fluid is an excellent culture medium for bacteria, though their growth may be slow at first. Bulletin 41, of the Hygienic Laboratory of the United States Public Health and Marine Hospital Service gives a table⁵ showing the multiplication of bacteria in milk kept at ordinary room temperature. This is ordinary milk

⁵ p. 451.

from a healthy animal. Starting with 400 bacteria per cubic centimeter, in fourteen hours there were only 500; but in 24 hours the number had reached 5,000. In 36 hours the number had reached 60,000; 48 hours, 366,000; and in 60 hours, 780,000. Since many diseases are the result of bacterial action, it is very apparent that the danger is far greater in the use of old milk than in that which is fresh. As it is well known that typhoid fever, scarlet fever, diphtheria, measles, tuberculosis, and probably other diseases are often spread through the agency of milk, it is clear that the lengthened time between the cow and the user necessitates greater care and cleanliness in the handling of business.

The change in conditions introduces another element of danger. Formerly a germ dropped in a pail of milk would, even if given time, infect only a few gallons at the most. Infection on a dairy farm would endanger only a few families in a limited area. Today, the large milk companies collect the fluid in bottling establishments, and a single infected pailful may easily infect several carloads. The result might endanger a large population, scattered widely through urban territory. This demands a more careful supervision than was required before.

The man who buys milk from his next door neighbor, (who thus disposes of the surplus left after supplying his own family from the cow which he keeps in an adjacent vacant lot), can without trouble satisfy himself as to the degree of danger which he thus risks. If the children of the owner of the cow be ill with an infectious disease, the neighborhood knows it. If the cow be sick, or if she be kept in a filthy condition, that

is discovered. If the animal be fed unwholesome slop, it is not difficult for the milk buyer to find it out. Even when the dairy farm is outside of the village, the villager may discover for himself what are the conditions of milk production. With the increase in the size of the milk company, with the greater territory covered by the collective dairy farm, the individual user can less easily guard himself. He must therefore trust this guardianship to the agent of the community, the health department.

§ 9. Municipal control limited by nature and law. A municipal officer has authority only within the limits of his own corporation, but he may easily keep posted as to conditions in the immediate neighborhood. Local interests may often serve as efficient aids in upholding the sanitary requirements for dairies even outside of the territorial jurisdiction or the municipality. When, however, the dairy farm is far removed from the consumer, not only does the municipal official have no authority over the milk producer, but evidence as to the conduct of the farm is more difficult to secure. The special danger of infection may not be learned by the municipal authority until much of the harm has resulted. The commercial interests of the dairy district may combine to keep hidden the evidence of disease. Such a course is not wise, and it may result in much needless suffering and loss of life. It is wicked morally, if not criminal legally, and it may prove expensive in the end for the offending community. Incredible as it may seem, such conditions do sometimes exist, and serve to emphasize the necessity for a general supervision of sanitary affairs with authority wider than municipal boundaries. (§ 418.)

§ 10. Diversity of municipal methods causes confusion. The same dairy district may supply different municipalities, and each may by ordinance require a different method of handling the milk. To guard against tuberculosis one corporation may require that all of the cattle be tested regularly with tuberculin. Another may require the pasteurization of the milk. The resulting confusion may be avoided when the entire territory is administered by one authority, and under a single code. On account of the presence of an infectious disease in a dairy district, it is sometimes necessary to obtain the supply from another territory. Under the system of municipal control such a shift of trade opens the door to new dangers, for the conditions in the new district can hardly be determined before the change is made, and the new district may not be prepared to comply with the local ordinances of the purchasing municipality.

§ 11. Bacterial problems in commerce. Formerly the standards as to milk were chemical, and they were such that any intelligent customer might easily learn to apply them within his own home. The value of coal for fuel depends upon its purity. The value of milk as food depends upon the proportion of butter fat and other solids contained, and this value is decreased if the supply be watered. If the coal contains gunpowder it may prove not only useless, but dangerous as well. Milk containing the germs of disease is dangerous to the community where it is consumed. The bacilli which cause diphtheria are known, and may be recognized when met. The same is true as to those of typhoid fever. It is manifestly impossible to examine all of the milk consumed, and a thousand samples

might be tested without happening to discover the germs in a dangerously contaminated supply. Moreover, the germ which causes scarlet fever, for example, is not as yet identified, and therefore it cannot be recognized in milk. For this reason it is necessary to keep a strict watch of the territory, especially to discover cases of infection which might contaminate the milk supply. It takes several days after infection of a person for disease germs to multiply sufficiently to produce symptoms of illness. A pollution which produces one case is likely to continue for some time, and produce more. Any method chosen by a municipality, therefore, to discover and control such infections within its own boundaries must result in a large number of cases which become infected before the first case shows symptoms. It is therefore a practical necessity that the infection be prevented by excluding the dangerous milk before it does harm. This can only be done by keeping representatives in the dairy district as detectives. These detectives must have a technical education for the work. If they are armed also with authority over the local sanitary district in which they work, they may thus prevent harm being done by misguided or dishonest persons. When a supply of milk has been refused admission on account of infection, it has sometimes entered a city surreptitiously by some other route. With authority upon the farm, the official could order the destruction of the milk until the source of danger could be removed. (§ 466.)

§ 12. Advancement of science changes legal methods. The advancement made in the science of public health has in another way necessitated changes in administration. Small-pox has long been recognized in the com-

mon law as a nuisance. (§ 202.) Reasonable measures pertaining to the restriction of that disease have always been supported in the courts, even though private property were invaded, and property rights were involved. Malaria was formerly supposed to be a misfortune, and it is not therefore recognized as a common law nuisance. Now science has demonstrated that malaria may be even a more dangerous nuisance than small-pox, for the reason that it is more easily spread through a community.

Unfortunately there are many members of the medical profession who have not kept pace with the advances made in science. In the absence of specific legislation, if a health administrator entered private premises and there destroyed the breeding places of the mosquitos, he might be brought to trial for trespass, or for injury to property. Because it would not be difficult to find medical men with large practices, who would question or ridicule the mosquito theory of causation, it is not unlikely that a lay jury might find for the plaintiff, and that the health official would be punished for doing his duty. It is therefore more necessary than formerly that the operations of health departments be definitely prescribed and defined by statutory enactment.

Manifestly, because of the intimate sanitary relationship between adjoining municipalities, it is quite essential that these statutes should be uniform. Such uniformity is impossible if the enactment be left to the different municipalities themselves. Recognizing that the problems of a metropolis differ from those of a small country community, statutes should be passed by the state, making the administration uniform for places

of like character. The relationship of the nation, state and municipality to sanitary matters will be considered from a legal standpoint in a subsequent chapter.* From a scientific point of view it seems that many matters can only be satisfactorily handled by the national government. At present the government has taken control of the standardization of antitoxins; that is, as a commercial proposition, but in the interest of health, the government has assumed to regulate the manufacture of antitoxins by private firms, so that the user may know the exact strength, as far as is possible, of the article which he uses. An initial dose of 1,000 units of antitoxin (§ 22) is useless in a case of diphtheria, but until the government took charge of the matter a package labeled 5,000 units might in reality be only one-fifth of its apparent strength. Adjacent states may be unequally interested in the purity of the waters of a river forming a boundary, or flowing from one into the other. Many of the problems of health are involved in interstate commerce of food stuffs. From the standpoint of science, therefore, the nation should have supreme authority in matters of health. The state should act in a subordinate capacity, and the municipality should be limited to dealing with questions of a purely local character.

§ 13. Legal uncertainties necessary for advancement. We sometimes hear of "the uncertainties of the law." The expression is used almost with contempt, and the implication is clearly that, in the opinion of the speaker, the courts are influenced in their judgments by personal interests, either social or financial. It must be recognized, however, that the very strength

* Chapter IX.

and safety of the law is coupled with these uncertainties. If it were inalterably fixed, the only possibility of advancement would be in revolution, and a new beginning. Law must be interpreted, whether common, constitutional, or statutory, not alone in accordance with the state of knowledge prevalent when the law was created, but in the light of the present degree of advancement in civilization. Just as a word, or sentence, is changed in meaning by a change in its context, so the meaning of facts or conditions is changed by the state of intellectual advancement. An act committed by a mentally responsible person may be a crime; though the same act committed by a child, or by an individual rendered irresponsible by disease, would be no crime.

§ 14. Reasonableness of action important. In construing statutes, ordinances, and administrative orders, the courts must consider the reasonableness of the act contemplated. (§ 31.) Measures which would have been perfectly reasonable in the light of the knowledge, or lack of knowledge, of a score of years ago, for the control of yellow fever, would today be deemed unreasonable. It is no longer necessary, as it was formerly thought needful, to destroy an infected house to check the disease. Today it is only required to kill the infected mosquitoes by fumigation, and to destroy, or render unfavorable, the breeding places for *stegomyia* mosquitoes in the vicinity.

On the other hand, when it was supposed that malaria was due to a miasm exhaled from the soil, an order requiring the confining of patients within mosquito proof structures, especially at night, would have been regarded as so very impracticable and

unreasonable, that it is doubtful if any court would have sustained the legality of the act. It therefore follows that the fundamental law must be flexible in its application, and it must be changed in form according to conditions.

§ 15. Reasonableness based on facts. The reasonableness of a statute must not rest upon the wish of any one man, or class of men. Neither can it depend upon the degree of education, or of mental development of the person to be coerced. (§§ 31, 170.) The insane man is confined in an institution, though he can not realize the necessity therefor. The dairy man, who opposes the modern methods of sanitary milk production, may through ignorance affirm that what was good enough for his father is good enough for himself, but his idea of reasonableness would have little influence with an intelligent court. Neither is the degree of reasonableness to be decided by the state of the average knowledge of the community. In a mill village composed almost entirely of uneducated operatives, it might easily be possible that an overwhelming majority would consider a sanitary regulation unreasonable, though the court would uphold its reasonableness. In forming its judgment, the court is guided, not by the general consensus of opinion, but by the sentiment of those whom it considers best qualified to form a decision upon that specific question. So in sanitary matters the court should be guided by the authority of those especially versed in this particular branch of learning.

§ 16. Health administration distinct from medical practice. In a question relative to the construction of a bridge, the opinion of a structural engineer would be sought, not that of a mining engineer. Public health

is a function of what is now called preventive medicine, not of medical treatment. The practitioner of medicine only gets his opportunity when preventive medicine has failed to obtain full results. The public health administration has nothing to do with the treatment of cases, further than is necessary for the restriction of infectious diseases.

This distinction is often overlooked. It is true that in some places it is necessary incidentally for the health department to establish hospitals, in order that the people may have intelligent medical treatment. Such instances are relatively rare, and are limited largely to frontier or colonial localities. The habit of thought, and the methods of action, as well as the basal principles of preventive medicine are very different, and often directly opposed to the ordinary practice of medicine. Preventive medicine is often more closely associated with certain engineering problems than with medical practice; and in America engineering schools are devoting attention to the subject of public health to a degree equal to, or exceeding that given by medical colleges.

The course of study proposed by the Council on Medical Education of the American Medical Association practically ignores preventive medicine. The result is that the average medical practitioner knows very little of the science of public health, and his opinion on the problems is often very far from correct. A question of public health administration was lately submitted to two medical advisers of a university corporation. One was a prominent authority on the practice of medicine, and the dean of one of the leading medical schools. The other was a professor of chem-

istry, also with a wide reputation. They united in an opinion, which was based upon premises, every one of which was wrong. They supposed that the law was different from what it was. They presumed the facts would follow the supposed law—widely variant from the actual conditions; and they underestimated the dangers, as was shown by the results.

Though the preliminary training of medical practitioners fits them for acquiring proficiency in preventive medicine, very few take the trouble. The reason is commercial. It is necessary for most men to devote attention to that which will support their families. In the United States today people are perfectly willing to pay, and pay liberally, for the treatment and cure of disease when it has fastened itself upon the individual. They pay, not in proportion to the service rendered, but largely according to the time consumed by the practitioner. The real service rendered is to be estimated by the saving in time and usefulness for the patient. If a sickness of a month could be cut down to one day the saving would really be the value to the patient of twenty-nine days; but the pay to the practitioner for the saving twenty-nine days is only one thirtieth of what he would receive for a month's service. In private practice it does not pay to study preventive medicine. There is no incentive. Men are not willing to pay anything, as a rule, to be kept well. To a great extent the same is true as to communities, and health administrators are poorly compensated. Far too frequently the result is that the service is in proportion to the amount contributed. It follows, therefore, that questions of health administration, questions relative to the reasonableness of pro-

posed action, should be determined by those skilled in the study of health administration, and not by laymen, nor by the general practitioner of medicine, uneducated in this special branch.

§ 17. Scope of health service. The sphere of public health service is to so protect the lives and health of the citizens that their usefulness may be increased and the value of the property may be raised. It has to do with vital statistics, by which the profit and loss of the business can be gauged. It deals with law, in that the rights of property and persons must be guarded. It must depend largely upon engineering for the safe solution of many of its problems. It presupposes a wide acquaintance with industrial and economic conditions, that harm may be anticipated and prevented. It must give much of its attention to epidemiology which teaches how infectious diseases are spread through communities. It must determine, and remove the cause of disease.

Suppose that a patient be ill as the result of some poisonous article of diet. Whereas the medical practitioner need consider little outside of the patient's room, it is incumbent upon the ideal health department to determine what was the particular article which wrought harm. Secondly, was the poison inherent in the article, or was it the result of some change which had taken place after it had been produced? If due to change, what caused the change? In a small epidemic of typhoid fever it was found that each of the patients had recently eaten celery purchased in a certain store. There was no other factor which could be found common to all of the patients. That celery was traced through the wholesaler to the marsh on which it was grown, in another state. Then

it was discovered accidentally that there were cases of typhoid fever among the residents of that marsh.

§ 18. Epidemiology. Epidemiology has to do chiefly, or wholly, with two classes of infectious diseases, which have much in common. Such diseases are the result either of the action of microscopic plants, called *bacteria*, or of minute forms of animal life known as *protozoa*. While admitting the possibility that a community may sometimes be made ill by some change in the chemical composition of the common water supply, which might produce an epidemic of intestinal disorder, such occurrences are rare, and unimportant, unless associated with biologic infection. The specific forms of the organisms which produce many diseases are well known, and their life history has been carefully studied. In other cases, though we may know much about them, as yet they have escaped identification. The forms which cause poliomyelitis, sometimes called infantile paralysis, are so small that they are enabled to pass through a stone filter. They are too small to be seen by the most powerful microscope, though by means of the ultramicroscope they have recently been discovered and described. Evidence seems to show that they may gain admission to the body through dust, or by food, and certain flies have served as carriers. The germ of small-pox is probably protozoal, though it has not been absolutely identified; that for scarlet fever is evidently bacterial, though it has not been surely differentiated. The terms bacillus, coccus, and spirilla are used to describe the forms of the different families of bacteria. A bacillus is a short rod; the coccus is round or elliptical; and the spirilla is a corkscrew, thread-like form. Many, and perhaps

all disease producing bacteria grow in nature outside of the animal body, and they gain admission to the body by inhalation, by direct contact, or in food.

§ 19. Koch's postulates. Professor Koch, the distinguished German pathologist, who has done very much towards the solution of the question as to the causation of infectious diseases, formulated four postulates, as demonstrable proof that a certain disease is the product of a certain germ. These postulates are in their full form applicable at present to bacteria only, because of the inability of growing most protozoa in pure culture.

First, the bacterium must be found in the body or discharges of a person ill, or dead of the disease.

Secondly, this germ must be grown in pure culture, that is unmixed with other germs.

Thirdly, that bacterium, grown in pure culture, when introduced into a perfectly healthy individual, whose blood and discharges showed no previous trace of the particular form of germ, must be followed by a typical case of the illness.

Fourthly, the particular germ must thereafter be recovered from the body or discharges of the person thus made ill.

Such observations, many times repeated with the same results in each disease, form a demonstration which cannot be questioned, especially when other germs fail to produce the typical symptoms.

§ 20. Protozoa. In the case of protozoal diseases the proof is slightly different. Take the case of malaria, for example. There are three principal forms of malarial fever. It is found that there are three distinct kinds of protozoal bodies in the blood of malarial

patients. Each form of the fever has its peculiar form of the plasmodium; and each form of plasmodium has its peculiarities of development. The plasmodia free in the blood serum enter the red blood corpuscles, and there grow until they are ready for division into many cells. Each form has its peculiar number of days for this multiplication. When the division occurs the red blood corpuscle is ruptured, permitting the escape of the newly formed plasmodia. Since all of the generations resulting from a single infection are timed alike, when one plasmodium divides, all in the body are likely to divide at the same time. It is found that this division corresponds exactly with the time of the chill of the disease, followed by the fever. It is found further, that a man weighing 142 pounds will not show the fever until he has about 150,000,000 plasmodia (the newly formed protozoa) free in his blood at one time. When the plasmodia are numerous in the blood of a man he will be found to show symptoms of the disease. When the plasmodia are few there is no evidence of the disease. Then too these plasmodia have been traced through their development in the bodies of the mosquitoes, and the mosquitoes have been experimented with. It has been found that patients living in malarious countries, do not get the malaria when protected from the mosquitoes. On the contrary, infected mosquitoes sent to non-malarious countries, and there permitted to bite healthy men, have thus produced the disease where it had never before been known. Such are some of the cumulative evidences as to the causation of diseases.

§ 21. Action of bacteria. When pathogenic, or disease producing bacteria are introduced into the body

of a susceptible animal, they there multiply. As a consequence of their growth certain poisons are developed. These poisons are specific to the peculiar germ, and are called toxins. The toxin of the diphtheria bacillus is excreted by the germ; that of typhoid is secreted, and only set free by the destruction of the germ, apparently. The symptoms of the disease, with few exceptions, are not produced directly by the germ, but indirectly, from the action of the poison. The presence of the toxin in the system of the animal stimulates the formation of another chemical substance which neutralizes the toxin. This neutralizing chemical substance is called an antitoxin, and it is specific for each particular germ. That for diphtheria is active to neutralize the effect of the toxin of diphtheria, but practically powerless against the toxin of lockjaw; and *vice versa*. As ordinarily used the antitoxin is suspended in the serum of a horse's blood. Under strict antiseptic precautions, and with great care to prevent other infections, the horse is treated with repeated injections of the toxin, until he has developed an enormous degree of protection against that particular toxin. Then his blood is drawn, and the serum separated, containing the antitoxin.

§ 22. **Antitoxic sera.** When serum thus prepared is introduced into the body of a patient sick with the disease it tends to neutralize the poison and thus to cure the patient. When introduced in sufficient quantities before the introduction of the germ, the symptoms of the disease do not show themselves. It has, therefore, been a well recognized practice in preventive medicine to use these protective injections of the antitoxin. It is found, however, that the antitoxin has

little or no bacterocidal power. It does not directly kill the germs. It only neutralizes the poison, and thus gives nature time in which to destroy the germs. As a public health measure this use of the antitoxin must therefore be condemned. As a personal protection it may be advisable. (See § 25.)

§ 23. Phagocytosis. Nature also fights the disease by direct destruction of the bacteria. This is accomplished through the agency of cells called "phagocytes," and the process is technically termed "phagocytosis." The phagocytic cells, which include certain cells found in the glands of the body and in the deeper portions of the skin, as well as the white blood corpuscles, engulf and digest various proteid bodies including the bacteria, as a normal portion of their nutrition. They are the real curative agencies of the body, for they destroy the causes of the diseases. It is found that this phagocytic power varies greatly between two individuals, and between different diseases in the same person at a given time, and between different times in the same person, with reference to a given disease. For example, in a given individual at a certain time this power may be weak for the typhoid germ, but strong for diphtheria or tuberculosis. The strength of the power is found by estimating the number of bacteria which are engulfed by the white blood corpuscles in a given time, and this proportion is called the "opsonic index." The power may be stimulated, often very greatly, by injections of killed bacterial cultures into the body. This process, sometimes inappropriately called "bacterial vaccination," is therefore used as a curative measure, and it is also a well recognized method of prevention. In typhoid

fever, for example, by giving three injections, under proper conditions, the average individual is rendered practically immune to the disease for a period of three years, and perhaps more. The treatment is not at all dangerous, either to the health or life of the person, and is a well recognized method for the restriction of certain diseases. This "bacterin" treatment is specific; that is, the injection of the typhoid bacilli, killed, is a protective measure only against typhoid fever. This treatment is not as yet a well recognized protective against all bacterial diseases, and it is of doubtful value with reference to protozoal diseases.

§ 24. **Changes in virulence.** The virulence of strains of bacterial cultures may be raised or lowered in laboratory work. So too, the virulence may be altered by passage through animals of different species. Thus, the bacillus of tuberculosis differs in character, and in effect in different species. That found in birds differs from that in cattle, and both differ from the human type. Apparently the bovine type is much more dangerous for cattle than for man, and to a degree an infection with the bovine type may assist in rendering the human being immune to the human form of the germ; but as yet this protection by inoculation with attenuated living bacteria is of very doubtful value, and it may well be exceedingly dangerous. It is not, therefore, as yet a justifiable process for preventive medicine.

In protozoal diseases, on the contrary, this method of protection is well recognized, though not as yet of universal application. It is probable that the germ of small-pox is essentially identical with that of cow-pox. Vaccination with the cow-pox germ tends to protect

the human being from the small-pox. This is an acknowledged scientific fact, which is not disputed by scientific men, and is amply proven by statistics, though sometimes disputed by unscientific objectors from superficial examinations. The virus for use in vaccination is now prepared in this country under a general supervision of the national government. Selected animals are carefully examined; and after isolation and under strict aseptic conditions they are vaccinated. When the blisters have developed the serum is withdrawn and prepared for use. It is then tested, to make sure that it has not been contaminated by other disease germs. Often the calf from which it was taken is killed, and examined *post mortem* for evidence of other disease. If evidence of other infection be discovered, the virus must be destroyed. Under such precautions, vaccination properly performed, is without danger, and is a well recognized method of protection.

Similarly, dourine is a disease which is very fatal to horses, usually killing them within a year at most. Experiments made on the Canal Zone by officers of the government, indicate that this disease, which is also protozoal, may be controlled by a species of vaccination. Two mules were inoculated with disease germs which had been attenuated by passing the strain through guinea pigs. The mules went through the disease, and the trypanosomes of the disease disappeared from their blood. Inoculations with virulent cultures of the germ later failed to infect the animals. So, too, hydrophobia, which is also protozoal in origin probably, is cured and prevented by injections of cultures of the germ which have had their virulence

reduced by drying. This is also a well recognized protective measure.

§ 25. Bacterial antagonisms. Nature has everywhere arranged for antagonistic agents. It is well known that milk when left to itself sometimes sours and remains sour for a long time without becoming rancid. At other times the rancidity develops early. At still other times it becomes putrid without having soured perceptibly. The acidity is due to the action of yeasts or bacteria. The putrefaction is also due to the action of the bacteria. It is found that if the milk be artificially inoculated with a pure culture of the lactic acid bacillus, the putrefactive bacteria are unable to thrive. This bacterial antagonism is applicable in public health work. The lactic acid germ is harmless for the human being, and it is antagonistic to the bacillus of diphtheria, and to the meningococcus which produces the epidemic meningitis. As a protective measure all persons exposed to either of these diseases should have their throats and noses sprayed with a culture of the lactic germ. It has been customary to use injections of the diphtheria antitoxin as a protective against the diphtheria. Sanitary advances indicate that such injections are no longer reasonable or best. It is true that they are curative, in that the evidences of the disease so far as symptoms are concerned are removed; but they do not kill the germ, and therefore they may serve to hide the source of trouble. By retarding or suppressing the disease symptoms they may permit nature to destroy the germs, but in the case of those exposed to the disease, but not actually sick, they may simply neutralize the poison, while the germs may grow in their throats with impunity; and

because they are not showing by symptoms any danger, such persons may be very active in the spread of the disease.

The use of the antitoxin is not entirely devoid of danger. There is a peculiar susceptibility in animals of one species relative to the blood of another. This susceptibility is not so evident with one injection as it may be with another made a long time afterward. Since most antitoxins are supplied in the serum derived from a horse, it is quite possible that when it has been used for protection from disease, at a subsequent time antitoxin may be needed for treatment of another disease, and if that also chanced to have been prepared with the horse serum, serious harm or possibly death may result. Though this outcome is now rare and likely to be guarded against by competent physicians, it is a danger which must be remembered. On the contrary, the lactic spray is very active in its antagonism to the diphtheria germ, and is absolutely devoid of danger. It is therefore a proper measure for the health service.

§ 26. Entrance of bacteria to body. Since bacteria cannot of their own power force themselves into healthy tissue, to gain entrance they must attach themselves to some friendly agent. Many enter the body with food. They are carried from one patient to another, or to the food, on the hands of attendants. Sometimes they take advantage of entering the body through some injury to the skin or mucous membrane. Not infrequently they are carried from one patient to a healthy individual, who is thus infected, by insects, and perhaps inserted by the hypodermic needle of a mosquito. In all these cases the insect is a simple

carrier of the infection, and the danger of infection decreases with the passage of time since the insect has come in contact with the diseased body or culture. The species of carrier is not important, for the methods of propagation for bacteria are practically uniform. Some protozoal diseases are thus transported, as was shown on the Canal Zone, where it was found that the common house fly carried the trypanosome of dourine from horse to horse, thus producing the infection.

§ 27. Insect carriers versus hosts. In the case of many protozoa, on the other hand, the insect may be more than a simple carrier. (§ 417.) Take the sleeping sickness of Africa, for example. This is due to a trypanosome which propagates itself asexually in the body of a patient to whom it has been communicated through the bite of a tsetse-fly. If such a fly bites a patient suffering with the disease, it may be able to communicate the disease to a healthy individual by biting him within from twenty-four to forty-eight hours. During this period the fly is a simple carrier, just as is the flea a carrier of the bacillus pestis. After forty-eight hours the fly is incapable of communicating the disease for a period of about seventeen days, during which the protozoon is undergoing sexual reproduction in the body of the fly. Thereafter, for a period of two months the insect is again an infective agent. It has not been shown that any other insect, aside from the different species of *Glossina*, can thus serve for the sexual development of that particular protozoon. In like manner the stegomyia mosquito is the only known intermediary host, as it is called, for the yellow fever; the culex mosquito harbors thus the filaria; and the various species of anopheline mos-

quitoes alone permit the sexual cycle of development for malarial parasites. Any insect possessing an instrument like a hypodermic needle, by extracting blood laden with these protozoa, and carrying it to a healthy person may be a disease carrier. Only special varieties may be intermediary hosts. Only thus are these diseases spread.

In the case of these intermediary hosts the danger of infection is based upon the mathematical calculation of probabilities. The factors entering into the computation are many, but they are readily demonstrable. In the case of the malarial mosquito, for example, the distance from the breeding ground to the patient is a factor. The proportion of insects to persons is another. The chance that a person will be bitten, not simply by a mosquito, but by one which has chanced to have bitten a patient is another factor. Then the chance that a mosquito shall live long enough after infection to permit the plasmodium of the disease to pass through its sexual cycle is another factor. The doctrine of probabilities, though often ignored, must be at the base of scientific warfare against disease.

§ 28. **Animal hosts.** It must be remembered that the human family are not the only animals which may furnish food for disease germs. The flea bites a person afflicted with the bubonic plague, and carries the bacilli to the rat, where they develop and multiply. From the rat other fleas carry the disease to ground squirrels, and other animals, whence the disease may again be transferred to man. The study of these means for the spread of disease is an important part of public health science, and the restriction of the operation of this method involves the destruction of the vermin. Not

only must infected rats be destroyed, but a portion of the legitimate work of the service must be the prevention of propagation of the insect carriers, and of the vermin which aid in the spread of diseases dangerous to mankind. Herein is the very marked difference between the old methods and those now used for the restriction of infectious diseases, and it is quite possible, and some of us believe that it is probable, that almost the only value of fumigation, as a preventive of the spread of disease, is found in the destruction of insects and other carriers. Formerly patients with yellow fever were strictly isolated from their friends, but the disease spread nevertheless. Today the patient is not isolated, but he is kept in a mosquito proof room, the mosquitoes are all killed in the house, and the breeding of the stegomyia species is carefully prevented. The result is that the disease is quickly eradicated. The "yellow jack" has completely lost its power to produce fear, though in times past it was able to depopulate towns, and many ships, in Santos or Rio, which reached the port with full crews of healthy men, were left to rot at the docks, because not enough men were left to manage the ship. The old method was cruel, and inefficient. The new is humane and effective.

§ 29. Means of restricting infectious diseases. The means for the restriction of infectious diseases must include:

1. The treatment of first patients, to prevent other infections. Quinine as a cure for malaria, is the chief dependence in some countries for the restriction.

2. Treatment of exposed persons. Quinine is protective against malaria. Vaccination is protective

against small-pox. Lactic spray is protective against diphtheria and meningitis.

3. Restriction of patients to prevent exposure. Sometimes the old quarantine is still required. Sometimes, as in yellow fever and malaria, patients are surrounded by mosquito proof cages.

4. Destruction of insect carriers, and vermin.

5. Discovery and treatment of human carriers.

6. Education, as in the case of tuberculosis.

§ 30. Disease carriers—human. It is found that many healthy individuals are a constant source of danger to the community, by reason of the fact that they are producing, and throwing off disease germs. This is especially true of typhoid fever. After an attack of the fever, perhaps so mild that it was not at the time recognized, many persons continue to develop, and discharge the bacilli of the fever, and they are thus causing frequent infections, especially because owing to their apparent good health neither the carrier nor his friends are on their guard against the ever present danger. The legal rights of such individuals, and of the community as against them, may be a matter of some considerable question and perplexity. This must be recognized, however, that a typhoid fever patient is not properly quarantined so long as his infectious discharges are permitted to escape complete sterilization, and a typhoid carrier is entitled to no consideration if he so conducts himself that others receive infection from him. In other words, it is as necessary for the discharges of a carrier to be sterilized, as it is for those of a patient.

§ 31. Reasonableness, a problem of probabilities. The question of reasonableness is not always a simple

one of abstract statement. (§§ 14, 15, 170.) A district infected with anopheline mosquitoes is potentially malarial, but in the absence of the disease, or of danger that the disease may be imported, it is not necessarily reasonable to exterminate the breeding places by compulsion. (§§ 199, 200, 201.) It may be advisable, but it is not necessary. Neither is it reasonable to force the antimalarial measures when one patient is imported. It is far more reasonable to care for, and treat the patient, and prevent the contact of the insects, than to spend large sums in draining, and training the watery breeding places of the mosquito. It might be reasonable to attempt these engineering problems to raise the value of the property, and to recover waste land, but from the standpoint of health alone it would not be reasonable in the face of a single case or two, which might be otherwise cared for. Especially is it true when we consider that the engineering task would take perhaps years to accomplish, and would likely be uncompleted long after that danger had passed. From another point of view, even the draining plan would be reasonable. If the location were one which might at any time be invaded by carriers of the plasmodium, prudence would demand that the community be defended by removing the local partnership in the threatened danger. It was the malarial mosquito which conquered Greece, and caused the downfall of Rome. Today the Italian and Grecian laborers who come to assist in our railroad and other constructions, frequently have the plasmodium in their blood, though to a degree they have become immune to its active manifestations. Before beginning such constructive work therefore, it is wise to consider the advisability

of destroying the breeding places of the insects. It would be perfectly reasonable to require that laborers coming from a malarial district should pass such a physical examination as would prove whether or not they be affected by the malarial plasmodium; and that all individuals showing such infection might reasonably be prohibited from remaining in the district. A case originating in the state of California turned upon the reasonableness of certain quarantine regulations. The Court said that where less than nine persons of the population of the city had died from the bubonic plague though it was shown that living human beings had been infected, the prohibition of persons either entering or leaving a territory of twelve blocks with a population of more than 10,000 was an unreasonable interference with their lives and business.⁶

§ 32. Reasonableness of requiring reports of infectious diseases. It is reasonable, and necessary for efficient public health operations, that the laws requiring the reporting of infectious diseases should be strict and complete. (§§ 392, 393, 410.) Without such reports the efforts of the service must be uncertain and unsatisfactory. Such requirements should be complete, in that every possible source of omission should be excluded. This means that every infectious disease should be mentioned, and that there should be a personal responsibility therefor upon physicians and householders. It is reasonable that the penalty should be severe for hiding, or attempting to hide such cases.

⁶ Jew Ho v. Williamson, 103 Fed. 10.

CHAPTER II

UNDERLYING PRINCIPLES OF GOVERNMENT—COMMON LAW —CONSTITUTIONS, INSTITUTIONS AND STATUTES

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| § 50. English Constitution. | |

§ 33. Governmental ideals. In order to appreciate the full import of legal decisions, it is necessary to have a clear idea of the fundamental principles of government. A method which may be advisable in one country, may be impossible in another. Since science is universal, its disciples are prone to overlook distinctions in systems of administration which are important; but, just as from a scientific standpoint the

prevention of malaria in one place must be very different from that which will prove efficient in another, so the legal steps must vary. At Cairo, in Egypt, drainage is practically impossible in antimalarial work and recourse must be had to the free petrolization of cesspools. Similarly, administrative orders in a centralized government are all that need be required in many instances; but such orders would be illegal in the United States under precisely the same physical conditions.

§ 34. Centralized system. There are two widely different theories of government. The centralized system is well illustrated in the Roman Church. The Pope is regarded as the representative of God upon earth. Power and authority is delegated down from him through the cardinals, archbishops, and bishops to the priests, over the individual persons. The distinctively catholic idea of a government must therefore be an absolute monarchy; and even when applied to such a democratic government as that of the United States, the teaching is that the government is representative of divine authority. This slightly differs from the old Roman theory, carrying the practice further than did the Caesars. Rome was the head of the Roman Empire, though the importance of the individual citizen of the city was greater than under the rule of the Pope.

§ 35. Collective authority. The theory of the framers of the Government of the United States is quite the reverse. Sovereignty resides in the individual citizens, who unite to delegate authority to officers of different grades and jurisdictions. The officers act for, and in the name of the people collectively. They are not supposed to represent any class,

nor to give special liberty, or license to any individuals. They have authority only as it is distinctly granted. Neither officer nor citizen has a right of arbitrary action. They do not rule the people, but govern for the people.

§ 36. Development of Anglican liberty. A distinguishing feature of Anglican liberty is found in the relative importance and dignity of the individual. The Magna Charta was forced from King John by the Barons in England, a recognition from the monarch of the fact that the individual subjects have rights which even kings are obliged to respect. Gradually the power of the citizen in Great Britain has increased, and, *pari passu*, the authority of the sovereign has diminished. In the American law the liberty of the individual has always been theoretically recognized.

§ 37. Individual liberty necessitates restraint. An elastic sphere may be perfect when alone; but if it be among a number of such spheres, crowded together in a box, each loses a portion of its perfect form. The province of government is to see that each sphere loses as little as possible of its perfection of form; that is, that each citizen preserves as much as possible of his individual freedom of action.

§ 38. True liberty is communal. Rousseau's idea of liberty centers in the individual; that of Montesquieu centers in the community. Restraint is needful for the most perfect liberty. That restraint must be found in the law to protect each from injury by others. The democracy of Rousseau is impossible. The logical result of unrestrained personal freedom is the supremacy of the strong. The most perfect form of this supremacy of the strong is an absolute monarchy. As

Dr. Lieber aptly says:¹ "Limitation of self-determination is one of the necessary characteristics of civil liberty."

§ 39. Liberty influenced by density of population. Returning to the illustration of the elastic spheres, one readily recognizes that the greater crowding of the spheres renders each less perfect. The more humanity becomes condensed in populous communities, the less individual freedom can each possess. If any one retains an undue proportion, it must be at the expense of the weaker neighbors, just as a more firm sphere may preserve its form at the expense of adjoining balls with thinner walls.

§ 40. Mistaken ideas of liberty obstacles to progress. Failure to realize this necessary subordination of individual rights to those of the community, especially among the misguided citizens of foreign birth, has been an obstacle in health administration. Nor is this opposition confined to uneducated foreigners. The needful invasion of property rights, and the violation of individual liberty are the causes for which public health measures have been impeded. It cannot here be too strongly emphasized that liberty does not imply the unrestrained right to do as one pleases. Neither does it imply the right to use one's property in any manner detrimental to the community. "But it may be here observed that every citizen holds his property subject to the perplexities of this (police) power, either by the state legislature directly or by public or municipal corporations, to which the legislature may delegate it."²

¹ Civil Liberty, Chap. II, p. 28. *Textor v. Baltimore & Ohio R. R.*,

² Dillon, Sec. 141, citing *Me-* 59 Md. 63.
Kibben v. Ft. Smith, 35 Ark. 325;

“Still he owns it (property) subject to this restriction, namely, that it must be so used as not unreasonably to injure others, and the sovereign authority may by police regulations so direct the use of it that it shall not prove pernicious to his neighbors or the citizens generally.”³

§ 41. Liberty influenced by division of labor. It is not only the physical condensation of the population which restrains personal liberty. With advancing civilization and division of labor, each individual citizen is more dependent upon the many, and the injury of one may affect all. The great aggregations of capital, called corporations, are natural results of commercial and industrial development. They act as more powerful oppressors of individual freedom, and the observation of legal safe-guards is therefore even more important than when the republic was formed, and before these soulless bodies became a menace.

§ 42. Constitutional liberty. It is well to consider the remarks which Mr. Webster made before the United States Senate, May 7, 1834. The spirit of liberty⁴ “demands checks; it seeks for guards; it insists on securities; it entrenches itself behind strong defenses, and fortifies itself with all possible care against the assaults of ambition and passion. It does not trust the amiable weakness of human nature, and therefore will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic purpose come along with it. * * * This is the nature of constitutional liberty, and this is our

³ Dillon, Sec. 141.

IV, p. 122.

⁴ Works of Daniel Webster, Vol.

liberty if we will rightly understand and preserve it." He further said: "The simplest government and the most direct is pure despotism." This statement is true, whether it be said with reference to the city, the state, or the nation, and whether we consider the broader scope of governmental activity, or a limited portion like that of the health department.

§ 43. **Legal interpretation.** Some of the fundamental differences between the Anglo American systems of government, and those of other peoples, are the direct result of the relative protection afforded to the individual. The Justinian Code, for example, was the product of enactment. Any question of interpretation was answered by a new enactment. So too in the temporal government of many other peoples, the enacting power, whether of king or senate, has been the only judge of interpretation, and as Dr. Lieber says:⁵ "Authentic (i. e., official) interpretation is not interpretation, but rather additional legislation." Questions were discouraged, and the law had no inherent life. Thus we find that the Papal Bull of Pius IV, January 20, 1564, "sanctioning and proclaiming the canons and decrees of the Council of Trent, contains also the prohibition to publish interpretations and dissertations on the canons and decrees."⁶ With such a system there could be neither philosophy of law, nor growth.

§ 44. **Supremacy of law.** The predominance, or supremacy of law, as opposed to personal absolutism, is the distinguishing characteristic of English institutions.⁷ In England at an early period courts began to

⁵ Chapter 18, p. 208.

⁷ See Dicey, 2nd Ed., p. 173.

⁶ Lieber, Note, p. 206.

strive for some philosophy of government, and every decree of the king, or enactment of parliament was interpreted by judges. Gradually these judges became more and more independent of both the legislative and the executive powers, and the usages of procedure were determined by the courts themselves. Changes in methods were slowly made, as necessity became apparent, and they were intended to preserve justice, as between man and man, and to defend the rights of the individual from encroachments. Each case decided became a precedent—a custom. This custom was not binding absolutely, like the Justinian Code, but it might be modified, limited, or overruled for due cause, according to the opinion of the court. “A precedent in law is an ascertained principle applied to a new class of cases, which in the variety of practical life has offered itself. It rests on law and reason, which is law itself. It is not absolute. It does not possess binding power merely as a fact or as an occurrence.”⁸ This system is the natural development of a reasoning people, for it is the nature of a thinking man to analyze and systematize facts and ideas.

§ 45. Common law. Precedents having accumulated, an idea became customary, or common, and the fundamental principles of law thus became recognized, though unwritten. This *lex non scripta* is called therefore the common law. “A living common law is, as has been indicated, like a living common language, like a living common architecture, like a living common literature. It has the principle of its own organic vitality, and of primitive, as well as assimilative expansion, within itself. It consists in the customs

⁸ Lieber, Chapter 18, p. 208.

and usages of the people, the decisions which have been made accordingly in the course of administering justice itself, the principles which reason demands and practice applies to ever varying circumstances, and the administration of justice which has developed itself gradually and steadily.”⁹ From time to time portions of this *lex non scripta* became written in the enactments of parliament, and so more fixed and inflexible.

Although the expression “common law” is with us ordinarily applied to the English common law, it must not be forgotten that every country has its own common law, and that the courts do not make common law—they but recognize officially what is common law. Common law of a given section may cause an exception to be made in the working of statutory law. Such exceptions we find, for example, relative to Moham-medans in East India sometimes. Again, starting with the same common law two peoples may develop a very different common law according to circumstances. Common law in England today is not binding upon the peoples of the United States. “As long as a nation continues to live and grow, nothing can stop the growth of its law. The rules of law are simply those rules of conduct which are enforced by the state, and they have to be applied with reference to the political, social, and economic conditions of the time. Absence of power to legislate, or failure to exercise it, may impede, cramp, or distort the growth, but cannot destroy it. The stream will either burst through, or, more often, find its way by tortuous and unexpected channels. The human mind displays marvellous

⁹ Lieber, Chapter 18, p. 205.

ingenuity in adapting old forms to new conditions, whether those forms are embodied in codes or in creeds. The principle of development has been applied, not only to theological formularies, but to documents like the Constitution of the United States, and, under the pressure of inexorable necessity, is somehow applied in apparent defiance of the rules of logic and of language."¹⁰

§ 46. Common law basis of liberty. The common law is essentially the same among all English speaking peoples. It was brought to America by the colonists, and it forms the bulwarks of our institutions. It may be changed, but it cannot be ignored, or trampled under foot, without injury to the people. Herein lies the great difference between American Democracy and the old Roman type. This old Roman idea is seen in the earlier French republic; an absolute equality concentrated in the absolute dominion of the majority; or, in the French empire, where the power of the majority is transferred to, and centered in the Emperor. The same theory is found in a weakened form in the present French republic. Such seems, too, to be the theory of some at least of the later day socialists in America, who show a tendency to overthrow or annihilate the bulwarks of personal liberty found in the common law.

§ 47. Common versus statutory law. From time to time, according to the exigencies of the case, the legislative authorities enact statutes; but here again, as Dillon remarks,¹¹ the common law is the basis of the

¹⁰ Ilbert, p. 173.

¹¹ Municipal Corporations, Sec. 8.

laws of every state. The distinction between common and statutory law dates back to 1216. "National councils had met from the most remote times; but to the end of this reign, their acts not being preserved on record are supposed to form a part of the *lex non scripta*, or common law. Now begins the distinction between common and statute law."¹²

§ 48. Institutions. Growth in any community leads to the establishment of institutions. One of our most ancient institutions is trial by jury. Another example is the institution of quarantine. Though institutions have grown with the common law, and though our constitutions are based upon the common law, constitutions may sometimes conflict with institutions. This conflict may result in modifying, or restricting the institution; or, depending upon the sanction of usage, the institution may persist in spite of constitutional restrictions for a time.

§ 49. Antiquated institutions. An institution may become antiquated by reason of social, or scientific, progress. The provision that members of a jury shall be disqualified for service if they have heard or read of the case on trial, is a relic of the days before the art of printing, the modern newspaper, the telegraph, and the telephone. Ignorance of a case often indicates an untrained mind, slow of comprehension, and unable to reason clearly. Such a man is a creature of impulse and of feeling. He may be easily swayed by the oratorical efforts of the barrister, and is not an ideal agent for the preservation of right and justice. Again, such quarantine as was the result of former theories, we know today is utterly useless against yellow fever.

¹² Lord Campbell, Vol. I, p. 113.

The mere fact that common practice has used such quarantine for hundreds of years is no satisfactory evidence of its value. (See Chapter XIV).

Old institutions should be preserved only so long as, or to the degree that, they tend to preserve and protect individual liberty. On the other hand, these old institutions have a most powerful influence even among the educated in preventing the substitution of new methods. "*No es costumbre*" is a chain which retards progress even outside of the Spanish peninsula. Unfortunately it often happens that well meaning practitioners of medicine, who have not kept abreast of scientific advancement, make the same objection to changes in methods of quarantine. "It is no part of modern quarantine to make commercial intercourse difficult; it is designed to protect commerce by lessening the risk of disease," wrote Sir Rubert Boyce.¹³ Institutions must be used and preserved only so far as they make for the preservation of liberty in its best sense.

§ 50. English Constitution. "What is called the English Constitution consists of the fundamentals of the British polity, laid down in custom, precedent, decisions, and statutes; and the common law is a far greater portion than the statute law.¹⁴ In England, therefore, the distinction between constitution and statute is not as clearly defined as in the United States.

§ 51. American Constitutions. When the United States was formed into a nation, its founders agreed upon certain clear portions of the common law, and recorded them in a Constitution, together with matters

¹³ Boyce, p. 114.

¹⁴ Lieber, Chap. 18, p. 210.

of executive detail. Each state in the Union, likewise, has a written constitution, and no act either of a court, legislative body, or executive, can be lawful, or legal, if it violates the principles thus recorded. Every statute must be measured according to the constitutions under which it is enacted. A state statute must not conflict with either the constitution of that state, nor with that of the Nation. These constitutions are interpreted by the courts according to the principles of the common law, and we have therefore a collection of precedents known collectively as Constitutional Law. It must also be remembered that no state constitution may violate that of the United States; and where an apparent conflict might exist, it is the duty of the court if possible to interpret the state document under the limitations of the Constitution of the Nation.

§ 52. **Common law, constitutions, and statutes.** We find, therefore, that the more fixed facts of law are embodied in the written constitutions. Those less sure, and more variable are enacted into statutes, which may be readily altered. Yet even common law is not easily changed. It takes much time to alter legal custom. But if, with the changes due to civilization, or science, some custom of the common law has become antiquated, it may be modified or abolished by statutory enactment. Constitutional provisions are therefore more permanent than those of statutes, and statutory enactments conflicting with the constitutions governing the same territory are not law. Institutions, or the acts of either officials or private individuals, conflicting with either statutory or constitutional law are not lawful, even though with the sanction of custom they may be permitted, or ignored. Such today are certain public health operations.

§ 53. **Interpretation of law by courts.** In the interpretation of statutes the courts are guided by the common, as well as by the written law. A decision by a lower court has little value as a precedent, though the same argument may be applicable in the case at bar. The same is true as to the opinions rendered by the Attorneys General, either of the state or nation. In certain states there is a provision for the rendering of an opinion by the members of the supreme court, upon the request of the Governor, or other proper officer, but even such an opinion is not authoritative, and may be overruled by the same court, when a case is presented. The decision of a case by a supreme court is practically binding upon subordinate courts, until it shall have been overruled by the same, or a higher court. It therefore has the force of law, though it does not thereby repeal a statute which it pronounces unconstitutional.

Since state constitutions vary, identically the same statute may be law in one state but not in another. Decisions in other states, or in the British empire, are valuable aids in the critical examination of a question, but they have no binding force. Decisions of the Supreme Court of the United States are authoritative as to questions pertaining to the Federal Constitution, and the statutes of the United States. It is the usage of that court to uphold the decisions of the state supreme courts as to the constitutions of their respective states, and therefore the same question, reaching the United States Supreme Court from different states may be decided differently.

§ 54. **Illegal acts sometimes sanctioned.** "Self preservation is the first law of nature," and "*Salus populi*

est suprema lex,” are dicta which are well recognized by the common law. Though contrary to both the moral and the statutory law to kill a man, such an act may be legally excused if it is necessary for the preservation of other lives. It is excused if, for example, it is done in the line of duty; as when a policeman shoots a dangerous criminal who is trying to escape. In such cases, however, it is required that the killer must have used every reasonable means to avoid taking human life. In other words, neither self-preservation nor the safety of the people may be used as an excuse except in extreme emergency. In the presence of great epidemics the safety of the people has been the warrant which was taken to authorize frequent violation of property rights, and the deprivation of innocent citizens of personal liberty.

§ 55. **Doctrine of expediency.** Herrera y Tordesillas, the Spanish historian who wrote three centuries ago, said: “Those who are governed by reasons of state are apt to shut their eyes against everything else.”¹⁵ and what was true at that time is equally true at present. There is always a constant tendency on the part of governmental officers to overstep the limits of their power; not because of wilfulness, nor of desire to oppress; but rather through such an excess of enthusiasm, perhaps, for their own special work, that they are blinded to the rights and duties of others. They do not recognize the bounds which are set to their lawful operations.

§ 56. **Public health has overridden legal restriction.** There are several closely associated reasons why pub-

¹⁵ Hist. General, Dec. 5, Lib. 6, Cap. 3.

lic health operations have sometimes overridden constitutional, and statutory limitations.

|| First, Makeshifts. Owing to the former ignorance as to the science of preventive medicine, many expedients have been used as makeshifts, and by long usage they have become unquestioned habits.

|| Secondly, Ignorance. Public health administration has been largely in the care of physicians. Physicians as a rule are ignorant of the theory of law, and as health officers they have unconsciously ignored its restrictions.

|| Thirdly, Public Health an Avocation. Heretofore public health service has been an avocation, rather than a vocation. Few members of the profession have devoted their whole time to it, and the remuneration for such public service as has been rendered has been very small. There has been no other inducement than pure altruism for studying the problems of health administration. The methods and interests involved in the practice of medicine, are antagonistic to preventive medicine. The life of the practitioner depends upon his practice, and public health has been neglected.

|| Fourthly, Emergency Produces Precedents. Precedents in public health work have been chiefly established in times of special danger. The people have been willing to pay a great price to be rid of the pestilence. Action has been forced by necessity, and the methods chosen have not been closely scrutinized.

|| Lastly, Slight Deviations Result in Perversion. Variations from legal methods have developed so slowly, and each step has been so insignificant, that they have not even been noticed. Just as a wayfarer going through a wood may step aside from the path to gather

berries, and supposing that he is still paralleling the road he may proceed until he suddenly discovers himself far out of his way; so a health officer may advance with assurance in his work, emboldened by custom, until at a critical point he may be checked by *quo warranto* or other legal action. Too often, under such conditions, he resents the interference of the courts, and chafes under the technicalities of the law. The fault is not with the law, nor is it in the courts. The check is the penalty of the administrator for failing to use the methods ordained, and for overlooking or disregarding the provisions for the protection of the people. It is well to consider the words of Mr. Justice Miller: "I but repeat the language of the Supreme Court of the United States when I say that in this country the law is supreme. No man is so high as to be above the law. No officer of the Government may disregard it with impunity."¹⁶

§ 57. Foresight better than emergent energy. The ideal public health executive does not show his strength in spectacular performances, nor in the handling of a great epidemic, but in the making of such preparations that the pestilence can gain no foothold. "In time of peace prepare for war," should be his motto. The nation which is prepared is less likely to have a war, and the state or city which is prepared in advance is not likely to have an epidemic. The very appearance of an epidemic is evidence of primary weakness and inefficiency. It is vain for the health official to plead necessity as an excuse for autocratic methods in the face of an epidemic. Legal measures should have been

¹⁶ Miller, on the Constitution, p. 33.

taken before the danger showed its head. Mr. Justice Story says:¹⁷ "It has been often said that necessity is the plea of tyrants; but it is equally true that it is the plea of all public bodies invested with power, where no check exists upon its exercise. The guarantees of individual liberty in the Constitution were intended for a state of war as well as a state of peace, and were equally binding upon rulers and people at all times, and under all circumstances." Public health work has been aptly compared with warfare, and therefore the above quotation from the distinguished jurist is the more appropriate in the present connection. In *Ex parte Milligan*, we read:¹⁸ "Neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty, incorporated into the Constitution, except so far as the right is given in certain cases to suspend the privilege of *habeas corpus*," and "No doctrine involving more pernicious consequences was ever invented by the wits of man, than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads to anarchy or despotism; but the theory of necessity on which it is based is false; for the Government within the Constitution has all the powers granted to it which are necessary to preserve its existence."

§ 58. Purity of intention no excuse. Unfortunately it too frequently happens that honest and competent men, realizing only the purity of their own intentions, fail to recognize that in their zeal they are seeking to establish precedents which may be potent for evil in

¹⁷ Commentary on the Constitution, Sec. 551.

¹⁸ 4 Wall., 120.

the hands of unscrupulous officials. Judge Davis was speaking of the exigencies of war when he said ¹⁹ that the theory of necessity was false, but the statement is equally true in public health service. The plea is only evidence of previous inefficiency. In *Jenkins v. Board of Education*,²⁰ the supreme court of Illinois said: "There is nothing in the nature of an emergency in the occasional recurrence of the well known disease of smallpox in a city like Chicago, which may not be provided for by general rules and regulations prescribed by the legislative authority of the city." "*The securities of individual rights, it has often been observed, cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachments of power, nor to watch with too lively a suspicion the propensity of persons in authority to break through the 'cobweb chains of paper constitutions.'*"²¹

§ 59. **Compliance with law to be preferred.** Whenever two courses are open for action, the one constitutional, and the other unconstitutional, it is our duty to choose the former. It matters not how desirable an object may be of attainment, if the method used is even slightly illegal it should be abandoned, and a more just way should be found. In *Boyd v. United States*²² Mr. Justice Bradley says that "Illigitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches, and slight deviations from legal modes of procedure." So in *Potts v. Breen*,²³ the court, while admitting the advisability of vaccina-

¹⁹ *Ex parte Milligan, loc. cit.*

²⁰ 234 Ill., 427.

²² 116 U. S. 616, 635.

²³ 167 Ill., 67.

²¹ Story, On the Constitution, Book III, Sec. 1938.

tion, decided that the path chosen was not constitutional, and pointed out the legal method of its attainment.

§ 60. Injurious institutions. Lieber calls attention²⁴ to the fact that institutions, though not viciously conceived, may become injurious. They may become hollow, and like the empty boxes in an ill managed house, become catchalls for rubbish, and thus nuisances. Thus the institution of quarantine, though designed for the common good, has been used for the purposes of oppression, and to gain advantage over opponents. Health office inspectors, under the old Tweed regime in New York City, were used systematically for the collection of blackmail.²⁵ Other illustrations might be found of a like perversion of health administration, for private gain.

§ 61. Health powers too great. Under these conditions it is not to be wondered that Professor Goodnow says:²⁶ "It may well be doubted whether the powers possessed by these (health) authorities in the United States, in those cases in which their powers are the greatest, are not too great. Their discretion is so wide and so uncontrolled that it offers large opportunities for official oppression, and if current rumor may be credited, this discretion has in the past been made use of in many cases, not so much to protect the public safety and health, as to enrich the officers of the health and building departments through the levy of blackmail, or to obtain political support for the party in control of the city government."

§ 62. Law should be observed. Even a pernicious

²⁴ Civil Liberty, Chapter 26, p. 317.

²⁶ Municipal Government, p. 286.

²⁵ Autobiography of Andrew D. White, Vol. I, p. 107.

statute should be observed. If it is vicious it should be repealed, or the sting should be removed to make it harmless. The responsibility for the law is with the legislative body, not with the executive. The repeal cannot be attained by violating its provisions. Then the people will not see its harmfulness. Ignore it, and a bad example is set, and respect for law has been decreased. Observe it, and the evils perceived will cause its repeal, and respect for law will be deepened. On the other hand, as Mr. Justice Miller says:²⁷ "History teaches us in no mistaken language, how often customs and practices which were originated without lawful warrant, and opposed to sound construction of the law, have come to overload and pervert it."

§ 63. **Institutions and statutory law preserve personal freedom.** Institutions and constitutions, common law and statutory enactment are all for the preservation of personal freedom, and not for oppression, nor for injury. Their object is to aid, not to hinder progress in civilization. No apparent harm may result when an individual in a hurry "cuts across" a private lawn, rather than go around the corner on the sidewalk. If he repeat the act frequently he wears a path which injures the lawn, and sets a bad example. The act is lawless, and opens the way for more lawless deeds by others. Just so, to make up for previous negligence public officers may do some minor act of illegality, but that makes it more possible to wander further from the lawful path. The object sought is no excuse; it is simply an explanation.

§ 64. **"Force of Law."** It is necessary that we

²⁷ On the Constitution, p. 21.

should make a clear distinction between that which is genuine law, that is, which has the full force and authority of law, and that which simply has the appearance and external form of law. A statute, though passed in due form, is not really law if it conflicts with constitutional provision; though until passed upon by the court it may have the effect of law. So the order of an executive, the ordinances of a municipality, or the regulations of a board of health, are law only when within the powers granted by the constitution and the statutes. The standing of any enactment, order, rule, regulation, or ordinance, as law, is not sure until it has been passed upon by the highest court having jurisdiction. (§ 112.) Either may be law if properly issued; neither is law if it violate constitutional provisions or superior statutes. Unfortunately, health executives not seldom lose sight of this distinction, and in consequence, unduly emphasize the value of special ordinances. The English writer upon Sanitary Law, Dr. Charles Porter, devotes his entire discussion to the form of statutes as passed; and in his excellent work on Municipal Hygiene Dr. Charles V. Chapin devotes most of his space to the forms of municipal ordinances, rather than to the underlying principles. A desirable law, from a scientific point of view, may not be good law in the legal sense; and *vice versa*. Municipal ordinances or executive orders have the full force of law, when issued with statutory authority;²⁸ and a statute is law only when within the permission of the constitution. The decision as to the validity of statute or ordinance is the prerogative of the court.

²⁸ Buffalo v. H. L. & E. W. 496; People v. N. Y. Edison Co., R. R. Co., 152 N. Y. 276; 46 N. E. 144 N. Y. Supp. 707.

CHAPTER III

THE TRIPLE SYSTEM OF GOVERNMENT, AND RELATION OF EACH BRANCH TO PUBLIC HEALTH ADMINISTRATION

- § 65. The Anatomy and physiology of government.
- § 66. Three branches of government.
- § 67. Separation of powers often ignored in public health administration.
- § 68. Importance of Triple System.
- § 69. Union of powers, tool of tyranny.
- § 70. No liberty with powers united.
- § 71. Separation of powers purely Anglican.
- § 72. Separation most perfect in United States.
- § 73. Union of powers in European governments.
- § 74. Abuse of power may not be frequent.
- § 75. Paper constitutions.
- § 76. Basis for comparison of governments.
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- § 79. Latin American government.
- § 80. Misjudgment.
- § 81. United States, division of powers.
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- § 92. Division of powers in state governed by state constitution.
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| <p>§ 101. Power yielded because claimed is not sanctioned.</p> <p>§ 102. Executive orders and regulations, limitations of.</p> <p>§ 103. Legislative limitations.</p> <p>§ 104. Due process of law.</p> <p>§ 105. Public health protection, police power.</p> <p>§ 106. Public health activities based upon idea of "nuisance."</p> <p>§ 107. Lack of legislation, a source of executive weakness.</p> | <p>§ 108. Legislation more needful in decentralized government.</p> <p>§ 109. Legislation definite in effect.</p> <p>§ 110. Agreement of three branches necessary.</p> <p>§ 111. Executive semi-legislative duties.</p> <p>§ 112. Illegal statutes.</p> <p>§ 113. Crazy-quilt legislation.</p> <p>§ 114. Executive duty to systematize enacted statutes.</p> <p>§ 115. Limitation and distinction.</p> |
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§ 65. The anatomy and physiology of government. The study of the structure of government properly belongs to that branch of legal science known as constitutional law. This "deals with the anatomy of government; administrative law and administration have to do with the functions, the physiology of government, so to speak."¹ While we are especially interested in the operation, rather than in the structure, it will be necessary, first of all, to examine into the organization, and motive influences which may be found in the different divisions.

§ 66. Three branches of government. In all systems of government there are three agencies, namely, Legislative, Executive, and Judicial. These agencies may be united in one person, as in an absolute monarchy; or, they may be united in the mass of the populace, as in the French commune. They may be partially divided, as in Great Britain, and in Belgium; or they may be absolutely separated as in the United States. To the degree that they are united we have despotism, either of the individual, or of the majority. When they are

¹ Goodnow, Ad. Law, p. 3.

separated each power acts as a check upon the other, thus preserving the balance of power. With this separation the individual citizen secures the greatest possible liberty.

Mr. Daniel Webster says:² "The first object of a free people is the preservation of their liberty, and liberty is only to be preserved by maintaining constitutional restraints and just divisions of power. Nothing is more deceptive, or more dangerous, than the pretence of a desire to simplify government. The simplest governments are despotisms; the next simplest, limited monarchies; but all republics, all governments of the law, must impose numerous limitations and qualifications of authority, and give many positive and many qualified rights. In other words they must be subject to rule and regulation. This is the very essence of free political institutions. * * * We may easily bring it to the simplest of all possible forms, a pure despotism. But a separation of departments so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our constitutions; and doubtless the continuance of regulated liberty depends upon maintaining these boundaries."

§ 67. Separation of powers often ignored in public health administration. The importance of this separation of powers is frequently forgotten in zeal for public health work. The executive has sometimes sought to exert legislative power, or he has failed to appreciate the fact that he has not been entrusted with judicial prerogatives. One reason for this condition is that until very recently the science of preventive medicine

² Webster, Vol. IV, p. 122.

was so indefinite that general rules could not well be formulated. The facts were uncertain. Under the police power (Chap. VI), the health administration was of necessity specific, and applied to one case at a time. It was essentially local, and had little reference or bearing upon the affairs of state or nation. The science has developed, and there is no longer excuse for unconstitutional practices in health preservation. Unfortunately, the present condition has been so long tolerated that the necessity for a change has not been generally recognized. "The time has come when the Constitution and laws of the United States are not the mere theoretical object of the thoughts of the statesman, the lawyer, or the man of affairs; for the operations of its government now reach the recesses of every man's business, and force themselves upon every man's thoughts."³

§ 68. Importance of triple system. It seems therefore necessary to devote some space to the fundamental principles involved in the separation of powers, as prescribed by the Constitution of the United States, and by those of most of the individual states. In looking over the numerous decisions referring to health measures, and in reading the discussions of medical men, one can hardly avoid being impressed with the fact that the very ignoring of this extremely important idea is the greatest obstacle, and source of weakness in the service.

§ 69. Union of powers, tool of tyranny. Paley in his *Moral and Political Philosophy* has thus expressed himself upon this point.⁴ "The first maxim of a free

³ Miller, *On the Constitution*, p. 107.

⁴ Book VI, Chap. VIII.

state is that the laws be made by one set of men and administered by another. In other words, that the legislative and judicial characters be kept separate." Jefferson called the union of powers an "elective despotism," and the Federalist speaks of such union as "the very definition of tyranny." "In all tyrannical governments," says Blackstone,⁵ "the same magistracy, or the right both of making and of enforcing laws, is vested in the same man, or one and the same body of men, and whenever these powers are united together there can be no public liberty." Again, he says⁶ that public liberty "cannot long subsist in any state unless the administration of common justice be in some degree separated from the legislative and also the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the legislative, this union might soon be an overbalance for the legislative."

§ 70. No liberty with powers united. This same idea is thus expressed by Montesquieu;⁷ "When the legislative and executive powers are united in one person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, or execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from

⁵ Commentaries, I, 146.

⁷ B. II, Chap. 6.

⁶ Commentaries, I, 269.

the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression." Once more we must remember the dictum of Lieber:⁸ "Authentic interpretation is no interpretation, but rather additional legislation." How this division has worked for the safeguarding of personal liberty may be estimated by considering the statement of Pomeroy:⁹ "No other check has proved so effectual as the division of functions into legislative, executive, and judicial, and their assignment to classes of officials physically separate."

§ 71. Separation of powers purely Anglican. This separation of powers is essentially Anglican, and has been of slow growth. It was unknown in the earlier civilizations, and is not yet complete in any European nation. It was five and a half centuries after the Magna Charta that the American colonies revolted from the British rule, and in their separation from the mother country they very naturally separated still further the three powers. They did this to insure as much as possible of individual liberty, and they were free to make use of every known advantage in government, unhampered by existing systems. For a time they attempted to work as a confederation, but realizing the weakness and the danger in such a loose organization they formed the nation, and bound themselves by a Constitution, which is today perhaps the most perfect document of its kind in existence. The individual states have also adopted constitutions modeled after that of the nation.

⁸ Chap. 18, p. 208.

⁹ Constitutional Law, Sec. 170.

§ 72. Separation most perfect in United States. Neither in England, nor in the British colonies, is the separation of powers as distinct and perfect as it is in the United States. In England the interpretation of the laws is partially in the hands of the members of the House of Lords, and the executive branch is much more closely intertwined with the legislative. In Canada, by the British North American Act of 1867,¹⁰ the initiative for certain kinds of legislation is reserved to the Governor General.

§ 73. Union of Powers in European governments. The right of the chief executive to initiative in legislation is common in European constitutions. This is found in the German Empire,¹¹ in Italy,¹² and in France.¹³ In Belgium¹⁴ the king holds a third of the legislative power, and has the initiative upon legislative matters. Also we find:¹⁵ "The interpretation of laws by authority belongs only to the legislative power." Such interpretation is in reality new legislation. It gives an uncurbed power for oppression, which would not be tolerated in Anglican communities. So too if the executive and judicial powers are united, either in one person, or in a body of men, tyranny becomes easy. Every citizen has rights, and one of them is the assurance that the strong arm of the law will protect, and not oppress him. This union of powers as found in Belgium gives a supremacy without check. In its operation it may easily result in what we call *ex post facto* legislation, clearly hostile

¹⁰ Sections 53 and 54.

¹³ Cons. 1875, Art. 3.

¹¹ Constitution 1871, Articles 15, 16.

¹⁴ Constitution 1893, Art. 26 and 27.

¹² Cons. 1848, Art. 6.

¹⁵ Art. 28.

to individual liberty, and repugnant to Anglican spirit. It enables the legislative body in the interpretation of a law to make criminal, and therefore punishable, that which when committed was no crime, unless by extreme stretching of existing statutes. Mr. Justice Miller says:¹⁶ "Under the boasted constitution of Great Britain there are many instances in which a man has been condemned to death by its Parliament without any reference to any statute or law existing at the time authorizing such proceeding."

§ 74. **Abuse of power may not be frequent.** It is true that in wise hands abuse of power is not frequent, but the possibility shows the necessity for safeguarding individual rights as much as possible.

§ 75. **Paper constitutions.** A "paper constitution," as Gouverneur Morris called it, may be weak, and it might give a false sense of security. The real constitution must be engrafted upon the hearts of the people. It must find its life coincident with the lives of the citizens. The importance of the individual is an idea peculiar to the Anglo-Saxon, and it is foreign to the nature of the Latin races.

§ 76. **Basis for comparison of governments.** In comparing different systems of government, one must consider the character of the peoples, geographical conditions, and especially the history of the population. As Sir James Bryce has said,¹⁷ "A nation is the child of its own past." Perhaps Gouverneur Morris was too severe in calling certain documents "paper constitutions." Much depends upon the point of view. To us the Constitution of Brazil, modeled upon that of the United States, seems but paper. To the Brazilian it

¹⁶ Constitution, p. 105.

¹⁷ South America, 418.

is real, though he cannot see as much in it as we do. He studies our court decisions as we do, and then of necessity he violates the precepts. The great trouble was that the Latin Americans translated the words of our Constitution, but they were unable to translate its spirit. What Mr. Eder says, relative to Colombia, is equally true relative to all Latin America: "The United States Constitution was the result of a natural evolution, a product of the brains of men steeped in the common law, learned in their Coke and their Blackstone, jealous of their hereditary rights and liberties; while adopting new external forms, its inner spirit was essentially a common law spirit: almost every phrase was pregnant with historical meaning, engendered by an ancestry of ancient statutes and decisions. It was obviously a mistake to attempt to graft such an alien institution on a people bred in the Spanish civil law, instead of revitalizing the existing Spanish institutions and breathing into them—no easy, yet no impossible task—the modern spirit of liberty. The consequence has been that the Colombians, a few exceptions apart, have never really understood, do not today understand, their own Constitution, which is a translation wherein words and phrases have lost much of their historic significance, and in which the precious safeguards of individual right and the admirable system of checks and balances seem to have been entirely lost." ¹⁸

We must not be misled by mere names. It is quite possible that Great Britain, though a limited monarchy, may be more truly democratic than any South American republic. Nominally the states of Java are

¹⁸ Eder, Colombia (1913), p. 57.

governed by native regents. Practically the ruling powers are the Dutch regents, officially recognized as the "elder brothers." Even with the same general basic ideas, the real government of a closely settled, homogenous people like that of Rhode Island, must differ widely from that of a country like Bolivia, inhabited by two races having little in common, and very widely separated.

§ 77. Confederation not a nation. A confederation is not really a nation. The Achaean League lasted from 281 to 146, B. C. The Swiss confederation began in 1291 as a union of three cantons, and has spread and endured to the present. The seven United Provinces of the Netherlands endured from 1579 to 1795. The United States of (North) America is the first enduring grand republic. It must be remembered that the Swiss confederation has been preserved, not so much by its inherent strength, as by circumstances. Composed of numerous (twenty-two) small states, or cantons, with common interests, enclosed in a mountainous country, and surrounded by France, Italy, Austria, and Germany, each jealous of the other, there is little to threaten its existence. In framing the constitution of 1848 the committee of fourteen carefully studied the American Constitution; but the present constitution, bearing the date of May 29, 1874, with amendments since adopted, in some particulars differs widely from the American ideal.

§ 78. Permanence of Nation depends upon individual restriction. It must be well recognized that, especially in a republic, the permanency of the government must depend upon the restrictions placed upon the assumption of undue authority by ambitious indi-

viduals. The permanence of the United States therefore is due in no small degree to the wisdom shown by the framers of our constitution, and its provisions should not be violated carelessly.

§ 79. **Latin American government.** Considering the success of the United States, it is not strange that other nations have taken its constitution as a model. This is especially true of the republics of Latin America. Thus we find in the constitution of Mexico:¹⁹ "The supreme power of the Federation is divided for its exercise into legislative, executive, and judicial. Two or more of these powers shall never be united in one person or corporation, nor that legislative power be deposited in one individual." So also the constitution of Brazil²⁰ provides that they shall be separate, but in Argentina there is a provision²¹ for legislative initiative by the executive. Professor Pennington, in speaking of this constitution says:²² "Unfortunately, as is the case with all human documents, there are ways and means of driving the traditional coach and four through the constitution of Argentina as through a British Act of Parliament; but, taken as it stands, it is a notable foundation for the life of a nation." But W. A. Hirst has hit the nail on the head for all of Latin America when he said²³ in speaking of this same country: "The hotblooded Creole, who for centuries had been subject to a paternal government, was altogether unfitted for Parliamentary institutions." In speaking of all Latin America except Chile and Argentina, Sir James Bryce

¹⁹ Article 50.

²⁰ Article 15.

²¹ Chap. V, Art. 68.

²² The Argentine Republic (1910), p. 59.

²³ Argentina (1910), p. 122.

says²⁴ that these states never have been democracies in any real sense of the word. They could not have been democracies. "To expect peoples so racially composed, very small peoples, spread over a vast area, peoples with no practice in self-government, to be able to create and work democratic institutions was absurd, though the experience which their history has furnished to the world was needed to demonstrate the absurdity," and injustice is done to Spanish Americans by censures and criticisms which ignore these fundamental facts.

§ 80. Misjudgment. This difference in the natures of the people, and the relationship thereof to the republican form of government, is frequently misunderstood, and may be misleading in considering methods of administration. Thus we find Mr. Justice Miller saying:²⁵ "It is with sorrow and regret that we see their descendants on this side of the Atlantic, Spanish republics they call themselves, evince scarcely more respect for written constitutions than the country from which they came." Nominally Mexico is a republic, but in reality it is of necessity an empire. For these countries a constitution is as a point ahead, to guide the progress of the nation, and to attain. For the Anglican, a constitution is a limit beyond which neither ruler nor individual citizen may pass.

§ 81. United States, division of powers. In the United States the Federal Constitution defines the agencies of the three powers, giving to the President, the supreme executive, no judicial power, and only the negative legislative power of the veto, which may be overruled. The legislative power resides in Con-

²⁴ South America, p. 539.

²⁵ Constitution, p. 70.

gress, which has no executive power, further than the approval of certain executive acts such as appointments, and the making of treaties. Congress has judicial power only as to its own membership, and for impeachment trials. Authoritative interpretation of the laws resides only in the courts, which have absolutely no executive nor legislative power further than is necessary for their own guidance. It is true that the President may in his message suggest legislation, but, unlike the French or English systems, the American President has no power of initiative in legislation.

§ 82. **State constitutional provisions.** In many of the state constitutions we find a section defining still further this separation of powers. Thus, that adopted by Virginia in 1902 says:²⁶ "Except as hereinafter provided, the legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time." Similarly the constitution of California provides:²⁷ "The powers of the government of the state of California shall be divided into three separate departments, the legislative, executive, and judicial; and no person charged with the powers properly belonging to the one of these departments shall exercise any functions appertaining to either of the others, except as in the constitution expressly directed or permitted." The Illinois constitution of 1870 provides:²⁸ "The powers of the government of this state are divided into three distinct departments—the legislative, executive, and

²⁶ Sec. 39.

²⁸ Article III.

²⁷ Article IV, Sec. 1.

judicial: and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.”

§ 83. Lack of distributive clause. In all the states we find the same division of powers as in the Federal Constitution, though in some the distributive clause, such as is found in the constitutions of Virginia, California, Illinois, Oklahoma, Alabama, Arkansas, etc., may be omitted, as it is in the Federal Constitution. Practical experience has demonstrated the necessity for this clear statement of the law. In the absence of the distributive clause there might be a little liberty of interpretation as to the extent of this division of powers. The interpretation as to the Federal Constitution is not absolutely binding upon the state courts in interpreting the constitutions of their respective states, and a slight degree of divergence has thus been introduced. Especially when the distributive clause is present, any legislation which passes the limits thus prescribed is unconstitutional, and therefore no law.

§ 84. Danger of congressional usurpation of power. In speaking of the Federal Constitution, though equally applying to interpretation of state constitutions, Pomeroy says:²⁹ “I am strongly of the opinion that the people of the United States are not in so much danger from an undue stretch of authority by President or by judges, as from unlawful assumptions by Congress. The Constitution is well as far as it goes; the design was good; the checks and balances were carefully and skillfully arranged; but no mere organic law can place a lasting barrier to the advance of a popular legisla-

²⁹ Constitutional Law, Sec. 186.

ture. Step by step their powers are exceeded; the nation acquiesces; the precedent becomes established; and a system of construction is finally elaborated which takes the place of the written constitution as a practical guide to the government in its official duties." While it may be that the executive branch is more likely to assume legislative powers, than is the legislative branch to attempt to use power not properly its own, still it must be admitted that the courts act as efficient checks upon the executive, even when they might be restrained from similar action upon minor errors of the legislature.

§ 85. Illegal custom lacks sanction. Any practice or usage, no matter of how long duration, which permits or contemplates a union of powers is forbidden and illegal. "Abuses of power, and violations of right, derive no sanction from time or custom."³⁰ This applies equally to affairs of the nation, state, or municipality.

§ 86. Executive quasi-legislative or quasi-judicial combination. It is frequently necessary for executive departments to formulate rules, or orders, which is a quasi-legislative action, or to act in a quasi-judicial manner. Though the letter of the constitution might not prohibit such action by one person, or board, and at the same time that the person or board is employed in a purely executive manner, the spirit of the prohibition would dictate that as far as is possible, even in executive departments, quasi-judicial, or quasi-legislative duties be divorced from the purely executive. For example: If the same body decides what shall be the

³⁰ Hood v. Lynn, 1 Allen
(Mass.) 103.

requirements as to medical education to entitle an applicant to a license, (quasi-legislative action) and examines applicants for license, (quasi-judicial action), and determines whether the law has been violated, (also quasi-judicial action), and in an executive procedure either prosecutes for practice without license, or begins action for the annulment of a license, it is easy to suspect an improper bias in some one of these operations. Such power is too great to be entrusted to one body, and in the past it has given rise to charges of corruption. Similarly, under the old Tweed regime in New York, the union of the quasi-judicial duties of an inspector in the health department, with purely executive responsibilities, opened the door for fraud and oppression.

§ 87. Municipal division of powers. The same division of powers should be observed in municipal administration for the best results, but the courts have not always been strict in this interpretation.

§ 88. Judges acting as executives. Readers of history may note that sometimes members of the Supreme Court of the United States have at the same time held executive positions. John Jay, Chief Justice from 1789 to 1795, was during a portion of that time, Minister to England. John Marshall, that great authority upon Constitutional Law, retained his position as Secretary of State for two or three months after his appointment to the position of Chief Justice. More recently, Mr. Charles Hughes continued to hold the office of Governor of New York, after he was appointed to the Supreme Bench. In no instance, however, did these men sit upon the bench while holding the executive position.

§ 89. Legislative branch. The legislative power of

the nation rests solely in Congress. That of states is confined to the legislatures, or general assemblies. The legislative power of municipalities is found in the city councils, or, under the commission form of government, in the entire commission. As to municipalities it must be remembered that they have only such powers as are distinctly granted to them by the state. The state is the political entity. It is true that, as Mr. Justice Allen has said in *People v. Albertson*:³¹ "The right of (local) self government lies at the foundation of our institutions," but that remark applies to the purely internal matters of a community. Since the city must depend upon the state for its authority, and because the legislature is unrestricted³² in its prescribing the powers and duties in cities, (except of course by the Federal and state constitutions), the work of a city council, or of a city commission, is largely of an executory nature, and its legislation has not the dignity of law, or statutory enactment. In England the enactments of these public corporations are called by-laws, and in the United States we designate them as ordinances. They partake more of the nature of regulations. This general rule is thus stated by Professor Freund:³³ "Under the principle of local self-government local authorities cannot be vested with powers necessarily exceeding their territorial jurisdiction; those matters therefore which equally affect the people of the state at large, and cannot be confined locally, must be reserved to the state legislature. Moreover, the inauguration of a novel policy in matters of safety and health, the prohibition of articles of consumption

³¹ 55 N. Y., 50.

³³ Police Power, Sec. 142.

³² *Jameson v. People*, 16 Ill. 257.

possibly but not undoubtedly injurious to health, the establishment of monopolies, the restriction of the right to pursue established avocations, may under circumstances be conceded to the legislature of the state, but cannot be introduced by local authorities under mere general grants of power." Judge Dillon thus defines the general authority of municipalities.³⁴ "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied."³⁵ (See Chapter IX.)

§ 90. Municipal legislative power limited. The power of the municipality to legislate is therefore absolutely dependent upon the permission of the state; and an ordinance passed by a city not only has a limited territorial authority, but it is limited as to substance, and may at any time be rendered illegal by the action of the state legislature, as representing the supreme will of the people. In other words, municipal ordinances are simply regulations providing for the transaction of such business as may be entrusted to the corporation by the state. Moreover, the division of powers as prescribed in the state constitutions is with regard to the operations of the state, and does not necessarily restrict municipal corporations in a like manner.

³⁴ Municipal Corporations, I, 145.

³⁵ See also Fairlie, p. 387.

§ 91. State legislative infringement upon judicial power not prohibited by Federal Constitution. It sometimes happens that legislation has partaken of the nature of judicial procedure. The division of powers in the Federal Constitution does not prevent such union in the operations of the individual states. "There is nothing in the Constitution of the United States which forbids the legislature of a state to exercise judicial functions."³⁶ "A legislature cannot, however, declare what the law was, but what it shall be."³⁷ This distinction is important.

§ 92. Division of powers in state governed by state constitution. The prohibition against the assumption of judicial powers by a state legislature must be found in the constitution of that particular state. It is true that often the legislature may not recognize the fact that it has been assuming powers not its own; and the courts will not act to prevent such action until a case is brought before them. In the earlier days in Ohio the legislature got into the habit of granting divorces by statutory enactment. Finally it was realized that great harm had been done. The acts were unconstitutional. To declare such divorces illegal, however, would injure many innocent persons, by the making of subsequent remarriages illegal, and hence the children thus born, illegitimate. Not only so, but the title to much of the property in the state might be invalidated. This illustration again shows the necessity of observing the restrictions found in the constitution.

§ 93. Judicial action of legislature prohibited. The legislature of Tennessee passed a resolution directing

³⁶ *Saterlee v. Matthewson*, 2 Peters, 413.

³⁷ *Ogden v. Blackledge*, 2 Cranch. 272.

the discharge of a criminal by a court. The resolution was declared an unconstitutional assumption of power by the legislature, and an invasion of the power of the judicial department, and therefore void.³⁸ A legislature cannot grant a new trial, nor direct a court to do so.³⁹

§ 94. **Legislation by "the people."** There is at present a tendency to take from the legislature a portion of its legislative power, by means of the initiative and referendum. Since the real source of power is in the people, they have the undoubted right by constitutional amendment to make such a reservation. In some instances it may work very satisfactorily. Whether it be advisable or not may be questioned, for it reduces the responsibility of the members of the legislature. It is also a very grave question whether or not, with the large proportion of foreign born, uneducated, and irresponsible citizens, a popular vote is a safe guide in matters of legislation. It takes from the enacting power the opportunity for wise consideration. It makes it a matter of comparative ease for a corrupt and designing corporation to secure legislation which no responsible body of men, intelligent enough to represent the people in the general assembly, would dare to pass. On the other hand it may make it more difficult to secure new and advisable legislation. It is more than possible that such a principle may be safe in municipal affairs, though it may be unsafe in state government. Particularly in state government the initiative and referendum is still on probation, though it is more easy to secure, than to get rid of when once established.

³⁸ State v. Fleming, 7 Humphreys, 152.

³⁹ DeChastellux v. Fairchild, 15 Pa. St. 18.

§ 95. **Legislative power can not be delegated.** Legislative powers cannot be delegated from the state legislature, without express constitutional provision to that effect. "It is a principle not questioned, that except where authorized by the constitution, as in respect to municipalities, the legislature cannot delegate legislative power—cannot confer on any body or person the power to determine what shall be law. The legislature only must determine this."⁴⁰ So we find in *Dowling v. Insurance Co.*,⁴¹ that it was an unconstitutional act for the legislature to leave to the Insurance Commissioner the decision as to what form of a policy must be used. So also the supreme court of California held⁴² that it was illegal to leave to an executive officer the power to determine the particular form of appliance which should be used in factories to limit the dangers therein, making it compulsory upon the owners of factories to comply with his orders. The same court in *Ex parte Cox*⁴³ ordered the discharge of the petitioner who had been convicted of violation of a certain rule and regulation in the nature of quarantine, as established by the Board of State Agricultural Commissioners. The act establishing the commission declared it had power to enforce rules and regulations. The court said: "For the purpose of local legislation legislative function may be delegated, but the legislature had not authority to confer upon the board the power of declaring what acts should constitute a misdemeanor. The legislative power is vested in the legis-

⁴⁰ *State v. Young*, 29 Minn. 551.

⁴¹ 92 Wis. 63.

⁴² *Schaezlein v. Cabaniss*, 135 Cal. 466.

⁴³ 63 Cal. 21.

lature; it cannot be attempted to confer that power upon any officers of the executive department.”⁴⁴

§ 96. **Executive assumption of legislative power.** (See Chap. IV.) The State Board of Health in Illinois passed a regulation requiring vaccination as a preliminary requisite for attending school, but the supreme court held the order void, as being legislation.⁴⁵ “It had, and could have, no legislative power. Its duties were purely ministerial, and the provisions of a statute authorizing the board to make such rules and regulations as it should from time to time deem necessary for the preservation or improvement of the public health, cannot be held to confer that broad discretionary power contended for.” And: “We are of the opinion that the powers of the Board are limited to the proper enforcement of the statutes, or provisions thereof, having reference to emergencies of government to preserve the public health, and prevent the spread of contagious, or infectious diseases.” The court further said: “Its duty to recommend legislation is repeated more than once in the act in connection with specifications of the powers and duties of the Board.” From a legal point of view the above case covers the entire field of health work of the state, and on the broad basis of reasoning which must appeal to all. The supreme court of Wisconsin gave a very similar statement of the matter in *State v. Burdge*.⁴⁶

§ 97. **Executive emergency.** What then is the emergency contemplated? In *Jenkins v. Board of Education*,⁴⁷ speaking of an order of the Chicago Commission-

⁴⁴ See also *State v. Hansen*, 63 Ind. 155; *State v. Ball*, 34 Ohio, 194; *East St. Louis v. Wehrung*, 50 Ill. 28.

⁴⁵ *Potts v. Breen*, 167 Ill. 67.

⁴⁶ 70 N. W. R. 347; 95 Wis. 390; 37 L. R. A. 157.

⁴⁷ 234 Ill. 427.

er of Health, the court held: "There is nothing in the nature of an emergency in the occasional recurrence of the well known disease of small-pox in a city like Chicago, which may not be provided for by general rules and regulations prescribed by the legislative authority of the city." Webster defines an emergency as "a sudden or unexpected occurrence, or combination of occurrences, demanding prompt action." But the idea also presupposes an attempt at foreseeing, and of preparing against, possible unfavorable conditions.

Sanitarians would agree that typhoid fever and malarial fever are infectious, and that they are dangerous to the community, and legitimate objects for some form of quarantine. They recognize that malaria is spread by the anopheles mosquito, and that the extermination of those insects would eliminate that disease. They recognize that typhoid fever is sometimes spread through the agency of the common household fly, which breeds in stable manure, wet straw, and garbage. The typhoid infection is often transported, and the germ is propagated to a dangerous degree in milk. Public sanitarians know that the bubonic plague is now upon the Pacific coast in this country. It is in Mexico, and along the Gulf of Mexico. It may at any time attack any of the eastern cities of the United States. They know that the disease is spread through the agency of rat fleas, and the extermination of those rodents is our chief, and rational protection. They know that the rats live upon garbage, and breed in manure pits, and to exterminate the vermin we must protect garbage and manure from the rats, and so construct barns and other buildings that the vermin will find no place for hiding. These things are well known, and there can

hardly be an emergency which would warrant a board of health, or a health official in issuing mandatory orders for the abatement of these nuisances, except in accordance with definite statutes. Such orders would be an unconstitutional assumption of legislative power by executive officers.

§ 98. Executive assumption of judicial power. It is not the province of the executive officer to determine what is a nuisance. That is a judicial act. The officer may in each case go into court and prove a nuisance, and secure an order for abatement. That is a tedious, and expensive, as well as uncertain method of action. The more simple method is to secure beforehand the enactment of a statute, which will specify that certain conditions are nuisances. Then as an executive officer it will be his duty to see that the statute is obeyed.

§ 99. Executive duty to give legislature information. (§ 135.) It is the duty of the executive officer to so lay the facts properly before the legislative bodies as to secure needed enactments.⁴⁸ If he neglects to do so, the responsibility rests upon his shoulders. If the facts are properly presented to the legislative body, the responsibility will then be transferred from the executive, to the legislative authority, if disease and death occur as the result of their negligence. Freund thus summarizes:⁴⁹ "It cannot be left to an administrative officer to determine conclusively the existence of a danger, and the choice of measures to be taken against it, since that would involve an unconstitutional delegation of legislative power."

§ 100. Executive orders, law? It is often claimed that the orders of a board of health, or of a health offi-

⁴⁸ Potts v. Breen, 167 Ill. 67.

⁴⁹ Police Power, Sec. 34.

cer, have the force and effect of law. This is an unfortunate statement, which is only partially true. A Federal statute provided for the free entry of animals to be used for breeding purposes. The Secretary of the Treasury ruled that the collector must be satisfied that the animals were of superior quality. The court held that this was additional legislation, not a regulation.⁵⁰ So, too, when the Postmaster General ruled that second class matter should only include such publications as consisted of the current news, or miscellaneous literature, and excluded a collection of railroad time tables, the court held that this was legislation, not regulation, and therefore void.⁵¹ In *United States v. Eaton*, regulations as to manufacture were considered to have gone beyond the statute, and therefore void.⁵² On the other hand, regulations as to branding and marking were considered proper administrative regulations, and not legislation.⁵³ "What is allowed to be done is anything within the law, that is, in execution of it; what is forbidden to be done is anything without the law, that is, in extension of it. In execution anything may be done that is administration, nothing may be done that is legislation—is the principal distinction."⁵⁴ "As regulations depend upon a statute, they can never go to the extent of being independent of the statute. A regulation which is in effect legislation is in a just sense a regulation no longer. That is, as a regulation is derivative, it must keep within the scope of the statute under which it is framed."⁵⁵

⁵⁰ *Morrill v. Jones*, 106 U. S. 466.

⁵¹ *Pub. Co. v. Payne*, 30 *Was. L. R.* 339.

⁵² 144 U. S. 677. See also *Merritt v. Welsh*, 104 U. S. 694.

⁵³ *In re Kinlock*, 165 U. S. 535.

⁵⁴ *Wyman*, *Administrative Law*, Sec. 99.

⁵⁵ *Wyman*, *Administrative Law*, Sec. 133.

The New Jersey court distinctly says: "The functions of a board of health are executive and advisory, and not legislative or judicial in character, and hence a resolution passed by it declaring a certain tannery to be a nuisance is void."⁵⁶ "The regulations required to be passed by ordinance are such as prescribe general rules with respect to the several matters intrusted to local boards, and a particular permit authorizing the doing of that previously authorized by ordinance may be granted by resolution."⁵⁷ The Illinois statute which conferred upon the State Board of Health the authority to license, or refuse to license, itinerant venders of drugs was attacked on the ground that it conferred upon the board both legislative and judicial duties, because it permitted the board to make the rules upon which it would pass upon the applicants. The court held that the board had under the statute no true legislative authority, and that it simply had quasi-judicial discretion as to the granting of license; and that the rights of applicants was safeguarded in so far that if the board acted in an arbitrary manner the action would be subject to review in the courts.⁵⁸ When an incorporated town or city has been invested by the legislature with power to pass an ordinance for the government or welfare of the municipality, an ordinance enacted by the legislative branch of the corporation in pursuance of the act creating the corporation has the force and effect of a law passed by the legislature, and cannot be regarded otherwise than as a law, and within the corporation.⁵⁹ The constitution

⁵⁶ Marshall v. Caldwell, 36 N. J. L. 283.

⁵⁸ People v. Wilson, 249 Ill. 195.

⁵⁹ Mason v. Shawneetown, 77 Ill.

⁵⁷ Courter v. Newark, 25 Vr. 325. 533.

of Louisiana authorizes the legislature to "prescribe the powers" of the board of health. The court held that this can only mean to delegate the powers necessary for efficiently carrying out the purposes for which the board was created, and to give its regulations the force of law.⁶⁰

§ 101. Power yielded because claimed is not sanctioned. Mr. Cooley says:⁶¹ "A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition, without the mischief which the constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the constitution."⁶² "There is always some plausible reason for latitudinarian constructions which are resorted to for the purpose of acquiring power; some evil to be avoided, or some good to be attained by pushing the powers of government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined and finally overthrown. * * * If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process."⁶³

§ 102. Executive orders and regulations, limitation of. Mr. Justice Daniel has given us a very clear statement of the province of the "regulation" in *U. S. v. Eliason*:⁶⁴ "The whole of administration is governed

⁶⁰ *State v. Snyder*, No. 19, 418 Sup. Ct. La. 1912.

⁶¹ *Constitutional Limitations*, 71.

⁶² Citing *Sadler v. Langhan*, 34 Ala. 311; *People v. Allen*, 42 N.

Y. 384; *Greencastle Township v. Black*, 51 Ind. 565.

⁶³ *Bronson, C. J., in Oakley v. Aspinwall*, 3 N. Y. 568.

⁶⁴ 16 Peters, 291.

to a greater or less extent by fixed rules. These rules are made by the executive itself in the course of administration to facilitate the enforcement of the law. In part these rules are written, then they are called regulations; in part they are unwritten, then they are called usages. The general result is a definiteness in usual administration. The situation that is found is this: When the law is put upon the statute book it is not specific enough for administration. It requires further elucidation. This is the office of legislation which is done by the administration. That is, the administration first puts the law in shape for convenient administration. The force of these regulations that thus accompany the statute is the problem. The general conception is that these regulations have the force which any governmental action has. This is usually summed up in the ordinary decision that these regulations have the force of law." But it must be remembered that "A regulation has the force of law [only] within the sphere of its legal action."⁶⁵ In other words, orders or regulations have the effect of law only so far as they remain within the clear provisions of the constitution and the statutes under which they are framed. Relying upon a mistaken confidence, it has often happened that health officials have issued as orders, or regulations, acts really of legislation. In the presence of real danger under such conditions, the efficiency of the health department has been paralyzed by the decisions of the courts. The time for legislation is before the danger approaches, and the authority of legislation does not reside in the

⁶⁵ Wyman, *Administrative Law*,
96.

health officials. General rules and regulations have not the same standing as statutes.⁶⁶

“A health officer who is expected to accomplish results must possess large powers and be endowed with the right to take summary action, which at times must trench closely on despotic rule. The public health cannot wait on the slow process of a legislative body, or on the leisurely deliberation of a court. Executive boards or officers who can deal at once with the emergency under general principles laid down by the law making body must exist if the public health is to be preserved in cities.”⁶⁷ “Perhaps some of these statutes may be justified constitutionally on the ground that the work of the board of health is only a determination of details in the nature of administration, which may be by a board appointed for that purpose; and that the substantive legislation is that part of the statute which prescribes a penalty for the disobedience of the rules which they make as agents performing executive and administrative duties.”⁶⁸ Clearly, when a penalty is attached to a violation of the rules or regulations of a board of health such rules must be published, and due notice given, before they can be made effective.⁶⁹ Even here, the regulations must not be broader than the statute under which they are passed. Thus, under the general power to inspect baggage to guard against the introduction of infectious disease, the Michigan board passed a rule requiring all baggage inspected, without making it a prerequi-

⁶⁶ Health Dept. v. Knoll, 70 N. Y. 530; Reed v. People, 1 Park Cr. 481.

⁶⁷ Nowotny v. Milwaukee, 121 N. W. 658.

⁶⁸ Brodbine v. Revere, 182 Mass. 598.

⁶⁹ Reed v. People, 1 Parker Cr. 481; Pierce v. Doolittle, 130 Ia. 333.

site that the baggage so treated must be from an infected district, and the court declared the regulation void as being in excess of authority.⁷⁰

It is true that in some cases in different states certain legislative power has been conceded to the health departments. Thus in Vermont,⁷¹ it was held that police powers may lawfully be delegated to state boards of health, and when so delegated the agency employed is clothed with power to act as fully and efficiently as the legislature itself. The same decision also recognizes a similar power for local boards. Similarly in New York state the court has admitted that the state may confer upon boards of health the power to enact sanitary ordinances having the force of law within the localities for which they act.⁷² These decisions do not seem, however, to have the breadth of meaning which some enthusiasts would desire. They may be considered in the light of other decisions by the same courts rather to recognize the necessary force which must be given for the general welfare to such legal orders as are issued under the general provisions. Thus the Vermont court also said⁷³ that the state may invest state and local boards of health, created for administrative purposes, with authority in proper way to safeguard the public health and the public safety. The way in which these results are to be accomplished is within the discretion of the state, provided the powers and functions of the general government are not thereby infringed, nor any constitu-

⁷⁰ *Hurst v. Warner*, 102 Mich. 238.

⁷¹ *State v. Morse*, 80 Atl. 189.

⁷² *Cartwright v. Cohoes*, 165 N.

Y. 631; *Polinsky v. People*, 73 N. Y. 65.

⁷³ *State Board of Health v. St.*

Johnsbury, 73 Atl. 581.

tional provision of the state or the United States. "If the mode adopted by the state for the protection of the public health and safety of its local communities proves objectionable, inconvenient, or even distressing to some, if nothing more can reasonably be affirmed against the statutes, the answer is that it is the duty of the constituted authorities primarily to keep in view the welfare and safety of the many, and not to permit their interests to be subordinated to the wishes or the convenience of the few." Since this case was heard not long before the Morse case, the last mentioned must be read in the light of the former, which distinctly recognizes that neither the constitution, nor the authority of the central government are to be infringed upon. Even were it possible under our system to thus delegate legislative authority to health departments, it would be inadvisable for the reason that it would necessarily bring confusion. There must be one governmental body in control.

The possible conflict between the ordinary legislative authority and that of a health department is shown in a case originating in South Carolina. Sections 1451 and 1463 of the Civil Code of 1912 confer ample authority on boards of health to make and enforce all needful rules and regulations to prevent the introduction and spread of infectious or contagious diseases, and generally to make all such regulations as they shall deem necessary for the preservation of the public health, and to define, declare, and abate nuisances injurious to the public health. Acting under these provisions the board of health of the city of Charleston passed a resolution requiring the closing of all dairies in the city on or before July 1, 1912. The city council

regularly passed a resolution antagonistic to the action of the board of health, and practically nullifying the resolution of the board of health. The question was therefore directly raised as to the relative powers of the two bodies. In *Alston v. Ball*⁷⁴ the supreme court passed upon the matter, holding that as these powers are conferred upon the boards of health to control sanitary matters by rules, regulations, and resolutions, the said board of health had full authority in the matter. It is not to be presumed that they act arbitrarily or capriciously, and so long as they are reasonable in the discharge of their discretionary duties, the court is without power to interfere. "Within the limits of their power they are exclusive judges of the propriety and wisdom of their actions, and so long as they act strictly within those limits and not arbitrarily or capriciously, they are not subject to the control of the court. In other words, the court cannot set its judgment against theirs, for that would be to usurp their power. Under the showing made it could not have been said that the action of the board in this case was arbitrary or capricious, or that it had no substantial or reasonable relation to the purpose for which it was intended, namely, the protection and preservation of the public health. On the contrary, the overwhelming weight of the evidence was that it was not only desirable but necessary to that purpose." Inasmuch as the board of health derived its authority directly from the legislature and not from any municipal action, the board of health was not subject to the council. Each derived its authority from the same source. Apparently, therefore, in every place

⁷⁴ 77 S. E. R. 727.

where there is a conflict between the ordinary legislative body for the city and the board of health, it will be necessary to take the question to the supreme court to decide how much may be a matter of sanitation, and how far questions other than those relative to health may be involved. Such conflict in authority is entirely obviated by holding strictly to the rule that legislative authority may not be delegated; and, further, insisting that there shall be but one legislative body for each prescribed territory.

§ 103. Legislative limitations. Even legislatures have no unlimited power of legislation, within constitutional limitations as to substance. Legislation must be reasonable, and not arbitrary. The Fifth Amendment to the Federal Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment says:⁷⁵ "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

§ 104. Due process of law. It will be noticed that these two provisions of the Federal Constitution similarly protect property. In the judicial interpretations the Fifth Amendment is understood as restraining the Federal Government, not the individual states, whereas the Fourteenth Amendment is clearly a restraint upon the individual states. The fuller discussion of the meaning of the phrase "Due process of law" will be found in a subsequent chapter. (Chap. VII.) It is

⁷⁵ Section 1.

sufficient to state here that the expression does not necessarily refer to judicial decisions in court, but a person may be deprived of liberty or property by legislative action, or by the act of the executive, and such deprivation may still, within the intent of the constitutional amendment, be due process of law. The most vital point in due process is that the individual shall have an opportunity to be heard formally. This opportunity may be through his legislator. If the law tends to act unjustly he may then get his hearing in court. He may have his opportunity for objection before the executive charged with the enforcement of the statute. Even summary action by the executive may be held as within due process under certain conditions, and then the aggrieved person may have the act reviewed in court.

§ 105. **Public health protection, police power.** The foundation for all of the protective operations of government is in that peculiar and wide reaching power called Police. (See Chapter VI.) Its maxim is "*Salus populi est suprema lex.*" Its object is to prevent, not to punish, crimes and misfortunes. It is not a power granted to any governmental body. It is an inherent function of government, without which no government could endure. Upon this power the government depends for its very life. The extreme strength of the power renders its abuse the more dangerous, and because every act of a health department must be finally justified under this power, it is the more needful that its limitations be strictly observed by the administrator. On the other hand, because of the strength of this power actions of governmental officers under it are especially liable to restrictive investigations. In

other words, if the officer is disposed to go to the limit of his power, basing his efforts upon that which he may consider his duty and privilege, the individual citizens are very likely to rebel, and take the questions into court. For these reasons the subject of Police Power will be more fully treated in a subsequent chapter.

§ 106. Public health activities based upon idea of "nuisance." The protection of the life and health of the individual citizen is a most important portion of police power. Protection does not mean the cure of illness, unless the cure of one case may have a restraining action upon the spread of the malady; or possibly if it be necessary for the state to step in and prevent the continuance of the illness. Prevention presupposes a cause which is to be removed or controlled, and that cause must be some thing or condition which has an injurious effect upon the health (or morals) of the individual citizen. Such a thing or condition is called a nuisance. (Chap. VIII.) Thus we find that "In the United States also the police of public health and safety starts from the idea of nuisance. It is further based upon the principle that there is to be a legislative determination in great detail as to what are nuisances. There is not in this country any elaborate statute on the subject, and in those states where special legislation is permitted by the constitution, much of the legislation is contained in statutes which affect only one city."⁷⁶

§ 107. Lack of legislation, a source of executive weakness. The difficulty of determining what are

⁷⁶ Goodnow, *Municipal Government*, p. 271.

nuisances and what are not is very greatly increased by the lack of systematic compilations of approved facts or opinions in our statute books. The question of jurisdiction between municipality, state, and nation, together with the multitude of enactments which may often conflict, the lack of clearness and definiteness in statutes enacted, all conspire to make the subject like a promiscuous pile from which the desired article may be sometimes taken easily, and at others it is most difficult to find, and its extraction is hindered by other articles. Without definiteness of statutory enactment, the health official must "feel" his way. (§ 163.) He is on uncertain ground. Even long established custom does not ensure his safety. The custom may never have been questioned, but it may only need to be brought into court to be condemned. The officer may at any time be blocked, and the block may come when it is most unfortunate and crippling. In legislation every citizen finds abundant opportunity for objection. If he does not have this opportunity in this manner, he is more likely to oppose an executive order. Opposition to the executive order may cause expensive delay—expensive both in time and money.

§ 108. Legislation more needful in decentralized government. Because of the right of every citizen to be heard, and because the primary authority here rests with the individual citizen, exactness and definiteness of legislative determination by statutory enactment is far more necessary in a decentralized government like ours, than it could possibly be in a centralized system like those of Europe. In England the supervision of all public health activities is under the one Local Government Board. Such a body has far more

authority than any similar body in this country. It could give definiteness to efforts which would be blocked by uncertainty here.

§ 109. **Legislation definite in effect.** We hear much of the uncertainty of the law, and the delays of the law. So far as public health work is concerned it is probable that very much of the basis of such complaints is to be found in the absence of legislation. Every man has his right to his day in court. An executive order may be opposed by the citizen. The case is of minor importance, apparently, and it is not carried to the higher courts. Consequently the same questions may be repeatedly tried, and settled for individual cases. Were the question one based upon the intent of a statute it could not be settled until it reached the higher court, and practically the one case would cover all. Lack of legislation then increases the work of the courts, and cumbers their dockets with useless and time-taking cases. Because of the multitude of such cases the courts do often of necessity occupy much time.

With the absence of legislation upon which to base conclusions, when each case is brought into court it must go through every phase of investigation, be viewed from every angle. Each case must be settled by itself, and the ground previously traversed must be retraced as if it had never been trod. Much depends upon the way in which the case may be presented to the court by each side. Under such circumstances no wonder that the officer who seeks to do his work with executive regulations and orders chafes under the uncertainties and delays of the law. All of this could be prevented by convincing the legislative body of the

need for legislation, and then by judiciously guiding the enactment.

§ 110. Agreement of three branches necessary. Even after the legislature has passed a statute its terms may be questioned in the court. It must there appear that the statute is reasonable for the accomplishment of the object intended. It must not be an arbitrary use of power. "Practically the present system of judicial control over legislation has meant in many cases that unless all three departments of government are convinced of the justice and reasonableness of a radical change in social or economic policy it cannot become embodied in principles of law."⁷⁷ Executive irritation often springs from a misunderstanding, or a lack of appreciation of these fundamental principles of our governmental system. Executives have tried to ignore the necessity for the aid of other branches, and finding themselves thwarted in their efforts, they have mistaken law for obstruction. All things should be done decently and in order, and this means in accordance with the fundamental plans of our system of government.

§ 111. Executive semi-legislative duties. Although the legislative branch is, and must be distinct from the executive, there are important semi-legislative duties which naturally devolve upon such a technical executive as a public health official. Not only must he call attention to the need for legislation, but because the subject dealt with is highly technical, and because the legislators as a class are not educated in these technicalities, it becomes a most important duty to wisely guide the form of legislation. This guidance

⁷⁷ Freund, Police Power, Sec. 21.

must be through publications, and especially by the concise and patient work with committees. This duty is perhaps the most difficult, and the most important which may devolve upon the head of a state department of health. It requires a broad acquaintance with the science, a clear appreciation of the legal points involved, combined with the ability to use logic and diplomacy effectively.

§ 112. **Illegal statutes.** The fact that a statute may be found upon the pages of the statute book is not conclusive evidence that it is law. (§ 64.) Presumably a statute is sound law after it has passed, until such time as it may be tested and nullified by the court. Unfortunately the adverse decision of the court does not remove the law from the statute books, and in the compiled statutes of the state the nullified act may remain until someone takes the trouble to have it repealed. The repeal of an act takes it from the book. An act may be practically nullified by the court in a collateral case. Thus, the state of Missouri enacted a statute intended to prevent the importation of the Texas cattle fever into the state. This statute was declared unconstitutional by the Supreme Court of the United States.⁷⁸ In Illinois a similar statute was enacted, approved in 1867.⁷⁹ Since the two statutes were "on all fours" as to the specific points discussed in the Missouri case, practically that decision nullified the Illinois act, even though the Illinois act be not mentioned. This latter act should have been repealed, but it has remained all these years dead wood to choke the vital growth of the legal administration. Simi-

⁷⁸ H. & St. J. R. R. Co. v. Husen, 5 Otto, 465.

⁷⁹ Revised Statutes, Illinois, Chap. 8, Sec. 29-40.

larly, there are statutes which are nullified by the advances of science, and this same Illinois statute mentioned is an illustration. Generally speaking, there is no state officer whose duty it is to see that such dead material is pruned from the living law. A dead statute is simply disregarded. Every such dead statute tends to beget a general disrespect for law, and thus to make "a dead letter" of other statutes. Not only so, but the fact that the statute books are cumbered with this dead material tends to hide important acts from public knowledge.

§ 113. Crazy-quilt legislation. Another very great fault in our present system of enactments, and one which is intensified by our popular form of government, is that enactments are made piecemeal, and without any organic plan. The dignity and importance of our legislatures have been lowered until they have lost much of their former position, and acts are passed during the closing hours of a prolonged session, in which months have perhaps been spent in dickering and jockeyings, which could be of no public benefit. Each act has been considered by itself, without reference to cognate subjects. The result has been that statutes may seriously conflict. Added to this fact, and partially resulting from it, in broadening the work of a special department the tendency has been, not to systematize the organization, but to add more independent offices. Multiplicity of offices, dividing responsibility, necessitates inefficiency and extravagance of administration.

§ 114. Executive duty to systematize enacted statutes. No one should be better able than the executive to clearly see and appreciate these facts. He should

constantly keep the legislative body informed as to dead statutes, that they may be repealed. Every act should be carefully studied with reference to other statutes, and for possible legal objections. The legislative responsibility rests with the legislature, but the executive must bear the blame if legislation is based upon misinformation. This guidance of legislation according to some definite plan, is the most important and helpful work possible to the chief administrator of a state department of health, by whatever title he may be called.

§ 115. Limitation and distinction. This duty of the executive just mentioned has very definite limitations. The executive has no legislative power nor authority. He must not attempt to coerce, for that is a use of power over legislation. One man may lead a horse to water, but ten cannot make him drink. The duty of the executive ends with giving the information. If he cannot convince the legislators as to the need for certain legislation he may properly appeal to the people, but he has no moral nor legal right otherwise to attempt to force legislation.

CHAPTER IV

THE EXECUTIVE—ORGANIZATION

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| § 116. National executive. | § 127. Power of removal. |
| § 117. State executive. | § 128. One man in charge of each department. |
| § 118. Oneness of executive. | § 129. Experts paid by salary. |
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| § 120. Subjection of the trained specialist to the untrained official. | § 131. Responsibility must be tangible. |
| § 121. Organization. | § 132. Organization of State Department of Health. |
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| § 124. Appointment by the Governor. | § 135. Duty of executive to advise legislation. |
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§ 116. National executive. The second branch of governmental action is the Executive. In the national system, the head of the executive department is the President, and under the general term there are also included the members of the Cabinet, and all those officers and employees who are engaged in the administration of governmental affairs of the nation. The ramifications of the executive are to be found even on the country roads where the rural mail carrier may be seen making his occasional trips; in the forests of the west, where the forest reserve employees are protecting the trees from the ravages of fire and insects; in the dark mines of the land, where the mineral experts are making their investigations; in foreign

countries, where the consular agents collect commercial data, and protect American interests; as well as in those hives of administration which are housed in the great buildings of the national capitol. For reasons which will appear in a subsequent chapter, attention will not here be given to national executive administration, further than as illustrating the application of the law.

§ 117. **State executive.** From a public health standpoint the state executive is the centre of interest. The very great importance of the subject justifies a somewhat critical consideration, not only of the existing conditions, but of what we should have.

Business ability and acumen are the pride and boast of Americans generally. That there is a legitimate basis for such pride may be seen by a glance at the great commercial and engineering undertakings which have been carried through, not only in the United States, but also in far distant lands. We have also the direct testimony of foreign writers. The eminent English statesman, Sir James Bryce, in the first edition of his "American Commonwealth" wrote:¹ "The Americans are, to use their favorite expression, a highly executive people, with a greater ingenuity in inventing means, and a greater promptitude in adapting means to an end, than any European race. Nowhere are large undertakings organized so skillfully; nowhere is there so much order with so little complexity; nowhere such quickness in correcting a suddenly discovered defect, in supplying a suddenly arisen demand."

On the other hand, and in marked contrast with the

¹ Vol. II, p. 44.

author just quoted, though not in the least contradicting his assertion, another English writer, Mr. Percy Ashley, says of the American state governmental system:² "The state executives are ill organized and weak." This is not the statement of a hypercritical faultfinder. It is simply an epitome of the conclusions of every student of American administrative machinery. No one can successfully controvert Professor Goodnow when he says:³ "The experience of the world is against the administrative arrangements of the states of the American Union."

§ 118. Oneness of executive. A prime essential for executive efficiency is found in the idea of oneness. It is true that for over six hundred years the executive powers of Switzerland have been reposed in a council; but there is no such separation of powers in Switzerland as in this country, and that federation is not a nation in the same sense as is the United States. At the founding of this country there were those who feared to trust the executive power of the nation to one man, and at first several states voted against the proposition. "The Federalist"⁴ contains a full discussion of this point, and Chief Justice Story has given the subject a somewhat lengthy discussion in his commentary on the Constitution. What is there said applies with equal force to the government of the individual states, and also to the portion of the state administration which pertains to the care of the public health.

"That unity is conducive to energy will scarcely

² Local and Central Government, p. 327.

⁴ Number 70.

³ Principles of Administrative Law, p. 133.

be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of a greater number; and in proportion as the number is increased, these qualities will be diminished.”⁵ Mr. Cushing⁶ feared that this unity might result in despotism, but with our division of powers and consequent restraints upon the executive, this is hardly possible. To result in despotism, the executive must be united with either the legislative, or the judicial branch. Because responsibility is more easily fixed with one executive, than with a board, he is more easily restrained from abuse of power, as Delolme has pointed out. “This unity may be destroyed in two ways: First, by vesting the power in two or more magistrates of equal dignity; secondly, by vesting it ostensibly in one man, subject however, in whole or in part, to the control and advice of the council.”⁷ Either of these methods is fatal to individual responsibility. They shield the incompetent or shrewdly unscrupulous officer, and hinder the trained and competent man.

Although discussions are beneficial in legislation, after a law has been enacted there is no longer occasion for discussion. It is only the duty of the executive to administer the law as enacted. “No favorable circumstances palliate or atone for the disadvantages of dissension in the executive department. The evils here are pure and unmixed. They embarrass and weaken every plan to which they relate, from the first step to the final conclusion. They constantly counteract the

⁵ Story, On the Constitution, 1420.

⁶ 7 Opin. Attorneys General 453, 470; also 2 Opin. Attys. Gen. 482.

⁷ Story, On the Constitution, Sec. 1421.

most important ingredients in the executive character—vigor, expedition, and certainty of action.”⁸ “But the multiplication of voices in the business of the executive renders it difficult to fix the responsibility of either kind; for it is perpetually shifted from one to another. It often becomes impossible, amidst mutual accusations, to determine upon whom the blame ought to rest.”⁹ The magistrate sinks into comparative insignificance—compelled to follow when he should lead—blamed for acts over which he has no control.

§ 119. Boards of health. Mr. Justice Miller tells us that:¹⁰ “The nearer we approach to individual responsibility in the executive, the nearer will it come to perfection,” and Professor Goodnow assures us that:¹¹ “the desirability of singleheaded departments has come to be regarded as unquestionable, and it is almost heretical at the present time to express the conviction that the board form is preferable.” In spite of this it is the rule in the various states to entrust the management of the health administration to *boards* of health, often unpaid. Pennsylvania has a department of health headed by a commissioner, and though less perfectly organized, New York has a similar department. Mr. Eaton, in his *Government of Municipalities*,¹² gives a somewhat lengthy argument to show that health administration should be in the hands of a *board* of health. He argues that where the work is done by one man there is too great an opportunity for oppression and partiality in administration, and that there is need for multiplicity of council to obtain the best

⁸ Story, Cons. 1424.

⁹ Story, Cons. 1425.

¹⁰ Constitution, p. 94.

¹¹ *Municipal Government*, p. 225.

¹² p. 407.

result in formulating regulations and ordinances. On the contrary, to get the advantage of numbers in a board it must have some degree of legislative power. True it can have no true legislative authority, but it must have authority to enact ordinances. The rules, regulations, and ordinances passed by the board do not of themselves set any bar against the abuse of power in the executive work. On the other hand, the more boards are allowed legislative authority, in either state or city government, the less prominent will the deliberations of each become. In another portion of his work, Mr. Eaton says:¹³ "In most American cities the ordinance making power is distributed between limited councils, boards, and single officers. Much conflict, confusion, and needless litigation are the inevitable result, as there would be concerning the laws if there were several law-making bodies in the same state." This is sufficient to condemn the suggestion that an administrative body should be a "board" in order to get the advantage of multiplicity of ideas, and division of responsibility.

Since boards of health are purely the creatures of enactment, when they exist their composition and operations must be controlled by the law which provides for their existence. Thus, a provision of law authorizing a board of health to employ such persons as shall be necessary to enable it to carry into effect its orders and regulations does not authorize a village board of health to employ regularly an attorney and counselor.¹⁴ States have attorneys general, whose

¹³ p. 262.

¹⁴ Reynolds v. Ossining, 92 N. Y. Supp. 954.

duty it is to represent the state, or state officers, in all cases. State boards of health are state officers, so that it is the duty of attorneys general (as well as the assistants which are called by various names in different commonwealths, such as state's attorneys, county attorneys, prosecuting attorneys, etc.), to represent the board, and to give it counsel and advice.¹⁵ Likewise in cities and villages there are ordinarily local attorneys for the corporations who are supposed to look after the affairs of the corporation. Unless there may be a distinct provision in the statute, therefore, permitting or directing such employment of a special attorney the employment would not be justified in law. Because such a special attorney would not be under the control of the legal department of the city or state, there might very easily arise conflicts as to authority which would complicate administration. As a general proposition, then, such special employment of attorneys by boards of health would be contrary to policy, as well as contrary to law.

By the constitutions of some states it is illegal to appropriate money, or fix a salary, in a general act embracing other matters. Such a provision in an act creating a state board of health would therefore be void, but making that item void does not render void the entire statute.¹⁶ A board of health will be considered legally organized if there be a substantial compliance with the requirements of the law.¹⁷

General laws relating to boards of health apply to all boards of health in existence, with the exception only

¹⁵ Reports, Attorney General, Ill. 1902, p. 391, and 1910, p. 305.

¹⁶ Munk v. Frink, 106 N. W. 425; Walker v. McMahn, and State

v. Walker, 106 N. W. 427.

¹⁷ Trenton v. Hutchinson, 39 N. J. Eq. 218.

of such boards as may be specifically exempted;¹⁸ but it was held that the provisions of the Washington State Code creating city boards of health do not apply to any city in which a board of health is organized, and a health officer appointed, under a special charter.¹⁹

The fact that constitutional provisions confer upon a state board of health supervision of matters pertaining to public health has no application when the board declines, or neglects, to interfere with municipal ordinances.²⁰

Actions by the board should be formal. The record should show that rules, regulations, or orders are formally passed. The record should show who were present at the meeting, and by what vote a matter was passed or rejected. All rules and regulations should be published.²¹ The conditions imposed as to manner of making rules must be observed. When the charter of a borough does not confer the veto power upon the chief burgess, and he is not a member of the council, his concurrence in the rules and regulations of a board of health is not necessary.²² The records of boards of health are not to be used as evidence between private parties in all cases. Within its legitimate objects and purposes the record in question is proper evidence. In the absence of positive declaration on the part of the legislature, it will not be presumed that the rights of private citizens are to be foreclosed by the opinion of a public health officer contrary to the general rule of

¹⁸ *People v. Monroe County*, 18 Barb. 567.

¹⁹ *State ex rel. Rose v. Hindley*, 121 Pac. 447.

²⁰ *Logan v. Child*, 41 So. 197.

²¹ *Reed v. People*, 1 Parker Cr. 481.

²² Board of Health rules in Boroughs, 14 Pac. C. C. 116; s. c. 3 D. R. 225.

evidence, however learned or conscientious that officer may be.²³ It is quite possible that for preventive purposes it might be necessary to legally regard a certain case as one of infectious disease, yet after the case is all over, and the patient has recovered, all doubt may be dispelled, and the case prove to be noninfectious. During the period of doubt the safety of the community demands, perhaps, that the case be isolated as infectious. During that time it should be regarded legally as infectious. Scientifically it may not be infectious. We may therefore say that for administrative purposes it should be regarded as legally infectious, but in a suit for damages for causation it must be considered as legally not infectious.

§ 120. Subjection of the trained specialist to the untrained official. There is another very strong objection to the board idea, which is specially forceful relative to health administration. The board necessitates the subjection of the trained professional administrator to the non-professional advisor. A chain is only as strong as its weakest link. Admittedly, today there are very few competent health administrators. The position requires a special education and training such as finds practically no field for employment outside of the public service. The importance of this department demands the very best qualifications possible in its officers. It is practically impossible to appoint a board of sanitarians of equal value. Every member of a board below the best man for this special work, no matter how competent he may be in other lines of professional activity, is so much dead weight upon the administra-

²³ Brotherhood of Painters v. Barton, 92 N. E. 64.

tion. His presence may be positively antagonistic to good work, on account of his lack of special education and experience. He may even help to force the board into some *ultra vires* tort, for which the competent man, who has been overruled, will be held equally liable legally.

Whereas, in Prussia and in France the professional administrator is only subject to a general and financial supervision and control, in England "the unprofessional administrators are supreme; they are the authorities, and the salaried experts are merely their agents and servants."²⁴ This is not indicative of good business sense. It is neither productive of efficiency nor of economy, yet the United States has adopted the English policy; and by our system of separation of powers the evils of the plan must be intensified in America. In England the boards have some power of legislation. In America they have none. The legislation must be by the legislature.

We find then that generally in the United States the trained sanitarian is (if employed at all) subject to, and hampered by a board of health composed of men who know relatively little of the science of public health. The professional health administrator should be the real head of the department.

Boards are generally unpaid, or paid a nominal compensation. In Illinois, for example, the statutes provide that aside from the Secretary, no member of the State Board of Health shall receive any compensation for his services.²⁵ Especially, in an office requiring a special technical education like that of health adminis-

²⁴ Percy Ashley, *Local and Cent. Gov.*, p. 13.

²⁵ Rev. Stat., Chap. 126a, Sec. 11.

tration, there is no better reason for expecting a physician to give his service to the community, than there would be for requiring a judge to serve without compensation, or demanding that bankers give the use of the needed funds for public improvements. Such a provision, therefore, as to prohibit compensation opens the door to fraud and inefficiency; to fraud, because the tendency is for the officer to get his compensation indirectly; to inefficiency, because competent men cannot afford to accept the responsibility, and the office becomes a political asset for the control of elections.

In the same state of Illinois some time ago there was appointed a commission on industrial diseases, and it was provided that the members should not receive compensation, though an appropriation was made for the necessary investigation. In order to be able to do the work required, a competent person was obliged to resign from the commission. In other words, the competent person must be subordinate to those who were not competent, or who did not devote their best thought and time to the public duties. Clearly, this is not in accord with business experience and usage.

§ 121. Organization. In the states of the American Union the executive chief is the Governor. This is provided in each of the state constitutions. The organization of the remainder of the executive departments is determined by the constitutions and the statutes. In general it may be said that the authority of the Governor over the other executive officers is often very slight. The tendency in legislation has been to multiply governmental factors, and to entrust purely administrative matters to boards composed of non-expert politicians, who hold office for a limited period,

and too often use their positions, through the control of patronage, to influence elections. According to the constitutional provisions, or statutory enactment, these executive officers obtain their positions either by general election, or by appointment. When by appointment, it is customary for the appointment to be made by the Governor, with the advice and consent of the senate; or by the Governor alone, or by one of his subordinates.

§ 122. **Individual responsibility.** The key to efficiency—and that includes economy—in administration is individual responsibility. This is true whether we consider manufacturing, mercantile, or governmental administration. This element is of importance in exact ratio with the increase in the magnitude of the concern, and the amplitude of its operations. It is quite possible for a country store, for example, to be conducted fairly well, where each clerk sells gingham, oats, nails, and mowing machines, and also takes his turn in distributing the mails and billing express packages. The proprietor is at the same time close to his stock, his employees, and his customers. So few persons are involved in the transactions that an item may be easily traced. The supply of any line of goods presents few varieties and all are easily accessible. Even a stranger might readily determine for himself whether or not a particular pattern of dress-goods were in stock. On the other hand, in an establishment like that of Marshall Field and Company, economy and efficiency demand that the book-keeper do nothing else; the lace salesman must know where to find any one of a thousand patterns; and each department must be accurately supervised. In such an establishment it would be manifestly

impossible for each employee to be directly subordinate to one general manager. Neither can the manager know personally each of the customers. The manager must deal with generalities; the submanagers, with lesser generalities; the heads of departments, with particularities only in emergencies; and the individual clerks must watch the details. Throughout all there must be a perfect system, with definite subordination leading to one responsible head.

This idea of specialization, and non-duplication, is still better illustrated in manufacturing concerns. In the small shop one workman may do any one of the acts necessary in the manufacture of a given machine; he may work with the saw, the plane, the chisel, and the sandpaper upon the wood; he may shape the iron with forge or lathe; he may nickel the bright metal, and paint or varnish the wood. In the large shop one man may spend a lifetime doing only a single act of the many required. Each group of workmen is under a foreman; the foremen are under department heads, and all are under one general manager. There may be a board of directors who may be said to be the legislative body of the concern, but when this board has decided upon a plan it is never left to a board to execute it. A commission might be given to several workers to investigate a proposition, or to devise a plan of action, but such experiment or test is distinct from executive administration, though the administration may be guided by the results thus obtained. A manufacturing concern like the Harvester Company, or the Illinois Steel Company would not entrust the responsibility for the management of a shop or an office to a board of equal authority among its members.

§ 123. **Principles in organization.** According to this fundamental principle of individual responsibility, organized into a system, our state executive business should be readjusted in several radical features. In many states this reorganization would require constitutional amendment in order to make the change complete. Fortunately, so far as relates to health departments, the reorganization would be dependent largely upon the internal arrangement of the departments, and aided by statutory enactment. The requirements for efficient organization in state government are:

1. The Governor must appoint, and be responsible for all executive subordinates.

2. Each separate office, or department, must be managed by one man.

3. Each responsible officer should be an expert in the line of his official duty, hold a permanent position during efficiency, and should be paid an adequate salary, not by fees.

4. Each department should be organized systematically, so that the responsibility of each officer or employee is made definite, exclusive, and tangible.

The above statements are general, and will be considered generally, though each has its direct application to public health administration.

§ 124. **Appointment by the governor.** It is very evident that a man may not be properly held responsible for the acts of a subordinate over whom he has no control. (§ 282 *et seq.*) He may order, he may criticize, and he may prefer charges; but without the power for enforcing his demands he may not justly be deemed responsible for the methods or misdeeds of his subordinates. Charges would fall, unless there were posi-

tive evidence of malfeasance in office, but a difference in methods, without malfeasance, might be equally disastrous to the efficient administration. He who is expected to supervise a large factory or mercantile concern would demand the right to select his own workmen. Thus we find the statement in regard to governmental administration, that the primary rule is that the executive must have the right to appoint to office.²⁶ This statement is true relative to every grade of officer, though it is to be presumed that the superior may reasonably have a certain supervision over all inferior grades.

§ 125. Power to appoint not inherent. The power to appoint subordinates is not an inherent executive function.²⁷ In point of fact, both in the national executive and in state administration, this power of appointment is frequently taken from the superior; either directly or indirectly. (§ 285.) Thus, though the President may nominate subordinates, we have seen a hostile senate refuse to confirm, and thus block appointments for political reasons. So in state governments also, according to the constitutions or statutes of many states, presumably subordinate officers may be elected. Thus according to the constitution of Illinois,²⁸ for example, the Secretary of State, Treasurer, Superintendent of Public Instruction, Attorney General, and Auditor of Public Accounts are all elected. In no sense are such officers really subordinate to the Governor. They are nominated and elected by the same powers as is the Governor himself. They cannot then

²⁶ Wyman, *Administrative Law*, 48.

²⁷ Elliott, 259; citing *Fox v. McDonald*, 101 Ala. 46; *State v.*

Boucher, 3 N. Dak. 389; *People v. Freeman*, 80 Cal. 233.

²⁸ Art. V, Sec. 1.

be responsible to him. They are responsible only to the people of the state. "Every officer who is elected by the people is upon equal terms with every other (elected) officer."²⁹ The result is that the Governor, nominally the chief executive of the state, has only responsibility over a portion of the administrative business. He is neither a "Governor," nor a "Chief Executive," except in name only. He really ranks with his Secretary of State, Superintendent of Instruction, and Auditor. It is quite possible that one or all may be completely out of harmony with the Governor. Though all belong to the one branch of government, the executive, their ideas and methods may be so at variance as to effectually block most of the operations of government. It may easily happen that men who are thoroughly incompetent may be elected to these offices, especially under the direct primary system of election, by which a small minority is empowered to effect an election. This incompetence also tends toward inefficiency. Clearly, efficiency in administration demands that there be harmony of action in the department. A house divided against itself cannot stand, and to reach the same goal the different members of the department must not attempt to travel different roads.

For such reasons Mr. Justice Miller viewed³⁰ with some alarm the growing tendency to remove the appointing power from the President, through the operation of the patronage system. Admitting that there may be a possibility of harm when carried to

²⁹ Wyman, *Admin. Law*, 46.

³⁰ Miller, *On the Constitution*, p.

an extreme, the patronage system practically amounts only to this, that there shall be harmony between the legislative and executive branches of the government. The framers of our constitutions very wisely provided for a degree of this harmonizing influence by requiring that certain appointments should have the approval of the senate before they became effective.

Perhaps the best illustration of the weakness of an executive, through deprivation of power, may be found in the republic of France. Though the French Constitution invests the President with great nominal power, his every act is so hampered that he is little more than a figurehead. By the constitutional law of February 25, 1875, it is stipulated that "every act of the President of the Republic shall be countersigned by a minister."³¹ The same act further provides³² that "The Ministers are jointly and severally responsible to the Chambers for the general policy of the government, and individually for their personal acts." In consequence of such restrictions Sir Henry Maine says:³³ "There is no living functionary who occupies a more pitiable position than a French President. The old kings of France reigned and governed. The Constitutional King, according to M. Thiers, reigns but does not govern. The President of the United States governs, but he does not reign. It has been reserved for the President of the French Republic neither to reign nor yet to govern."

§ 126. Restrictions in appointment. Though the responsibility relative to appointments should rest with the superior officer, his freedom of action may be

³¹ Art. 3.

³² Art. 6.

³³ Popular Government, 250.

limited by legislative enactment as to the qualifications of appointees. (§§ 305-308.) Thus it is quite customary that it be required as a qualification for office that the appointee be a citizen, and of lawful age. Time of residence in the district may be a qualification. Special qualifications may be demanded for special offices, such as that the person appointed, (or elected), shall be a lawyer, or a physician, or otherwise skilled in some particular branch of knowledge demanded by the office.³⁴ A man was appointed interpreter in a district court in New York though he knew no foreign language. He sued the city for his salary. The court held that "By accepting the position of interpreter, when, if he understood no foreign language, he could not interpret at all, he stands convicted of fraud, either upon the officer who appointed him, and upon the public from whom he was to receive compensation, or upon the latter alone."³⁵ It will be noted that this case was not based upon a statutory requirement, but it rests wholly upon inherent qualifications. It is seldom possible so easily to demonstrate unfitness arising from lack of knowledge, but appointment in the public health service demands certain technical training, even though the statute may not prescribe it. Requirement that boards of officers shall be taken from different political parties, has been sustained in Massachusetts,³⁶ and in New York.³⁷ In Michigan such a requirement was deemed unconstitutional as a violation of the doctrine that political opinions cannot

³⁴ *People v. May*, 3 Mich. 508.

³⁷ *Rogers v. Buffalo*, 123 N. Y.

³⁵ *Conroy v. Mayor*, 6 Daly, 490; 173.

affirmed, 67 N. Y. 610.

³⁶ *Commonwealth v. Plaisted*,
148 Mass. 375.

be made a test of the right to hold office.³⁸ It is now a well recognized principle that certain civil service tests may be demanded of appointees, unless some special constitutional provision be thus violated.³⁹ (§ 310.) It is sometimes held that civil service requirements violate constitutional provisions.⁴⁰ The statutes may stipulate certain disqualifications for office, such as conviction of crime.⁴¹

§ 127. Power of removal. It is not enough that the superior officer shall have the power to appoint to office. The power to appoint implies also the power of removal from office. (§ 351.) Unless the term of office be definitely fixed by statutory enactment the power of removal is incidental to that of appointment.⁴² One of the earliest Illinois decisions was to the effect that the Governor has not the power of removal unless it be expressly given.⁴³ This power of removal is given by the state constitution of 1870.⁴⁴ The same argument which Mr. Madison used relative to the President, applies also to all appointing officers. He said:⁴⁵ "It is absolutely necessary that the President should have the power of removing from office. It will make him in a peculiar manner responsible for their conduct, and subject him to impeachment himself if he suffers them to perpetrate with impunity high crimes

³⁸ Attorney General v. Detroit, 58 Mich. 213. Also Evansville v. State, 118 Ind. 426; Brown v. Haywood, 4 Heisk. 357; Baltimore v. State, 15 Md. 376.

³⁹ Rogers v. Buffalo, 123 N. Y. 173.

⁴⁰ People v. Durston, 3 N. Y. Supp. 522; People v. Angle, 109 N. Y. 564.

⁴¹ People v. Thornton, 25 Hun 456; People v. Goddard, 8 Col. 432; State v. Pritchard, 36 N. J. L. 101.

⁴² Goodnow, Princip. of Ad. Law, 135, citing *Ex parte Hennen*, 13 Peters, 230.

⁴³ Field v. People, 3 Ill. 79.

⁴⁴ Art. V, Sec. 12.

⁴⁵ 1 Annals Cong. (1789) 350.

and misdemeanors against the United States, or neglects to superintend their conduct so as to check their excesses." To prevent delinquencies is often as important as to check their excesses—perhaps more so. The officer is responsible only to the appointing power by whose favor he holds his position. If the appointing officer has no power of removal the officer is independent, and so long as he commits no crime he is free from possible discipline. Evidently such an arrangement does not foster efficiency in administration. Conditions relative to appointment and removal from office will be more fully treated in a subsequent chapter. (Chap. X.)

§ 128. One man in charge of each department. Executive efficiency necessitates the idea of oneness. When the responsibility is divided among the members of a board whose members are equal in power, human nature causes each to shirk the disagreeable duty, and to claim the credit for successes in administration. It often happens that a necessary act may be resented by certain individuals. The law must, however, be enforced. Administrative vigor, expedition, and certainty of action are only possible with one executive.⁴⁶

The name executive indicates action; not thinking, nor judging. The executive department is not charged with the making of laws nor with weighing evidence. Its duty is to put into operation the laws that have been enacted. An absolute separation of powers according to the three branches is not possible, and there are times when council is advisable. Thus we

⁴⁶ Federalist, No. 70; Story, Constitution, Sec. 1420 *et seq.*; Miller, Constitution, 94.

find that the President has his Cabinet. He is responsible, but they are his advisers. The same idea is applicable in any executive department in which the duties are discretionary, rather than mandatory. The responsibility must rest with the one man, and one man only.

That justice may be done to all, our governmental system provides for trial by jury. So there are certain administrative processes which resemble trial by jury. To prevent, or minimize, the possibility that personal prejudice, either as to persons or ideas, may bias judgment, it is very right and proper that examinations for license to practice certain professions should be conducted by boards composed of several members, differing as to personal view. Such boards are in fact juries whose finding must be collective. This act, though it be in an executive department, is not executive in nature, but preliminary to the executive act of issuing the license. This fact should be borne clearly in mind when considering a state board of health, for example, which is also charged with such duties. Logically, the application for the license should be made to the head of the health department in such a case, who, after satisfying himself that the specified preliminary requirements have been complied with, orders the applicant before this special jury for trial. The finding of the jury should be returned to the executive, and he should then issue the license if it be deemed proper.

§ 129. **Experts, paid by salary.** There is another fundamental business principle which is well illustrated in all large commercial establishments. Other things being equal, a man can do more and better work in a line in which he is an expert. In most govern-

mental executive positions, the duties require a special training and education. For this special training there may be little demand outside of the governmental work. As an incentive to acquire special fitness the officer should be led to expect permanency of tenure with pay commensurate with the character of the duties. In commercial business it is found to be economical to pay sufficiently large salaries to the higher employees to make it an object for them to study constantly how their particular branches of the work may be improved, either as to quality of work performed or as to amount of output. Such employees are retained so long as they can "make good," to use the business expression, and the pay is made sufficiently high so that they will not be looking for other positions. The state must compete with commercial establishments for men. Certainly the business of the entire commonwealth is as important as that of any portion, as represented by a single commercial establishment. In spite of this fact, the salaries paid to governmental officers and employees in the United States are almost universally insignificant; and as previously stated, it is sometimes specially stipulated that the officer shall receive neither salary nor fee. Such a provision is contrary to all business principles. It necessitates that the trained expert must be a mere employee, and subject to the orders of those who are incompetent to give proper direction. Commercial failure would overtake any mercantile or manufacturing establishment which would attempt to operate upon a similar plan. (§ 321.)

§ 130. Paid by salary, not by fees. Unless the amount of business transacted by an official be insignificant, he should be paid by salary, not by fee.

Though fees be received from those having business with a department, those fees should be the property of the government, either city, state, or nation, as the case may be. If compensation be by fee for the officer there is a constant temptation to so manipulate the business as to increase the number or amount of fees received. This operates to absorb unnecessary time, and to increase the bulk of business transacted. It may foster imperfect work. Thus, in examinations for license to practice medicine, especially where there may be granted reciprocal licenses in other states, in order to receive as many fees as possible a board has seemed to be inclined to be exceedingly lenient. In that way it has attracted candidates who wish to practice in other states, from which they later received the reciprocal licenses. Again, the fee compensation tends to give the preference to matters paying the larger fees, rather than to the affairs which are essentially the most important, or the most urgent.

If the amount of business transacted by an official be very variable, and if it require only a small portion of his time, it may be that the fee system is the only method of compensation practicable. Even here the system is pernicious. The tendency is for the officer to neglect his official duties when his private business is flourishing, and to be unduly active when he has more time. The real duties of his office might be quite the reverse. If possible, then, a fair salary should be determined upon, and the fees received be paid into the general treasury. This will enable the responsible superiors, which finally means the people of the territory, to know more definitely what is being done, and what is being accomplished.

§ 131. Responsibility must be tangible. As a necessary corollary to the foregoing, in the interest of efficiency each administrative department must be so systematically organized that finally one man shall be definitely responsible for certain portions of the work, and that all portions shall be definitely provided for. Certain supervision must be provided, grouping portions similar into bureaus. The heads of the bureaus must be responsible to the department chief, and may serve as his advisory council. It is not to be presumed that a department chief will give personal attention to individual items, unless they be very exceptional. He must deal with the general problems of administration.

§ 132. Organization of state department of health. As illustrating this idea, and giving some general conception of the organization of a state department of health, the following is suggested:

Commissioner of Health

Assistant Commissioner

Administrative Assistants

Infectious Disease Inspector

Assistants

County and Local Officers

Veterinarian

Deputy Veterinarians

Occupational Disease Investigator (and Assistants?)

Lodging House Inspector

Assistants

Chief Dairy Inspector

Assistants

Laboratory Chief

Chemist

Bacteriologist

Pharmacist

Water Analyst

Food and Drug Inspector

Assistants

Recorder of Vital Statistics

Assistants

Local Registrars

Chief Clerk

Correspondence Clerks

Accountant

Assistants

Librarian

Records Assistant

Library Assistant

Editor

License Council, consisting of one member from each board and presided over by the Commissioner

Examining board for

Physicians, Surgeons, Midwives, Embalmers,
and Nurses

Pharmacists

Dentists

Veterinarians

Entomologist

Field Assistants

Sanitary Engineer

With such an organization, though an item might involve the attention of a number of members from the department, it need not require the notice of the Com-

missioner. For example: suppose that a local health officer report a number of cases of infectious disease in his district, apparently traceable to milk imported from another district. He, being responsible for his district, and finding the origin of the trouble in another territory, must call the attention of his superior to the facts. The assistant commissioner, recognizing that the other local officer had not prevented the spread of the disease, would call upon the chief dairy inspector for information, and the dairy inspector might detail men to make a fresh inspection; or infectious disease inspectors might be sent to the suspected territory. According to this scheme every man in the service is responsible, and he cannot disclaim the responsibility.

An efficient health service should assist commerce. Without an efficient organization, in such cases as that just instanced, it would be necessary for the first local health official to stop all importation of milk from the infected, or suspected territory. With efficient organization it should be easy to discover the point of infection, and thus permit the noninfected milk to be delivered. By making some official responsible for every point of danger, and by making his tenure of position depend upon the accuracy of his work, as shown by results, individual attention to duty is stimulated, and efficiency is magnified.

With such an organization, in which every man is definitely responsible for a definite portion of the work, the time and attention of the overseers may safely be devoted to the general questions arising. To use a mathematical illustration, the chiefs will work out the algebraic problems, leaving the subordinates to

substitute values in the result for special application, and to solve the arithmetical problems when a general solution is not possible, or advisable.

§ 133. **Excess of power.** It may be thought by some that such an organization as this just mentioned will give to the superior officers too great power, and an authority which may be easily abused. It is true that many governmental problems are first met by the executive department. Especially in health administration, it is frequently necessary to act at once, and without the aid of the other branches. To guard against excess in such cases we have the power of the judiciary.

The courts are always open to stop executive action by injunction, when it appears that the action is not justifiable. Moreover, if the executive have worked injury unnecessarily, the court will hold the individual officer responsible, as will be shown in a subsequent chapter. (Chapter XI).

The chief restraint upon administrative excess must be found in the legislature. As we have repeatedly stated, the executive has no real legislative power. Its action pre-supposes legislative action by the proper branch. If the legislature have done its duty, the executive is bound by the course there laid down. Where the legislature has failed to act, it may be necessary for the executive to take the responsibility of action without special authority. This fact should be kept clearly in mind. The executive must act, and its course will probably be upheld by the court in the absence of previous legislation, even though the method taken may not prove to be the best, provided that it seems to be reasonable.

§ 134. **Appeal in department.** A source of weakness

in our system of government is found in the general failure to provide for appeal from the decision of executive officers. Such an organization as that just proposed provides the machinery for appeal. (§§ 141, 143.) Practically it makes it possible to carry appeals from the holder of the lowest village office to the governor of the state. Provision for appeals in the executive department should be made generally by statute, determining how, and how far such appeals may be taken. The division of powers assigns to the legislature the making of laws; to the judiciary the interpretation of the laws, and their application. The executive branch does the work. In a large portion of executive work there is necessity for the use of judgment. Accordingly many officers are vested with discretionary authority. If such officers fail to use their brains, or if they are guilty of fraud or corruption in their administration, their acts are subject to the review of the courts; but, as a general rule, even though a grave error of judgment has been committed, the decision of an officer with discretion is not subject to judicial review, unless such provision has been distinctly made.⁴⁷ The act of the officer with discretion, if it really has been the result of a decision by the officer, is final and conclusive as to the subject matter itself. Were it not so—were the courts to attempt to pass upon the subject matter itself, it would be in effect the subjection of the executive to the judicial branch, and the union of the judicial and executive duties in one set of officers. Both of these ideas are

⁴⁷ Elliott v. Chicago, 48 Ill. 293; Waugh v. Chauncey, 13 Cal. 11; U. S. v. Arredondo, 6 Pet. 691; Charles River Bridge Co. v. Warren Bridge Co., 11 Pet. 240; Allen v. Blunt, 3 Story, 742; Fitzgerald v. Harms, 92 Ill. 372.

antagonistic to our system; yet owing to the lack of provision for appeal within the departments, there is a constant tendency to attempt to get the courts to pass upon the discretionary acts of executive officers.

Aside from the fact that judicial review of executive acts is antagonistic to our theory of government, as a problem in efficiency such a solution is not satisfactory. A general officer should be more familiar with the nature of the problems before his subordinates than one who in no way comes in contact with such problems. The judge devotes his attention to law and its interpretation; it is not to be presumed that he knows the relative merits of different food preservatives. Neither is he competent to diagnosticate diseases. Such executive decisions, when they come before him for review, must be settled according to the opinions of others, rather than himself, and he is not even able always to determine which witnesses are most trustworthy. The consequence is that his decision may be very far from just. In his blindness he has reached out and caught the aid which seems at a glance the safest, but he may be greatly mistaken.

Errors in judgment of executives are inevitable. In a well organized department appeal within the department can most readily correct these mistakes. "The question before the inferior is, What is proper to be done; the question before the superior is, Whether what is done is fit. The superior thus takes the whole question up anew, and decides himself what is just in the premises upon the merits. All of which is of plain advantage to the complainant. By the internal law the claimant gets relief upon any grounds that may

appear.”⁴⁸ So in the national government it has been held that the official duty of direction and supervision implies the correlative right of appeal in every case of complaint, although no such appeal is expressly given.⁴⁹ “In the states, however, where the head of the department does not usually have the power of direction, there is no general right of appeal from the decision of subordinates to superiors.”⁵⁰ This is especially true where the general officers are elected, and therefore of equal rank with the governor.

In the usage of the national government there are certain safeguards against oppressing the President with unnecessary appeals. Thus it has been held that there is no appeal from a Division above the head of the Department, for the performance by the Cabinet head of the Department is regarded as the performance by the President himself.⁵¹ But an appeal may be made to the President on the question of the jurisdiction of an officer attempting to pass upon some matter not properly within his jurisdiction.⁵²

§ 135. Duty of executive to advise legislation. (§ 99). Governmental problems are first met by the executive. In an organized department, made up of individuals specially educated in particular lines, such problems may be better solved in an intelligent manner than would be possible in the ordinary legislative body. This is especially true of a health department. The true scientist is a practical man. He deals with facts more than with theories. Though he may at

⁴⁸ Wyman, *Ad. Law*, 5.

⁴⁹ *Butterworth v. U. S.*, 112 U. S. 50; *Bell v. Hearn*, 19 How. 252.

⁵⁰ *Goodnow Prin. Ad. Law*, 146.

⁵¹ 9 *Opin. of Atty. Gen.* 462; 10

id. 526; *Wilcox v. Jackson*, 13 Pet. 498; *U. S. v. Eliason*, 16 Pet. 291; *Confiscation cases*, 20 Wal. 92, 109.

⁵² 15 *Opin. Atty. Gen.* 94.

times group his facts under some theoretical analysis, still it is chiefly the demonstrable facts which specially interest him. Intelligent legislation must be based upon facts. It is therefore one of the most important duties of an executive department, through regular channels, and in due form, to set forth clearly the facts, and with them, but distinct from them, the advised solution. Too frequently departmental reports consist simply of epitomes of past actions, with recommendations sometimes as to future needs. No recommendation or request from a department is worthy of consideration unless it be accompanied with the basal facts. In a well organized department covering all the various phases of the work, it is then the duty of the subordinates to pass the facts up to their superiors. They may then collect the data from widely differing localities, and from different branches, so that they may be harmonized fully before presentation to the legislature. For example: the milk problem demands that facts be collected from the health officials in the dairy districts and in the cities; from the food inspectors and the dairy inspectors; from the veterinarian and perhaps from the entomologist. Unless all be organized under one responsible head the facts collected may not be properly harmonized. The general solution has been worked out in several conflicting ways, for each branch magnifies its own viewpoint. Under such conditions intelligent legislation is very improbable. The fault here does not lie with the legislative body. The real fault, though it is seldom recognized, is in the lack of efficient organization of the executive.

§ 136. Summary. A well organized executive fixes

responsibility definitely upon every individual in the department. It therefore insures efficiency because delinquency is easily apparent. Efficiency is aided by specialization of work, and coupling it with special training and education of members of the department. Economy is favored by eliminating duplication of efforts. Organization assists in the digestion of administrative problems before legislation is asked, and therefore assists in harmonizing the legislative with the executive branch. It makes better legislation possible, and tends to shorten the time needed for legislative action, and to reduce to a minimum favoritism in legislation.

The efficiency with which the Panama Canal has been constructed by the federal government has been used as an argument for state control of all great enterprises. As a study of executive action it is worth while to listen to the comment of Sir James Bryce:⁵³ "To the unbiased observer it is rather an instance of the efficiency obtainable by vesting full administrative control in men whose uprightness and capacity have been already proved beyond question, who have not risen by political methods, and who have nothing to gain by any misuse of their powers. So far as any political moral can be drawn from the case, that moral recommends not democratic collectivism, but military autocracy." All efficient executive organization must contain the element of military discipline and system. Its autocracy must be within the law, but within its proper scope a certain degree of autocracy is necessary.

As a corollary of the foregoing we may conclude

⁵³ South America, p. 28.

that the most efficient organization is one in which the number of persons engaged in the higher positions is directly proportional to the number of their subordinates; and that the purely ministerial duties should be performed chiefly by employees of the lowest rank. The number of these employees should be the smallest which can reasonably accomplish the work before them. As the army in time of peace is only a skeleton organization which can be put upon a war strength by increasing the number of enlisted men, so a governmental department should be capable of expansion or contraction, according to circumstances, by increasing or diminishing the number of clerks, and other subordinates. Thus a state department of health should be so organized that in case of an epidemic, like that of yellow fever, or in times of special danger, such as that during and after a flood, with the least possible delay trained forces may be put into the field prepared to safeguard the general health. Under ordinary circumstances every member of the service should have enough to do to keep him reasonably busy. In the place of using half time of two or three men on different lines of work, the work should be combined in the care of one. Occasional extra work should be performed by an assistant. Efficiency is frequently weakened in governmental offices by the number of persons only partially employed.

CHAPTER V

THE JUDICIARY

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| § 137. Judiciary, a governmental balance-wheel. | § 141. No appellate power over certain executive acts. |
| § 138. Individual supremacy of branches. | § 142. Executive jurisdiction. |
| § 139. Judicial power over legislation. | § 143. Departmental adjudication. |
| § 140. Judicial power over executives. | § 144. State courts. |
| | § 145. General statement. |

§ 137. Judiciary, a governmental balance wheel.

The third branch of the government is the judiciary. This branch, which acts as a balance wheel to prevent excesses by the other branches, is frequently misunderstood, and unjustly criticised. There is a legal way to accomplish desirable ends, and there are often ways which are not legal. Because a court holds a measure illegal is no reason ordinarily for condemning the court. The steps taken are disapproved, not the idea. Since a clear understanding of this point will assist in the efficiency of a health department it seems best to devote a little space to the aims and methods of courts.

In all constitutional government it is necessary that some body be selected to interpret the constitution and statutes. For this purpose we have the courts. Though, especially in the individual states, "the executive is ill organized and weak," the courts are well organized. The lower courts, both state and national.

have for their province the determination of fact, and the application of the law to the fact. The chief function of the higher courts is this interpretation of law, and to prevent misapplication of the law as determined. Because of this function we sometimes hear of legislation by the judiciary. It is true that sometimes the effect of the judicial decision is to negative the will of the people as expressed in a statute, or to find a meaning in a statute which was not contemplated by the drafters of the act. The implication of the critics is that the courts have usurped authority over other departments. Unfortunately judges are but human beings, and like other members of the human race they are not infallible. Errors may occur, but such errors will generally be found to have some basis of plausibility, and not due to the perverseness of judicial minds. More frequently no error can be justly charged to the courts. Temporary inconvenience, or even injury, may be caused by the judicial determination of a statute; but the temporary ill is more than compensated for by preventing further excess of enthusiasm. It must always be remembered that even the Supreme Court of the United States is not permitted to do intentional wrong. Every member of that Court is sworn to obey the Constitution, and if he violate his oath, or if he use his high position for unworthy ends, he is subject to impeachment and removal by the Senate. So perfectly is the government of the United States balanced that there is a check upon excess of authority in every department. There have been instances when personal viewpoints may have biased the judgment of courts; but taken together there is no collection of writings which show more

clearly the dominance of reason, than do the decisions of our own Supreme Court. Its decisions are read, and studied by lawyers in other lands for guidance, just as we study the decisions in the courts of our English cousins across the ocean.

§ 138. **Individual supremacy of branches.** It is necessary for the members of the other branches of the government to make their own interpretations of the Constitution and statutes. Some have claimed that for their own guidance such interpretation must be final, and that the judiciary have no power to review such conclusions, or to punish the members of other branches for misinterpretations, and acts done under them. Were this idea accepted by the nation, the logical result would be that in the place of a perfectly balanced government of three branches, we should have three, possibly conflicting governments, somewhat dependent upon each other because of differing methods. "A house divided against itself cannot stand." Strange as it may seem, this independence of each branch seemed to be the idea of Mr. Jefferson. What the ultimate result of such a theory might be is shown in the contention of Governor Barstow of Wisconsin when he attempted to retain his position as Governor, in spite of the expressed wish of the voters to the contrary. Certain spurious election returns which were placed on file with the State Board of Canvassers gave him an apparent majority. He therefore refused to surrender the office to his successor, and the Attorney General filed a *quo warranto* in the supreme court of the state. Barstow denied the authority of the court to decide and consider as to his title to office, holding:

"1. The three departments of the state government, the legislative, the executive, and judicial, are equal, co-ordinate, and independent of each other; and that each department must be and is the ultimate judge of the election and qualifications of its own members, subject only to impeachment and appeal to the people.

"2. That this court must take judicial notice of who is governor of this state, when he was inaugurated, the genuineness of his signature, etc.; and therefore cannot hear argument or evidence upon the subject. That who is rightfully entitled to the office of governor can in no case become a judicial question, and

"3. That the constitution provides no means for ousting a successful usurper of either of the three departments of the government; that that power rests with the people, to be exercised by them when they think the emergency requires it."¹ Mr. Barstow apparently frankly stated that only a popular rebellion, and recourse to mob rule, could defeat him in his usurpation of power. Very evidently, such an appeal to the supremacy of brute force, to craft, and chicanery, rather than to reason, does not appeal to the student of government. The duties of boards of election canvassers are ministerial, rather than judicial.² While such a board must determine that the returns are apparently in due form, it has no authority to go back of the returns, and determine as to fraud or illegal voting.³ It is true that according to the Constitution of the United States as well as those of the individual

¹ Attorney General v. Barstow, 4 Wis. 587.

² Hudmon v. Slaughter, 70 Ala. 546; People v. VanSlyck, 4 Cow. (N. Y.) 297; *Ex parte* Heath, 3

Hill (N. Y.) 42; People v. Pease, 27 N. Y. 45; Morgan v. Quackenbush, 22 Barb. 72.

³ Throop, Public Officers, 156, with cases cited.

states, each legislative house is made a judge of the qualification of its own members, and under such conditions the courts have no jurisdiction over the question of validity of senatorial or representative election.

§ 139. Judicial power over legislation. According to a general rule of interpretation, an officer with discretion "may do any act within that discretion; and all that he does will be held to have been done by express authorization of law."⁴ Consequently, so far as a legislative body does not exceed the limits of discretion as judged by the constitutions and enactments under which it works, its acts are not subject to judicial review. Congress is only subject to the federal Constitution in its limitations. The state legislatures are subject to their individual state constitutions, and in addition to the limitations which may be imposed by the federal Constitution and statutes. A state legislature may not impose war, nor restrict interstate traffic, for those matters are placed by the federal Constitution under the control of the national government. It is within the province of both state and federal courts to determine whether or not a state statute has invaded the province of the federal government. It is within the jurisdiction of the federal courts to determine whether or not an enactment of Congress has violated constitutional provisions. The supreme courts of the individual states are the final interpreters of the constitutions and laws of their states, unless it shall appear that either the acts, or the interpretation, have violated provisions of the federal Constitution. It therefore happens that cases arising in dif-

⁴ Wyman, *Administrative Law*,

ferent states, and under state laws, may possibly be decided differently in the federal courts though the fundamental facts may be identical. The federal Supreme Court will not declare unconstitutional a state statute which violates or conflicts with the constitution of the state, but not with that of the United States.⁵

Because it is within their discretion, the different legislative bodies are the final authority upon the necessity for legislation within their jurisdiction, and for the advisability of the measures taken. This point was most clearly stated by the supreme court of Illinois, in *People v. Dunne*, as follows:^{5a} "No more baseless and defenseless proposition could be put into words than to say that the court has ever arrogated to itself the authority to pass upon the wisdom or propriety of either executive or legislative acts. It has never assumed to declare laws valid or invalid because they were wise or unwise, or because they tended to advance or retard social justice, individual justice, corrective justice, or any other variety of justice." The court concerns itself only with the preservation of the principles of the fundamental law. The members of the court may not coincide with the legislators as to the necessity or advisability of a given act, nor agree with them in the subject matter of the act, but unless the act be unconstitutional—unless it violate constitutional provisions,⁶ the court has no jurisdiction in the matter. For example, a legislature may pass a law compelling all citizens to be vaccinated. The court may not think such legislation necessary or advisable, and may not believe in vaccination as a protection against small-

⁵ *Calder v. Bull*, 3 Dall A. 386.

^{5a} 258 Ill. 441.

⁶ *McLean v. Arkansas*, 211 U. S.

539; *Ives v. South Buffalo Ry. Co.*,
201 N. Y. 292; *People v. Bradley*,

207 N. Y. 592.

pox; but unless either the terms or the subject be in violation of the constitution the court must approve. This does not mean that even the legislature has an arbitrary power. "The meaning of the term 'discretionary,' when granted by the law either expressly or by implication, in connection with official duty is that the discretionary decision shall be the outcome of examination and consideration. In other words, that it shall constitute the discharge of official duty and not be a mere expression of personal will."⁷ If the act be arbitrary it is then outside of discretion, and outside of the authority of the legislative body, and under the jurisdiction of the court to be set aside.

To say that an act must not be arbitrary is to say that it must be reasonable for the purpose for which it was enacted. So when Texas and Missouri enacted statutes which were intended to prevent the spread of the Texas cattle fever, by prohibiting importations of cattle from the infected districts, the Supreme Court of the United States upheld one, as in form complying with the provisions of the Constitution, and decided that the other was unreasonable in form, and an interference with interstate traffic.⁸

It was even affirmed by the court in one case that "We need not inquire whether the requirements of the statute are unjust or oppressive. These are matters for the consideration of the legislative part of the government. We may observe that it is difficult to discover oppression or injustice in requiring the medical profession to make known to the world statistics which may promote and are promoting the public health."⁹

⁷ U. S. v. Douglas, 19 D. C. 99.

⁹ Robinson v. Hamilton, 14 N.

⁸ Smith v. R. R. Co., 181 U. S. W. 202.

248; R. R. Co. v. Husen, 5 Otto,

465.

The court went on to say that the law does not require impossibilities, but that physicians should honestly attempt to secure the necessary information, and from the context we may understand that the court merely intended to say that it would not interfere with legislative discretion where possibly some relative, and minor injustice might be caused incidentally by the operation of needed requirements. So in another case it was held that if the real design of an ordinance is a quarantine regulation to guard against the introduction of disease, a court will not undertake to determine whether some other measure interfering less with commerce could not as well have accomplished the object.¹⁰ It is a natural consequence in the enforcement of many police requirements that they will rest more heavily upon some than upon others, and that innocent parties may be restrained along with the guilty for the general good. "The contention that the ordinance (regulating the location and maintenance of private hospitals and sanitariums) was void because it was admitted that it was enacted at the solicitation of persons residing in the vicinity of said premises and solely in their behalf as a local and special regulation, is answered by the court's saying that it was not permitted to inquire into the motives of the city council. If the ordinance was valid on its face, the reasons or arguments that might have moved the city council to act were not pertinent."¹¹

§ 140. Judicial power over executives. Since an executive officer derives his authority either from a constitution or a statute, the courts have the same juris-

¹⁰ St. Louis v. Boffinger, 19 Mo. 13.

¹¹ Shepard v. Seattle, 109 Pac. 1067.

diction over his acts as they have over the legislature, with certain additional authority. The determination of legality of executive acts is not limited solely by the constitutional restrictions. Almost all executive acts are prescribed by statutes. A determination of the legality of executive action may therefore involve also a determination as to legislative authority, by which the specified acts may have been passed. The statute may have made certain duties mandatory. If so, and the statute is lawful, the officer must do just that which is prescribed. He must not vary therefrom either by excess or delinquency. The court may pass upon his right to the office which he claims, and may command him to do, or not to do specific acts. It may hold him personally responsible, either to the community or to individuals, for variations from his prescribed duty.

If the executive duties be vested with discretion, then the officer may do anything within the limits of his discretion. *Mandamus* will not lie to compel such an officer to do a certain act. Thus, Oscar Dunlop applied for *mandamus* to compel the reissue of a pension and the court said:¹² "The Commissioner of Pensions did not refuse to act or decide. He did act and decide. * * * We have no appellate power over the Commissioner, and no right to reverse his decision. That decision and his action thereon were made and done in the exercise of his official function."

§ 141. No appellate power over certain executive acts. It will be noticed that in the Dunlop case, just cited, the court called attention to the fact that it had no appellate power over the decision of the Commis-

¹² Dunlop v. Black, 108 U. S. 40.

sioner. (§ 134.) There are many executive procedures which are quasi-judicial in character. Such acts may necessitate something like court procedure, in which the opposing parties present their witnesses, and question and cross-question them to determine the facts. Over these questions of fact the decision of the executive may be final.¹³ "The Land Department of the United States is administrative in its character, and it has been frequently held by this Court that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final."¹⁴

The courts may very properly consider whether the executive action was rightfully performed. Thus in *Low Wah Suey v. Backus*,¹⁵ an alien prostitute was ordered deported on executive hearing, after she became a citizen. The court said that an attack on the hearing must show that the officers hearing them were manifestly unfair.

Since an executive has only such powers and authority as are given in enactments, the court may question the jurisdiction of the executive. In speaking of the power of the Postmaster General to exclude certain letters from the mails, the court said: "His right to exclude certain letters or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exist, then he can-

¹³ *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 659.

¹⁴ *Amer. School of Mag. Healing v. McAnnulty*, 187 U. S. 94, 108; citing *Burfenning v. Chi-*

cago, etc., R. R. Co., 163 U. S. 321; *Johnson v. Drew*, 171 U. S. 93-99; *Gardner v. Bonestell*, 180 U. S. 362.

¹⁵ 225 U. S. 460.

not exclude or refuse to deliver them.”¹⁶ As in the case of legislation, everything which is done within the discretion of the officer will be held as legally done, but decisions made, and opinions formed, must show that they are the result of examination and consideration, and not be expressions of personal will or prejudice.¹⁷

Municipal corporations are essentially executive in nature. The corporation is given certain powers by the state statutes. Anything within those powers it may do. Anything without those powers it may not do.¹⁸

It is essential that in the administration of the public health a certain degree of liberty be given to the officers of health. This is done when they are given discretion. It is only when the discretion is abused that the officer's acts are, or should be, subject to judicial review. It should, then, be only in clear cases of such abuse that the court should be willing to listen to complaints. To subject the acts of health officers to judicial review, when such acts were within the discretion accorded by the constitution or statutes, would very frequently defeat the very object sought—the protection of the health of the community. If the officer go beyond the authority granted—if he abuse his discretion, he will be personally liable for injuries resulting. (§ 271, 365, 366.) This matter was well covered by the New Jersey court, when it said that it was not within the legislative intent, in enacting legislation conferring on the local boards of health the power to prescribe quarantine regulations in a district or locality infected with a contagious disease, to subject

¹⁶ Am. Sch. of Mag. Healing v. McAnnulty, 187 U. S. 94, 109; Potts v. Breen, 167 Ill. 67.

¹⁷ U. S. v. Douglas, 19 D. C. 99.

¹⁸ Landberg v. Chicago, 237 Ill. 112.

the discretion of such boards to the review of the local court for the purpose of substituting the judgment of such tribunal for that of the boards to which the power is specifically committed. If the boards of health so constituted transcend their authority in a given case, the act itself provides a remedy to the party aggrieved. The court is unable to perceive any authority in the legislation itself, or in the public policy on which it is based, which can be said to contemplate the submission to a legal tribunal of the public necessity which requires in an emergency the prompt and expeditious intervention of a board to which the legislature has especially committed the determination of the facts, for the purpose of protecting the life and property of a community. No question was made in this case as to the conceded power of a proper reviewing tribunal to pass on the reasonableness of an ordinance or a resolution passed under general laws, or the manner of the exercise of the powers therein conferred. That question has long been settled in the affirmative by repeated adjudications. But the insistence was that a tribunal to which an appeal is presumably given may, by its review of conditions and exigencies in a trial anew, determine adversely to the board to which the power has been specifically committed, by legislative act, that its exercise in any given case was unwarranted, and that its discretion was improperly exercised. The court finds no authority in the act for such a claim, and it is proper to assume that, if the legislature intended to confer such power, it would have found expression in the act. The statute makes provision for the interposition of the court of chancery under certain conditions, and it defines the liability

which may be imposed on the members of the board by reason of an excessive or illegal use of the power conferred. The legislative recital of these remedies carries with it a certain presumption of the exclusion of other and additional remedies. To assume that the legislature intended to confer a review of a discretionary power of this character, vested in a statutory board, charged with its exercise in critical situations, involving detriment to the life and health of the community, is tantamount to a declaration that the police power of the state is moribund and useless. It will not be assumed, therefore, in the construction of such a statute, that the legislature intended to defeat its own will or to create absurd results such as would ensue under such conditions.¹⁹

One reason why the dockets of our courts are overcrowded is that too many questions of an executive nature are taken before them for settlement. Particularly in matters requiring a technical knowledge, such questions may be much more intelligently decided in an administrative office. By statutory enactment, therefore, the decision of such departments should be final on questions of fact. The courts should limit their review of the cases to questions of law. Even without special statutory enactment it is customary for the higher courts to give attention to the questions of law; only considering evidence so far as it may have a bearing upon the legal principles involved. When it is found that error has been committed by the lower court the case is returned for further consideration.

A law providing that proceedings and actions of

¹⁹ Board of Health of Cranford Township v. Court of Common Pleas, 85 At. 217.

boards of health shall be regarded as judicial, and *prima facie* just and legal, does not make the board a court whose orders are final and conclusive.²⁰ On the other hand, we sometimes find distinct provisions as to appeals from the action of boards of health. Notice must be given to the state board of health of Massachusetts of an appeal from an order of that board, under Statutes, 1878, Chap. 183, Sec. 6.²¹ When the statutes creating boards of health invest them with discretionary power as to the fixing of compensation for health officers, no appeal lies from the ordinances of the county board relative to amount of salary.²²

§ 142. Executive jurisdiction. When the act of an executive officer is opposed in court, it is the first duty of the officer to show that he has jurisdiction over the matter. Failure to appreciate this point has caused disappointment in health administration. A very competent health administrator found a certain measure apparently necessary for safeguarding the health of his municipality. He accordingly secured the passage of an ordinance covering the point. This was contested, and finally appealed to the supreme court of the state, where it was set aside. The health official felt aggrieved that the supreme court did not consider what seemed to him the necessities of the case. It was decided upon a technicality. The fact was that it was not shown that the city had authority and jurisdiction in the matter. The special facts were therefore not before the court properly. The court could not consider these special facts. Unless jurisdiction be shown, the executive has no standing in court.

²⁰ Golden v. Health Dept., New York, 47 N. Y. Supp. 623.

²² Waller v. Wood, 101 Ind. 134

²¹ Pebbles v. City of Boston, 131 Mass. 197.

Generally speaking, executive jurisdiction must rest upon enactment, either in the constitution or in the statutes. The jurisdiction may be very limited. It may be the duty of an officer of health to suppress nuisances, but that does not give him authority to determine finally either what are nuisances, nor how they shall be suppressed. In the absence of specific legislation he must appeal to the courts for such determination.

§ 143. Departmental adjudication. According to the provisions of the national pure food and drugs act, the duty of enforcing the provisions of the statute devolve upon certain executive officers, and especially upon the Bureau of Chemistry in the Department of Agriculture. The determination of fact, the decision as to what is or is not the composition of a certain article, rests with that Bureau. "And if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be

given by publication in such manner as may be prescribed by the rules and regulations aforesaid.”²³

Just why it is made mandatory upon the Secretary of Agriculture to report these cases to the district attorney is hardly apparent. Experience demonstrates that in a very large percentage of the cases there is no contest in the court. The real questions here involved are chiefly those of fact, for the settlement of which those specially educated are better qualified than a judge or an untrained jury could be. It is true that the Fifth Amendment to the Constitution prohibits the nation from depriving a person of life, liberty, or property without due process of law; but a notice and an opportunity to be heard are the essentials in due process of law.²⁴ This section therefore provides for due process of law, the notice and opportunity to be heard, within the department. When there is no question of interpretation of law involved, neither efficiency of administration, speediness in action, nor justice are aided by the red tape method of submitting all of these cases to the district court. There is a very decided loss in efficiency of administration, and an unnecessary increase in cost of enforcing the provisions of the act. Practically it requires two hearings when one would be sufficient. Does the law include such cases as the presence of bacteria in milk? This is a question of legal interpretation, and as such must regularly go before a court. Is a coffee misbranded when labeled “Rio,” though it comes from Venezuela? This is also a problem in construction of

²³ Pure Food and Drugs Act, June 30, 1906, Sec. 4. 249; *Garfield v. Allison*, 211 U. S. 264.

²⁴ *Garfield v. Goldsby*, 211 U. S.

the law, and as such must go to the court, when the party interested demands it. But when these questions of construction have once been decided by the judiciary future cases might, did the statute so provide, be much better handled by the executive department alone. Is a proprietary medicine misbranded when it states upon the label that it contains no morphine, but examination shows that it does contain a very appreciable quantity of that alkaloid? This is a question of fact, which might very properly be decided by the executive department. The ordinary judge or jury knows nothing of the intricacies of chemical examination. Venial experts may easily beguile such an uneducated jury—uneducated in the interpretation of chemical analysis, into the belief that the competent government analysts are either prejudiced or incompetent. It is said that the expense of one of these prosecutions was over a million of dollars. In a similar case, originating under the patent laws, the presiding judge was unable to distinguish between a process of manufacture and a process of isolation in chemistry. He called attention in his decision to the fact that a court so constituted was beclouded by such technical problems.²⁵

Inasmuch as prosecutions under such an act as the Food and Drug Act are essentially under criminal law, and since the Sixth and Seventh Amendments to the Constitution preserve the right to trial by jury, even in executive hearing it might seem best and possible to preserve this feature, by providing for the impanelling of specially qualified experts to act as such jurors.

²⁵ Parke Davis & Co. v. Mulford Co., 189 Fed. Rep. 95, 115.

Such a jury would be able to get its evidence much more directly than the ordinary jury. The ordinary jury must depend upon the relation of evidence given by one who obtained the direct evidence. The real evidence is found in the chemical reactions, and in the physiologic tests. Using the expression in a nonliteral, and amplified signification, the narration of the analysts is essentially "hearsay" in character. It is the only evidence which the usual jury can understand, but it is "secondhand," and clearly less reliable than the direct evidence found in the chemical and physiologic tests. The jury, not witnesses, should be experts in such cases, to the end that justice may be the more sure in all cases.

To put the same proposition in another way; all would agree that a deaf mute should be barred from jury duty for cause. He could not understand the evidence, unless all that evidence be given in the language of mutes. So too a Russian who is ignorant of the English language might properly be excluded from jury duty in a court where all the transactions are in English. Such men are incompetent as jurymen because they do not understand the language, and are therefore obliged to depend upon the interpretation and ideas of others, rather than to form their own judgment. The man who is not educated in chemistry does not understand the language of chemistry. He is dependent upon the expert interpretation of facts for his opinion, and for his decision. When the experts disagree he does not really decide the real question at issue—he simply decides which man's opinion he will accept as his own. His real decision is as to the relative reliability of two men in a line of work to

which he is a stranger. The witness should be limited to a statement of facts. He should state that under certain conditions stated given results followed under his observation. When he adds that in his opinion those results indicate certain facts he is assuming to judge of facts which it is the proper function of the jury to determine. His interpretation of results should be considered simply as confirmatory evidence of his other statements.

§ 144. State courts. According to the decisions of the United States Supreme Court, and of many state courts, the first ten amendments to the federal Constitution are interpreted as limitations only upon the federal government.²⁶ It is quite customary, however, for state constitutions to offer similar provisions, so that the general discussion relative to national governmental procedures applies, with some individual exceptions, to the methods used in the individual states.

§ 145. General statement. It is, therefore, the chief duty of the courts to determine points of legal interpretation. In an orderly consideration of every problem the construction of the applicable clauses of constitutions and statutes must precede any study of peculiar facts pertaining to the case. This is not only the logical approach to the solution, but it is in the interest of ultimate justice. Individuals should be unknown to the court. Its opinions should be unbiased by any possible personalities and sympathies. The personal appeal, and the sympathy dodge before a jury are frequent causes for miscarriage of justice.

²⁶ *Barron v. Baltimore*, 7 Peters, Cow. 686; *James v. Commonwealth*, 12 S. & R. (Pa.) 220. (N. Y.) 815; *Barker v. People*, 3

If, therefore, a case before the court began with the individual particulars, the tendency would be for the partizanship, which might be generated in spite of intention to the contrary, to overrule reason. On the other hand, in the orderly investigation of a problem it not seldom happens that the case is decided before the particulars of that individual case can be considered. That being true, there is no longer occasion for taking up the time of the court with further investigation.

CHAPTER VI

See 4-165

POLICE POWER—NATURE OF, AND METHODS

CHAPTER VI

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§ 146. Health authority based on police power. Reference was made in a previous chapter to "police power." Since all authority in the preservation of public health is derived from that power, and since its nature and methods are frequently misunderstood, it is necessary to consider the subject more carefully.

Because the exercise of this power may often be unsupported by statutory enactment, and dependent apparently only upon the command of some executive officer, the term has sometimes been used as synonymous with the expression "arbitrary power." Police power must never be arbitrarily exercised. Arbitrariness implies action of will, rather than of reason. The use of this power must always be clearly dependent upon reason. Need must be evident, and the method of execution must be dictated by the necessities of the case. Neither is the power necessarily dependent upon the executive. The order may originate from the legislature, and the warrant for enactment must be found in this power.

§147. **Police or police power.** Modern writers make a distinction between "police" and "police power." Formerly this distinction was not so prominent. Jeremy Bentham defined police as¹ "A system of precaution, either for the prevention of crimes or calamities. Its business may be distributed into eight distinct branches: 1. Police for the prevention of offences; 2. Police for the prevention of calamities; 3. Police for the prevention of endemic diseases; 4. Police of charity; 5. Police of internal communications; 6. Police of public amusements; 7. Police for recent intelligence; 8. Police for registration."

Blackstone defines² police as "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like the members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood,

¹ Works, Edinburgh Ed., Part IX, p. 157.

² Blackstone's Commentaries, IV, 162.

and good manners, and to be decent, industrious, and inoffensive in their respective stations." Police, then, "means at the same time a power and a function of government, a system of rules, and an administrative organization and force,"³

Originally the word police referred to all the operations of government. Later it came to be used only with reference to internal administration. Today it has come to be limited to that part of governmental administration which attempts to prevent the happening of evil, and to the suppression of violations of law.⁴ Because the peculiar matters with which this power and function have to deal were found chiefly within the municipalities, this term, derived from the Greek word for city, was limited in its application to municipal action. Today it is recognized as a function of the state. It includes all acts, whether legislative, or executive, which have for their object the prevention of harm to the community, or to its individual members.

§ 148. Police power defined. Police power is more limited in application, and refers to that authority of government which is necessary for its preservation. "This extraordinary and dangerous power is not of constitutional origin or grant. It is institutional, and inherent in government; and, as wisely remarked by Chief Justice Shaw, 'it is much easier to perceive and realize the existence and source of this power than to mark its boundaries, or prescribe limits to its exercise.' * * * When exercised by due process of

³ Freund. Police Power, Sec. 2.

⁴ Goodnow, Municipal Government, p. 224

law, as in abatement of nuisances through civil or criminal proceeding, this power is usually found to be wholesome and beneficial. Its summary exercise is always perilous to private right, and often cruelly unjust; as when in emergency, apparent or real, the property of someone is sacrificed for the protection of others, or one is deprived of his personal liberty for the supposed safety of the many.”⁵

§ 149. **Characteristics.** The distinctive characteristics of police power are that “it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion.”⁶ Though taxation has often a restraining influence, the taxing power is quite distinct from police power. One of the measures used in taxation is the requirement of a license, and a license is also one of the aids in the exercise of the police power, but these two forms of license are quite distinct, and upon this distinction the courts may base their decision as to the constitutionality of legislation. For the purpose of taxation the license requirements must not be prohibitive or restrictive. For the exercise of police power the tax levied may be so great as to have such restrictive or prohibitive effect. Thus a tax of one thousand dollars annually would probably be deemed unconstitutional upon a dealer in meats or groceries, while it would be upheld as against his neighbor who is engaged in the liquor business. In the one case the object of the tax would be revenue; in the other, restriction and regulation of the traffic. Again, even in police power, the tax may be essentially distinct from the license. The power to require

⁵ Ingersoll, Public Corporations,
115.

⁶ Freund, Police Power, 3.

a license from a milk dealer is essentially police in nature. It is for the purpose of registration, and as an aid in the supervision of the sanitary conduct of the business. Not only is it useful for supervisory purposes, but it is a potent aid in the enforcement of rules and regulations adopted for insuring a pure supply of that widely used article of food. In such a case the tax must not be sufficiently large to restrict the trade. It is levied to pay a reasonable proportion of the work of issuing the license, and of supervising the trade. It must be the fact of license, rather than the amount of the license fee which will serve to restrict the business within reasonable limits.

§ 150. **Distinguished from criminal punishment.** In a similar manner we find a distinction between criminal legislation, and the legislation of police power. "The peculiar province of the criminal law is the punishment of acts intrinsically vicious, evil, and condemned by social sentiment; the province of the police power is the enforcement of merely conventional restraints, so that in the absence of positive legislative action, there would be no possible offense."⁷ We find, then, that "the range of the internal police is wider than police power."⁸ Sterilization has been provided for by the laws of several states in the cases of criminals, imbeciles, epileptics, and other defectives. Mental defectiveness may be transmitted through heredity, and the police power of the state would therefore perhaps authorize such an extreme measure to prevent the possibility of offspring who would become public charges. Criminality is not demonstrably hereditary. The police power, therefore, would not au-

⁷ Freund, *Police Power*, 26.

⁸ Freund, *op. cit.* 23.

thorize such a statute in the case of criminals. If the sterilization of criminals be provided, it must be considered as a part of criminal punishment. These two illustrations of the same act show a difference between the operations of the criminal law and of police power. (See Chap. XX.)

§ 151. **An expression of social, economic, and political conditions.** Although the use of the term police power has become of more limited application than formerly, it by no means implies that the essential power is more limited, nor that its use is more restricted than formerly. On the contrary, with the increase of civilization this power is used in more directions, and with a multitude of agencies and methods. Police power is not a fixed quantity, but it is the expression of social, economic, and political conditions. "As long as these conditions vary, the police power must continue to be elastic, i. e., capable of development."⁹

§ 152. **Alienum non laedat.** The police power of a state includes the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of property within the bounds of the commonwealth. Protection of property, for example, does not imply that the owner may at all times, and in all places use his possessions according to his own will and pleasure. It is a principle of the common law "*sic utere tuo ut alienum non laedas.*" This maxim is at the base of the police power of governmental action—one may so use his property that it shall work no injury to others. How the operations of the power may vary according to circumstances may be seen from a few illustrations.

A man upon a farm, far away from other property,

⁹ Freund, Police Power, 3.

may if he choose, burn an old and useless building. Perhaps its preservation might injure himself, or his family, as for example, if the structure were in danger of falling, or were infected with vermin. Within a crowded city the burning of the building would endanger the houses of his neighbors, and it would clearly violate the maxim. It is evidently within the province of the police under such circumstances to prevent this use by the owner. Again: the isolated farmer, or his family, afflicted with an infectious disease, might be permitted to continue his work unmolested. In the city, though the afflicted family remain upon their premises, as on the porch, and though the outside air might be beneficial to the patients, such freedom of motion might endanger the health and lives of others, and police power must restrain the liberty of the individual. Or again: the increase in our knowledge changes our use of the power. There is no restriction as to the right of a man to sell his farm products, so long as he does not thereby endanger others. The relationship of typhoid fever, or of diphtheria to milk was not formerly known. Now that the diseases are known to be the product of recognizable germs, and that those germs propagate freely in milk, new dangers are recognized. Formerly malaria was supposed to be due to aerial conditions. Now we know that it is an infectious disease, spread through the agency of one family of mosquitoes. Any quarantine of the disease would formerly have been deemed unreasonable, and unlawful. Today it is a recognized duty of a health department under police power to restrict the disease; but quarantine would not be justifiable in a district which is free from the anopheline mosquitoes.

§ 153. Police power superior to individual rights. Therefore: "The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his property as may be required to remove or reduce the danger of the abuse of those rights on the part of those who are unskillful, careless, or unscrupulous."¹⁰ As Chief Justice Shaw has said:¹¹ "Every holder of property, however absolute may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal enjoyment of their property, nor injurious to the rights of the community."

Ordinarily private property may not be taken, nor destroyed, without due compensation.¹² Under police power such use, or destruction may be permitted, as when a building is destroyed to prevent the spread of a conflagration.¹³ Ordinarily private individuals may not be pressed into public service, especially without compensation;¹⁴ but in the case of a flood, or at the time of a conflagration, since the duty is general it is held that no compensation is due.¹⁵ So also private land may be taken for the building of needful embankments, without compensation.¹⁶

§ 154. Statutes dependent upon police power. As

¹⁰ Freund, Police Power, 8.

¹¹ Commonwealth v. Alger, 7 Cush. 84.

¹² Mitchell v. Harmony, 13 How. 115.

¹³ Case of Prerogative, 12 Rep. 12; Mouse's case, 12 Rep. 63. Freund, Police Power, 534.

¹⁴ Penrice v. Wallis, 37 Miss. 172.

¹⁵ Sears v. Gallatin County, 20 Mont. 462.

¹⁶ Bass v. State, 34 La. Ann. 494; Ruch v. New Orleans, 43 La. Ann. 275; Peart v. Meeker, 45 La. Ann. 421; Egan v. Hart, 45 La. Ann. 1358; Eldridge v. Trezevant, 160 U. S. 452.

previously stated, police power may be exercised under statutory enactment. Such enactment may serve the purpose of due process of law, and very greatly aid in clear cases of the use of this power. Very often statutory enactment is impossible, and the steps taken are upon the verbal command of an executive officer, and without any semblance of attempt at complying with due process of law. At other times, the work is intermediate between these two extremes and due process is preserved by court action.

§ 155. **Cannot be alienated.** This exceedingly important power, being an inherent element of government, cannot be alienated. "Neither the legislature of a state nor a municipal corporation can surrender, bargain away, or otherwise divest itself of the police power, by non-user or by any grant, contract, or concession."¹⁷ From the foregoing it follows that this power may override those provisions of the Constitution which guard the sanctity of contracts,¹⁸ freedom of person, due process of law, and property rights. In the latter case police power goes beyond eminent domain, in that the taking of property under eminent domain requires compensation, but real or personal property may be taken under police power, either for use, or for destruction, without any compensation to

¹⁷ Black's Constitutional Law, 151, citing *Boston Beer Co. v. Mass.*, 97 U. S. 25; *Stone v. Mississippi*, 101 U. S. 814; *Shreveport Traction Co. v. City of Shreveport*, 122 La. Ann. 1; *State v. St. Paul, M. & M. R. R. Co.*, 98 Minn. 380; *State v. Murphy*, 130 Mo. 10; *C., St. P., M. & O. R. Co. v. Douglas Co.*, 134 Wis. 197; *Petersburg v.*

Petersburg Aqueduct Co., 102 Va. 654.

¹⁸ *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *Stone v. Mississippi*, 101 U. S. 814; *Boyd v. Alabama*, 94 U. S. 645; *Butchers' Union Slaughterhouse v. Crescent City Live Stock Land Ins. Co.*, 111 U. S. 746; *Kreser v. Lyman*, 74 Fed. 765.

the owner. It is true that such use of the power is not common, and may impose a moral obligation for compensation, but in many cases there is no legal protection for the individual.

§ 156. Police power of state may be superior to congressional supervision of commerce. Though by the Constitution the sole power to regulate interstate commerce rests in Congress, the police power of the individual states knows no such boundary. For purposes of health the state may sometimes use its police power as superior to the regulation of commerce.¹⁹ This is a legal use of the power of the state even when it serves to stop navigation,²⁰ or interferes with the operation of a treaty made by the United States with a foreign nation.²¹

§ 157. A dangerous power. Because of the very great danger which this power threatens to individual liberty, because of the fact that it places in jeopardy private property, and because it offers an almost unbounded field for spoliation, it is indeed a dangerous power. It is therefore necessary, for the purposes of good government, that its use be so hedged about as to preserve its efficiency, while lessening the possibilities for its abuse. Is this possible?

§ 158. Summary executive action. There are those who think that the health official should have the widest possible discretion with authority. They would have him supreme, unhampered by legislature, other

¹⁹ *Smith v. St. Louis & Southwestern Ry. Co.*, 181 U. S. 248.

²⁰ *Leovy v. U. S.*, 177 U. S. 621; *Wilson v. Blackbird Creek Co.*, 2 Pet. 245; *Gilman v. Philadelphia*, 3 Wall. 713.

²¹ *Compagnie Francaise de Navigation a Vapeur v. Louisiana*, 186 U. S. 380.

executive officers, or even by the courts. Unfortunately, this would not only give power for good to the conscientious and efficient officer, but it would remove checks from the dishonest man, and would put great power for evil into the hands of the ignorant and incompetent public servant. The natural tendency would be, as even now it sometimes seems, that health departments would be filled by unscrupulous politicians, rather than by experts trained in the saving of human life. It has often happened that in the past a zealous, but unwise health officer has worked great injury to private individuals, and exposed the municipality to needless litigation; or one less honest has used his position for private gain to the detriment of the people whom he was supposed to serve. "If an officer has discretion he may do any act within that discretion, and all that he does will be held to have been done with express authorization of law."²² It is true that even if the officer has discretion, his act must not be arbitrary. "The meaning of the term 'discretionary,' when granted by the law either expressly, or by implication, in connection with official duty, is that the discretionary decision shall be the outcome of examination and consideration. In other words, that it shall constitute the discharge of official duty, and not be a mere expression of personal will."²³ It is also true that an officer is amenable for the abuse of his power of discretion.²⁴ "If that officer, it may be proved, has deviated ever so little from his legal authority, if with the best of intelligence, he makes a mistake of law in interpreting his powers, or if he makes a mistake of fact in applying the law to a particular case, he is by

²² Wyman, *Administrative Law*, 83.

²³ *U. S. v. Douglas*, 19 D. C. 99.

²⁴ *State v. Yopp*, 97 N. C. 478.

the principal doctrine, if applied to its logical conclusion, liable as a private wrong doer, and responsible in such damages as may be proved."²⁵ "The criminal law regards as a crime almost every act of an officer which, if committed by an individual, would be a crime."²⁶ But, "In the case of officers acting with discretion, the act to be punished criminally must be willful and corrupt."²⁷ In all such cases the presumption must be that the officer has acted within his discretion unless it is clearly shown that he has not. There must be clear evidence of abuse of the power, and the burden of proof is upon the complainant. Any other condition would paralyze administration.²⁸

§ 159. Discretion may not be coerced. On the other hand, if the discretion be left entirely to the administrative officer there is no way in which he can be forced to act. (§§ 271, 274.) *Mandamus* can not lie against an officer who is acting under discretion. "We have no power to compel either of the departments of government to perform any duty which the constitution or the law may impose upon them, no matter how palpable such duty may be."²⁹ "It is also held that an officer is not liable to a private action for neglect of an exclusively public duty, even to a person specially injured thereby, and in some cases even though the act was unlawful and malicious."³⁰

²⁵ Wyman, Administrative Law, 15.

²⁶ Goodnow, Principles of Administrative Law, 298, citing Bishop, Criminal Law, II, Sec. 982.

²⁷ Goodnow, *op. cit.* 298, citing *People v. Coon*, 15 Wend. (N. Y.) 277; *People v. Norton*, 7 Barb. (N. Y.) 477.

²⁸ *Durand v. Hollings*, 4 Batch. 451.

²⁹ *People v. Bissel*, 19 Ill. 232; *Pennoyer v. McConnaughy*, 140 U. S. 1.

³⁰ *Ingersoll*, Pub. Corp., 90.

§ 160. Courts feeble to resist acts under discretion.

It therefore follows that though the courts have a right to review the acts of officers, the courts offer but a feeble resistance to the misdeeds, either of commission or of omission, of an officer acting under discretionary power. The evils, therefore, of such an administration may possibly far exceed the benefits. The very fact of personal liability under discretionary power may often deter an officer from doing his duty. This is particularly the fact when the action must be summary. He may act in good faith and with intelligence, but after the act has passed he may be cited into court, and a miscarriage of justice is far from impossible. In the absence of immediate danger, facts assume a different color, and far too frequently the decisions as to fact must rest with a jury who are neither fitted by nature nor education to give an intelligent decision. Attorneys ordinarily competent not infrequently fail to grasp the underlying principles of public health administration, even when they suppose themselves posted; and judges, in their zeal to protect the rights of the individual, may be somewhat colorblind, and misled. This denotes no intentional injustice. It is merely the result of the natural limitations in knowledge especially among the laity in regard to a rapidly advancing science.

§ 161. Statutory action. Opposed to discretionary authority and duty we find those specially commanded by statutory enactments. In mandatory matters the work of the officer is not with discretion, but is called ministerial. In ministerial duties the officer has certain set bounds of action. He must do all that the law commands; he must not do that which the law pro-

hibits. Here he may be forced by *mandamus*, and he is also subject to private action, whenever he shall deviate from the prescribed limits of his duty. Mandatory law may be just as truly under police power as action which is discretionary. Thus, the requirement that a man must obtain a license before entering upon the business of selling milk is mandatory upon the individual, and it is to be justified by the necessity of public supervision of the trade under police power. It is mandatory upon the officer because he must enforce the requirement of license. So, too, a law may be partially mandatory, and partially discretionary. A law requiring the health office to quarantine cases of infectious diseases would be mandatory as to fact of quarantine; but it would be discretionary as to the method and degree of quarantine, and also, unless the diseases were specified, as to what diseases should be included, until there should be a determination by judicial action. Public health workers today would include malaria. Many physicians would not consider that disease a fit object of quarantine. The official might, or might not regard it as included under the general term. If he attempted to quarantine such a case he might be cited into court to justify his action. If he convinced the court of the soundness of his views, he would, under the supposed conditions, thereafter be forced to quarantine all such cases. If, on the other hand, he did not quarantine a malarious case, he might be cited into court by some aggrieved neighbor, and the private interests might prove the infectious nature of the ailment. Again the officer would be forced to act.

Mandatory law presupposes a predetermination of

the necessities of all the cases which might arise. This is manifestly impossible; and even were it possible it would often be practically impossible so to draft the statute as to give the greatest efficiency with the least hardship.

§ 162. Judicial determination under police power. Since the basis of most public health work is to be found in the general idea of nuisance, the health executive may very properly appeal to the court for the determination of each particular case. This is indeed due process of law, and the decision of the court is final. This will protect the executive from danger of damage suits. The responsibility then rests with the courts. Such a course causes delay, and sacrifices efficiency to protection of the officer. Unfortunately the court is seldom educated to the essential requirements of the service. He must depend upon the opinion of others, and he may not at all times be able to decide as to which of conflicting opinions presented is correct. He may easily be led to trust to the advice of some reputable practitioner of medicine who may not be especially educated in the science of public health. Further, unless the health official be also posted as to legal proceedings, and thus able to conduct his case personally, the essential points may not be properly presented to the court. While, therefore, this method preserves effectually some of the rights of individuals, it hampers and endangers efficiency in administration.

“The basis of all administration is found in the law itself. If the law is absolute, what is commanded must be done; if the law is specific, that must be performed that is directed—to the extent that a duty is ministerial, mechanical execution is required. This is not a

question of the better method; that method must be followed.”³¹ If then the law be specific, the only questions which may come before the court are those of fact. If the power granted by the law be discretionary, the questions which may be presented to the court are those of fact, of reasonableness, and of extent of discretion. The law may be discretionary as to method chosen, though it be mandatory in requiring action.

Suppose that a statute requires the quarantine of infectious diseases, but neither specifies the manner of quarantine, nor defines what diseases are to be included. These points must then lie within the discretion of the officer, and his acts may be at any time questioned. (Chap. XIV.) He may be obliged to prove in court that his diagnosis is correct;³² that the disease is infectious within the meaning of the law;³³ and that the quarantine measures adopted are reasonable.³⁴ If, on the other hand, the statute specified which diseases are to be considered infectious, and specified as to the maximum and minimum requirements as to quarantine, a very large proportion of the possible delay and annoyance caused by litigation, would be removed, and the efficiency of the health administrator would be thereby increased. If also the statute specify that the diagnosis of the health official shall be legally binding and final, the discretionary power thereby granted would again increase the power of the health office. It would seem advisable, how-

³¹ Wyman, Ad. Law, 90.

³² Miller v. Horton, 152 Mass. 540; Brown v. Purdy, 8 N. Y. St. 143.

³³ Kirk v. Wyman, 65 S. E. R. (S. Car.) 387.

³⁴ Haverty v. Bass, 66 Me. 71; Kirk v. Wyman, 65 S. E. R. 387; Bloom v. City of Utica, 2 Barb. 104; Harrison v. Mayor of Baltimore, 1 Gill, 264.

ever, to provide for an appeal as to diagnosis, within the health department. Such an appeal should not serve, as would court action, to stop proceedings, and thus to hamper efficiency; and the provision for the appeal should be so worded that a change in diagnosis should not be retroactive, back of the time when the new diagnosis may be made. A case which is strongly suggestive of diphtheria must be regarded by the efficient officer as one of genuine diphtheria until it is clear that it is not. Such a diagnosis calls for the immediate injection of antitoxin as a curative measure, and perhaps in the persons of those exposed to prevent infection. As the result of such a diagnosis the family may be put to large expense, as well as worry. If the final decision is against the diphtherial infection, and if a court is convinced that there had been no infection with that germ, it is not at all impossible that the maker of the first diagnosis may be legally, though unjustly, assessed damages. There is another reason for such a statute. A diagnosis is often impossible at the first call. Time must be given for a study of the development of the case, and for the incubation of cultures. In the development of cultures time must also be permitted to guard against errors. For example, even in a throat containing many diphtheria bacilli, through the preliminary use of local antiseptic by the patient, or through some other unfavorable element, the first attempt at getting a culture may be negative, but later the germs may be found in large numbers. The diagnosis of the health officer should be considered final, in that he should not be held for error in judgment; but all interested should have the protection afforded by an appeal against incompetence or maladministration on the part of the officer.

Take another illustration. The general authority of a health officer under police power is sufficient to justify and enable him to make such orders as he might think needed relative to the care to be used in the milk business. If, however, the farmer or the dealer should see fit to violate those orders or regulations, the burden of proof must of necessity fall upon the health department to show the necessity for the regulations, and the reasonableness of their provisions. Each case must be tried separately. With a statute covering the general subject much of the possible question would be removed, and court investigations would be reduced chiefly to matters of fact—the question as to the violation of the law. “The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of the parties are, with reference to the transactions already had; the other prescribes what the law shall be, in future cases arising under it.”³⁵

§ 163. Efficiency increased by definiteness of enactment. It may be seen then that in administration of police power in the interest of life and health efficiency is increased and certainty is gained through definiteness of statutory enactment. It is indeed a supremacy of law, with the personal equation reduced to a minimum. With this definiteness, and by the same act, individual liberty is safeguarded. By enactment a large portion of discretionary power is substituted by ministerial duty.

§ 164. Variety of methods. We find, therefore, that

³⁵ Sinking Fund Cases, 90 U. S. (per Field, J.) 761; also *Mabry v. Baxter*, 11 Heisk. (Tenn.) 682.

in the use of police power there are many methods, each of which has its proper place and value. 1. Summary action, by the executive, must be preserved; but it should be limited to emergency, and an emergency is not such a condition as might have been reasonably anticipated.³⁶ Still, if as a matter of fact the conditions be not anticipated, and guarded against, summary action may become necessary. 2. Individual action by the aid of court decision, and without previous legislation or general regulation, is frequently efficient in the case of nuisance. It is more safe for the executive, and more perfectly guards the safety and liberty of the individual citizen, and the security of his property. 3. General rules, regulations, and orders, issued and published by the executive, while sometimes efficient under the general power, yet when contested generally prove to be a very weak reed upon which to lean. The executive may issue only such orders as are clearly within prescribed power.³⁷ 4. Municipal ordinances. For the same reasons, partially, as in the previous class of cases, ordinances may prove weak and inefficient. The municipality is practically considered an executive, not a legislative body. Municipal ordinances are superior to executive regulations issued by the health department in that they do more fully preserve the due process of law, by virtue of the fact that a certain public hearing is afforded in the passage of the ordinance. 5. Lastly there is the method of legislation. This preserves the idea of due process, largely reduces the personal equation of ad-

³⁶ Jenkins v. Board of Educa-
tion, 234 Ill. 422.

466; Pub. Co. v. Payne, 30 Was.
L. R. 339.

³⁷ Morrill v. Jones, 106 U. S.

ministration, and substitutes a certain definiteness for the uncertainties of discretionary administration. It relieves the executive of much responsibility, and so long as he is complying with the exact requirements of the statute he is personally protected from all civil action. As will subsequently be shown (Chapter XI), even the community is protected from the danger of civil claims.

§ 165. **Disadvantages in administration through enactment.** While administration through legislation has certain advantages, it also has certain disadvantages. It provides no latitude of application, if the requirements are definite. This may seriously hamper efficiency, and work injustice to individuals. For example: there may be typhoid fever in two adjacent families. The one is intelligent, and conscientious. They may carefully sterilize all discharges from the patient, and in other ways protect the community from danger of infection. The working members of the family may be employed where there is practically no possibility for communicating infection, as in the hardware business. The other family may be careless, and not realize the necessities for caution. They regard, perhaps, the illness as one of the inscrutable ministrations of providence. They do not understand the exact requirements of sterilization of discharges, and while they go through the form, they are not thorough. The members of the family indiscriminately take care of the patient, and while ordinarily clean to appearance, they use no special precaution as to cleansing their hands. Moreover, the working members of the family may be engaged in the handling of food which will not be cooked after their handling, as in a bakery, or milk

depot. This second family must be strictly quarantined, and restricted from participating in business, to secure the same degree of community protection as may be present without any restriction placed upon the first family. If one law is to be enacted to fully cover both cases, the basis of that law, for the good of the community, must be the second family. Such a law would work an injustice to the first family.

Again: exact legislation makes no provision for advances in science. Suppose that the law required disinfection by formaldehyde fumigation in all cases of infection. That gas is weak as against bedbugs, or vermin. It is quite possible for bedbugs to preserve the germ of typhoid, and to infect other persons. The formaldehyde gas is not efficient therefore in such disinfection, whereas, sulphurdioxide would be efficient. The same is true relative to the disinfection after a case of plague, which is communicated through the partnership of the flea and rat. A short time ago it was supposed that the burying of infected typhoid discharges was sufficient unless such burial might infect water supplies. Now it is known that the typhoid bacillus, which dies soon in pure water, or when exposed to the dry sunlight, will live in the earth at least eighty days; and that fly infected discharges buried six feet under the surface of the ground may permit the hatched larvae to crawl to the free air as a fly. Legislation based on the former ideas might prevent efficient administration. Further it has been shown that lettuce grown upon infected soil may bear the typhoid bacilli upon its leaves. This shows a necessity for a restriction in the disposal of nightsoil which might have been unnecessary under the former degree of knowledge. (See Chapter XVI.)

§ 166. **Legislation should be mandatory only where based on settled facts.** Efficiency and justice in the administration of police power therefore suggest that as much as possible shall be anticipated in legislation, but legislation should only be definite and mandatory with regard to the points which are more sure. Discretionary administrative power should be added to extend the beneficent governmental supervision, and that that discretion should, so far as possible, be made exact by general rules and regulations. Regulations may be speedily altered with changed conditions, whereas legislative action must be slowly effective. Finally, there must be reserved to the health department, and to each of its responsible officers, certain discretionary powers for use in genuine emergency. Practically this plan amounts to this—that the minimum requirements should be marked by legislation, remembering that the necessity for extension of demands must, in case of question, be proven to the satisfaction of the court. Legislation forms a basis for action, and permits the administrator to devote his attention to other matters. It serves much the same purpose as would the substitution of solid concrete for a portion of an earthen dyke, permitting the guardian to devote practically all of his thought to the more limited area.

§ 167. **Administrative action specific; legislative, general.** Administrative action is specific and individual, as contrasted with the general nature of legislative action, and regulations. Executive force is applied in particular cases to preserve the general welfare. Not seldom an individual action of the executive may be sustained in the court, when as a general prop-

osition it would be refused recognition. In other words, an emergency will justify that which under other conditions would be a violation of right. Suppose, for example, that a health officer found in a mountain valley that typhoid fever, evidently water-borne, was making its way to the foot of the valley; and that the people insisted in drinking the water from their springs. It is probable that he would be sustained in the courts if he impregnated every spring with ample quantities of chlorinated lime, even though he did so without previous notice, and to execute his design he entered upon private property. Such gross violation of the rights of the individual would not be tolerated as a general proposition, and the executive taking such measures will run the risk of being regarded as a common trespasser, and of being forced individually to pay heavy damages. To guard against this danger to the official, he should, in all cases in which the necessary delay will not too greatly hamper efficiency, preserve that protection of individual liberty, due process, by taking the case into court, and thus throwing the responsibility entirely upon the court.

§ 168. Public health portion of police power includes what? “The police power, so far as it relates to the public health includes the making of sewers and drains for the removal of garbage and filth, the boring of artesian wells and the construction of aqueducts for the purpose of procuring a supply of pure, fresh water, the drain of malarious swamps, and the erection of levees to prevent overflows.”³⁸ Laws forbid-

³⁸ *Wilson v. Sanitary District of Chicago*, 133 Ill. 443.

ding the intermarriage of white and black persons are a proper use of police power.³⁹ But such laws passed under police power must be the same for all classes, and not varied for particular individuals, or favored classes.⁴⁰ The business of dealing in second-hand clothing is a proper one for police regulation.⁴¹ Regulation of the milk industry, preserving the purity and good quality of milk, is a proper use of police power.⁴² A law limiting the hours of labor in mines was upheld by the Supreme Court of the United States as a proper use of the police power.⁴³ With the changes in industrial conditions, and with the clearer insight into the biological problems involved, we may find a change in the attitude of courts with regard to similar laws. This change is also due in part to the difference in the way of presenting the case. Thus, in the first Ritchie case,⁴⁴ emphasis was placed upon the industrial and economic factors of the case, and a law limiting the hours for employment of women was declared to be an improper use of police power. Fourteen years later the same court in the second Ritchie case,⁴⁵

³⁹ State v. Gibson, 36 Ind. 389; State v. Hairston, 63 N. C. 451; Allis v. State, 42 Ala. 525.

⁴⁰ Locke on Civil Government, Sec. 142; State v. Duffy, 7 Nev. 349; Dewis v. Webb, 3 Greenl. 326; Durham v. Lewiston, 4 Greenl. 140; Holden v. James, 11 Mass. 396.

⁴¹ State v. Taft, 118 N. C. 1190; Greensborough v. Ehrenruch, 80 Ala. 579; Weil v. Record, 24 N. J. Eq. 169; State v. Long Branch, 42 N. J. L. 364; State v. Seigel, 60 Minn. 507; Marmet v. State, 45 Ohio, 63.

⁴² State v. Nelson, 66 Minn. 166; People v. Mulholland, 82 N. Y. 324; Commonwealth v. Wheeler, 91 N. E. R. Mass. 415; State v. Dupiquier, 46 La. Ann. 577; People v. Van de Carr, 81 App. Div. 128; Commonwealth v. Waite, 11 Allen (Mass.) 264; Commonwealth v. Carter, 132 Mass. 12; State v. Campbell, 64 N. H. 402; Johnson v. Simonton, 43 Cal. 242.

⁴³ Holden v. Hardy, 169 U. S. 366.

⁴⁴ Ritchie v. People, 155 Ill. 98.

⁴⁵ Ritchie v. Wayman, 244 Ill. 509.

in which emphasis was placed upon the biologic laws involved, upheld a similar law as a right use of police power. In *People v. Williams*,⁴⁶ a statute prohibiting night factory work by women was declared not valid, apparently upon technical legal grounds. It was not clearly intended as a health measure, according to the wording of the statute. A statute in Oregon, limiting the laboring hours of women was upheld by the Supreme Court of the United States in the October term, 1907, in a sweeping decision.⁴⁷ (See Chapter XVIII.) Regulation of the practice of medicine is proper under police power.⁴⁸

The requirement of a license before engaging in a business or occupation is a very common use of the police power, but laws interfering with personal liberty cannot be upheld unless the public health, comfort, safety, or welfare depend upon their enactment and liberty embraces the right to follow a chosen occupation.⁴⁹ The law must be impartial.⁵⁰ There must be no discrimination as to fee, or otherwise, between residents and non-residents.⁵¹

“Since health as well as order is an essential of good living, and one of the primary purposes of municipal incorporation, sanitary powers may not only be expressly conferred by the charter, or implied therefrom, but they have been judicially declared to be inherent in a municipality as a necessary attribute

⁴⁶ 189 N. Y. 131.

⁴⁷ *Muller v. State*, 208 U. S. 412.

⁴⁸ *Watson v. Maryland*, 105 Md. 650, 66 A. 635; *Dent v. State*, 129 U. S. 114.

⁴⁹ *Bissette v. People*, 193 Ill. 334.

⁵⁰ *State v. Mahner*, 43 La. Ann.

⁵¹ *Indianapolis v. Beiler*, 138 Ind. 30; *Clement v. Town of Casper (Wy.)*, 35 Pac. Rep. 472; *Muhlenbrick v. Com.*, 44 N. J. L. 365; *State v. Orange*, 50 N. J. L. 389; *Burrough of Sayre v. Phillips*, 148 Pa. 482; *State v. Ocean Grove C. M. A.*, 55 N. J. L. 507.

thereof.⁵² This police power has been used to secure pure water supply.⁵³ Regulation of the cleaning and care of cesspools is a proper use of municipal police power.⁵⁴ Burial of the dead is a proper subject for police regulation.⁵⁵ But, "A bylaw which assumes to be a police regulation, but deprives a party of the use of his property without regard to the public good, under the pretence of the preservation of health, when it is manifest that such is not the object and purpose of the regulation, will be set aside as a clear and direct infringement of the right of property without any compensating advantages."⁵⁶ So, when an ordinance prohibited the burying of a dead body which was brought into town, it was declared void.⁵⁷

§ 169. Regulation versus prohibition. Regulation is very different from prohibition. It implies the continuance of an operation or business, but within certain general restrictions, and under some degree of supervision. This distinction frequently is the distinguishing point between legal and illegal efforts and ordinances. Thus, while the general supervision as to location and care of slaughter houses is a proper subject for police regulation,⁵⁸ under the general power granted to the city to compel owners and occupants of slaughter houses to cleanse and abate them

⁵² Ingersoll, Pub. Corporations, 121.

⁵³ Kennedy v. Phelps, 10 La. Ann. 227; Suffield v. Hathaway, 44 Conn. 521; Smith v. Nashville, 88 Tenn. 464.

⁵⁴ Commonwealth v. Cutter, 156 Mass. 52; Nicoulin v. Lowery, 49 N. J. L. 391.

⁵⁵ Graves v. Bloomington, 17 Ill. App. 476; Austin v. Association.

87 Texas, 330; Coates v. New York, 7 Cow. 586; *In re Bohon*, 115 Cal. 372.

⁵⁶ Cooley, Cons. Lim. 203.

⁵⁷ Austin v. Murray, 16 Pick. 121.

⁵⁸ *Ex parte Heilbron*, 65 Cal. 609; Beiling v. Evansville, 144 Ind. 644; Huesing v. Rock Island, 128 Ill. 465; Inhabitants of Watertown v. Mayo, 109 Mass. 515.

whenever necessary, it was held that the city could not pass an ordinance prohibiting the slaughter of animals within the city.⁵⁹ "Necessary restriction cannot sanction or cover arbitrary discrimination."⁶⁰ "In the absence of an epidemic showing an apparent necessity therefor, an ordinance prohibiting any one from bringing second-hand clothing into a town or exposing it for sale therein, without furnishing proof that it did not come from an infected district, is an unreasonable restraint of trade."⁶¹ However, "A very clear abuse of the police power must be shown in order to justify a court in declaring ordinances regulating the business of pawnbrokers, junk dealers and dealers in second-hand goods unreasonable and void."⁶² The sale of second-hand clothing is not a nuisance *per se*, but it is on the other hand a lawful business, and under proper regulations may be so conducted as to be without danger to the health of the community, and at the same time be a great benefit to a large portion of the people. There is nothing dangerous to health in articles of second-hand clothing themselves; they can only become noxious by reason of prior use, of having been worn or possessed by persons themselves infected, or living in infected communities.⁶³ Things susceptible of use to the injury of health can be regulated under police power.⁶⁴ The Georgia

⁵⁹ Wreford v. People, 14 Mich. 41.

⁶⁰ Freund, Police Power, 640.

⁶¹ Kosciusco v. Stomberg, 68 Miss. 469.

⁶² Grand Rapids v. Braudy, 105 Mich. 670.

⁶³ State v. Taft, 118 N. C. 1190;

Greensboro v. Ehrenreich, 80 At. 579.

⁶⁴ Hernandez v. State, 135 S. W. 170; State v. Griffin, 69 N. H. 1; State v. Noyes, 30 N. H. 279; Crowley v. Christensen, 137 U. S. 86.

statutes relative to the sale of second-hand clothing refer only to such clothing shipped into the state.⁶⁵

§ 170. Reasonableness. The validity of action under police power may frequently turn upon its reasonableness. An action which is not reasonable is arbitrary; and arbitrary actions are never sanctioned under our institutions. The degree of reasonableness may determine that a certain act would be lawful for the state, though unlawful for the city. Matters that are settled by common usage or common knowledge would be deemed reasonable in municipal legislation: but proposed actions, based upon less definitely recognized facts of science, or upon unsettled usages, might be permitted in state legislation, though they would be considered unreasonable on the part of the city.

A state may pass, as reasonable, laws which would not be permitted to municipalities as reasonable.⁶⁶ Questions of policy as determined by the legislature are held conclusive by the court, and therefore not subject to court revision.⁶⁷ But a law which does not clearly obtain the object sought, and with the least oppression, will be declared unconstitutional.⁶⁸ An ordinance cannot be considered unreasonable and void, which is expressly authorized by the legislature.⁶⁹ So, though creating a monopoly in making a contract for the collection of garbage, the city of Indianapolis was expressly authorized in its charter.⁷⁰ Without such

⁶⁵ *J. H. Smith & Co. v. Evans*, 53 S. E. 589.

⁶⁶ *Landberg v. Chicago*, 237 Ill. 117; *Jenkins v. Bd. Education*, 234 Ill. 422.

⁶⁷ *License Cases*, 5 Wall. 462 and 475.

⁶⁸ *Minnesota v. Barber*, 136 U.

S. 313; *R. R. Co. v. Husen*, 5 Otto, 465.

⁶⁹ *Coal Float Co. v. Jefferson*, 112 Ind. 15; *Cooley, Cons. Lim.* 241.

⁷⁰ *Walker v. Jameson*, 140 Ind. 591.

express permission, the city may not create a monopoly.⁷¹ In the case just cited, of *Landberg v. Chicago*, the points were on all fours with the case of *Walker v. Jameson*, apparently, both being on contracts let for the disposal and collection of garbage. Though the Illinois court stated that such an ordinance was null and void in the absence of express legislative permission, apparently the attention of the court was not called, through the neglect probably of the counsel for the city, to such an express provision, relative to the very matter of collection and disposal of garbage by Sec. 623, of Chapter 24, Revised Statutes of Illinois. This case, by the way, shows the necessity for more attention being devoted to this important branch of legal practice. Such cases are of too great importance for the welfare of the community to be entrusted to those who do not show an appreciative sympathy with the spirit of the work.

An ordinance requiring three and one-half per cent. of butter fat in milk was not considered as unreasonable, though it did necessitate an unusual degree of care in selection and feed of cattle.⁷² It is not unreasonable to require that a dealer shall know the standard of the milk which he sells;⁷³ or that a druggist shall know the degree of purity of his drugs.⁷⁴ An ordinance requiring the dealer of milk to give not exceeding half a pint of milk for analysis was upheld as reasonable;⁷⁵ though where the ordinance pro-

⁷¹ *Chicago v. Rumpff*, 45 Ill. 90;
Landberg v. Chicago, 237 Ill. 117.

⁷² *Weigand v. Dist. of Col.*, 22
Appeals, D. C. 559.

⁷³ *Commonwealth v. Wheeler*, 91
N. E. R. 415.

⁷⁴ *Dist. of Col. v. Lynham*, 16
Appeals, D. C. 185.

⁷⁵ *State v. Dupaquier*, 46 La.
Ann. 577.

vided for the purchase of milk by an inspector, "a sample sufficient for the purpose of analysis", and a dealer refused to sell less than a pint, as his supply was in bottles, the smallest of which contained a pint, the dealer was sustained, the court holding that the request of the inspector was unreasonable.⁷⁶

§ 171. Extreme use of police power. Very extreme measures contained in ordinances may sometimes be approved by the courts. The somewhat slow process of legal decision might permit much harm to be done, and to guard against such danger, summary powers may be conferred upon the executive. The city of Minneapolis had an ordinance that prescribed as a test of the purity and wholesomeness of milk brought into the city for sale, that it must be drawn from cattle previously tested with tuberculin, and found free from disease. This tuberculin is made from the dead bacteria of tuberculosis, and when injected into animals ill with tuberculosis, it causes a rise of temperature. By this method tubercular cattle may be found before other tests are definite. In the earlier cases of the disease the percentage of error in this test properly applied is very small. Such a test was prescribed in the ordinance, which also provided that milk not conforming with the requirements might be seized and summarily destroyed. Milk was so seized, and emptied upon the streets. It must be remembered that milk is subject to rapid change, and it is therefore of only very temporary value. The storage and impounding of the supply would serve no good purpose. In the second Nelson case⁷⁷ the court said: "The methods to

⁷⁶ Dist. of Col. v. Garrison, 25 Appeals, D. C. 563.

Minn. 16; Adams v. Milwaukee, 223 U. S. 572.

⁷⁷ Nelson v. Minneapolis, 112

be adopted to insure a supply of pure milk, and the standard by which the same shall be determined, is a legislative, not a judicial question. An ordinance authorizing the summary seizure and destruction of milk not conforming to the standard fixed by law is not violative of the constitutional rights of the citizen, nor a taking of property without due process of law." In *Blazier v. Miller*⁷⁸ it was also held that under the general powers usually granted to boards of health to make rules and regulations for the suppression of nuisances, it was allowable to fix standards for the purity of milk, to appoint an inspector, and to empower him to seize and destroy any milk found below the standard adopted.⁷⁹ The supreme court of the state of Washington⁸⁰ held that a qualified health officer of a county would have power to seize a private building in which to confine a small-pox patient without express authorization, either from the statute or from the county board of health. (§ 411.)

"The absolute destruction or abrogation of property rights—including confiscatory regulation leaving no reasonable profit to the owner—is an extreme exercise of the police power. Where it is proposed to exercise such an authority the constitutional right of private property must be weighed against the demands of the public welfare, and it is obvious that a public interest which is strong enough to justify regulation may not be strong enough to justify destruction or confiscation without compensation."⁸¹ (§ 188.) The destruction

⁷⁸ 10 Hun. 435.

⁷⁹ See also, *Deems v. Mayor*, 80 Md. 164; *Shivers v. Newton*, 45 N.

J. L. 469.

⁸⁰ *Brown v. Pierce County*, 28 Wash. 345.

⁸¹ Freund, *Police Power*, 517.

of sound property, without compensation would be unconstitutional.⁸² An officer who destroyed such property which had an intrinsic value, even though used in an unlawful manner and therefore a nuisance, would be liable for tort. Property created contrary to law does not represent a lawful interest on the part of the owner, and it may be summarily destroyed. There is no forfeiture, because there was no property right. Thus a house constructed contrary to law may be destroyed, but the material must be preserved for the owner.⁸³ Game killed contrary to law may be destroyed summarily, as a nuisance *per se*, but if provision be made for the sale of such seized matter, that provision is an evidence that it is not a nuisance *per se*.⁸⁴

A distinction is therefore found between substances and property which are nuisances *per se*, and those which are nuisances in their location or use. Even the taking of sound property without compensation is sometimes justified as an administrative measure, especially where the value of that taken is insignificant.⁸⁵ Thus the taking of articles of food for analysis is upheld, though many states provide in their statutes that compensation shall be offered. (§§ 468, 469.) Nets used for unlawful fishing were seized and destroyed. Relying chiefly upon the small intrinsic value, as compared with the cost and time in condemnatory proceedings, the action was upheld.⁸⁶ The case was taken

⁸² Pearson v. Zehr, 138 Ill. 48; Miller v. Horton, 152 Mass. 540.

⁸³ Eichenlaub v. St. Joseph, 113 Mo. 395; King v. Davenport, 98 Ill. 305; Nine v. New Haven, 40 Conn. 478. (But see Fields v. Stokley, 99 Pa. St. 306.)

⁸⁴ Sullivan v. Oneida, 61 Ill. 242.

⁸⁵ Commonwealth v. Carter, 132 Mass. 12; State v. Dupaquier, 46 La. Ann. 577.

⁸⁶ Lawton v. Steele, 119 N. Y. 226.

to the Supreme Court of the United States and again sustained,⁸⁷ with dissent by Chief Justice Fuller, and Justices Field and Brewer. In Ohio the seizure of nets thus illegally used was declared unconstitutional.⁸⁸

A dead animal is not a nuisance *per se*, though it may become a nuisance. The owner does not lose ownership with the death of the animal, but is entitled to make such salvage as he may from the sale of the hide, etc. (§ 450.) Destruction, or confiscation of dead animals, or garbage, requiring that they be collected in a designated place, or giving such articles to a contractor, have been judicially declared to be taking property without due process of law.⁸⁹ It may however be held "that property interests in the noxious materials must be subordinated to the general good."⁹⁰ Diseased cattle are nuisances, and as such the law may order their destruction. They may communicate their disease to other animals, or to human beings. The danger of such communication will vary according to the nature of the disease, and the progress which it may have made. The animal living or dead may still have a certain value. To facilitate the abatement of the nuisance, to reduce the expense of condemnation, and to remove obstruction in health administration, it is quite customary that condemned animals be killed, and that compensation be rendered

⁸⁷ *Lawton v. Steele*, 152 U. S. 133.

⁸⁸ *Edson v. Crangle*, 62 Ohio St. 49.

⁸⁹ *Underwood v. Green*, 42 N. Y. 140; *River Rendering Co. v. Behr*, 77 Mo. 91; *State v. Morris*, 47 La. Ann. 1660; *Schoen Bros. v. Atlanta*, 97 Ga. 697; *Knauer v. Louis-*

ville, 20 Ky. L. R. 193; *Campbell v. Dist. of Col.*, 19 App., D. C. 131; *Landberg v. Chicago*, 237 Ill. 112.

⁹⁰ *McGehee*, *Due Process of Law*, 336; *California Red. Co. v. Sanitary Red. Works*, 199 U. S. 306; *Gardner v. Michigan*, 199 U. S. 325; *Walker v. Jameson*, 140 Ind. 591.

to the owners. This is the custom in France,⁹¹ and in Germany,⁹² but I have failed to find an English statute granting compensation. In Minnesota the statute restricts compensation to cases where the animal is found free from disease. Such a statute works simply to deny any compensation for diseased animals; for common and constitutional law would, in such cases as are found free from disease, protect the rights of the owner. On the other hand such a law would protect the officer from the effects of a mistake in judgment. The state would assume the risks, and not leave them to the individual officer. A horse was condemned and killed by orders of the Board of Health on account of glanders. The diagnosis was disputed by unofficial testimony, and the court found against the Board.⁹³

§ 172. Extreme use must be clearly necessary. Although it is true that the authority of police power may override every constitutional or statutory provision, still the necessity therefor must be clear in the particular case. Every statute, bylaw, ordinance, rule, regulation, and action must be measured according to the terms of the constitution, as well as the demands of the case at bar. No tampering with the essence of the power will be permitted by the courts. When the provisions of the constitution are to be violated in one point, the court will be the more lenient if other points be respected. For example: one of the provisions of the Fourteenth Amendment to the Constitution stipulates that no state shall deprive any person of life, liberty, or property "without due process of law." The deprivation may be necessary as a health measure.

⁹¹ Law, July 21, 1881.

⁹² Law, June 23, 1880.

⁹³ *Miller v. Horton*, 152 Mass. 540.

It will likely be permitted and sanctioned by the court in proportion to the fulfilling the latter portion—due process of law. Court action preserves this due process. Legislation is a recognized modification of due process. Rules and ordinances represent a very weak form of legislative action, limited in scope. Even in executive administration due process may be preserved, by giving notice and an opportunity for being heard—a quasi-judicial proceeding—before final action. Which method shall be chosen, is a question of policy, quite as much as of law. A wise choice must be based upon a knowledge of the principles of governmental action, quite as much as upon the facts of science.

CHAPTER VII

“DUE PROCESS OF LAW”

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§ 173. **Historical origin—protection of individual rights.** Under an absolute monarchy there is complete union of all governmental powers. Individual oppression is easy, and no person is secure in the possession of his liberty, or his property. The first real security, small though it was, for Anglican peoples, was obtained in the Magna Charta. That contained the provision, wrung from King John, “No freeman shall be taken, or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed; nor will we pass

upon him or commit him to prison, unless by the legal judgment of his peers, or unless by the law of the land.” As Professor Adams has shown,¹ essentially this clause is the recognition, by the king, of the old feudal customs. He spoke of a baronial court. The independence of the judiciary began here, though imperfectly, and there was still union of the executive and legislative functions of government in the person of the king. With the development of the judiciary, and the growth of the common law we find the expression creeping in—“due process of law”—as synonymous with “the law of the land.” Ideally this expression “includes actor, reus, judex, regular allegations, opportunity to answer, and trial according to some settled judicial proceedings, yet this is not universally true. There may be, and we have seen that there are, cases under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process in its nature final issues against the body, lands, and goods of certain public officers without any such trial.”²

Originally this provision was to guard the people against the acts of the king, chiefly of an executive nature. In the United States this provision is equally applicable to the acts of the executive, legislature, or even the judiciary. This does not mean that there is any fixed method of due process applicable to all states in the union. The methods and laws of the states differ from time to time, and between different states. The provision in the Fourteenth Amendment to the Constitution of the United States which says: “No state

¹ The Origin of the English Constitution, p. 243.

² Murray's Lessee v. Hoboken Land Co., 18 Howard, 272.

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," does not give to the courts of the United States the entire power to right unjust decisions. "Upon all questions involving merely the conformity of the act with the constitution of the state, the decision of the highest state court is final and conclusive, however unjust, oppressive, or harsh an act may have been upheld by it.³ But when the state's decision is against the validity of a right claimed under the federal Constitution or laws, the denial of due process under the national Constitution becomes a question."⁴ "Due process, so far as mere procedure not affecting fundamental rights is concerned, is process due according to the law of the state,⁵ and the determination of the state is conclusive as to what the state law requires."⁶

In other words, the state courts decide whether the requirements of the state laws have been complied with, while the federal court passes upon the validity of the statute of the state, determining whether or not it violates the fundamental principles of the federal Constitution. This is brought out very clearly in the

³ Kirtland v. Hotchkiss, 100 U. S. 491; Missouri Pac. R. Co. v. Humes, 115 U. S. 512; Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112; French v. Barber Asphalt Pav. Co., 181 U. S. 324; Hibben v. Smith, 191 U. S. 310; Olsen v. Smith, 195 U. S. 332; National Cotton Oil Co. v. Texas, 197 U. S. 130.

⁴ McGehee, Due Process, p. 37,

citing Green Bay etc. v. Patten Paper Co., 172 U. S. 58.

⁵ Walker v. Sauvinet, 92 U. S. 90.

⁶ McGehee, Due Process, p. 37, citing Caldwell v. Texas, 137 U. S. 692; Iowa Cent. R. Co. v. Iowa, 160 U. S. 389; *In re Krug*, 79 Fed. Rep. 308.

following dictum of the Supreme Court.⁷ “The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative nor coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends upon the law making power of the state, and as it is solely the result of such authority, may vary or change as the legislative will of the state may see fit to ordain. It follows that to determine the existence of the one (due process of law) is the final province of this court, while the ascertainment of the other (that is what is merely essential under state statute) is a state question within the final jurisdiction of the courts of last resort of the several states. When, then, a state court decides that a particular formality was, or was not, essential under the state statute, such decision presents no federal question, providing always the statute thus construed does not violate the Constitution of the United States by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters, the state’s interpretation of its own laws is controlling and decisive.”⁸

The act of a judge, whether in a judicial or ministerial character, but in his official capacity, must be

⁷ *Castillo v. McConnico*, 168 U. S. 674. 160 U. S. 389; *Allen v. Georgia*, 166 U. S. 138; *Baltimore Traction*

⁸ *French v. Taylor*, 199 U. S. 274; *Iowa Cent. R. Co. v. Iowa*, Co. v. Belt R. Co. 151 U. S. 138.

in harmony with due process of law.⁹ Acting as a judge, he represents the state, and his act is the act of the state, and thus comes within the provisions of this Fourteenth Amendment.

§ 174. **Fifth Amendment restricts nation; Fourteenth, the state.** Though the Fifth Amendment, which also contains the words "due process of law," was accepted soon after the adoption of the Constitution, this provision applies only to the powers of the federal government, and by no means binds the acts of the individual states.¹⁰ It was enacted to guard against the possible encroachments of the central government. The Fourteenth Amendment, limiting the powers of the individual states, was added after the civil war, and it was intended simply to safeguard the rights of the freed slaves. The wide application of this provision was then unexpected. The primary use of the provision has faded into insignificance compared with the broad application which touches every part of the country, and all classes of society. That it was a wise provision is evidenced by the numerous instances in which its protection has been demanded. At the same time it must be remembered that without this provision in the federal Constitution we had similar protection in the constitutions of almost every state in the Union. Long experience of English speaking peoples had demonstrated the necessity for such protection, and the reason why it was left out of the federal Constitution was that it was found in the separate constitutions of the individual states.

⁹ *Ex parte Virginia*, 100 U. S. 250; *Boring v. Williams*, 17 Ala. 339; *Hovey v. Elliott*, 167 U. S. 516; *Withers v. Buckley*, 20 How. 409.

84.

¹⁰ *Barron v. Baltimore*, 7 Peters

§ 175. **Pomeroy's summary.** What, then, is “due process of law?” Pomeroy says:¹¹ “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 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.” It will be noticed that these summary measures form a large proportion of the activities of health departments, and therefore due process of law cannot be too carefully studied by health officials. “Due process is not necessarily judicial process.”¹²

§ 176. **Legislation, due process by.** Due process of law, therefore, is now frequently applied to acts of legislation, the underlying principles being that all persons interested may have an opportunity of being heard, and that legislation does not represent arbitrary acts of government.¹³

¹¹ Constitutional Law, Sec. 246.

Wheaton, 235; *People v. Smith*, 21

¹² *Reetz v. Michigan*, 188 U. S. 505.

N. Y. 595; *People v. Adirondack Ry. Co.*, 160 N. Y. 225, affirmed in

¹³ *Bank of Columbia v. Okley*, 4

176 N. Y. 335.

“Where an act of government is based upon the especial circumstances of a particular case, these maxims require that the individual affected have an opportunity to be heard; this hearing affords him some assurance that the act will not be entirely arbitrary or without cause. Where an act of government applies to an infinite number of people alike and thus establishes a general principle, notice to every individual affected thereby is impossible and unnecessary and the generality of the principle is supposed to be a guaranty against its being arbitrary and unreasonable. This is the fundamental distinction between administration and legislation; the former requires notice and hearing which with regard to it constitutes due process, while the latter does not. But it does not follow that every act of legislation is due process, or the law of the land; an arbitrary statute is neither.¹⁴ Notice and hearing even in administration would be without value if it did not assure a just cause for proceeding against the individual; the essence of due process then is just cause, and this must underlie every act of legislation.”¹⁵

“Who ever by virtue of his public position under a state government, deprives another of life, liberty, or property, without due process of law, or denies or takes away the equal protection of the laws, violates that inhibition, and as he acts in the name of and for the state, and is clothed with her power, his act is her act. Otherwise the inhibition has no meaning, and the

¹⁴ Davidson v. New Orleans, 96 U. S. 97; Zeigler v. S. & N. Ala. R. R. Co., 58 Ala. 594, 598; Sears v. Cottrell, 5 Mich. 251, 254; Clark v. Mitchell, 64 Mo. 564, 578; West-

ervelt v. Gregg, 12 N. Y. 202; Officer v. Young, 5 Yerg. (Tenn.) 320; Beyman v. Black, 47 Tex. 558.

¹⁵ Freund, Police Power, 20.

state has clothed one of her agents with power to annul or evade it.”¹⁶

§ 177. Laws must be impartial. Laws are to be the same for all classes, and must not be varied for particular individuals or favored classes.¹⁷ (§ 103.) Thus, laws which forbid the intermarriage of whites and blacks are a proper use of the police power, and within due process of law, though they do interfere with the freedom of the individual.¹⁸

In *Bank of Columbia v. Okely*,¹⁹ Mr. Justice Johnson said, relative to the expression *per legem terrae*, which is accepted as practically synonymous with due process, “As to the words from the Magna Charta incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.” Due process of law does not require that a person be exempted from compulsory self incrimination in the courts of a state that has not adopted the policy of such exemption.²⁰

§ 178. Protection from state, not from fellow citizens. This provision of “due process” is designed to protect

¹⁶ Miller, on the Constitution, 665; *Ex parte Virginia*, 100 U. S. 339; *Leeper v. Texas*, 135 U. S. 712.

¹⁷ Locke on Civil Government, Sec. 142; *State v. Duffy*, 7 Nev. 349; *Lewis v. Webb*, 3 Greenl. 326; *Durham v. Lewiston*, 4 Greenl. 140; *Holden v. James*, 11 Mass. 396.

¹⁸ *State v. Gibson*, 36 Ind. 389; *State v. Hairston*, 63 N. C., 451; *Allis v. State*, 42 Ala. 525.

¹⁹ 4 Wheat. 235.

²⁰ *Twining v. New Jersey*, 211 U. S. 78.

the individual citizen from every form of governmental oppression, rather than from the acts of his fellow citizens. "It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the state, not a guaranty against the commission of individual offences; and the power of Congress, whether expressed or implied, to legislate for the enforcement of such a guaranty does not extend to the passage of laws for the suppression of crime within the states. The enforcement of the guaranty does not require or authorize Congress to perform the duty that the guaranty itself supposed it to be the duty of the state to perform, and which it requires the state to perform."²¹

We find very wide range in form between different operations, each of which are recognized as due process of law. The ideal form is court proceeding, in which the charges are definite, and each side has ample opportunity for presentation of his case. At the opposite extreme we find summary executive administration,²² in which there may possibly be no previous hearing of objection, and no previous statement as to intention. Between these extremes we find the provisions of legislation satisfying the claims of due process. Not only may we find a difference in the requirements of different states, and different times, but at the same period of time and in the same territory a form may be recognized as due process with regard to one matter, but be denied recognition in another. To those accustomed to deal with the immutable laws of nature, such uncer-

²¹ U. S. v. Cruiskshank, 1 Woods 308, affirmed 92 U. S. 542; U. S. v. Harris, 106 U. S. 629; Civil Rights Cases, 109 U. S. 3.

²² Murray's Lessee v. Hoboken L. Co., 18 How. 272; Weimer v. Bunbury, 30 Mich. 201.

tainty as seems apparent in decisions as to what is, or is not due process, may be confusing, especially if one fail to grasp the underlying principles. Since most, if not all, of the operations of health departments are under the general police power, and since it is in administering police power that the extreme minimum of due process must sometimes be allowed, it follows that it is of great importance that in this work the requirements of the due process shall be recognized.

§ 179. Who are protected? Who are protected under the Fourteenth Amendment? The words say “any person,” and this is interpreted by the courts as including nonresidents, aliens, and even the persons of the enemy.²³ The alien within the limits of this country is entitled to the “same regular course of judicial proceedings as is afforded to citizens, and he cannot be deprived of either (life or liberty) upon a mere executive hearing.”²⁴

§ 180. Exclusion acts. “Every sovereign state has, as inherent in its sovereignty, the right to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”²⁵ Such exclusion must be based upon legislation, and the enforcement of the legislation may be left to executive officers.²⁶ Having been left to executive officers, unless expressly provided by legislation, a court cannot examine into the

²³ Buford v. Speed, 11 Bush (Ky.) 338; U. S. v. Williams, 194 U. S. 279; U. S. v. Ju Toy, 198 U. S. 253; Lem Moon Sing v. U. S., 158 U. S. 538.

²⁴ McGehee, Due Process, 192.

²⁵ McGehee, Due Process, 190,

citing Chae Chan Ping v. U. S., 130 U. S. 581; Nishimura Ekiu v. U. S., 142 U. S. 659; U. S. v. Ju Toy, 198 U. S. 253.

²⁶ Japanese Immigration Case, 189 U. S. 86; U. S. v. Williams, 194 U. S. 279.

evidence upon which the executive acted.²⁷ This is important from a public health standpoint. If an alien be excluded on account of danger to public health, by an officer of the inspection service, the finding of such officer is final, excepting appeal within the Department. Appeal to the courts is not possible in the case of an alien, in this matter, until it has been carried to the head of the Department in which the service may be.²⁸ In *U. S. v. Ju Toy*,²⁹ after an appeal to the Secretary of Commerce and Labor, application was made to the District Court for a writ of *habeas corpus*. Seemingly upon new evidence the court found that the petitioner was a native born citizen of the United States. The case was appealed, and reversed by the Supreme Court which claimed that in the absence of abuse of discretion by the executive department, the case should have been decided upon its merits, without the introduction of new evidence. While aliens may be excluded, yet so long as they are living within our dominions they are entitled to every protection of due process, just as much as are citizens. Clandestine entry, or such temporary residence as to be in no real sense a part of our population, does not bring a person within the protection of this provision of the Constitution. A law is valid empowering an executive officer, whose action in the case is final, to order the deportation of an alien who has resided in this country less than one year.³⁰

²⁷ *Nishimura Ekiu v. U. S.*, 142 U. S. 659; *Fong Yue Ting v. U. S.*, 149 U. S. 711.

²⁸ *Habeas corpus* case, *U. S. v. Sing Tuck*, 194 U. S. 161, reversing (C. C. A.) 128 Fed. rep. 592.

²⁹ 198 U. S. 253.

³⁰ *Japanese Immigration Case*, 189 U. S. 86, approving, *U. S. v. Yamaska*, (C. C. A.) 100 Fed. Rep. 404; *U. S. v. Ju Toy*, 198 U. S. 253.

But the exclusion laws must be confined to aliens. They can not be applied to citizens of the United States.³¹ A new class of questions has arisen lately, with regard to those dependencies which the American nation has recently taken under its protection. It has been held that though the residents of Porto Rico, for example, are not citizens, neither are they aliens.³² A distinction is thus made between territory annexed to, or included under, the government of the United States, and that which is in fact a part of the nation. While denying to the citizens of these islands the status of citizens of the United States, they are protected from the operations of the exclusion acts.³³ The equality of rights which an alien may acquire by virtue of residence in this country, is no protection against his exclusion if he attempt to again enter the country after a temporary absence.³⁴ Because it violates the principles of due process, in that without such a judicial determination being required as would be requisite in the case of citizens, Congress may not, to give force to an exclusion act, impose a penalty of confinement at hard labor, to be applied by an executive officer upon one unlawfully attempting to enter the country. Temporary detention and confinement without judicial trial may be permissible, as it is sometimes necessary, in the operation of exclusion acts.³⁵ It therefore

³¹ U. S. v. Wong Kim Ark, 169 U. S. 649.

³² Gonzales v. Williams, 192 U. S. 1; Dorr v. U. S., 195 U. S. 138; Rassmussen v. U. S., 197 U. S. 516; Goetze v. U. S., 182 U. S. 221; DeLima v. Bidwell, 182 U. S. 1; Doolley v. U. S., 182 U. S. 222; Armstrong v. U. S., 182 U. S. 243; Downes v. Bidwell, 182 U. S. 244.

³³ Gonzales v. Williams, 192 U. S. 1.

³⁴ Lem Moon Sing v. U. S., 158 U. S. 538.

³⁵ Wong Wing v. U. S., 163 U. S. 228; U. S. v. Williams, 194 U. S. 280.

follows that the legal detention of those excluded for sanitary reasons is valid, until such time as they may be deported.

§ 181. State exclusion acts. The power of the individual states thus to exclude immigrants is much more limited. Thus state laws prohibiting the entrance of colored seamen have been declared unconstitutional as an interference with and constraint upon commerce.³⁶ Early cases in state courts sustained the right of the states to exclude free negroes from settlement within those states,³⁷ but unquestionably such enactments would not today be sustained. However, there are certain classes of cases in which the sovereign right of the states, under the police power, will permit exclusion, and most of these cases permit exclusion by executive officers. States may exclude criminals, vicious persons, mental defectives, paupers, and those afflicted with communicable diseases.³⁸

§ 182. Corporations are protected. Corporations doing business within a state are protected under the Fourteenth Amendment.³⁹ The state may sometimes discriminate against foreign corporations.⁴⁰ But, a

³⁶ I Op. Att. Gen., 659; *The Cynosure*, 1 Sprague, 88, Fed. Cases No. 3529.

³⁷ *Nelson v. People*, 33 Ill. 390; *Hatwood v. State*, 18 Ind. 492; *Pendleton v. State*, 6 Ark. 509.

³⁸ Passenger cases, 7 How. 283; *Henderson v. Mayor*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *R. R. Co. v. Husen*, 95 U. S. 465.

³⁹ *Smith v. Ames*, 169 U. S. 466; *C. R. I. & P. R. Co. v. State*, 86 Ark. 412; *American DeForest*

Wireless Tel. Co. v. Superior Ct. San Francisco, 153 Cal. 533; *Ward Lumber Co. v. Henderson White Mfg. Co.*, 107 Va. 626; *St. Clair v. Cox*, 106 U. S. 356; *Barrow Steamship Co. v. Kane*, 170 U. S. 100; *Philadelphia F. Ass. v. New York*, 119 U. S. 110; *Pembia Cons. Silver Co. v. Pennsylvania*, 125 U. S. 181.

⁴⁰ *Blake v. McClurg*, 172 U. S. 259; *Sully v. American Nat. Bank*, 178 U. S. 289.

municipal corporation is not within the intendment of the Constitution in such a sense that the legislature may not dispose of the revenues of the city with discretion.⁴¹

§ 183. **Property is protected.** The protection of the Constitution covers all property.⁴² “The right of property preserved by the Constitution, is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And as an incident to the right to acquire property, the right to enter into contracts by which labor may be employed in such ways as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty.”⁴³ Such occupations as are not open to all, but are of such a nature that a license may be required under police power, are not property.⁴⁴ Hence a license to sell milk is not a property right.⁴⁵ Neither is there a property right in a public office, which is protected by this constitutional guaranty.⁴⁶

On the other hand, the practice of medicine presupposes years of preparation and education, involving

⁴¹ *City of Chicago v. Knobel*, 232 Ill. 112.

⁴² *State v. Derry*, 171 Ind. 18; *Bloom v. Koch*, 63 N. J. Eq. 10.

⁴³ *Braceville Coal Co. v. People*, 147 Ill. 66; also see *Matthews v. People*, 202 Ill. 389; *Massie v. Cessna*, 239 Ill. 352; *Gray v. Building Trades Council*, 91 Minn. 171.

⁴⁴ *People v. Sewer, Water, and Street Com.*, 90 App. Div. 555; 86 N. Y. 445.

⁴⁵ *People v. Department of Health, City of New York*, 189 N. Y. 187.

⁴⁶ *Taylor v. Backham*, 178 U. S. 548; *Butler v. Pennsylvania*, 10 How. 402.

the expenditure of much capital. The practice of a physician, therefore, is a property right which may not be taken from him without due process of law.⁴⁷ The same is true relative to the profession of law,⁴⁸ and of the clergy.⁴⁹ This does not prevent the regulation of such callings by requiring examination and license.⁵⁰ Neither is it taking property without due process of law to require the payment of examination fees.⁵¹ Similarly the expense of commissions entrusted with the supervision of certain classes of business may be charged to those lines of business.⁵² Similarly, it is not a violation of this principle to assess sanitary improvements against the owners of tenement houses in which the improvements are required,⁵³ or to assess railroad corporations for constructing and maintaining improvements for the protection of the public safety.⁵⁴

§ 184. Regulation includes continued control; medical licenses. The right of the state to regulate the practice of medicine, for example, does not end with the granting of a license. Though Professor Freund chooses to consider that the establishment in the practice of medicine creates a "vested right,"⁵⁵ the deci-

⁴⁷ *Smith v. St. Board of Medical Examiners*, Iowa, 117 N. W. R. 1116; *Matthews v. Hedlund*, 82 Neb. 825; *Dent v. West Va.*, 129 U. S. 114.

⁴⁸ *Ex parte Garland*, 4 Wall. 333.

⁴⁹ *Cummings v. Missouri*, 4 Wall. 277.

⁵⁰ *Reetz v. Michigan*, 188 U. S. 505; *Hawker v. New York*, 170 U. S. 189; *Dent v. West Va.*, 129 U. S. 114.

⁵¹ *Nashville, etc., R. Co. v. Ala.*, 128 U. S. 96.

⁵² *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386; *N. Y. v. Squire*, 145 U. S. 175; *Consol. Coal Co. v. Illinois*, 185 U. S. 203.

⁵³ *Health Dept. v. Trinity Church*, 145 N. Y. 32.

⁵⁴ *N. Y., etc., R. Co. v. Bristol*, 151 U. S. 556 (eliminating grade crossings); *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57 (maintenance of viaduct).

⁵⁵ *Police Power*, 546.

sions of the courts seem to be opposed to his theory. Thus we find the supreme court of Ohio saying:⁵⁶ “The distinction between the right to establish a practice and the right to pursue a practice already established seems to be inadmissible. By what process of reasoning could it be maintained that the right to enjoy property should be esteemed more sacred than the right to make contracts by which property might be acquired?”

This power to continue in the regulation of the practice of medicine was emphatically upheld as a valid use of police power by the Supreme Court of the United States, three justices dissenting. The legislature of the state of New York had passed a statute in 1893, providing that no person should, after conviction of felony, attempt to practice medicine, on penalty of fine and imprisonment. One Hawker was at that time practicing medicine in the state. He had been convicted of a felony in 1878. In 1896 he was prosecuted for practicing illegally under the statute of 1893. He was convicted, and the supreme court of the state sustained the conviction.⁵⁷ The case was then carried to the United States Court. It was claimed that the statute violated the Constitution of the United States in that it was an *ex post facto* law, and that it served to deprive the petitioner of a valuable property right without due process of law. It was also claimed that the operation of the statute served to increase the penalty attached to the former conviction. The opinion of the court, written by Justice Brewer, held that in this case the law did not serve as a punishment

⁵⁶ State v. Gravett, 65 Ohio, 289.

⁵⁷ People v. Hawker, 152 N. Y.

for crime, but that conviction of crime was competent evidence as to the character of the person.⁵⁸ "If," said the court, "a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidence of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no real relation to character; but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test.⁵⁹ Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof. It is not the province of courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive of the desired result. These are questions for the legislature to determine." (See §§ 427, 428.)

§ 185. Wild animals are protected. Wild animals, that is animals *ferae naturae*, are considered as the property of the state until they shall have been reduced to actual possession by killing, or by subduction.⁶⁰ They then become recognized as qualified property. Qualified property is such that possession is peculiarly under the superior rights of the state, or the interdependence of several properties upon each other. Hence, animals *ferae naturae* may be protected by statutes prescribing times and conditions for the killing of game,⁶¹ even when raised artificially, without

⁵⁸ Hawker v. New York, 170 U. S. 189, 195.

⁵⁹ Citing, County Seat v. Linn Co., 15 Kan. 500.

⁶⁰ Com. v. Davis, 162 Mass. 510; Davis v. Massachusetts, 167 U. S. 43.

⁶¹ Geer v. Conn. 161 U. S. 519.

conflicting with due process.⁶² Since there can be no property right in game when the statute forbids the killing, game found in possession out of season may be summarily destroyed without violating due process. Statutes sometimes provide for the selling of such game, probably upon the supposition that dead game is not a nuisance *per se*. Then special judicial proceedings are required.⁶³

§ 186. Dogs. Another form of qualified property is found in dogs. The common law does not distinguish between valuable breeds and the common cur. It is considered that the owner of a valuable dog will take such precautions as will place him under the protection of the law as property, and not run the risk of having him considered as an animal *fera natura*. Further, by reason of their depredations upon flocks, as of sheep, or by viciousness, or by danger of infective diseases, such as rabies, dogs are liable to become nuisances. That worthless dogs may be destroyed, and that dogs permitted to live may receive care and supervision under the police power of the state it is quite customary that licenses be required and that other regulations be complied with. These are not held to interfere with due process. (§ 210.) Non-compliance with such regulations withdraws the protection of the state, and such dogs may be killed without further legal process,⁶⁴ and without giving the owner a right of action for damages. Laws requiring registration of dogs, or requiring them to wear a collar or muzzle, and

⁶² *Common. v. Gilbert*, 160 Mass. 157.

⁶³ *Sullivan v. Oneida*, 61 Ill. 242; *Phelps v. Racey*, 60 N. Y. 10;

Smith v. State, 115 Ind. 611; *State v. Rodman*, 58 Minn. 393.

⁶⁴ *Sentell v. New Orleans, etc., R. Co.*, 166 U. S. 698.

authorizing their destruction if found running without these provisions are constitutional.⁶⁵

§ 187. Property created contrary to law not protected. Property created contrary to law is not protected by due process. Thus a house so constructed may be summarily destroyed.⁶⁶ There is, however, a property right in the material of which the building is constructed, and such material must be saved for the owner. It has further been held by the Pennsylvania court that a house thus constructed is not a nuisance *per se*.⁶⁷

§ 188. Property inherently harmful, not protected. There can be no right of property in things which are inherently harmful or evil because of their pernicious effect, such as gambling devices, counterfeit money and the apparatus for making the same, burglars' tools, and obscene publications. Though they have a commercial value such substances may be taken and summarily destroyed, without violation of due process.⁶⁸ Similarly it is held that there is no violation of constitutional rights in the seizure and destruction of food which is unfit for human consumption, though exposed for sale;⁶⁹ or property infested with pests injurious to plant or human life;⁷⁰ or horses afflicted with glanders.⁷¹ (§§ 158, 171).

⁶⁵ Cranston v. Mayor, 61 Ga. 572,

⁶⁶ Eichenlaub v. St. Joseph, 113 Mo. 395; King v. Davenport, 98 Ill. 305; Hine v. New Haven, 40 Conn. 478.

⁶⁷ Fields v. Stokley, 99 Pa. St. 306.

⁶⁸ State v. Derry, 171 Ind. 18; J. B. Mullen v. Mosley, 13 Idaho, 457; Garland Novelty Co. v. State,

71 Ark. 138; Woods v. Cottrell, 55 W. Va. 476; Frost v. People, 193 Ill. 635.

⁶⁹ N. A. Cold Storage Co. v. Chicago, 211 U. S. 306.

⁷⁰ Los Angeles Co. v. Spencer, 126 Cal. 670.

⁷¹ Chambers v. Gilbert, 17 Tex. Civ. App. 106.

§ 189. Nuisance *per se*. “Since a nuisance *per se* (§ 199) is a source of present and continuing danger, its destruction does not require previous notice to the owner. The rightfulness of the destruction presupposes that the condition of the property is as a matter of fact harmful or objectionable, and the *ex parte* finding of the authorities does not determine this fact conclusively against the owner. If he cannot get his hearing in advance, he must get it afterward; i. e., he has a right to bring action for the destruction of his property and the authorities who are sued must justify their act.⁷² If the property proves to have been sound and harmless, the owner is entitled to compensation.⁷³ Since officers thus must act at their peril, they are not apt to exercise their power of abatement, and this has been urged as a reason why their determination should be held to be conclusive; but the supreme court of Massachusetts, in sustaining their liability, practically held that a destruction of sound property without compensation would be unconstitutional.”⁷⁴

Infected rags are a nuisance, but not a nuisance *per se*. They may be disinfected. Summary destruction then is the taking of property.⁷⁵ Owners may be required to pay for the necessary disinfection.⁷⁶

§ 190. Right to a hearing. It cannot be too strongly brought to the attention of the public health executive, for his own protective guidance, that every man has

⁷² Citing, *Savannah v. Mulligan*, 95 Ga. 323; *People ex rel. Copeutt v. Yonkers*, 140 N. Y. 1; *Newark, etc., R. Co. v. Hunt*, 50 N. J. L. 308.

⁷³ Citing, *Miller v. Horton*, 152 Mass. 540; *Pearson v. Zehr*, 138 Ill. 48.

⁷⁴ *Freund, Police Power*, 521.

⁷⁵ *Train v. Boston Disinfecting Co.*, 144 Mass. 523.

⁷⁶ *Train v. Boston Disinfecting Co.*; *Harrison v. Mayor of Baltimore*, 1 Gill, 264.

a right to his day in court. If that day does not come before action is had by the executive, it must come later, and if it shall appear that the act was without the authority of law, it will be at the peril of the officer. "Every action of administration is subject to the law of the land, in that some officer of the administration must answer in his own person if anything be done by it without the authority of positive law."⁷⁷ But, "The officer cannot be responsible for any action done in pursuance of discretion vested in him by law, whatever that action may be."⁷⁸ Thus, when an officer in Knoxville took bedding infected from a small-pox patient and burned it, action was brought, not for the bedding, but for the offensiveness of the smoke. Mr. Justice Freeman said:⁷⁹ "If the act was done by public authority or sanction, and in good faith, and was done for the public safety, and to prevent the spread of disease, and such means used as are usually resorted to and approved by medical science in such cases, and was done with reasonable care, and regard for the safety of others, then the parties were justified in what they did."

Though in *Miller v. Horton*⁸⁰ the court did hold the officers practically for a mistake in diagnosis, the finality of the diagnosis of the official has generally been recognized.⁸¹ For efficiency of administration⁸² this point should be covered by statute. The individual would still be protected from official oppression

⁷⁷ Wyman, *Administrative Law*,
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⁷⁸ *Seymour v. U. S.*, 2 Appeals,
D. C. 240.

⁷⁹ *State v. Knoxville*, 12 Lea,
146.

⁸⁰ 152 Mass. 540.

⁸¹ *Brown v. Purdy*, 8 N. Y. St.
143; *Kennedy v. Board of Health*,
2 Pa. 366.

⁸² *Jew Ho v. Williamson*, 103
Fed. 10.

if it be shown that the action of the official be arbitrary, or actuated by unworthy motives.

§ 191. **Property under eminent domain and police power contrasted.** There is a marked difference between the rights over property under eminent domain, and those under police power. In the former case the state (or municipality), must pay a reasonable price for property taken. Property taken under police power is not considered strictly as taken, but the owner is deprived of the use of his possessions, it may be permanently, as when destroyed. It is simply protecting the public from the misuse of his property by the individual. He holds his property under the condition that he must not so use it as to work harm to others. If it be infectious, or if he be offering for sale food which is not wholesome, the state may take such means as seem necessary to prevent harm. So “when a healthy horse is killed by a public officer, acting under a general statute, for fear that it should spread disease, the horse would seem to be taken for public use, as truly as if it were seized to drag an artillery wagon. The public equally appropriated it, whatever they do with it afterwards.”⁸³ Such an interpretation places the taking under the power of eminent domain, and relieves the officer from an individual liability. Police power is shown in the regulation of the use of property; eminent domain, in the taking of it for common use or benefit.

Garbage is not a nuisance *per se*, but has often a money value. A householder may be required to bear the expense of removal to the place for cremation.⁸⁴

⁸³ Miller v. Horton, 152 Mass. 540.

⁸⁴ Cal. Red. Co. v. Sanitary Reduction Works, 199 U. S. 306.

A municipal ordinance or regulation, making a contract for the removal of garbage and prohibiting other methods, or persons from removing garbage, creates a monopoly; and such ordinance is unconstitutional as a violation of due process, unless such power be given to the municipality by the statutes of the state.⁸⁵ Such an ordinance is in line with the principle of subordinating the use of property to the general good. Therefore a statute granting to municipalities such power is constitutional.⁸⁶

In a case where a house is quarantined, and other persons are subjected to such regulations as seem necessary, it is held that the house has not been taken possession of by the health authorities, and no compensation is due.⁸⁷

§ 192. Due process by executive. The most important elements in due process are notice and hearing. As previously stated the hearing may come after the fact—as when a house is destroyed to protect the community from the spread of the conflagration. There is no time in which to inquire into ownership, nor for a consideration of the value of the property destroyed, and for the setting forth the various arguments of the case. Though in such cases the owner has no legal recourse for the value of property destroyed,⁸⁸ the act will be held to have been no violation of this provision of due process of law.

⁸⁵ *Landberg v. Chicago*, 237 Ill. 112.

⁸⁶ *Cal. Red. Co. v. San. Red. Works*, 199 U. S. 306; *Gardner v. Michigan*, 199 U. S. 325.

⁸⁷ *Spring v. Hyde Park*, 137 Mass. 554. See also *Hersey v. Chapin*, 162 Mass. 176.

⁸⁸ *Case of Prerogative*, 12 Rep. 12; *Mouse's Case*, 12 Rep. 63; *Am. Print Works v. Lawrence*, 3 Zab. 590; *Surocco v. Geary*, 3 Cal. 69; *Pollock, Torts*, IV, 11.

The determination of the necessity for action frequently depends upon the judgment of the executive officer. In practice the notice is given as a notice to abate a nuisance. If the owner has objections he should then present them, and thus have his hearing before the executive. The affirming that a thing is a nuisance does not make it so, even when the affirmation be made by officers empowered so to do. They may decide, after consideration that it is a nuisance, but that decision implies that the other side has had an opportunity of being heard. To declare the possession of inoffensive property a nuisance leaves the case open for a judicial hearing.⁸⁹ “In abating a nuisance under such an order, local boards or officers act at their peril, and if it is proved that they have overstepped the bounds of reasonable police action, the order will be no protection to them. When they are in doubt whether the order is within their authority, they may always have the matter determined in advance by the courts in a proceeding to restrain, or abate, a nuisance. But they need not do so, and the exigencies of the situation may justify immediate action.”⁹⁰

§ 193. Health administration. Applying the foregoing to health administration, it must appear that in the absence of statutory enactment, clearly giving and defining such power, the act of a health officer in quarantining the members of a household because one of its members is afflicted with an infectious disease, is essentially unlawful, excepting only for such a disease

⁸⁹ Pearson v. Zehr, 138 Ill. 48; Y. 140; People v. Board of Health, 140 N. Y. 1; Dillon, Munic. Corp. 374.
 Loesh v. Koehler, 144 Ind. 278;
 Miller v. Horton, 152 Mass. 540;
 Hutton v. Camden, 39 N. J. L. 122; Underwood v. Green, 42 N.

⁹⁰ McGehee, Due Process, 374.

as is recognized as a common law nuisance. This is particularly true of the quarantining, or imprisoning, of persons who belong to the class now known as "carriers," persons who though themselves in good health still harbor in their bodies, and develop therein, the bacteria, or protozoa of infectious diseases, and thus become a danger to the community. Such persons should be kept under surveillance, but, though the restriction of liberty of such persons might be approved by a court, as a proper use of police power, still such surveillance should be provided by statute. A health officer who acts without such statute does so at his own risk, and in case the court might not uphold his official action, the officer would be liable legally for damages. In the absence of statutory enactment, rules, regulations, and orders of a health officer have only the legal value of requests and advice, unless supported by court action. There is no due process of law in the order of an officer alone. That due process may be furnished by statute, or by court action, but not otherwise.

The supreme court of South Carolina has stated this principle very clearly in *Kirk v. Wyman*,⁹¹ holding: "From this it follows that boards of health may not deprive any person of his property or his liberty, unless the deprivation is made to appear, by due inquiry, to be reasonably necessary to the public health; and such inquiry must include notice to the person whose property or liberty is involved, and the opportunity to be heard, unless the emergency appears to be so great that such notice and hearing could only be had at the peril of public safety." As seen above, this hearing

⁹¹ 65 S. E. R., 387.

and notice may be had in the legislative body, and not necessarily in court. The case at bar was as to the right of a board of health to remove a case of anaesthetic leprosy to a pest house, and the court held that the board had exceeded its authority in making such removal. There was no statute of South Carolina which required such action, nor which specifically gave to the board discretionary authority therefor.

It may not be left to the discretion of a city engineer to determine where sewers are to be constructed. That is legislation.⁹² On the other hand, a statute of New Jersey providing for the drainage of any low or marshy land within the state, upon the application of five owners of separate lots in the tract, and providing for an assessment of the expenses upon all the owners, was held not to be a violation of the Fourteenth Amendment.⁹³ So too, “An ordinance passed by the city of New Orleans, under authority conferred by the legislature of Louisiana, prohibiting the keeping of any private market within six squares of any public market of the city, under penalty of being sentenced, upon conviction before a magistrate, to pay a fine of twenty-five dollars, and to be imprisoned for not more than thirty days if the fine is not paid, does not violate the Fourteenth Amendment.”⁹⁴

“The rule of construction applicable to the charters of municipal corporations is equally applicable to the charter of the state board of health. As to municipal corporations, it is well understood that they

⁹² *St. Louis v. Clemens*, 43 Mo. 395; *Jackson Co. v. Brush*, 77 Ill. 59.

⁹³ *Wurts v. Hoagland*, 114 U. S. 606.

⁹⁴ *Miller*, on the Constitution, 673; *Natal v. Louisiana*, 139 U. S. 621.

may exercise not only the powers expressly granted, but those necessarily or fairly implied in or incident to the powers expressly granted, and also those which are essential to the declared objects and purposes of the corporation.”⁹⁵ A statute which gives a board of health “all the powers necessary and proper for the preservation of the public health and the prevention of the spreading of malignant diseases,” and makes it the duty of such board “to examine into all nuisances, sources of filth injurious to the public health, and causes to be removed all filth found within the town which in their judgment shall endanger the health of the inhabitants,” gives express power to decide what is filth; and if a board merely errs in judgment there can be no redress given a party who complains of its acts.⁹⁶ A board of health may regulate as well as prohibit the exercise of offensive trades.⁹⁷ “An order of the board under this section is not in the nature of an adjudication of a particular case, but of a general regulation of the trade or employment mentioned therein. It is not to be construed with technical strictness, but with the same liberality as all votes and proceedings of municipal bodies or officers who are not presumed to be versed in the forms of law; and every reasonable presumption is made in its favor. It need not state in direct terms that the trade which it prohibits is a nuisance. It is sufficient if the order clearly shows that, in the opinion of the board, the exercise of such trade will be hurtful to the inhabitants, or injurious to the public health, or attended by noisome and

⁹⁵ State Board of Health, Louisiana v. Standard Oil Co., 107 La. 713.

⁹⁶ Raymond v. Fish, 51 Conn. 80.
⁹⁷ Sawyer v. State Board of Health, 125 Mass. 195.

injurious odors.”⁹⁸ Sections 2143-2146 of the revised laws of Minnesota providing for abatement by the state board of health of premises and occupations menacing to public health are an exercise of the police power of the state, a sovereign power, for the protection of the public health, comfort, and safety. They are clearly constitutional, unless in so far as used in an arbitrary manner, or unnecessarily oppressively.⁹⁹ The legislature may enact laws upon public health without granting hearings to parties affected; and it may delegate this power to boards of health.¹⁰⁰ “In order to secure and promote the public health, the state creates boards of health as an instrumentality or agency for that purpose, and invests them with the power to adopt ordinances, by-laws, rules, and regulations necessary to secure the objects of their organization. While it is true that the character or nature of such boards is administrative only, still the powers conferred upon them by the legislature, in view of the great public interests confided to them, have always received from the courts a liberal construction, and the right of the legislature to confer upon them the power to make reasonable rules, by-laws, and regulations is generally recognized by authorities.”¹ (§§ 206 *et seq.*)

Since the powers of a board of health, or of a health officer, are not to be exercised in an arbitrary manner, it follows that the authority to abate nuisances does

⁹⁸ *Taunton v. Taylor*, 116 Mass. 254.

⁹⁹ *McMillan v. Minnesota State Bd. of Hth.*, 110 Minn. 145.

¹⁰⁰ *Health Department v. Rector*, 145 N. Y. 32.

¹ *Blue v. Beach*, 155 Ind. 121. See also *Isenhour v. State*, 157 Ind. 517.

not give the right to order the abatement in any particular manner.² Thus, in the absence of special statutory authority neither the board of health nor the city council of a city have any power to erect a dam for the purpose of abating a nuisance on adjacent land, without the consent of the owner of the property on which the dam is erected.³ According to the general rules of interpretation a board of health cannot delegate its powers,⁴ but it has been held that in abating a nuisance a board may act through a committee.⁵ A board of health has no authority to enter upon private property for the purpose of digging a cesspool thereon as a receptacle for drainage from the property which collects in pools on the streets and becomes stagnant. There are other adequate remedies to abate a nuisance of this kind.⁶ The board may remove the nuisance from the street, or it may bring civil action against the owner. The first may be an immediate and temporary remedy. The second may take more time, be more equitable and efficient.

By a legislative act in Montana the state directed that no polluting sewage, and no human excrement shall be discharged into any stream which is the source of water supply for a city or town until such deleterious matter is rendered harmless by some means of purification acceptable to the state board of health. That board is also authorized to make, or cause to be

² Belmont v. New England Brick Co., 190 Mass. 442; Salem v. Eastern R. R. Co., 98 Mass. 431; Wautuppa Reservoir v. McKenzie, 132 Mass. 71.

³ Cavanaugh v. Boston, 139 Mass. 426.

⁴ Commonwealth v. Staples, 77 N. E. 712.

⁵ Grace v. Newton Board of Health, 135 Mass. 490.

⁶ Smith v. Baker, 14 Pa. C. C. 65.

made, a thorough investigation in a case of this character; and, if in the judgment of the board the public health so requires, the board may make an order prohibiting any city from extending a sewer into a river, and directing that the city at as early a date as practicable dispose of its sewage in some sanitary manner acceptable to the board. This act does not contemplate a public trial, but rather an *ex parte* investigation; and the legislature, being the repository of the police power of the state, could designate the state board of health as its agent and prescribe the manner in which such police power should be exercised. If the board informs itself by any means, the fact that testimony is not taken is altogether immaterial.⁷

The Missouri State Board of Health is not a court—is not a judicial tribunal. It can issue no writ. It can try no case—render no judgment. It is merely a governmental agency, exercising ministerial functions. It may investigate and satisfy itself from such sources of information as may be attainable. To guard and protect the health and welfare of its people the state must have its ministerial agents or officers and entrust them with power. If every administrative act that looks to the enforcement of the law should be required to be reduced to the compass of a lawsuit and be put in effect only after a court had at the end of a formal trial stamped its judgment on it, the government would make slow progress. There must be trust reposed somewhere and the power to execute the law. The general assembly has taken great care to secure trustworthy men to perform the duties that are devolved

⁷ Miles City v. Montana State Board of Health, 102 Pac. 696.

on the state board of health. The duties of the board are of an administrative or ministerial character, and, therefore, as long as its acts are within the scope of the exercise of a reasonable discretion, it is free to act. If perchance, through a misunderstanding of the law, the board should refuse to perform a given duty, the writ of *mandamus* would right the wrong, but the writ of prohibition does not go against such a body. It goes only against a court, or tribunal exercising judicial functions.⁸

§ 194. **Summary action may be legal.** The action of a health official may necessarily be summary, but if performed within the powers granted by the statute it need not violate the Fourteenth Amendment. "By summary is not meant arbitrary, or illegal, or unequal. It must under our Constitution be lawfully done. But that does not mean, nor does the phrase 'due process of law' mean, by a judicial proceeding. The nation from whom we inherit the phrase 'due process of law' has never relied upon the courts of justice for the collection of her taxes. We need not here go into the literature of that constitutional provision, because in any view that can be taken of it, the statute here does not violate it, as it gives an opportunity to be heard."⁹

Thus a city board of health may remove a building or part thereof, dangerous to the lives of pedestrians passing along the adjacent sidewalk, but the members must be prepared to show, when called in question, that the destroyed building was in fact a nuisance.¹⁰ It was

⁸ *McAnally v. Goodier*, 195 Mo. 551.

¹⁰ *Smith v. Irish*, 55 N. Y. S. 837.

⁹ *McMillen v. Anderson*, 95 U. S. 37.

held in another case,¹¹ also, that the action of a municipal board of health determining a nuisance and ordering its abatement within a certain time, required no notice to the party interested, as he has his remedy in an injunction, or on the personal liability of the individual members of the board. Also, it has been held that the jurisdiction over nuisances given by the statute in Massachusetts to town boards of health is summary in nature, and orders made thereunder are not subject to judicial examination and revision before being carried out. Afterwards, the question of whether there was in fact a nuisance, and if so whether it was maintained by the parties charged, may be litigated.¹² This possible, subsequent litigation complies with the requirements as to due process of law.

§ 195. Legislative action must be reasonable. Legislative action must be reasonable, and clearly designed to secure the object sought. This is illustrated by two cases relative to the quarantine of cattle. The state of Missouri passed a statute excluding the cattle of certain states during certain portions of the year. Though it was designed to prevent the spread of the Texas cattle fever, and though the purity of the intentions of the legislators was not to be specially doubted, it did not appear that the law was so drafted as to make any distinction between infected, and non-infected animals. The court held, therefore, that though it was nominally intended as a health measure, really it worked as a regulation of interstate commerce, and it was therefore unconstitutional, being outside of the powers of the state.¹³ On the other hand, a somewhat

¹¹ *Hartman v. Wilmington*, 41 At. 74, 1 Marv. 215.

¹³ *R. R. Co. v. Husen*, 5 Otto, 465.

¹² *Stone v. Heath*, 179 Mass. 385.

similar statute in Texas, which appeared clearly to be a quarantine measure, was upheld on the ground of so being, even though it did interfere with commerce.¹⁴ The court there held: "Quarantine law, as construed and applied in this case, is not in conflict with the Constitution of the United States. The prevention of disease is the essence of a quarantine law. Such law is directed not only to the actually diseased, but to what has become exposed to disease." A statute making colorblindness a disqualification for service on railroads, and requiring the railroad companies to pay for the examination of its men, is reasonable, and does not take property without due process.¹⁵

The state of Minnesota passed a statute requiring certain inspection of cattle before slaughtering. This requirement of inspection would prevent the importation of dressed meats, no matter how perfect. The Supreme Court held that it was not a proper use of the powers of the state for the preservation of health. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effects, and the presumption that it was enacted in good faith for the purpose expressed in the title cannot control the determination of the question whether it is, or is not, repugnant to the Constitution of the United States."¹⁶

If the legislation is unreasonable it is arbitrary. Boards of health have no power to enlarge the common law nuisances, but the legislature may itself declare certain things to be nuisances.¹⁷ Still, the statutory

¹⁴ *Smith v. St. Louis and Southwestern Ry. Co.*, 181 U. S. 248.

¹⁵ *Nashville R. Co. v. State*, 128 U. S., 96.

¹⁶ *Minnesota v. Barber*, 136 U. S. 313.

¹⁷ *Frank J. Goodnow*, *Columbia Law Review*, Vol. 2, p. 205.

affirmation must be supported by facts. Calling a thing a nuisance does not make it so.¹⁸ “A just cause of legislation is the legitimate function of government. A statute not supported by such cause is not due process.”¹⁹

In all cases in which the element of time is not pressing it would seem that some form of judicial proceeding were advisable. This form may be entirely within the administrative office. The notice may be one to abate, or show cause. If then there be a failure to get satisfaction the case may be taken into the court for judicial determination. Summary action is seldom advisable.

Ordinances passed by a municipality serve as notices, and they also afford opportunity for objection, before the specific case arises. The same is true of legislative enactment. All such enactments, whether state, or municipal, whether executive regulation or special order, must be reasonable, and free from arbitrariness. The administration must be impartial, and free from all bias. “Due process of law within the meaning of the amendment is secured if the laws operate upon all alike, and do not subject the individual to an arbitrary exercise of the powers of government.”²⁰

§ 196. Jurisdiction. The question of jurisdiction may arise in considering due process. Due process

¹⁸ See *Desplaines v. Poyer*, 123 Ill. 111; *Ex parte O’Leary*, 65 Miss. 80; *State v. Mott*, 61 Md. 287; *Yates v. Milwaukee*, 10 Wal. 497.

657, 662. Also, *Dent v. West Va.*, 129 U. S. 114; *Duncan v. Missouri*, 152 U. S. 377; *Yick Wo v. Hopkins*, 118 U. S. 356; *Orr v. Gillman*, 183 U. S. 278; *Millett v. People*, 117 Ill. 294; *Sears v. Cottrell*, 5 Mich. 251.

¹⁹ *Freund, Police Power*, Sec. 20.

²⁰ *Giozza v. Turman*, 148 U. S.

may not require any court proceeding, but a quasi-judicial hearing may be had before an executive officer. The tendency is in legislation to leave more of these matters of administration to executive departments. Thus it is left to the administrative officers to determine whether or not an immigrant may be admitted to the country.²¹ While the legislature, or the common law, may place a quasi-judicial duty upon an executive officer, legislative power cannot be delegated. Executive orders which are essentially legislation, or municipal ordinances which exceed the powers distinctly granted by the statute, violate due process, in that the officers so acting have no jurisdiction.

§ 197. **Executive hearings.** The spreading of assessments for local improvements is essentially a clerical labor to a very large degree. It is customary to have such assessments spread by administrative officers. In Illinois it is the rule that after the assessments are spread they must be confirmed by the court. Such a rule, however, is not universal. In a case of this character the Supreme Court said:²² "Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal." The above dictum is quite as true relative to those problems which arise in the administering of the governmental efforts at protecting the health and lives of the citizens. A

²¹ U. S. v. Ju Toy, 198 U. S. 253.

²² Londoner v. Denver, 210 U. S. 373, 386.

hearing before the executive will often avoid the more expensive, and more annoying experiences in courts. Such executive hearings have the very great advantage that they are before officers trained in the special line of work to be considered. When within the law, and with full regard to the principles of due process of law, such hearings are therefore more likely to be in harmony with the greatest justice to all, than is a hearing before a court, however honest, and learned in law, but unversed in the sciences pertaining to the public health. This fact was plainly stated by Judge Hand, U. S. District Court, New York, in a patent case involving the chemistry and physiological effect of certain drugs.²³

²³ Parke, Davis & Co. v. Mulford,
189 Fed. Rep. 95, 115.

CHAPTER VIII

NUISANCE

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§ 198. **Nuisance harmful.** The fundamental idea at the base of most governmental action having for its object the preservation of public health is that of nuisance. This term, in its etymological signification, means anything which annoys. In legal wrongfulness, it is restricted to such things as are harmful, or threaten harm to others. The shouting of children may be annoying and irritating to individuals in the neighborhood. In common parlance this shouting might be a nuisance, but it would not be a legal nuisance unless it tended to work positive harm to the people, or to their property. It is evident that such shouting might work injury in the vicinity of a hospital, where silence is often important. For the same reason such noise might be a nuisance in a private neighbor-

hood at a time when serious illness is present. So, too, it might be a nuisance during school hours near a school building, where it would serve to distract attention. On the other hand the shouting of children at play is a natural and healthful way in which they express their joy. It is a healthful and innocent diversion, and serves much the same for their generated energy as does the safety valve for an engine.

§ 199. **Nuisance per se or in esse.** Small-pox is always harmful. It has no good features to counterbalance its detrimental influence. Its presence threatens persons with sickness and death. It is clearly a nuisance in the legal signification. The same may be said of such vermin as rats. They injure buildings, eat grain and other produce, serve as transmitters of disease, and destroy annually many thousands of dollars worth of property. The rat is essentially a nuisance. Such a nuisance is recognized as nuisance *in esse* or *per se*, to distinguish it from the nuisance *in posse*, a thing which may be injurious under certain conditions, but which in other conditions may be beneficial and useful.

§ 200. **Nuisance in posse.** It is the nuisance *in posse* which presents the most difficult problems with regard to public health operations, and it is this class of cases which the advances of science may very materially aid in determining when they are nuisances and when they are not. A manure pile is the natural result from the keeping of domestic animals, such as the horse or cow, within enclosed places, such as a barn or small yard. The manure has often a definite value as a fertilizer. A statute declaring all manure accumulations nuisances, even were it possible to get such a statute

passed, would not be legal. (§§ 171, 450.) It would involve the destruction of property without due process of law. Formerly the harmful influence of such accumulations was supposed to be in the effluvia. If no odor permeated neighboring buildings, upon that basis there would be no nuisance. In the light of recent investigations it may be questioned whether the effluvia from a manure pile be harmful. Persons who are much exposed to such emanations do not seem to be harmed thereby. It is true that the odors may be offensive to sensitive nostrils, but is not the offence really due to a mental state of the person, rather than to anything essentially injurious? In other words, is not such a person in an abnormal state which could be easily rectified by mental training? Upon the basis of the effluvia it may today be questioned whether it would be possible to regard a manure pile as a legal nuisance therefore. On the other hand, we know today that such piles are favorite breeding places for the house fly, and for rats. These members of the animal creation are frequently carriers of disease germs. They travel far. They are nuisances *in esse*, and the things which tend to produce their multiplication are in consequence nuisances *in posse*. A fly will travel one or two city blocks within a short time, and rats may range through a wide territory. Odors and effluvia from manure are dissipated within a short distance. Under the light of modern scientific studies then, the manure pile is a nuisance to a much wider extent than under the former theory. But even so, the manure pile is not necessarily a nuisance. Since it takes about eight days for the development of the fly, as regards its character as a fly breeding material, the manure is not a nuisance if

the pit be thoroughly cleaned once a week in the summer time; and the cleaning in the winter time is not necessary for this reason. In the winter the cleaning is necessary to take from the rats their nesting place.

Again: upon the basis of the effluvia as the essential nuisance, it was necessary only to prevent large accumulations. Such collections, especially when moist, generate the odor largely in proportion to the amount of heat generated. If effluvia be the basis of the nuisance, the pit might be called clean when the bulk is removed, and a littered bottom was of no special signification. Further, the pit might have a natural ground bottom. From the rat and fly points of view, the floor of the pit must be rat proof, and it should be moisture proof, and the pit must be absolutely cleaned, which means *swept out*, every week during the fly breeding season. No manure should be permitted to lie in piles upon the ground, for the flies may breed in the earth which is saturated with the drainage from the pile. From the point of view formerly taken, that the nuisance consisted in the effluvia, a pile under a shelter was less objectionable than in a pit, for the reason that it did not heat so much.

Manure, then, illustrates the fact that the conditions under which a thing must be deemed a nuisance vary greatly with our scientific advances in knowledge. Further: a nuisance *in posse* is so because it favors the production of something which is a nuisance *per se*.

Disease germs are nuisances *per se*. A person afflicted with small-pox has been regarded as a nuisance, because it was difficult to distinguish between

the person and the disease. But at the same time clothing and other material which had been in contact with a small-pox patient were regarded as nuisances. It is necessary to restrict the liberty of the person afflicted with an infectious disease in order to control the disease itself. This has long been recognized. The sickness of the person was taken as the evidence of necessity for such restriction. Now we have come to realize that seemingly healthy persons must frequently be restricted as to liberty, in order to prevent the infection of others by germs which seem to be unable to affect the primary host. It is today recognized that healthy persons may be disseminators of diphtheria, or of typhoid fever, and these typhoid and diphtheria carriers have become serious problems for the health executives.

§ 201. **Nuisance a question of fact.** From the foregoing it is evident that the question of nuisance is one of fact, not fundamentally one of law. To declare a thing a nuisance does not make it so. This is true whether the declaration be made by an executive officer, or by the legislature. In other words, the action of the legislature, or of the executive must be capable of proof.¹ Of executive determination the Supreme Court has said:² "It is a doctrine not to be tolerated in this country, that a municipal corporation without any general laws, either of the city or of the state within which a given structure can be shown to be a

¹ *Smith v. Irish*, 55 N. Y. S. 837; *Stone v. Heath*, 179 Mass. 385; *Hartman v. Wilmington*, 41 A. 74, 1 Marv. 285; *Ex parte Robinson*, 30 Tex. App. 493; *Tissot v. Great South Tel. Co.*, 39 La. Ann. 996;

Cole v. Kegler, 64 Iowa, 69; *St. Paul v. Gilfillan*, 36 Minn. 298; *Everett v. Marquette*, 53 Mich. 450; *State v. Mott*, 61 Md. 297.

² *Yates v. Milwaukee*, 10 Wall. 497.

nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city at the uncontrolled will of the temporary local authorities." Although a city charter conferred upon a municipality the power to declare what shall constitute a nuisance, the supreme court of Oregon very properly said:³ "An ordinance cannot transform into nuisance an act or thing not treated as such by the statutory or common law." Whether made by an executive or a legislative body, as well as by a court, it is expected that the decision as to what shall be called a nuisance will be the outcome of a form of judicial determination, based upon facts, and not the outcome of prejudice and emotion. Therefore, although a city ordinance cannot declare that to be a nuisance which is not in fact a nuisance, when there is an honest difference of opinion the city's determination is held conclusive.^{3a} A resolution by a board of health that certain property is a nuisance, is not judicial determination of the question.⁴

A hospital may or may not be a nuisance. Thus, in a Kansas case, the court said that the question was not whether the establishment of a cancer hospital would place the occupants or adjacent buildings in actual danger of infection, but whether they would have reasonable grounds to fear such a result; and whether, in view of the general dread inspired by the disease, the reasonable enjoyment of their property

³ Grossman v. Oakland, 37 L. R. A. 593.

ton and Quincy R. R. Co., 259 Ill. 391.

^{3a} Bushnell v. Chicago, Burling-

⁴ Gaines v. Waters, 64 Ark. 609.

would not be materially interfered with. It would make the neighborhood less desirable for residence purposes. The court concludes that on these considerations the injunction asked for was rightfully granted.⁵ In the same state authorities were obliged to provide for the care of small-pox patients. It was impossible for want of time to select a site and erect a suitable building. No houses could be obtained through the city. The authorities, therefore, took possession of the park building. An injunction was sought by citizens, and the city and its officers were prohibited by the injunction from performing an important public duty. The court of appeal said that public officers, who are required by law to perform duties, involving the exercise of judgment and discretion, cannot be controlled by injunction while in good faith performing such duties.⁶ (§ 382.) If in the first case there was a nuisance, certainly in the second the danger to surrounding property was quite as great for the time being, but the officers had to deal with an emergency, and there could not be any degree of permanence in the injury to surrounding property. "Hospitals and houses for the sick are not *prima facie*, or *per se*, nuisances, but they might under some circumstances become such, and be subject to injunction for maintaining a nuisance, where the evidence is clear and certain."⁷ A township may therefore restrain a city from erecting a pest house in the township, but outside of the city, even though the city may own the ground.⁸ "A building used as a hospital for the treatment of

⁵ Stotler v. Rochelle, 109 Pac. 788.

⁶ Manhattan v. Hessin, 105 Pac. 44.

⁷ Barnard v. Sherley, 135 Ind. 547.

⁸ Warner v. Stebbins, 111 Iowa, 86, 82 N. W. 457.

diseases contagious and infectious in their nature is not *per se* a nuisance, and the erection and use of such a building will not be restrained simply because there is an apprehension that it may result in being a nuisance; but the court must be satisfied that there is a well grounded apprehension.”⁹ In the state of Texas the court found that a pest house in close proximity (193 feet), to a public school is a nuisance, and the authority vested in the county authorities to provide pest houses does not authorize them to maintain a nuisance.¹⁰ Too much weight must not be placed upon the precedents in which hospitals and pest houses have been found to be nuisances. Many of these are based upon the manner in which such institutions were conducted before the nature of infections was known, and when the word “small-pox” was a conjurer of fear which made strong men turn pale. Formerly all hospitals were viewed with dread. Today they are becoming generally recognized as refuges to which people cheerfully resort, and there is no reason why a properly conducted hospital for infectious disease should be looked upon with apprehension. Such institutions are necessities, and like other hospitals they should be located where they may be most useful. Such a hospital should be located near to the residence centre, other things being equal. If they be really nuisances it must be because of faulty construction, or bad management, and not because they are used for the isolation and treatment of infectious diseases.

§ 202. Common law nuisance—Statutory nuisance.

A common law nuisance is one which long custom has

⁹ State *ex rel.* Board of Health, Hamilton v. Inhabitants of Trenton, 63 Atl. 897.

¹⁰ Thompson v. Kimbrough, 57 S. W. 328.

so determined, especially by court procedure. Small-pox is such a nuisance. A statutory nuisance is one which is so defined by statutory enactment. Thus statutes defining degrees of purity for food and drugs represent the consensus of opinion of the territory interested in the legislation. Food and drugs which do not come up to the required standards are included under the general term of nuisance, and enactments based upon these principles are legal even though there be no positive detrimental or harmful element therein. In a similar manner a statute defining the districts in which liquor may not be sold makes the sale within that territory a nuisance, and actionable.

“It seems to be essential to the common law idea of a nuisance that the offensive condition be due either to the act of man, or to the failure to maintain that which has been erected and created by human agency, in a safe or proper condition. At common law there is no liability for a natural condition not in any way traceable to positive human action. Thus, malarial swamps, or lowlands, swollen streams, weeds or insects, or diseased animals, do not constitute actionable nuisances.”¹¹ It is particularly in this latter class of cases that statutory enactment is necessary.

It must be remembered that the legislative power of municipalities is very limited. The state legislature may by enactment determine things to be nuisances which the individual municipalities would be impotent to condemn. In *Laugel v. Bushnell*, the supreme court of Illinois discussed¹² the powers of municipalities

¹¹ Freund, *Police Power*, 616, citing, *Giles v. Walker*, 24 Q. B. D. 656.

¹² 197 Ill. 20.

relative to nuisances, and differentiated three classes. 1. Nuisances *per se*, and so recognized by common law or denounced by statute. 2. Such conditions or things as are not essentially harmful, but which may become nuisances under certain conditions or surroundings. 3. Conditions or things regarding whose essentially harmful character there may be honest difference of opinion. In the absence of restrictive legislation by the state, the municipal denunciation by ordinance would be conclusive in the first and third cases, but the power over the second class is limited to such as are shown to be nuisance in fact. The court said:¹³ "We do not conceive it to be the law that city councils or boards of village trustees may conclusively declare that to be a nuisance which a court, acting upon experience and knowledge of human affairs, would say is not so in fact." Thus the court upheld an ordinance regulating the sale of certain soft drinks,¹⁴ but it refused to uphold an ordinance which denounced public dances, and the renting of halls for such dances, as a nuisance.¹⁵ The court would sustain an ordinance regulating such dances, and restricting them under circumstances where they could be shown to be nuisances in fact. Such a distinction seems to be reasonable, but sometimes courts view regulations of municipality regarding nuisances with great liberality.

"Where the power is only to declare and abate nuisances, it is restricted to nuisances in fact; where a power is given over a subject matter that may tend to give rise to nuisances, the charter will usually express

¹³ p. 25.

¹⁵ *Des Plaines v. Poyer*, 123 Ill.

¹⁴ *Laugel v. Bushnell*, 197 Ill. 20. 348.

whether it is a power to regulate or suppress. In the absence of such expression it would seem that the city should have power to forestall the nuisance by keeping the danger altogether away from its territory, provided such a course is in accordance with the customary practice of municipalities; and provided that regulation is not equally efficient, for then prohibition would be oppressive and unreasonable.”¹⁶

At common law smoke has not been recognized as a public nuisance, though its character as a private nuisance may have been acknowledged. Under the old conditions the harmful effects of smoke were not likely to be important upon the community. As cities grew in size, and as manufacturing with soft coal became more comprehensive, the injury resulting became so great that it became necessary to restrict the evil. This has been done by statutory enactment, and this determination has been deemed proper. Also when the determination has been made by ordinance, or by health regulation, under general powers conferred by the statute, this has been regarded by the court as of the same force as a statute;¹⁷ but, a penal law or ordinance should be sufficiently definite for those affected by it to know their duty thereunder, and if not it cannot be sustained on the assumption that officers will exercise a wise discretion in enforcing it.¹⁸

§ 203. Executive determination. The determination of the existence of a nuisance may be made by an executive officer. (§ 192.) Such a determination is individual rather than general. It is liable to be

¹⁶ Freund, Police Power, 141.

¹⁸ People v. N. Y. Edison Co.,

¹⁷ People v. N. Y. Edison Co., 144 N. Y. Supp. 707.

144 N. Y. Supp. 707.

negated by court action. If the nuisance be abated upon such determination, the officer making the abatement may be liable for damages, in case the court be not satisfied that there was in fact a nuisance. Summary action of this nature is not advisable, therefore, except in real emergency.

§ 204. Judicial determination. The determination may be made in court. This also is individual action. Proceedings thus instituted are more free from personal liability of the officer, but each case must be thus determined by itself. The influence of one determination upon future cases is practically only a moral one.

§ 205. Statutory determination. The determination of character as nuisance may be made by statute, ordinance, or rules. These methods are general. Whereas determination by executive, or by court action, is comparable to examples in arithmetic, enactments which declare certain things or conditions to be nuisances are comparable to algebraic formulae. These also may be tested by court action. If the statute or ordinance be upheld by the court, the question is settled for all similar cases. All that remains for the executive to do is to decide when such general conditions may be present, and to act accordingly. It must always be remembered that ordinances are stronger than executive rules or regulations, and that state enactments are more sure than municipal by-laws.

§ 206. Nuisances prohibited, abated, or regulated. Nuisances may be prohibited, abated, or regulated. It is neither good law nor good policy to inflict a penalty which is unnecessarily severe. Especially in the presence of the plague, for example, a building infested with rats would be deemed a nuisance. It must be

remembered that the real nuisance is not the building itself but its rats and fleas. The nuisance would be abated with the destruction of those pests. Future recurrence of the nuisance would be prevented by making the building rat proof. The destruction of the building would only be justifiable when the expense of the rat proofing and purification would be prohibitive, compared with the value of the property; or when, after due notice, the owner neglects to take the necessary steps. The summary abatement of the nuisance by the destruction of the building would be justifiable only in emergency. (§ 193.)

§ 207. **Abatement.** Nuisances *per se* should be abated. Because of the very close association between the nuisance and things which are not nuisances, abatement may not be possible at once. Thus: a person in whose system the bacteria of typhoid fever are being generated must not be destroyed in our efforts to exterminate the nuisance of the disease. He is, for the time being, a nuisance *in esse*, for he harbors intimately the nuisance *per se*. He must be restrained. Other nuisances are prevented by regulations and prohibitions.

As in the determination of nuisance, so in the prevention, the method to be pursued may be by executive, or judicial decision, or the question may be more generally settled by legislative action. Legislative action has the very great advantage of removing the personal element, or reducing it to a minimum. It removes to a large extent that general uncertainty which may ever be present in all police work. Police power is essentially one of compulsion, and of repression. When left chiefly to the executive there is a great opportunity for personal favoritism or oppression in administra-

tion. This is a fault. On the other hand, a conscientious administrator may act with greater justice than would be possible under set regulations. This is true because some individual citizens may be trusted, while others will take advantage of the liberty granted, and laws must be drafted especially for the unruly. For this reason it is often advisable that a statute or ordinance stipulate the minimum and maximum requirements, leaving the exact determination to the executive, or to the court.

§ 208. **Summary abatement.** From the very exigencies of the case, summary abatement is sometimes necessary.¹⁹ (§ 194.) Previous notice to the owner is not then requisite.²⁰ As in the presence of a conflagration it may be needful, in order to check the flames, to destroy a building, and the case does not permit the use of time to determine ownership and notification, so there may be cases arising in public health service equally urgent.²¹ In many cases arising in the health service, to wait for a judicial determination of a nuisance would be to permit the nuisance to work its full harm upon the community. For example, a pond in the midst of a populous city breeding mosquitoes in the heat of the summer might very likely continue its work until cold weather, if the abatement of the nuisance depended upon the slow operation of the courts. In Massachusetts it was held that the powers conferred on boards of health were intended to provide a summary and speedy remedy for the ordinary case of local nuisance occasioned by the neglect or mismanagement

¹⁹ *McGehee, Due Process of Law*, 372.

²⁰ *Freund, Police Power*, 521.

²¹ *Mecker v. VanRensselaer*, 15

Wend. 397; *Ferguson v. Selma*, 43 Ala. 398; *Montgomery v. Hutchinson*, 13 Ala. 573.

of an individual upon his own land, which could be removed or abated by him personally.²² In Wisconsin the local board of health may abate nuisance without notice.²³ A law directing destruction of a privy vault, pending appeal, is constitutional.²⁴ The board of health of the city of New York may order a tenement house vacated because of its unsanitary condition without notice to the owner.²⁵

§ 209. Hearing after abatement. Though by statute and custom health officials are vested with quasi-judicial powers in the determination of nuisances, their decision is not final. If the owner of property destroyed cannot get his formal trial before the abatement, he is entitled to a hearing after. This is ordinarily in the form of a suit for damages. The burden of proof is then upon the authorities ordering the destruction, and they must justify their action.²⁶ The authority of the officers is to decide as to the existence of a nuisance. They have no authority to declare that to be a nuisance which is not so in fact. Their determination must be capable of proof. If it shall appear to the court that there was no nuisance in fact, or that the decision be unnecessarily severe in effect, it will be held that the act was not warranted in law. The officers will therefore be considered as private wrong doers, and the injured party will be held entitled to damages.²⁷

²² Cambridge v. Monroe, 126 Mass. 496.

²³ Lowe v. Conroy, 120 Wis. 151.

²⁴ Harrington v. Providence, 20 R. I. 223.

²⁵ Egan v. Health Dept. City of N. Y., 45 N. Y. S. 325.

²⁶ Savannah v. Mulligan, 95 Ga.

323; People v. Yonkers, 140 N. Y. 1; Newark R. Co. v. Hunt, 50 N.

J. L. 308; Hutton v. Camden, 39

N. J. L. 122; Loesch v. Koehler, 144 Ind. 278; Pearson v. Zehr, 138

Ill. 48.

²⁷ Miller v. Horton, 152 Mass. 540; Pearson v. Zehr, 138 Ill. 48.

There can be no property right in that which is unlawful, or inherently harmful. Ownership in property presupposes that it shall be so used as not to work injury to others. If the property be a legal nuisance, that implies that the owner has disregarded the conditions upon which it was held, and he has therefore lost his special right as an owner. Moreover, it is customary to hold that the owner of the property shares in the general benefits accruing to the community in the abatement of a nuisance.²⁸ For these reasons an owner is not entitled to damages for the property necessarily destroyed for nuisance abatement.²⁹ Herein is the distinction between the powers of Eminent Domain and Police Power. Though in each instance the property is appropriated for the use of the public, under police power it is considered that in reality the property is not used by the community, though the owner be deprived of its use to prevent abuse.³⁰

§ 210. Destruction not always permissible. Summary abatement by destruction would entitle the owner to compensation in case the nuisance could have been removed by regulation. A building may not be destroyed to abate nuisance if discontinuing its use will abate the same.³¹ The summary destruction of a building is not allowable for unlawful sale of liquor,³² nor because it was used as a house of ill fame.³³ Neither

²⁸ *Ex parte* Lacey, 108 Cal. 326; *State v. Campbell*, 64 N. H. 403; *Health Dept. v. Trinity Church*, 145 N. Y. 32; *Thorp v. Rutland R. Co.*, 27 Vt. 140; *Dillon, Munic. Corp.*, 4th Ed. 141.

²⁹ *Freund, Police Power*, 521; *McGehee, Due Process*, 375; *Black's Constitutional Law*, 578.

³⁰ *Miller v. Horton*, 152 Mass. 540.

³¹ *Health Dept. City of N. Y. v. Dassori*, 159 N. Y. 245.

³² *Eap v. Lee*, 71 Ill. 193.

³³ *Ely v. Supervisors of Niagara Co.*, 36 N. Y. 297; *Welsh v. Stowell*, 2 Douglas, 332.

may a canal be summarily destroyed because it is not kept in a clean and wholesome condition.³⁴ The same reasoning applies to livery stables.³⁵

Speaking abstractly, liquor is not a nuisance *per se*. Even where its sale may be illegal as a beverage, it may be regarded as a medicine, or as an article of export, and therefore not subject to summary destruction.³⁶ However it was held in Connecticut that this interpretation would tend to nullify the statute.³⁷ Such summary destruction may be a necessary use of police power, where the presence of the liquor can serve no lawful purpose, as on an Indian reservation.³⁸ Dogs, being qualified property, may be summarily destroyed when kept contrary to law.³⁹ (§ 186.)

It is quite customary according to the statutes of the several states, and foreign countries, that when cattle are destroyed for infectious diseases the owner be compensated, either in part or in whole. If the destruction be necessary, such compensation will be a matter of policy, not of law. In a large proportion of the cases, however, the killing of the animal is a matter of policy rather than of necessity. Take for example a tuberculous cow, in the early stages. The presence of that cow in a herd endangers other cattle, but the sick individual may be isolated. Her milk may be pasteurized, and thus made harmless. She may have special value for breeding purposes. It is not necessary that the cow be

³⁴ Babcock v. Buffalo, 56 N. Y. 268.

³⁵ Miller v. Burch, 32 Tex. 208.

³⁶ Brown v. Perkins, 12 Gray, 89.

³⁷ Oviatt v. Pond, 29 Conn. 479.

³⁸ U. S. Rev. Stat. 2140 and 2141.

³⁹ Campau v. Langley, 39 Mich. 451; Sentell v. New Orleans, 166 U. S. 698; Blair v. Forehand, 100 Mass. 136.

slaughtered, but it may be advisable. If the authorities therefore order her destruction the owner should be entitled to some compensation. On the other hand, dourine is an infectious disease which is very fatal to horses and mules. On the Panama Canal Zone it was found that the disease may be spread through the agency of flies; and that a fly may infect another animal two hours after feeding upon the diseased nose of an infected animal. It is seldom true that an infected animal lives more than nine months. Practically the disease is incurable, according to the present knowledge. In equity the owner of such an animal would only be entitled to compensation for the loss of its services for a very short time at the most, and the urgency of the case would justify summary destruction, even without compensation.

§ 211. **Urgency, not intrinsic value, must govern.** It is the urgency of the case, not the intrinsic value of the property which justifies summary action. It is true that in *Lawton v. Steele*,⁴⁰ it was held that the insignificant value of the fishnets destroyed for illegal use, as compared with the expense of a previous condemnation proceeding justified the act. In the United States Court, however, Chief Justice Fuller, and Justices Field and Brewer called attention, in their dissenting opinion, to the danger of this doctrine, and the New York court later practically reversed its stand in *Colon v. Lisk*,⁴¹ when they held an act authorizing the forfeiture of a vessel destroying oyster beds as unconstitutional.

§ 212. **License does not abrogate power.** We have stated that nuisance is a question of fact, not of state-

⁴⁰ 119 N. Y. 226; 152 U. S. 133.

⁴¹ 153 N. Y. 188.

ment nor of legislation. A municipality, or a legislature may declare a thing to be a nuisance as the consensus of opinion. In the proportion that a thing or condition is a nuisance, the doctrine *Salus populi est suprema lex* demands that it be suppressed. By virtue of its police power for the regulation of things or conditions which may prove to be nuisances the municipality or the state may issue licenses. Though under some conditions licenses may be interpreted as contracts, it is one of the principles of law that the state cannot by any act of its own hamper or prevent the future exercise of its police power. The fact of the issuance of a license does not therefore prevent future acts nullifying the license on account of nuisance, even when the license does not contain a provision for its revocation. (§ 428.)

Thus in the liquor business, though some of the earlier decisions held the license to be a contract,⁴² and therefore irrevocable, it is now generally agreed, following the opinion of the supreme court of Massachusetts⁴³ in 1856, that liquor licenses may be revoked, even without the reservation of revocation being expressed.⁴⁴ The license grants permission to conduct only the business specified. For example, the fact that a man holds a druggist license does not prevent the further requirement of a liquor license when he sells liquor otherwise than on a physician's prescription.⁴⁵

⁴² Adams v. Hackett, 27 N. H. 289; Hirn v. State, 1 Ohio, 15.

⁴³ Calder v. Kurby, 5 Gray, 597.

⁴⁴ State v. Holmes, 38 N. H. 225; McKinney v. Salem, 77 Ind. 213; Moore v. Indianapolis, 120 Ind. 483; Fell v. State, 42 Md. 71; Columbus v. Cutcomp, 61 Iowa,

672; Powell v. State, 69 Ala. 10; Carbondale v. Wade, 106 Ill. 654; People v. Flynn, 184 N. Y. 579; Brown v. State, 82 Ga. 224; Melton v. Mayor, 114 Ga. 462; Pleuler v. State, 11 Neb. 547.

⁴⁵ Gray v. Connecticut, 159 U. S. 77.

A license to sell meat implies that the business of slaughtering be conducted by someone and somewhere. The license to sell meat does not include the business of slaughtering. The license covers only that which is specifically mentioned, and the license of a market would not cover and permit the business of slaughtering upon the premises. Even the issuance of a slaughtering license does not prevent the abatement of the business if it proves to be a nuisance. Thus, a board of aldermen in Massachusetts issued a license for a slaughterhouse, and the prohibition of the business by the board of health was sustained by the supreme court of the state.⁴⁶ In Louisiana a similar power in the interest of health was upheld as to slaughterhouses;⁴⁷ and with regard to markets legally established.⁴⁸ Similarly, though a city conveyed land for a cemetery that fact did not prevent the passage of an ordinance making the interment of the dead within the city limits unlawful, on account of nuisance.⁴⁹ On the other hand, and this brings prominently forward the fact that the existence of a nuisance is a question of fact rather than of law, a trust accepted by a city to hold property for cemetery purposes cannot be nullified by legislation where there is no claim of sanitary necessity therefor.⁵⁰

“In general, a right which is derived from the exercise of legislative authority is as much within the power of that body afterwards to change, modify, or

⁴⁶ Cambridge v. Trelegan, 181 Mass. 565.

⁴⁷ Villavaso v. Barthet, 39 La. Ann. 247.

⁴⁸ New Orleans v. Stafford, 27 La. Ann. 417; New Orleans v. Faber, 105 La. Ann. 208.

⁴⁹ Brick Presbyterian Church v. Mayor, 5 Cow. 538; Coates v. Mayor, 7 Cow. 585.

⁵⁰ Stockton v. City of Newark, 42 N. J. Eq. 531.

abrogate, as it was in the first instance to enact it.”⁵¹ However, the legislature may not enact subsequent legislation abrogating a contract lawfully made by a prior act.

§ 213. Legislative determination best. So far as is possible nuisances should be determined by statutory enactment, preferably by state laws, and the method of treatment should be likewise thus provided. This not only relieves officers from personal liability, and saves time, but it is more sure and definite. It often happens that a thing or condition is of doubtful status. The orders of the executive may be defied and the case taken into court. The court may recognize the fact that there may be a difference in opinion, and in the absence of a clear case of nuisance the court would probably, very properly, find in favor of the defendant. Otherwise there may be the question of partiality. The condition may have been permitted to continue in other cases, and though a nuisance be shown in that individual case, in the absence of statutory enactment the court would have no guaranty that other cases would be likewise thus treated. One case thus decided, even in a lower court, would serve as a precedent. The consensus of opinion as expressed in the statute of a legislature would remove all this uncertainty. Therefore we find that there should “be a legislative determination in great detail as to what are nuisances.”⁵² The absence of such state enactments, the leaving such determinations to municipalities, to executives, and to courts, and the consequent confusion and uncertainty

⁵¹ Black's Constitutional Law, 733, citing *People v. French*, 10 Abb. N. C. (N. Y.) 418.

⁵² Goodnow, *Municipal Government*, p. 271.

in results, constitute one of the greatest sources for inefficiency in public health administration.

§ 214. Authority for abatement is not for construction. Unless that specific power be distinctly granted, authority given to a health department to abate a nuisance does not carry with it the right to direct any particular form of reconstruction. Thus a section in a city charter, providing that the commissioner of health has power to declare certain things to be nuisances, and to abate the same at the expense of the owner, does not authorize him to require a new erection or construction, better in accord with modern sanitation, against the will of the owner.⁵³ The two operations are quite distinct. Neither may a board of health order the construction of a permanent improvement at a scale bringing it within the definition of public works, and assess costs upon the property.⁵⁴ The board may advise such improvement, but the authority for the construction lies with another department.

⁵³ *Eckhardt v. Buffalo*, 156 N. Y. 658.

⁵⁴ *Haag v. City of Mt. Vernon*, 58 N. Y. S. 585, 41 App. Div. 366.

CHAPTER IX

PUBLIC HEALTH POWERS AND LIMITATIONS, NATIONAL, STATE, AND MUNICIPAL

- NATION
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| <p>§ 251. State laws not conclusive as to authority.</p> <p>§ 252. Meat inspection.</p> <p>§ 253. Authority of state must be evident in the act.</p> <p style="text-align: center;">CITY</p> <p>§ 254. Relation of municipality to state.</p> <p>§ 255. City corporation.</p> <p>§ 256. Legislation.</p> <p>§ 257. Ordinances must not exceed limits of statutes.</p> | <p>§ 258. Authority may be general, specific, or implied.</p> <p>§ 259. Ordinance must not contravene common rights.</p> <p>§ 260. State may do what city may not.</p> <p>§ 261. Ordinance not unreasonable if authorized by state.</p> <p>§ 262. Executive authority depends upon legislative.</p> |
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Nation

We have seen that the protection of public health by governmental action is in virtue of that inherent power for self preservation commonly called police. We have learned that this is a constitutional government, with careful checks designed to prevent abuse of authority by public officers, and to protect the individual citizen from governmental oppression. There are similar restraints by which power and authority are allotted between the nation, state, and city, imposing special duties and limitations. It is not necessary to give even an outline of all these boundaries of power and authority, but it is necessary to understand such limitations as pertain to health administration.

§ 215. Police power resides in the states. We find in the federal Constitution no mention of police power, but in the Ninth and Tenth Amendments, adopted practically with the Constitution, we learn that "all powers not delegated to the United States by the constitution, nor prohibited to the states, are reserved to the states respectively, or to the people." This reservation to the states, therefore, includes police power, and since the preservation of the public health is an important

portion of this power, it follows that this duty and authority rests principally with the individual states. We say principally because incidentally even the central government has certain powers and duties in this regard. For the present omitting consideration of these special powers and obligations, we find that each state is and must be independent in its efforts to preserve the lives and health of its citizens. It may pass such laws, and adopt such measures, as its people may decide for this purpose, provided that they do not conflict with the fundamental principles of our system, such as "due process of law," for example. The United States is a republican nation, and so is France; but there is this very important difference in the health administration of the two countries: in France we find a centralized system, so that ultimately even the village health official is subject to the national control; while in the United States the central government has no authority over the states. This lack of authority sometimes complicates and seemingly nullifies the operations of the constitutional provisions. Thus, by Article II, Section 2, Par. 2, the President is empowered to make treaties with foreign countries, by and with the advice and consent of the Senate; and Article I, Section 10, Par. 1, expressly prohibits the individual states from entering into any treaty. The United States may make a treaty with Japan providing that the citizens of one country may own real estate in the other; but the individual states may prohibit ownership of land by Japanese. Is our nation impotent to enforce the terms of the treaty within its borders?

Article XVI of the convention with Italy, proclaimed September 27, 1878, says: "In case of the death of a

citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the Consuls, or Consular Agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested." There have been two or three complaints from Italy that the United States has not complied with the terms of this Article.¹ The neglect in this case is perhaps due, to some degree at least, to a lack of appreciation of the relative powers of state and nation, and to the neglect on the part of local officers.

§ 216. **Vital statistics.** Because vital statistics are closely associated with the police power of public health, and because this power is chiefly reposed in the individual states, according to former interpretations, laws pertaining to the registration of births and deaths have been passed only by state authority. (Chap. XIII.) Though their importance is very generally admitted, for various reasons many states have either failed to act at all, or they have enacted statutes which are faulty in form, or statutes which have been ineffectively enforced. Though, (I believe that) in the specific cases to which attention has been called by Italy of failure to report deaths, the failure was not dependant upon a lack of official registration of the death, it is manifest that such deaths as are covered by this convention might very easily escape notice of American governmental officers if bodies be permitted to be buried without public record of the same. In

¹ Correspondence to Department of State from Italian Ambassador, April 24, 1907, February 4, 1909, and October 25, 1909.

other words, no American official could be reasonably charged with reporting deaths of such Italians to Italian consuls, unless by a strict enforcement of the registration of such deaths the officer be enabled to learn of the same. To a degree, therefore, the enforcement of the provisions of this treaty depend upon such state statutes as are generally classed as public health measures. It is not impossible that the former construction may be in error, and that the collecting of original entries of births and deaths may be properly within the province of the national government. In its present form this treaty invades the province of public health, other treaties may involve the operations of public health agencies in other ways. It is therefore proper to consider this function of the federal government.

§ 217. Treaty making power resides in nation. As we have said, according to the federal Constitution, the power to make treaties is given to the President, with the consent of the senate.² The Constitution further prohibits the individual states from entering into any treaty, alliance, or confederation.³ In this regard we differ from some other nations. Although the Brazilian Constitution gives to the national government authority to make treaties, the state of São Paulo entered into certain foreign relationships to protect its interest in the coffee trade. In Switzerland, "Within the domain of international relations, the cantons retain the right to conclude treaties with foreign powers respecting border and police regulations and the administration of public property."⁴ In the Ger-

² Art. II, Sec. 2, Par. 2.

³ Art. I, Sec. 10, Par. 1.

⁴ Ogg, Governments of Europe, p. 414.

man Empire also, the individual states may make treaties, though such treaties become operative relative to certain specified matters only after they have been approved by the federal council.⁵ In making comparisons with administration in other lands it must be remembered that there may be authority of legislation, without an independent executive machine sufficient to give full force to the laws enacted. In the United States we have executive officers, and also courts, in every part of the land, and with authority limited practically to national business. In Switzerland, on the other hand, the executive machinery of the federation is meagre;⁶ and as in Germany, the execution of national laws is left to the officers of the individual states.⁷

Our national Constitution provides⁸ "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which 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 wording of this section seems to be sufficiently clear. No state enactment can stand against the expressed terms of a treaty, and it has even been held that a treaty may supersede a prior act of Congress.⁹ If, therefore, a treaty involves the use of the powers of health protection in any form or degree, that power then resides in the national government.

⁵ Constitution, IV, Art. 11, and II, Art. 4.

⁶ Ogg, *Op. Cit.*, p. 415.

⁷ Ogg, *Op. Cit.*, p. 206.

⁸ Article VI, Section 2.

⁹ Foster v. Neilson, 2 Pet. 314.

§ 218. **Treaties classified.** Treaties are practically contracts, and like ordinary contracts between individuals they may be divided into two classes—executed and executory. An executed treaty is one in which the transaction is finished by that document, as in the transfer of sovereignty over a district from one nation to another. Such a treaty “differs in nothing from a grant.”¹⁰ By the treaty with England in 1794 certain property rights of Americans in England, and of English in America, were recognized. In both countries it was held that the war of 1812 did not abrogate those rights.¹¹ It was found under the old federation that the different states regarded treaties as only general moral restraints, and they did frequently disregard treaty provisions. Congress in vain sent a circular letter (April 13, 1787), to the states, though right was with Congress.¹² Consequently, when the Constitution was drafted this authority of Treaties was stated very emphatically, “anything in the constitution or laws of any state to the contrary notwithstanding.”

Some treaties, being in the nature of a lasting contract, are complete in themselves, and provide for their own execution. They do not require legislative action to make them active. Others are practically agreements between the powers to do certain things. To be of force the powers must pass certain enactments. Such a treaty is that between this country and Italy, before mentioned. It is particularly such treaties as are liable to be of interest to workers for the preservation of the public health. Article XVI of the

¹⁰ *Fletcher v. Peck*, 6 Cranch. 136.

¹¹ *Sutton v. Sutton*, 1 Russell & Mylne, 663, and *Society for Propa-*

gating the Gospel v. New Haven, 8 Wheat. 464.

¹² *Opinion of Iredell, J.*, in *Ware v. Hylton*, 3 Dall. 270.

convention of 1878 necessitates certain definite action from Congress, and Congress has been negligent. It has failed to specify who shall be deemed "competent local officers"; it has not assigned the duty of making these reports to consular agents; it has provided no penalty for failure to observe these requirements. It has provided no means by which the "competent local officers" may become cognizant of the deaths of Italians. This last item practically raises the question whether the national government has the power to establish a registration of deaths.

§ 219. Legislative power originating in treaty making authority. The power to do a certain governmental act, especially if that power be exclusive, presupposes a full authority to complete the transaction. The individual states are not subject to any compulsion from the national government. The authority to compel certain acts from the states would presuppose an authority over the subject matter itself. But we are not left to these general reasonings. The Constitution is explicit in the settlement of the question. Article 1, Sec. 8, Paragraph 18, grants to Congress power and authority "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or any department or officer thereof." Many treaties cannot become law until there shall have been legislation to give the treaty effect.¹³

§ 220. Subjects of treaty. Whereas, in some countries the treaty making power is divided, by our Con-

¹³ *In re Metzger*, 1 Parker, Cr. R. (N. Y.) 108.

stitution the treaty making power is solely in the hands of national officers. The Constitution puts no limitation thereon. This does not mean that the power is absolutely without limit. By the principles of international law a treaty which binds one of the parties to do acts which are unlawful is void; such as contradicting a prior treaty with another power, or to do acts of injustice as to put down liberty, or to conquer and appropriate an independent country.¹⁴ A treaty must not conflict with the Constitution. It has been claimed by some that the President and Senate may not negotiate a treaty upon a subject over which, either expressly, or by implication, the Constitution gives jurisdiction to some other body. First, there are treaties which require action by Congress. Because the House of Representatives is a portion of Congress, and because it has no part in the treaty making power, it was contended that a treaty might not be made which required such legislation; but, as Mr. Jefferson¹⁵ says of the thirty-one articles in the commercial treaty with France, if we were to admit of such limitation, it would be found that not more than small portions of two or three articles would remain as subjects for treaty. Mr. Washington, when President, called attention to the fact that the treaty making power did not include the House of Representatives, in a refusal to send certain papers to Congress. It is now well recognized that questions relative to commerce are among the most important of our international problems which must be met by treaty; and that the treaties

¹⁴ Woolsey, *International Law*, 105; Taylor, *International Public Law*, 361.

¹⁵ *Man. of Parl. Prac.* (1843)

111.

so made are binding upon Congress as the supreme law of the land. Congress has never failed to appropriate money, when demanded by the terms of a treaty. In such cases, therefore, it must be recognized that the apparent limitation of the Constitution is not a restriction upon the treaty making power.

Again: when Mr. Livingston was Secretary of State, he called attention (to Mr. de Sacken, June 13, 1831), to the fact that the right of regulating successions was among the powers reserved to the states, and therefore not within treaty making power. In 1874, Mr. Fish, Secretary of State, wrote to Aristarchi Bey (May 19) "The estates of decedents are administered upon and settled in the United States under the law of the state of which decedent was a resident at the time of his death, and on this account, in the absence of any treaty on the subject, interference in the disposition of such measures as may be prescribed by the laws of the particular state in such cases is not within the province of the federal authorities." Note that he says, "in the absence of any treaty." "Treaty stipulations may restrict or abolish the disability of aliens as to property in the several states."¹⁶ We are not dependent upon mere opinions of executive officers. Cases have been repeatedly before the courts. Thus it was held in *Chirac v. Chirac*¹⁷ that by the convention with France in 1800 aliens might inherit lands without being naturalized, and the treaty was held to dispense with limitations in a state statute on alien inheritance. "A treaty giving the subjects of a foreign state (Switzerland) the privilege of holding real estate in the United States is the supreme law of the land."¹⁸

¹⁶ 8 Op. 411, Cushing, 1857.

¹⁷ 2 Wheat. 259.

¹⁸ Wharton, *International Law Digest*, 138, citing *Hauenstein v.*

It is a duty of every sovereign state to protect the lives and property interests of its citizens, both at home and abroad. To deny the power, would be to deny sovereignty. The individual states have no treaty making power. By exclusion, therefore, as a governmental proposition, we must conclude that even though it invade the ordinary rights of the states, the nation has authority to make a treaty which may be deemed necessary for such protection of the lives and property of American citizens.

§ 221. Legislation dependent upon treaty making power. Since many treaties require legislation, and because such treaties are lawfully within the power of the President to make, it naturally follows that the nation has the power and authority to pass such legislation as may be required to make the treaty effective. If, then, it can be shown that in order to give full effect to the treaty with Italy, as above mentioned, it is necessary to enact a law requiring the reporting and recording of every death, it follows that the national government has that power. Treaties relative to alien inheritance may require the recording of births also, for residents of the United States have lost foreign inheritances through inability to comply with the requirement of certain lands, which demand that as proof of heirship a copy of birth record must be supplied.

Concerning this legislative power of the nation which depends upon the treaty making power, Pomeroy says:¹⁹ "There is, as I believe, a mine of power which

Lynham, 100 U. S. 483; affirming
Chirac v. Chirac, 2 Wheat. 259;
Carneal v. Banks, 10 Wheat. 181;

Frederickson v. Louisiana, 23 How.
445.

¹⁹ Constitutional Law, § 679.

has been almost unworked, a mine rich in beneficent and most efficacious results. The President may, and must, manage the foreign relations; he may, in the manner prescribed, enter into treaties. To these executive attributes must be added the legislative authority to pass all laws which may be necessary and proper to aid the President in exercising these functions. From this combination there result particular powers in the national government commensurate with the needs of every possible related occasion. We have been too much accustomed to look at the particular grants contained in the Constitution, in order to ascertain what the government may do. But here is a most ample and comprehensive grant. The government not only may, but must, preserve its foreign relations; it not only may, but must, use all such means as shall prevent just causes of war against us by foreign powers. Its international relations are unlimited in number and extent; they affect to a greater or less degree the internal and domestic relations; many of the measures which are necessary to preserve and control them, must act entirely within the national territory, and directly upon private persons or rights. So far as those external relations affect the internal, and so far as the measures appropriate in exercising the function of controlling the external relations act within the interior, and upon private persons and rights, just so far has the government all the power under the Constitution which the exigencies of any occasion may demand. Where the act is legislative in its nature, the Congress may legislate; where the act is executive in its nature, the President may execute." And again Pomeroy says:²⁰ "The states have no international

²⁰ *Op. cit.*, 680.

status; but they may, through their governments, do such acts as endanger the foreign relations of the nation: for these acts the government is responsible to the foreign power, and cannot evade the responsibility by asserting its want of control over the state. As the responsibility rests upon it, the power must belong to it. * * * I repeat, that in this executive attribute, and in the capacity of Congress to pass laws in aid thereof, there is a source of power which has, as yet, been little resorted to, which has even been little thought of, but which is fruitful in most important and salutary results." The treaty making power seems therefore to cover the enactment of a national vital statistics law, and perhaps other matters pertaining to public health.

§ 222. **Qualifications for federal officers.** Article I, Section 2, Paragraph 2, of the Constitution provides that "No person shall be a representative who shall not have attained to the age of twenty-five years." Similarly in the same Article, Section 3, and Paragraph 3, it provides "No person shall be a senator who shall not have attained the age of thirty years." In like manner Article II, Section I, Paragraph 5, in speaking of the Presidency, says: "Neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years," and the third paragraph of the Twelfth Amendment stipulates that "No person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States." It would seem that under these provisions Congress would have authority to enact a statute requiring the filing of certificates of birth, as an evidence of age. If so, it would seem to have the further

authority to provide for suitable registrations of birth. Especially in cases of the presidency and vice presidency, such provisions as to birth certificate would be particularly warranted because in Article II, Section 1, Paragraph 5, it is demanded that the President must be a natural-born citizen, and the Twelfth Amendment extends this requirement to the vice president.

§ 223. Qualifications for citizenship. The first clause of the second section of Article IV of the Constitution reads: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Citizenship is defined in the first section of the Fourteenth Amendment as follows: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"; and the last paragraph of this amendment gives to Congress "power to enforce by appropriate legislation the provisions of this article." Do not these provisions also grant to Congress the authority to enact a statute requiring the registration of births in order that citizenship may be thus more definitely proven?

§ 224. Vital statistics as evidence. Although registration of births and deaths is commonly regarded as a portion of the work of health departments, it must be recognized that by far the most important use of such records is essentially commercial. They are needed in proof of heirship; in proof of title to property; in proof of age, as for admission to school, to work, right to practice medicine or other professions,

the right to be married, etc.; in criminal trials; to prevent fraud in life insurance; proof of legitimacy, etc. Since persons living in one state may inherit property in others, and since the transfer of property is essentially in the nature of a commercial transaction, it would seem that the clause in the Constitution which gives to the nation control over interstate and foreign commerce might also have a bearing upon the power of the nation to enact a national vital statistics law.

Article IV of the Constitution says: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof." This again seems to give to the federal government authority to enact a vital statistics law.

§ 225. **Census.** Article I, Section 3, of the Constitution provides for the taking of a national census. "The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct." This clause gives the outside limits as to period of time from one census to the next. It does not say that the nation may not take a continual census. In point of fact, under that clause it has been customary for the nation to collect, year by year, such reports of births and deaths as seem to the officers of the Bureau of Census reliable. The Bureau has also collected in the general census data relative to various public health problems, such as blindness, deafness, mental disease, and the like. If the nation has any power to

collect such data it must have the authority to do so completely. It would seem, therefore, that under the census clause the nation has authority to require the regular reports of births and deaths, and the recording of the same, and also an act requiring the reports of morbidity and accidents.

At first the national census was taken once in ten years by a service organized for that particular census. This method was not found to be efficient, and as early as 1845 the then Secretary of the Treasury, Bibb, urged upon Congress the formation of a permanent Bureau, in order to avoid a recurrence of errors.²¹ But it is not only to prevent errors that a permanent organization is desirable. As was pointed out in an article by Prof. Wilcox,²² a highly organized government should provide for the continuous registration of social phenomena, as well as for the periodical census of social conditions. He further set forth that the establishment of a permanent statistical office at Washington, with a continuous co-operation with state and municipal governments, was an essential. Such a permanent office was established, and it is now a vast statistical laboratory. If there be authority for the national government to maintain such a permanent laboratory, it would seem that it contemplated real efficiency to make the work as perfect as possible. For such perfection it is essential that every possible check and counter check be used. To make the data as perfect as possible, therefore, and sufficiently up to date to be of greatest use, it is necessary that there be a prompt reporting of all births and deaths.

²¹ Compendium of the Seventh Census, p. 18.

²² Quarterly Journal of Economics, Aug. 1900.

§ 226. Authority to require reports, not authority for prevention. It must be remembered that power to require reports of morbidity and accidents does not empower the nation to take steps to prevent such conditions. If the nation has such power of prevention this must be found in some other grant of the Constitution. The power of prevention of evil or injury is essentially police; and because the police power is ordinarily reserved to the individual states, the steps to be taken to prevent the disease or accident must remain in the states. It is true that in some cases the nation has even this power and authority for prevention, but it is found independently of authority to require reports. Thus, under the commerce clause, it has been possible to stop the shipment of milk containing bacteria from one state to another. Safety appliances have been required on railroads doing an interstate business. This does not indicate that the nation has the authority to prevent the shipment of infected milk from one place to another within the state, nor that it may require safety appliances in factories located within individual states. While this last power might possibly be found, it must be found in other clauses of the constitution, and neither from such as would require reports, nor such as refer to commerce. Legally speaking, authority for acts very similar, or most intimately connected, may be widely separated.

§ 227. Vital statistics not essentially health measures. A record of a birth or of a death is not essentially a health measure. The mere report does little towards enabling a health official to prevent future sickness and future deaths. It is true that sometimes a death report discloses the existence of an infectious

disease; but that particular case has ceased to exist before the death report has been filed. The death report therefore does not enable the health officer to do anything to mitigate that case, nor does it ordinarily give him aid in discovering other possible cases. Taken together the records of deaths are valuable aids in the study of diseases in a community, and birth reports taken with death records are important guides. Individually considered, the value of a record of a birth, or of a death, is almost absolutely limited to its use as evidence. It seems an error, therefore, to seek authority for requiring such reports in the police power, the essence of which is the prevention of evils. There seems to be full authority in several clauses of the federal Constitution for the enactment of a national law requiring the recording of births and deaths which occur within the borders of this country. Although the power may rest with the nation, as a problem of expediency, or advisability, it may not seem as yet to be advisable; but inasmuch as a uniform system is greatly to be desired, and because the individual state governments have frequently shown a local influence antagonistic to the most perfect system, and further, because the value of collected statistics increases in proportion to their amplitude, other things being equal, it appears that for greatest value the Congress should enact such statutes as may be necessary. Again on the ground of expediency it might be best that in states having an efficient registration the business be conducted in a sort of partnership. Individual states may need some special information, or need it immediately, for certain administrative state business. The partnership arrangement would thus

prevent duplication of work. On the other hand, in states which have neglected to enact, or enforce, efficient state statutes relative to the registration of births and deaths, the federal law should be enforced by federal officials, ignoring local governments.

§ 228. **Specified and implied powers.** It is true that we do not find it written in the Constitution that Congress "shall have power to enact laws requiring the reporting of all births and deaths." "The Constitution unavoidably deals in general language. It did not suit the purpose of the people in framing this great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution."²³

As Chief Justice Marshall put it: "America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete; for all these objects it is supreme. It can then, in effecting these objects, legitimately control all individuals or governments within the American territory."²⁴

A careful study of the Constitution reveals the fact that those powers are reserved to the individual states which operate and affect only within the state limits. They are strictly matters of private interest to the state. Those affairs which, though occurring within one state, affect also the residents of other states, are matters of national concern. Authority over such must, if the United States be a nation, remain either

²³ *Martin v. Hunter*, 1 Wheat. 326; also *McCulloch v. Maryland*, 4 Wheat. 316; *Cohens v. Bank of Virginia*, 6 Wheat. 414; *Legal Tender Cases*, 12 Wall. 457.

²⁴ *Cohens v. Bank of Virginia*, 6 Wheat. 414.

supremely, or exclusively, with the national government. Executive authority over a subject implies an equal degree of legislative power, and both imply judicial power. The three branches of government are equal in dignity, and complete of each other. With the development of interstate and international relationships, the importance of the United States as a nation must increase; and because of that fact, authority and power which before lay dormant must be exercised. In the earlier years even under the Constitution there would be relatively very few occasions for protecting the persons and property of Americans in foreign lands. Today the United States is a recognized world power. Our islands get the first rays of the rising sun, and other of our lands watch his setting. There is no part of the world in which we are not to some degree interested. A nation is not the result of an enactment. The enactment of a constitution is the result of the development of a nation. Neither is a nation the product of a moment; it is rather the ripening product of growth. Its existence as a nation presupposes power and authority commensurate with its needs. When its infant clothing restricts too much its growth, the clothing must be changed; but apparently the Constitution which was so wisely framed by our fathers provides for all the power and authority which we may require for some time in the future. Custom may be a chain to retard progress. The fact that a power has not been used does not argue that the power has not existed, but that necessity for its use has not been sufficiently strong to require it. Today we are a nation as never before. As a nation we have need of powers which before were possibly of doubtful

value. Those were chiefly implied powers. Other powers were distinctly specified in the Constitution. Since the demand for a federal Constitution arose largely from commercial circles, and on account of complications referable to commercial transactions, it was very natural that commercial powers should receive especial attention; and among the public health functions of the federal government there are probably none of greater importance than those which pertain to commerce. Aside from the matters pertaining to interstate and international trade, specific power is given over territories, and over lands owned by the federal government.

§ 229. Powers of the nation—Territories. Article IV, Section 3, Paragraph 2, of the federal Constitution provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

The first portion of this paragraph seems to give to Congress all needed authority for the administration of the government of such territories and colonies as may from time to time come under our control. Moreover, the very right of ownership in such territorial lands presupposes also the power and duty to govern them in accordance with the spirit of our government. In the *American Insurance Company v. Canter*,²⁵ Chief Justice Marshall says: "Perhaps the power of governing the territory belonging to the United States, which has not by becoming a state acquired the means

²⁵ 1 Peters, 511, 542.

of self government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory." Mr. Justice Marshall further says in this case: "In legislating for them (i. e., the territories), Congress exercises the combined powers of the general and of a state government."

Without specially prolonging the general consideration of this subject we may quote the following summary:²⁶ "That Congress possesses the power to legislate for the territories; that this power is exclusive; that it may be exercised directly, or delegated to local governments set up by Congress and retained under its supervision, are propositions of constitutional construction settled by the uniform practice of the government and by the unvarying decisions of the Supreme Court. The contrary dogma, that the inhabitants of a territory have the entire control of their own local concerns, and may form their governments independently of the national legislature, never rose above the level of a mere party cry; it never obtained the assent of any department of government, and has been distinctly repudiated by the Supreme Court."

The right to make laws implies the right to enforce them. This right of legislation therefore carries with it executive and judicial authority also. Since "Congress exercises the combined powers of the general and of a state government," and as the public health administration is ordinarily in the hands of the state,

²⁶ Pomeroy, Constitutional Law,
Sec. 494.

it follows that the nation has supreme authority over the matters pertaining to the health of the territories. Moreover, it must be remembered that police power is inherent in government; it cannot be alienated. To deny the right of police control over the territories is therefore to deny the right of government.

On the other hand, anything which it may be necessary to do on the part of the inhabitants of those lands for the protection of life and health would be deemed lawfully done, under the general rules of interpretation, provided that it be done in accord with the spirit of our institutions. It must not be so done as to conflict with enacted statutes. It must be remembered that the relationship of territories to the nation are much the same as those which exist between counties and cities to state governments. The only power as to legislating, and in the executive administration, residing in the territories are such as are distinctly given by Congressional action. It has been the policy of the government to leave the exercise of police power in the organized territories almost exclusively in the hands of the territorial government.

§ 230. Powers of nation over public places. By Article 1, Section 8, and Paragraph 17, of the federal Constitution, Congress is given the authority "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

The provisions of this paragraph are very broad. At the time that the Constitution was adopted it might not have been appreciated how broad it really was. It covers not only the class of buildings named, which related almost exclusively to the support of the army and navy, but also to postoffices, hospitals, turning basins in harbors, needful shore defenses, and dams. The consent of the legislature of the state may be specific, for a certain tract of ground mentioned, or general. Thus, the Revised Statutes of Illinois contain nine specific cessions, and one general. This cession of governmental authority absolutely ousts police power²⁷ of the state over the grounds thus ceded, though the state may reserve the authority to serve and execute civil or criminal processes within the prescribed territory.²⁸ Lands thus ceded are free from the imposition of state or municipal taxes and assessments.

In *Loughborough v. Blake*,²⁹ it was contended that Congress was in effect two bodies, one having the general powers of the national legislature, and the other practically taking the place of the state legislature in enacting laws for the territories. It was therefore claimed that a general tax assessed upon the states and District of Columbia was not proper; that though Congress had the power to levy taxes upon the District of Columbia, those taxes should be for District purposes only. The court did not directly answer this contention, but it clearly affirmed that the power of legislation also included the power of taxing.

As a general proposition it may be stated that every

²⁷ Freund, *Police Power*, 67.

²⁹ 5 Wheaton, 317.

²⁸ Revised Statutes of Illinois, Chap. 143, Sec. 29.

power which the national government has over the individual states, it also has over the territories, colonial possessions, District of Columbia, and such grounds and property as it may have purchased for public uses. The converse is not true. Congress has powers over territories and public places which it may not use in individual states. Under police power a law prohibiting mixed marriages within the District of Columbia would probably be declared binding, but a similar law enacted for the nation would be unconstitutional.

Ordinarily, with the recession of a tract of land the state again acquires police jurisdiction. This is not always true, as is shown in the case of *Ohio v. Thomas*.³⁰ April 3, 1867, Ohio ceded to the United States a certain tract of ground for a National Asylum for disabled volunteer soldiers. The management of the asylum was in the care of a Board of Managers incorporated by action of Congress for that purpose. January 21, 1871, Congress ceded this ground back to the state, but the act contained the following clause: "Provided, that nothing contained in this act shall be construed to impair the powers heretofore conferred upon the Board of Managers of the National Asylum for Disabled Volunteer Soldiers, incorporated under said act, in and over said territory." The Governor of the Asylum was arrested by an officer of the state for violation of the state oleomargarine law. After trial and conviction before a justice court the governor of the home was fined \$50.00. and sentenced to imprisonment until the fine should be paid. He was released on a writ of *habeas corpus* from the U. S. Dis-

³⁰ 173 U. S. 276.

strict Court. The state appealed, and the case ultimately reached the Supreme Court, which upheld the act of the lower federal court. The effect of this decision is practically that, though for most purposes the state had reacquired full authority in the premises, it could not use its power of police to interfere with any of the operations of the management of the home which were within the authority given by Congress. In the reasoning of the court more stress was laid upon the personal factor—upon the fact that the governor of the home was acting practically as an officer of the government and in the line of duty, because the case was really one of *habeas corpus*, and the relative powers of nation and state in matters of sanitation were not exhaustively discussed.

§ 231. Powers of the nation, among states. Granting that the basis of governmental action for the preservation of health is found in police power, and that this power is reserved to the individual states, does it follow that the national government has neither duties, authority, nor power to safeguard the lives of the citizens who chance to reside in organized states? It is evident that such possibilities as are at present offered to the federal government must be indirect, rather than direct. Chief of these indirect powers for the preservation of public health is that found in Section 8, of the first Article of the Constitution, which gives to Congress the power: “3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

§ 232. Regulation of commerce. We are told by Mr. Justice Marvin³¹ that “A leading object of the Con-

³¹ Metropolitan Bank v. Van Fyck, 13 Smith (N. Y.) 508.

stitution was to get rid of all conflicting commercial interests, and, as to commerce, to effect a union of all the people, of all the states, great and small, and make them one people, one nation, without divided interests, and without the power, as states, to produce divided interests or conflicts."³² Before the Constitution was adopted, each individual state placed such restrictions, as it thought wise, upon commerce. This made the transaction of business unnecessarily expensive. The protection and fostering of business relationships is one of the important functions of government. Though essentially the regulation of business is a portion of police, in American law it is not so included, for the reason that the regulation of commerce was distinctly named as one of the functions of Congress. Of necessity, due to the exigencies of the case, therefore, Congress was given the power to regulate commerce.

§ 233. Commerce includes what? By the interpretations of the Supreme Court the word commerce, as intended in the Constitution, is very broad. It includes the means used for the conduct of trade with foreign nations, and between the states, and the subjects of that trade. The means used include the supervision of navigation and railroads. Congress thus takes control over navigable waters which may be used in interstate traffic, and over the construction and operation of railroads. It may legislate as to the composition of the substances forming a portion of interstate traffic. Persons as well as merchandise are included under the term commerce.³³ "Congress has not only the right

³² See also Prentice and Egan, Commerce Clause, Federal Constitution, p. 1.

³³ Passenger Cases, 7 Howard, 283.

to pass laws regulating legitimate commerce among the states and with foreign nations, but also has full power to bar from the channels of such commerce illicit and harmful articles.”^{33a} “Disease, pestilence, and pauperism are not subjects of commerce, although among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them.”³⁴ The national government has therefore used its inherent police power to prevent, by means of quarantine, the importation of disease from foreign lands. This in no way interferes with the police power of the individual states. It is the duty of the state, under its police power, to protect the health and lives of its citizens. National quarantine therefore simply assists the state in this protection.

§ 234. Pure foods and drugs. Through its power to regulate commerce between the states Congress has seen fit to pass statutes determining standards of purity for foods and drugs, and to prohibit the sale of goods not properly labeled, or not coming up to the standard adopted. (Chap. XVII.) This power of Congress is clearly limited to goods forming a part of interstate traffic. It may not determine for any state what shall be the standard of purity used for goods manufactured and sold within that state, but no state may fix a standard which shall prevent the sale, in the original package, of goods forming a portion of interstate traffic.

Since the national control over the subject of purity

^{33a} *McDermott v. Wisconsin*, 228 U. S. 115.

Mass.; *Fletcher v. Rhode Island*; *Peirce v. New Hampshire*, 5 How-

³⁴ *License Cases, Thurlow v. Ward*, 504.

of food and drugs is commercial in nature, it follows that laws passed for that purpose must be considered on a commercial basis. The fact that such a law may protect health of citizens is incidental. The Act of June 30, 1906, which went into effect January 1, 1907, was the first enactment by the national government to fix a standard of purity. The conditions under which drugs and foods were to be considered impure, adulterated, or misbranded for the purposes of the act are there stated very definitely, and the constitutionality of the act has been repeatedly upheld. In Section 7, the fifth provision relative to adulteration in the case of food says:

“If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: provided, that when in the preparation of food products for shipment they are preserved by any external application applied in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption.”

It will be noticed that there is a possible question as to when a food product may contain a poisonous ingredient. Benzoate of soda has been used as a preservative. In large quantities it is harmful; in small quantities it may not be harmful. The determination as to this harmfulness is primarily executive by the terms of the act, and in the Bureau of Chemistry in the Department of Agriculture. If it shall appear that the terms of the act have been violated the Secretary

of Agriculture must give to the party from whom the sample was obtained, notice and opportunity to be heard. If then it shall appear that the terms of the act have been violated the case is to be certified to the District Attorney for prosecution. The harmfulness of the ingredient is then a question of fact, to be proven before the court. The decision does not rest with the Secretary of Agriculture. Much less does it rest with the Bureau of Chemistry. It is a question of fact, and not of opinion. Moreover, it is a question of fact to be determined specifically for each article, and although one decision may serve as a precedent and guide for similar future cases, one case may not definitely fix the law, as would a decision involving the interpretation of an act. Another case, exactly similar, but in the light of further evidence, may be determined quite the reverse.

Section 8 of the act further provides that an article may be deemed misbranded, if the package or label shall bear any statement regarding the ingredients or substances "which shall be false or misleading in any particular." This is another question of fact, and not of opinion. It is to be determined by the court. One Johnson shipped packages of medicine from Missouri to Washington, and the packages bore labels that stated or implied that the contents were effective in curing cancer. On the ground that such representations were false, prosecution was begun, but on motion of the defendant the District Judge quashed the indictment.³⁵ A writ of error brought the case to the Supreme Court,³⁶ and Mr. Justice Holmes gave the

³⁵ U. S. v. Johnson, 177 Fed. Rep. 313.

³⁶ U. S. v. Johnson, 221 U. S. 488.

opinion of the court, to the effect that though such a statement was misleading, it was not clearly misleading in the sense intended in the act. "It was much more likely to regulate commerce in food and drugs with reference to plain matter of fact, so that food and drugs should be what they professed to be, when the kind was stated, than to distort the uses of its constitutional power to establishing criteria in regions where opinions are far apart. As we have said above, the reference of the question to the Bureau of Chemistry for determination confirms what would have been our expectation, and what is our understanding of the words immediately in point." Mr. Justice Hughes (Justices Harlan and Day, concurring) gave the dissenting opinion, holding that the terms of the act did cover such misrepresentation as in this case. He said:

"Granting the wide domain of opinion, and allowing the widest range to the conflict of medical views, there still remains a field in which statements as to curative properties are downright falsehoods and in no sense expressions of judgment. This field I believe this statute covers. * * * The question then is whether, if an article is shipped in interstate commerce, bearing on its label a representation that it is a cure for a given disease, when on a showing of the facts there would be a unanimous agreement that it was absolutely worthless and an out and out cheat, the act of Congress can be said to apply to it. To my mind the answer appears clear. * * *

"Nor does it seem to me that any serious question arises in this case as to the power of Congress. I take it to be conceded that misbranding may cover statements as to strength, quality, and purity. But so long

as the statement is not as to matter of opinion, but consists of a false representation of fact—in labeling the article as a cure when it is nothing of the sort from any point of view, but wholly worthless—there would appear to be no basis for a constitutional distinction. It is none the less descriptive—and falsely descriptive—of the article. Why should not worthless stuff, purveyed under false labels as cures, be made contraband of interstate commerce, as well as lottery tickets?³⁷ I entirely agree that in any case brought under the act for misbranding,—by a false or misleading statement as to curative properties of an article—it would be the duty of the court to direct an acquittal when it appeared that the statement concerned a matter of opinion. Conviction would stand only where it had been shown that, apart from any question of opinion, the so-called remedy was absolutely worthless and hence the label demonstrably false; but in such case it seems to me to be fully authorized by the statute.”

It will be noticed that the only difference of view between the opinion of the majority and minority of the Court was whether or not the curative effect were a matter of opinion. Mr. Justice Holmes in his opinion stated clearly: “It is a postulate, as the case comes before us, that in a certain sense the statement on the label was false, or, at least, misleading.” The indictments affirmed “when in truth and fact said article is wholly worthless and ineffective in bringing about the cure of cancer, as he, the said O. A. Johnson, then and there well knew.” It does not appear that the said Johnson, in his motion to quash, or otherwise, in any

³⁷ *Champion v. Ames*, 188 U. S.

way denied this allegation in the indictments. It was in the opinion of Mr. Phillips, District Judge, that we find the statement as to curative effect designated as a matter of opinion. Why, under the circumstances, it was so designated by Mr. Justice Holmes, therefore, does not appear.

The Court was in agreement as to the fact that the act was intended to protect the citizens in the genuineness of the article itself, and was not so much concerned with the effect of the article of commerce upon the citizens. It intended that when a citizen of one state purchased an article from a foreign country, or from another state, he might depend upon its being just what he desired. In other words, as the act stands, it is a regulation of commerce, and not an exercise of police power in the American signification and limitation. True, the line between the two is not always clear, but it must be remembered.

§ 235. **Determination by executive.** It will be noticed that the first hearing of cases under the Pure Food Law is before an executive officer. It is not his province to interpret the law. He is not to decide as to the scope of the intent of Congress. He is to determine matters of fact. His determination of matters of fact, by the terms of the law itself, is not final, but it must then be passed to the courts for final settlement. The provision that the case must be submitted to the court is not a matter of inherent necessity. The law might have provided that the determination as to matters of fact by the executive department should be final. "The Land Department of the United States is Administrative in its character, and it has been frequently held by this Court that in the administration

of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final.”³⁸ But, the executive has no unlimited power to pass upon matters of fact. He must find his authority in the statute. The Postmaster General decided after investigation that a certain institution was essentially fraudulent, and denied to the institution the use of the mails. The Court held that he had exceeded his authority, saying: “His right to exclude letters, or to refuse to permit their delivery to persons addressed must depend upon some law of Congress, and if no such law exist, then he cannot exclude or refuse to deliver them.”³⁹

§ 236. Interstate commerce includes persons. As we have previously stated, persons, as well as live stock and ordinary articles of merchandise, are subjects of interstate commerce.⁴⁰ This by no means implies that the persons so included are articles of merchandise. Under this commerce clause, therefore, Congress has full power to regulate the entrance of persons into the country, and their passage from one state to another. Under this clause Congress has legislated to prohibit the entrance of undesirable persons from foreign lands. It excludes paupers, those mentally deficient, and those afflicted with certain diseases. The determination of fact may be made by the executive officers.⁴¹

³⁸ American School of Mag. Healing v. McAnnulty, 187 U. S. 94; citing Burfenning v. Chicago, etc., R. R. Co., 163 U. S. 321; Johnson v. Drew, 171 U. S. 94, 99; Gardner v. Bonestell, 180 U. S. 362.

Healing v. McAnnulty, 187 U. S. 94, 109.

⁴⁰ Passenger Cases, 7 Howard, 283.

⁴¹ Japanese Immigration Case, 189 U. S. 86; U. S. v. Williams, 194 U. S. 279.

³⁹ American School of Magnetic

§ 237. **White slave traffic.** More recently we have the decisions under the Mann Act, designed to stop the transportation of women and girls from one state to another for immoral purposes. One Effie Hoke, aided by Basil Economides, enticed a woman from New Orleans to Beaumont, Texas, and was prosecuted for violation of the act. The defense was purely based upon the exclusive police power of the state, and that the regulation of prostitution was therefore the duty of the state with which the national government had no authority to interfere. The Court said: "The power of Congress under the commerce clause of the Constitution is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons or states is not material to be considered. It is the supreme law of the land, and persons and states are subject to it. Congress is given power 'to regulate commerce with foreign nations and among the several states.' The power is direct; there is no word of limitation in it. Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property; that is, a person may move or be moved in interstate commerce.

"Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people, and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away

from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle and persons, the impurity of food and drugs, the like facility can be taken away from the systematic debauchery of women, and more insistently of girls.”⁴² The law was also sustained in the same sitting of the court in *Athanasia v. United States*,⁴³ *Bennett v. U. S.*,⁴⁴ and *Harris v. U. S.*⁴⁵ In the latter two cases it was held, further, that an error in the name of the person transported, or in the name of the station at which tickets were bought was not sufficient cause for a reversal of decision.

It will be noticed that this act, and the decisions under it, are not interferences with the police power of the states. The states are still free to act. Police power is essentially restrictive in action. Failure to act gives no special rights. A regulation which gives permission is good so far as the limits of the states are concerned, but no further, and practically it is as if no action were taken. It does not prevent the state from future action. Clearly then, the fact that the state has taken no action, or that it has practically declined to act by giving a permission, can in no way be considered as interfering with the operation of Congress in regulating interstate traffic. Neither is this action of Congress an interference with the police power of the state. The state still has full power to put such further restrictions upon the traffic as it may reasonably have done before the act of Congress. “The intent of Congress to supersede the exercise by the states of their police power will not be inferred unless

⁴² *Hoke v. U. S.*, 227 U. S. 308.

⁴⁴ 227 U. S. 333.

⁴³ 227 U. S. 326.

⁴⁵ 227 U. S. 340.

the act of Congress fairly interpreted is in actual conflict with the law of the state.”⁴⁶

Before the passage of the Mann Act immigrant prostitutes were excluded from the country as undesirables. An alien, having married a citizen, thus becoming a citizen herself, entered the country. When it appeared that she had become an inmate of a house of illfame she was ordered deported by the immigration officials. The order of deportation was contested, partly as a violation of “due process of law” in that the investigation was made by an executive officer, and not by a court. The order was sustained, the Court saying that an attack on the hearing must show that the officers hearing them were manifestly unfair.⁴⁷ Apparently, under this decision any alien found in a house of illfame might be deported by executive order, irrespective of the time she had resided in this country, and the fact of marriage with a citizen might be no bar. In a subsequent case⁴⁸ it was held that prostitutes may be deported regardless of the time they are in the country.

§ 238. Meaning of “interstate.” Ordinarily there could be no question as to interstate signification. “Commerce among the states consists of intercourse and traffic between their citizens,” that is, between the citizens of different states. The beginning and the end of the transaction may, however, be within a single state, and yet it may be interstate. Thus, a shipment from Fort Smith, Ark., to Grannis, Ark., via

⁴⁶ *Savage v. Jones*, 225 U. S. 501; also *Standard Stock & Food Co. v. Wright*, 225 U. S. 540.

⁴⁷ *Low Wah Suey v. Backus*, 225 U. S. 460.

⁴⁸ *Bugajewitz v. Adams*, 228 U. S. 585.

Spiro, Indian Territory, was held to be interstate, and therefore within the authority of Congress.⁴⁹ It is true that in certain cases involving the state right to levy tax, or to fix tariff a contrary opinion has been held by state courts. Generally speaking, interstate, or foreign commerce begins when goods have been manufactured and are consigned for shipment to another point, and that shipment will take them outside of the state in which they were before consignment. During that passage the goods are a part of the interstate traffic, and as such they are not subject to state laws in such a manner as to interfere with the passage. The track within a state is reasonably subject to local taxation, and the earning power of the road within the state may properly be considered subject to taxation; but the interstate traffic is not subject to local tax, if in any way such a tax would operate to interfere with the traffic. It is well recognized that a municipality may, if the state laws so permit, require a local license of all who engage in peddling goods, or in taking orders for such goods to be delivered later. In *Caldwell v. North Carolina*,⁵⁰ it was held that when such an agent was soliciting orders for picture frames to be sent from another state the operation of such a license was an interference with interstate traffic, and to that extent it was an unconstitutional invadement of the authority of the nation. A police measure otherwise within the constitutional power of the state will not be held unconstitutional under the commerce clause of the federal Constitution because it inci-

⁴⁹ *Handley v. Kansas City Southern Ry. Co.*, 187 U. S. 617; also *State v. Railroad Co.*, 40 Minn.

267; *Sternberger v. Cape Fear & Y. V. R. R.*, 29 S. C. 510.

⁵⁰ 187 U. S. 622.

dentally and remotely affects interstate commerce.⁵¹ Still, the regulation of the liquor traffic is an example of the use of police power, and it has been repeatedly held that such laws must not operate to stop the delivery of original packages. The leading case in this line was *Brown v. Maryland*.⁵² The state had enacted a statute which required importers of foreign goods to take out a state license. The case was carried to the Supreme Court, and Chief Justice Marshall delivered the opinion of the Court, in which he said: "If this power reaches the interior of a state and may there be exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse, one of the most ordinary ingredients of traffic. It is unconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, therefore, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell." After asking what answer the United States

⁵¹ *Plumley v. Mass.*, 155 U. S. 461; *Silz v. Hesterberg*, 211 U. S. 31.

⁵² 12 *Wheat.* 419.

could give, if after permitting the importation of foreign goods the sale of such goods be hindered, he proceeds to say: "Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of Congress, which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce; since an essential part of the regulation, and the principle object of it, is to prescribe the regular means for accomplishing that introduction and incorporation." This case referred to foreign commerce, but for some time there was a different interpretation of the taxing power upon interstate traffic. In 1868 Mr. Justice Miller delivered the decision in *Woodruff v. Parham*.⁵³ Alabama had imposed a tax upon articles imported from other states and sold in original packages. This law was sustained, Mr. Justice Miller saying that it is obvious that if articles brought from another state are exempt from taxation, the grossest injustice must prevail. "The merchant who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the state nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares, or educate its children." This rule was followed in *Brown v. Houston*.⁵⁴

⁵³ 8 Wall. 123.

⁵⁴ 114 U. S. 622.

In *Robbins v. Taxing District*⁵⁵ the ruling was slightly changed, in that the power of the state to tax imported articles from other states was admitted, so long as there was no discrimination against such goods as interstate merchandise. In *Bowman v. Northwestern R. R. Co.*,⁵⁶ however, the court, by a divided vote returned to the earlier decision of *Brown v. Maryland*, and applied it to interstate traffic. The case involved the right of the railroad company to transport liquor into Iowa, in spite of the state prohibition upon the liquor trade. The Iowa law was clear use of its police power, and it was intended to preserve the health and morals of that community. It was essentially a quarantine law, against an infectious trade. But there is an honest difference of opinion as to whether or not the liquor trade is essentially an evil, so the Court said that whether or not an article is a subject of commerce is to be determined by the usages of the commercial world, rather than by the opinion of individuals, or even the enactment of states, and in a subsequent case,⁵⁷ this right of importation was held to include the right of the importer to sell the imported beer in the original packages. On the other hand, the right of a state to refuse to permit the importation from another state of oleomargarine colored in imitation of butter, was sustained.⁵⁸ It was not denied that the oleomargarine was wholesome and fit for use as food, but it was in the nature of a fraud; it was colored so that its true character was not easily determined by the ordinary customer. Commerce

⁵⁵ 120 U. S. 489.

⁵⁶ 125 U. S. 465.

⁵⁷ *Leisy v. Hardin*, 135 U. S. 100;
see also *Schollenberger v. Penn.*

171 U. S. 1; *Vance v. Vandercook*,
170 U. S. 438.

⁵⁸ *Plumley v. Massachusetts*, 155
U. S. 461.

implies legitimate trade, honest transactions, and though frauds may be perpetrated in the name of commerce they are not legitimate portions thereof. To stop such frauds is not an interference with commerce. The objection was not that the oleomargarine was colored, but that it was colored to imitate butter. Had it been ordered by a state statute that it be colored with a harmless red or blue dye its character as a substitute would have been so apparent that, because of general prejudice, the commerce would have been restricted. Such a restriction, however, would not have been because of the demand of the state law, but because of the natural disinclination of customers to buy the substitute. Such a law would not then be an interference with interstate traffic, even though it might practically stop the same.

We may say, therefore, that interstate commerce begins when legitimate articles of commerce are purchased, or consigned, for shipment into another state, or when persons start on a journey from one state to another. Interstate commerce ends when the persons have reached their destination, or the goods have been either sold in unbroken packages, or the packages have been broken, so that the goods have become so mixed with the merchandise of the state as to be a real part of the general stock.⁵⁹ In a similar manner, persons may be considered as a part of interstate commerce until they become really a portion of the population of the state into which they move.⁶⁰ While a person, or an article of trade, is a part of interstate commerce, he or it is within the jurisdiction of the

⁵⁹ *Low et al. v. Austin*, 80 U. S. 29.

⁶⁰ *Low Wah Suey v. Backus*, 225 U. S. 460.

United States, and not subject to the laws of the individual states, except under certain special cases where as a matter of the necessary use of police power the commerce may be stopped, either temporarily or permanently.

§ 239. What is an original package? The answer to this question is of so great importance, as showing the line of demarcation between the jurisdiction of the state and the nation, that, without any apology therefor, we shall copy the discussion found in Food Inspection Decision 86, from the Department of Agriculture, which is as follows:

Regulation 2 of the Rules and Regulations for the Enforcement of the Food and Drugs Act (Circular No. 21, Office of the Secretary, United States Department of Agriculture) declares:

The term "original unbroken package" as used in this act is the original package, carton, case, can, box, barrel, bottle, phial, or other receptacle put up by the manufacturer, to which the label is attached, or which may be suitable for the attachment of a label, making one complete package of the food or drug article. The original package contemplated includes both the wholesale and the retail package.

This definition of original unbroken package was inserted in the regulations for the purpose of facilitating the administration of the act. It was intended to be, or at all events is, a guide to the inspectors who purchase the samples throughout the United States, as to the nature of an original unbroken package. Upon the basis of this regulation the inspectors have collected a large number of samples, but when an examination of some of the cases has been made, with prosecutions in view, it has been found that no action could be taken because the package bought was not an original package, though apparently so upon a reasonable interpretation of the regulation. Furthermore, the Department is advised that the food commissioners of some of the States, guided by a literal interpretation of the regulation, have refrained from enforcement of their laws upon all packages apparently embraced within its terms.

It is believed that the discussion of the question and the cases cited will prove helpful to those United States attorneys to whom cases are reported for seizure in original packages under section 10 of the food and drugs act.

To prevent the further misconception of the scope of the regulation, and for the information of those concerned, it is the purpose of this

decision to set out the interpretation the Department has made of it, and the authorities therefor.

Construed in the light of judicial determinations of the question, the terms "original unbroken packages" (as set out in the regulation and as used in sections 2 and 10 of the act) and "unbroken packages" (as used in section 3 of the act) will be restricted to such a package containing the food and drug product as has been prepared for shipment or transportation and shipped or transported, as an entirety or unit, from a State, Territory, or the District of Columbia, or a foreign country, into another State, Territory, or the District of Columbia, and delivered to the consignee, remaining his property in the identical form and condition in which it was shipped or transported. After arrival in a State and delivery to the consignee, if any part of the contents of the package be removed, or if the package be opened and commingled with other property, or if the package be *transferred* by the consignee, it is no longer an original package. The retail package is not an original package, unless it bears the characteristics set forth above.

It is not practicable to frame an universally accurate and satisfactory definition of an "original package." No statute has done so, and the Department disclaims any attempt to do so in its construction of the terms. The question must be determined largely upon each case as it arises, with the guidance of the authoritative decisions of the courts, which for the sake of elucidating and explaining the subject are presented in the following pages of this decision.

The food and drugs act of June 30, 1906, entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," provides in sections 2, 3, and 10 as follows:

Sec. 2. * * * Any person * * * who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in *original unbroken packages*, for pay or otherwise, or offer to deliver to any other person, any such article [food or drug] so adulterated or misbranded within the meaning of this Act, * * * shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court. * * *

Sec. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs * * * which shall be offered for sale in *unbroken packages* in any State other than that in which they shall have been respectively manufactured or produced, * * *

Sec. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in *original unbroken packages*, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * *

In the enforcement and administration of these provisions, it is necessary to determine what is an "*original unbroken package*" or an "*unbroken package*." For the purpose of such determination it is not permissible to resort to the common and popular understanding of these words, for the reason that they have received a *special* meaning and import when applied to the law of interstate and foreign commerce through numerous judicial decisions upon the commerce clause of the Constitution and were employed in the food and drugs act in that sense. It will be seen hereafter that these words, when used in their legal signification in connection with interstate or foreign commerce, are of restricted import.

The expression "*original package*" was employed for the first time in the case of *Brown v. Maryland*,⁶¹ decided by the Supreme Court of the United States in 1827. In the larger number of cases subsequent thereto in which the expression is used it will be seen that no modification is made in the term. But in the present act the word "*unbroken*" has been added in sections 2 and 10, and has been substituted for "*original*" in section 3, but without qualifying effect, as the courts have used the words "*unbroken*" and "*original*" as synonymous. It is held, therefore, that their combination or substitution effects no change in significance.⁶²

It is sought in this decision to show *what is an original package*. Possibly it might be logical to proceed to that question at once, but it has been thought advisable, if not necessary, to consider first the extent of the power of Congress over food and drug articles transported into a State from another State or Territory, the District of Columbia, or a foreign country, and there remaining. When this has been considered, it will appear that the control of Congress over food and drugs, so transported, continues, after their arrival in the State, so long as they are in original packages. It will then be shown what is an original package.

In *Brown v. Maryland*, heretofore referred to, it was decided that the law of Maryland imposing a license tax upon all importers of foreign articles, dry goods, and merchandise by bale or package, and upon other persons selling the same, was unconstitutional so far as it undertook to

⁶¹ 25 U. S. 419.

29; *United States v. Fox*, Federal

⁶² *Low et al. v. Austin*, 80 U. S. Cases No. 15155.

require such license tax from an importer of goods from a foreign country for the sale thereof *in the original packages in which they were imported*; that such a tax was an interference with foreign commerce, which, under the Constitution of the United States, was committed to Congress to regulate. The conclusion of the court is contained in the following syllabus:

An act of a state legislature, requiring all importers of foreign goods by the bale or package, etc., and other persons selling the same by wholesale, bale, or package, etc., to take out a license, for which they shall pay \$50.00, and in case of neglect or refusal to take out such license, subjecting them to certain forfeitures and penalties, is repugnant to that provision of the United States which declares that "No state shall, without consent of Congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and to that which declares that Congress shall have power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes."

The goods in this case were imported from a foreign country, but the court said—"It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state." This dictum was afterwards affirmed as law in the case of *Leisy v. Hardin*,⁶³ decided in 1899, which overruled *Peirce v. New Hampshire*,⁶⁴ decided subsequently to *Brown v. Maryland*. In *Peirce v. New Hampshire* it was held that a barrel of gin shipped from Massachusetts to New Hampshire was subject to the law of New Hampshire prohibiting the sale of gin, so as to render the seller amenable to the law for the sale of the barrel in the exact condition in which he received it.

In the case of *Waring v. The Mayor*,⁶⁵ decided in 1868, the Supreme Court held that the sacks of salt brought into Mobile Bay from England and sold to a merchant in Mobile City after arrival of the vessel in the bay, twenty-five miles from the city, and transported by the merchant's lighters to Mobile, were subject to the taxation by the city. The sacks had been sold by the importer after their arrival in Alabama, and hence were merged in the general mass of property in the state and were no longer under the shelter of the commerce clause of the Constitution when taxed by the city of Mobile.

In 1871 the question of taxation of imports from foreign countries in the original packages came again before the Supreme Court in the case of *Low et al v. Austin*,⁶⁶ and it was there held—"Goods imported from a foreign country, upon which the duties and charges at the custom house have been paid, are not subject to state taxation whilst remaining in the original cases, unbroken and unsold, in the hands of the

⁶³ 135 U. S. 100.

⁶⁵ 75 U. S. 110.

⁶⁴ 46 U. S. 504.

⁶⁶ 80 U. S. 29.

importer, whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the citizens of the state, which is subjected to an ad valorem tax." It will be seen that the Court here uses the expression, "original cases, unbroken and unsold."

In *Cook v. Pennsylvania*,⁶⁷ decided in 1878, the same court held a tax imposed by the law of the state upon every auctioneer on the amount of his sales invalid when applied to the sale of imported goods in original packages. It was held that—"The statute of Pennsylvania of May 20, 1853, modified by that of April 9, 1859, requiring every auctioneer to collect and pay into the state treasury a tax on his sales, is, when applied to imported goods in the original packages, by him sold for the importer, in conflict with sections 8 and 10 of article 1 of the Constitution of the United States, and therefore void, as laying a duty on imports and being a regulation of commerce."

In *Schollenberger v. Pennsylvania*⁶⁸ an act of the State of Pennsylvania prohibiting the sale of any oleaginous substance or compound of the same designed to take the place of butter was held unconstitutional so far as attempted to be enforced in the case of a sale of a 40-pound tub of oleomargarine imported from Rhode Island and sold as oleomargarine in the identical condition in which imported. The law of the case is contained in the following syllabus:

Act No. 21 of the legislature of Pennsylvania, enacted May 21, 1885, enacting that "no person, firm, or corporate body shall manufacture out of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation of adulterated butter or cheese, nor shall sell nor offer for sale, or have in his, her, or their possession with intent to sell the same as an article of food," and making such act a misdemeanor, punishable by fine and imprisonment, is invalid to the extent that it prohibits the introduction of oleomargarine from another state, and its sale in the original package.

The right of a State to prohibit the importation of a recognized article of commerce was distinctly denied by the Supreme Court in the case of *Bowman v. Chicago and Northwestern Railway Company*,⁶⁹ decided in 1887. In that case the court declared invalid the statute of Iowa forbidding any railway company from bringing into the State intoxicating liquors unless previously furnished with a certificate from the county auditor that the consignee was authorized to sell them. It was held that—"A State can not, for the purpose of protecting its people against the evils of intemperance, enact laws which regulate

⁶⁷ 97 U. S. 566.

⁶⁹ 125 U. S. 465.

⁶⁸ 171 U. S. 1.

commerce between its people and those of other States of the Union, unless the consent of Congress, express or implied, is first obtained. Section 1553 of the Code of the State of Iowa, as amended by C. 143 of the Acts of the 20th General Assembly in 1886, (forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without being first furnished with a certificate, under the seal of the auditor of the county to which it is to be transported or consigned, certifying that the consignee or person to whom it is to be transported or delivered is authorized to sell intoxicating liquors in the county), although adopted without a purpose of effecting interstate commerce, but as a part of a general system designed to protect the health and morals of the people against the evils resulting from the unrestricted manufacture and sale of intoxicating liquors within the state, is neither an inspection law, nor a quarantine law, but is essentially a regulation of commerce among the states, affecting interstate commerce in an essential and vital part, and, not being sanctioned by the authority, express or implied, of Congress is repugnant to the Constitution of the United States." It will be seen from the above that in this case the question of the right of the importer to sell the article so imported in the original package was not decided.

Two years later the question just stated was squarely presented to the court in the case of *Leisy v. Hardin*,⁷⁰ where it was held that the statute of Iowa prohibiting the sale of intoxicating liquors, except for certain prescribed purposes, was, as applied to the sale by the importer, in original packages or kegs, unbroken and unopened, of liquors manufactured in and brought from another state, unconstitutional and void, as repugnant to the Constitution of the United States, granting to Congress the power to regulate commerce among the states. The law of the case was stated in the following syllabus:

A statute of a state, prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical, or sacramental purposes, and under a license from a county court of the state, is, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void, as repugnant to the clause of the Constitution, granting to Congress the power to regulate commerce with foreign nations and among the several states. *Peiree v. New Hampshire*, 5 How., 504, overruled.

In *Vance v. Vandercook Co.*⁷¹ the court reaffirmed its prior decisions upon the subject. The law of interstate commerce and the relation of the original package thereto, is succinctly stated in the following syllabus to the opinion:

"It is settled by previous adjudications of this court—

(1) * * *

(2) That the right to send liquors from one state into another, and

⁷⁰ 135 U. S. 100.

⁷¹ 170 U. S. 438.

the act of sending the same is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence, that a state law which denies such a right or substantially interferes with or hampers the same is in conflict with the Constitution of the United States.

(3) That the power to ship merchandise from one state into another carries with it as an incident the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution until by a sale in the original package they have been commingled with the general mass of property in the State. * * *

These decisions settled the respective rights of the Federal and State government over goods moving in interstate and foreign commerce. It was determined that a State could not prevent the introduction into its territory of a recognized article of commerce; that it could not prevent the disposition by the importer in the original package of an article of commerce brought into its territory; and that Congress alone could regulate interstate commerce in such goods and the disposition of them in the original package by the importer. This is now the settled law. Hence the food and drugs act asserts the right of the United States to prohibit the sale or disposition of adulterated and misbranded food and drugs imported into a State and remaining in the original package.

The next question to be determined is, At what time in the existence of imports does the power of Congress to regulate their disposition cease? Stated otherwise, When does an original package cease to be such and the regulation of its disposition pass beyond the jurisdiction of the Federal Government?

This question was answered in general terms by the Supreme Court in *Brown v. Maryland*, heretofore mentioned, as follows: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State."

In the case of *Low et al v. Austin*,⁷² decided in 1871, it was held that—"Goods imported do not lose their character as imports, and become incorporated into the mass of property of the State *until they have passed from the control of the importer or been broken up by him from their original cases.*"

Again in *Vance v. Vandercook Co.*, heretofore referred to, it was held that—"Goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, *until by a sale in the original packages they have been commingled with the general mass of property in the State.*"

In the case of *Heyman v. Southern Railway Company*,⁷³ recently decided, it was said—"In the absence of Congressional legislation goods moving in interstate commerce cease to be such commerce *only after delivery and sale in the original package.*"

From these decisions it will be seen that merchandise brought into a State is protected from State interference only so long as it remains in the original package, unbroken, and in the hands of the importer. If the importer sells the article in the identical condition and form in which imported, or if he breaks the package, it is no longer an original package, but has become merged in the mass of property in the State and subject to its laws.

Let these decisions be applied to a hypothetical case under the food and drugs act: A, a wholesale dealer in New York City, ships by express to B, in Hoboken, N. J., a box containing one dozen cans of adulterated condensed milk. B receives them into his store and shortly thereafter sells the box, just as received, to C. B in this example would be liable to the penalties prescribed by the act, because he is the importer and sold the original package. But should C, in due course, sell this identical box to D in Hoboken, he could not be successfully prosecuted under the act because he is not the importer. When the box was sold by B it lost the character of an original package and became merged in the property of the State, and the State only may regulate its disposition by C.

Suppose B, after receipt of the box, opens it and removes a can of the milk, which he sells to C. B is exempt from prosecution under the food and drugs act for the sale of this can or for a subsequent sale of the remaining eleven, even though he sells the eleven in the box. By this act of removing one can he has broken the original package and in consequence destroyed the jurisdiction of the United States over it and over him.

But suppose B simply removes the top of the box to permit inspection, in no way disturbing the contents, replaces the top, and sells box and milk to C. Has B incurred the penalties prescribed by the food and drugs act? Such a question has not been presented to the Supreme Court, but two cases very similar have been decided by the lower Federal courts.

The first case, *United States v. Fox*,⁷⁴ decided in 1869, was a suit by the United States under the internal-revenue act of July 13, 1866,⁷⁵ to recover the penalties therein prescribed for the sale of perfumery without affixing a proper stamp thereon. A proviso in the act prescribed that when imported perfumery was sold in the original and unbroken package in which the bottle or other inclosure was packed by the manufacturer the person so selling should not be liable to the aforesaid penalty.

⁷³ 203 U. S. 270.

⁷⁵ 14 Stat. 144.

⁷⁴ Federal Cases No. 15155.

Fox sold one small wooden box containing twelve 1½-ounce bottles of hair oil and a similar but larger box containing twelve bottles of pomade. He opened both boxes, so that the purchaser might examine the contents. The top of the smaller box was put on again before delivery without change of the contents. In the larger box, containing pomade, Fox, at the request of the purchaser, substituted three smaller bottles taken from the shelf of the store, and nailed up the box.

In respect to the smaller box of oil the court said—"Although the top of this box was taken off by the defendant Fox, it was only for the purpose of enabling the witness Quivey to ascertain the kind and quality of its contents, and before the sale and delivery to him it was put on again, with the contents unchanged in kind or quantity. Under these circumstances the defendant must be considered as selling an unbroken package, the contents of which were not then required to be stamped."

But as to the sale of the box of pomade, the court said: "The package was opened, and three bottles being taken out of it, it was sold with only the remaining nine bottles in it. This was a broken package, and so the court instructed the jury."

The verdict of the jury in favor of the defendant, Fox, was set aside on motion of the United States, upon the ground that the package of pomade was not an original package, the court holding: "Goods are sold 'in the original and unbroken package' within the meaning of the act of July 13, 1866,⁷⁶ although the package is opened for inspection, if closed again before delivery without the contents being changed."

In the other case, *In re McAllister*,⁷⁷ decided in 1892, the facts were these: Two men, emissaries of a butter dealer in Baltimore, went to the store of McAllister, a dealer in oleomargarine, and sought to buy butter. McAllister stated that he had none, but could supply oleomargarine. They requested him to remove the lid from the tub of oleomargarine that they might look at it. He did so, stating that he could not sell less than 10 pounds, as it reached him in the tub from Chicago. They purchased the tub and forthwith informed on him. He was duly tried in the State court and convicted. The State Court of Appeals affirmed the conviction, and McAllister applied to the Circuit Court of the United States for a writ of habeas corpus, on the ground that the sale of the tub of oleomargarine was a sale of an original package and beyond the power of the State to prohibit, which it sought to do in an act of the legislature. The court granted the writ and announced the proposition of law involved, in the following syllabus to the case: "Removing the lid of an original package of oleomargarine, so that a prospective buyer may examine its contents, is not such a breaking of the package as will destroy its original character." In reaching the above conclusion the court said: "It is argued that the taking the lid from the tub containing this oleomargarine was a breaking

of the package so as to destroy its original character. This in no sense did it do. The goods had in no way become commingled with his property or the general property of the State.⁷⁸ Anyone calling for oleomargarine with an honest purpose would have purchased this package as an original one, even if he knew it had had its lid lifted off once to see whether or not it held another substance than it purported to hold. The laws of the United States recognize oleomargarine as a merchantable article. Being such, while a State may perhaps regulate its sale, it can not prohibit its importation. The statute in question does this, and is unconstitutional, and in this respect void. The petitioner is discharged."

Upon the authority of these two cases, and following their reasoning, it must be concluded that B, in the last example, is amenable to the penalties prescribed by the food and drugs act. The first of these cases has another and important significance in connection with this decision, namely, the use of the word "unbroken" as synonymous with "original," thus substantiating the statement in the preliminary part of this discussion that the courts used the words interchangeably.

An example may be profitably introduced at this point to show how far goods moving in interstate commerce may be subjected to seizure under section 10 of the act. A, a wholesale dealer in New York City, ships 50 barrels of flour to B in St. Louis, Mo. This flour may be seized, if adulterated or misbranded, at New York City after delivery to the carrier, or at any point along the route, and may likewise be seized in St. Louis in the hands of the carrier before delivery to B, regardless of the question of whether or not it still remains in original packages, which, in the illustration, are the barrels. After delivery of the flour to B it may still be seized, in his hands, if it remains in the barrels (the original packages) as shipped. But if B, after delivery to him, transfers the flour to 5-pound sacks, or otherwise breaks the barrels and commingles the flour with his stock of goods, the original packages have been destroyed, and it is no longer subject to seizure by the United States; nor are the barrels liable to seizure by the United States after B disposes of them to C in Missouri, even though no alteration is made in their condition.

Having now briefly reviewed the decisions of the Federal courts asserting the power of Congress to regulate the disposition of goods imported into a State from elsewhere, it is necessary to advert to the original question of what is an original package.

The first distinct definition of an original package by the Supreme Court was announced in the case of *Austin v. Tennessee*,⁷⁹ where it was held that: "Original packages are such as are used in *bona fide* transactions carried on between the manufacturer and wholesale dealers residing in different States."

This is hardly an accurate test to determine what is an original pack-

⁷⁸ *Low v. Austin*, 13 Wall. 29.

⁷⁹ 179 U. S. 343.

age in every case, and certainly can not restrict the provisions of sections 2 and 10 of the food and drugs act of 1906 to transactions wholly between the manufacturer and the wholesale dealer. If so, the plain intent of the act could be easily defeated, in the case of sales by importers in original packages. An illustration will forcibly demonstrate the incompleteness of the definition when applied to the food and drugs act.

It will scarcely be gainsaid that a can of tomatoes shipped by a person in no way connected with the manufacture or preparation thereof, from one State to a person in another State in no way engaged in the general sale of such commodities, is a shipment and receipt of an original package, and if the recipient disposes of it in any way, in the form in which it comes to him, he has violated the food and drugs act.

The above language of the court is materially modified by its expressions in *Schollenberger v. Pennsylvania*, heretofore referred to, where it was said: "The right of the importer to sell can not depend upon whether the original package is suitable for retail trade or not. His right to sell is the same whether to consumers or to wholesale dealers in the article, provided he sells them in original packages." A much more satisfactory and exact definition is contained in the decision in *Guckenheimer v. Sellers*,⁸⁰ where it was held that: "An original package within the meaning of the law of interstate commerce, is the package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped."

And when this is followed by the expression of the court in the case *In re Beine*,⁸¹ where it was said: "It is not perceived why, in the absence of a regulation by Congress to the contrary, the importer may not determine for himself the form and size of the packages he puts up for export." It seems there could hardly arise a question in the enforcement of the provisions of the food and drugs act under consideration that could not be tested by the foregoing definitions.

Concrete examples of what have been held to be original packages are found in several of the adjudicated cases:

Peirce v. New Hampshire:⁸² A barrel of gin.

Bowman v. Chicago and Northwestern Railway Company:⁸³ A barrel of beer.

Leisy v. Hardin:⁸⁴ One-fourth barrel of beer; one-eighth barrel of beer; and a sealed case of beer.

Schollenberger v. Pennsylvania:⁸⁵ 10 and 40 pound tubs of oleo-margarine.

Rhodes v. Iowa:⁸⁶ A box of liquors.

May v. New Orleans:⁸⁷ Box, case, or bale in which were inclosed separate bundles and packages of dry goods.

⁸⁰ 81 Fed. 997.

⁸¹ 42 Fed. 545.

⁸² 46 U. S. 504.

⁸³ 125 U. S. 465.

⁸⁴ 135 U. S. 100.

⁸⁵ 171 U. S. 1.

⁸⁶ 170 U. S. 412.

⁸⁷ 178 U. S. 496.

*Austin v. Tennessee:*⁸⁸ A large open basket in which were shipped numerous pasteboard boxes, each containing ten cigarettes.

*Plumley v. Massachusetts:*⁸⁹ A 10-pound package of oleomargarine.

*In re Beine:*⁹⁰ A single bottle of beer or whisky, packed, sealed, and mailed up in a pasteboard or wooden box.

*In re Harmon:*⁹¹ An open pine box containing several pint and quart bottles of whisky, each done up in a paper wrapper or box and sealed.

*In re McAllister:*⁹² A 10-pound tub of oleomargarine, even though its lid had been removed to allow inspection by the purchaser.

*United States v. Fox:*⁹³ A small wooden box containing twelve 1½-ounce bottles of oil, even though its top had been removed by the seller to permit inspection by the purchaser.

*Guckenheimer v. Sellers:*⁹⁴ A single bottle of beer, if shipped singly; several bottles of beer fastened together and so shipped constitute one package; if several bottles be inclosed in one box, barrel, crate, or other receptacle, the box, barrel, crate, or other receptacle is the original package.

In *May v. New Orleans*,⁹⁵ decided in 1899, the Supreme Court held that where dry goods were imported into New Orleans from a foreign country in boxes, bales, and cases, each containing separate bundles of merchandise, separately marked and packed, which were so exposed for sale or taken out of the boxes, bales, and cases and sold, the boxes, bales, and cases were the original packages, and when the separate bundles were removed or exposed for sale the goods lost their distinctive character as imports and each parcel or bundle became a part of the general mass of property in the State and subject to local taxation. The syllabus of the case states the law as follows: "May & Co., merchants at New Orleans, were engaged in the business of importing goods from abroad, and selling them. In each box or case in which they were brought into this country, there would be many packages, each of which was separately marked and wrapped. The importer sold each package separately. The city of New Orleans taxed the goods after they reached the hands of the importer (the duties having been paid) and were ready for sale. *Held:*

(1) That the box, case, or bale in which the separate parcels or bundles were placed by the foreign seller, manufacturer or packer was to be regarded as the original package, and when it reached its destination for trade or sale and was opened for the purpose of using or exposing to sale the separate parcels or bundles the goods lost their

⁸⁸ 179 U. S. 343.

⁸⁹ 155 U. S. 461.

⁹⁰ 42 Fed. 545.

⁹¹ 43 Fed. 372.

⁹² 51 Fed. 282.

⁹³ Federal Cases No. 15155.

⁹⁴ 81 Fed. 997.

⁹⁵ 178 U. S. 496.

distinctive character as imports and each parcel or bundle became a part of the general mass of property in the State and subject to local taxation.”

(2) * * *

The case *In re Harmon*⁹⁶ presented the following facts: Harmon was agent in Sardis, Miss., for Jordan, a liquor dealer in Memphis, Tenn. Panola County, in which Sardis is situated, was a “prohibition” county. Jordan shipped from Memphis to Harmon at Sardis a number of boxes containing bottles or flasks of whisky, some containing a pint, others a quart. These bottles or flasks had each a paper wrapper or box placed around it and sealed. These boxes so inclosed were by Jordan placed in ordinary pine boxes, *but without cover*, closely packed together. They were so shipped, and there was an understanding between Harmon and Jordan that the wooden boxes were to be returned to Jordan when all the bottles or flasks of whisky had been sold. (The fact that these boxes were comparatively valueless and not worth the return express charges exposed the agreement to return them to the suspicion of fraud). Harmon received the liquors in this condition, and when a sale was effected would take each bottle out of the box and deliver to purchaser. He was convicted in the State court for selling liquor. Being imprisoned upon the judgment, he applied to the Circuit Court of the United States for a writ of habeas corpus, alleging the restraint of his liberty in violation of the Constitution of the United States, supporting this contention by the allegation that the whisky was sold in original packages and therefore beyond the jurisdiction of the State to prevent. The decision was as follows: “Where bottles of whisky, each sealed up in a paper wrapper and closely packed together in uncovered wooden boxes furnished by an express company, and marked, ‘To be returned,’ are shipped from one State to another, the boxes, and not the bottles, constitute the ‘original packages’ within the meaning of decisions of the Supreme Court upon the interstate commerce provision of the National Constitution.” The case of *Guckenheimer et al v. Sellers et al*⁹⁷ contains the following definition of an original package: “An original package, within the meaning of the law of interstate commerce, is the package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. In the case of liquors in bottles, if the bottles are shipped singly, each is an original package, but if a number are fastened together, and marked, or are packed in a box, barrel, crate, or other receptacle, such bundle, box, barrel, crate, or receptacle constitutes the original package.”

In the *Austin* case⁹⁸ there was presented the question whether or not a pasteboard box containing 10 cigarettes, over one end of which was

⁹⁶ 43 Fed. 372.

⁹⁸ 179 U. S. 343.

⁹⁷ 81 Fed. 997.

securely pasted the United States revenue stamp, was an original package under the circumstances of that case and within the prior decisions of the court. The facts were:

The legislature of Tennessee in 1897 passed an act to prohibit the sale of any cigarettes or introduction of them into the State for that purpose. Austin was a merchant in the State and in the course of his business purchased from a factory in North Carolina a number of packages of cigarettes put up in small boxes, containing 10 cigarettes each, there being securely pasted over the end of each box a United States revenue stamp. When the order was received by the North Carolina factory, the packages above described were placed in a pile on the floor of their warehouse and the agent of the Southern Express Company notified to come for them. An employee of the company brought with him a large basket without cover, belonging to his company, in which he gathered the individual boxes and took them to the station for carriage to Austin, in Tennessee. When the basket containing the packages reached its destination in Tennessee, the agent of the company there took it to Austin's store and emptied the packages on the counter of the store and took the basket away with him. Austin immediately exposed the cigarettes for sale and sold one package to a customer. He was indicted, tried, and convicted for this sale. His defense was that the package was an original package, and that the law of the State so far as applicable to this transaction was unconstitutional as an interference with interstate commerce. Upon appeal to the Supreme Court of the State the conviction was affirmed. He then sued out a writ of error to the Supreme Court of the United States. A majority of the Justices held that the original package in this case was the basket in which the packages were transported, and not the package sold. They therefore affirmed the judgment of the State court.

The results of the conclusions reached are expressed in the syllabus, as follows: "Original packages are such as are used in *bona fide* transactions carried on between the manufacturer and wholesale dealers residing in different States. Where the size of the package is such as to indicate that it was prepared for the purpose of evading the law of the State to which it is sent, it will not be protected as an original package against the police laws of that State. Where cigarettes were imported in paper packages of three inches in length and one and one-half in width, containing ten cigarettes, unboxed but thrown loosely into baskets: *Held*, that such paper parcels were not original packages within the meaning of the law, and that such importations were evidently made for the purpose of evading the law of the State prohibiting the sale of cigarettes."

The court rested its decision in this case more upon the palpable fraud upon the laws of Tennessee than upon any attempt to analyze the definition of an original package. So in *Cook v. Marshall County*,⁹⁹

⁹⁹ 196 U. S. 261.

Iowa, the boxes of cigarettes in the same form as in the Austin case were shoveled into the car in Missouri and delivered to Cook in Iowa in that condition. They were not inclosed in any receptacle, but shipped in bulk. The State imposed a tax of \$300 on the business of selling cigarettes. Cook resisted the payment upon the ground that he sold only in original packages and was therefore protected by the interstate commerce clause of the Constitution. Having lost in the State courts, he prosecuted a writ of error to the Supreme Court of the United States, where it was held that Cook was not exempt from the tax; that the manner of dealing disclosed by the facts in the case was a gross fraud upon the laws of Iowa, and the court would not lend its aid to such a proceeding. The question of what was an original package in the case was a matter of minor importance, though the court said the term original package did not include packages which could not be commercially transported from one State to another. The syllabus contains the law, as follows:

The term original package is not defined by statute, and while it may be impossible to judicially determine its size or shape, under the principle upon which its exemption while an article of interstate commerce is founded, the term does not include packages which can not be commercially transported from one State to another.

While a perfectly lawful act may not be impugned by the fact that the person doing it was impelled thereto by a bad motive, where the lawfulness or unlawfulness of the act is made an issue, the intent of the actor may be material in characterizing the transaction, *and where a party, in transporting goods from one State to another, selects an unusual method for the express purpose of evading or defying the police laws of the latter State the commerce clause of the Federal Constitution can not be invoked as a cover for fraudulent dealing.*

This court adheres to its decision in *Austin v. Tennessee*,¹⁰⁰ that small pasteboard boxes each containing ten cigarettes, and sealed and stamped with the revenue stamp, whether shipped in a basket or loosely, not boxed, baled, or attached together, and not separately or otherwise addressed but for which the express company has given a receipt and agreement to deliver them to a person named therein in another State, are not original packages and are not protected under the commerce clause of the Federal Constitution from regulation by the police power of the State.

From a consideration of all the decisions and upon the basis of common understanding of the words, it seems that an original package within the meaning of the food and drugs act is the unit, complete in itself, delivered by the shipper to the carrier, addressed to the consignee, and received by him in the identical condition in which it was sent, without separation of the contents in any manner. This unit may

¹⁰⁰ 179 U. S. 343.

be a hogshead containing 500 bottles of wine, or a single can of tomatoes, or it is a small ounce phial of some drug if shipped to the consignee in that form; and if the consignee sells or gives away any one of the three in the unaltered condition in which he received it, if contents be adulterated or misbranded, he has violated the act.

This presentation of the decisions of the courts would not be complete, and certainly not satisfactory, if some reference were not made to three very important decisions, two of the Supreme Court of the United States: *Plumley v. Massachusetts*¹ and *Crossman v. Lurman*² and one of the Circuit Court of Appeals of the Sixth Circuit: *Arbuckle Bros. v. Blackburn, Dairy and Food Commission of Ohio*.³ But they are referred to here simply to show that, so far as the food and drugs act of June 30, 1906, is concerned, they are in a sense obsolete. These decisions were rendered prior to the passage of the aforesaid act, and asserted the right of the States to prohibit the sale and traffic in adulterated and misbranded foods and drugs even in original packages. They were rendered in the absence of Congressional action covering the entire subject-matter of interstate commerce in foods and drugs. Since then Congress has assumed its full authority over the subject by the passage of the act of June 30, 1906.

The decisions proceeded upon the well-recognized principle that in the absence of complete Federal regulation of interstate and foreign commerce effect will be given to the legitimate exercise of the police powers of the States, even though incidentally affecting that commerce. There can scarcely be a doubt that since the enactment of the food and drugs act all power of the States over interstate commerce in foods and drugs, including the regulation of importations and sales in original packages, has been abrogated, and the subject is entirely and exclusively under the control of the Federal Government. That such is the state of the law is clearly and succinctly shown by the following quotation from the opinion of Justice Harlan in the case of *Reid v. Colorado*, 187 U. S., at page 146:

It is quite true, as urged on behalf of the defendant, that the transportation of live stock from State to State is a branch of interstate commerce and that any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. So that when the entire subject of the transportation of live stock from one State to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and

¹ 155 U. S. 461.

³ 113 Fed. 616.

² 192 U. S. 189.

such rules and regulations as Congress may lawfully prescribe or authorize will alone control. * * * The power which the States might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the police power of the States.

This case involved the validity of a certain act of the State of Colorado designed to prevent the introduction of infectious and contagious diseases among the cattle of the State. The defendant contended that the act was void as an interference with interstate commerce, and because the subject-matter had already been covered by an act of Congress. The Supreme Court sustained the validity of the act of Colorado, because a legitimate exercise of the police power in the absence of complete regulation by Congress covering the matter. The act of Congress in force at that time did not attempt a full and complete regulation of interstate transportation of animals.

The principal that the State police laws affecting interstate and foreign commerce must yield to the regulation of Congress when it shall assume jurisdiction is well and tersely stated by Freund in his work on Police Power, at page 82, as follows: Sec. 85. The State may enact measures for the protection of safety, order, and morals, though affecting foreign and interstate commerce, subject to the following principles:

1. Every measure of State legislation, however legitimate in itself, yields to positive regulation of interstate or foreign commerce by act of Congress, inconsistent with such measure or intended fully to cover the same matter. (January 31, 1908.)

It must be remembered that the commercial expression "original package" is not synonymous always with the legal definition. A drug firm in Baltimore may put up a mixture in certain sizes of bottles, each properly labelled, and sealed, and ready for sale by the retailer. The manufacturers pack these bottles in boxes, each containing a dozen or two dozen. Legally this box is the original package. Commercially each bottle is an original package. But the individual bottle may legally become an original package when, in the course of the retail trade, it shall be shipped from one state to another. It must be remembered, as will be shown in Chapter XVII, that when this bottle is so shipped the guaranty printed upon the bottle will

not necessarily protect the retailer, if it shall appear that the bottle be mislabelled (§ 464).

§ 240. **Federal control over manufacture.** In *United States v. Boyer*,⁴ which concerned an indictment for attempting to bribe an inspector to consent that diseased carcasses might be made into food products, the court held that slaughtering and packing of cattle intended for transportation to other states and territories was not interstate commerce, or subject to regulation by Congress; that inspection of meat during the process of packing belongs to the states; that the inspector was not performing a duty as a federal officer, and that therefore the attempt to bribe was not a federal offense. Therefore Prentice and Egan⁵ conclude that federal laws relative to the inspection of meat during the process of packing, or other federal control over manufacture is beyond the constitutional authority of the nation. It certainly is true that interstate commerce cannot strictly begin until after the process of manufacture has been completed. It is also true that there is hardly any article of manufacture which is not, to a greater or less extent, a subject of interstate commerce. To grant full federal control over such manufacture would imply the authority to control nearly all of the operations of the citizens. As was remarked in *Kidd v. Pearson*,⁶ "Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the states, it would follow as an inevitable

⁴ 85 Fed. Rep. 425.

⁶ 128 U. S. 1.

⁵ Commerce Clause of the Federal Constitution, 34 and 339.

result that the duty would devolve upon Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be local in all the details of their successful management.” It seems to us that the fault in this line of argument is in the failure to clearly distinguish between interstate and local commerce. It is clearly within the province of the federal government to prohibit interstate commerce in diseased meat. That is admitted. It is also admitted that the detection of evidence of disease in meat may be much more thoroughly and satisfactorily made at the time of slaughtering. It seems, therefore, fully within the province of the federal government to require evidence of such inspection upon all carcasses shipped in interstate, or foreign commerce. An officer inspecting goods during interstate or foreign transportation is clearly within the authority of the federal government. It seems that an officer who inspects goods for admission to such traffic would equally be within the constitutional provision giving to Congress full authority over such commerce. With due deference to the learned judge in the Boyer case, it seems to us that such an inspector is performing the duties of a federal officer. He may not, perhaps, under federal regulations, absolutely refuse to permit such diseased meat to be placed among articles of food, but it would seem to be his duty to insure its exclusion from interstate or foreign commerce.

It is of the utmost importance that such articles of commerce as antitoxic sera be absolutely reliable. Much harm might be done before a fault be detected, unless the process of manufacture be carefully super-

vised. The bacillus of tetanus has been spread in diphtheria antitoxin, and the germs of the foot and mouth disease were scattered through the country in the virus of vaccina. For the government to rely upon examinations of samples sent out alone, would be to delay detection of danger until after the harm has been done. The inspection of the animals before the virus is collected, and the supervision of the care with which the manufacture is conducted, are absolutely necessary for federal control over this line of commerce. It is therefore required that such manufacturers, engaged in interstate commerce, shall take out government licenses, and such general supervision is required in the taking of a license. This does not interfere with manufacture for domestic consumption. Neither need it interfere with state regulation of manufacture.

Unfortunately state regulation of the manufacture of biologic products is often very lax and inefficient. In one case where several deaths were caused by diphtheria antitoxin contaminated with the virus of tetanus, the product was manufactured for local consumption, and not under federal control. Because of the laxity of state control, unless federal supervision be required for manufacture of such products, the federal government would be practically powerless to control the matter. Further, to leave this necessary supervision to the states would be to deny the sovereignty of the nation in this regard, and it would take from Congress full control over interstate commerce.

§ 241. Authority versus policy. Much may frequently be accomplished without full authority.

According to our interpretation it is the duty of meat inspectors to make sure that no diseased meat shall enter interstate or foreign commerce. When a carcass has been condemned it would seem to be official duty to make sure that it should not by any possibility be returned to the lot of accepted pieces. It would seem reasonable to require that such carcasses be sent at once to a rendering establishment. Such a rule, or regulation might very properly be made by the supervising officer as a condition of inspection. True, he might have no authority to order such destruction, according to the constitutional provisions; but the requirement would still be reasonable. There is no constitutional provision which gives a shipper a right to export his goods. The provision which gives to Congress sole authority in regulating interstate commerce, is sufficient to cover any reasonable regulations with which the shipper must comply. It is a purely voluntary agreement. There is no compulsion about it. The government says to the shipper, when you comply with these regulations you may make the shipment; and the shipper says to the government, I will comply with these regulations on condition that I may then make shipment. If he fails to keep his part of the agreement, the contract is rendered null, and shipment may then be denied to him, not only as to the articles specially condemned but reasonably he may be refused any shipment. Having broken his contract he cannot be trusted. On the other hand, if he does not wish to comply with the regulations, he may still dispose of his merchandise to local customers, so far as federal control is concerned. He has not been deprived of his property, nor of its lawful use.

The government may not lawfully demand that a condemned carcass be destroyed. It may require this act as a part of its contract with the shipper, but it may not make this absolute demand. Compliance with the requirement rests with the will of the shipper. It would seem to be bad policy for him to refuse to comply, for that would of necessity exclude his products from the wider commerce, and it would put his more valuable products upon a par with those of less value. Still, in the absence of state legislation, should the condemned carcass be forcibly taken without his consent, it is probable that he might legally recover from the officer so taking, for it is probable that such forcible taking would not be considered as authorized under the federal Constitution. The officer in such case would be exceeding his authority, and therefore would be not an officer in that act, but a private wrong doer.

Reasonable policy may therefore accomplish that which may not be covered by constitutional provisions. This would be lawful, though not authorized by law, in the sense that it implies authority. The only authority in the matter is the authority under contract.

§ 242. Federal control over means of transportation. Federal control over interstate and foreign commerce includes of necessity the means used for the commerce. A statute of Louisiana required separate accommodations for whites and negroes, but it was held that this statute could not apply to steamers plying the Mississippi river, even though the passengers be traveling from one point in the state to another. If such a law be valid, a neighboring state might with equal propriety order that separate accommodations

be not furnished, and this would work confusion with interstate commerce.⁷ In the case of railways, the same statute may be complied with by adding extra cars to the train, and the statute would be within the constitutional power of the state so long as it did not operate upon interstate traffic.⁸ It is fully within the authority of Congress, therefore, to enact such statutes as may be indicated for the preservation of the lives and health of those engaged in interstate traffic. Congress has acted under this right to regulate the conditions under which ships may be navigated upon interstate waters, or the high seas. It may properly go further. Epidemics of typhoid fever have been traced to the water used for drinking purposes upon Mississippi river steamers engaged in interstate traffic. One series of such epidemics occurred as the result of carelessness upon an excursion boat which touched three states, Illinois, Iowa, and Missouri, and the epidemics were found in each state. Certain excursion boats upon Lake Michigan were found to yield an undue proportion of typhoid patients for the marine hospitals. Investigation showed that, though the water for the drinking tanks was taken in out in the lake, while the boats lay in the Chicago or Milwaukee harbors it was customary to use the same pipes for pumping water for the boilers. In that way the drinking water was also polluted. Clearly, neither the state of Illinois, nor that of Wisconsin, could have jurisdiction over such a matter, though it be of a purely police nature. The responsibility must rest with the federal government to give this protection to its citizens.

⁷ Hall v. DuCuir, 95 U. S. 485.

⁸ Louisville, etc., Ry. Co. v. Mississippi, 133 U. S. 587.

So on the railroads engaged in interstate traffic, it is quite within the province of the federal government to make such rules as to car couplers as will serve to prevent accidents. It might very properly also enact rules and regulations for railway employees engaged in the care of interstate cars, so as to prevent accidents. "The power of Congress under the commerce clause of the Constitution is plenary and competent to protect persons and property moving in interstate commerce from all danger, no matter what the source may be; to that end Congress may require all vehicles, moving on highways of interstate commerce to be so equipped as to avoid danger to persons and property moving in interstate commerce."⁹ Under general authority granted to the Public Health Service, general rules and regulations have been issued governing the various matters connected with interstate transportation, specifying as to the cleaning of cars, supply of water and ice for cars, disinfection of cars, etc. The authority resides with the nation and policy indicates that this authority should be so used. So long as these matters are left under the control of individual states, there has been such conflict as to requirements that the railroad companies have been embarrassed, and state governments have found difficulty in enforcing their own laws.

§ 243. Purity of interstate waters. Under the commerce clause of the Constitution Congress has seen fit to take charge of navigable waters. (§ 442.) Before a city may do anything which will by any possibility interfere with navigation, as by extending a water in-

⁹ Southern Ry. Co. v. U. S., 222 U. S. 20.

take pipe into a lake or river, it must receive federal permission. There may possibly be some question as to the authority of Congress to legislate to prevent pollution of such interstate waters. In the case of such pollution by the citizens of one state, the citizens of another state, injured thereby, might, upon proof thereof, collect civil damages from the offending state. Such civil damages might be assessed so high as to force the offending state to abate the nuisance, but such action is really civil, not governmental. True, commerce may be conducted on the waters without the use of boats, as when logs are floated from one place to another, and on the same basis it has sometimes been claimed that the transportation of disease germs in the water could come under the federal control of commerce. Desirable as this reasoning seems to be in this case, it does not appear to us that it is sound. Disease is often an attending evil of commerce, but disease germs are not subjects of commerce.¹⁰ It will not be permitted that at one time one interpretation be placed upon a subject, and at another time, though for good reason, the interpretation be reversed. That must of necessity work confusion, and give rise to a claim of arbitrariness on the part of the court. By very many decisions the powers of Congress over navigable waters are those which pertain to preserving such waters as a means of communication. It is true that if the discharge of a sewer into a navigable stream tends to obstruct navigation Congress would have full power to prohibit such discharge; but it would seem that there must be an actual obstruction to navigation, clearly

¹⁰ License Cases, 5 How. 504, 465; *Commsrs. of Immigration v. 576*; *Leisy v. Hardin*, 135 U. S. Brandt, 26 La. Ann. 29. 100; *R. R. Co. v. Husen*, 95 U. S.

traceable to the sewer. Such obstruction may be shown in some streams to a degree which would warrant action of Congress. It seems doubtful, however, in case of such legislation by Congress that the act would be held valid in the absence of such actual obstruction.

Water itself may be an object of commerce, and as such it is clearly within the authority of Congress to pass such legislation as shall be necessary and reasonable to preserve the purity of waters transported from one state to another. Apparently it matters not whether that water be transported in bottles, casks, tanks, conduits, or by open channels, the authority of Congress would be the same. In point of fact each method has been used for the interstate traffic in water, except possibly the last mentioned. Apparently there should be a distinction between a case in which the water of a spring, or lake in one state is piped, or otherwise conducted into another state, and either the water itself is sold, or the ground from which it is derived is sold or leased to the water company or municipality, and a case in which the waters arising in one state, but flowing through a natural channel into or by another state, are there taken for domestic use. In the one case it would seem to be within the power and duty of the federal government to enact such statutes as shall prevent pollution, and preserve the purity of the waters thus supplied. It is within the power of Congress, for such waters are clearly articles of interstate commerce. It is the duty, for the source of supply, being within the limits of another commonwealth, is out of the jurisdiction of the state whose citizens are dependent upon this water. Water

taken from a stream or lake, where the intake is situated within the state using the water, can hardly be called interstate commerce, although the origin of the water be in an adjoining state. The commercial nature of the article begins and ends within one state.

Article 1, Section 8, paragraph 10 gives to Congress power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." Article III, Section 2 of the Constitution grants to the federal courts jurisdiction over "all cases of admiralty and maritime jurisdiction." Neither of these provisions would seem to warrant legislation by Congress prohibiting the pollution, from a sanitary point of view, of interstate lakes and rivers. The term "high seas" has been legally interpreted as referring to extra territorial waters, and not including tidal rivers, bays, and harbors.¹¹ Pollution of the waters through the discharge of sewage is within the police jurisdiction of the individual states, and is not therefore on the high seas. It is within the tide waters. As to water supply, moreover, the problem is not on the salt waters, but the inland lakes and rivers. Pollution of oyster beds, as affecting articles of interstate traffic, might be lawfully prevented by the federal government on other grounds, even though within the tidal waters. It is not the pollution of the waters, but the pollution of the oyster beds which would then be the object of the legislation.

Again: the term "felonies" refers to grave crimes, rather than to misdemeanors, whereas pollution of the

¹¹ U. S. v. Wiltberger, 5 Wheat. 76; U. S. v. Grush, 5 Mason, 290; U. S. v. Ross, 1 Gallison, 624, but see DeLovio v. Boit, 2 Gallison, 398; U. S. v. Bevans, 3 Wheat. 336; U. S. v. Furlong, 5 Wheat. 134; U. S. v. Holmes, 5 Wheat. 412.

water supply would be classified as a misdemeanor. The federal government has admiralty and maritime jurisdiction relative to matter within harbors, and rivers; but such jurisdiction refers exclusively to matters pertaining to the conduct and care of the boats, with their management.

Although the Great Lakes and rivers may each be interstate, there is no portion which is not intra state. The area of Lake Michigan, for example, is entirely divided between Indiana, Illinois, Michigan, and Wisconsin. By the constitution of Illinois the boundary of the state is fixed at the middle of the lake, and by statute, the jurisdiction of Cook and Lake Counties extends to the same line. Although the ordinary jurisdiction of a city upon the shores of the lake extends only three miles from low water mark, the jurisdiction of the same city may extend ten miles out to protect the purity of its water supply. Though the admiralty jurisdiction of the federal government extends into the harbors, Congress has no general police jurisdiction over any portion of the lake. Many members of the bar, generally well informed, seem to be quite "at sea" upon this point, affirming that the jurisdiction of the state extends only three miles from the shore. We find, however, no basis for such a statement, as the charters of the states, and the acts of Congress establishing the states, clearly so fix state boundaries as to include all of the waters within the limits of the nation.

Contractors dredging the Chicago river, under the authority of the War Department, were accustomed to dump their dredgings where they polluted the water supply of the city of Chicago, contrary to the ordinances of the city. Upon appeal having been made to

the authorities at Washington, Mr. Attorney General Griggs gave an opinion saying, "While an ordinance of the city of Chicago may, as to all persons subject to its jurisdiction, forbid the deposit of any heavy substance in the waters of Lake Michigan within eight miles of the shore in front of that city, it cannot control or limit the power of Congress over the navigable waters of the United States, nor dictate where it shall or where it shall not deposit, within such waters, material removed in the improvement of one of its harbors." It seems unfortunate that this matter was not taken to the high court for determination. The problem was solved by an act of Congress prohibiting the dumping complained of. The *ex cathedra* statement of the Attorney General seems to ignore certain facts. As regards obstruction to navigation the opinion seems to be sound, but the complaint was not with reference to navigation. The filth removed from the river bottom was laden with the germs of disease, and being dumped near the intake cribs the water supply of the city was polluted. The place where the dumping occurred was well within the limits of the state. The state had granted to the city full authority to protect the purity of its water supply, to a point ten miles from the shore. Within that authority the city had prohibited such dumping. This was all within the police power of the state to protect the lives and health of its citizens. As will be subsequently shown, by numerous cases the Supreme Court of the United States has always upheld this police power of states to protect life and health. An officer who commits an illegal act is in such act no longer an officer, but a private wrong doer. In making a contract with the dredging company, therefore, it

was presumed that the government expected the dredging company to so dump its dredgings that they would not violate either the laws of the state or city pertaining to health. - The Attorney General, in his opinion, distinctly admitted the power of the city to enact the ordinance. He simply denied that agents of the federal government were subject to such ordinances. In substantiation of his claim he cited no cases, and he forgot the sanitary nature of the ordinance.

§ 244. Enforcement of state acts. There is one further clause of the federal Constitution which may assist sanitary measures to some extent. The first section of Article IV directs: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved and the effect thereof."

It has been a custom of parties divorced, and by the divorce prohibited from remarrying within a stated time, to dodge or attempt to dodge, this prohibition, by going to another state and there marrying according to the laws of the second state. Such marriages have been declared illegal by Judge Tuttle of the Superior Court of Cook County, but the matter has not been passed upon by the Supreme Court. It would seem, under this Section of the Constitution, to be within the authority of Congress to make such marriages criminal, and subject all participants in such illegal marriages to certain prescribed penalties. Under the existing circumstances, the clerk in the second state, and the minister performing the ceremony, are not subject to the jurisdiction of the state in which the

divorce is granted. Though the participants in such second marriage may be guilty of contempt of Court, they are free so long as they remain without the jurisdiction of the Court. Apparently the only means open for enforcing such prohibitive decrees is by congressional action. Marriage has a direct relationship to that field of public health designated as Eugenics, which pertains to the betterment of the race. It is possible, also, that in other matters pertaining to the public health, this same provision of the Constitution may be applicable.

State

§ 245. **Sanitary authority of the states.** The Tenth Amendment to the federal Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This provision was not included in the original draft of the Constitution. It seemed to be a reasonable stipulation insisted upon by the representatives of certain state ratification conventions. Included under this reservation is that peculiar authority called police power. Originally this power pertained only to the internal affairs of the individual state. At the time of the adoption of this amendment the states were not thickly settled and as compared with the present time they were isolated. The provisions necessary under the then existing conditions were not numerous. As has been shown by Professor Beard,¹² the demand for the

¹² An Economic Interpretation of the Constitution of the United States.

enactment of the Constitution was largely commercial in origin, and the provisions adopted were very largely those which seemed desirable for the safeguarding of business transactions. Practically the only ordinary relationships between the citizens of different states were those pertaining to commerce. There was no science of preventive medicine at that time. Any community might adopt such methods as seemed requisite for the protection of the lives and property of its citizens, without any possible injury to citizens of other states, so long as commercial relationships were not disturbed. The Congressional control over interstate traffic therefore gave all the protection needed to the citizens of one state from the actions or negligence of other states.

Today all this is changed. This provision, which was never really needed, and was inserted simply to satisfy the fears of some colonists, has now become a serious hindrance for the nation. There is great confusion occasioned by the diverse laws of the states relative to marriage and divorce, for example. The fact that a man may be permitted to practice medicine in one state grants relatively little assurance that he may be permitted to enter practice in any other. So long as he is a law abiding citizen he may go freely from one state to another, and he may engage in almost any business. He may know before he starts from his old to his new home that he may thus engage in ordinary business, but there is always an uncertainty as to a physician's being able to get a license in another state. Here the federal government is weak. It can afford him no protection. The federal government may make treaties with foreign nations pertaining to

the reciprocal rights of citizens. The states may not have such foreign relationships; but any state may more or less effectually block the efforts of the nation. Questions relating to the relative powers of the state and nation give rise to many expensive litigations.

No longer are the states isolated commonwealths. The boundaries between states are imaginary lines which work great confusion of authority. The provision which was at first innocent has become a hindrance. It is the one great defect in the Constitution—the one great blemish in the national idea. The abrogation of the Tenth Amendment to the Constitution would empower the national government to take the full charge of conflicting methods, and to bring harmony in the place of chaos. Only this repeal of the Tenth Amendment can raise the nation to the dignity which it should attain. It has served its purpose. Its preservation can give no further advantage to the grand cause of government, but it may be used as one of the tools for attaining petty advantages against the general good.

While it might often be desirable that the nation have full authority in all matters pertaining to the public health, the condition which confronts us is one of fact, not of ideals. Since the basis of most operations for the preservation of life and health is in police power, and since that power is reserved to the states by the Constitution, it necessarily follows that the supreme authority in almost all legislative or executive action for such preservation of health resides in the individual states.

§ 246. State authority in health recognized by the federal government. The national government has

recognized the authority of the states in matters pertaining to health. Congress, in a general law relative to quarantine, has directed federal coöperation with state laws and officials.¹³ In harmony with this idea the naval authorities surrendered an infected vessel to the health officer of a port. The supreme court of New Hampshire held ¹⁴ that this did not make the port health official an officer of the United States.

§ 247. Conflict between state health regulation and national law. Although national laws are superior to those of the individual states when alike in nature, the inherent necessity of certain kinds of governmental action gives them greater importance than other classes of legislation or administration. The motto of police power is *Salus populi est suprema lex*. That which is necessary to preserve the life and health of citizens is more important than mere commercial relations. It does sometimes happen, therefore, that a state law or regulation pertaining to health administration may be given preference over a federal statute or even the provisions of a treaty with a foreign country.

§ 248. State stoppage of navigation. A leading case showing that the state laws may successfully interfere with national administration was the Blackbird Creek case, decided in 1829 by the Supreme Court of the United States.¹⁵ This case, which was not at the time deemed important, and was not elaborately considered by the court, has been the basis upon which subsequent decisions have been founded, involving very much more than did this. The Blackbird Creek Company,

¹³ Sec. 3 of Act of Feb. 15, 1893.

¹⁵ *Wilson v. Blackbird Creek Co.*,

¹⁴ *Delano v. Goodwin*, 48 N. H. 2 Peters, 245.

incorporated under the laws of Delaware, was the owner of marsh lands bordering Blackbird Creek. The tide ebbcd and flowed in this creek, and it was used for the navigation of small vessels. In order to reclaim the marsh land the Company empowered by the state of Delaware erected a dam across the creek. Wilson was the owner of a sloop licensed and enrolled under the statutes of the United States. He found that the dam arrested his course, and he therefore broke and injured the dam. The Company sued him for damages. Wilson justified his trespass by setting up his license and enrollment, and his right to navigate the creek, and that the dam was an unlawful obstruction to his right which he might properly, and did, remove. The Company demurred. The only question arising was the validity of the statute of the state of Delaware. The supreme court of the State upheld this validity of the statute, and found for the plaintiff. Wilson then appealed to the Supreme Court of the United States. Chief Justice Marshall delivered the opinion of the Court, as follows:

“The act of Assembly by which the plaintiffs were authorized to construct their dam plainly shows that this is one of those many creeks passing through a deep, level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those powers which are reserved to the states. But the measure authorized by

this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiff in error insist that it comes in conflict with the power of the United States to regulate commerce with foreign nations, and among the several states. If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over these small navigable creeks into which the tide flows, we should not feel much difficulty in saying that a state law coming in conflict with such an act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question. We do not think that the act empowering the company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed upon the subject."

At a later date the state of Pennsylvania passed an act enabling the city of Philadelphia to erect a bridge across the Schuylkill river, below the docks of one Gilman. This bridge, being permanent, and only thirty feet above the water, would prevent coal bearing ships having masts to come to Gilman's dock. Gilman

therefore sought to enjoin the city from erecting the bridge, basing his plea upon its interference with commerce. The Supreme Court upheld¹⁶ the power of the city and state, basing their decision upon the Blackbird Creek case. Justice Clifford, Wayne and Davis concurring, delivered a dissenting opinion, and affirmed that the Blackbird Creek case was decided as a sanitary measure. He said: "Judgment was rendered in that case by the same court which gave judgment in the case of *Gibbons v. Ogden*;¹⁷ and there is not a man living, I suppose, who has any reason to conclude that the constitutional views of the court had at that time undergone any change. Instead of overruling that case, it will be seen that the Chief Justice who gave the opinion did not even allude to it, although as a sound exposition of the Constitution of the United States, it is second in importance to no one which that great magistrate ever delivered. Evidently he had no occasion to refer to it or to any of its doctrines, as he spoke of the creek mentioned in the case as a low sluggish water, of little or no consequence, and treated the erection of the dam as one adapted to reclaim the adjacent marshes and as essential to the public health, and sustained the constitutionality of the law authorizing the erection, upon the ground that it was within the reserved police power of the state." There was no sanitary question involved in the Philadelphia bridge case.

The state of New York enacted a statute which required masters of vessels arriving at New York from a foreign port, or from a port in another state, to make

¹⁶ *Gilman v. Philadelphia*, 3 Wall. 713. ¹⁷ 9 Wheat. 1.

a report in writing within twenty-four hours after arrival, giving the names, ages, and last place of residence of all passengers. One Miln having arrived with passengers, and having failed to make report as required by the statute, was sued. He defended his action on the ground that the state statute was a violation of that portion of the Constitution which gave to Congress jurisdiction over interstate and foreign commerce. This case was carried to the high court, and the authority of the state in the matter was upheld as a police measure.¹⁸ It was not a regulation of commerce. The court said: "It is apparent from the whole scope of the law, that the object of the legislature was to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the states; and for that purpose a report was required of the names, place of birth, etc. of all passengers, that the necessary steps might be taken by the city authorities to prevent them from becoming chargeable as paupers. Now we hold that both the end, and the means here used, are within the competency of the states. * * *

"That a state has the same undeniable, unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States: that, by virtue of this it is not only the right but the bounden and solemn duty of a state, to advance the safety, happiness, and welfare, by any and every act of legislation which it may deem to be conducive to those ends, where the

¹⁸ City of New York v. Miln, 11 Pet. 102.

power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated: that all these powers which relate to municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that consequently, in relation to these the authority of a state is complete, unqualified, and exclusive.”

In *Gibbons v. Ogden*,¹⁹ while speaking of inspection laws, Chief Justice Marshall said: “They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description—are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation.”

Likewise, we find the statement in *Barbier v. Connolly*,²⁰ that the police power of the state includes the authority “to prescribe regulations to promote the health, peace, morals, education, and good order of the people.” And in *Jacobson v. Massachusetts*, Mr. Justice Harlan says:²¹ “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 the power, yet it has distinctly recognized the authority

¹⁹ 9 Wheat. 1.

²⁰ 113 U. S. 27, 31.

²¹ 197 U. S. 11, 25.

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.'"

§ 249. **State authority in matters of health is exclusive.** From these and other decisions it is apparent that the power to legislate on matters pertaining directly, and solely, to the health of the nation resides in the individual states, and that the federal government has no authority in the subject. This is true, though in their necessary operation they do today often affect the people of other states, and perhaps they may even conflict with our relationship with foreign nations. Federal statutes relative to health are therefore practically advisory. For that reason the national quarantine law directs federal officers to recognize state and local statutes and regulations, and to coöperate with local officers. As previously stated, under the commerce clause the national government may stand guard at the confines of the state. Within the state it has no authority. The national government does sometimes send its officers into the states to aid in sanitary work. It does so at the request of local officials. Because of greater efficiency, due to a broader training, the national officers may be given charge; but in these cases they are practically loaned to the states, and the authority comes from the state, not from the nation. This was the case when Surgeon White took charge at New Orleans to exterminate yellow fever. It was true also when the national Public Health Service undertook the extermination of the bubonic plague from California. The advisory character of the

national health service is further shown in the investigations relative to different epidemic diseases, with the instruction given as to preserving the purity of water supplies, care of milk, and prevention of the hook-worm disease, for example. The authority rests in the state. National influence must be advisory.

§ 250. **State sanitary authority may override federal authority.** As Mr. Justice Harlan has said:²² "The mere grant to Congress of the power to regulate commerce with foreign nations and among the states did not, without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people."

This power of the state has been sustained, even when it stopped navigation,²³ as by a dam on Kinloch Creek: or by a dike erected in the interest of public health.²⁴ The syllabus in *Morgan's Steamship Co. v. Louisiana Board of Health* says:²⁵ "The system of quarantine laws established by the statutes of Louisiana is a rightful exercise of the police power for the protection of health which is not forbidden by the Constitution of the United States. While some of the rules of that system may amount to regulations of commerce with foreign nations or among the states, though not so designed, they belong to that class which the states may establish until Congress acts in the matter, by covering the same ground, or forbidding state laws. Congress, so far from doing either of these things, has, by the act of 1799²⁶ and previous

²² *N. Y., N. H. & H. R. v. N. Y.*,
165 U. S. 628, 631.

²³ *Manigault v. Springs*, 199 U.
S. 473.

²⁴ *Leovy v. U. S.*, 177 U. S. 621.

²⁵ 118 U. S. 455.

²⁶ Chap. 53, Rev. Stat.

laws, and by the recent act of 1878²⁷ adopted the laws of the states on that subject, and forbidden all interference with their enforcement.”

The power of the state relative to quarantine was upheld by the Supreme Court, when a steamship company was not permitted to land its passengers at certain Louisiana ports then under quarantine, though those passengers were not diseased, nor had they been exposed to any infectious disease, so far as was shown, and though those passengers had sailed from certain European ports, in accordance with treaties made between United States and European nations.²⁸ (§ 408).

§ 251. State laws not conclusive as to authority. While it is true that in matters pertaining to the public health the individual legislatures are practically supreme, it is not sufficient that the legislature be satisfied that there is necessity for action, neither has it an unlimited choice of methods. State statutes are subject to the review of the federal courts and they may there be set aside. “The federal courts do not accept as conclusive the judgment of the state legislature that a measure restraining commerce is called for by the interest of public health, but inquire in every case whether there is a legitimate exercise of the police power.”²⁹ Although the court set aside, as an unconstitutional interference with commerce, a statute of Missouri which prohibited the importation of cattle during certain months from certain specified territory, which was commonly infected by the Texas cattle

²⁷ 20 Stat. 37.

²⁹ Freund, Police Power, Sec.

²⁸ *Compagnie Francaise de Navigation à Vapeur v. Louisiana State Board of Health*, 186 U. S. 380. 387.

fever,³⁰ the same court upheld the law of Texas which prohibited the importation of cattle from infected territory, saying:³¹ "the prevention of disease is the essence of a quarantine law. Such law is directed not only to the actually diseased, but to what has become exposed to disease." The Missouri statute was a bar against a certain territory, without necessary reference to infection; but cattle might be imported from other territory which was infected. The Texas law excluded only cattle from actually infected territory. One was a law against a geographic area; the other was against a disease. With reference to the Missouri statute in another case, the court said:³² "No attempt was made to show that all Texas, Mexican, or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court." Quarantine regulations against infected areas have been repeatedly upheld.³³

§ 252. Meat inspection. It is well recognized that the states are empowered to legislate for the preservation of the purity of the food supply. It is true that an inspection of meat may best be made where it is slaughtered, for the appearance of an animal on the hoof may show at a glance facts which might easily

³⁰ Ry. Co. v. Husen, 5 Otto, 465.

³¹ Smith v. St. Louis & Southwestern Ry. Co., 181 U. S. 248, 255.

³² Kimmish v. Ball, 129 U. S. 217.

³³ Rasmussen v. Idaho, 181 U. S. 198; Smith v. St. Louis & S. W. R. Co., 181 U. S. 248; Reid v. Colorado, 187 U. S. 137.

be overlooked after the meat is exposed for sale; but a law prohibiting the sale of meat which had not been inspected in the state before slaughter is a prohibition against the importation of an article of commerce.³⁴ Such a statute is not essentially a health proposition. Its real action is commercial—a restraint of commerce in the interest of local industries. It is therefore an unconstitutional invadement of the authority of Congress. So, also, a Virginia statute was declared unconstitutional, which required the inspection of all flour imported from other states, with the payment of a fee therefor, but it did not require a like inspection of flour made within the state.³⁵ Both of these statutes made an arbitrary difference between the state in which they were enacted and other states, and that difference did not exist in sanitary conditions. Another Virginia statute permitted the sale of meat a hundred miles or more from the place of slaughter only after inspection by local officers, and the payment of fees therefor, amounting to one cent per pound. This was set aside as unconstitutional on the ground that the tax was so onerous as to be practically a prohibition, and it was therefore an interference with commerce, unjustifiable on sanitary grounds.³⁶

§ 253. Authority of state must be evident in the act. Granting, then, that the state has full authority to legislate for the preservation of health, and admitting that it is the duty of the state thus to protect its citizens, it is evident that the statute passed must clearly show that it is a sanitary measure, in purpose and in

³⁴ *Minnesota v. Barber*, 136 U. S. 313.

³⁶ *Brimmer v. Rebman*, 138 U. S. 78.

³⁵ *Voight v. Wright*, 141 U. S. 62.

operation. It will not do for the state to attempt to gain a commercial advantage under the cloak of sanitation, though evidently commercial advantage may locally accrue from the enforcement of a strictly sanitary provision; but such commercial advantage must be incidental and secondary to the greater object of sanitation. There must be evident a need for the enactment, and the means used must be reasonable, and designed to attain the object with the least possible interference with commerce. Even a statute like that prohibiting the importation of Texan cattle into Missouri might be upheld in its operation if its enforcement were limited to cases of actual danger; but it would manifestly be better were the statute so drawn as to be always upheld, thus leaving no opening for the plea that its execution was arbitrary.

City

§ 254. **Relation of municipality to state.** The governmental relationship between city and state is not at all analogous to that existing between the state and the nation. The city has no powers but those which are expressly given it by the state. The state has received nothing of authority from the nation. All power originally belongs to the states, in our theory. Certain portions of this power were ceded by the states to the nation. All that was not ceded still remains to the states. Power ceded to the nation, but unused, may sometimes be employed by the state until the nation gets ready to act in the matter. On the other hand, the city is a component part of the state, and as such may be permitted to do a portion of the work of the state, under the direct guidance of the state. A

limited, or subordinated authority over certain matters is delegated by the state to the city; it is not ceded. Such authority may be modified, or withdrawn by the state. Certain powers belong exclusively to the nation; others, to the state. None belongs to the city, in the same sense, though the city may be permitted to use a portion of the power of the state.

Neither the state nor the nation may be sued *en tort*. An incorporated city may be sued for its misdeeds or nonaction. Both state and nation are supplied with all of the machinery of government. The city is essentially only an executive organization. It has not true legislative authority. Its common council may make certain rules or regulations, prescribing how the affairs of the city may be conducted, but those ordinances must be within limits prescribed by the state, and always subject to nullification by the state. The nation and state are distinct governmental bodies. The city is only a part of the state. These distinctions are real, and important, though often overlooked.

§ 255. City corporation. An incorporated city bears a duplex character. Territorially it is a portion of the state, and as such it shares with unincorporated towns and villages the duty of preserving state laws, and doing its part of the state business. But there are certain communal interests in a thickly settled section which are not so evident in the country at large. For example: in a farming district the economical method of furnishing water for domestic use would be by individual wells. Each owner may then safeguard the purity of his own supply. In the city wells are not safe; they are always a source of danger. The safe way is to have a general supply, often carried from

some distant source. As a commercial proposition it is impossible for each property owner to manage this business for himself. The supply may be furnished by a commercial company, which will be legally and financially responsible for any damages which may result, either from a flooding of land, through a breakage in the dams or conduits, or for impurity which produces disease. The supply of water for that individual city is not fully of vital interest to the remainder of the state. The farmer must dig his own well, build his own windmill and tank. It would be manifestly unfair to require that he also contribute for the erection and maintenance of a water plant in a distant city. However, the residents of the city may object to contributing unnecessarily to give profits to the water company. Since all citizens are interested in the matter, it is not more than right that they, and not some few individuals, perhaps not even citizens, should reap the financial profits. They therefore make a public corporation. As such a corporation the city comes in commercial competition with individual men and business corporations. To gain certain advantages the citizens incorporate. Having incorporated the city becomes legally responsible. If now it furnishes impure water, infected with disease, damages may be assessed in court for resulting injuries.³⁷ The furnishing a city with water, gas, sewers, etc., is not strictly governmental in character, but rather commercial competition with private enterprises. The city must therefore be recognized as partially govern-

³⁷ *Milnes v. Huddersfield*, L. R. 10 Q. B., Div. 124; *Keever v. Mankato*, 113 Minn. 55.

mental, and partially as any other corporation doing business for commercial profit.

A corporation which is organized ostensibly to manufacture some given article of farming machinery would hardly be upheld in conducting a general mercantile business, unless it amend its charter. In selling the farm implements the corporation might accumulate notes, mortgages, and bonds, as a necessary part of the business; but that would not excuse a general dabbling in the bond market as brokers. The private corporation is permitted to do only that for which it is incorporated. For a like reason, when, to gain special advantage, the inhabitants of a district apply for a charter as an incorporated city, they do so for certain specified objects. The state then permits them to do those things specified. It does not surrender authority, but in return for corporate privileges the city agrees to take care of certain local governmental matters. It is therefore apparent that the city may do anything which is permitted, or specified by its charter. It must not attempt to pass the bounds set by the charter, either as to subject, territory, or degree of authority.

§ 256. Legislation. It is a general rule in law that work which is ministerial in nature may be executed by a deputy; but where the duties require the exercise of discretion they must be performed by the officer selected for that purpose. Thus, a board of health may not delegate to a committee the duty of employing a physician.³⁸ The duty of enacting the laws for a state resides in the legislature, or general assembly. It can-

³⁸ *Young v. Blackhawk County*,
66 Iowa, 460.

not shift that responsibility, or delegate it to any other officer, or governmental body. "The legislative neither must nor can transfer the power of making laws to any body else, or place it anywhere but where the people have."³⁹ The legislature may not, under the general rule, delegate its law-making power to municipalities, though the state constitution may make provision which would grant that transference of power, and in differences in interpretation of municipal ordinances this possibility must be remembered. Such a possibility is suggested by the supreme court of Minnesota when it says: "It is a principle not questioned, that except where authorized by the constitution, as in respect to municipalities, the legislative power * * * can not confer on any body or person the power to determine what shall be law. The legislature only must determine this."⁴⁰

There cannot be two independent law making authorities. It must be left to some one body to determine what shall be the law. However, under certain general provisions it is quite reasonable to leave to individual communities the determination as to how a certain problem shall be met. Thus, the legislature might under a general statute forbid the sale of liquor in any city which shall so determine. The ordinance of the city in that case simply puts into effect the state law. It is itself only a bylaw. Ordinances are sometimes called laws, and their passage is spoken of as legislation, but really they are not of themselves on the same footing as state statutes. The state legislature enacts the general statute, within whose limits the city

³⁹ Locke, On Civil Government, Sec. 142.

⁴⁰ State v. Young, 29 Minn. 551.

determines how it shall be administered. This is the only reasonable way in which much of police power, especially, may be fairly administered. The stringent rules which may be necessary for the city may often be a hardship for the more thinly settled community.

The density of a city population, of itself, frequently makes additional requirements necessary, particularly in matters pertaining to public health. State laws must of necessity be reasonable for the entire state; and it therefore becomes necessary to grant to municipalities additional powers. It has sometimes been held that both the state and municipality may, independently of each other, pass statutes or regulations upon a given subject and that the ordinances of the city will be sustained unless there be positive conflict with the provisions of the state law.⁴¹ The ruling in Massachusetts was to the effect that the authority of the city will be sustained in the absence of any state law upon the same subject.⁴² In a case in Illinois the supreme court said, in speaking of municipal corporations,⁴³ "The necessity for their organization may be found in the density of the population, and the conditions incidental thereto. Because of this the municipal government should have power to make further and more definite regulations than are usually provided by general regulation, and to enforce them by appropriate penalties." Again the same court has said: "The most important of police powers is that of caring for the health of the community, and that is inherent in a

⁴¹ *City of Bellingham v. Cissna*, 87 Pac. 481; *Ex parte Snowden*, 12 Cal. App. 521.

⁴² *Commonwealth v. Newhall*, 205 Mass. 344.

⁴³ *Chicago v. Ice Cream Company*, 252 Ill. 311.

municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporation.”^{43a} This power has been sustained in the case of milk,⁴⁴ and in the regulation of the manufacture and sale of bread.⁴⁵ If both the state and the city legislate upon a matter, and each provide penalties to be inflicted in case of violation of their regulation, it might be claimed that the constitutional provision relative to twice being in jeopardy for the same offence might be violated. So far as I have noticed, however, this view has not been taken by the court, but the violation of each law has been considered a misdemeanor by itself, so that a single act may practically be two misdemeanors.

§ 257. Ordinances must not exceed limits of statutes.

Since the legislature cannot delegate its law making power, it necessarily follows that the city ordinance must not go beyond the reasonable meaning of the statute. It does not seem that a statute authorizing a city to regulate the liquor traffic would grant the power to prohibit the same. “The term restraint may be used to designate the forbidding and punishing of the excess or abuse of liberty or property, to the inconvenience or injury of the community; regulation differs from restraint either by defining a precise line the limit beyond which rights may not be exercised, or by creating positive duties which without the statute would have no existence; by prohibition is meant the forbid-

^{43a} Gundling v. Chicago, 176 Ill. 340, 348; Ferguson v. Selma, 43 Ala. 400.

⁴⁵ Chicago v. Schmidinger, 243 Ill. 167.

⁴⁴ Chicago v. The Bowman Dairy Company, 234 Ill. 294.

ding of acts in themselves harmless because they may be carried to excess."⁴⁶ The power to regulate or restrain does not therefore seem to give the power to prohibit.⁴⁷ Under the general power to regulate, with authority to restrict the sale of liquor to the business portion, the city ordinance, defining by certain designated streets and avenues what is the business portion, is *prima facie* binding, though it is admissible to show by other evidence that the declaration is wrong as a matter of fact.⁴⁸ Note, that the statute under which this ordinance was passed restricts the sale to the business portion, and does not specifically give to the city the determination of what shall be so termed. The city ordinance does not extend the scope of the law, unless as a matter of fact it includes in the specified territory a portion which may not properly be called business portion. If it does this it is an exercise of legislative authority, and therefore unconstitutional and void. In California the general power to "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws,"⁴⁹ has been held to place the liquor traffic entirely within local control, even to the extent of absolute prohibition.⁵⁰ Likewise in Alabama the power to restrain has been held to include the power to prohibit.⁵¹

The operation of the city ordinance must not reach beyond the limits of the city, though it may do so

⁴⁶ Freund, Police Power, 28.

⁴⁷ Milliken v. Weatherford, 54 Tex. 388, in which an ordinance, passed under the authority to regulate, and prohibiting the renting of houses to lewd women, was declared void.

⁴⁸ Rowland v. Greencastle, 157 Ind. 707.

⁴⁹ Constitution, Cal. Act. XI, Sec. 11.

⁵⁰ *Ex parte* Campbell, 74 Cal. 20.

⁵¹ Town of Marion v. Chandler, 6 Ala. 899.

indirectly. The prohibition of the bringing into town for sale secondhand clothing without proof of noninfection has been held as an unwarranted interference with trade.⁵² Such an ordinance is really legislation, affecting parties without the jurisdiction of the city. It is also unreasonable. Were there evidence of special danger, or were the ordinance so general as to require the evidence of noninfection for all secondhand clothing offered for sale, it would doubtless have been sustained. As it was it put a special burden upon non-residents.

A general authority granted to control infectious disease, while sufficient to warrant a general vaccination in the presence of an epidemic, does not warrant the passage of an ordinance requiring that all children be excluded from school in the absence of an epidemic until they present evidence of successful vaccination.⁵³ Such an ordinance went beyond the reasonable authority of the city in the matter, and consisted in real legislation—putting special requirements for admission to the public schools. The schools of the city were only a portion of those in the state, all being under certain general laws. To enforce the vaccination requirement upon the scholars in one city would be to open the way for all kinds of different stipulations as to schools, and to bring chaos into the educational system of the state. Only the legislature has authority to pass that legislation.

The proper disposal of garbage in a city becomes often an important sanitary problem. A general sanitary authority will enable the municipality to make

⁵² *Kosciusko v. Stomberg*, 68 Miss. 469; *Freund, Police Power*, 142.

⁵³ *Jenkins v. Board of Education*, 234 Ill. 427.

rules and ordinances specifying how the garbage shall be kept, and how collected; but, unless specially authorized by the charter, or statute, the city may not create a monopoly, nor take property of citizens.⁵⁴ "Since all the powers of a corporation are derived from the law and its charter, it is evident that no ordinance or bylaw of a corporation can diminish, or vary its powers."⁵⁵ The power to change a salary does not include the right to abolish it altogether.⁵⁶ Neither does the power to legislate relative to hucksters imply the authority to include under that term "any person not a farmer or butcher who should sell, or offer for sale any commodity not of his own manufacture," for no municipality has authority under its franchise to change the ordinary meaning of English words.⁵⁷

§ 258. Authority may be general, specific, or implied. The authority under which a city enacts ordinances may be in general terms, or specific in character, or simply implied. "The power to make by-laws, when not expressly given, is implied as an incident to the very existence of a corporation; but in the case of an express grant of the power to enact by-laws limited to certain specified cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication."⁵⁸ Where the grant of power is specific, the city may not exceed the specific limits. Where the power is gen-

⁵⁴ Landberg v. Chicago, 237 Ill. 112; Chicago v. Rumpff, 45 Ill. 90.

⁵⁵ Dillon, Municipal Corporations, 317; citing Thompson v. Carroll, 22 How. 242; Andrews v. Insurance Co., 37 Me. 256; Thomas v. Richmond, 12 Wall.

349; Garden City v. Abbott, 34 Kan. 283, etc.

⁵⁶ State v. Nashville, 15 Lea, 697.

⁵⁷ Mays v. Cincinnati, 1 Ohio, 268.

⁵⁸ Sawyer, J., in State v. Ferguson, 33 N. H. 424, 430.

eral, anything may be done which is not repugnant to the constitution or the statutes, in letter or in spirit. Where certain general authority is given, and specific mention is made of certain subjects, the general power does not permit an enlarged authority over the specific subjects. A power to pass ordinances to "improve the morals and order" of the people does not authorize an ordinance to punish the offence of keeping a house of ill-fame according to a decision in Iowa.⁵⁹ No expression of authority would permit the city to go beyond the provisions of the constitution or statutes, and the municipality, being a child of the state, cannot do that which would be prohibited to the state legislature. The authority given to a city, by which it may require a license from peddlers or trade solicitors, is valid when applied to matters wholly within the state, but it is void as applied to a solicitor for interstate trade.⁶⁰ The state legislature had not this power over interstate commerce; and because it did not have it, the state could not have given that authority in the general grant to the city. Because state statutes must be reasonable, the state cannot give to the city authority to pass an ordinance making unreasonable requirements. An ordinance which subjects the citizens to the will or judgment of a given executive officer without special restraints, is deemed unreasonable. It is liable to abuse, and to be used for oppression of individuals.⁶¹ It is to avoid this danger that Eaton, in his *Government of Municipalities*,⁶² argued that health administration should always be by a board

⁵⁹ *Chariton v. Barber*, 54 Iowa, 360.

⁶¹ *Baltimore v. Radecke*, 49 Md. 217.

⁶⁰ *Caldwell v. North Carolina*, 187 U. S. 622.

⁶² p. 407.

of health. In his argument, however, he failed to recognize that administration to be effective must be immediate, and that efficiency is always weakened by division of responsibility. He seems further to ignore the fact that this executive branch of government has no legislative authority, and can have none.

§ 259. Ordinance must not contravene common rights. Unless the power be distinctly, and specifically granted, either in the constitution, charter, or statutes, the city cannot pass an ordinance which contravenes common rights. A man has a common right to rent his property to whomsoever he may choose. If he rent to undesirable tenants he works an injury upon the surrounding property owners. If the property be used for immoral purposes it is a menace to the morals and health of the community. It seems highly desirable, therefore, that he should be prohibited from renting to lewd women. Such an ordinance would be a good use of the police power, but the power to regulate the business does not give authority for the passage of an ordinance prohibiting such rental.⁶³ Everyone, according to the laws of some of the states, has a common right to fish in navigable waters. A city may make ordinances regulating fisheries, but unless specifically granted, there is no authority for an ordinance which prohibits fishing within the city limits.⁶⁴ While under the general sanitary power it might be lawful to prohibit all fisheries within the city limits, such sanitary control would not warrant the arbitrary selection of one class for prohibition, and another for

⁶³ Milliken v. Weatherford, 54 (Conn.) 22; Willard v. Killingworth, 8 Conn. 247; Classon v. Tex. 388.

⁶⁴ Hayden v. Noyes, 5 Conn. Milwaukee, 30 Wis. 316.
391; Peck v. Lockwood, 5 Day

permission. Such an ordinance is therefore open to the charge of arbitrariness, as well as that it contravenes common rights. When there is no common right an ordinance will not be declared void which prohibits a special class from doing a certain act. No one has a common right to slaughter animals in the street. An ordinance which prohibits such slaughtering by butchers is not therefore arbitrary, nor does it contravene common rights.⁶⁵ A municipal contract giving exclusive rights and franchises by a city is void, otherwise than in the exercise of the police power of the city.⁶⁶ But under the police power a contract for the exclusive right to clear and dispose of the garbage of a city has been declared not an illegal monopoly.⁶⁷ "While ordinances which unnecessarily restrain trade or operate oppressively upon individuals will not be sustained, yet such as are reasonably calculated to preserve the public health are valid although they may abridge individual liberty and individual rights in respect to property."⁶⁸ On this ground an ordinance in a populous city, prohibiting the purchasing of carcasses of animals for boiling, steaming, and rendering, and the rendering of the same within the city, except in certain enumerated cases, and under specified conditions, was sustained as reasonable.⁶⁹ An ordinance conferring upon one person the right to remove and convert to his own use dead animals, to the exclusion of the owner's rights, was held to be an uncon-

⁶⁵ *City Council v. Ahrens*, 4 Strob. (S. C.) 241; *City Council v. Baptist Church*, 4 Strob. 306; *Peoria v. Calhoun*, 29 Ill. 317; *St. Paul v. Colter*, 12 Minn. 41.

⁶⁶ *Long v. Duluth*, 49 Minn. 280.

⁶⁷ *Grand Rapids v. DeVries*, 123

Mich. 570; *State v. Orr*, 68 Conn. 101.

⁶⁸ *Dillon, Mun. Corp.* 326, approved in *State v. Holcomn*, 68 Iowa, 107; *Commonwealth v. Patch*, 97 Mass. 221.

⁶⁹ *State v. Fischer*, 52 Mo. 174.

stitutional taking of private property without compensation, and also a deprivation of property without due process of law.⁷⁰ McGehee holds⁷¹ that "the property interests in the noxious materials must be subordinated to the general good."⁷² While this is true as to state legislation it is not true as to the right of a city to enact ordinances unless that authority be distinctly given. It is in such cases that misunderstandings arise as to conflicts in decisions.

The general principles of this problem have been thus very well stated by Professor Freund:⁷³ "Under the principle of local self government local authorities cannot be vested with powers necessarily exceeding their territorial jurisdiction; those matters therefore which equally affect the people of the state at large, and cannot be confined locally, must be reserved to the state legislature. Moreover, the inauguration of a novel policy in matters of safety and health, the prohibition of articles of consumption, possibly but not undoubtedly injurious to health, the establishment of monopolies, the restriction of the right to pursue established avocations, may under circumstances be conceded to the legislature of the state, but cannot be introduced by local authorities under mere general grants of power." In a similar strain the supreme court of Georgia said, relative to a health ordinance:⁷⁴ "The city council is restrained to such matters, whether specially enumerated or included under gen-

⁷⁰ *River Rendering Co. v. Behr*, 77 Mo. 91; *Landberg v. Chicago*, 237 Ill. 112.

⁷¹ *Due Process of Law*, p. 336.

⁷² Citing *California Reduction Co. v. Sanitary Red Works*, 199 U.

S. 306; *Gardner v. Michigan*, 199 U. S. 325.

⁷³ *Police Power*, 142.

⁷⁴ *Dubois v. Augusta*, *Dudley R.* 30.

eral grant, as are indifferent in themselves, such matters as are free from constitutional objection, and have not been the subject of general legislation; or, as it is expressed in the charter, are not repugnant to the constitution or laws of the land.”

§ 260. **State may do what the city may not.** From the foregoing it is evident that the state may do that which is not permitted to the ordinance making power of the city. There are many problems in the public health work which are designated as questions of public policy. Public policy is not decided according to the opinion of an individual, nor by the consensus of the inhabitants of a given city. It is of broader signification, and must be settled according to the consensus of opinion in each unit of government having the police power; and that unit is the state. The opinion is expressed, not by the executive, nor by the judicial branches, but by the legislature.⁷⁵ “The best indications of public policy are to be found in the enactments of the legislature. To say that such a law is of unusual tendency is disrespectful to the legislature, who, no doubt, designed to promote the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object is a question with which the courts have no concern,”⁷⁶ when the legislative will has been clearly expressed. “Courts of last resort * * * would have no means of ascertaining whether it was a collusive case or not, or whether the weight of evidence was in accord with the truth. * * * The legislature in determining upon the passage of the law may make investigations which

⁷⁵ License Cases, 5 Wall. 462, 475.

⁷⁶ State v. Clarke, 54 Mo. 17, 36.

the court cannot.”⁷⁷ The conclusiveness of the legislative judgment as to the necessity or wisdom of a sanitary measure is strongly insisted upon in the matter of compulsory vaccination by the supreme court of Georgia.⁷⁸ “With the wisdom of vaccination we have nothing to do. * * * The legislature has seen fit to adopt the opinion of those scientists who insist that it is efficacious and that is conclusive upon us.”

§ 261. Ordinance not unreasonable if authorized by state. When authority is specifically granted in the charter, or by the laws of the state, an ordinance passed within the authority cannot be deemed unreasonable.⁷⁹ If the ordinance complies with the authorization, but exceeds the limits of constitutional rights, the act of the state granting the authority must be attacked, rather than the ordinance. Though ordinarily it is contrary to public policy to grant monopolies, and though an ordinance creating a monopoly would generally be declared void on that account, the state has the authority under its police power to grant to the city such jurisdiction for the preservation of health. Under such conditions an ordinance granting a monopoly in the matter of the collection of manure and garbage was upheld.⁸⁰ This ordinance also disregarded the property rights in the matter of ownership.

§ 262. Executive authority depends upon legislative. As executive authority must ordinarily be derived from legislative action, it necessarily follows that under such conditions the executive is thus limited

⁷⁷ *People v. Smith*, 108 Mich. 527; also see *State v. Main*, 69 Conn. 123.

⁷⁸ *Morris v. Columbus*, 102 Ga. 792.

⁷⁹ *Coal Float Co. v. City of Jefferson*, 112 Ind. 15; *Cooley*, Const. Lim. 241.

⁸⁰ *Walker v. Jameson*, 140 Ind. 591.

to such powers as are granted. This means that the authority for a municipal officer is found either under the general laws of the state, in the charter, or in the enactments of the city itself. Under the police power, however, the health officer may sometimes lawfully do that which the city may not direct or authorize by a general ordinance. The fact that during a small-pox epidemic a health officer might very properly, and lawfully insist upon a general vaccination, is no authority for the passage of an ordinance requiring general vaccination.⁸¹ In the presence of yellow fever the sanitary officer might very properly arrest without warrant, and hold without trial, a person whom he suspected of having been exposed to the bites of infected mosquitoes. The warrant for such executive action must be found in the dictum of *Salus populi*. The check upon the officer to prevent excess of action, and the working of injustice, is found in personal liability. Such summary administrative measures would not be tolerated except in extreme emergency. The officer who attempts to use such measures under ordinary conditions will hardly be sustained by the court. In such a course under ordinary conditions he would not show official authority so much as arbitrary or autocratic assumption of power, and it would not be unlikely that he might be assessed heavy personal damages.

A village board of health is purely a creature of statute. It has only such powers, and may use only such methods, as may be provided by statutory enactment. Although, having been created, the board may

⁸¹ *Jenkins v. Board of Education*, 234 Ill. 422.

be expected to improve the general sanitary condition of the community, still it must use only such modes of operation as are clearly given. In the absence of such distinct authority, an attempt to impose penalties for violations of its orders, and to collect the same, would be a deviation from recognized course of action, and as such it would be void. The accused might very properly take advantage of such excess of authority.⁸²

⁸² *Carthage v. Colligan*, 144 N. Y. Supp. 468; *Case of Bonham*, 8 Coke, 107a.

CHAPTER X

OFFICERS

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§ 263. **Importance of the subject.** From the public health standpoint, the most important branch of governmental work is the executive. It is in this field that problems are first met. The executive must make the first decisions. He collects the evidence upon which legislation must be based. He carries into effect the orders of the state as expressed in legislation. Very much, therefore, depends upon the character of the men in the executive work of preserving the public health. Most intimately related with the character of the service we find such questions as: Who are officers? What makes them officers? What are the duties and liabilities of officers?

Strange as it may seem, it sometimes happens that men accept the responsibilities of office with only a very hazy idea as to what their acceptance may imply, further than the right to regularly receive a check for services rendered, or neglected. Because the questions do not frequently come to the attention of trial lawyers, it happens that even well informed attorneys are by no means clear as to what is legal, and what is not. This is shown from a case mentioned in this chapter in which a well known attorney, with extensive experience, when elected to a responsible position, tried twice, with honesty of purpose, to make an illegal appointment, though in the meantime he had neglected an opportunity to make the same appointment legally.

§ 264. **Executive department composed of officers and employees.** Executive departments are composed of officers and employees, or agents. This distinction may not always be important, particularly as to relations with the public; but to the individual exercising

the authority it may be very important to determine his position. Upon the answer to the question whether he be an officer or agent may depend his right to his position, and the amount of his compensation. Neither are officers all upon the same footing. Some are elected, and others are appointed. Since the members of departments of health in this country are seldom, or never, elected, further special consideration of elective offices will be but lightly touched. As health executives, we are chiefly interested in laws relating to elective officers simply because they make appointments. The sovereign power resides in the people. They unite in election to collect the authority into the hands of a few individuals. The people temporarily resign their authority to the elected officer. The elected officer having received this authority, appoints either alone, or with the concurrence of other officers, subordinate officers to look after specified portions of the governmental business. Officers employ additional assistance, and the individuals so engaged are not officers, but employees or agents. Appointive officers and employees are not responsible to the sovereign people, but to the superior officer, or officers by whom they were appointed.¹

As we have attempted to show in Chapter IV, efficiency is closely related to complete organization, and complete organization implies that the entire executive department, or branch, is centered in one head, to whom ultimately every subordinate officer and employee is responsible. Efficiency means the prompt, economic transaction of the affairs of the government. Simplicity and perfection of the organization, with its

¹ See Wyman, Ad. Law, 46.

graduated positions, is of vital importance from every point of view. In proportion to the size of the governmental department we find that the proportion of employees to officers is increased, and the line is not always easily drawn between the two classes.

§ 265. Office and employment distinguished. "An officer is a public agent; the employee is a private agent."² "The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches, for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature the individual is not a public officer."³

There are exceptions to almost every other distinguishing characteristic of an office. Ordinarily an office depends upon enactment for its status, and this enactment may be found in the constitution or in the statute of a legislature. The act creating the office generally states how the office is to be filled; the term of appointment or election, or whether it be at the will of the appointing power; sometimes it fixes the salary or compensation to be received by the holder; always it defines the duties pertaining to the position. Generally, it will be noticed that the office is perma-

² Wyman, *Ad. Law*, 42.

³ Mechem, *Pub. Officers*, 4; citing *Bunn v. People*, 45 Ill. 397; *U. S. v. Germaine*, 99 U. S. 508; *U. S. v. Smith*, 124 U. S. 525; U.

S. v. Mouat, 124 U. S. 303; and several others. Also Wyman, *Ad. Law*, 43; *Throop, Pub. Off.*, Chap. 1.

ment, at least until abolished by subsequent legislation, though the incumbent may be changed at short intervals of time. As distinguished therefrom, an agency or employment is frequently self limited. The employment ends when the duty or contract has been performed. The duties are not fixed by statute. The holder of the position is never elected. An employment may be continuous,—renewed each pay day, but the position is indefinite as to permanence, and character. The Ohio supreme court has said that where the powers and duties of a public nature are required by the law of the state, and where the state law also fixes the character of the individual authorized to perform those duties, he holds an office.⁴

Perhaps the distinction between office and employment may be better appreciated by illustration. Suppose that under the general powers granted in charter and statutes, a city should appoint a health officer, or commissioner of health, his duties being specified in state statutes and municipal ordinances. Suppose that a city ordinance makes provision for the appointment of a physician to treat the destitute sick within the city, and other city charges. In each case, according to the ordinances the appointment is to be for one year. While in the determination of the question whether these two positions are offices or employments, much will depend upon the exact wording of the enactments. On general principles we should expect the health commissionership to be declared an office, and the other an employment. The work of the one is directly governmental, as a part of the state

⁴ State *ex rel.* Attorney General
v. Kennon, 7 Ohio, 547.

police in the prevention of harm to the citizens as a whole. The other has none of the characteristics of government. He has no part of the sovereignty delegated to him. He deals with the citizens as individuals. He may be under the general supervision of the health office, and incidentally he may make the bacteriologic diagnosis of cases suspected of being infectious. He may also attend to the disinfections ordered by the department, but essentially his position is an employment under contract. With such a differentiation of position the following are some of the results. The officer may be removed at any time. The physician can hold his position for the year, and if discharged before the expiration of the contract, unless he be guilty of violating it, he could recover pay for the entire year. In the case of a serious epidemic, involving a very material increase in the work of each, interfering with their private business, the health officer could not hope for special extra compensation, and the city would, in most jurisdictions, be barred from paying extra money, above the regular salary. The physician would perhaps have no legal right to demand greater pay, but the city could, and should in justice, award him extra for such special service. On the other hand, the officer may at any time resign his office, whereas the physician cannot give up his work without the consent of the city. The commissioner of health, so far as his duties are ministerial, may delegate them to an assistant; but so far as they are with discretion he must do the work himself. The physician may employ a substitute, provided that he supply one as competent as himself, particularly if the arrangement be made with the consent of the city

authorities. Mere consent of the city government would not, apparently, be sufficient for the providing of a substitute commissioner of health. An ordinance providing for the office of assistant, or deputy commissioner, would be necessary, though that ordinance might be temporary, in the form of a resolution formally passed and recorded, stating by whom the appointment shall be made. (But see § 272.)

If it be held that the commissioner is a state officer, that is, that his duties are such that he is using the authority of the state, so long as he keeps within his discretion, even if through poor judgment serious harm may result to individuals, neither the city, nor the officer may be successfully sued in the courts. If through lack of care injury result in the physician's service, both city and its agent are liable for damages.

It must be remembered that the two positions may be combined. The statute, or ordinance, providing for the appointment of the commissioner must state the duties of the office. If it seem best for the same man to perform other service for the city, service not conflicting with his work as commissioner, there is no reason why the city may not employ him for such service. Having made such an arrangement in case of legal question as to office or employment, it will be necessary to determine, not whether he be an officer, but whether in the matter at bar he acted as an officer, or as an agent or employee. It must be remembered that the additional service may be made a part of his official duty. If the additional service, by resolution of the council be awarded to the officer by name, it would probably be deemed an employment. If the resolution, or ordinance, be formally passed, imposing

the extra duties upon the commissioner, without mentioning the name, they would be deemed official. Though an officer may not receive extra pay for an increase in service naturally pertaining to his office, he may receive such extra pay when assigned additional duties. (This subject will be discussed later in the chapter. § 329.)

§ 266. Offices not dependent upon statutes. While, as has been stated, an office generally depends upon enactment for its existence, this is not always true. The essential characteristic of an office is the possession of some degree of sovereign power. The recognition of the office may be found in the common law. We thus find in Connecticut that the court recognized a clergyman as a public officer. A "clergyman, in the administration of marriage, is a public civil officer, and in relation to this subject, is not at all distinguished from a judge of the superior or county court, or a justice of the peace, in the performance of the same duty;" and his acts are *prima facie* evidence of his official character.⁵ What is it that makes him able to perform this service?—not his learning, nor any educational degree, but his investiture with the office by the church. It is that alone which gives him the authority to pronounce a man and woman husband and wife. When he has so pronounced it will take judicial action to part them in the name of the state. The clergyman is invested with this governmental authority as an accident to his position in the church. But authority implies also duty. As an officer he is charged with a quasi-judicial obligation. In England

⁵ Goshen v. Stonington, 4 Conn. 209.

it has been held that a clergyman of the Church of England, who was *ad hoc* a public officer, was therefore guilty of a misdemeanor for refusing to marry two persons who might be legally married.⁶ But the greater portion of a clergyman's work is not clothed with any governmental livery. If he be wrongfully kept from his office, unless such deprivation involves the loss of some emolument of office, or legal right, the court will not act to restore him to his official position.⁷ In the United States the government has little or no control over the entrance of men into the public office of clergyman.

It is more than possible that by reasoning similar to that relative to clergymen physicians may be regarded as quasi-public officers. In most of the states the state does exert control over the entrance into such an office. It is a general rule that a person may hold two offices unless they be incompatible, and that a permanent office exempts from a temporary service.⁸ By common practice, and often by statutory enactment, physicians are exempted from jury service. Such an exemption would be in the nature of special privilege, and therefore repugnant to the American system, unless the exemption be based upon some general disqualification. As special privilege it would also be an unconstitutional provision, according to the constitutions of many states. This is true in Illinois, for example. Now there could be nothing in the personal character of physicians which would unfit them for such service. They are of good moral character, and

⁶ Reg. v. James, 2 Den. Cr. Winemiller, 4 H. & McH. (Md.), Cas. 1. 429.

⁷ Union Church v. Saunders, 1 ⁸ Rex v. Tizzard, 9 B. & C. 418. Houst (Del.), 100; Runkel v.

more intelligent than many jurors. There is nothing in the belief of physicians which would unfit them for giving fair consideration to evidence. The Illinois statute, listing those exempt from jury service, names school teachers, but qualifies the exemption by adding "during the term of school."⁹ So, as to clergymen, the exemption is "officiating ministers of the gospel." As with other classes mentioned there is a manifest conflict between their ordinary duties and the temporary service on the jury, so when "physicians" are included in the same list we must conclude that there is an official conflict. Farmers are not exempted "during seedtime and harvest," though at such a time for a farmer to be confined on jury duty might very seriously endanger his financial standing, and even the ownership in his home. Exemptions are not based upon the conflict between private business and public service. A juror is a public officer.¹⁰ The exemption of physicians, therefore, implies that they also have an official status. Statutes generally state the qualifications for physicians. They also name some of the duties of physicians—duties to the people in general, and for the conduct of government. They are given the mandatory duty of reporting to the proper officers all cases of infectious diseases with which they come in contact. Another mandatory duty is to record legally the evidence of the births and deaths occurring in their practice. These reports of physicians are not sworn to, but they are by law termed "*prima facie* evidence" of the facts recorded, and as such evidence they are used in many classes of cases decided by the

⁹ Statutes, Ill. Chap. 78, Sec. 4.

¹⁰ Turpin v. Booth, 56 Cal. 65;
Hunter v. Mathis, 40 Ind. 356.

courts. These duties are mandatory, and a physician who neglects to perform these public duties promptly and accurately is false to his trust, and should be removed from office, by the cancellation of his license to practice; or, if he does not wish to perform his official duties, he should resign his office by retiring from practice. As distinguished from these official duties, the work of a physician for the government may sometimes be an employment. Thus, surgeons appointed by the Commissioner of Pensions are not officers of the United States.¹¹ Their service is purely ministerial—to examine and record the physical condition of applicants for pension ordered before them. Such examining surgeons do not possess any degree of sovereign authority. As employees these examining surgeons are paid regular fees, proportional definitely to the work done. If upon the regular day the board of examiners make no examinations they receive no pay. As officers, physicians often receive no pecuniary compensation for their services. An employment always implies compensation.

§ 267. Honorary office. When there is no pecuniary compensation attached to an office, and the duties are assumed by the incumbent merely for the public good, the office is called naked, or honorary.¹²

§ 268. Lucrative office. An office of profit, also called a lucrative office, is one in which the incumbent receives compensation for his services, either in the form of salary, honorarium, or fees. As used in law the designation lucrative office has no reference to the amount of compensation. If any compensation what-

¹¹ U. S. v. Germaine, 99 U. S. 508.

¹² State v. Stanley, 66 N. C. 59; Throop v. Langdon, 40 Mich. 673.

ever be attached to the office, it is presumed in law that this compensation is in full, even though it be shown that the necessary expenses of the officer are in excess of his compensation.¹³

§ 269. Classification according to service. It is customary to classify officers according to their duties into military, naval, and civil; and to subdivide the civil officers into legislative, judicial, and executive. It would seem better to make the second division first, dividing officers into legislative, judicial, and executive. Executive officers may be military, naval, or civil. Judicial officers are also designated civil, though legislators are generally not considered as civil, basing this action upon the refusal of the United States Senate in 1797 to entertain impeachment proceedings against Senator William Blount, on the ground that he was not a civil officer.¹⁴ Legislative officers are sometimes grouped under the head "civil."¹⁵

Legislative officers are such as determine what the law shall be. Their duties pertain to the enactment of statutes. This class includes the members of Congress and state legislatures.

Judicial officers determine what the law is, or was at a specified time, and decide controversies between individuals, or between individuals and the public. They alone may make an authoritative interpretation of the law.

¹³ Dailey v. State, 8 Blackf. (Ind.) 329; State v. Kirk, 44 Ind. 401; State v. Vallé, 41 Mo. 29; People v. Whitman, 10 Cal. 38; Crawford v. Dunbar, 52 Cal. 36; Kerr v. Jones, 19 Ind. 351; State v. DeGress, 53 Tex. 387; *In re Corliss*, 11 R. I. 638; Foltz v. Kerlin, 105 Ind. 221.

¹⁴ Senate Journal, 10th January, 1799; Story, Constitution, 792; Pomeroy, Const. Law, 716; Rawle, Cons. 213; Twenty per cent Cases, 13 Wall. 568.

¹⁵ Twenty per cent Cases, 13 Wall. 568; Tuck. Black. Comm. App. 57.

Executive officers are those whose duty it is to secure observation of the law as it then exists, and to transact the routine business of the government. It is their duty to abide by the will of the people, as expressed in the legislative branch. The fact that to them is entrusted administrative authority, does not give to them the right to ignore, nor oppose, the legislative branch in action. As executives their duty is purely to obey the expressed wish of the people. However, as citizens, and particularly as having special knowledge of a subject, it is the privilege and perhaps duty of the executive to give advice and information to the legislature. Having given the advice and information, his rights cease as to making legislation, except as he may have the power to veto.

§ 270. **Ministerial or discretionary duties.** The duties of an office are either ministerial or discretionary. It often happens that the duties of a given officer are of both kinds. When a specific duty is imposed by the statutes in a mandatory way, the executive power is purely ministerial. If the officer is permitted to use his judgment, his function is said to be discretionary. "If an officer has discretion, he may do any act within that discretion, and all that he does will be held to have been done by express authorization of law. On the other hand, if the duty of the officer is ministerial, only that very act which he had been directed to do can be held to have been done with authorization of law. Therefore if he acts beyond this express authorization, his acts will be held to be void."¹⁶ (§ 360.) The ministerial officer must do all that the law commands, and nothing more. *Mandamus*

¹⁶ Wyman, Admin. Law, 83.

may be used to enforce the performance of purely ministerial duties.¹⁷

§ 271. **Discretion implies free use of judgment.** “The meaning of the term discretionary, when granted by the law, either expressly or by implication, in connection with official duty, is that the discretionary decision shall be the outcome of examination and consideration. In other words, that it shall constitute the discharge of official duty and not be a mere expression of personal will.”¹⁸ This, therefore, is the essential characteristic of discretionary duties, that they must be the resultant product of a personal investigation and consideration. If the action taken be not based upon the results of such investigation and judgment,—if it be not the outcome of reason, the act is arbitrary and so unauthorized in law. As Mr. Cooley said,¹⁹ “A public office is a public trust”; and he who is elected or appointed to an office with discretionary power is false to his trust when he fails to be governed solely by reason in the discharge of his duty. “An office whose duties and functions require the exercise of discretion, judgment, experience, and skill is an office of trust, and it is not necessary that the office should have the handling of money or property, or the care or oversight of some pecuniary interest of the government.”²⁰

§ 272. **Discretionary power cannot be delegated.** It is a well settled rule that where a trust, either public

¹⁷ U. S. v. Seaman, 17 How. 225; U. S. v. Commissioners, 5 Wall. 563; U. S. v. Schurz, 102 U. S. 378; People v. Bender, 36 Mich. 195.

¹⁸ U. S. v. Douglas, 19 D. C. 99.

¹⁹ Southern Law Review, Vol. 3, N. S., p. 531.

²⁰ Mechem, Pub. Off. 16; citing *In re Corliss*, 11 R. I. 638; *Doyle v. Raleigh*, 89 N. C. 133.

or private, involves matters of personal judgment or discretion the authority cannot be delegated to another person. It is presumed that the trust has been imposed upon him because of his knowledge or special fitness for making a reasonable decision in the matter. "A judicial officer cannot, it is said, make a deputy, unless he hath a clause in his patent to enable him, because his judgment is relied on in matters relating to his office, which might be the reason of making the grant to him."²¹ This rule has been applied in the United States as to private agency, presuming that the agent has been selected by his principle because of special preference.²² A physician employed to treat the sick of the community may not properly employ another to do his work; and if he does so he is not entitled to receive pay for such services. It is legally presumed that his own employment is based upon the estimate of his fitness.²³

Neither may a health officer delegate his duties to another, so as to give the person employed the right to make his services a county charge.²⁴ So as to officers, unless there be a specific permission in the enacted laws of the jurisdiction, there may be no delegation of powers requiring the exercise of judgment and discretion.²⁵ So, under the statutory power to employ a physician, a board of health cannot leave

²¹ Bacon. Abr. Tit. Offices and Officers, L., Vol. VII.

²² Mechem, On Agency, Secs. 184-197; Mechem, Pub. Off. 567.

²³ Chapman v. Muskegon County, 134 N. W. 1025.

²⁴ Copple v. Davie County, 50 S. E. 574.

²⁵ Throop, Pub. Off. 572;

Mechem, Pub. Off. 567; Crocker v. Crane, 21 Wend. 211; Sheehan v. Gleeson, 46 Mo. 100; State v. Patterson, 34 N. J. L. 163; Abrams v. Ervin, 9 Iowa, 87; State v. Shaw, 64 Me. 263; Lewis v. Lewis, 9 Mo. 183; Gale v. Kalamazoo, 23 Mich. 344.

this duty to a committee.²⁶ Though if the action of the committee be later endorsed by the board the power would not be deemed delegated, and the action though irregular would be legal.²⁷

In a Wisconsin case it was said that the power to investigate and report is given to the health officer without limitation, but the power to take measures for the prevention, suppression, and control of the disease is vested in the board and cannot be exercised by the health officer without the approval of the board. Whether this legislation is wise or otherwise, and whether more extensive powers should be given to health officers are not questions for the courts. The legislature, doubtless, in limiting the powers of the health officers, and making them subject to the approval of the board, clearly intended that such matters involving the exercise of judgment and discretion should be vested in the board, and not in the health officer, and that the acts of the health officer in such matters should not be binding without the approval of the board. This seems to be the plain and obvious intention of the legislature, and cannot be disregarded.²⁸

We fear that this well known and well recognized principle, that discretionary powers shall not be delegated, has been frequently violated by boards having charge of examinations for license. The Illinois statute relative to medical practice,²⁹ for example, provides that after an applicant for license to practice medicine has complied with certain preliminary re-

²⁶ *Young v. Blackhawk Co.*, 66 Iowa, 460.

²⁷ *Lyth v. Buffalo*, 48 Hun, 175.

²⁸ *Collier v. Town of Scott*, 102 N. W. 909.

²⁹ Stat. Ill., Chap. 91, Sec. 6.

quirements, "the board shall notify the applicant to appear before it for examination," and "examinations may be made in whole or in part in writing by the board." Very clearly the duties of the board in this case are not ministerial. The examination requires the exercise of judgment and discretion: it must therefore be conducted by the board, and not by deputies. The statute further specifies in what branches of professional education the applicant shall be examined. There is nothing in the statute which provides for license "by reciprocity," that is, the issuance of a license on the strength of an examination made in another state. Since this judicial duty cannot be delegated, it seems that such licenses by reciprocity are not warranted in the law of Illinois. Neither would it be lawful for a member of the board to entrust the marking of examination papers to an assistant, or deputy. The reading of the papers must be done in person by the member of the board. On the other hand, the direct superintendence of the examination, the watching, and otherwise attending to the mechanical details of the test, does not imply a quasi-judicial duty. Such service is ministerial, and may therefore be performed by a deputy or clerk. (§ 426.)

§ 273. Arbitrary action not discretion. Discretion implies the use of reason rather than will. "It not infrequently happens that the statutes require particular things to be done that must be made to depend upon the judgment—discretion—of a designated officer, and the discretion in such is not arbitrary, it is lawful and must be lawfully executed," and an officer is personally liable for an abuse of that discretion.³⁰

³⁰ State v. Yopp, 97 N. C. 478.

“It follows that boards of health may not deprive any person of his liberty, unless the deprivation is made to appear, by due inquiry, to be reasonably necessary to the public health.”³¹ Since an officer may not exceed his authority and in a matter requiring the exercise of judgment arbitrary action is not warranted in law, such arbitrary action is contrary to law. “An officer charged with discretionary power is not liable in damages unless he acts arbitrarily, and in obvious violation of law.”³² “It is a general rule that judicial officers acting within their jurisdiction cannot be held personally responsible for the improper, or erroneous performance of their duties. This rule embraces all officers exercising discretionary powers,” but the rule does not apply when an officer has been actuated by corrupt or malicious motives, or has practiced fraud upon the injured party.³³

§ 274. Officers with discretion cannot be coerced. A duty which is imposed with discretion implies the use of a free exercise of judgment. (§ 159.) Anything within that discretion is lawful. It therefore follows that the officer may not be legally coerced in his decision. He may, under certain circumstances, be compelled by *mandamus* to take action, but how the action shall result is within the discretion of the officer. A board may be compelled to audit accounts, but not to approve them.³⁴ A board of auditors may be compelled to examine an account, but not to allow the

³¹ Kirk v. Wyman, 65 S. E. R. 387.

³² Ingersoll, Pub. Corp. 89; Boute v. Emmer, 43 La. Ann. 980; Pruden v. Love, 67 Ga. 160; McCarthy v. DeArmit, 99 Pa. 63;

Rounds v. Mumford, 2 R. I. 154; Baker v. State, 27 Ind. 485.

³³ Ingersoll, Pub. Corp. 90, citing numerous cases.

³⁴ People v. Supervisors, 53 Hun, 254.

account.³⁵ In so far as the act is ministerial, *mandamus* will lie to compel action even upon officers with discretion;³⁶ but beyond that point the decision of the officer must be absolutely free and untrammelled. "To the judiciary department is intrusted the interpretation of the laws, the determination of rights, and the application of remedies, and in this regard it is sometimes difficult for the courts to properly appreciate the fact that the executive department is charged with perfectly independent duties, which require the ascertainment of facts, involve the interpretation of laws, and in many respects call for the exercise of judgment and discretion; and this independence is so great that no matter how gross an error may be committed in the execution of these duties, the courts are nevertheless powerless to interfere. Private interests may suffer in instances, and rights may sometimes be denied; but these alone do not authorize the interference of the courts with executive officers. Greater evils could not exist under our system of government than would follow the usurpation by the judiciary of powers not entrusted to them." And therefore, in this case, the court refused a *mandamus* to compel the registration of a trademark.³⁷ Any effort therefore made to influence a decision of such an officer, other than by argument, is illegal.³⁸ In this connection it

³⁵ *People v. Barnes*, 114 N. Y. 317.

³⁶ *Attorney General v. Common Council*, 29 Mich. 108; *State v. Commissioners*, 31 Ohio, 451; *People v. Judge*, 27 Mich. 170; *State v. Webber*, 38 Minn. 397; *Case v. Blood*, 71 Iowa, 632; *Eden v. Templeton*, 72 Iowa, 687.

³⁷ *Seymour v. U. S.*, 2 App. D. C. 240.

³⁸ *St. Claire v. People*, 85 Ill. 396; *People v. Henry*, 236 Ill. 124; *People v. Dental Examiners*, 110 Ill. 105; *People v. Rose*, 225 Ill. 496; *People v. Knickerbocker*, 114 Ill. 539; *Commonwealth v. McLaughlin*, 120 Penn. 518; *State v. Webber*, 38 Minn. 397; *State v. Young*, 84 Mo. 90; *People v. Chapin*, 104 N. Y. 96.

may not be out of place to call attention to a modern tendency in American governmental methods which seems to be a violation of this principle. By use of the patronage, by withholding appropriations, by riders in appropriation bills, and by various other tricks, executive officers have sought to force legislative action in particular lines, and legislatures have tried to compel executives to do as desired by the other branch. This system cannot be too strongly condemned. The legislative duty rests entirely with the legislature, and the legislature has no authority over the executive other than that found in legitimate statute making. The present tendency is to destroy the fundamental division of government into three branches. It is the duty of the executive to bring to the attention of the legislature subjects requiring legislation, according to his opinion. It is very doubtful if he have the moral right to call special sessions to compel the legislature to do specific things.

§ 275. **Discretionary decision not subject of purchase.** By common law and common parlance efforts to influence decisions of officers by purchase are deemed corrupt and contrary to public good. Agreements or contracts made to bias such decisions are not legal. Thus an agreement to appoint a certain person to office is void.³⁹ With reference to legislation it has been said: "Any contract, therefore, for services to be performed in procuring or attempting to procure the passage or defeat of any public or private act by the use of any improper means or the exercise of undue influence, or by using personal solicitation, influence or persuasion with the members is void; and any

³⁹ Hager v. Catlin, 18 Hun, 148.

agreement for the payment of a fee for such services is likewise void." ⁴⁰ Where one agreed to work for the election of a certain candidate, on condition that if successful the candidate would appoint him a deputy, the agreement was void. ⁴¹

§ 276. Public and private officers. An individual invested with some portion of the sovereign powers of the government, to be exercised by him for the benefit of the public, is a public officer. ⁴² As distinguished from the foregoing we have private officers, who possess none of the sovereign power. It is one of the duties of the state to protect its citizens from harm. This is a sovereign duty, and it is also the duty of policemen. They are therefore public officers. ⁴³ Since, however, the duties of a police patrolman refer chiefly to the enforcement of municipal ordinances, such an officer has sometimes been, perhaps mistakenly, held to be not a public officer. ⁴⁴ It must be remembered that, considering the nature of his duties, an officer of a municipality may sometimes be a public, and sometimes a corporate officer. So far as a mayor's duties consist in enforcing state laws he may be considered as a state officer; but in signing a contract for the erection of a municipal gas, or water plant he is acting as an official of the corporation as such. In a suit alleging injury or debt the court would consider, not the abstract position of the officer, but his position with regard to the specific act. A college professor

⁴⁰ Mechem, Pub. Off. 360, citing cases.

⁴¹ Stout v. Ennis, 28 Kans. 706.

⁴² Mechem, Pub. Off. 1; Throop, Pub. Off. 1-28; Bunn v. People, 45 Ill. 397; U. S. v. Smith, 124 U. S. 525.

⁴³ Dickson v. People, 17 Ill. 191; Farrell v. Bridgeport, 45 Conn. 191.

⁴⁴ Doyle v. Raleigh, 89 N. C. 133.

does not exercise any of the sovereign powers of the state, even though he hold his position in a state university. He is therefore not a public officer.⁴⁵ The members of a commission appointed to fund the floating of a municipal debt are not public officers;⁴⁶ and the treasurer of a city was held not to be a public officer.⁴⁷

The sovereign power is represented by the state. For convenience in administration the state is divided into counties, towns, villages, and cities. Certain communities incorporate themselves for commercial advantage. As portions of the state they conduct the local affairs of the state government, and officers thus engaged are public officers. As coöperative corporations they manufacture gas, lay sewers, and sell water, and the officers thus engaged are not public officers. Whatever is necessary for government, or essentially a part of government, is public; whatever is essentially a coöperative affair of business is not public. This is not a mere distinction of name. It is of practical importance because of the difference in legal liability. The preservation of health, and the protection of citizens generally from infectious diseases, is an attribute of police power, and that power is an evidence of sovereignty. It naturally follows that a city officer of health (not a physician treating the poor of the city at public expense), though appointed by the municipality, and with powers confined to the limits of the city, is a public officer.⁴⁸

⁴⁵ *Butler v. Regents*, 32 Wis. 124.

⁴⁶ *People v. Middleton*, 28 Cal. 608.

⁴⁷ *State v. Wilmington*, 3 Harr. (Del.) 294.

⁴⁸ *In re Whiting*, 1 Edm. Sel. Cas. (N. Y.) 498.

§ 277. **State versus municipal officers.** Because municipal, township, or county officials who exercise real governmental powers are essentially doing the work of the state, they are sometimes called "state officers." Thus, Judge Dillon says:⁴⁹ "It is important to bear in mind the before mentioned distinction between state officers—that is, officers whose duties concern the state at large, or the general public, although exercised within defined territorial limits—and municipal officers, whose functions relate exclusively to local concerns of the particular municipality. The administration of justice, the preservation of the peace and the like, although confined to local agencies, are matters of public concern; while the enforcement of municipal by-laws proper, the establishment of gasworks, the construction of sewers and the like, are matters which pertain to the municipality as distinguished from the state at large."⁵⁰ Therefore, police are state officers, rather than municipal.⁵¹ Because the work of the police department of cities is really in the nature of necessary governmental action, and because it has frequently happened that, owing to local influences, the departments have been lax in enforcing certain police regulations of the statutes, such as restriction of the sale of liquor, it is now becoming more common to place municipal police departments under direct state control, and statutes so providing have been found con-

⁴⁹ Municipal Corporations, Sec. 567; *Britton v. Steber*, 62 Mo. 58. 370; also *Fairlie, Munic. Ad.*, p. 142.

⁵⁰ Citing *People v. Hurlburt*, 24 Mich. 44; *Chicago v. Wright*, 69 Ill. 326; *People v. Draper*, 15 N. Y. 543; *Wolsey (In re)* 95 N. Y. 135; *Astor v. New York*, 62 N. Y.

⁵¹ *Burch v. Hardwick*, 30 Gratt. 24; *Farrell v. Bridgeport*, 45 Conn. 191.

stitutional.⁵² When the administration is left with the municipality, the corporation is therefore regarded simply as the agent of the state. It has been held that the state may fix the pay of municipal police.⁵³

Whatever has been said relative to the police as state officers, applies especially to public health administrators. Certainly, if any local officer, that is, one whose appointment is received from local sources, and whose authority is limited by the confines of the city, is entitled to be regarded as a state officer, it must be the officer of health, for his efficiency guards other communities besides his own, and his negligence endangers large areas.

“The health officers of a city are officers of the state, their functions are governmental and are conferred in the interest of the public at large.”⁵⁴ Public officers, even when elected by the voters of a town to perform statutory duties which involve the expenditure of money properly raised by local taxation, are not the agents of the town. The members of a board of health, therefore, cannot be removed by a vote of the inhabitants of the town.⁵⁵ It is competent for the legislature, in the preservation of the public health and prevention of disease, to appoint or direct the manner of appointing persons to act as health officers, and to impose the expenses incurred by them in the performance of their duties on the municipality for which they are appointed.⁵⁶ When the state law provides the manner of

⁵² Goodnow, *Principles of Ad. Law*, p. 100; Fairlie, *Municipal Administration*, p. 142; Dillon, *Munic. Corp.*, Sec. 40.

⁵³ See Dillon, *Munic. Corp.* 60, note for list of cases. *Baltimore v. State*, 15 Md. 376.

⁵⁴ *White v. San Antonio*, 60 S. W. 427.

⁵⁵ *Attorney General v. Stratton*, 194 Mass. 51.

⁵⁶ *Keefe v. Union*, 56 Atl. 571.

appointing, and the number of members of a board of health, an ordinance changing these provisions is illegal and void.⁵⁷ The police power, which controls everything essential to the public health, has been left to the individual states, but in its operation it is largely left to the authority of municipalities and of local boards of health.⁵⁸ But where the legislature has vested in boards of health authority to make regulations and ordinances to preserve the public health, ordinances made by county commissioners are invalid.⁵⁹ This last case illustrates, by conflicting ideas of authority, the inadvisability of permitting any degree of real legislative authority to an administrative board.

§ 278. State officers proper. As in ordinary conversation a word varies in meaning according to its context, so legal terms vary, not only according to the individual opinions of the interpreting authorities, but also according to the context in which the words are found in the law to be interpreted. The expression "state officers" as used in the preceding paragraph refers only to the nature of the duties of such officers. It is the duty of the attorney general to appear for and defend "state officers." As thus used the term applies only to those who are connected with the government of the state at large.⁶⁰ Thus, the commissioners of a metropolitan police district, even though appointed by the governor of the state, are not state officers in this

⁵⁷ *Lozin v. Newark Board of Health*, 48 N. J. L. 452.

⁵⁸ *Klopper v. Board of Health*, 9 N. P. N. S. O. 33; *Atlantic City v. Crandol*, 38 Vr. 488; *Johnston v. Belmar*, 13 Dick. 354; *Withing-*

ton v. Harvard, 8 Cush. 68; *Meyers v. Clarke*, 122 Ky. 866.

⁵⁹ *State v. Beacham*, 34 S. E. 447.

⁶⁰ *Throop, Public Officers*, 29.

sense.⁶¹ Neither is an officer elected under a municipal charter a state officer.⁶²

§ 279. **Officers de jure, and de facto.** There is another important classification of officers, namely officers *de jure*, and officers *de facto*. A *de jure* officer is one who has been legally appointed or elected to a genuine, or *de jure*, office, and who has complied with all of the requirements pertaining to the assumption of the office. This implies that he is legally eligible for the office, that he has a legally executed commission, and otherwise has complied with the constitutional or statutory requirements. A defect at any point makes the officer *de facto*. As ordinarily used the terms are exclusive.⁶³ An officer *de jure* may or may not be in possession of the office, though Mechem⁶⁴ defines an officer *de jure* as "one who has the lawful right to the office in all respects, but who has either been ousted from it or who has never actually taken possession of it. When the officer *de jure* is also the officer *de facto* the lawful title and possession are united."⁶⁵

Lord Ellenborough, in *Rex v. Bedford Level*,⁶⁶ has defined an officer *de facto* to be "one who has the reputation of being an officer he assumes to be, and yet is not a good officer in point of law." Although there has been a tendency to qualify this definition in American cases, requiring the color of title to the office, by virtue of an election or appointment,⁶⁷ it is now the estab-

⁶¹ N. Y. & Harlem R. R. Co. v. Mayor, 1 Hilt. (N. Y.) 441.

⁶² Britton v. Steber, 62 Mo. 370; Mohan v. Jackson, 52 Ind. 599; People v. Conover, 17 N. Y. 64.

⁶³ Throop, Public Officers, 622.

⁶⁴ Public Officers, 316.

⁶⁵ Citing Hamlin v. Kassafer, 15 Ore. 456; Plymouth v. Painter, 17 Conn. 585.

⁶⁶ 3 East, 356.

⁶⁷ Wilcox v. Smith, 5 Wend. (N. Y.) 231; Cary v. State, 76 Ala. 78; People v. Tieman, 30

lished usage to follow the definition given by Chief Justice Butler of Connecticut, in *State v. Carrol*.⁶⁸ He said: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties were exercised: First, without a known appointment or election, but under such circumstances of reputation or quiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. Second, under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent requirement or condition, as to take an oath, give a bond, and the like. Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public. Fourth, under color of an election, or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

The reason why public policy demands that for the time during which they officiate, such officers' acts should be legal as regards the public and third persons, is well stated by Justice Devens, in the case of *Petersilea v. Stone*.⁶⁹

Barb. 193; *People v. Collins*, 7 Wickwire, 19 Conn. 492; *Carleton Johns* (N. Y.), 549; *McInstry v. v. People*, 10 Mich. 250.
Tanner, 9 Johns, 135; *Cocke v.* ⁶⁸ 38 Conn. 449.
Halsey, 16 Pet. 71; *Douglas v.* ⁶⁹ 119 Mass. 465.

A usurper, one who thrusts himself into, or assumes an office contrary to law, is distinguished from an officer *de facto*. The acts of a person who thus intrudes himself without color of law, are void both as regards the public and as to other persons.⁷⁰ One who is at first a mere usurper may by acquiescence become an officer *de facto*.⁷¹ Likewise, an officer *de facto* may become an officer *de jure*, through the completion of some of the required steps of entering into office, such as filing a bond, taking an oath, or the issuance of a legal commission.

Members of a board of health for a village constitute a board *de facto*, notwithstanding irregularity in the passage of the ordinance creating the board;⁷² but a city physician, though duly elected by the city council, is not *ex officio* a member of the board of health, where the ordinance making him such is invalid.⁷³

§ 280. **No office de facto.** There can be no office *de facto*, according to the system of the United States.⁷⁴ "Where the law has provided that an office may legally be filled then the acts of an incumbent may be valid although not lawfully appointed, because the public being bound to know the law, knows that somebody may or should fill the place and perform the duties; and possession would as to them be evidence of

⁷⁰ State v. Taylor, 108 N. C. 196; Plymouth v. Painter, 17 Conn. 585; State v. Carroll, 38 Conn. 449; Hooper v. Goodwin, 48 Me. 79; Tucker v. Aiken, 7 N. H. 113; Hamlin v. Kassafer, 15 Ore. 456; McCraw v. Williams, 33 Gratt. (Va.) 510.

⁷¹ Mechem, Public Officers, 319; State v. Carroll, 38 Conn. 449.

⁷² Smith v. Lynch, 29 Ohio, 261.

⁷³ Attorney General v. McCabe, 52 N. E. 717.

⁷⁴ Hildreth v. McIntire, 1 J. J. Marsh (Ky.), 206; Hawver v. Seldenridge, 2 W. Va. 274; Norton v. Shelby County, 118 U. S. 425.

title. But where the law itself negatives the idea that there can be a legal incumbent, anyone assuming to act assumes what everyone is bound to know is not a legal office, and his acts cannot be effectual for any purpose."⁷⁵ But the rule "would seem to be that a person who holds a position which has been established by an unconstitutional law, should be regarded, until the law establishing the position has been declared unconstitutional, a *de facto* officer, inasmuch as he is holding a position under color of the title which comes from a law which has not been formally declared unconstitutional. This view of the subject may also be sustained upon the theory that the title to office may not be impeached in a collateral proceeding to which the officer is not a party, even though the ground of the impeachment is the fact that the position is based upon an unconstitutional law."⁷⁶ An officer *de jure* may become an officer *de facto*, through the expiration of his term of office.⁷⁷ But when the statute provides that an incumbent shall hold his office until his successor is elected or appointed and qualified, the officer so holding over is an officer *de jure*, not *de facto*.⁷⁸ "Where such a provision exists, it is held that so far as it is necessary to

⁷⁵ Campbell, J., in *Carleton v. People*, 10 Mich. 250, 258.

⁷⁶ Goodnow, *Principles of Administrative Law*, p. 258, citing *State v. Gardner*, 54 Ohio, 24; *Burt v. Railway Co.*, 31 Minn. 472; *American Law Review*, Jan. 1896; *Leach v. People*, 122 Ill. 240.

⁷⁷ *People v. Tieman*, 30 Barb. 193; *Newman v. Beckwith*, 61 N. Y. 205.

⁷⁸ Goodnow, *Prin. Ad. Law*, p. 306; *State v. Bulkeley*, 61 Conn. 287; *People v. Forquer*, 1 Ill. 104; *People v. Bissell*, 49 Cal. 407; *People v. Hammond*, 66 Cal. 654; *People v. Tyrell*, 87 Cal. 475; *People v. Tilton*, 37 Cal. 614; *People v. Osborne*, 7 Colo. 605; *State v. Harrison*, 113 Ind. 434; *People v. MeAdoo*, 110 N. Y. Sup. 432.

the protection of the public the officer will be deemed to be in office even if he has resigned and his resignation has been accepted.”⁷⁹ The appointments of an officer *de facto* are themselves *de facto*, and the English rule is that ousting the appointer also ousts the appointee.⁸⁰ Though there is some difference in the ruling of American courts, the English rule seems to have been followed in the later American cases.⁸¹ It is manifestly impossible that two persons shall hold the same position at one and the same time. It therefore follows that there can not be at the same time an officer *de jure* and an officer *de facto*.⁸² Neither can there be two officers *de facto* for the same office.⁸³

§ 281. **Determination of title to office.** Since the actual occupancy of an office presupposes that the incumbent is there lawfully, it is a well recognized principle that the title to office cannot be tested collaterally.⁸⁴ Thus an injunction will not lie to oust a usurper from office.⁸⁵ (§ 382.) Neither may the title to office be tried by *certiorari*.⁸⁶ (§ 383.) In *Simon v. Hoboken*,^{86a} the court held that *certiorari* would not lie to test title to office, even though the person appointed

⁷⁹ Goodnow, Prin. Ad. Law, p. 306; *State v. Bulkeley*, 61 Conn. 287; *State v. Howe*, 25 Ohio St. 588.

⁸⁰ *Rex v. Lisle*, Andrews, 163; *Rex v. Mayor*, 5 Term R. (D. & E.) 66; *Rex v. Grimes*, 5 Burr, 2599; *Rex v. Hebden*, Andrews, 389.

⁸¹ *People v. Anthony*, 6 Hun (N. Y.), 142; *People v. Murray*, 73 N. Y. 535; *Contra*, *People v. Staton*, 73 N. C. 546; *Brady v. Howe*, 50 Miss. 608; *State v. Alling*, 12

Ohio, 16; *State v. Jacobs*, 17 Ohio, 143; *Mallett v. Uncle Sam G. Co.*, 1 Nev. 188.

⁸² *Mechem*, Public Officers, 322, citing cases.

⁸³ *Mechem*, Public Officers, 323, citing cases.

⁸⁴ *Mechem*, Pub. Off. 330, citing cases, 343.

⁸⁵ *Throop*, Pub. Off. 850, citing cases.

⁸⁶ *Donough v. Dewey*, 82 Mich. 309.

^{86a} 52 N. J. L. 367.

had not entered upon the discharge of his duties, so that *quo warranto* would not lie.

Mandamus will not lie to oust an officer *de facto*.⁸⁷ (§ 384.) When the title to office has been settled, and there is no other incumbent, then *mandamus* may be employed to seat the officer *de jure*.⁸⁸

Since a person may not profit by his own fault, it naturally follows that, though the acts of an officer *de facto* are valid as regards others, they are not valid as regards himself. "When an individual claims by action an office, or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for defense; but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office."⁸⁹ Neither may an officer *de facto* plead in defense, when action is brought against him for any misfeasance in office, that he was not an officer *de jure*.⁹⁰ Likewise, he may be compelled by *mandamus* to perform the duties of the office which he assumes.⁹¹

The proper remedy to test the title to office, in the absence of any special statutory provision, is by *quo warranto*, or information in the nature of *quo warranto*,⁹² except in the case of officers of a court, where the matter may be decided by motion. (§ 379.)

⁸⁷ Throop, Pub. Off. 825 *et seq.*, citing cases.

⁸⁸ Throop, Pub. Off. 828, citing cases.

⁸⁹ *People v. Tieman*, 30 Barb. 193; *Mechem*, Pub. Off. 331, 342; Throop, Pub. Off. 517, 518, citing cases, 659.

⁹⁰ Throop, Pub. Off. 664;

Mechem, Pub. Off. 338, citing cases.

⁹¹ *Mechem*, Pub. Off. 339; Throop, Pub. Off. 666; *Runion v. Latimer*, 6 S. C. 126; *Kelly v. Wimberly*, 61 Miss. 548.

⁹² *Mechem*, Pub. Off. 344; Throop, Pub. Off. 776 *et seq.*

A *de facto* officer may be punished for negligence, malfeasance, or misfeasance.⁹³ He may be compelled by *mandamus* to perform the duties of the office.⁹⁴ But he may at any time withdraw from office, or publicly disavow authority, and he will thereafter not be liable for nonfeasance.⁹⁵

An officer *de facto* cannot enforce payment for his services.⁹⁶ The emoluments of office belong to the officer *de jure*, even though he be kept out of office, and he may collect the same from the proper disbursing officer.⁹⁷ It has been held in one case that the officer *de jure* may collect all of the emoluments of the office, and that he need not deduct the amount which he has otherwise earned while he was kept out of his office.⁹⁸

When the officer *de facto* has been paid the salary, the officer *de jure* may not claim the salary from the officer or corporation which has paid the officer *de facto*.⁹⁹ But he may collect by action for that purpose, against the officer *de facto*.¹⁰⁰ It has sometimes been held that an officer *de facto* is entitled to deduct his expenses in earning the fees and emoluments.¹ In other cases it was held that the officer *de jure* might collect the whole salary, without deduction.² In New Jersey it was held that the officer *de jure* might not

⁹³ Mechem, Pub. Off. 336, 337, 338; Throop, Pub. Off. 668.

⁹⁴ Mechem, Pub. Off. 339; Throop, Pub. Off. 666.

⁹⁵ Mechem, Pub. Off. 340; Throop, Pub. Off. 666.

⁹⁶ Mechem, Pub. Off. 331; Throop, Pub. Off. 661.

⁹⁷ Throop, Pub. Off. 661; Fitzsimmons v. Brooklyn, 102 N. Y. 536.

⁹⁸ Fitzsimmons v. Brooklyn, 102

N. Y. 536; Andrews v. Portland, 79 Me. 484.

⁹⁹ Memphis v. Woodward, 12 Heisk, 499; Mechem, Pub. Off. 332; Goodnow, Prin. Ad. Law, p. 288.

¹⁰⁰ Mechem, Pub. Off. 333; Throop, Pub. Off. 523; Goodnow, Prin. Ad. Law, p. 288.

¹ Mayfield v. Moore, 53 Ill. 428.

² People v. Miller, 24 Mich. 458.

recover the salary earned by the officer *de facto*.³ The public cannot recover salary voluntarily paid to an officer *de facto*.⁴ The emoluments collected by an officer *de facto*, may be collected from him by the officer *de jure*, but they may not be collected from his sureties.⁵

Dillon calls attention⁶ to the fact that the fees of an office are not property, and cannot be collected by action against the city, by officer wrongfully kept from office.⁷

“Where a statute annexes a pecuniary penalty to an office, and empowers a particular officer to sue for it, a person suing for the penalty must show that he is the officer *de jure*, as well as *de facto*.⁸ This results from the rule, that he must sue in his individual name, with the addition of his official title; and in pleading he must allege, that he is the officer he purports to be, upon which issue may be taken.⁹ But where a statutory penalty is given to a town, county, or other municipality, an action therefore may be maintained by the municipality, although the penalty was incurred by the violation of rules established by officers of the municipality, who were merely officers *de facto*, *ex gr.* a board of health.”¹⁰

§ 282. Appointment to office. An appointment may be the result of the action of a single officer, or of a

³ Stuhr v. Curran, 15 Vroom, 181.

⁴ Badeau v. United States, 130 U. S. 439.

⁵ Throop, Pub. Off. 256, citing Curry v. Wright, 86 Tenn. 636; Mechem, Pub. Off. 334.

⁶ Municipal Corporations, 235, note.

⁷ Citing Smith v. New York, 37 N. Y. 518; Saline Co. v. Anderson,

20 Kans. 298; Dolan v. Mayor, 68 N. Y. 279; Hadley v. Mayor, 33 N. Y. 603.

⁸ Horton v. Parsons, 37 Hun, 42; People v. Nostrand, 46 N. Y. 375.

⁹ Gould v. Glass, 19 Barb. 179; Supervisor v. Stinson, 4 Hill (N. Y.), 136; Commissioners v. Peck, 5 Hill, 215.

¹⁰ Throop, Pub. Off. 862, citing Bedford v. Rice, 58 N. H. 446.

select body. The fact that a statute, in prescribing that certain officers shall be chosen by certain boards, uses the word election does not affect the question, for such a selection is in legal effect an appointment.¹¹ A selection made by a court, or by the legislature, or by a municipal council, is not an election. It is legally an appointment.¹² "An appointment by the Governor or other person is not an election, so as to satisfy a provision of the constitution directing an election in certain cases."¹³

§ 283. Appointment by same branch of government. The fundamental idea of the separation of the powers implies the right of each branch to select its own agents. (§ 124.) The legislature may therefore appoint, either directly or indirectly through its officers, executive officers for its own body.¹⁴ Such appointments could not be made by the general state executive. On the other hand, and for like reason, the legislature may not appoint a purely administrative officer.¹⁵ In *State v. Hyde*, Mr. Justice Berkshire said "that the power to appoint to office is not a legislative function it seems there can be no question. Is it an executive function? That the power to appoint to office is intrinsically an executive function has been decided over and over again. Therefore the legislature cannot do what it has attempted in this case: take upon itself the appointment of the head of a department, as the appointment

¹¹ *Sturgis v. Spofford*, 45 N. Y. 446.

¹² *State v. McCollister*, 11 Ohio, 46; *Carpenter v. People*, 8 Col. 116; *People v. Lord*, 9 Mich. 227; *People v. Bull*, 46 N. Y. 57; *State v. Denny*, 118 Ind. 449; *State v. Hyde*, 121 Ind. 20; *Throop, Pub.*

Officers, 84; *Wyman, Ad. Law*, 47.

¹³ *Throop, Pub. Off.* 84, citing *Speed v. Crawford*, 3 Met. (Ky.) 207.

¹⁴ *State v. Denny*, 118 Ind. 449.

¹⁵ *State v. Kennon*, 7 Ohio, 546; *State v. Hyde*, 121 Ind. 20.

to office is an executive function." The legislature may establish the office, and may provide for the appointment of the officer; it may increase or decrease his duties; but it may not appoint. Therefore, when Congress established a commission for a park, and provided that it should consist of five persons, three of whom should be appointed by the President, with the advice and consent of the Senate, and the other two should be two existing officers of the United States, it was held that Congress did not appoint these two additional members to the commission, but that it simply enlarged their previous duties, and left the appointing power in the hands of the President.¹⁶

§ 284. **Appointment by nonofficial body.** Throop cites,¹⁷ with apparent approval *Sturges v. Spofford*,¹⁸ and *In re Bulger*,¹⁹ to show that in the absence of any specific direction in the constitution of the state, the legislature may provide for appointment by unofficial persons or corporations. We may hardly agree with that distinguished writer, nor with the reasoning of the court cited. The decision written by Mr. Justice Cartwright in *Lasher v. People*,²⁰ seems to be the more safe. In effect, it is that since the legislature could not itself make the appointment, as that would be an encroachment of the legislative upon the powers of the executive, therefore the legislature was also powerless to grant the appointive power to another, to clothe the corporations with the sovereign power of appointment.

¹⁶ *Shoemaker v. United States*,
147 U. S. 282.

¹⁷ Pub. Off. 85.

¹⁸ 45 N. Y. 446.

¹⁹ 45 Cal. 553.

²⁰ 183 Ill. 226, 233. See also
Commissioners Ct. Perry Co. v.
Med. Soc., 128 Ala. 257.

In *Lasher v. People*²¹ there was also a constitutional question involved, further than that of the separation of the powers. The statute involved was an act passed in 1899 to regulate the shipping, consignment, and sale of produce, fruit, butter, eggs, poultry, etc. The act created a Board of Inspectors, and provided that those inspectors should be appointed by several societies from their own membership. One member was to be selected by each of the societies named. The constitution of the state prohibits²² the legislature from passing any law "Granting to any corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever." The court said: "Such rights as inhere in the sovereign power can only be exercised by the individual or corporation by virtue of a grant from such sovereign power, and whenever the state grants such a right it is a franchise."²³ The appointing power is an attribute of sovereignty.²⁴ Therefore the granting to these private corporations the right to appoint public officers was granting to them special privileges, and franchise. The act was therefore unconstitutional.

This prohibition as to the granting of appointive power to corporations or individuals outside of the official body has a direct application in the administration of public health. It is frequently suggested that the selection of health officials, or members of medical examining boards, should be left to the membership of the medical societies, who would be the more competent, on an average, to make proper selections. The

²¹ 183 Ill. 226.

²² Art. IV, Sec. 22.

²³ *Board of Trade v. People*, 91

Ill. 80; *People v. Holtz*, 92 Ill.

426.

²⁴ 1 Blackstone's Com. 272.

general rule would prohibit such delegation of appointing power. To a degree, the same end may be secured by requiring the societies to nominate to the appointing officer such persons as may be deemed suitable. Such nominations, however, would have no binding power, and the appointing power may entirely disregard them. "As the function is executive, it is independent; no dictation to the department can be made without violation of the rule of separation of powers. Qualifications upon the eligibility of officers may be made, but directions as to the choice may not be made. Since appointment is an executive function, these results follow."²⁵

§ 285. Power to appoint must be given by law. The power of appointment must be distinctly given either by the constitution, or by the legislative enactment.²⁶ It is customary in the state constitutions to give to the Governor a general power of appointment in all cases where either by the constitution, or by enactment, other provision is not made. (§ 125.) It is also customary in the constitutions and statutes that the power of appointment given to the Governor over the more important offices, is subject to the advice and consent of the senate. The appointment consists in the choice. If the choice requires nothing more than the commission of the appointing power, the appointment is absolute. When the consent of another body or officer is required before the issuance of the commission, the appointment is conditional. Where an officer was appointed when the senate was not in session, and entered upon the discharge of

²⁵ Wyman, Ad. Law, 48.

Fox v. McDonald, 101 Ala. 51;

²⁶ State v. French, 141 Ind. 618;

State v. George, 22 Oregon, 142.

his duties, and served until notified that the senate had refused to confirm his appointment, it was held that he must be deemed to have been duly and legally appointed, and entitled to the office while he served.²⁷

Since the power of appointment depends upon statute, it naturally follows that the provisions of the statute must be carefully observed. Thus, an appointment of a health officer by the common council without the nomination of the mayor, as disposed by law, is invalid;²⁸ but boards appointed by the mayor under ordinances not specifying manner of appointment are to be deemed legally appointed.²⁹ Under the general law in California authorizing a county to make and enforce police and sanitary laws and regulations, boards of supervisors have power to appoint health officers and to provide for the payment of their salaries.³⁰ The statutory requirement that three out of the five members of a local board of health shall be physicians does not prohibit the organization of a municipal board of health on which more than three of the five members are physicians.³¹ A law providing for the appointment of health officers by boards of health, and for the payment of salary is mandatory.³²

§ 286. Municipal or board appointments. By the laws of some states certain municipal officers are said to be elected, but they are really appointed by the mayor and common council. In such cases the mayor does not act independently, but simply as the presiding

²⁷ Gould v. United States, 19 Ct. of Claims (U. S.), 593.

²⁸ Braman v. New London, 74 Conn. 695.

²⁹ Taunton v. Taylor, 116 Mass. 254.

³⁰ Valle v. Shaffer, 81 Pac. 1028.

³¹ State *ex rel.* Weber v. Kohnke, 31 So. 45.

³² State v. Massillon, 24 Ohio Cir. Ct. 249.

officer of the council. The written resolution, duly entered in the minutes of the council, has been considered a complete appointment even though the mayor refused to attest it.³³ After a city officer has been declared duly chosen by a board of aldermen, and the declaration has been recorded, the board cannot at any adjourned meeting, held the next day, reconsider its action and choose another.³⁴ So too, after having confirmed an appointment, the council cannot reconsider its action and refuse to confirm.³⁵ But a rule regularly adopted, providing for a reconsideration is valid.³⁶ When an appointment is once made, no subsequent appointment is valid.³⁷ An office once filled cannot be declared vacant until the term for which the appointment is made has expired, or the death, resignation, or removal of the person appointed.³⁸ An appointment to take effect at some future time specified is valid.³⁹ But such appointment made by outgoing officers, to take effect after the expiration of the service of the appointers, is not valid.⁴⁰

§ 287. Appointment implies written commission.

An appointment to be complete implies a written commission from a person authorized to issue the same,⁴¹

³³ *People v. Stowell*, 9 Abb. N. C. (N. Y.) 456.

³⁴ *State v. Phillips*, 79 Me. 506; also *State v. Barbour*, 53 Conn. 76.

³⁵ *State v. Wadham*, 64 Minn. 318.

³⁶ *People v. Mills*, 32 Hun, 459; *State v. Hamilton Co.*, 7 Ohio, 134.

³⁷ *Thomas v. Burrus*, 23 Miss. 550; *People v. Woodruff*, 32 N. Y. 355.

³⁸ *Johnston v. Wilson*, 2 N. H. 202.

³⁹ *Smith v. Dyer*, 1 Call (Va.), 562; *Whitney v. Van Buskirk*, 40 N. J. L. 463.

⁴⁰ *Ivy v. Lusk*, 11 La. Ann. 486; *State v. Meehan*, 45 N. J. L. 189; *People v. Reid*, 11 Colo. 141.

⁴¹ *Cooner v. Gilmer*, 32 Cal. 75; *Wood v. Cutter*, 138 Mass. 149.

and evidence of the acceptance of the same by the appointee.⁴²

The rule above given, that an appointment is valid only when a commission is issued has not always been strictly followed. "If a person acts notoriously as an officer of a corporation, and is recognized by it as such officer, a regular appointment will be presumed, and his acts will bind the corporation, although no written proof is, or can be, adduced of his appointment."⁴³ The appointment, and authority of a municipal officer may be presumed by the recognition, or adoption of the work of such officer.⁴⁴ This does not necessarily mean that such an officer is one *de jure*. It does follow that as regards the public such an officer's acts must be regarded as those of a true official. In one of the early New York cases it was held that in the absence of a constitutional or statutory requirement that the appointment be in writing, an oral appointment was sufficient.⁴⁵ In a subsequent case it was held that a written communication to the council, and confirmed by the council, (though such confirmation was not necessary), was a sufficient commission, though not in due form.⁴⁶ In another case where the mayor nominated a candidate orally to the council, and the council regularly confirmed the same, regularly recording the action in the minutes of the meeting, it was held that since the confirmation was not required by the law, the action was a nullity; and since the only act of appointment was the oral appointment of the

⁴² *People v. Willard*, 44 Hun (N. Y.), 580.

⁴³ *Dillon, Munic. Corp.* 213, citing *Bank of U. S. v. Danridge*, 12 Wheat. 64.

⁴⁴ *Killey v. Forsee*, 57 Mo. 390.

⁴⁵ *People v. Murray*, 5 Hun, 42.

⁴⁶ *People v. Fitzsimmons*, 68 N. Y. 514.

mayor, it violated the common law upon the subject, and was no appointment.⁴⁷ In delivering the opinion in this case Mr. Justice Allen cited *Hunt v. Ellisden*,⁴⁸ *Curles' Case*,⁴⁹ and *Craig v. Norfolk*,⁵⁰ which held that an oral appointment is invalid. He therefore concluded that since by the common law the act was invalid, by implication it was also contrary to the statute. An appointment is not complete until a commission has been made and signed, and until such time the appointment may be revoked.⁵¹

§ 288. Commission is evidence of appointment. The commission is not the appointment, but the evidence of the appointment.⁵² It is not necessary that the commission shall have been delivered.⁵³ When a person has been nominated by the President, and confirmed by the senate, and the commission has been signed and sealed, his appointment is complete. The delivery of the commission to the appointee is not necessary to his investiture with the office. He may be required to perform certain acts, such as taking the oath of office, before the investiture of office is complete, but the delivery of the commission is not essential.⁵⁴

§ 289. Commission best evidence of appointment. Though some kind of a written commission is necessary for a valid appointment, that commission is not the appointment itself, but the evidence of appoint-

⁴⁷ *People v. Murray*, 70 N. Y. 521.

⁴⁸ 2 Dyer, 152.

⁴⁹ 11 Coke, 2.

⁵⁰ 1 Mod. 122.

⁵¹ *Cooner v. Gilmer*, 32 Cal. 75; *Wood v. Cutter*, 138 Mass. 149.

⁵² *State v. Allen*, 21 Ind. 516.

⁵³ *Marbury v. Madison*, 1 Cranch, 137.

⁵⁴ *Marbury v. Madison*, 1 Cranch, 137; *U. S. v. LeBaron*, 19 How. 73; *Hill v. State*, 1 Ala. 559; *Jeter v. State*, 1 McCord (S. C.), 233; *State v. Lylies*, 1 McCord (S. C.), 238; *Justices v. Clark*, 1 T. B. Mon. (Ky.) 82; *Johnston v. Wilson*, 2 N. H. 202.

ment, and generally speaking it is the best possible evidence.⁵⁵ One holding an office by virtue of a commission must show that the person making such appointment, and signing the commission, was lawfully empowered to make the appointment.⁵⁶ In a case where the constitution declared that the appointment should be made by the Governor, and the general assembly assumed to make a selection, and the Governor issued a commission in which it was stated that the officer was appointed by the vote of the general assembly, it was held that this was not an appointment by the Governor, and the appointment was therefore void.⁵⁷ So also, in cases where a commission is issued through any error, as for an elective office when a commission is issued to one person under the mistaken idea that he had received the highest number of votes, the commission is void.⁵⁸ And a commission which was issued by the Governor, under the mistaken supposition that there was a vacancy, conferred no title.⁵⁹

§ 290. Time for appointment. When county judges make appointments to membership in boards of health they may exercise their discretion in filling vacancies without delay.⁶⁰ Where authority is given to appoint a successor "at" the expiration of an offi-

⁵⁵ State v. Allen, 21 Ind. 516; U. S. v. LeBaron, 19 How. 73; Allen v. State, 21 Ga. 217; Carter v. Sympton, 8 B. Mon. (Ky.) 155; Bank of U. S. v. Dandridge, 12 Wheat. 64; Callison v. Hedrick, 15 Gratt. (Va.) 244.

⁵⁶ State v. Board of Health, 49 N. J. L. 349.

⁵⁷ State v. Peele, 124 Ind. 515.

⁵⁸ State v. Johnson, 17 Ark. 407; Ewing v. Filley, 43 Pa. 384; Kerr v. Trego, 47 Pa. 292; Low v. Towns, 8 Ga. 360; Luzerne Co. v. Trimmer, 95 Pa. 97; also see Hardin v. Colquitt, 63 Ga. 588.

⁵⁹ State v. McNeely, 24 La. Ann. 19.

⁶⁰ *In re* Board of Health, 64 Hun, 634.

cer's term, it was held that the appointment might be made at or near the time of the expiration of the term.⁶¹ It was held that an appointment made within six months of a specified time was valid, even though the statute directs the Governor to make the appointment "at least six months" before that time.⁶² In a similar manner it was decided that a county treasurer was validly appointed when he gave a bond three days afterward, and the bond was accepted and approved by the commissioners, even though when the appointment was made it was conditional upon the giving of a bond within two days.⁶³

"Where a statute vested the appointing power in the mayor and two aldermen of a city, and two justices of peace of the county, and directed that it should be exercised on a certain day; and the appointment was made clandestinely, after a refusal by the mayor to inform certain aldermen and justices of the peace as to the hour when and the place where the appointment would be made; it was held, that this was not such an exercise of the mayor's discretion as would satisfy the law; and leave was granted to file an information in the nature of a *quo warranto* against the officers so appointed."⁶⁴

§ 291. Appointments requiring confirmation made during recess. There is another class of cases in which a question as to legality of appointment may arise, namely in those in which the appointment requires confirmation by the legislative body. In the state of

⁶¹ *People v. Blanding*, 63 Cal. 333.

⁶² *In re Census Superintendent*, 15 R. I. 614; also *People v. Police Board*, 46 Hun (N. Y.), 296.

⁶³ *State v. Ring*, 29 Minn. 78, 83.

⁶⁴ *Throop, Public Officers*, 94; citing *Comm. v. Douglas*, 1 Binn. 77.

New York the constitution provides that the Governor may temporarily fill a vacancy in the office of justice of the supreme court, by the advice and consent of the senate "if the senate shall be in session," or by his own appointment if the senate be not in session. The senate adjourned an extraordinary session from September 10 to November 20. On September 13 a vacancy occurred which the Governor filled on the 21st. The question raised was whether the senate was then in session, as within the meaning of the constitution. The court of appeals held that the appointment was valid, for the reason that when the sittings of the body were terminated by an adjournment of months, it could not be said to be in session. The court suggested, but did not pass upon, the question whether the provision in the constitution referred to any other than the regular sessions of the senate as a branch of the legislature.⁶⁵

The question of the power of the Governor to appoint during a recess of the legislature, when the statute says that the appointment shall be made "by and with the advice and consent of the senate," is quite fully considered in an opinion by Attorney General Stead of Illinois.⁶⁶ The statute says,⁶⁷ in part: "The Governor of this state, by and with the advice and consent of the senate, shall, before the first Monday in December, 1881, and every four years thereafter, appoint in each county in this state, and as often as any vacancy may occur, a suitable person to be known as public administrator of such county, who shall hold his office for the term of four years from the first Monday in December,

⁶⁵ *People v. Fancher*, 50 N. Y. 288.

⁶⁶ Report of the Attorney General, 1910, p. 172.

⁶⁷ Revised Statutes, Chap. 3, Par. 44.

1881, or until his successor is appointed and qualified." On December 6, 1909, the Governor appointed one Tracy to the office of public administrator of Kankakee County, for four years from date, and a certificate was made out and issued on that date. The senate was not then in session. The preceding administrator had neither resigned, died, nor been removed, but he was still holding the office, and discharging the duties thereof. The county judge refused to permit Mr. Tracy to qualify, because the senate had not concurred in the appointment when the commission was made out, or when said Tracy applied to qualify. The senate met in extraordinary session December 14, 1909, and adjourned, *sine die*, March 2, 1910. Mr. Tracy's nomination was not submitted for confirmation. On March 3, 1910, the Governor submitted to the Attorney General for opinion three questions. First: Can the Governor make such appointment, and issue a commission during a recess of the senate, and before the senate has concurred in such appointment? Second: Has the county court the right to question the validity of such appointment when asked to enter an order fixing a bond of such appointee? Third: If the appointment of December 6th was not valid because it was not submitted to the senate, can the Governor reappoint said Tracy?

In his opinion Mr. Stead said that so far as he was aware the questions submitted had not been passed upon by the courts of Illinois, nor by those of other states. He then says:⁶⁸ "The law is well settled that an office does not become vacant on the expiration of the fixed term of the incumbent of the office, where,

⁶⁸ P: 173.

under the law, he holds over until his successor is elected or appointed and qualified.”⁶⁹ Mr. Stead then proceeds to say that there being no vacancy, the appointment must be considered as for the full term, beginning with the expiration of the term of the incumbent then in office. But the statute did not give to the Governor the power to make such appointment alone, but only “with the advice and consent of the senate.” The original appointment was therefore illegal and void, and the county court was justified in refusing to treat the appointment as valid, and in refusing to enter the order fixing the amount of the bond. As supporting the contention that the Governor could not issue a lawful commission without the consent of the senate, Mr. Stead cites, *Marbury v. Madison*; ⁷⁰ *Field v. People*,⁷¹ and *People v. O’Toole*,⁷² each of which held that the chief executive could not act alone, but that it must be the concerted action of the Governor (President), and the senate.

§ 292. **Recess appointments must be submitted for confirmation.** According to a statute in California an officer held over, after the expiration of his term, until his successor qualified; and a person appointed to fill a vacancy held until his appointment was acted upon by the senate. It was held that having made an appointment to fill the vacancy, the governor could not revoke the appointment, but must submit it to the senate.⁷³ A vacancy which occurred during a session of the legis-

⁶⁹ *People v. Forquer*, 1 Ill. 104; *People v. McAdoo*, 110 N. Y. Supp. 432.
People v. Bissell, 49 Cal. 407;

People v. Hammond, 66 Cal. 654; ⁷⁰ 1 Cranch. 137.

People v. Tyrell, 87 Cal. 475; ⁷¹ 2 Seam. 79.

People v. Tilton, 37 Cal. 614; ⁷² 164 Ill. 344.

People v. Osborne, 7 Colo. 605; ⁷³ *People v. Cazneau*, 20 Cal. State v. Harrison, 113 Ind. 434; 504.

lature may be filled by appointment under the provision which permits the governor to appoint during recess of the legislature.⁷⁴ The provision of the constitution which requires the governor shall nominate to the senate such civil officers as are thus to be appointed, "within fifty days from the commencement of each regular session of the legislature," does not apply to such offices as were created by acts passed during that session of the legislature.⁷⁵ A municipal officer appointed by the mayor temporarily to fill an office during the absence of the regular officer (a defaulter), contended that the mayor had only the power to appoint to fill a vacancy, and that the appointment was therefore for the remainder of the full term. It was held that if the mayor did not have the power to appoint temporarily his action was a nullity.⁷⁶

§ 293. Time for which appointed. Where a correct interpretation of the charter of the city provided that the term of a city officer was two years, and the city council appointed a man for one year, supposing that one year was the correct term, it was held that the appointment was legally for two years, and the appointment of a successor at the end of one year was nullity.⁷⁷ (§§ 314-316.)

§ 294. Vote must show approval. A case in Massachusetts centered upon the vote for confirmation of a nomination by the mayor. The statute said that, "The mayor shall have the exclusive power of nomination, subject however to confirmation or rejection by the board of aldermen." The same nomination had been

⁷⁴ State v. Kuhl, 51 N. J. L. 191.

⁷⁵ Co. Coms. v. Hellen, 72 Md. 603.

⁷⁶ People v. Hall, 104 N. Y. 170; People v. Lord, 9 Mich. 227.

⁷⁷ Stadler v. Detroit, 13 Mich. 346

rejected ten times, and upon being made again the mayor put it to vote in this form: "Shall the nomination be rejected?" There were three votes for, and three against. The mayor declared the nomination not rejected, and the nominee appointed. There was no objection made at that time, and the officer's bond was approved by the aldermen, after the appointee had taken his oath of office. It was held by the court that if the nomination was not confirmed by a majority vote of those voting the appointment was not made, and the appointee would be ousted upon *quo warranto*.⁷⁸

§ 295. **Action of majority.** The English rule as to whether or not the act of the majority concludes the minority is thus stated by Ch. J. Eyre:⁷⁹ "I think it is now pretty well established that where a number of persons are entrusted with powers, not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole."⁸⁰

The American rule is that when the statutes confer upon three or more persons the power to act in a matter of public concern, requiring discretion and judgment, but contain no directions as to the number of those who may exercise the power, such action requires the presence of all and the action of a majority.⁸¹

⁷⁸ *Com. v. Allen*, 128 Mass. 308; also *Baker v. Comrs.*, 62 Mich. 327.

⁷⁹ *Grindley v. Barker*, 1 Bos. & Pul. 229.

⁸⁰ See also, *Rex v. Whitaker*, 9 B. & C. 648; *Rex v. Beeston*, 3 T. R. (D. & E.) 592; *Cortis v. Kent Waterworks Co.*, 7 B. & C.

314; *Withnell v. Gartham*, 6 T. R. (D. & E.) 388.

⁸¹ *Mechem*, Pub. Off. 575; *Throop*, Public Officers, 106, citing: *Caldwell v. Harrison*, 11 Ala. 755; *Pulaski Co. v. Lincoln*, 9 Ark. 320; *Louk v. Woods*, 15 Ill. 256; *Paola R. R. Co. v. Anderson Co.*, 16 Kas. 302; *Merrill v. Berkshire*, 11

If there be any vacancies upon the board, it has been held that the members in office cannot act, even though they constitute a majority of the full board.⁸² But if all have been duly convened the dissent of a minority, or their withdrawal or refusal to be considered as members of the board will not affect the validity of the acts of the majority.⁸³ If two out of three act in the absence of the third, his subsequent signature to the instrument executed by them will not cure the defect.⁸⁴ Approval by full board of minutes where two acted will not cure defect.⁸⁵ Where a statute provides that a majority may act, they may act without consultation with the minority.⁸⁶ It is not necessary that the statute should specifically confer upon the majority the power to act, even without notice to the minority, if such power may be reasonably inferred from the provisions, or the nature of the power conferred.⁸⁷ The right of a majority to act in the absence of the minority is thus stated by Judge Emott:⁸⁸ "The rule of the common

Pick. (Mass.) 268; Williams v. School Dist., 12 Met. (Mass.) 497; State v. Porter, 113 Ind. 79; Scott v. Detroit Y. M. C. A., 1 Doug. (Mich.) 119; State v. Smith, 22 Minn. 218; Jewett v. Alton, 7 N. H. 253; Charles v. Hoboken, 27 N. J. L. 203; Green v. Miller, 6 Johns. (N. Y.) 39; Cooper v. Lampeter, 8 Watts (Pa.) 125; Cassin v. Zavalla, 70 Tex. 419; Schenck v. Peay, 1 Woolw. (U. S.) 175; Curtis v. Butler, 24 How. 435; Cooley v. O'Connor, 12 Wall. 391; First Nat'l Bank v. Mount Tabor, 52 Vt. 87; Soens v. Racine, 10 Wis. 271; and numerous other cases.

⁸² Cassin v. Zavalla, 70 Tex. 419; Williamsburg v. Lord, 51 Me.

599; Schenck v. Peay, 1 Wool. 175.

⁸³ See cases above cited.

⁸⁴ Keeler v. Frost, 22 Barb. 400.

⁸⁵ *In re Palmer*, 1 Abb. Pr. N. S. (N. Y.) 30.

⁸⁶ Johnson v. Dodd, 56 N. Y. 76; People v. Batchelor, 22 N. Y. 128; Jefferson Co. v. Slagle, 66 Pa. St. 202; Austin v. Helms, 65 N. C. 560; Walcott v. Walcott, 19 Vt. 37.

⁸⁷ Pulaski Co. v. Lincoln, 9 Ark. 320; State v. Wilkesville, 20 Ohio 288; People v. Nichols, 52 N. Y. 478; Keeler v. Frost, 22 Barb. 400; People v. Williams, 36 N. Y. 441.

⁸⁸ Horton v. Garrison, 23 Barb. 176, 179.

law, which is now declared by statute, that where an authority is to be exercised by more than one officer, they must all concur in its exercise, or all meet and consult and a majority agree to act, is subject to the necessary qualification, that if one is notified to attend and refuses, it is the same as if he had attended and dissented from the act.”⁸⁹

Under the statutory provisions requiring the presence of all of the three members of the executive committee of the State Board of Health to make a valid quarantine order, an order signed by two members, that is by a majority, is invalid in the absence of proof that all of the members were present when the order was made.⁹⁰

§ 296. **Vote need not show quorum.** The presence of a quorum is not required to be shown by the votes cast. When a majority of the board are present, if a majority of those present decline to vote, or vote in a different manner than that prescribed by law, as *viva voce* when the statute requires vote by ballot, a minority, composed even of a single member, is sufficient to make an appointment.⁹¹

§ 297. **Sufficiency of notice.** “As to the sufficiency of the notice required, in order to enable the majority to act in the absence of the minority, it seems that a reasonable notice suffices; and whether a notice is, or is not reasonable, will depend upon the circumstances of

⁸⁹ Also see *McCoy v. Curtice*, 9 Wend. 17; *Woolsey v. Tompkins*, 23 Wend. 324; *Perry v. Tynan*, 22 Barb. 137; *People v. Walker*, 22 Barb. 304; *In re Church St.*, 49 Barb. 455; *People v. Supervisors*, 10 Abb. Pr. 233; *Gildersleeve v. Board of Education*, 17 Abb. Pr

201; *People v. Batchelor*, 22 N. Y. 128; *People v. Nichols*, 52 N. Y. 478.

⁹⁰ *Wilson v. Ala. Ga. S. Ry. Co.*, 77 Miss. 714, 28 S. 567.

⁹¹ *Comm. v. Read*, 2 Ashm. (Pa.) 261.

each particular case.”⁹² A member who is present and participates in a meeting is thereby estopped from objecting to a special meeting on the ground of insufficient notice.⁹³ A body having established rules or by-laws, with stated times and places of meetings may make appointments at such regular meetings without special notice to absentees.⁹⁴ A board having appointed a day for choosing a city officer, and at an intervening meeting rescinded the resolution and proceeded to make the selection, some of the aldermen being absent, and not having had notice of the change, it was held that the action was void.⁹⁵ Where the day of the meeting of the Mayor and council is fixed by statute, half of the aldermen may not defeat an election by absenting themselves, thus to leave the board without a quorum.⁹⁶ Where the statute directed the township trustees of a county to meet on a specified day and appoint a county superintendent, but gave no direction as to the requisite number to form a quorum, or the manner of election; and on the given day ten trustees met and balloted unsuccessfully until noon, and then adjourned to meet on the day following; when only five met and made the selection; it was held that the common law rule requires the presence of a majority to render the action valid, and the appointment was therefore void.⁹⁷ Where the town officers met on the day specified by statute and selected a town treasurer, and

⁹² Throop, Public Officers, 113, citing Whiteside v. People, 26 Wend. 634, reversing 23 Wend. 9; People v. Batchelor, 28 Barb. 310; *In re Church Street*, 49 Barb. 455.

⁹³ Mitchell v. Horton, 75 Iowa 271.

⁹⁴ People v. Batchelor, 22 N. Y.

128; Gildersleeve v. Board of Education, 17 Abb. Pr. 201.

⁹⁵ People v. Batchelor, 22 N. Y. 128.

⁹⁶ Kimball v. Marshall, 44 N. H. 465.

⁹⁷ State v. Porter, 113 Ind. 79.

then adjourned to a certain day to enable the appointee to accept or decline the appointment; and on the day appointed he appeared and declined the appointment, and the town officers then adjourned to another certain day and on that day appointed another man; it was held that the last appointee was lawfully appointed, and that the former incumbent did not hold over.⁹⁸

§ 298. **Appointment by two or more bodies.** "Where the power of appointment to an office is conferred by statute upon two or more bodies, and no provision for a quorum is made, nor is it provided that they shall act separately, the rule is that all the bodies must meet together for consultation, or all must be notified so to meet; and thereupon if the majority of those present constitute a majority of all the members of all the bodies, they may proceed to make the appointment."⁹⁹ But even when the law requires a joint ballot, an appointment by ballot of the separate bodies is sufficient to give color of office.¹⁰⁰ Where the statute gives the power to appoint to two bodies, specifying that when they disagree they shall meet and make the appointment by joint ballot, the failure of one body to nominate is the same as a disagreement, and the appointment must be made by joint ballot.¹ If after so meeting in joint session to make an appointment, and the smaller body, finding itself in the minority, withdraws; and the larger body, having present a majority of the combined joint meeting proceeds to

⁹⁸ Carter v. McFarland, 75 Iowa 196.

⁹⁹ Throop, Pub. Off. 116, citing People v. Walker, 23 Barb. 304; Gildersleeve v. Board of Education, 17 Abb. Pr. 201; Comm. v. Hargest, 7 Pa. County Court, 333;

Canniff v. Mayor, 4 E. D. Smith, 430; Davenport v. Hull, 18 Wend. 510.

¹⁰⁰ Belfast v. Morrell, 65 Me. 580.

¹ Ex parte Humphrey, 10 Wend. 613.

make an appointment, it was held that the appointment was valid.²

§ 299. **Appointive power once used is exhausted.** Whenever the appointive power, either of an officer or of a board has been legally used, no subsequent appointment can be made until a vacancy exists by reason of the expiration of the term for which appointment was made, or by the death, resignation, or removal of the appointee.³ Where an appointment is complete, and the incumbent is removable only "for cause," the appointing power has no authority to revoke a commission, nor to rescind an appointment.⁴ But if the appointment was illegally made, either as to manner, or by officers not having authority to make the appointment, another appointment may lawfully be made.⁵ A ballot having been taken and announced cannot be rescinded by resolution, and the person so appointed was held to have been legally appointed.⁶ But if the result of the ballot has not been announced, though counted, a second appointment will be valid.⁷ Where the body has a general rule providing for reconsideration, a vote taken and recorded, may at a later meeting be reconsidered, and another appointment be lawfully made.⁸

² Whiteside v. People, 26 Wend. 634; Kimball v. Marshall, 44 N. H. 465.

³ Thomas v. Burrus, 23 Miss. 550; People v. Woodruff, 32 N. Y. 355; Johnson v. Wilson, 2 N. H. 202; People v. Bissell, 49 Cal. 407.

⁴ Ewing v. Thompson, 43 Pa. 372; State v. Love, 39 N. J. L. 14; People v. Stowell, 9 Abb. N. C. 456; Marbury v. Madison, 1 Cranch, 137.

⁵ State v. Peele, 124 Ind. 515; Commissioners v. Philadelphia Commrs., 5 Binn. 534.

⁶ State v. Barbour, 53 Conn. 76; State v. Phillips, 79 Me. 506.

⁷ Baker v. Cushman, 127 Mass. 105; Putnam v. Langley, 133 Mass. 204.

⁸ People v. Mills, 32 Hun, 459.

§ 300. Appointment of self. It is sometimes necessary for a board to appoint one of its own members to a position. A vote of an authorized committee, electing the clerk as city engineer, duly recorded and signed by him as clerk was declared valid, and sufficient to take the appointment out of the statute of frauds.⁹ But appointment of one's self to office is contrary to public policy, and where a board is to make the appointment, and they appoint one of their own members, and owing to division the candidate's own vote was necessary for his election, it was held that the appointment was void.¹⁰

Under a city ordinance providing for the appointment of a quarantine physician by the local board of health the board could not lawfully and properly elect one of themselves to this office. The ordinance, by requiring that he shall be subject to the orders of the board, contemplates that he shall not be a member. His charges are to be only such as the board approves. His personal interest in these charges is inconsistent with the proper performance as a member of the board of health to fix their amount in the interest of the public and the protection of the patients. Such appointment was therefore contrary to public policy, and the mayor was upheld in removing the members of the board of health for making such appointment.¹¹

§ 301. Appointments by outgoing officers. It is manifestly contrary to public policy for an outgoing

⁹ Chase v. Lowell, 7 Gray (Mass.) 33.

¹⁰ People v. Thomas, 33 Barb. 287; State v. Hoyt, 2 Oreg. 246. See also Sloan v. Peoria, 106 Ills. App. 151.

¹¹ Gaw v. Ashley, 195 Mass. 173. Also, Ft. Wayne v. Rosenthal, 75 Ind. 156; Spearman v. Texarkana, 24 S. W. 883. But see St. Johns v. Supervisors, 70 N. W. 131.

officer to appoint subordinates for his successor. Though it is a duty to make appointments to fill vacancies, the retiring officer may not make appointments to positions which will not be vacant during the terms of the appointers.¹² Where a county commissioner whose term had expired the night before, and whose successor had been elected and qualified, took part in the appointment of a county treasurer, it was held that therefore the appointment was void.¹³

§ 302. Municipal authority to create offices and make appointments. By the common law a city has the power to create such officers as shall seem necessary for conducting the business of the city. Such civil offices must be of very limited authority and jurisdiction. By the general rules governing the relationship between the city and the state, the city may not create any office, nor impose powers and duties, contrary to the general statutes of the state; and the state may at any time nullify the act of the city by state legislation. The city has no power to create any office which is not authorized by the state. This authorization may be general, rather than specific. Formerly all health administration was local in character. Local health officials were therefore recognized in the common law. In addition, under the general powers given to the city to preserve the health of the citizens, it would therefore be lawful for a city to create such offices of health as might seem necessary, even though power to create offices of health be not distinctly given by the state. The power is implied. In creating offices the city has

¹² State v. Meehan, 45 N. J. L. 189; People v. Blanding, 63 Cal.

¹³ Rogers v. Buffalo, 123 N. Y. 173.

full authority to determine by whom appointments shall be made, for what time, for what duties, and how paid. The city may at any time abolish an office so created.¹⁴

§ 303. Appointments of two or more for unspecified class or district. It sometimes happens that an appointing body has to elect, that is, in reality appoint, two or more officers of equal rank and designation, but for different term, or class, or for different districts, the districts being known by number. When the vote is not distinctly announced beforehand as for a given term or district, it has been held that the one first chosen shall be deemed appointed for the first class or district, and others in order to other classes or districts; but if both be elected on one ballot the person whose name appears first on the record shall be deemed appointed for the first class or district.¹⁵ It is evident that resort to this ruling is undesirable, and that it should be distinctly understood before a ballot be taken what position is about to be filled. In case that there be two vacancies to be filled, that which has longest existed should be first filled. Suppose that A be appointed to a certain office, presumably in conformity with law, and enter upon the discharge of his office. Later, and before the expiration of the term of B in a corresponding office, with same title, suppose that C be appointed to the office by name without designating the term. But before the expiration of the term of B suppose that it be determined that A was not legally appointed; apparently, under the ruling in *People v.*

¹⁴ *Dillon*, *Munic. Corp.* 206, 207. *Pr.* (N. Y.) 404; *People v. Supervisors*, 20 N. Y. 252.

¹⁵ *People v. Kneissel*, 58 *How.*

Supervisors,¹⁶ it would be held that C would take the unexpired term which was being occupied by A, even though when he was appointed it was supposed that he would succeed to the long term. In other words, of two undesignated officers, the term of the one first appointed should expire before that of subsequent appointees.

§ 304. Officers of health appointed, not elected. It will perhaps be noticed that in this discussion little has been said relative to elective officers. Neither have all the possible phases of appointments been covered. So far as I am aware, the officers of public health administration are always appointed, in this and foreign countries. They never should be elected, and there is little probability that they will be. The laws governing elections are therefore of interest in public health administration only secondarily, as determining the right of elective officers to make appointments. On the other hand, an attempt has been made to select from the decisions relative to the power of appointment such as might have a bearing upon a possible appointment of health officers. Much may depend upon the legality of appointment, and one may easily err in supposing himself an officer *de jure*.

§ 305. Eligibility for appointment—Citizenship. Having decided who shall make an appointment, and how it may be accomplished, the next question which arises is, Who are eligible for appointment? (§ 126.) At the very beginning of the answer to this question one is met by the distinction between an appointment to office and an employment. There is nothing in nature or law, aside from the statutes, which would in

¹⁶ 20 N. Y. 252.

any way interfere with employing the best man available for a position, irrespective of his citizenship. In fact, such a course is highly commendable. But to an officer the people resign a portion of their sovereign authority. It would be beyond belief that any self-respecting nation would permit a resignation of sovereign authority within its own bounds to any foreign power, except in such reciprocal limited areas as are used for diplomatic service. To appoint to an office one who is not a citizen, one who owes allegiance to another nation, is practically to surrender such authority to the foreign power. A fundamental principle therefore is that an officer must be a citizen. Thus it was held that officers appointed by the State Board of Health for towns must be residents of the town for which appointed.¹⁷ This seems to be an extreme view, and not necessarily for the greatest efficiency, though endorsed by legal principles. If the local health officer be really a state officer, and appointed by a state board, the necessity of local residence does not seem emphatic. On the other hand, the city physician who is not a member of the board of health is simply the servant of the city, and though called an officer it was held that the place could be filled by an alien.¹⁸

Exactly what shall be the definition of the limits of citizenship must be left to enactment, either in the constitutions, or statutes. It may be easier to acquire citizenship in one jurisdiction than in another. Citizenship requires, ordinarily, that in acquiring that status in one jurisdiction it must be relinquished in the former residence. In moving from one ward to another, one

¹⁷ *Nay v. Underhill*, 42 Atl. 610.

¹⁸ *Attorney General v. McCabe*,
172 Mass. 417.

country to another, or one state to another in the nation, the fact of such removal, and the nonexercise of the rights of citizenship in the former residence is generally deemed sufficient to transfer citizenship to the new residence. As to the time of such residence necessary in the new domicile, that is a matter to be fixed by the statutes, and it may be varied by subsequent enactment. In coming from a foreign country citizenship is acquired by judicial proceedings in which the former allegiance is formally resigned. In one case it was held that the fact that a candidate was not a citizen did not prohibit him from election to office. The conditions were peculiar. By the constitution of Indiana it was provided that "No person shall be elected or appointed as a county officer, who shall not have been an inhabitant thereof during one year next preceding his appointment," and the fact that a candidate who had resided in the county for the requisite time, and under the constitution was a voter, made him eligible, though he had not been naturalized.¹⁹ So also the fact that a candidate had only been naturalized two months, though he had resided in the county a full year, was no bar to his election.²⁰ But if he have the power of voting, the delegation of authority is not alienated in giving him the office. "The word inhabitant means one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor. A citizen is a native or naturalized person."²¹ As a general rule, however, an alien may not hold a public office.²²

¹⁹ *McCarty v. Froelke*, 63 Ind. 507.

²¹ *State v. Kilroy*, 86 Ind. 118.

²² *State v. Smith*, 14 Wis. 497;

²⁰ *State v. Kilroy*, 86 Ind. 118. *State v. Murray*, 28 Wis. 96.

For this reason, and that the fact of residence and citizenship may be clear, it is customary that state constitutions require a residence of a year next preceding election or appointment to public office. A resident of another state may not, therefore, be lawfully appointed as an officer in the health service of a state, though he may be employed in such service. As an employee he has no sovereign power. Disregard of this principle has sometimes brought disappointment. Officers have been selected for their fitness, and having relinquished former positions they find that they may not lawfully enter the new places until after the expiration of the stipulated period of time. Where it was shown that an appointee had intended to make Milwaukee his residence, without claiming that he had actually been there continuously, that was sufficient to comply with the provision that a commissioner of health shall have resided in the city continuously at least one year prior to his appointment.²³

§ 306. Natural qualifications. By the common law of England, as adopted by the people of the United States there is a recognition of certain natural qualifications or disqualifications. It is evident that a person of unsound mind is incompetent to hold office. So, where the office is vested with discretion, and where its exercise requires the exercise of judgment, a person of immature mind is disqualified; but in ministerial duties only, a minor who is otherwise qualified, may take office. While by the common law women have been barred from holding legislative or judicial positions,²⁴ "The common law of England, which was our

²³ *Kempster v. Milwaukee*, 97 Wis. 345. *Conn.* 131, and *Matter of Goodell*, 48 Wis. 693.

²⁴ But see *Matter of Hall*, 50

law upon the subject, permitted a woman to fill any local office of an administrative character, the duties attached to which were such that a woman was competent to perform them.”²⁵ On this basis women have been permitted to occupy many offices. It is competent for the Governor to appoint women as members of the State Board of Health.²⁶

There is sometimes a necessary conflict between two offices. Under such conditions it is manifestly improper, and it would so be held by the court, to attempt to thus unite them in one person. By the general rule, therefore, acceptance of a second office incompatible with the first, vacates the first office.²⁷ (§ 309.)

§ 307. Educational qualifications. Aside from any special requirement as to qualifications for office to be found in enactments, by the common law a man should have a training or education which will fit him for the position to which he may be elected or appointed. Once again we must go back to the old writers. “If an office, either of the grant of the king or subject, which concerns the administration, proceeding, or execution of justice, or the king’s revenue, or the commonwealth, or the interest, benefit, or safety of the subject, or the like; if these, or any of them be granted to a man that is inexpert, and hath no skill and science to exercise or execute the same, the grant is merely void, and the party disabled by law, and incapable to take the same, *pro commodo regis et populi*; for only men of skill, knowledge, and ability to exercise the same, are capable to serve the king and his people.”²⁸ While this rule

²⁵ Opinion of Judges, 115 Mass. 602.

²⁶ Opinion of Justices, 136 Mass. 578.

²⁷ Mechem, Pub. Off. 420, citing cases.

²⁸ Bacon, Abbr. Titl. Offices and Officers, I. citing cases.

has not been frequently applied in this country, and its application is hedged about with difficulties, it has been used, as when an interpreter was removed from his position in one of the New York city courts.²⁹ It would be well if sometimes more attention were paid to the provisions of this common law restriction, especially in making appointments pertaining to work requiring a special or technical training. For example, the head of a state department of health should be one thoroughly versed in the science of preventive medicine, and that includes a vast field beyond the education which fits one for the practice of medicine. On the other hand, there is much in the education of a practicing physician or surgeon which has only a very remote application in public sanitation. In consequence a man may be an expert practitioner, but utterly incompetent as a health official; yet it is the ordinary course for appointing officers in selecting their health officials to pick their men according to standing as physicians. Far more competent sanitarians might be frequently found among the engineering profession than among physicians. In fact, much of the effective work in preserving the public health, perhaps the large percentage, will be found to center on engineering problems, for which the average practicing physician is utterly incompetent. Problems of drainage; sewage; waste disposal, including the collection, transportation and conversion or destruction of garbage, litter and stable waste; water supplies, including purification and problems of construction; construction of buildings for various purposes; manufacture, transporta-

²⁹ *Conroy v. Mayor*, 6 Daly, 490, affirmed, 67 N. Y. 610.

tion, and storage of food products; elimination of domestic pests;—all of these are much more closely connected with the science of engineering than with that of medical and surgical practice. This cannot too strongly be impressed upon the minds of those responsible for appointments to public health positions.

It was contended that the health commissioner of St. Louis was disqualified from sitting as a member of the board of health, when, before the board met, in the written notice issued by him to the relators, calling them to appear before the board to answer to the charge as to their works being a nuisance, he stated that in his opinion the works as operated constituted a nuisance and were detrimental to the public health. The court did not agree that proceedings before the board should be conducted with an impartiality, and absence of preconceived opinions as would be required in a court trial. The competent man must have an opinion when a matter is brought before him, and to agree to the contention would require incompetent officers.³⁰

The common law requirement for educational qualification as a requisite for appointment to office, though not clearly perceived generally, is really the basis of civil service requirements, and it is customary for those in charge of such service to examine as to particular fitness for special positions.

§ 308. Legislative restrictions. It is usual for governmental bodies to enact certain other restrictions relative to election or appointment to office, and the basis of these will be found in the common law, ampli-

³⁰ State *ex rel.* Parker-Washington Co. v. St. Louis, 207 Mo. 354.

fying, or more definitely stating those requirements. Such restrictions are found in the general statements in the various constitutions and in the enacted statutes. In addition to the general restrictions, it is common in acts providing for certain offices to place thereon special restrictions; for example, in an act providing for appointing a board of examiners for license, it is the rule that the act specifies that the members of the board shall be selected from those who are engaged in the same profession. It would be manifestly improper that a board of architect examiners be picked from the legal or medical professions. Statutes making these definite restrictions, if general, and based upon reasonable ideas, will be sustained.

Statutes and constitutions frequently make a definite age limit for appointments, following the example set in the Constitution of the United States. A representative in Congress must be twenty-five years of age; a senator, thirty years; and a President, thirty-five, of age, at least. The United States Constitution further provides that no person shall be elected President who has not resided at least fourteen years in the United States. In state statutes defining qualifications for office it is quite customary that a stated period of residence be required in the jurisdiction before election or appointment, and this residence must be next preceding the election or appointment. Under such a statute it has been held that the period of residence must be before the election or appointment, rather than before the beginning of term of service.³¹ A non-resident is eligible to office unless the contrary is provided by statute.³²

³¹ Parker v. Smith, 3 Minn. 240;
State v. McMillen, 23 Nebr. 385.

³² Com. v. Jones, 12 Pa. 365;
State v. George, 23 Fla. 585.

While the general requirement of previous residence may be highly desirable as to elective offices, it may be a distinct disadvantage in such appointive offices as require special, or technical education. By the general statutes of Illinois,³³ it is required that no person shall be elected or appointed to any office in a city or village, who has not been a resident thereof for the year next preceding the election or appointment; but it makes two exceptions to this requirement, namely, city engineer and attorney. Now it may very well be true that in even a fairly large city or village, the best service obtainable within its limits in these particular lines will be inferior to the requirements of the situation. Moreover, a removal of this requirement as to residence will stimulate home talent to apply itself for perfection, in the hope that having made a record in the smaller place promotion may be offered to a more lucrative position elsewhere. The same argument is doubly applicable relative to public sanitarians. A lawyer, or an engineer may find private employment elsewhere, if he prove efficient. There is practically no private demand for sanitarians, and he who applies himself to mastering this branch of science is practically limited to public employment. If, then, there is no opportunity for the resident in a small city or village to take a position in another city of the common wealth there is no incentive for him to pay any attention to this line of investigation. The idea at the base of the exceptions in the Illinois statute is sound. It favors a better and more efficient service. As it stands, however, it is of doubtful legality it being distinctly class legislation. The exception should be gen-

³³ Chap. 24, Art. VI, Sec. 6.

eral, and cover all such appointive offices as require special technical education or training. In fact, it would seem desirable that the exception be made so broad as to permit appointments to office requiring such special training or education, without restriction as to previous residence, provided the appointee be a citizen of the United States. Such exception should include both state and local offices, but it should not include elective offices. In most states such a broad exception would need to be embodied in the constitution. In a more restricted form, as applying to residents of the state, and to local offices, a general statute would be sufficient.

Conviction of crime, or a previous unsettled public account, are often statutory disqualifications for office, as may also be the previous holding of another office. In all cases of statutory restriction, the exact wording of the constitution and of the statutes of that particular state must govern. There are in some cases of statutory restriction certain general considerations, which have a bearing. After the civil war of '61-5 many states passed statutes giving a preference to veterans of the military service. In New York state that statute was held not to apply to membership on boards of health for villages.³⁴

§ 309. Holding two offices. By the common law it is forbidden that the same person shall hold incompatible offices at the same time. By statutory enactment we frequently find this prohibition widened to include the holding of a position under state and national government, the holding of two positions of

³⁴ *People v. Board of Trustees*,
159 N. Y. 568.

trust, or the holding of two lucrative positions at the same time. With regard to the last it must be remembered that every office carrying any pecuniary compensation, no matter how infinitesimal the compensation may be, is an office of profit, according to law.

“Two offices are incompatible when the holder cannot in every instance discharge the duties of each.”³⁵ The American rule is well stated by Dillon as follows: “Incompatibility in offices exists where the nature and duty of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both.”³⁶ An officer on the retired list of the United States Army may hold an executive office under the national government, and draw his salary therefor, in addition to his pay;³⁷ and he is not under the statutory prohibition against the holding by certain municipal officers of “any other federal, state, or municipal office.”³⁸

Ordinarily, whether the holding of two offices is forbidden, by either the common or statutory law, acceptance of the second vacates the first office.³⁹ But this rule does not apply when the second appointment was illegal. Thus, where the statute prohibited members of a city council from holding certain offices, and a member of the council was appointed to such office, it was held that the appointment was illegal, and therefore it did not vacate his position in the council.⁴⁰

³⁵ *Rex v. Tizzard*, 9 B. & C. 418.

³⁶ *Municip. Corp.* 166, note. (Abridged from the opinion in *State v. Buttz*, 9 S. C. 156. See pp. 182-184.)

³⁷ *Collins v. U. S.* 15 Ct. of Claims, 22.

³⁸ *People v. Duane*, 121 N. Y.

367. The contrary was held in *State v. DeGrass*, 53 Tex. 387.

³⁹ *Foltz v. Kerlin*, 105 Ind. 221; *Dickson v. People*, 17 Ill. 191; *People v. Hanifan*, 96 Ill. 420; *People v. Brooklyn*, 77 N. Y. 503; *State v. Draper*, 45 Mo. 355.

⁴⁰ *State v. Kearns*, 47 Ohio, 566.

Another exception is to be found where the appointee is obliged under penalty, to accept the second office, as where an officer was appointed inspector of election. To cause thus a vacancy in the first office would be to give to the police commission power to vacate that position.⁴¹ In this last case there is considerable question as to the soundness of the decision. If the holding of the two offices was contrary to the statutes the board of police had no authority to make such appointment, unless the first office was to be relinquished. But under penalty for refusing to accept the second office he could not thus be forced to relinquish the first by a board having no authority over the first office. In other words, the appointment was illegal.⁴² So it has been held that an officer holding one office may not be a candidate for an incompatible office, and if elected he is disqualified from accepting the same. The election is void.⁴³ In the Goettman case there was no compulsion upon Goettman as to accepting the second office, for the fact that it would be illegal would be sufficient excuse to prevent the imposition of the penalty.⁴⁴ When, however, the holding of the two positions is prohibited by state law, and the second office is under the national government, clearly the state law cannot control the national appointment. It does control the state position, and therefore it is not necessarily the first position which must be vacated, but

⁴¹ Goettman v. Mayor, 6 Hun, 132.

⁴² See State v. Clarke, 3 Nev. 566; Spear v. Robinson, 29 Me. 531.

⁴³ Vogel v. State, 107 Ind. 374; Crawford v. Dunbar, 52 Cal. 36;

In re Corliss, 11 R. I. 638; People v. Clute, 50 Barb. 451; Foltz v. Kerlin, 105 Ind. 221.

⁴⁴ Reg. v. Richmond, 11 W. R. 65; London v. Headon, 76 N. C. 72; Hartford v. Bennett, 10 Ohio, 441.

the one to which the state law applies.⁴⁵ While it has been held, as stated above, that the holding of an incompatible office disqualifies a candidate for election, and if elected the election is void, if the disqualification be removed by resignation or otherwise, before the time for entering upon the second office, the election will not then be considered void.⁴⁶ The fact that an officer either elected or appointed to an office is ineligible can only be determined by direct test of title, by *quo warranto*.⁴⁷ But acceptance of a second office, incompatible with the first, *ipso facto*, vacates the first, and it requires no proceedings in *quo warranto* to accomplish the fact.⁴⁸

§ 310. Civil service. The right to make appointments is an executive prerogative. (§ 126.) This prerogative should be freely exercised, without dictation. The legislature may not order the executive to make a definite appointment, but it may, by reasonable legislation, restrict the appointment to persons having certain qualifications. Under what are called "civil service" statutes it is now common that restriction of appointments to certain positions, both of employment and in office, is made to require that the candidates pass certain definite examinations, and that preference be given to those who stand the highest on the list. The making of certain general exceptions to such rules, as by giving a preference to old soldiers, where there is an evident and just reason for the exception, has been frequently sustained. Where the civil service

⁴⁵ *People v. Leonard*, 73 Cal. 230; *Foltz v. Kerlin*, 105 Ind. 221.

⁴⁶ *Privett v. Bickford*, 26 Kansas, 52.

⁴⁷ *Hall v. Luther*, 13 Wend. 491; *Hamlin v. Dingman*, 5 Lans. 61.

⁴⁸ *People v. Brooklyn*, 77 N. Y. 503; *Whiting v. Carique*, 2 Hill, 93; *People v. Nostrand*, 46 N. Y. 375; *People v. Green*, 58 N. Y. 304.

law is justly and honestly administered, it is an undoubted advantage. Where it is dishonestly administered, it may prove a temporary advantage to dishonest officials. It must further be remembered that in its administration the law favors the mediocre incumbent of a position. The fact that he has the position, though he may be naturally unfitted therefor, tends to hold him there so long as he does nothing positively wrong. Sometimes the law serves as a hindrance to efficient administration. In a large public institution under civil service candidates for the position came from quite a large area. The superintendent found that the candidates for the lower positions especially, where the pay was small, were very likely to look for appointment when work was not plenty and general wages were low. On the other hand, when work was plenty and wages were high these positions were vacated. By law the Superintendent was obliged to offer appointment to those highest on the waiting list, and would be obliged to delay to hear from one after another, instead of appointing an available man near at hand.

§ 311. Acceptance of office. The statutes ordinarily specify that before entering upon an office the appointee shall take an official oath, and sometimes that he shall file an official bond, for the faithful discharge of his trust. Where the statute requires that an acceptance be filed within a specified time, and a failure to file such acceptance shall be deemed a refusal, the filing of the acceptance is a substitute for the oath, according to one case.⁴⁹ The best evidence of accept-

⁴⁹ Bentley v. Phelps, 27 Barb. 524.

ance of office is the taking of the official oath, and giving the required bond, and entering into, and actually discharging the duties of the office. The officer administering the oath of office is not empowered to consider the validity of an appointment or election.⁵⁰

§ 312. Taking office. Ordinarily there is no trouble in this country as to the taking of an office, unless there be a dispute over the claims of two or more candidates. Without such a dispute it is still possible that there may properly be some hesitancy on the part of the former incumbent, due to an honest questioning relative to the legality of the appointment. An officer in charge of an office is responsible therefor until he is formally and properly released by the lawful authority. If he turn the office over to an imposter, or to one who may not lawfully have the responsibility of the position, then the former officer may be held responsible, even for the misdeeds of his successor. It is therefore incumbent upon the holder of an office that he shall be fully satisfied as to the legality of the claims of his successor to office, before he relinquishes his hold. If there be a reasonable doubt in the case the only way open is for him to sit quiet until the case is decided by the court. It is not the duty of the holder of the office to bring action. That remains for the officer who is deprived of his lawful position. What are the proper legal steps to be taken to settle questions relative to changes in office will be considered in other sections. (§§ 281, 379.)

§ 313. Taking receipts from successor in office. In turning over an office to a successor, the first incumbent

⁵⁰ People v. Dean, 3 Wend. 438.

should have an invoice prepared of all property turned over, and he should take a receipt from his successor for such property and especially for all moneys thus transferred. All books should be balanced. This includes not only books containing financial accounts, but books of record, showing exactly the state of the work. For example: if there be records of reports of infectious diseases, the balance should show the number and location, of each case still active. If there be accounts of antitoxin out, the balance should show how much and where it may be located. In some states it is customary to keep supplies of antitoxin at different stations, to be handed out on special vouchers. Those vouchers are transmitted to the state office, and final reports are to be sent in each case by the physicians using the same. The balance should therefore show what each agent still has for use, and how much has been handed out without the final report having been received. Incidentally it may here be remarked that many practitioners seem to be negligent of making these final reports. It may well be questioned whether such physicians deserve further recognition, by the honoring of their vouchers, if they persistently neglect to do their share, by making the final reports, by which the value of the service may be estimated.

§ 314. Term of office. The statute, or other enactment, providing for an office usually defines the duties of the office, and specifies by whom, and for what period of time, the office is to be filled. The word "term," when used relative to tenure of office, denotes a fixed period of time. (§ 293.)

§ 315. No term—office held at pleasure. If neither the constitution nor the statute, under which the office

exists, mention a term for which the appointment is made, the office is held at the pleasure of the appointing power, and the holder may be removed at any time by the officer, or officers, holding the appointing power, and without giving any reason therefor.⁵¹ Where the constitution provides that officers of cities and villages shall be elected "for such terms and in such manner as may be prescribed by law," and the statute provided that certain offices should be held at the pleasure of the appointing power, it was held that the statute did not comply with the constitutional provision, for there is no "term" where the office is held at pleasure.⁵² The office of a deputy expires with the office on which it depends, and if the principal be reappointed the deputy cannot serve without a reappointment.⁵³ But a commission of one holding an office "during the pleasure of the Governor for the time being" does not expire with the term of the Governor making the appointment.⁵⁴

The repeal of a statute or ordinance under which an office exists abolishes the office.⁵⁵ So it has been held that the abolishment of the office making an appointment vacates the subordinate offices.⁵⁶ On the other hand, under similar conditions, where the Governor of California undertook to make an appointment under

⁵¹ Field v. Girard Col., 54 Pa. 233; Story, Constitution, 1537; Com. v. Sutherland, 3 S. & R. 145; Patton v. Vaughan, 39 Ark. 211; People v. Whitlock, 92 N. Y. 191; Keenan v. Perry, 24 Tex. 253; People v. Hill, 7 Cal. 97; State v. Alt, 26 Mo. App. 673; Gibbs v. Morgan, 39 N. J. Eq. 126.

⁵² Speed v. Crawford, 3 Met. (Ky.) 207.

⁵³ Banner v. McMurray, 1 Dev. L. 218.

⁵⁴ Kaufman v. Stone, 25 Ark. 336.

⁵⁵ Chandler v. Lawrence, 128 Mass. 213.

⁵⁶ State v. Board of Public Lands, 7 Neb. 42.

the general provision as to appointing to fill vacancies, and where by the abolishment of district courts there was no other provision for appointment of police commissioners, it was held that the old officers still held, and there was no vacancy.⁵⁷ An office may be changed by general enactment from "at pleasure" to a fixed term. Thus, where an office was held at pleasure, a subsequent statute providing that the terms of "all officers not otherwise fixed" should be fixed at four years, it was held that this fixed a definite term of four years for this office.⁵⁸

§ 316. Term fixed by constitution. When the term of an office is fixed in the constitution, the legislature cannot extend it nor abridge it.⁵⁹ But a constitutional provision that the term of an officer should not be extended does not prevent such reasonable changes in times of holding elections as the legislature may make, even though, incidentally, the term of an officer be thereby extended.⁶⁰ Where the constitution provided for a term of four years, and the legislature passed an act providing for the filling of the office by an election and fixing the term at two years, it was held that the act was void as to the length of term, but valid otherwise; and that a person elected under the statute was lawfully elected for a term of four years.⁶¹ When the term of an office is fixed by law the Governor cannot alter the term, by extension or abbreviation, nor can he alter the duties of the office, by changes made

⁵⁷ *People v. Hammond*, 66 Cal. 654. See also *Currier v. R. R. Co.*, 31 N. H. 209.

⁵⁸ *Hughes v. Buckingham*, 13 Miss. 632.

⁵⁹ *Mechem*, Pub. Off. 387;

Throop, Pub. Off. 305 and 311, citing cases.

⁶⁰ *State v. McGoveny*, 92 Mo. 328.

⁶¹ *People v. Rosborough*, 14 Cal. 180.

in the wording of the commission issued.⁶² Whenever there is a doubt as to the construction of the statute or constitution, in determining the length of an officer's term the court will always give preference to that interpretation which limits the term to the shortest time.⁶³ Though the commission of an officer may, or may not, state the exact term for which the appointment is made, as to beginning, duration, or ending, this is a question of fact to be proven by evidence, and that evidence may conflict with the dates as given by the commission.⁶⁴ Unless it be contrary to special constitutional provisions, the legislature may at any time by enactment alter the term of an office.⁶⁵ The legislature may lengthen the term, even after the election or appointment of an officer,⁶⁶ and that is not a violation of the constitutional provision against *ex post facto* laws, for that provision applies only to criminal legislation.⁶⁷ But such legislation does not necessarily extend the term of those holding office at the time, unless that intention be clearly shown.⁶⁸ Such extension of term was, by the California supreme court, not considered as a legislative appointment.⁶⁹ The reasoning of the New York court on a similar question seems more

⁶² *Hench v. State*, 72 Ind. 297.

⁶³ *Wright v. Adams*, 45 Tex. 134.

⁶⁴ *State v. Fulkerson*, 10 Mo. 681; *State v. Chapin*, 110 Ind. 272; *State v. Taylor*, 15 Ohio, 137; *Hale v. Evans*, 12 Kas. 562.

⁶⁵ *State v. Bailey*, 33 N. W. R. 778; *State v. Howe*, 25 Ohio, 588; *In re Bulger*, 45 Cal. 553; *Taft v. Adams*, 128 Mass. 213; *Wileox v. Rodman*, 46 Mo. 322; *In re Jordan*, 37 Minn. 174.

⁶⁶ *In re Jordan*, 37 Minn. 174; *State v. Bailey*, 33 N. W. R. 778; *In re Bulger*, 45 Cal. 553; *Wileox v. Rodman*, 46 Mo. 322.

⁶⁷ *Johannersen v. U. S.*, 225 U. S. 227.

⁶⁸ *Farrel v. Pingree*, 16 Pac. Rep. 843.

⁶⁹ *Christy v. Supervisors*, 39 Cal. 3.

nearly correct, and less liable to abuse. The constitution provided that town officers must be elected or appointed as the legislature should prescribe. A statute, extending the terms of the present incumbents of certain town officers was virtually an attempt of the legislature to exercise the power of appointment; such a statute was therefore in conflict with the constitution; that though the legislature had authority to lengthen the terms of officers, the extension of terms should apply only to future holders; and a person elected at the town meeting, just before the expiration of the terms of officers in authority at the time of the passage of the act, was entitled to the office, and that the term of the former holder was not extended.⁷⁰ Under the constitutional provision authorizing the legislature to fix the term of office, an act has been called unconstitutional which changes the term during the incumbency of an officer.⁷¹ So a statute which lengthens the term by advancing the beginning has been considered unconstitutional.⁷² But where the constitution fixes the length of the term, but does not define the beginning, the legislature may determine the time of beginning.⁷³ Under the authority of the statute, empowering the city council to regulate the manner of appointment and removal of officers, an ordinance fixing the duration as "during good behavior" is valid.⁷⁴ By an act amending a city charter, and providing for the election of a mayor two years before the expiration of the term of the incumbent, but not stating when the newly elected mayor should take

⁷⁰ *People v. McKinney*, 52 N. Y. 57.

⁷¹ *People v. Bull*, 46 N. Y. 57.

⁷² *Howard v. State*, 10 Ind. 99.

⁷³ *People v. Rosborough*, 14 Cal. 181.

⁷⁴ *State v. Trenton*, 50 N. J. L. 331.

his chair, it was held that he might take immediate possession of the office.⁷⁵ Where the constitution fixes the maximum term, the legislature may alter its duration, provided that it does not exceed the maximum.⁷⁶

The constitution of Michigan provided for the election of a judge of probate, who should hold office for four years, and until his successor was elected and qualified. A judge was reelected, but before the expiration of his old term he died, and the Governor, under his general powers to appoint to fill a vacancy, made an appointment, issuing a commission reciting that it was to hold until the Governor should revoke the commission. After the beginning of the new term, under the supposition that there was a vacancy, the Governor made a new appointment. The court held that the first appointee was lawfully appointed to fill the vacancy, and that the Governor's power to appoint to fill vacancy was not applicable, there being no vacancy. The holder was entitled to the office.⁷⁷ Where the duration of a term is fixed, and an incumbent fixes his construction of the statute by entering the office upon a certain day, he is thereby estopped from putting another interpretation upon it, and thus trying to extend his term.⁷⁸ Where a city charter provided that the appointment of a marshal for a term of two years should be made by the council, and the council made an appointment by resolution fixing the term for one year, and the bond given recited that it was for the term of one year, it was held that the limitation to one year was void, and that the appointee held for two years,

⁷⁵ Alexander v. McKenzie, 2 S. C. 81.

⁷⁷ People v. Lord, 9 Mich. 227.

⁷⁸ Pursel v. State, 111 Ind. 519;

⁷⁶ Christy v. Supervisors, 39 Cal. 3.

Griable v. State, 111 Ind. 369.

and that the bond was valid for the two years.⁷⁹ An office filled by appointment, and where the beginning of the term is not otherwise fixed, may be assumed by the appointee as soon as he qualifies.⁸⁰ The term really begins from time of appointment, though the officer may not draw pay until he has qualified.⁸¹ Authority and office cease with the accomplishment of the result when an officer is appointed to accomplish a specific result or an office is created to perform a definite act.⁸² And where the legislature provided for the appointment of an officer for a fixed time, and at the expiration of that time provided for the appointment for a similar fixed time, it was held that the office ceased with the expiration of the second period.⁸³ Where an appropriation act provided for the appointment of assistant agents of the Treasury Department at a certain place, it was held that the office ceased with the expiration of the appropriation.⁸⁴ When there is a constitutional provision for appointing to fill a vacancy, stipulating that the person so appointed shall hold office "until the next regular election," this means the next regular election for that office.⁸⁵ But where the law provided that the successor should be elected at the first annual election occurring more than thirty days after the

⁷⁹ *Stadler v. Detroit*, 13 Mich. 346.

⁸⁰ *State v. Love*, 39 N. J. L. 14; Also, *McGee v. Gill*, 79 Ky. 106.

⁸¹ *Atty. General v. Love*, 39 N. J. L. 476, approving dictum in *Marbury v. Madison*, 1 Cranch, 137, and disapproving *Brodie v. Campbell*, 17 Cal. 11.

⁸² *Bergen v. Powell*, 94 N. Y. 591; *Douvielle v. Supervisors*, 40 Mich. 585.

⁸³ *State v. Brown*, 38 Ohio, 344.

⁸⁴ *Beaman v. U. S.*, 19 Ct. of Claims, 5. It will be noticed that according to the distinction made in § 265 in some of these cases the positions may properly be considered employments rather than offices.

⁸⁵ *People v. Wilson*, 72 N. C. 155.

happening of the vacancy, it was held that a judge could not be elected for the unexpired term at an election held within thirty days, but that he might be so elected for the succeeding term.⁸⁶ A statute directing the appointment of an officer of the city to hold office during a term of two years creates a permanent office, and requires a new appointment at the expiration of the term, and an officer so appointed holds for two years.⁸⁷ Likewise, where a statute provided for the appointment of seven commissioners, and directed that they cast lots to hold office for one, two, three, four, five, six, and seven years, it was held that at the expiration of those terms new commissioners appointed to fill the vacancies continued seven years each.⁸⁸

§ 317. Holding over term. It is repugnant to law that there be an absolute vacancy, and in the interpretation of laws the courts are bound in each case, if possible, so to construe that the vacancy shall not exist. It is customary, either by constitution or by statute, to provide that an officer shall hold office until his successor shall have qualified. Under such conditions it has been held that the incumbent shall remain in office until his successor has qualified, even though he thus hold beyond the term fixed by law.⁸⁹ When there is no such provision for thus holding over term, it is the general rule that the incumbent continues to remain until his successor qualifies.⁹⁰ When a successor has

⁸⁶ State v. Black, 22 Minn. 336.

⁸⁷ People v. Addison, 10 Cal. 1;
State v. Pearcey, 44 Mo. 159.

⁸⁸ Holden v. People, 90 Ill. 434.

⁸⁹ Walker v. Ferrill, 58 Ga. 512;
Jones v. Jefferson, 66 Tex. 576;

Baker v. Kirk, 33 Ind. 517; State
v. Howe, 25 Ohio, 588.

⁹⁰ People v. Oulton, 28 Cal. 44
(full discussion); Dillon, Munic.
Corp., 219, citing cases; Mechem
Pub. Off. 397, 398, 399.

been elected and qualified, his death before the beginning of his term does not revive right of predecessor to hold over.⁹¹ Boards of health retain their powers until their successors are appointed.⁹²

§ 318. Appointments to fill vacancies. Where the constitution provided that the Governor might make an appointment until the close of the next session of the legislature, it was held that, though the Governor made the appointment for the full term, the appointment lasted only until the close of the legislative session, but the officer so appointed would continue in office until his successor was appointed or elected and qualified.⁹³ Where the statutes are not specific as to the term of an officer appointed to fill a vacancy, the courts have been somewhat divided as to whether the appointment would be for a full term, or only for the unexpired time of the previous incumbent, the majority seeming to favor the idea that he holds for a full term.⁹⁴ In California it was held that an appointment during a recess of the senate was not an appointment to fill a vacancy under the authority to fill a vacancy until the next session of the legislature. The appointment was therefore for the full term, and a new appointment could not be made, unless the senate refused to concur in the appointment.⁹⁵

§ 319. When term begins. When the date of the beginning of a term is stated, as from a certain day, the day mentioned is excluded from the computation.

⁹¹ *State v. Seay*, 64 Mo. 89;
State v. Hopkins, 10 Ohio, 509.
But see *Commonwealth v. Hanley*,
9 Pa. 509.

⁹² *Board of Health of Kort-*
right v. Cease, 53 Hun, 638.

⁹³ *People v. Tyrrell*, 87 Cal. 475.

⁹⁴ *Throop*, Pub. Off. 320, citing
cases.

⁹⁵ *People v. Mizner*, 7 Cal. 519;
People v. Addison, 10 Cal. 1.

Thus when a commission states that the appointee shall hold his office for four years from January 1, 1900, the appointee would take office on January 2, 1900, and be in office on January 1, 1904.⁹⁶

§ 320. Compensation for service—office not a contract. “It is therefore well settled in the United States, that an office is not regarded as held under a grant or contract, within the constitutional provision protecting contracts; but, unless the constitution otherwise expressly provides, the legislature has power to increase or vary the duties, or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights or privileges, before the end of the term, or to alter or abridge the term, or to abolish the office itself. But if either of those incidents of the office is fixed by the constitution, the legislature has no power to alter them, unless the power to do so is expressly reserved in the constitution. On the other hand, the acceptance of the office does not create a contract on the part of the officer to serve during the term fixed by law, and he may determine the relation at any time. The same rules apply to a city, county, or other municipal officer, and the common council or other legislative body of the municipality, where that body has power by statute to create and regulate the office, without restriction upon its powers or to particular incidents of the office. So, where the board of supervisors of a county has power to fix the salary of a county officer, its action in doing so does not create a contract between the officer and the county, and the legislature may authorize the board to reduce the salary, as far as it has not already been earned.”⁹⁷

⁹⁶ Best v. Polk, 18 Wall. 112. cases; Mechem, Pub. Off., Chap.

⁹⁷ Throop, Pub. Off. 19, citing VI.

A county health officer, appointed by the board of supervisors is only entitled to the salary fixed in advance by the board of supervisors as compensation for official services rendered by him, and he cannot maintain an action of *assumpsit* upon a *quantum meruit* for such services, however great.⁹⁸ Later the same court said that under the statutes of Mississippi it is the duty of the board of county supervisors to fix the salary of a county health officer in advance of his appointment; but in the event that it fails to do so it may fix his salary at a later date. To hold otherwise would result in depriving such officer of any compensation for services which might have been rendered after his appointment and before his salary was fixed, for the reason that he can receive no compensation except at a salary fixed by the board. There is no conflict herewith in the prior decision that where a salary of a health officer has been fixed by order of the board it cannot be subsequently reduced to such an amount as virtually to abolish the office.⁹⁹ Before a health officer may sue a city of the third class in Kentucky to recover for services rendered in attending a family afflicted with the smallpox, he must show that his salary was fixed as provided by law.¹⁰⁰ The Kentucky statute which provides for the appointment of the county officer, also provides for the payment of such salary as may be fixed by the fiscal court, and at no time shall he receive other compensation. Though a county contended that the determination of the fiscal court was final in that matter, it was held that either

⁹⁸ *Yandell v. Madison County*,
32 So. 918; 81 Miss. 288.

¹⁰⁰ *Cawley v. Allentown*, 2 Leh.
58.

⁹⁹ *Adams County v. Aikman*, 52
So. 513.

party had the right of appeal should the amount fixed be not a "reasonable amount."¹ But before the amount allowed shall be put aside the court must be convinced that there has been a palpable abuse of discretion amounting to injustice, and in the case at bar there was not sufficient evidence to show that the salary fixed, being \$250.00 per annum, was so small as to constitute an abuse of discretion.²

Under the general provisions of the public health laws of New York state, a local board of health is expressly empowered to fix the compensation of its health officer, and to allow him in addition to the sum so fixed his reasonable expenses in attending the annual sanitary conference of health officers. Under the same law the local board is directed to prescribe the duties of such health officer, and direct him in their performance. The failure of the board to prescribe the duties is no ground for withholding his compensation. Neither could the board of town auditors reject the claims of the health officer for his reasonable expenses because it did not agree with the board of health as to the rate of compensation or the value of his services.³ A health officer is entitled to his salary while he was not removed, irrespective of whether he had properly discharged his duties.⁴ Extra compensation may be allowed to a health officer for performing other duties than those for which he was appointed or employed.⁵ The city of Elmira, New York, created the office of city physician, and appointed an incum-

¹ Butler County v. Gardner, 96 S. W. 582.

⁴ People v. Sipple, 96 N. Y. Supp. 897.

² Graves v. Paducah, 89 S. W. 708.

⁵ Allen v. DeKalb Co., 61 S. W. 291.

³ People *ex rel.* Sherwood v. Blood, 105 N. Y. S. 20.

bent, and fixed his salary. The court held that the city council had no authority to create such an office, and that therefore there was no such office, and there was no salary. Neither was there a contract for pay, for the city council had no authority to bind the city by such a contract. If he be regarded simply as an employee, he could be discharged at any time, and he was entitled to no compensation further than for the time actually served.⁶

The matter of treatment is distinct from the quarantine of persons sick with infectious diseases. Therefore unless the treatment be a part of the regular duties of the health officer as prescribed by law, before he assumes the treatment of a case for the city, or county, as the case may be, there should be a distinct understanding with the proper officers. In most of these cases the service in treatment must be considered an employment. The following cases are mentioned here chiefly because of their bearing upon the work of health departments, and particularly in the service of health officers in country districts. In Michigan it was held that it was not necessary that a health officer have had an express agreement with the proper officers, namely the board of health, for his services in the treatment of patients sick with infectious diseases, if the board knew that the services were being rendered, and afterwards allowed his bill.⁷ Also, when a physician has presented his bill for services rendered to indigent persons, his bill has been audited, and he has accepted without protest the amount allowed, he is estopped to claim the balance as service rendered

⁶ *Jacobs v. Elmira*, 132 N. Y. Supp. 54.

⁷ *Cedar Creek v. Wexford County*, 135 Mich. 124.

under statute.⁸ After the board of supervisors had made a valid contract with a physician to treat the indigent of the county he could not require the board to pay more than the sum agreed upon, although by reason of an epidemic he was called upon to render more service than was expected when the contract was made.⁹ The compensation of a clerk employed by the commissioner of health is not properly a charge against a board of health.¹⁰

§ 321. Importance of salary in health service. There is nothing in a public office which implies any legal right of the holder to demand pay for service. As we have already seen, many offices are honorary, and without compensation. This, however, does not imply that the community has a moral right to make special use of a citizen's time and special training for the common good without rendering pay therefor. Where one person may serve the state or the city as well as another, there may sometimes be a little excuse in providing either no pay, or such a small amount of compensation that it is merely nominal—perhaps not enough to cover the official expenses. When on the other hand, the service requires practically all of the officer's working time, it is neither just, nor in harmony with sound business judgment, to expect to secure such services without paying therefor practically what similar services would bring elsewhere. When, in addition, the service requires a specific

⁸ *Brown v. Livingston County*, 85 N. W. 745.

⁹ *Zimmerman v. Cheboygan County*, 95 N. W. 535. See also *Bjelland v. Mankato*, 127 N. W. 397; *Bourke v. Sanitary District*

of Chicago, 92 Ill. App. 333;

Sloan v. Peoria, 106 Ill. 151;

Reynolds v. Mt. Vernon, 164 N. Y. Supp. 592.

¹⁰ *Goodson v. Detroit Board of Health*, 72 N. W. 185.

knowledge, or technical education, it is ridiculous to expect that the service will be faithfully rendered, in proportion to the needs of the community, unless an adequate provision be made for the pay of the officer. In this regard the United States is particularly weak, and nowhere is this vital defect more clearly shown than in the public health service. Physicians engaged in the warfare are actuated by altruistic motives, and their aid has been freely rendered, but they have by no means given such service as the needs of the people demand. This is particularly true because of the very high degree of technical education required, and the fact that there is practically no market for such service, and for the use of such training, aside from that to be found in public office. It is therefore good business sense to pay officers of health adequate salaries. A very common mistake, it seems, is to provide plenty of subordinate help in the office, and not to pay the supervisor sufficient salary to keep his full time. In this, as in other matters, the very size of the office is an impediment to efficiency. Certainly not more than two or three persons should be connected with an office of health, unless the head of the service give thereto his full time. The office is one which requires brains, and sound judgment, rather than mechanical attention to small details, though the details are important. The underling has neither the judgment, nor the education, to give the best service. (§ 129.)

The Earl of Cromer has had a long experience in the British foreign office. That experience has been as broad and varied as it has been long. What he says relative to the government of Egypt and the Sudan is as nearly authoritative as it could be; and what he says

relative to that service applies equally well to service in public health offices. In his Introduction to Low's "Egypt in Transition" Cromer says:

"Imperialist England requires, not the mediocre by-products of the race, but the flower of those who are turned out from our schools and colleges to carry out successfully an Imperial policy. Their services cannot be secured unless they are adequately paid. Of all the mistakes that can be committed in the execution of an Imperialist policy the greatest, in my opinion, is to attempt to run a big undertaking 'on the cheap.' I am, of course, very fully aware of the financial difficulties encountered in granting a high scale of salaries. I can speak with some experience on this point, in as much as for a long period, during the early days of our Egyptian troubles, I had to deal with a semi-bankrupt Exchequer. But my reply to the financial argument is that if money is not forthcoming to pay the price necessary to secure the services of a really competent man, it is far preferable not to make any appointment at all."¹¹

§ 322. **Inadequate salaries expensive.** Colquhoun, in his "Greater America," says:¹² "The liberality of the United States Government does not apply in the matter of official salaries which are invariably, and even scandalously, inadequate." The tendency of this inadequateness is not towards economy. It frequently happens that either a man is sought for a position on account of his wealth, and an ample fortune which he is willing to spend for the sake of personal prestige, or incompetent men are placed in positions because the competent cannot afford to make the personal sac-

¹¹ Low, p. XVIII.

¹² P. 296.

rifice. With inadequate salaries there is always a tendency to attempt to "come out even" by engaging in outside enterprises, often to the neglect of official duties. Sometimes it happens that the trusted officials of a community have misused their positions to amass illegal gains. Because of the ineffectiveness of official service, it often happens, also that really public service must be performed by private associations, organized to supply governmental deficiencies. This frequently results in duplication of endeavors, where several organizations, acting independently, each seek to do the same work. This is shown in charity organizations, where it not seldom happens that families receive at the same time aid from two or more organizations, each being ignorant of the interest of the other. It is this same inadequacy of governmental methods in America which has given rise to the "Anti-tuberculosis" societies, Milk Supply societies, for the distribution of pure milk among the deserving poor, and to the employment of agents by private societies to detect and prevent various unsanitary practices. All of this work should be much more efficiently managed by governmental agencies, and at less expense. As it is the extra service and expense falls upon a few citizens, though all reap the benefit.

§ 323. "Office" of wider significance than "officer." In considering the economic side of this matter of pay, it is important to remember that in reality the word "office" includes far more than "officer." Legally the two words are used as if coextensive, and the officer includes in his liabilities all the employees. What the clerk, or the messenger, or the day laborer does in a given office, all are the work of the officer. His is the

hand which guides the machine; his is the brain which must plan the work. The employees in an office are but parts of a machine. In mechanics, no man would think of building an efficient piece of mechanism with expensive parts carelessly adjusted and put together; but in American governmental operations this is common. The head of the department, the officer, should be more than a mere figure, and that implies that he be properly paid. He is the responsible holder of the trust of the people, and that fact demands a fuller recognition. The employees are under the ordinary regulation of commercial law. Their pay depends upon the contract made. That contract may be at any time altered by mutual agreement, but it cannot be changed except by such agreement. Or they are under the general rules of employment. The amount of the pay of individual employees is often fixed by individual officers. The pay of the officer is not thus determined.

§ 324. **Officer's compensation determined by legislation.** The pay of an officer may be in the form of salary, honorarium, or fees, but in each case it is determined by some act of legislation. The salary of the principal officers of the state may be fixed by the constitution. Other general officers find their compensation stated in the statutes. Sometimes the pay is determined in appropriation bills. The stipend of municipal officers is ordinarily determined in the city ordinances. In each case the public estimation of the value of the individual officer's service is expressed by the act of the legislative representation of the sovereign will. Unless some compensation is thus fixed by law for a given office, none may be claimed nor recov-

ered. Unless there be such provision in law,¹³ the office is considered to be assumed as a public duty, and a personal honor for trust reposed, and services are rendered gratuitously. There is no implied contract to pay what the services may be worth. This rule applies to cities,¹⁴ where neither in the statutes, nor in the ordinances is provision made for pay.^{14a} But when a corporation requires special services, as of an engineer, in its corporate, rather than its governmental capacity, he is then regarded as a private agent, and may recover reasonable value.¹⁵ So where a statute provided that a board of officers should have a secretary, but made no provision for the pay of such clerk, it was decided that he was entitled to a reasonable compensation.¹⁶ This position was hardly that of a public officer, but rather that of an employment. If right to compensation exist for an officer it must be found in the fact that the law provides it.¹⁷ The only contract that may be presumed is that the incumbent is entitled to such compensation as the law at that time provided.¹⁸ Unless there be a constitutional prohibition, the legislature may at any time change, or abolish, the compensation attached to an office; and in the same way, unless there be constitutional, or legislative pro-

¹³ State v. Brewer, 59 Ala. 130; Wortham v. Grayson Co., 13 Bush, 53; Perry v. Cheboygan, 55 Mich. 250; White v. Levant, 78 Me. 568.

¹⁴ White v. Levant, 78 Me. 568; Sikes v. Hatfield, 13 Gray, 347; Walker v. Cook, 129 Mass. 578; Locke v. Central City, 4 Colo. 65; Haswell v. Mayor, 81 N. Y. 255; Barton v. New Orleans, 16 La. Ann. 317.

^{14a} Dillon Mun. Corp. 230.

¹⁵ Detroit v. Redfield, 19 Mich. 376; Chase v. Lowell, 7 Gray, 33.

¹⁶ Territory v. Norris, 1 Ore. 107.

¹⁷ Steubenville v. Culp, 38 Ohio, 18.

¹⁸ Hoboken v. Gear, 27 N. J. L. 265; Locke v. Central City, 4 Colo. 65.

hibition, a municipality may at any time alter the pay of its officers.¹⁹ The pay may at one time be in the form of a fixed salary, or at another it may be in fees. Because it is a matter of law, rather than of executive detail, a superior officer has no control over the pay of his subordinate. If the superior attempts to cut down the pay of the subordinate, by holding back a portion of his salary, the subordinate may recover the full amount, even though he may have accepted the smaller sum at the time.²⁰ An act fixing an officer's pay does not necessarily repeal former provisions. The new act must distinctly state its intention of change, as by the expression "in full compensation," or by a statement that the sum is in lieu of any different amount.²¹ Therefore an officer is not estopped from collecting the larger sum by having accepted a smaller amount.²² Where the pay of one officer is made the same as that of another, the change of one does not alter the pay of the other, unless the intention is clear.²³ "The term 'salary' of itself imports a compensation for personal services, and not the repayment of moneys expended in the discharge of the duties of the office."²⁴ So, where a public officer, in the discharge of his official duties, has been expressly, or by implication, required to incur special expense, and that expense is not clearly covered by his salary or fees, as allowed by law, he is entitled to

¹⁹ Mechem, Pub. Off. 857, citing cases; Throop, 443.

²⁰ Kehn v. State, 93 N. Y. 291.

²¹ U. S. v. Fisher, 109 U. S. 143; U. S. v. Mitchell, 109 U. S. 146.

²² State v. Steele, 57 Tex. 200. But see Brown v. Livingston Co., 85 N. W. 745.

²³ Johnson v. Lovett, 65 Ga. 716; Kinsey v. Sherman, 46 Iowa, 463.

²⁴ Sniffen v. Mayor, 4 Sandf. 193.

recover the amount thus expended, in addition to his other pay.²⁵ But where the constitution prohibited the increase or diminution of the "emoluments" of an office during the term of the incumbent, it was held that the board of prisoners was among the emoluments of the office of sheriff, and so within the constitutional prohibition.²⁶ Another case illustrating how the provision for expenses may be included in the "emoluments" of an office arose in the state of New York. The constitution of 1880 contains a provision that justices of the supreme court shall not continue to serve after the 31st of December, following the attainment of the age of seventy years. It also provides that a justice so retired from service, who shall have served ten years or more, shall continue to draw "the compensation" attached to the office for the remainder of the term for which he was elected. Whereas formerly there had been a statute providing that each justice should receive an annual salary of \$6,000, and in addition a *per diem* allowance of five dollars a day for reasonable expenses when absent from home on judicial business, in 1872, it was enacted that each of the justices should receive \$1,200 annually, "in lieu of and in full of all expenses now allowed by law." A justice having been thus retired claimed the \$7,200 per annum, but it was claimed that he was entitled only to his salary, and that the \$1,200 was intended only for expenses while on duty. He therefore sought by *mandamus* to compel the payment of the entire sum. The court of appeals held that there was no distinction

²⁵ *Andrews v. U. S.*, 2. Story C. C. 202; *U. S. v. Flanders*, 112 U. S. 88; *Powell v. Newburgh*, 19 Johns. 284.

²⁶ *Apple v. Crawford County*, 105 Pa. 300.

between the two items, and "that the \$7,200 had become a debt from the state, which nothing could extinguish except payment, and which remained such until the official term for which he had been elected had expired."²⁷ On the other hand, it has been held that the constitutional provision against the change of a county officer's compensation does not prohibit the county board from making such allowances for clerk hire, fuel, and other office expenses, in sums from time to time as may seem necessary.²⁸

§ 325. Constitutional prohibition of change of salary during term. Very properly, most states provide in their constitutions a prohibition of the change of the compensation of an officer during his term of office. Such a provision is wise, for it tends to restrict the possibility for improperly depleting the treasury. But if the compensation of an officer may not be changed during his term of service, he should be aware of the full import of the provision before he enters upon the duties and responsibilities which he is about to assume. The courts are very strict in interpreting this prohibition. A county board attempted to reduce the salary of the district attorney about an hour after he had qualified. They were acting under the statute which authorized them to fix the salary, but they were prohibited from changing it during his term. It was held by the court that the reduction was void, as a violation of the prohibition.²⁹ Where a reduction has thus illegally been made, though the reduced salary has

²⁷ *People v. Wemple*, 115 N. Y. 302; reversing, 52 Hun, 414.

²⁸ *Briscoe v. Clark Co.*, 95 Ill. 309; *Kirkwood v. Soto*, 87 Cal. 394.

²⁹ *Pole v. Minnehaha Co.*, 5 Dak. T. 129. See also *Milner v. Reibenstein*, 85 Cal. 593.

been accepted, there is no doctrine of waiver or estoppel which prevents an officer from recovering the balance of the larger amount. Likewise an increase in an officer's salary made three days after he had entered upon his duties, was decided to be illegal, though he would be entitled to it upon his reelection.³⁰ An officer may not receive the larger salary, increased in spite of the prohibition during his term, by resigning, and being reappointed.³¹ The general expression "during his continuance in office simply refers to the term held by the officer during which an attempt may be made to increase or decrease his pay, and it does not refer to future terms.³² By the same interpretation, an officer who is appointed to fill a vacancy is not entitled to an increase in salary which may have been voted during that term of office, though before the occurrence of the vacancy.³³ It may therefore become very important to determine the beginning of the term. Apparently, when the appointment is entirely subject to the will of the appointing power, and there is no fixed term, the expression "during his continuance in office" could under no conditions be stretched to include a time before he has accepted the official responsibilities. Likewise if the word term be found in the prohibition against changing the pay, the prohibition would not hold as against an office held at pleasure. But where the appointment is made annually and the law does not state when the term shall begin, there may be some considerable doubt as to whether or

³⁰ Weeks v. Texarkana, 50 Ark. 81; Smith v. Waterbury, 54 Conn. 174.

³² Smith v. Waterbury, 54 Conn. 174.

³³ Larew v. Newman, 81 Cal.

³¹ State v. Hudson County, 44 N. J. L. 388. 588.

not a given increase was voted within the term of the officer. The word "annually" implies that there is a fixed term. The fact that the appointing officer delays making an appointment does not increase the term of the incumbent, but in effect, the old officer is serving in the place of his successor. Thus, where the constitution of the state provides that an officer shall hold over until his successor is chosen and qualified, and an officer accepts an incompatible office, his continuance in performing the duties of the first office will not serve to oust him from the second.³⁴ His own term had ended, and that of his successor had practically begun, though he was not qualified, nor perhaps selected. The law does not permit a vacancy. One term begins when another leaves off, with the exception of such cases as those for which the statute provides for the length of term, but does not state when the term shall begin.³⁵ In such cases the officer holds for the full period of time after entering upon the discharge of his duties. But where an appointment is to be made annually, if the appointment for a certain office be delayed, and in the meantime the salary be increased, it would probably be held that the increase was made during the term of the new appointee. Certainly, following the interpretation of the Attorney General in the case of Love,³⁶ that the term begins when the appointment is made, an increase in salary made after the appointment, but before the acceptance of the office as shown by qualification, the increase would be held to be in violation of such provision. It must be remembered, how-

³⁴ State v. Somers, 96 N. C. 467. ³⁶ 39 N. J. L. 476.

³⁵ Haight v. Love, 39 N. J. L. 14; State v. Chapin, 110 Ind. 272.

ever, that this prohibition, when found, is against the change of the compensation for officers only, and does not apply to the pay of employees, and that a large proportion of those engaged in the health service would be held to be simply employees, and not public officers.

§ 326. **When compensation may be fixed after appointment.** The general prohibition against changes in an officer's compensation, made during his term of service, has been held not to apply when there was no previous compensation provided. Thus, in Pennsylvania the statute imposed upon the court of quarter sessions the duty of fixing the compensation for the sheriff in payment for the board of prisoners. The court had never permanently fixed that amount, though in settling the account of the former sheriff it had allowed a certain rate. A new rate was fixed by an order of the court after the term of the sheriff had begun. The new rate was lower than that allowed to the predecessor. It was held that this was not a violation of the prohibition against raising or diminishing an officer's compensation.³⁷ Where the compensation of municipal officers had not been determined before they took office, it was held that the ordinance granting them certain salaries did not violate the prohibition.³⁸ Also, where a change in the compensation was provided by the city council before the beginning of the term, though the change could not be effective until later in the term, on account of the necessity of making certain publication of the ordinance, it was

³⁷ Peeling v. York County, 113 Pa. 108.

³⁸ State v. McDowell, 19 Neb. 442; Purcell v. Parks, 82 Ill. 346;

Rucker v. Supervisors, 7 W. Va. 661; Wheelock v. McDowell, 20 Neb. 160.

held not to be a violation against the change of compensation.³⁹ The Kentucky statutes provided,⁴⁰ among other things, "That the local board shall receive such compensation for such services as the county court, in which the local board is established, shall, in their discretion, determine." This section refers to the compensation for the members of boards of health. One John R. Allen had been duly appointed and qualified as a member of the board of health for the county of Kenton, and he was chairman of the board. After serving for two years, he brought action against the fiscal court of the county, for the payment for his services. This amount, having been adjudged to him, the fiscal court, which had refused to allow anything for his services, appealed. The court of appeals said,⁴¹ "The Legislature intended that the members of the local board of health should be fairly compensated for the services they are required by law to render. The discretion of the fiscal court with reference to the compensation to which such board is entitled, is not an arbitrary one, but it is a sound judicial discretion, and one that can be controlled. If the fiscal court has an arbitrary discretion in the matter, they could refuse to allow any compensation, however valuable and meritorious might be the services of the members of the local board of health." The fact, therefore, that no previous compensation had been arranged for by the fiscal court, did not preclude the recovery for services. The fact that the statutes directed that such compensation be provided was suffi-

³⁹ *Stuhr v. Hoboken*, 47 N. J. L. 147.

⁴⁰ Sec. 2055.

⁴¹ *Stephens v. Allen*, 44 S. W. R. 386. See also *Adams Co. v. Aikman*, 52 So. 513.

cient to remove all suspicion that the position had been removed from the status of honorary to that of lucrative, contrary to the spirit of our institutions. So, where the state statute authorized the village trustees to make an annual appropriation to pay the members of the Board of Health for their services, it was held ⁴² that although no appropriation had been made at the time of his appointment a member does not accept such appointment without compensation. On the other hand, the act of 1891 in Nebraska provided for the establishment of a state board of health, and it further provided that the compensation for the services of the secretary should be paid from fees received; and there was no provision for either requiring that such fees be accounted for, nor that they be paid into the state treasury. It was held ⁴³ that although such provision for the compensation of the secretary was void, the statute as a whole was not void. Practically therefore, such a condition makes certain duties obligatory upon the officer, though he may not be paid therefor.

§ 327. Effect of increased duties. An officer who accepts an office is expected to perform all the duties naturally falling to that position, and for the compensation which is provided. There being no contract in the case, there is nothing to prevent the legislative authorities from increasing the duties of the office. "The limit of compensation cannot be transgressed by the county by extra allowance without statutory authority. The basis of this rule is that the officer

⁴² *People v. Village of Haverstraw*, 43 N. Y. 135, 11 App. Div. 108.

⁴³ *Munk v. Frink*, 75 Neb. 172; *Walker v. McMahn*, 75 Neb. 179; *State v. Walker*, 75 Neb. 177.

has, by taking the office, agreed to perform all the duties of the office, whether prescribed at the date of his induction, or subsequently added by statute, for the compensation fixed by law, and that these include all the services performed in the line of his official employment." It has accordingly been held that public corporations cannot lawfully allow extra compensation to attorneys, physicians, and other county officers, for extraordinary services rendered by them in the line of their professional and official duty, though they were not foreseen or contemplated at the time of induction into office.⁴⁴ Thus in Iowa a statute was passed providing for the creation of boards of health, and the mayor was made a member of such board, and its chairman. It was admitted that additional duties were thus imposed upon the mayor, while no addition was made to his official salary. "This he knew when he accepted the office, and he is bound to perform the duties of the office for a salary fixed, and cannot legally claim additional compensation for additional services, even though they be subsequently imposed upon him; and it matters not that the salary was inadequate."⁴⁵ Therefore, "an officer can recover no compensation for services rendered unless it was provided for by law at the time the office was accepted."⁴⁶

This prohibition against extra pay is a necessity. Duties of officers are often indefinite at the best, and were it not for this prohibition it would often occur

⁴⁴ *Ingersoll*, Pub. Corp. 25, 84. U. S. v. Clough, 55 U. S. 373;

⁴⁵ *State v. Olinger*, 72 N. W. R. 441. *People v. Vilas*, 36 N. Y. 459; *Mayor v. Kelley*, 98 N. Y. 467;

⁴⁶ *Cooley*, Cons. Lim. 276. Other cases upon this important point are: *Swan v. Buck*, 40 Miss. 268; *Marshall County v. Johnson*, 127 Ind. 238; *Pierie v. Philadelphia*, 139 Pa. 573; *Garvie v. Hartford*, 54 Conn. 440; *Buck v. Eureka*, 109

that claims of special service would be made and permitted. Therefore it is, that when a statute possibly allowing extra compensation admits of two interpretations, it should be construed strictly against the officer.⁴⁷

The correctness of diagnosis must be the base for all quarantine regulations. It is upon that act that the health official must depend for his jurisdiction and defense. If the disease be infectious he may quarantine; if not infectious quarantine would not be justifiable. Whether specifically so stated by statute or not, the official diagnosis depends, in the absence of statement to the contrary, with the health officer. To make that diagnosis is part of his official duty, and it is as much official duty when he finds that the disease is not one for the use of his authority, as when it proves to be infectious. A health officer therefore is not entitled to compensation for going in consultation, for diagnostic purposes, to see a patient afflicted

Cal. 504; *Debolt v. Cincinnati Tp.*, 7 Ohio, 237; *Preston v. Bacon*, 4 Conn. 471; *Heslep v. Sacramento*, 2 Cal. 580; *Reif v. Page*, 55 Wis. 496; *State v. Nashville*, 15 Lea, 697; *Gilmore v. Lewis*, 12 Ohio, 281; *Evans v. Trenton*, 25 N. J. L. 766; *Detroit v. Redfield*, 19 Mich. 376; *Waterman v. New York*, 7 Daly, 439; *Albright v. County of Bedford*, 106 Pa. 582. (In this case the matter involved expenses incurred in performing duties, which the county, by long usage, had been accustomed to bear.) *White v. Polk Co.*, 17 Iowa, 413; *Ludlow v. Richie*, 25 Ky. 1581; *Sidway v. Commissioners*, 120 Ill. 496; *Covington v. Mayberry*, 9

Bush, 304; *People v. Supervisors*, 1 Hill, 362; *Poughkeepsie v. Wiltse*, 36 Hun, 270; *Council Bluffs v. Waterman*, 86 Iowa, 688; *Coleman v. Elgin*, 45 Ill. App. 64; *Bartch v. Cutler*, 6 Utah, 409; *Gordon Co. Com. v. Harris*, 81 Ga. 719; *Stiffler v. Delaware*, 1 Ind. App. 368; *Beard v. Decatur*, 64 Tex. 7; *Stockwell v. Genesee Co.*, 56 Mich. 221; *In re Parsons*, 54 N. Y. 451; *Glavie v. U. S.*, 182 U. S. 595; *Pilie v. New Orleans*, 19 La. Ann. 274; *Hatch v. Mann*, 15 Wend. 44; *Hobbs v. Yonkers*, 102 N. Y. 13; *Memphis v. Brown*, 20 Wall. 289.

⁴⁷ *U. S. v. Clough*, 55 U. S. 373.

with a disease dangerous to the public health.⁴⁸ Neither is a health officer entitled to extra compensation in Michigan for disinfecting and fumigating houses in which cases of infectious disease have occurred, as this is one of the duties prescribed for health officers by the statutes.⁴⁹

§ 328. Payment of substitute for extra services not permissible. The Court of Appeals of Kentucky had before it a case which covers several questions relative to extra services for a health office. The facts were substantially as follows: The county board of health for Hickman County was legally organized, and in accordance with the law it appointed one Dr. Scarborough to act as secretary and health officer, and fixed his salary at \$50.00 per annum. The said Dr. Scarborough refused to perform the duties of the office for such a sum, and the board therefore engaged one Dr. McMorris to perform the needed services. It was admitted that acting under the orders of the board the said McMorris had established a number of quarantines for smallpox and for scarlet fever, and had fumigated premises therefor, because of epidemics. It was admitted that the bill rendered was reasonable and just. The circuit court concluded that the circumstances were sufficient to justify the board of health in hiring a substitute to do the work which the health officer had refused to do. It therefore allowed the bill of McMorris. The court of appeals reversed this decision.

The court of appeals agrees with the circuit court that the evidence was sufficient to show that the particular services for which an allowance was claimed

⁴⁸ *Brown v. Livingston Co.*, 85 N. W. 745.

⁴⁹ *Tabor v. Berrien Co.*, 120 N. W. 588.

were authorized by the county board. It also concludes that services rendered in fumigating premises of those afflicted with contagious diseases and establishing quarantines, even though the persons afflicted with the disease were solvent, were services for which the county was liable, as such measures are not taken for the individual benefit of the particular patient, but to prevent the spread of the disease, and are therefore for the benefit of the public generally. May the county board of health, while there is a regularly appointed health officer in office, who refuses to perform the duties of the office, impose the performance of his duties upon another physician, and make the county liable for the payment of the latter's services? Manifestly not. When Dr. Scarborough resigned as health officer, on the ground that he was unwilling to perform the duties of that office for the compensation fixed by the fiscal court, the county board of health should have accepted his resignation. It had no right to let him continue in office and delegate his duties to another; nor did Dr. Scarborough have the right to hold the office, and at the same time refuse to perform the duties thereof. Even if he had not resigned, it was the duty of the county board of health to remove him and appoint another in his place, who would perform the duties of the office. The statute plainly provides that the fiscal court shall fix the salary of the health officer at the time of or immediately after his election, and that in no state of case shall such health officer claim or receive from the county any compensation for his services other than the salary fixed by the fiscal court. This provision of the statute cannot be evaded by letting the health officer remain in office without per-

forming the duties of the office, and then delegating to another the performance of those duties, and allowing him compensation therefor.

“But it was claimed that under this view of the law, the fiscal court may fix the salary of the health officer so low that no one will perform the duties of the office, and thus defeat the very purposes for which the county boards of health are established. This court has held, however, that the salary fixed for the health officer must be reasonable, and that from an order of the fiscal court fixing the salary an appeal lies to the circuit court, and thence to this court. Under these circumstances the court thinks that there will be no difficulty in securing the services of a competent health officer, even though the fiscal court should make the salary unreasonably low, for, on making this fact appear, the necessary relief will be afforded either in the circuit court or this court. If it be argued that, owing to the uncertainty as to the amount of salary the health officer is to receive, no one will undertake the duties of the office, it is sufficient answer to say that the members of the fiscal court are charged with the duty of fixing a reasonable compensation for the health officer, and no doubt the fact that for a failure in this respect, resulting in an epidemic in the community, they will be answerable to their constituents, who will not continue in office men who are so unmindful of the health and welfare of the people, will be a sufficient reason why they should act justly and properly, aside from the fact that their action will be reviewed by a higher court. As \$213 of the amount of Dr. McMorris' claim was for services rendered while Dr. Scarborough was the health officer it follows that he was not

entitled to recover that sum. Nor was he entitled to recover the remainder of \$69 for services performed after his appointment as health officer, as his claim for the latter sum will be included in whatever salary the fiscal court may have fixed for his services. If no salary has heretofore been fixed, the fiscal court will fix the salary at a reasonable sum.”⁵⁰ It must be remembered that, if made, an appeal from the action of the fiscal court in fixing the salary must be made immediately. Otherwise a change would be held to violate the principle that the salary may not be changed during the incumbency of the holder.

There are important deductions to be made from this decision which is evidently sound. First, it is the duty of those who fix the salary of health officials to determine upon a reasonable sum, and if through their failure to do so harm results to the community they are responsible to their constituents for the harm produced. Secondly, this salary, or other compensation must be such as to produce an efficient service. Thirdly, having fixed the salary it is incumbent upon the health officer so appointed to actually do the work for the sum thus provided. It is very questionable whether, having fixed the salary at such a sum that the chosen official cannot properly do the work, because it is necessary for him to engage in other business, as in the ordinary practice of his profession, the authorities have either the moral or the legal right to evade the spirit of the law by providing that some part of the officer's work shall be done by other employees; and it is questionable whether a municipality has the authority, under such circumstances, to create addi-

⁵⁰ Hickman County v. McMorris,
147 S. W. R. 768.

tional officers to do a portion of the work regularly belonging to a health officer. By this it must not be concluded that there is reasonable objection to appointing additional help in an office which uses the full time of the health officer, or commissioner, where his official business will not permit him to do the whole work; but it does apply to such offices as are presided over by a commissioner, or health officer, who, owing to the smallness of his official compensation, devotes much of his time to private practice, even though he do devote more time to his office than a reasonable estimation of the services show that he is really paid for.

§ 329. Extra official duties. Incidentally, and not as a portion of his official duties, an officer may be called upon to perform other services. Thus, though it may be no part of the health official's duties to treat cases of illness, during an epidemic, as of small-pox, it may be advisable for him to also take the treatment of cases, as a precautionary measure, especially when he finds that it be necessary to remove the patients from their homes. Under ordinary circumstances such a course is not advisable, for it tends to produce friction between the private practitioners and the office. Such service, if rendered by the official, should be the result of a special arrangement, in the nature of a contract. Sometimes the law may provide for such extra service, by fixing the amount of fees, but not stating by whom the fees shall be paid. In such cases it is the general rule that the fees shall be paid by the person at whose request the service is rendered, and the officer may collect them from such person.⁵¹ But the officer may

⁵¹ Baldwin v. Kansas, 81 Ala.

272; People v. Harlow, 29 Ind. 43;

Ripley v. Gifford, 11 Iowa, 367.

not collect more than is specifically thus provided, even on the ground of extra service and though promise be made of extra compensation.⁵² A contract or agreement to pay more than the legal fees is void as being opposed to public policy.⁵³ In some instances the claim for extra compensation for officers has been sustained, in the absence of express provision, where the law has required an officer to perform a duty, attended with extra trouble and expense, and clearly outside of his regular official duties.⁵⁴

§ 330. Compensation for two offices. An officer who holds two distinct offices, not incompatible with each other, is entitled to recover the stipulated compensation for each office.⁵⁵ He can not, however, recover a *per diem* compensation for the same day from two or more independent sources.⁵⁶ Where the offices are incompatible, or the holding of the two is prohibited by law, it is clear that with the office forfeited the officer also forfeits his pay therefor.⁵⁷

⁵² Wilcoxon v. Andrews, 66 Mich. 553; Peck v. Bank, 51 Mich. 353; Burk v. Webb, 32 Mich. 174; Vandercook v. Williams, 106 Ind. 345; Fort Wayne v. Lehr, 88 Ind. 62; Willemin v. Bateson, 63 Mich. 309.

⁵³ Hatch v. Mann, 15 Wend. 44; Vandercook v. Williams, 106 Ind. 345; Fort Wayne v. Lehr, 88 Ind. 62.

⁵⁴ People v. Supervisors, 12 Wend. 237; Bright v. Supervisors, 18 Johns. 242; Mallory v. Supervisors, 2 Cowen, 531; Detroit v. Redfield, 19 Mich. 376; McBride v. Detroit, 47 Mich. 236; s. c. 49 Mich. 239; Huffman v. Green-

wood Co., 23 Kas. 281; Butler v. Neosho Co., 15 Kas. 178; Leavenworth v. Brewer, 9 Kas. 307; White v. Polk Co., 17 Iowa, 413, 479; Goud v. Portland, 96 Me. 125; Finley v. Territory, 12 Oka. 621; Clooman v. Kingston, 37 Misc. Per. 322; Niles v. Muzzy, 33 Mich. 61; McBride v. Grand Rapids, 47 Mich. 236.

⁵⁵ U. S. v. Saunders, 120 U. S. 126; *In re* Conrad, 15 Fed. Rep. 641.

⁵⁶ Montgomery County v. Bromley, 108 Ind. 158.

⁵⁷ State v. Comptroller General, 9 S. C. 259.

§ 331. Compensation depends upon actual service.

In order to recover his salary an officer must show that he has been duly elected or appointed, and that he has properly qualified, that is, that he is in truth an officer *de jure*. An officer holding over lawfully is entitled to the regular salary until his successor has qualified.⁵⁸ An officer is entitled to his salary during the time he is actually serving,⁵⁹ even though he may not have filed his official bond before beginning service.⁶⁰ An officer nominated for promotion, on condition of his passing an examination, is not entitled to the new salary until he has actually passed the examination.⁶¹ An officer removed from office is entitled to recover only for that portion of his salary which he has earned; and if the salary be paid quarterly, and he be removed during the quarter he is not entitled to the entire salary for the quarter.⁶² Neither is an officer entitled to his pay during the time that he may stand suspended from office.⁶³ But if he had been unlawfully removed he is entitled to recover the salary which he had been thus prevented from earning,⁶⁴ even though the salary had been paid to one thus unlawfully appointed to the supposed vacancy created by his removal.⁶⁵ So long as an officer is permitted to retain his office, sick-

⁵⁸ Hubbard v. Crawford, 19 Kas. 570.

⁵⁹ Farrell v. Bridgeport, 45 Conn. 191; Throop, Pub. Off. 473; Dillon, Munic. Corp. 235, citing Queen v. Atlanta, 59 Ga. 318; Auditors v. Benoit, 20 Mich. 170.

⁶⁰ U. S. v. Flanders, 112 U. S. 88.

⁶¹ Crygier v. U. S., 25 Ct. of Cl. 268.

⁶² U. S. v. Smith, 1 Bond (U.

S.), 68; White v. Mayor, 4 E. D. Smith, 563; Chisholm v. Coleman, 43 Ala. 204.

⁶³ Steubenville v. Culp, 38 Ohio, 18; Smith v. Mayor, 37 N. Y. 518; Attorney General v. Davis, 44 Mo. 131; Westberg v. Kansas City, 64 Mo. 493.

⁶⁴ Fitzsimmons v. Brooklyn, 102 N. Y. 536.

⁶⁵ Andrews v. Portland, 79 Me. 484.

ness will not prevent him from recovering his salary.⁶⁶ Also, where an officer *de jure* has been prevented from entering upon the discharge of his duties by the wrongful refusal of other officers to recognize his authority, he is entitled to recover the full amount of the perquisites of the office,⁶⁷ and the plaintiff need not deduct the amount which he earned while illegally kept out of his office.⁶⁸ Where the salary has been paid to an officer *de facto*, the officer *de jure* cannot recover from the government,⁶⁹ but he may recover from the officer *de facto*. Opinions are somewhat conflicting as to the amount which may be recovered thus from the *de facto* officers. In some cases the officer *de facto* has been permitted to retain certain fees, on the ground that the officer *de jure* had not made formal demand for the surrender of the office. In others, the officer *de facto* was permitted to retain expense of the office.⁷⁰ Where the salary has been voluntarily paid to an officer *de facto* the public can not recover.⁷¹ An officer *de facto* cannot recover for his services.⁷²

A physician having been employed to treat the poor of the county later engaged another to do the work for him. Held, that though the first physician was entitled to recover for services up to the time of employment of the second physician, and for the drugs

⁶⁶ O'Leary v. Board of Education, 93 N. Y. 1.

⁶⁷ Matthews v. Supervisors, 53 Miss. 715; McCue v. Wapello Co., 56 Iowa, 698; Darby v. Wilmington, 76 N. C. 133.

⁶⁸ People v. Miller, 24 Mich. 458; Fitzsimmons v. Brooklyn, 102 N. Y. 536; Andrews v. Portland, 79 Me. 484.

⁶⁹ Mechem, Pub. Off. 332, with list of cases.

⁷⁰ Mechem, Pub. Off. 333, 334; Throop, Pub. Off. 522, 523.

⁷¹ Diggs v. State, 49 Ala. 311; State v. Long, 76 N. C. 254; Neale v. Overseers, 5 Watts, 538; State v. Goss, 69 Me. 22.

⁷² Mechem, Pub. Off. 331, citing cases.

actually used in the matter by the second physician, he could not recover for the services of the second physician.⁷³

§ 332. **Second term presupposes old rate.** According to the rule of private agencies, where a person is engaged at a fixed compensation per annum, the continuance of the service will presuppose the same rate of pay, in the absence of other arrangements.⁷⁴ So with public officers, at the expiration of the term for which they were appointed, in the absence of a new agreement, if retained in position the officer can recover only according to the former arrangement, and he can not claim greater pay on a *quantum meruit*.⁷⁵

§ 333. **Abolition of office stops compensation.** If there be no office there can be no service; and there being no service, there can be no pay therefor. Therefore, when an office is abolished the incumbent is entitled only to that portion of the salary earned,⁷⁶ even though money was appropriated to pay the salary for a year.⁷⁷ But where the salary is payable at so much per annum, though the services may be irregular, it was held in one case that upon the abolition of the office the incumbent was entitled to the full year's salary.⁷⁸

§ 334. **Dissatisfied officer may resign.** There is in the United States no tendency towards compelling a person to take and keep a public office against his will, unless the jury system be an exception, though in

⁷³ Chapman v. Muskegon County, 134 N. W. 1025.

⁷⁴ Mechem on Agency, 212, 608.

⁷⁵ Capps v. Adams Co., 43 N. W. R. 114.

⁷⁶ Jones v. Shaw, 15 Tex. 577; State v. Gaines, 2 Lea, 316.

⁷⁷ Hall v. State, 39 Wis. 79.

⁷⁸ *Ex parte* Lawrence, 1 Ohio, 431.

times of special stress an officer may be called upon for services far beyond what his compensation calls for, and far more than he may feel able to give. He may not claim extra compensation, but he may resign.⁷⁹ There is a well recognized hesitancy about resigning "under fire," and a health official, especially, who does so exposes himself to very unfavorable criticism, but such a course is sometimes the only one to bring the community to realize the injustice which it is working. The officer who, either because of inadequate salary, or for other reason, cannot give the service which the office demands, should resign. In one instance a health official's efforts were blocked by the inactivity, and perhaps hostility of the legal department. There had been much extra work due to the presence of an epidemic, which was still raging. The health official's resignation, coupled with a plain statement of the facts, resulted in an investigation. The health department was freed from the restraints of the legal department, and with certain added work the pay of the officer was increased, in the place of accepting the resignation, which had been given in good faith.

§ 335. Original bond covers extra duties. When the law increases the duties of an officer during his incumbency, his original bond is held to cover the new duties, though the same be not specifically stated in the bond.⁸⁰

§ 336. Officer cannot pay self. Because the making of contracts by boards with one of the board members,

⁷⁹ *Evans v. Trenton*, 4 *Zabr.* 766; *Decatur v. Vermilion*, 77 *Ill.* 315.

⁸⁰ *Bd. of Auburn v. Quick*, 99 *N. Y.* 138; *People v. Vilas*, 36 *N. Y.* 451.

or by officers with fellow officers, opens the door for fraud and jobbery, such arrangements are contrary to public policy and should be prohibited. It is true that in *Cedar Creek v. Wexford County*,⁸¹ for example, the court recognized such an agreement, even without a specific contract. It seems to us that the court rather stretched the point. Be that as it may, such contracts are frequently prohibited, either by the state constitution, or by statute. Upon this point the Minnesota supreme court has said:⁸² "Contracts with public officers are forbidden by Section 5032 of the Revised Laws of Minnesota, and are void. The rule that such contracts are void and cannot be enforced rests on a wise public policy, and it must be enforced without reference to the merits of the contract, the intention of the parties, or the hardship of exceptional cases. Nor does the court agree with the contention that the statute and the rule do not apply to a board of health, and that it may employ one of its members as its health officer for the purpose of controlling and suppressing an epidemic of contagious or infectious disease. As to the suggestion that the board was confronted by an emergency which justified it in making the contract in question, the court answers that an emergency confronts a board of health in every case of an epidemic of contagious or infectious disease; but this affords no reason why such cases should be exempted from the statute by the court, for the board may employ, when the emergency justifies it, a physician other than one of their own members to render the extra medical service."

⁸¹ 135 Mich. 124.

⁸² *Bjelland v. Mankato*, 127 N. W. 397.

The public have a right to know what is transpiring in its name. Everything which is proper for the citizens to know relative to public affairs should be easily ascertained. There are matters of government, such as the diplomatic service, which may be efficient for the common good, very nearly in proportion to the degree with which, during the transaction, they are kept private. As an example of how the business of a department should not be done, we may instance the Illinois State Board of Health. By a series of enactments this somewhat anomalous body was entrusted with two general classes of duties. As a board of health, proper, it received general appropriations from the state. As a board entrusted with the regulation of the practice of medicine and of undertakers, it received fees for licenses and fines collected for violations of the practice acts. As a board of health, because all appropriations were easily traced it was an easy matter to audit its accounts, and this was for years done by the state auditor. As a license board it audited its own accounts, paid money on its own vouchers, and rendered such accounts to the Governor as it thought proper. These accounts were filed in the Governor's office, and only a summary was published. Because the itemized accounts were not published, and easily accessible for any interested citizen, it would have been very easy so to "juggle" the statements as to fail to account for very much of its receipts. It employed a private attorney, contrary to the law of the state, but in accord with a long established practice. Though not clearly within the law, it was understood that the board provided for the pay of its members for making the license examinations

from amounts received in this branch of its work. Without intimating that there was any intentional dishonesty in this proceeding, it is easy to see that such a practice is contrary to public policy.

A public officer is entitled to pay for his services from the public treasury, unless it be distinctly stated in the law that he may retain fees received for the transaction of the business, and all fees, or fines, collected should be paid into the public treasury. This subject was very clearly treated in a case arising in New Orleans. The wharfinger of the city was *ex officio* collector of levee dues, which he retained for his services. The court said:⁸³ "His duties were to collect the moneys due to the city in the department in which he held office; his obligation was to deposit the money so collected in the city treasury. His salary was to be paid as the salaries of other officers of the city were paid, to wit: out of the common treasury. There is no place for the plea of compensation in a case of this kind. Compensation takes place of right between individuals when the debts due by the respective parties are equally due and demandable, and where the character of the debts is the same. It cannot be opposed by a fiduciary acting in the line of his duty. There is no such thing as compensating a debt due by an agent for moneys collected by him in the performance of his duties, by a debt due by the principal to the agent. No officer of a government, state or municipal, is empowered to pay himself his salary, or plead in compensation a demand made against him for moneys collected by him in his official capacity, by

⁸³ New Orleans v. Finnerty, 27 La. Ann. 681.

an amount due him on account of his salary. His duty is to discharge the obligations of his office according to the terms of his acceptance thereof and to get his pay as other officers get theirs. In other words, he cannot pay himself.”

The Illinois statute relative to the State Board of Health provides⁸⁴ that the secretary of the board shall receive a certain salary, but that other members of the board shall receive no pay, but they shall be allowed their traveling expenses while in the discharge of their duty. There is nothing in the chapter,⁸⁵ which defines the duties of the board as license examiners, providing for other pay to any member of the board for those services. There is nothing which provides for the appointing of two boards, but the provisions as to making the appointments are all found in the one chapter.⁸⁶ Apparently, therefore, the prohibition in Sec. 11 of Chapter 126a against members, other than the secretary, from receiving compensation applies also to their work as license examiners. Neither was there for many years any general appropriation made by the legislature for this work. Any resolutions, ordinances, or other provisions made by the board to pay members for such work must therefore be considered as unconstitutional infringement of the legislative power. Though the acts do not so specifically state, it seems, therefore, that all funds collected by the board in its license capacity, or fines collected, should have been paid into the treasury of state.

The Game Law of Illinois provided for the appointment of a Game Commissioner and his deputies,⁸⁷ and

⁸⁴ Chap. 126a, Sec. 11.

⁸⁵ 91.

⁸⁶ 126a.

⁸⁷ Ill. Statutes, Chap. 61.

defined their duties, and stated what salaries they should receive. The act further provided for a game protection fund which was to be accumulated by licenses, and collection of fines, etc. It further provided that the salaries should be paid from this fund. It was for some time the custom of this office to keep this fund within the office and pay therefrom the official salaries. In an opinion handed in February 13, 1911, by Attorney General Stead it was held that this practice was contrary to the statutes. The state constitution provides:⁸⁸ "Bills making appropriation for the pay of members and officers of the General Assembly, and for the salaries of the officers of the government, shall contain no provision on any other subject." And in another section⁸⁹ the constitution provides: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The title of the game act says nothing about the appropriation of moneys to pay salaries, and the act, insofar as it can be considered an appropriation act, contains two distinct subjects, and therefore insofar it is unconstitutional. The constitution further provides:⁹⁰ "No money shall be drawn from the treasury except in pursuance of an appropriation made by law and on presentation of a warrant issued by the auditor thereon." An appropriation, we are told, "is an authority from the legislature given at the proper time and in legal form, to the proper officers, to apply designated sums of money out of that which may be in the treasury in a given year to specified objects and demands against the state. While it must be express,

⁸⁸ Art. IV, Sec. 16.

⁹⁰ Art. IV, Sec. 17.

⁸⁹ Art. IV, Sec. 13.

it may not be in any set form of words, and the fund out of which it is payable need not be specified.”⁹¹ The Attorney General, therefore, held that the long continued practice of the department was illegal; that moneys received should be paid into the treasury of the state, and that all payments for salaries, and for office expenses, must be provided for by legislative appropriations. Although this opinion was only relative to one department its effect was far reaching, and for a time it did much towards demoralizing the administration of several departments.

A statute determining the amount of salary to be paid for services, is not an appropriation for such payment. Though the statute may not, specifically, state that fines, fees, and other receipts of a department must be paid into the general treasury, both policy and law indicate that they should be so paid into the treasury, and that all salaries be paid only on legal warrant from moneys properly appropriated. A contrary course opens the way to misuse of funds, and the employment of the office for private gain.

§ 337. Unearned salary not assignable. Since there is no contract in an officer's position, and he is liable to removal from office at any time, there is no certainty that he will earn more salary than that already earned. The assignment of unearned salary therefore might lead to complications. The assignee would naturally desire to keep the officer in his position, and assignment of salary might serve as a bribe for that purpose. In most American cases, following

⁹¹ See *Clayton v. Berry*, 27 Ark. 129; *State v. Moore*, 50 Neb. 88; *People v. Brooks*, 16 Cal. 11.

the decisions of the English courts, it has been held that such assignment of future salaries was contrary to public policy, and therefore void. "Salaries are by law payable after work is performed and not before, and while this remains the law, it must be presumed to be a wise regulation and necessary, in the view of the lawmakers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. It is true that, in respect to officers removable at will, this evil could in some measure be limited by their removal when they were found assigning their salaries; but this is only a partial remedy, for there still would be no means of preventing the continued recurrence of the same difficulty. If such assignments are allowed, then the assignees, by notice to the government, would, on ordinary principles, be entitled to receive pay directly and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service."⁹² In this opinion most of the American courts concur.⁹³ The one dissenting opinion in this country was based upon the idea that the English decisions were not applicable to the conditions of society in this country.⁹⁴ To such a dictum it is not probable that many students of English and American jurisprudence would agree,

⁹² Johnson, J., in *Bliss v. Lawrence*, 58 N. Y. 442.

⁹³ *Bangs v. Dunn*, 66 Cal. 72; *Beal v. McVicker*, 8 Mo. App. 202;

Webb v. McCauley, 4 Bush, 10; *Field v. Chipley*, 79 Ky. 260; *Story*, Eq. Jur., 1040 e; *Story*, Contr. 709.

⁹⁴ *State v. Hastings*, 15 Wis. 75.

and in *Bliss v. Lawrence*,⁹⁵ Mr. Justice Johnson says with regard to the *Hastings* case: "We do not understand that the English decisions really rest on any grounds peculiar to that country, although sometimes expressed in terms which we might not select to express our views of the true foundation of the doctrine in question. The substance of it all is the necessity of maintaining the efficiency of the public service, by seeing to it that public salaries really go to those who perform the public service. To this extent, we think, the public policy of every country must go to secure the end in view."

Though in Massachusetts some cases were decided without regard to public policy, sustaining the assignment of officer's future salaries,⁹⁶ the majority of American courts have followed the English decisions and *Bliss v. Lawrence*.

In one American case the conditions were peculiar. An officer had entered into a partnership agreement, one clause of which provided that any salaries or other income received from the professional work of either of the partners, from any office or employment should be the property of the firm. Such a condition may easily be found in the municipal health service of our smaller cities, where the services of the office occupy only a portion of the officer's time. Such an agreement, as respects the salary of the officer was held to be valid, the court holding: "The case in hand is not that of an assignment of an unearned salary, where all control over the expected funds, even to their

⁹⁵ 58 N. Y. 442.

⁹⁶ *Brackett v. Blake*, 7 Met. 335; *Mulhall v. Quin*, 1 Gray 105; *Manchester v. Doane*, 2 Allen, 541.

See also, *Adams v. Tyler*, 121 Mass. 380; *Walker v. Cook*, 129 Mass. 577; *Dewey v. Garvey*, 130 Mass. 86.

reception in the first instance, is passed over to another. It is but an agreement as to the manner in which the salary shall be employed or disposed of, when earned and paid. The agreement did not take away from the parties the right to receive their salaries, at such periods as the law appointed for payments. Its effect was not to impair their obligations as public officers, or to present inducements to inefficiency or unfaithfulness in the performance of their public duties."⁹⁷ It seems very probable that a general partnership agreement, by which two physicians agreed that their professional earnings should belong to the firm, would also be held to include the salary which one of them might earn in a public office. If, therefore, one of such a firm be appointed to such a public office, where his services would be of a professional nature, he should have the partnership dissolved, in case he did not wish to share his salary with his partner.

It is generally agreed that salaries already earned are subject to assignment.⁹⁸

§ 338. Officers' salaries are not subject to garnishee. "It is well settled that the public, whether it be the United States, state, or municipal government, such as that of counties, townships, cities, and school districts, cannot be charged in garnishment or attachment for the compensation due to its public officers. This exemption is based upon public policy, and is not for the benefit of the officer but for that of the public that the latter may not be harassed or inconvenienced by suit against it, and that the efficiency of its servants be

⁹⁷ *Thurston v. Fairman*, 9 Hun, 584, following *Serry v. Clifton*, 9 C. B. 110.

442; *Birkbeck v. Stafford*, 14 Abb. Pr. 285; *Stephenson v. Walden*, 24 Iowa, 84.

⁹⁸ *Bliss v. Lawrence*, 58 N. Y.

not interfered with by any uncertainty as to their payment.”⁹⁹ For this reason it is common that by statutory enactment such proceedings are prohibited.

“It is also well settled that a public officer, who has money in his hands which is due from him in his official capacity to a third person, cannot be charged as the garnishee of such person on account of such indebtedness. * * * But if the officer does not hold the money and owe a duty to disburse it in his official capacity, but merely as the agent, bailee, or debtor of the third person, it may be reached by garnishment.”¹⁰⁰

§ 339. Termination of official relation. Official relationship may be terminated in any one of several ways. First, there is the cause of nature, the death of the incumbent. Then there are causes originating in legislation, as by the expiration of the legal term, the abolition of the office, or the failure to provide for the necessary expenses of the service. There are also causes originating within the action, or will of the incumbent, such as the refusal to accept the office, the failure to attend to the duties of the office, the acceptance of an incompatible office, the abandonment of the office, or resignation. Finally, there are causes originating external to the incumbent, as by removal, either with, or without trial, or by the court upon the finding that the incumbent is not properly possessed of his position.

§ 340. Death. The death of an officer creates an absolute vacancy. The constitutions, statutes, and ordinances generally make provision for such an emer-

⁹⁹ Mechem, Pub. Off. 875, citing cases.

¹⁰⁰ Mechem, Pub. Off. 876, citing cases.

gency. Perhaps this provision may be found only in the general provision of authority to fill vacancies. Death, then, creates a vacancy.¹ In the absence of provisions to the contrary, the office of the deputy expires with that of the principal upon which the deputy depends,² but in the absence of express provision of this nature, which is generally found, even common law provides that an officer holds over after the expiration of his term, until his successor has been appointed and qualified.³ "When the law gives him power to appoint a deputy, such deputy, when created, may do any act that the principal might do. He cannot have less power than the principal."⁴ In the case of the death of the principal, therefore, the deputy may continue to do the work of the office until a new principal shall be appointed. He may do any acts which the principal may do, and clearly his authority would be commensurate, and not exceed that of the principal while he was living. Where, however, the deputy is a special deputy, appointed for a specific service, he is regarded not as a public officer, but as a private agent.⁵ While, as a matter of public policy, such a special deputy might be permitted to continue his special work, his authority might be open to question, and it would cease on the appointment of a new principal.

The power to make a deputy, if not expressly given

¹ *Yonkley v. State*, 27 Ind. 236; *Hedley v. Commissioners*, 4 Blackf. 116; *State v. Jones*, 19 Ind. 516.

² *Banner v. McMurray*, 1 Dev. L. 218; *Greenwood v. State*, 17 Ark. 332.

³ *People v. Oulton*, 28 Cal. 44.

⁴ *Abrams v. Ervin*, 9 Iowa, 87; *Parker v. Kett*, 1 Ld. Raym. 658;

Ellison v. Stevenson, 6 T. B. Mon. 275; *Triplett v. Gill*, 7 J. J. Marsh, 444; *Commonwealth v. Arnold*, 3 Littell, 316; *Hope v. Sawyer*, 14 Ill. 254.

⁵ *Meyer v. Bishop*, 27 N. J. Eq. 141; *Meyer v. Patterson*, 28 N. J. Eq. 239.

by enactment, may be open to question. Generally speaking, an officer with discretion may not delegate his authority.⁶ But ministerial duties may be so delegated.⁷ In so far as a health officer's duties are ministerial, such as the recording of vital statistics, for example, those duties may be delegated. So far as they are judicial, and dependent upon the exercise of reason, the health official's duties may not be performed by a deputy. Employees are not deputies. Neither are subordinate officers deputies. If there be subordinate public offices in the department, the act providing for the office also defines the duties of the officer, and the death of his superior would then make no difference with the duties of the subordinate. Unless, therefore, there be a specific provision for the continuance of the work of the health office in the case of the death of the health officer, or provision for the appointment of a deputy, all authority vested with discretion in the office would cease until the appointment of a successor.

When the deceased officer was one of two or more officers holding a joint authority, though the death creates a vacancy to be filled, the whole office is not vacant, and the survivors may continue to exercise the authority, and perform the duties of the office, unless it be expressly required by the law that the joint action of all is needed.⁸

§ 341. Abolition of office. Since there is nothing in the nature of a contract in an office, it follows that the

⁶ State v. Patterson, 34 N. J. L. 163.

⁷ Abrams v. Ervin, 9 Iowa, 87; Edwards v. Watertown, 24 Hun, 428.

⁸ People v. Palmer, 52 N. Y. 84; Dowling v. Rugar, 21 Wend. 178.

legislative body which created the office may at any time abolish the same. If there be no office, there can be no duties, and no services may be rendered. Since the compensation depends upon the rendition of services, there can be no compensation. There being no office, there can be no officer, and the retirement of the incumbent under such circumstances produces no vacancy. This is true whether the office be abolished directly, by repeal of the enactment creating the office, or indirectly, as by the abolition of the office upon which the subordinate office depends, or possibly by failure to make appropriation for the support of the office, as has been mentioned in a preceding section. Mechem says:⁹ "So the legislature may declare the office vacant,¹⁰ or may transfer its duties to another officer,¹¹ although the effect may be to remove the officer in the middle of his term, or to abolish his office by leaving it devoid of duties." This entire paragraph is unfortunately misleading. The first case cited has to do with the result of the canvass of election returns. By the general constitutions and statutes the legislatures are the judges of the validity of the rights of their own members to their seats. As such they are not strictly legislatures, but are vested with the judicial determination of certain questions. It is only in such cases that the legislature may declare an office vacant, and then not as an act of legislation, but of legal decision, there having been no valid election. To grant to the legislature such power to directly remove an officer would be to interfere with the executive right of appointment. Since legislative

⁹ Pub. Off. 465.

¹¹ Attorney Gen. v. Squires, 14

¹⁰ Prince v. Skillin, 71 Me. 361; Cal. 13.

State v. Davis, 44 Mo. 129.

officers are within the appointing power of their own bodies, so in such cases also the legislature would have the authority to remove the appointee. So as to the power to practically abolish an office by transferring its duties, the abstract statement may be open to question.¹² If it be the intention to abolish an office that intention should be clearly, and indubitably expressed by the direct act of abolition. If the duties be simply transferred to another office, leaving the old office without duties, it might readily be claimed that it was the intention of the legislature to assign to the old office other duties; otherwise, why did it still permit the office to exist? It is therefore probable, though not certain, that if an office be left with a salary attached, even though there be no services to be performed in the line of duty, the incumbent might still retain his office and draw his salary. It has even been held that the legislature may not abolish an office by a reduction in the salary or other compensation,¹³ nor remove an officer by shortening his term.¹⁴ Unless forbidden by the constitution, or where the matters are defined in the constitution, the legislature may make such changes in the terms of officers as it may think proper, but it must not attempt to evade constitutional limitations by subterfuge. If, therefore, the legislature determines to abolish an office, the rights of the incumbent cease.

§ 342. Expiration of term. The duration of the term of office is ordinarily expressed in the commission. The constitution or the statutes define the term

¹² Warner v. People, 2 Denio, 272; People v. Albertson, 55 N. Y. 50; Hoke v. Henderson, 4 Dev. 1.

¹³ Conner v. Mayor, 2 Sand. 355.

¹⁴ State v. Wiltz, 11 La. Ann. 439.

of office, if there be a term, including thus under the word "statutes" all enactments subordinate to the constitution. The term may be fixed according to certain days, as the "first of January," or it may be simply defined as to duration. The commission should state the time during which it is good. Whenever there may be question as to the legal interpretation of the enactments defining the term of the officer, that interpretation will be adopted which fixes the shortest time.¹⁵ The date from which a term is to be reckoned is always exclusive.¹⁶ At the expiration of the term of office, authority, and with it the rights, duties, and privileges of the office cease.¹⁷ Sometimes the statutes expressly forbid the continuance in office after the expiration of the term for which appointed or elected, as in the case of Treasurers. When the term is fixed in the constitution the legislature may not provide that an incumbent shall hold over until his successor qualifies.¹⁸ It is, however, generally true that either in the constitutions or the statutes provision is made that an officer once qualified shall hold over until his successor has qualified. This provision does not apply when a successor cannot be legally chosen to fill the position, as to an office in a municipality which has been dissolved.¹⁹ An officer holding over, under authority of the constitution or the statutes, is an officer *de jure*, and not *de facto*. In such a case, if the appointment is to be made by the Governor, by and

¹⁵ Wright v. Adams, 45 Tex. 134.

¹⁶ Best v. Polk, 18 Wall. 112.

¹⁷ Badger v. U. S., 93 U. S. 599;
People v. Tieman, 30 Barb. 193.

¹⁸ State v. Brewster, 44 Ohio,
589.

¹⁹ Beckwith v. Racine, 7 Biss.
142; Barkley v. Levee Commis-
sioners, 93 U. S. 258.

with the consent of the senate, there is no such vacancy as would permit of the appointment in case the senate was not in session.²⁰ In the absence of a law permitting the incumbent to hold over, he may continue in office, pending the qualification of a successor, as an officer *de facto*, if not *de jure*. An officer thus holding over will be entitled to the compensation for the service, where his holding over may be through no fault of his.²¹

§ 343. When an officer may not hold over. There are certain cases in which, in spite of a general provision empowering an officer to hold over his official term, he is not entitled thus to lawfully remain in office. Where an officer is a candidate as his own successor, and after being elected he fails to qualify, it has been held that he is not entitled to hold over under the general provision, but that his right has ceased, and that there is a vacancy.²² However, it has also been held to the contrary, that the incumbent is entitled to remain under exactly similar conditions.²³ Where the incumbent has been duly reelected, and has qualified after the issuance of his commission, but it has later been legally determined that the election was void, a vacancy results, and the failure of the election does not revive the prior right to hold over.²⁴ In such a case, the second qualification serves as a renunciation of rights under the old election, and the incumbent is by his own action estopped from setting up a claim based on former occupancy. However, it has

²⁰ *People v. Forquer*, 1 Ill. 104;
People v. Bissell, 49 Cal. 407.

²¹ *Hubbard v. Crawford*, 19 Kas.
570.

²² *Scott v. Ring*, 29 Minn. 398.

²³ *Bath v. Reed*, 78 Me. 276;
State v. Berg, 50 Ind. 496.

²⁴ *Handy v. Hopkins*, 59 Md. 157;
Ex parte Smith, 8 S. C. 495; *Ex parte Norris*, 8 S. C. 408.

also been held under such circumstances that the incumbent may still hold over.²⁵ Since a person may not profit from his own misdeeds, an officer is not entitled to hold over, when by his action he prevents his successor in office from qualifying.²⁶

§ 344. Abandonment of office. Failure to qualify.

It is possible that an appointee may voluntarily relinquish his right to the office at any time from the moment of his appointment, to the close of his official term. The laws stipulate certain things which an officer must do before he may lawfully be considered an officer *de jure*, such as taking the official oath, filing an acceptance, furnishing an official bond, and the like. Clearly, if an officer neglect or refuse to do the acts thus specified, he thereby expresses his refusal of the office, and his embryo official relations thereby cease. A refusal to perform the duties imposed by law upon the office works a forfeiture of the official right.²⁷ The laws generally state that these preliminary steps must be taken before the appointee takes the office, or within a stipulated time. It is generally agreed that these directions are directory, rather than mandatory, and that a failure to comply with the exact letter of the law in this regard does not work a forfeiture.²⁸ Certainly, when the failure to thus qualify was due to no fault of the appointee, such failure can not be said to

²⁵ Forrestal v. People, 3 Ill. App. 470; Stadler v. Detroit, 13 Mich. 346.

²⁶ State v. Steers, 44 Mo. 223.

²⁷ State v. Allen, 21 Ind. 516; People v. Kingston, T. R. Co., 23 Wend. 193; People v. Hartwell, 67 Cal. 11; Neale v. Overseers, 5

Watts, 538; Olney v. Pearce, 1 R. I. 292.

²⁸ Chicago v. Gage, 95 Ill. 593; People v. Holley, 12 Wend. 481; State v. Churchill, 41 Mo. 41; State v. Porter, 7 Ind. 204; State v. Colvig, 15 Ore. 57; State v. Peck, 30 La. Ann. 280.

work a forfeiture.²⁹ Thus, where the giving of a bond was delayed pending a contest, and doubt as to who is entitled to the office results, such delay does not work a forfeiture.³⁰ If the officer finally files his bond, takes the oath, and does the other preliminary acts demanded, and those charged with the duty formally accept the bond, etc., any default is thereby waived, and the officer thereby becomes *de jure*.³¹

§ 345. **Abandonment after qualification.** In the case of the Earl of Shrewsbury,³² Lord Coke defined three causes of forfeiture of office; Abuser, Nonuser, and Refusal.

§ 346. **Malfeasance.** Malfeasance in office works a forfeiture.³³ This forfeiture is not immediate and self operative, but it requires the action of the court or the appointing power to make the effect complete. Malfeasance is a willful perversion of official conduct. It is necessary to draw a distinction between the character of the officer, and the character of the man who occupies the office.³⁴ It has been held that intoxication is not within a constitutional provision providing for the removal of an officer for malfeasance in office, and a statute pronouncing it malfeasance, and thus providing for the removal of the officer, was unconstitutional.³⁵ So where a police justice was charged with intoxication it was held that he was entitled to show

²⁹ Ross v. Williamson, 44 Ga. 501; State v. Hadley, 27 Ind. 496.

³⁰ People v. Potter, 63 Cal. 127; Pearson v. Wilson, 57 Miss. 848.

³¹ Chicago v. Gage, 95 Ill. 593; Ross v. Williamson, 44 Ga. 501; Cronin v. Gundy, 16 Hun, 520.

³² 9 Coke, 50.

³³ Minkler v. State, 14 Neb. 181;

Commonwealth v. Chambers, 1 J. J. Marsh, 160; State v. Leach, 60 Mo. 58.

³⁴ Commonwealth v. Barry, Hardin, 229; Commonwealth v. Chambers, 1 J. J. Marsh, 160.

³⁵ Commrs. v. Williams, 79 Ky. 42.

in defense that he performed his official duties honestly, impartially, and otherwise competently.³⁶ It was held in another case that the officer might be removed if he was intoxicated while attempting to perform official duties, but not for intoxication at other times.³⁷ All of these cases are based upon a true interpretation of the law. The private character, as such, has nothing to do with the official character. But, as a physiologic fact, and from a psychologic standpoint, these decisions may be open to question, for it may well be doubted whether the mind which is at times benumbed by the effects of alcohol may be able to perform its official acts with normal precision. Therefore it is that we find other cases, in seeming conflict with the foregoing citations, in which officers have been removed from office for intoxication even when off duty.³⁸ There is no necessary conflict between these two lines of cases. In one the stress is laid upon the distinction between the private and the public life of the officer, and in the other the greater importance is given to physiologic facts.

Secondly, malfeasance does not mean simply a mistaken action, or an error in judgment. Such an error may be serious in its results, and work great harm. It may further demonstrate the fact that the officer is not qualified for the position which he holds, but it is not malfeasance. It is rather misfeasance. An officer vested with discretion may do anything within that discretion, and it will not be deemed that he has been guilty of malfeasance. But, as we have heretofore

³⁶ *In re Grogan*, 24 N. Y. St. R. 473; 5 N. Y. Supp. 499.

³⁷ *People v. Police Commrs.*, 20 Hun, 333.

³⁸ *McComas v. Krug*, 81 Ind. 327; *People v. French*, 102 N. Y. 583; *People v. Partridge*, 13 Abb. N. C. (N. Y.) 410.

shown, discretion does not include arbitrary decisions. Discretion implies the use of knowledge and reason. Within discretion, the action is lawful. In the case of ministerial duties only that must be done which is prescribed, and none of that demanded in the law can be omitted. It is presumed that the officer knows what his duties are, and therefore a failure to do that which the law requires, or a doing of that which the law does not permit, would be a willful perversion of official position. That is malfeasance, even though —there was no malicious motive, nor corrupt cause.³⁹

“When an officer acting in his official capacity, and under his official signature does an act which has relation and refers to matters belonging to his department, and under his particular charge, and he acts knowingly, designedly, falsely, and the act is one calculated to mislead, and one that in its nature may be used for purposes of fraud or imposition, it is misconduct in office within the intent of this statute. And this, although no actual corruption by bribery or otherwise is proved.”⁴⁰ Clearly, if coupled with the willful misdeeds there be a corrupt motive, or if they arose from a malicious intent, there could be no question as to the fact of malfeasance. Arbitrary use of power, especially with corrupt, or malicious intention is malfeasance. Where a health department is used, as during the reign of the Tweed ring in New York, for the collection of blackmail, or for intimidation for political or other purpose, it is malfeasance, and should receive the strongest punishment, by immediate forfeiture of office, coupled if possible with criminal prosecutions.

³⁹ Minkler v. State, 14 Neb. 181.

⁴⁰ State v. Leach, 60 Mo. 58.

§ 347. **Nonuser as cause of forfeiture.** The simple fact that an officer fails to perform the duties of his office, even possibly for some considerable time, would not be considered to work a forfeiture of office, especially when such nonuse of the office may be a matter beyond the will of the officer. The fact of his being detained by personal sickness will not be deemed a surrender of the office, even though he thus remain from his duties for more than fifty days.⁴¹ Absence from office may be a cause for removal from office, even though it be not in itself a forfeiture.⁴² For the absence to work a forfeiture, there must be a clear intent of the holder to relinquish his position.⁴³ In this case the office had been relinquished under a mistaken opinion that another had been elected, and for a period of two years there was no attempt to perform the duties of the office. On the other hand, in *Turnipseed v. Hudson*,⁴⁴ the office was relinquished to a successor who had been elected under a new law, which was later declared unconstitutional. It was claimed by the court that the relinquishment under such conditions, in accord with the act which was in force at the time, did not work a forfeiture when the act was wiped out. When an officer enlisted in the volunteer army, to serve for a term of three years, or until the close of the war, it was held that such an act was clear declaration of intention to abandon the duties of the office.⁴⁵ When the law requires that an officer shall reside in his district, a removal from the district will work a forfeiture.⁴⁶ But if the removal be clearly temporary,

⁴¹ *State v. Baird*, 47 Mo. 301.

⁴² *Page v. Hardin*, 8 B. Mon. 648.

⁴³ *People v. Hartwell*, 67 Cal. 11.

⁴⁴ 50 Miss. 429.

⁴⁵ *State v. Allen*, 21 Ind. 516.

⁴⁶ *Yonkley v. State*, 27 Ind. 236;

Curry v. Stewart, 8 Bush, 560;

Prather v. Hart, 17 Neb. 598.

and with no intention to abandon the office, no forfeiture will be held to have been worked.⁴⁷ Where there has been a complete abandonment of the office by the officer, it cannot again be resumed by him,⁴⁸ and no accidental, or forcible reoccupancy can give him title thereto.⁴⁹

§ 348. Refusal to perform the duties of the office. "After once accepting an office, refusal to serve is a cause of forfeiture, if without good reason; but however general and absolute, it is not a forfeiture, *per se*."⁵⁰ The refusal to act may not rest within the officer's discretion. So, where an officer is in possession, the question whether or not he has forfeited his right thereto cannot be tested collaterally.⁵¹ Neither may a new appointment be made to fill the vacancy, until after a judicial determination of the fact of forfeiture.⁵²

Although for an officer *de jure* to refuse to act is a cause of forfeiture, for the officer *de facto* it constitutes the forfeiture itself. If he still claimed the office and attempted to do other portions of the duty of the office, but refused to do some particular portion, and harm thereby resulted, he could be held personally liable for his negligence, or malfeasance.⁵³ So long as he claims the position he may be forced by *mandamus* to perform the duties of the office,⁵⁴ but when the offi-

⁴⁷ State v. Graham, 26 La. Ann. 568; McGregor v. Allen, 33 La. Ann. 870.

⁴⁸ Yonkley v. State, 27 Ind. 236.

⁴⁹ State v. Allen, 21 Ind. 516.

⁵⁰ Van Orsdall v. Hazard, 3 Hill, 243.

⁵¹ McKim v. Somers, 1 Penn. 297.

⁵² State v. Bryce, 7 Ohio, Part II, 82.

⁵³ Longacre v. State, 3 Miss. 637.

⁵⁴ Runion v. Latimer, 6 Rich, 126; Kelly v. Wimberly, 61 Miss. 548.

cer *de facto* disavows authority, and refuses to perform the duties, he can incur no personal liability thereby,⁵⁵ nor subject himself to punishment under the statutes.⁵⁶ Receiving neither the honor of the trust, nor pecuniary compensation, manifestly no man can be blamed if he refuses to do the work of an office for which he can receive no reward.

§ 349. **Acceptance of incompatible office.** It is contrary to law that a man should attempt to hold at the same time two offices whose duties conflict. As a general proposition the acceptance of an incompatible office vacates the first without any other act or proceeding.⁵⁷ Without judgment of ouster all compensation attached to the first office is forfeited from the moment that the second office is accepted.⁵⁸ According to the common law, therefore, the office may be immediately filled, by election or appointment, as provided, and without *quo warranto* or other proceedings.⁵⁹ It must be remembered that there are certain exceptions to the general rule relative to the forfeiture of the former office. This subject has been discussed under the qualifications of officers, and these variations in the general rule will not here be further considered than simply to say that if there be a question whether the former office be vacated by accepting a second, or to oust from the second office, leave should be asked for permission to file information in the nature of *quo war-*

⁵⁵ *Olmstead v. Dennis*, 77 N. Y. 1229; *State v. Goff*, 15 R. I. 505; *People v. Hanifan*, 96 Ill. 420.

⁵⁶ *Bentley v. Phelps*, 27 Barb. 524. ⁵⁸ *State v. Comptroller General*, 9 S. C. 259.

⁵⁷ *State v. Brinkerhoff*, 66 Tex. 45; *Pooler v. Reed*, 73 Me. 129; *State v. Dellwood*, 33 La. Ann. ⁵⁹ *State v. Buttz*, 9 S. C. 156; *Shell v. Cousins*, 77 Va. 328.

ranto. In other words, the acceptance of a second office, incompatible with the first, may, *ipso facto*, forfeit the first office, or it may simply be a cause of vacating either the first or the second office, according to conditions. The choice as to which office shall be considered vacant does not rest with the holder after he has made his choice by accepting the second position, and even when he finds that his claim upon the second position is worthless, through defect of election or appointment, the forfeiture of the first position is complete.⁶⁰

§ 350. Resignation. He who so acts as to forfeit his office has impliedly resigned. Since a man may not accept an incompatible office without forfeiting his former position, the fact of the second acceptance is, *per se* an expression of willingness to be relieved of the duties and responsibilities of his former service. Essentially he has resigned. In form he has not resigned, and since there may be some question as to his legal ability to hold the two offices, if it be his wish to retire from the first office he should resign formally, to remove all doubt.

A resignation implies three distinct actions: 1. The office is handed back from the holder to the state as represented by some proper officer of superiority. 2. The office is received by such representative officer. 3. The responsibilities of the office are accepted by the superior officer, for transmission to a subsequent holder. Until the third of these steps has been completed, the incumbent is not free from the duties of his position. It therefore happens that an officer may not resign his position without the consent of the

⁶⁰ Rex v. Hughes, 5 B. & C. 886.

appointing power, either expressed, or implied, for example, by an appointment made to an incompatible office.⁶¹ It has, however, been repeatedly held in the United States that any officer has the unqualified right to resign an office,⁶² and in one case it was held that this right existed, and the resignation took effect, although the appointing power expressly refused to accept the resignation.⁶³ There may possibly be some question as to whether the appointing power is bound to accept an absolute resignation, but according to the common law an office is a public duty which it is the duty of citizens chosen to accept.⁶⁴ Penalties are sometimes provided for refusal to serve, and officers who are thus negligent of their public duties may sometimes be proceeded against by criminal trial.⁶⁵ As a general statement, the office is not relinquished until the resignation is formally accepted and a successor appointed and qualified.

The resignation need be in no special form, unless that form be prescribed by law. When so prescribed the exact form must be observed.⁶⁶ The resignation may be oral, but it should be definite in form, and preferably in writing. There can then be no question as to what was intended. It should be given to the officer or body authorized by law to receive the same; or in the absence of such a statutory provision, to the officer or body having the appointive power over the

⁶¹ *Edwards v. U. S.*, 103 U. S. 471; *Van Orsdall v. Hazard*, 3 Hill, 243.

⁶² *People v. Porter*, 6 Cal. 26; *Leech v. State*, 78 Ind. 570; *Gates v. Delaware County*, 12 Iowa, 405; *Olmsted v. Dennis*, 77 N. Y. 378.

⁶³ *State v. Mayor*, 4 Neb. 260.

⁶⁴ *Edwards v. U. S.*, 103 U. S. 471.

⁶⁵ *Rex v. Mayor*, 4 Doug. 14; *Rex v. Leyland*, 3 M. & S. 184.

⁶⁶ *Barbour v. U. S.*, 17 Ct. of Cl. 1499; *Van Orsdall v. Hazard*, 3 Hill, 243.

position. So also, the acceptance of the resignation should be so clear and unmistakable that no possible question may subsequently be raised. Sometimes the acceptance is shown simply by the appointment of a successor. The appointment of the successor, however, is a transaction between the appointive power and the party appointed, and does not of itself touch the predecessor. It is really only an evidence of the acceptance of the resignation, and not an acceptance itself. It would be far better that the acceptance be formal, and in writing, and that it further direct to whom the resigning officer shall transfer all moneys, books, and other property in his possession. Even the acceptance of the resignation is not sufficient to release an officer until his successor has been duly qualified in many offices of trust.⁶⁷

A resignation once made may only be withdrawn with the consent of the superior, though it has been held that a prospective resignation is not a real resignation, but rather is it a notice of intention to resign; and if it be so regarded it is subject to withdrawal at any time, unless new rights have arisen by the appointment of a successor.⁶⁸ On the other hand, it has repeatedly been held that a resignation once offered cannot be withdrawn, even with the consent of the superior,⁶⁹ unless, possibly, where the power to accept the resignation rests in the same hands as the power to fill the vacancy.⁷⁰ Resignation to an office made while in a state of unsound mind, when

⁶⁷ *Badger v. U. S.*, 93 U. S. 599;
Jones v. Jefferson, 66 Tex. 576;
People v. Barnett Tp., 100 Ill. 332;
U. S. v. Green, 53 Fed. Rep. 769.

⁶⁸ *State v. Boecker*, 56 Mo. 17.

⁶⁹ *Yonkley v. State*, 27 Ind. 236;
State v. Hauss, 43 Ind. 105.

⁷⁰ *Pace v. People*, 50 Ill. 432;
Gates v. Delaware Co., 12 Iowa,
405; *State v. Fitts*, 49 Ala. 402.

accepted, and a successor had been appointed, was regarded as a valid resignation, and the loss was held to be upon the officer resigning.⁷¹ In this case the resignation was accepted in ignorance of the fact that it was given while insane, but the office is not property, and the holder had no property right therein. On the other hand, public interest demands that only sane men shall hold offices, and the fact of such mental condition would seem a sufficient justification for removal, even though no resignation be offered.

Sometimes the resignation may be made provisional upon some future act or event. Such a resignation is not effective until such stipulated act or event, and the acceptance before such event is void.⁷²

Only an officer who has been duly elected or appointed, and who has qualified, may resign.⁷³ An officer who has been illegally elected or appointed, and who resigns, does not create a vacancy.⁷⁴ He cannot give up that which he never really had.

That a resignation may be complete it is ordinarily necessary that the resignation be formally accepted, but this may be done by a corporation making an entry of the same in the public books, or by appointing some person to fill the place, thus treating the office as vacant,⁷⁵ but it has sometimes been held that the resignation takes effect without any formal acceptance.⁷⁶

§ 351. Power of removal is incidental to that of appointment. It has been the recognized practice in

⁷¹ Blake v. U. S., 14 Ct. of Cl. 462.

⁷² State v. Boecker, 56 Mo. 17.

⁷³ Miller v. Supervisors, 25 Cal. 93; *In re Corliss*, 11 R. I. 638.

⁷⁴ *In re Corliss*, 11 R. I. 638; Queen v. Blizard, L. R., 2 Q. B. 55.

⁷⁵ Edwards v. U. S., 103 U. S. 471.

⁷⁶ Reiter v. State, 51 Ohio, 74; People v. Porter, 6 Cal. 26; State v. Lincoln, 4 Neb. 260; Bunting v. Willis, 27 Gratt. 144.

our system of government to grant to the appointing power the right to remove those whom it has appointed, especially where the appointment is made without stipulating any particular term of office. (§ 127.) As was stated in an early case before the Supreme Court, it is "a sound and necessary rule to consider the power of removal as incident to the power of appointment."⁷⁷ The arbitrary power of removal is limited to such offices as may have no definite terms fixed by law,⁷⁸ and it is not granted to the appointing power, where the officer appointed is to hold his office at the pleasure of some other officer or board than that which appoints.⁷⁹ In a case in California it was held that the legislature may not limit the power of removal except by fixing the term of the incumbent, where the constitution grants to the legislature the authority to fix the term, but stipulates that if the legislature has not fixed the term, the office shall be held during the pleasure of the appointing power.⁸⁰ In all these cases where the office is held during the pleasure of the appointing power, that pleasure is the absolute guide, and the power for removal may be used for political or other reasons.

For offices having definite terms, either according to the constitution or the statutes, the power of removal is ordinarily defined in the statutes, and the causes and methods are also defined. Manifestly, it is essential that there be harmony in the administration of governmental business. The power of removal is essentially an executive function, and it is to be used to promote

⁷⁷ *Ex parte Hennen*, 13 Peters, 230; *Newsome v. Cocke*, 44 Miss. 352; *People v. Commissioners*, 73 N. Y. 437.

⁷⁸ *Collins v. Tracy*, 36 Tex. 546;

Keenan v. Perry, 24 Tex. 253; *State v. Chatburn*, 63 Iowa, 659; *People v. Hill*, 7 Cal. 97.

⁷⁹ *Carr v. State*, 111 Ind. 101.

⁸⁰ *People v. Hill*, 7 Cal. 97.

harmony and efficiency in administration. That an officer is removed from his position need be no reflection upon either the officer removed, or upon the officer making the removal. It does not necessarily imply that the officer removed has been either dishonest or inefficient. Rules or statutes, which limit the discharge of officers during term to malfeasance may very seriously interfere with good government and efficient administration. For this reason democratic governments are between two dangers. Where the power of appointment and removal is unlimited there is great tendency to make the government unstable in character. With every election there is a danger that all offices shall change, and it will take time for the new holders to become acquainted with their new duties. Appointments are apt to be made purely for political reasons, and to build up political machines. On the other hand, under strict civil service regulations the tendency is to keep men of mediocre ability in office. They may be entirely lacking in originality of idea, with poorly developed judicial capacity, and slow of comprehension, thus utterly unfitted for their positions; but so long as they do their work honestly it will be difficult to remove them. They are blocking progress, but are secure in their positions. The removal of such obstacles is evidently for the common good, but any such attempt would be immediately decried as political in motive, and hostile to the spirit of civil service. In a monarchical government it is much easier to build up a permanent and efficient corps of administrative officers in any department.

§ 352. Conditions for removal fixed in the Constitution. When the term of office, conditions under which

an officer may be removed, or method of removal are fixed in the constitution, the legislature may not enact laws changing the constitutional provisions.⁸¹ Thus, when the constitution mentions certain kinds of offence for which an officer may be removed, the legislature may not by statute name other offences for which removals shall be made, nor attempt to classify other offences under the constitutional provisions.⁸² A constitutional or statutory fixing of the term of office by implication withholds from the governor the power to remove the incumbent,⁸³ unless that power be distinctly granted.⁸⁴ Constitutional provisions relative to removal may be self-operative. Thus, where it is provided that officers of the courts may be removed for specific causes, "upon the cause thereof being set forth in writing, and the finding of its truth by a jury," it was held that it was self operative, and may be executed without legislation.⁸⁵ "And where the constitution provides for the removal of an officer by sentence of the court, upon conviction of willful neglect of duty, or misdemeanor in office, the court, upon the conviction of a person indicted for either offence, has no discretion with respect to that part of the sentence."⁸⁶

A constitutional provision empowering the governor to remove any officer whom he may appoint includes his power to remove such officers as he may appoint by and with the advice and consent of the senate, and even those cases for which other specific remedies are provided.⁸⁷ Where such a provision specifies the

⁸¹ *Lowe v. Commissioners*, 3 Met. 237; *State v. Wiltz*, 11 La. Ann. 439; *Runnels v. State*, 1 Miss. 146.

⁸² *Commis. v. Williams*, 79 Ky. 42.

⁸³ *People v. Jewett*, 6 Cal. 291.

⁸⁴ *Field v. People*, 3 Ill. 79.

⁸⁵ *Trigg v. State*, 49 Tex. 645.

⁸⁶ *Throop*, Pub. Off. 342, citing *Shattuck v. State*, 51 Miss. 575.

⁸⁷ *Wilcox v. People*, 90 Ill. 186.

causes for which such removal may be made, but does not specify how the power shall be exercised, the governor may determine whether the cause exists upon such evidence as he may think proper.⁸⁸ It is not necessary that the governor should specify the cause.⁸⁹ It has, however, sometimes been held that the officer must have notice of the ground for removal, and a reasonable opportunity to be heard in self defense, but the judicial decision must rest with the governor.⁹⁰

§ 353. **Statutory requirements for removal.** In the absence of constitutional limitations the legislature may make such regulations relative to removal from office as it may deem proper. It is a common provision in national, state, and municipal governments that the power of removal for cause shall be operable over elective as well as appointive officers. Such a provision is indispensable to the proper exercise of the functions of government, and is clearly within sovereign authority.⁹¹ Such a power of removal, under suitable restrictions is much to be preferred to the newer proposal of recall by election, for it is far less likely to be abused. Where removal is for cause the proceedings are essentially judicial in their nature, and must therefore be before officers clothed with judicial authority.⁹² This tribunal may be a court of law,⁹³ or a court of impeachments,⁹⁴ but this judicial power may be conferred upon the governor, mayor, or other officer, or

⁸⁸ *Wilcox v. People*, 90 Ill. 186.

⁸⁹ *Keenan v. Perry*, 24 Tex. 253.

⁹⁰ *Dullam v. Willson*, 53 Mich.

392.

⁹¹ *People v. Whitlock*, 92 N. Y.

191.

⁹² *Dullam v. Willson*, 53 Mich.

392; *Page v. Hardin*, 8 B. Mon.

672; *State v. Pritchard* 36 N. J.

L. 101; *Evans v. Populus*, 22 La.

Ann. 121.

⁹³ *Page v. Hardin*, 8 B. Mon.

648.

⁹⁴ *State v. Pritchard*, 36 N. J.

L. 101.

board of officers.⁹⁵ In the absence of power expressly given by the constitution, the legislature may not, either directly or indirectly, remove an officer in another branch of government.⁹⁶

Where a city officer has been appointed under a general statute, which authorized the governor, after notice and hearing, to remove him, a statute providing for his removal by the mayor for "any cause deemed sufficient by himself," is valid, and the mayor may remove him without notice or hearing.⁹⁷ Such a removal is ministerial, and need not comply with the general rules as to judicial proceedings.⁹⁸ If the removal be of the nature of judicial proceedings, it will be necessary that the records of a board, before whom the case is tried, shall show fully the nature of the charges, and the result of the determination. In other words, the record must show all the facts necessary to give the power of removal.⁹⁹ The records must further show that the action was legally taken. Where a two-thirds vote was necessary to remove, the vote of a less number will not be valid for removal.¹⁰⁰ According to the common law no person may sit as a judge in any case to which he is a party, or in which he is interested. A proceeding before a township board for the removal of an officer of a school district, where one of the board is interested in the subject of the complaint, violates the general prohibition of the common law, and is therefore void; and if the pres-

⁹⁵ *Dullam v. Willson*, 53 Mich. 392.

⁹⁶ *Cotten v. Ellis*, 7 Jones, L. 545; *Hoke v. Henderson*, 4 Dev. 1; *State v. Wiltz*, 11 La. Ann. 439.

⁹⁷ *People v. Whitlock*, 92 N. Y. 191.

⁹⁸ See also, *Donahue v. Will County*, 100 Ill. 94; *Stern v. People*, 102 Ill. 540.

⁹⁹ *McGregor v. Supervisors*, 37 Mich. 388.

¹⁰⁰ *People v. College*, 62 How. Pr. 220.

ence of the officer be necessary for a quorum, the action is void.¹

In the absence of constitutional restrictions the legislature (or city council, where the state law does not prohibit), may make such restrictions as it deems best as to cause for removal. A provision which prohibits removal for political reasons only is valid.² If it grants the general power to remove "for cause," this cannot be construed as a permission to remove at pleasure.³ The removal can only be for the causes specified.⁴

Since an office is not a contract in itself, and any contract which might be made with reference to tenure of office might very likely be to the disadvantage of the community, it follows that any agreement made between the appointing power and the officer appointed may at any time be nullified by the removal of the appointee. Thus an arrangement which was made between the mayor and a health officer did not prohibit the removal of the health officer from office.⁵

In the cities and towns of Massachusetts there is no power to remove public officers except that which is given by the statutes. Public officers, even when elected by the electors of a town to perform statutory duties which involve the expenditure of money which is raised by local taxation, are not the agents of the town. The members of a board of health for a town cannot be removed by a vote of the inhabitants of a town.⁶ A health officer is entitled to his pay until he

¹ Stockwell v. Township Board, 22 Mich. 341.

² State v. Board, 17 Atl. Rep. 112.

³ Mead v. Treasurer, 36 Mich. 416.

⁴ Dubuc v. Voss, 19 La. Ann. 210.

⁵ Young v. City of Ashland, 125 S. W. R. 737.

⁶ Attorney General v. Stratton, 194 Mass. 51.

shall have been removed, irrespective of whether or not he had properly discharged his duties.⁷

Where the removal is absolute, within the power and pleasure of the superior officer, it is not subject to review by any court, further than to determine that the removing officer had authority for his action. If that be doubted, it may be tested by information in the nature of *quo warranto*.⁸ But if he have the authority, the action of a governor in removing an officer cannot be reviewed by *quo warranto*. If there be question as to irregularity of method, or improper conclusion, the case may be brought into court by *certiorari*, which will also cover the question of authority. (§§ 379, 380, 383.)

§ 354. What is not removal. Exclusion from office because of failure to qualify is not a removal from office.⁹ Discharge of an officer, either because the work was finished, or appropriation was exhausted, is not removal from office. It is rather an abrogation of the office.¹⁰ Neither is the discharge of an officer for the purpose of reducing expenses, or reducing the size of the force, a removal.¹¹ A transfer to an inferior class is not a removal.¹² But if the officer thus transferred makes no protest, and signs the weekly pay roll, he is thereby estopped from making future objection thereto.¹³ The fact that an officer is discharged for the purpose of cutting down the expense of the service is in no way prevented because the appropriations are

⁷ *People v. Sipple*, 96 N. Y. Supp. 897.

⁸ *State v. Lupton*, 64 Mo. 415.

⁹ *Hyde v. State*, 52 Miss. 665.

¹⁰ *Phillips v. Mayor*, 88 N. Y. 245; *People v. French*, 25 Hun, 111.

¹¹ *People v. French*, 25 Hun, 111; *People v. Health Department*, 24 Week. Dig. 197.

¹² *State v. Police Comms.* 40 N. J. L. 175.

¹³ *Reilly v. Mayor*, 48 N. Y. Sup. Ct. 274.

sufficient to provide the pay for the entire force.¹⁴ But the power given to discharge subordinates in order to reduce the force, or reduce the expenses, does not give authority to remove an officer for the purpose of creating a vacancy to be filled.¹⁵ The revocation of a commission illegally executed is not a removal, whether the irregularity be due to the ineligibility of the appointee, the absence of a vacancy, or other defect.¹⁶

§ 355. Power to remove does not include the power to suspend. Although in a few cases it has been held that the power to remove includes the power to suspend,¹⁷ the general consensus is that unless the power be distinctly granted the power to suspend does not exist.¹⁸ A suspension creates no vacancy, and gives no power to assign some person to fill the position. And a person who assumes the responsibilities of an office, whose holder is under suspension, has only ministerial authority.¹⁹

§ 356. Impeachment. There is one other form of removal provided under the Anglican system of government, which might perhaps be well used more frequently than it is. We refer to impeachment. It might be well if the statutes were more explicit as to this proceeding, defining liberally the conditions under which an officer may be impeached, and also providing for impeachment under less expensive, and more uni-

¹⁴ *People v. French*, 25 Hun, 111.

¹⁵ *State v. Schumaker*, 27 La. Ann. 332.

¹⁶ *People v. Police Commrs.* 102 N. Y. 583; *People v. Fire Comms.* 114 N. Y. 67; *Gulick v. New*, 14 Ind. 93; *State v. Capers*, 37 La. Ann. 747.

¹⁷ *State v. Lingo*, 26 Mo. 496;

Shannon v. Portsmouth, 54 N. H. 183; *State v. Police Commrs.*, 16 Mo. App. 48.

¹⁸ *Metsker v. Neally*, 41 Kas. 122; *State v. Jersey City*, 25 N. J. L. 536; *Gregory v. New York*, 113 N. Y. 416.

¹⁹ *State v. Herron*, 24 La. Ann. 432.

versal conditions than at present for the minor offices. At present, the custom is for the House of Representatives, either of state or nation, to formulate the charges, which are tried before the Senate. Any civil officer, generally speaking, is subject to impeachment; but much of the time the legislative body is not in session, and minor officers, shielded by their superiors, are permitted to mismanage, and pervert their positions with absolute impunity. The difficulty and expense involved in impeachment restricts its use to flagrant cases. The punishment inflicted is limited to removal from, and disqualification for holding office. With the exception of impeachment and certain possibilities, like that of *quo warranto*, which are not generally known, all the power for removal of incompetent, or dishonest officials, so long as they abstain from committing statutory crime, is in the hands of a few superior officers. As a consequence, it is possible for an entire administration to be honeycombed with a form of corruption. Because statutes are not explicit in directions, public officers are slow to take up the prosecutions of fellow officers. There should be some provision for the trial of charges under conditions resembling impeachment before certain courts for minor officers, upon the petition of private citizens, under clearly defined conditions. Such removal should always be judicial in method, rather than a yielding to the unreasoning whim of the populace. An officer should be removed for willful neglect of duty, or for perversion of authority to the public harm, or for malfeasance in office; but an officer having the confidence of his superior, should not be punishable for the performance of his duty according to his judgment, nor for adher-

ence to duty when such adherence may make him unpopular for the time being. According to constitutional provisions, Congress, or the legislative branches of the individual states, may impeach officers, but they do not specify when the power shall be exercised. The legislative body is therefore the sole judge as to the time when the power shall be exercised as well as relative to the grounds for impeachment, free from control by the executive or the courts. Hence, the impeachment of the governor by the general assembly while in extraordinary session is valid, although the constitution provides that no subject shall be acted upon in such a session except such as the governor recommends, and the governor had not recommended his own impeachment. The provision of the constitution restricting action in extraordinary session clearly refers to legislative efforts. Impeachment is a judicial procedure, and must be free from the control, either active or negative, of the other branches of government.²⁰

²⁰ People *ex rel.* Robin v. Hayes,
143 N. Y. Supp. 325.

CHAPTER XI

LIABILITIES

- § 357. State can not be sued.
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- § 359. Liability of officers judged by duties.
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§ 357. State cannot be sued. It is axiomatic that the State cannot be sued, except with its own consent. In proportion as the body represents the sovereign power it must be free from this danger. As we have shown the government is conducted by three branches which are coördinate. These branches together represent the State. It would be impossible, therefore, for the State to be attacked before a part of itself, unless it granted the permission. Further, because the branches

are coördinate, neither one has authority over the others in actual operation. While the courts may scrutinize complaints that the legislative or executive branches have exceeded their authority, on the other hand, they will not interfere with the legislature, nor the executive, in their own proper work.

In the discharge of governmental duties the nation, the state, the county, and smaller divisions of the state are all protected from suit for damages which some portion of the community may have sustained. Such injury must occur occasionally. The common good may demand something which works against some private interest; but to protect that private interest it would be necessary that many be harmed.

§ 358. Duplex character of the municipality. Most municipalities have been incorporated at the request of their own citizens. As a portion of the state, and doing the governmental work of the state within their borders they share with the state freedom from court action. But as corporations they come into commercial competition with individuals and other corporations. In that character the city must be under the same rules and laws as those which regulate the conduct of the private persons or corporations. In other words, cities are liable to individual citizens for any harm which may come from the corporate deeds or misdeeds, and for their negligences, just as are ordinary persons.

§ 359. Liability of officers judged by duties. Officers may be considered the personification of government. It is impossible to conceive of government except through the instrumentality of officers. Since the officer is a portion of the government, he partakes with

the government its immunity from prosecution. So long as a state officer strictly adheres to the law in the execution of his duties, the state will protect him from attack in transacting its business. On the other hand, the purely municipal officer, one looking after some corporate interest rather than a governmental duty, is not shielded by the state any more than he would be in working for a private corporation. An officer whose duties are partially governmental and partially corporate will be shielded or exposed in proportion as the particular matter under consideration may be governmental or corporate.

§ 360. Officers are such only when complying with the law. "All officers of the government, from the highest to the lowest are creatures of the law and are bound to obey it."¹ The law provides offices and prescribes the duties of the officers. It further directs how certain work shall be accomplished. The authority for the act must therefore be found in the law. If the person do that which the law does not provide, he is not acting with the authority of the law, and in so far he is not an officer, nor the representative of the state or city. (§ 270.) He is simply a private individual, and as such is liable for any harm which may result. "Action in accordance with legal authority is legal, and the official so acting will always be justified, and action without warrant of law is illegal, and the official so acting will always be considered a private wrong doer."² "The criminal law regards as a crime almost every act of an officer, which, if committed by

¹ U. S. v. Lee, 106 U. S. 196, per Miller, J.

² Wyman, Ad. Law. 3.

an individual, would be a crime,"³ and the law of the United States declares, "any act or omission in disobedience of public duty, as by one who has accepted office, when of public concern" to be a crime.⁴

"Before the law of the land, therefore, the public officer stands as a private person; and the result is startling; every act by every public officer may be subject of suit against the officer as an ordinary person. More than that, unless the officer can show an exact legal justification for the precise act which he has done, he has done nothing more or less than a legal wrong by his interference, for which he must answer just as any private wrong doer must answer for his wrongs. In this view every action of administration is subject to the law of the land, in that some officer of the administration must answer in his own person if anything be done by it without authority of positive law."⁵

It will be noted from the foregoing that the officer must do nothing which the law does not direct, but that he must do all that the law directs; in other words, he must answer for his sins of omission, as well as for those of commission.

§ 361. Unconstitutional law no defense. A statute is law only when it is passed in conformity with the Constitution. The fact that the legislature has exceeded its authority, and has placed upon the books a statute which is unconstitutional, or that a city has passed an ordinance which is contrary to, or exceeds

³ Goodnow, Prin. of Ad. Law, 298, citing Bishop, Crim. Law, II, 982; McKenzie v. Royal Dairy, 35 Wash. 390; Aaron v. Broiles, 64 Tex. 316.

⁴ Bishop, Crim. Law, I, 459.

⁵ Wyman, Ad. Law, 7.

its powers, is no justification for an executive officer who thus commits an injury.⁶ It matters not that the act may be performed in good faith, with good intentions, and with scientific accuracy of knowledge, if the act is not within the provisions of true law, it is a private wrong, and the doer is liable. It is therefore of the greatest importance for the executive officer to be thoroughly posted as to his legal rights and duties; and because the powers of a municipality are less than those of the state, and liability may exist against the city where the state would be protected by its sovereignty, it is doubly important that the officer who holds his position under a city government shall be especially careful.

§ 362. Discretionary or ministerial authority. In determining the personal liability of an officer, whether he be in the service of the nation, state, or city, and in deciding as to the liability of a city if he be upon the municipal pay roll, it is important to distinguish between the quasi-judicial services which imply the use of reason, and those duties which are purely ministerial. If his authority is discretionary in nature, the officer may do anything which is within the bounds of that discretion, and so long as it is the result of a judicial determination, and the use of his reason in making a decision, the act will be considered as within the law. But if his duties be ministerial, he must do that which the law specifies, no more, and no less. If he fail in the strict compliance with the law,

⁶ Fisher v. McGirr, 1 Gray, 1; 196; Cunningham v. Macon R. R. Ely v. Thompson, 3 A. K. Marsh, Co., 109 U. S. 446; Poindexter v. 70; Osborn v. Bank, 9 Wheat. 783; Greenhow, 114 U. S. 270; Sumner v. Beeler, 50 Ind. 341; Board v. Norton v. Shelby County, 118 U. S. 442; U. S. v. Lee, 106 U. S. McComb, 92 U. S. 531.

his act will be deemed void, and illegal.⁷ It frequently happens that an executive officer is vested with ministerial duties, commingled with discretionary powers. In such cases in so far as the authority is vested with discretion he will be permitted to do anything within that discretion.⁸

§ 363. Officers with discretion not ordinarily responsible. "It is a general rule that judicial officers acting within their jurisdiction cannot be held personally responsible for the improper, or erroneous performance of their duties. This rule embraces all officers exercising discretionary powers."⁹ This rule refers simply to errors in judgment, and by no means applies to a case in which the officer has been actuated by corrupt or malicious motives, nor when he has practiced fraud upon the injured party.¹⁰ Public officers are also liable in a criminal action for negligence in the performance of their duty, and this is particularly true of police officers;¹¹ and it must be remembered that essentially the health administration is a portion of the police. Although officers with discretionary duties are thus protected, it is the general rule that in the performance of merely ministerial duties an officer is liable to third parties for any injury suffered as the

⁷ Wyman, Ad. Law, 83.

⁸ Wall v. Trumbull, 16 Mich. 228; Weaver v. Devendorf, 3 Denio, 117.

⁹ Ingersoll, Pub. Corp. 90; Moss v. Cummings, 44 Mich. 359; Jordan v. Hanson, 49 N. H. 199; Lange v. Benedict, 73 N. Y. 12; Mostyn v. Fabrigas, 1 Smith, Lead. Cas. 1027; People v. Bender, 36 Mich. 195; Wamesit Power Co. v. Allen, 120 Mass. 352.

¹⁰ McTeer v. Lebow, 85 Tenn. 121; Wilkes v. Dinesman, 7 How. 89; Hoggatt v. Bigley, 6 Humph. 236; Elmore v. Overton, 104 Ind. 548; City of Oakland v. Carpenter, 13 Cal. 540; Roper v. McWorter, 77 Va. 214; Whidden v. Cheever, 69 N. H. 142, 44 Atl. 902; Seavey v. Preble, 64 Me. 120.

¹¹ People v. Diamond, 76 N. Y. Supp. 57; People v. Foody, 79 N. Y. Supp. 240.

result of nonfeasance, misfeasance, or malfeasance;¹² and this rule applies not only to those officers whose duties are purely ministerial, but also to the performance of ministerial duties by those who may also have discretionary duties.¹³ But he will still be protected in his discretionary duties.¹⁴

§ 364. **Cases showing liability, or nonliability of quasi-judicial officers.** The public health service is an important portion of the police. Its officers must have a degree of latitude in their operations. Their duties may be mandatory, and to a degree ministerial; but essentially their duties are quasi-judicial, and governmental. In determining the sources of disease, in handling epidemics, and in deciding upon the existence or nonexistence of nuisances much must be left to their discretion. In such cases, so long as they are within their discretion, health officials are not liable to parties who may sustain injury as the result of the action taken.¹⁵ Inspectors are not liable for errors committed in determining the fitness or quality of provisions;¹⁶ but such officers are liable for failure to perform their ministerial duties.¹⁷ However, "Where a public officer other than a judicial one, does an act directly invasive of the private rights of others, and there is other-

¹² *Amy v. Supervisors*, 11 Wall. 136; *Nowell v. Wright*, 3 Allen, 166; *Hover v. Barkhoof*, 44 N. Y. 113; *Allen v. Commonwealth*, 83 Va. 94.

¹³ *Robinson v. Rohr*, 73 Wis. 436; *Rounds v. Mumford*, 2 R. I. 154; *Grider v. Tally*, 77 Ala. 422; *People v. Bush*, 40 Cal. 344; *Thompson v. Holt*, 52 Ala. 491; *People v. Provines*, 34 Cal. 520.

¹⁴ *Wall v. Trumbull*, 16 Mich.

228; *Jenkins v. Waldron*, 11 Johns. 114; *Henderson v. Smith*, 26 W. Va. 829.

¹⁵ *Raymond v. Fish*, 51 Conn. 80; *City of Salem v. Eastern R. Co.*, 98 Mass. 431.

¹⁶ *Fath v. Koepfel*, 72 Wis. 289; *Seaman v. Patten*, 2 Caines (N. Y. 312).

¹⁷ *Hayes v. Porter*, 22 Me. 371; *Nickerson v. Thompson*, 33 Me. 433.

wise no remedy for the injury, such officer is personally liable without proof of malice and an intent to injure.”¹⁸ Whereas the McCord case was one relative to highway officers, it is practically on all fours with health administration. In that case the learned judge was influenced in his decision by the fact that action could not be brought against the road district, the township, nor the county. In health administration action could not be brought against an incorporated township, county, nor the state; and it is very doubtful if action could be sustained against a municipality for the reason that health administration is strictly governmental in its character, rather than corporate. Clearly, the fact that a man holds an office should not shield him in sins of omission or of commission. If an officer of health be manifestly careless in the performance of his duty he should be held personally liable, for his position presupposes due care in execution, and if he fail to use such care to that extent he is not an officer.¹⁹ (§ 360.) So, too, when because of personal benefit to himself, a health officer neglected to prevent the sale of disease-producing milk, it was held that he was personally liable for the harm resulting.²⁰ Such omission in the performance of duty was evidently the result of corruption; and it did not greatly matter whether the motive originate in the receipt of a bribe from the owner of the dairy, or in his profits as a partner in the dairy business, though as a partial owner of the business such an officer would be doubly liable.

When the president of a board of health does no

¹⁸ Dillon, Ch. J., in *McCord v. High*, 24 Iowa, 336, 350.

²⁰ *McKenzie v. Royal Dairy*, 35 Wash. 390.

¹⁹ *Aaron v. Broiles*, 64 Tex. 316.

more than to see that the requirements of the board are carried out with regard to quarantine he is not personally liable.²¹ So also, a health officer acting under statutory provisions vesting him with discretionary powers as to the removal of patients, and the quarantine of exposed persons, is not liable in damages to the owner of a house for refusing to remove a tenant with small-pox, who lived in a part of the house, to the pest house, nor for quarantining the owner in his house. There being no evidence of bad faith, or imputation thereof, it would be assumed that, in the opinion of the health officer, the life of the patient would have been endangered by his removal.²² As to the quarantining of the owner there might be some possible doubt. According to present information, if he had been recently vaccinated, or if he had ever had small-pox, it is difficult to see how he would be a source of danger in the community, unless possibly through some business relationship, as in the conduct of a milk dairy. Vaccination is a reasonably sure defense against small-pox, and it is exceedingly doubtful if the disease may be communicated by a third person. Although health officers are not ordinarily liable for damages caused in the performance of their duty in the enforcement of quarantine,²³ city officers enforcing an ordinance to prevent the spread of contagious disease act at their peril, and are liable for damages caused if the ordinance is void. A city is not liable for damages sustained by the enforcement of a void ordinance.²⁴ (§ 374.) Neither are health officers liable

²¹ Kirby v. Harker, 121 N. W. 1071.

²² Whidden v. Cheever, 44 Atl. 902, 69 N. H. 142.

²³ Forbes v. Escambia County Board of Health, 28 Fla. 26.

²⁴ Verdon v. Bowman (Neb.), 97 N. W. 229.

for errors in diagnosis where they are acting in good faith.²⁵

§ 365. Officer is liable if he exceed his jurisdiction.

Every officer has his proper jurisdiction, as to territory, as to persons, and as to subject matter. In the course of his lawful duty he may pass beyond the bounds of that jurisdiction. If he do so, and injury to a third person result, he will be held liable.²⁶ Judge Cooley has defined jurisdiction as the authority of law to act officially in the matter in hand.²⁷ That the officer may have complete immunity from the results of his errors, therefore, he must have jurisdiction over the person or thing, and the subject matter involved in the question to be determined by his judgment.²⁸ But even if he exceed the limits of his jurisdiction he may not always be liable. If there be a mistake of fact which has led him to go outside of his jurisdiction, if it be through the ignorance of certain facts or circumstances applicable to the particular matter before him, which he had neither knowledge of, nor means of knowing, that error of fact due to such ignorance, will be an excuse.²⁹ But simple ignorance, where the means of information were at hand, will be no excuse.

It is the duty of certain officers to lay out, construct, and keep in repair, public roads, bridges, and water

²⁵ *Valentine v. Englewood*, 76 N. J. L. 509; *Beeks v. Dickinson Co.*, 131 Iowa, 244.

²⁶ *Freeman v. Kenney*, 15 Pick. 44; *Gage v. Currier*, 4 Pick. 399; *Sydam v. Keys*, 13 Johns. 444; *Mygatt v. Washburn*, 15 N. Y. 316; *Hays v. Steamship Co.*, 17 How. 596; *Williams v. Weaver*, 75 N. Y. 30; *Goetcheus v. Matthew-*

son, 61 N. Y. 420; *Brown v. Murdock*, 140 Mass. 314.

²⁷ Cooley on Torts, 417.

²⁸ *Lange v. Benedict*, 73 N. Y. 12.

²⁹ *Clarke v. May*, 2 Gray, 410; *Vaughn v. Congdon*, 56 Vt. 111; *Pike v. Carter*, 3 Bing. 78; *Lowther v. Earl of Radnor*, 8 East, 113.

ways. "The discretion which protects such an officer as the road supervisor stops at the boundary where the absolute rights of property begin."³⁰ The importance of the knowledge of the legal rights in such a matter is well set forth by Mr. Justice Cooley in a case where the highway officers had cut private drains.³¹ "Highway authorities have no more right than private persons to cut drains, the necessary result of which will be to flood the lands of individuals. This was shown in *Ashley v. Port Huron*, where many authorities are referred to.³² The highway officer, no doubt, has a discretion in deciding how and where he will expend highway labor; but it is a discretion limited by the rights of individuals, and when he invades those rights he becomes liable.³³ And when he is liable for a lawless act, all his assistants are liable with him for the consequent injury.³⁴ This rule sometimes, when the agent has acted in good faith, and without knowledge of the want of legal authority, may seem to operate oppressively, but it is a necessary and very just rule notwithstanding, and full protection of the citizen in his legal rights would be impossible without it. Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it. Every one must be sure of his legal right when he invades the possession of another." By way of contrast we may mention an English case, in which, though private grounds were entered the action

³⁰ Dillon, Ch. J. in *McCord v. High*, 24 Iowa, 336.

³¹ *Cubit v. O'Dett*, 51 Mich. 347.

³² 35 Mich. 296.

³³ *Tearney v. Smith*, 86 Ill. 391.

³⁴ Story on Agency, 311, 312;

Brown v. Howard, 14 Johns. 119;

Coventry v. Barton, 17 Johns. 142;

Fielder v. Maxwell, 2 Blatch.

(U. S. C. C.) 552; *Tracy v. Swart-*

wout, 10 Pet. 80; *Smith v. Colby*,

67 Me. 169.

was within the sovereign power of the state. Six Lords Commissioners of the admiralty had entered the property of one Raleigh to survey for a naval college, preliminary to compulsory purchase.³⁵ In this decision the judge said: "In other words, to sum up shortly the result of the above by the use of convenient phraseology, the plaintiffs in respect of the matters they are now complaining of could sue any of the defendants individually for trespass committed or threatened; but they could not sue the defendants officially or as an official body."

§ 366. Officer is liable for acts not covered by duty. The foregoing cases are illustrative of questions which directly interest health officials. It is frequently necessary for the officer of health to invade private property. Whatever he may do there in the line of his official duty would be considered as done by the state, and the officer would therefore be held not liable for any damage which might accrue. But if taking advantage of his official position, while being thus within private property, he should do any act not in the necessary line of his duty, and harm result therefrom, in that extra official act he would not be the representative of the state, but a private trespasser, and a wrong doer, and as such would be held liable.

To give another view of the same problem an illustration might be taken from the writer's personal experience. Several members of a family were taken seriously ill immediately after their noonday meal. It was found that only one member of the household had escaped, and that he was the only one who had not drunk tea; those who drank the tea most freely were

³⁵ Raleigh v. Goschen, 1 Ch. 73.

those most severely ill; there was no other peculiar circumstance which seemed to be associated with the cases. It was found that this was the first brew from a new package of tea; and inquiry at the store developed the fact that only a few pounds had been sold from that newly received shipment, which was the first of the kind received in the city. The health officer was perfectly justified in his official duty in stopping the sale of the tea until he could make further investigation. He suspected that some deleterious chemical had been used in the preparation of the tea, but after full investigation he failed to find evidence of harmfulness in the particular package which had been suspected. Had he published his suspicions, and thereby injured the later sale of that brand, the officer would have exceeded his authority, unless by no other means could the sale have been temporarily checked, pending the investigation. Again, having decided in the first place that the tea was at fault, had he simply told the family his suspicions, but made no further investigation, and had the family then spread the report, thus injuring the sale, it is quite likely that the officer would have been held liable. Having given voice to his suspicions it was his duty to make further investigation. That duty was mandatory upon him, though it might not be found in the written law of the state or city. Under the circumstances, had he failed to make the further investigation, he would have gone without the bounds of his authority as truly as though he had invaded the territorial jurisdiction of a neighbor.

§ 367. Superior officer not liable for torts of subordinates. The superior officer is not liable for wrongs committed by, or negligences of, his subordinates.³⁶

³⁶ Robertson v. Sichel, 127 U. S. 507, a case involving the loss of a

§ 368. When superior officer is liable for subordinate.

When the fault of the subordinate, either officer or employee, is due to the connivance or negligence of the superior, the superior will be held responsible, and liable for the torts of his subordinate, though the subordinate may also be held. If the superior employs incompetent, or improper aids, or so carelessly conducts his office as to open the way for defaults and misdeeds, or if he has authorized or coöperated in the wrong, the superior must be held liable.³⁷ A ministerial officer is under obligation to perform certain duties in the specified way. His responsibility cannot be delegated to another. If he have deputies, either officers or employees, it is his duty to see that they perform the work in the specified manner. If, then, the deputy under the seeming compliance with law, and under color of authority, be guilty of misfeasance, malfeasance, or nonfeasance, the superior officer will also be held liable.³⁸

“No case has been discovered in which an action for damages has been sought to be maintained against the governor for his neglect or refusal to perform such an act (ministerial), but if he is amenable to *mandamus*, no satisfactory reason is apparant why he may not be compelled to respond in damages.”³⁹ Because the executive is independent of the judicial branch of government, no legal attempt to control the discretion of

trunk while in the care of a customs officer; *Dunlop v. Munroe*, 7 Cranch, 242, a letter lost by carrier.

³⁷ *Bishop v. Williamson*, 11 Me. 495; *Dunlop v. Munroe*, 7 Cranch, 242; *Ford v. Parker*, 4 Ohio, 576; *Ely v. Parsons*, 55 Conn. 83.

³⁸ *VanSchaick v. Sigel*, 60 How. (N. Y.) Pr. 122; *Draper v. Arnold*, 12 Mass. 449; *Hazard v. Israel*, 1 Binn. 240; *State v. Moore*, 19 Mo. 369; *Flanagan v. Hoyt*, 36 Vt. 565; *Prosser v. Coots*, 50 Mich. 262.

³⁹ *Mechem*, Pub. Off. 610.

the governor would be entertained by the court. While, therefore, the higher officers of government might be technically liable for misfeasance, malfeasance, or nonfeasance, the responsibility of such high officers would need to be very apparent before the courts would so determine.

§ 369. **Liability as to contracts.** The only way in which a governmental body may deal with individuals is through its officers. An officer may, in the course of his official duty, have occasion to make contracts for the government which he represents. For making such contracts he must have a clear authorization. As a general proposition this authority, in the case of an executive officer, must be found in some act of legislation. The contract may be made in writing, or by word of mouth; it may be formal, or by implication. In any case where it is intended to make a contract for the governmental body this fact should be clearly understood, and the written contract should so state. If the officer has not the distinct authority to make the contract, the contract will be null and void. In such a case the question naturally arises, Can the officer be held personally liable on such a void contract, especially when the other party has acted in good faith, and has sustained injury thereby? In such cases there is a well defined distinction between one who is acting as an agent for a private person or concern, and one who claims to represent the public.⁴⁰ The public officer must act under authority if he presumes to make a contract, and because the matter is public the party with whom he is dealing may easily learn from other sources whether or not such authority for contract

⁴⁰ Mechem on Agency, 426.

exists, and the terms of the authority. In dealing with the agent of a private concern such knowledge of authority is more difficult, and for that reason he may be the more easily imposed upon. It is never presumed that the public officer intends to personally assume the obligation.⁴¹ If such personal liability is intended to be assumed by the officer that must be clearly stated, and when so stated he will be held liable, and personally bound to assume the obligation.⁴² If, therefore, under such circumstances one dealing with an officer seeks to hold him personally liable he must show that, though a public officer, the officer was dealing with him as a private individual.⁴³ If he is acting as a public officer, and "his authority to act is defined by public statute, all who contract with him will be presumed to know the extent of his authority, and cannot allege their ignorance as a ground for charging him with acting in excess of such authority, unless he knowingly misled the other party."⁴⁴ Therefore, persons dealing with a public officer or agent are charged with knowing the extent of the authority of such agent.⁴⁵ "It is much against public policy to cast the obligations that justly belong to the body politic upon this class of officials."⁴⁶ "The natural presumption in such cases

⁴¹ Knight v. Clark, 48 N. J. L. 22; Hodgson v. Dexter, 1 Cranch, 345; Crowell v. Crispin, 4 Daly, 100; Tippitts v. Walker, 4 Mass. 595; Pine v. Huber Mfg. Co., 83 Ind. 121.

⁴² Cahokia v. Rautenberg, 88 Ill. 219; Wing v. Glick, 56 Iowa, 473.

⁴³ Ogden v. Raymond, 22 Conn. 379.

⁴⁴ Newman v. Sylvester, 42 Ind. 112.

⁴⁵ Mayor v. Eschbach, 18 Md. 283; Mayor of Baltimore v. Reynolds, 20 Md. 1; Lee v. Munroe, 7 Cranch, 366; State v. Bank, 45 Mo. 528; State v. Hastings, 10 Wis. 518; The Floyd Acceptances, 7 Wall. 680; Clark v. Des Moines, 19 Iowa, 199; Whiteside v. U. S., 93 U. S. 247.

⁴⁶ Beardsley, Ch. J. in Knight v. Clark, 48 N. J. L. 22.

is that the contract was made upon the credit and responsibility of the government itself, as possessing an entire ability to fulfill all its just contracts, far beyond that of any private man; and that it is ready to fulfill them not only with good faith, but with punctilious promptitude, and in a spirit of liberal courtesy.”⁴⁷

§ 370. **Officer not ordinarily liable on implied authority.** “When the public agents, in good faith, contract with parties having full knowledge of the extent of their authority, or who have equal means of knowledge with themselves, they do not become individually liable, unless the intent to incur a personal responsibility is clearly expressed, although it should be found that through ignorance of law they may have exceeded their authority. * * * In this, as in other cases, the intention of the parties governs, and when a person, known to be a public officer, contracts with reference to the public matters committed to his charge, he is presumed to act in his official capacity only, although the contract may not in terms allude to the character in which he acts, unless the officer by unmistakable language assumes a personal liability or is guilty of fraud or misrepresentation. Being a public agent with his powers and duties prescribed by law, the extent of his powers is presumed to be as well known to all with whom he contracts as to himself. When, therefore, there is no want of good faith, a party contracts with such an officer with his eyes open, and has no one to blame if it should afterwards appear that the officer had not the authority which it was supposed he had.”⁴⁸

⁴⁷ Story on Agency, 302.

Neal, 4 Minn. 126. Also, McCurdy

⁴⁸ Emmett, Ch. J. in *Sauborn v.*

v. Rogers, 21 Wis. 197; *Murray v.*

§ 371. When officer is liable on contract. Where an officer fraudulently or deceitfully conceals or misrepresents the facts as to his authority; or makes representations as to his authority as matter of fact, rather than of law, he will be held personally liable.⁴⁹ So a public officer who denies to his government that he made a given contract, and by such denial prevents the other party from recovering from the government, thereby disavows the fact of his acting as a public agent, and makes himself personally liable.⁵⁰ So, also, an officer may be held liable where, concealing the fact of his agency, he makes a contract as the real principal.⁵¹ Where the officer knows that he has no authority to make the contract, but the other party may not easily know the condition, as when the authority has ceased, or where the authority must depend upon facts not within the knowledge of the other party, it is quite likely that the officer may be held liable.⁵²

§ 372. Application to health officers. In the course of a health officer's work it may sometimes happen that attempt is made to hold either his government, or himself, for the value of animals killed, or goods destroyed, or for time lost through quarantine. Especially when newly appointed, officers through ignorance of the law may sometimes promise to the interested parties that compensation will be given; or such compensation may be demanded. Thus, a horse was killed by order of a board of health, and the owner

Carothers, 1 Mete. 71; Perry v. Hyde, 10 Conn. 329; New York, Etc. Co. v. Harbison, 16 Fed. Rep. 688.

⁴⁹ Mechem on Agency, 542, 543, 544, 545; Mechem, Pub. Off. 810, 811, 814, citing cases.

⁵⁰ Freeman v. Otis, 9 Mass. 272.

⁵¹ Mechem on Agency, 554.

⁵² McDonald v. Franklin Co., 2 Mo. 218; McClenticks v. Bryant, 1 Mo. 598; Ruggles v. Washington Co., 3 Mo. 501.

sued the members of the board. The board had decided that the horse was suffering from glanders, but the court decided, after listening to evidence, that the horse did not have glanders, and held the members of the board liable.⁵³ Though this case did not hinge upon a claim of contract, such an implied contract may sometimes be claimed. This was a case of summary abatement, and had the owner been permitted to prove beforehand that his horse was not a nuisance, that it was sound from the public health standpoint, the decision would probably have been different. Practically the supreme court of Massachusetts decided in this case that the destruction of sound property without compensation was contrary to law. The act of the board could not bind the government, for there was no authority for such an implied liability. Under the general rule the board should not have been held liable for an error of their judgment, an error in the use of their discretion. But their discretion implies carefulness in its application, and a true examination into the conditions. If there were question as to the correctness of the diagnosis, that doubt should if possible have been cleared before summary action was taken. For failure to use such caution the board was held liable. In a similar manner a health officer was held personally liable for destruction of cattle which were in fact not a nuisance nor a cause of sickness endangering public health, but were mistakenly adjudged by him so to be. He had exceeded his authority. Had he acted wisely the municipality could not have been held liable, for under rightful use of police power there is no assump-

⁵³ Miller v. Horton, 152 Mass.

tion of liability. Having committed an *ultra vires* act the officer could not claim immunity under police power. The only way in which abuse of power can be prevented is by the imposition of a penalty for harm done. Because the health officer's official duties did not include this act, the municipality could not be held liable. The health officer himself, the man who committed the wrong, though with apparently honest intentions and poor judgment, was the only one who could be held liable for the act.⁵⁴

Property destroyed under the proper use of police power requires no compensation according to the common law.⁵⁵ It is not a taking of property for the public use, as in eminent domain, but the prevention of its use to the public detriment; not its taking because it is useful to the public, but because it is harmful, and "the property itself is the cause of the public detriment."⁵⁶ *Ex parte* condemnations of property are not conclusive.⁵⁷ On the other hand, it is not always necessary to prove that the property destroyed was in fact a nuisance. During a cholera epidemic a board of health, without formal notice to the owner, had condemned his property as a nuisance, and by order of the members of the board the property was destroyed. In his suit for trespass the plaintiff was not permitted to prove that the property had not in fact been a nuisance, and the board's decision was held conclusive.⁵⁸ But in this case the owner had previously

⁵⁴ *Lowe v. Conroy*, 97 N. W. R. 942; 120 Wis. 151.

⁵⁵ Freund, *Police Power*, 517.

⁵⁶ *Davidson v. New Orleans*, 96 U. S. 97.

⁵⁷ *Salem v. Eastern R. Co.*, 98 Mass. 431; *Shipman v. State Live*

Stock Commrs., 115 Mich. 488; *Lowe v. Conroy*, 97 N. W. R. 942;

Waye v. Thompson, L. R. 15, Q. B. D. 342.

⁵⁸ *Van Wormer v. Mayor of Albany*, 15 Wend. 262.

appeared before the board with reference to this same property, and he had therefore had sufficient notice. It is not unlikely that the imperativeness of the emergency may have been taken into account by the court.

Summary action, when taken unnecessarily, may very properly be considered such an abuse of discretion as to take from the officer the ordinary protection accorded to such officers in the use of their discretionary authority. While this personal liability thus imposed may sometimes work a hardship upon the officer, and possibly subject him to hampering annoyances, yet this protection is necessary for the public, for without it abuse of the discretion by incompetent, or corrupt, officials would be very hard to prevent. A case settled without suit well illustrates this possibility. The keeper of a general store, chiefly groceries, lived with his family above the store. The family were much of the time in the store. The children had scarlet fever, and not only were they quarantined, but the entire stock of groceries was ordered destroyed. Now it would be very difficult, or impossible, to prove that the stock of goods had been sufficiently exposed to render them dangerous, especially as most of them were in sealed packages. The closing of the store and the destruction of the goods effectually drove the proprietor out of business and gave the trade to his competitors who had previously not been successful to the same degree. Such a case demonstrates how great would be the danger were health officials permitted thus to use summary action in connection with their discretion.

§ 373. Liability of employees. Much of the work of every governmental body is done by employees, rather

than by officers. In a health department, except as there be a statute, or ordinance of a city establishing such offices and defining their duties, all of the work of the laboratory, the inspections, the fumigations, and the policing, which is performed by subordinates, is done by employees, rather than by officers. Most of the work of mosquito reduction, or of rat extermination, is done by employees. Employees have no official discretion. It is their duty to obey the law and their superiors. So long as they keep within the law, and within the line of their duty as prescribed by their superiors, they will share the immunity of their superior officers in matters of tort: but if in obedience to the commands of the officer they commit some *ultra vires* act, through which injury may result to a third person, they will be individually liable,⁵⁹ and when the employee does that which is not lawful he cannot seek to shield himself under the immunity of his superior.⁶⁰

§ 374. Liability of city for performance of public duties. An incorporated city stands before the law like an individual officer. As some official duties are discretionary in their operation, while others are ministerial or mandatory, so some of the duties of the city are vested with discretion, and others are compulsory. The city is not liable to individuals for injury in the performance of duties vested with discretion in the line of purely governmental action.⁶¹ Prominent

⁵⁹ Story on Agency, 311, 312; Brown v. Howard, 14 Johns. 119; Coventry v. Barton, 17 Johns. 142; Fielder v. Maxwell, 2 Blatch. (U. S. C. C.) 552; Tracy v. Swartwout, 10 Pet. 80; Smith v. Colby, 67 Me. 169; Cubit v. O'Dett, 51 Mich. 347.

⁶⁰ State v. Moore, 19 Mo. 369;

Harrington v. Fuller, 18 Me. 277; Sheldon v. Payne, 7 N. Y. 458; Robertson v. Sichel, 127 U. S. 507; Dunlop v. Munroe, 7 Cranch, 242; Keenan v. Southworth, 110 Me. 474.

⁶¹ Verdon v. Bowman, 97 N. W. 229; Kempster v. Milwaukee, 79 N. W. 411.

among these duties we find the preservation of the public health. Thus Ingersoll says: ⁶² "Nor is a city liable for the misconduct of its health department, or any of its health officers, since sanitation is a public rather than a municipal duty." ⁶³ "In carrying out the laws for the preservation of the public health the city is performing a duty which it owes to the whole public as distinguished from a mere corporate duty. It is a duty which it is bound to see performed in pursuance of law as one of the governmental agencies, but not a duty from which it derives special benefits or peculiar advantages in its corporate or private capacity. It is like the administration of the fire and police departments. It is well settled that a city may indemnify its officers against liabilities incurred in the discharge of their duties where the city had a right to defend, or had a pecuniary or corporate interest in the discharge of such duty, but not where the officer was acting simply as an official performing a public service, such as the preservation of the public health. If the city cannot legally agree to indemnify such officer, it plainly cannot be liable without agreement. If the common council was guilty of an actionable tort in maliciously encouraging the prosecution of the plaintiff, its members must answer therefor in their individual capacity; there would be no corporate liability." ⁶⁴ The municipality cannot be held liable for the mistakes of its officers in the diagnosis, quarantine,

⁶² Pub. Corp. 137.

⁶³ City of Dalton v. Wilson, 118 Ga. 100; Summers v. Board, 103 Ind. 262; Love v. Atlanta, 95 Ga. 129; Ogg v. Lansing, 35 Iowa, 495; Bryant, v. St. Paul, 33 Minn. 289; Brown v. Vinalhaven, 65 Me.

402; Whitfield v. Paris, 84 Tex. 431.

⁶⁴ Kempster v. Milwaukee, 79 N. W. 411, citing: Lawrence v. McAlvin, 109 Mass, 311; Uren v. Walsh, 57 Wis. 98; Robinson v. Rohr, 73 Wis. 436.

or care of cases of infectious diseases.⁶⁵ In general it may be stated that a municipal corporation is not civilly liable for the nonfeasance, malfeasance, or misfeasance of its officers or agents while engaged in the governmental duties of the corporation.⁶⁶ Contrary to the above, and we believe not in accord with present methods of interpretation, is the case of *Sumner v. Philadelphia*,⁶⁷ as published in a *Public Health Bulletin* of the U. S. Public Health Service,⁶⁸ in which it was held that "When a vessel is in a condition of cleanliness and freedom from malignant disease, which entitles her owners to take her to sea, the purely arbitrary detention of the vessel by a board of health entitles her owners to a recovery for the damages suffered, and the city is liable therefor." Exception is here taken only to the last clause. All arbitrary action is not "with discretion," and is not countenanced in law. Officers acting arbitrarily are in so far not officers, but private wrong doers, because they exceed their authority. Such officers are therefore personally liable for the torts committed. (§§ 273, 363 and following.) Because they are not in such acts officers of the municipality, and because the detention of a vessel in quarantine is a public, rather than a corporate duty, it does not seem that in such a case the municipality should be held liable. Since all this is true, and

⁶⁵ *Beeks v. Dickinson Co.*, 131 Iowa, 244; *Valentine v. Englewood*, 76 N. J. L. 509; *Ogg v. Lansing*, 35 Iowa, 495; *Richmond v. Long's Adm'r*, 17 Grat. 375; *Kollock v. Stevens Point*, 37 Wis. 348; *Having v. Covington*, 78 S. W. 431.

⁶⁶ *Sherburne v. Yuba County*, 21 Cal. 113; *Stewart v. New Or-*

leans, 9 La. Ann. 461; *Dargan v. Mobile*, 31 Ala. 469; *Reardon v. St. Louis*, 30 Mo. 555; *Martin v. Brooklyn*, 1 Hill, 550; *Western College v. Cleveland*, 12 Ohio, 375; *Richmond v. Long's Admr.*, 17 Grat. 375.

⁶⁷ 9 Phila. 408.

⁶⁸ No. 62. (1914.)

the citizens have no recourse against an incompetent health officer, though his powers are great, it follows that the citizens are especially interested in seeing to it that the health officer selected shall be both competent and efficient. A municipal corporation is not liable for the value of property destroyed by mistake on the order of its health officers.⁶⁹ Neither is a city liable for the trespass of its mayor, police officers, and city physician in quarantining and detaining a body of yellow fever suspects in a hotel.⁷⁰

As we have already said, according to the common law there is no liability, either for officers or the corporation, for property destroyed as a nuisance. As a matter of policy, and of equity, statutes are sometimes passed by the state, or ordinances by the city, providing for some compensation. A cow afflicted with tuberculosis may still have considerable pecuniary value. Her milk may be deprived of its danger by efficient pasteurization. She may be used for breeding purposes, and her calf may be free from disease. In other words, although she may be a danger in the community, still it is possible so to care for her that the danger will be controlled, and her value preserved. Manifestly her value is not that of a perfectly sound animal. It may be for the public good that she be killed. Because the nuisance is so vitally connected with the property of value, to thus abate the nuisance would deprive the owner of his property without compensation. It is therefore very proper, as many of the states have enacted, that some compensation be given for such animals destroyed. (§§ 206 to 211.)

⁶⁹ *Lowe v. Conroy*, 97 N. W. 942; *Creier v. Town of Fitzwilliam*, 83 At. 128.

⁷⁰ *City of San Antonio v. White*, 57 S. W. R. 858.

In a similar manner, if it be for the public good that healthy persons who have come in contact with infectious diseases be deprived of their liberty by quarantine and thus prevented from earning their usual wage, while at the same time they must live, it is very proper that by legislation some provision should be made for their support at least. Not only is such a course justifiable as a matter of equity, but it seems often to be good policy, especially in dealing with the laboring class, for it takes away a very potent excuse for hiding cases of infection. Every health officer has known of numerous instances where infectious disease has spread through the fear that if a physician be called, the entire family would be quarantined and thus prevented from attending to their usual avocations. Nor is this only true of the laboring classes, but those higher in the financial scale not infrequently manage to keep their cases hidden from the health department. While it is probable that owing to the advances made in sanitary science, such rigid quarantine may soon be a thing of the past, it still remains true that some provision should be made for the support of those thus restrained. (See § 415.)

§ 375. Liability for municipal duties. When we come to the purely municipal duties of a city, those dependent upon the corporation, the conditions are very different. It is a duty of the city, oftentimes, to provide pure water for the citizens. "The contrary cannot be maintained unless we hold that a municipal corporation may by mere implication bargain away its duty to protect the public health and safety, as they are involved in supplying the people with sufficient water. Nothing can be more important or vital to any people

than that they should be supplied with pure, wholesome water."⁷¹ Among the earliest of governmental activities none was more important than this form of public utility. We still find the remains, often in good preservation, of old aqueducts constructed for the purpose of supplying cities with water. In modern times it has been a common custom for a few capitalists to combine for the purpose of deriving a profit from the business of thus supplying water. Municipal ownership of a water plant is not an innovation. It is rather the private company which is modern in origin. But whether the city furnishes water through municipal ownership, or through the instrumentality of a private corporation, the responsibility is still upon the city to provide its citizens with a bountiful supply of pure water. If it make a contract with a private corporation, through franchise, the city does not shirk its duty thereby. The corporation must understand that it is its duty under the contract to supply, not water simply, but pure water.^{71a}

Since public ownership of public utilities comes into commercial competition with private enterprises, to that extent the municipality is, and must be legally regarded as a business corporation,⁷² and as such it is subject to the same principles of legal application as govern the quasi-public corporations.⁷³ If the city provides water for its citizens free, so that it is acting purely in its public capacity, and deriving no profit therefrom, the city may not be charged with damages

⁷¹ *Vicksburg v. Vicksburg Water Works Co.*, 202 U. S. 453.

^{71a} *Mayor of Jersey City v. Flynn*, 74 N. J. Eq. 104.

⁷² *Baily v. Philadelphia*, 184 Pa. 594; *Aldrich v. Tripp*, 11 R. I. 141.

⁷³ *Bailey v. New York*, 3 Hill, 531; *Thayer v. Boston*, 19 Pick. 511; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 185.

by a private citizen.⁷⁴ But when it charges for the water supplied it is then acting in its corporate capacity, and it is liable for the injury.⁷⁵ Thus, where a city furnishes water contaminated with typhoid germs, it may very properly be held liable for the damages accruing.⁷⁶ As Chief Justice Nelson said,⁷⁷ relative to the power of a municipality to construct and maintain water works: "If the grant is for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands upon the same footing as would any individual or body of persons upon whom the like special franchise had been conferred." A similar rule applies to cemeteries owned by the city, and from which it may derive an income.⁷⁸ (§§ 430-436.)

There seems to be some difference of opinion whether or not the city should be considered as a governmental body, or as a corporation, in its care of sewers. (§§ 440-443.) (It is proper to state that the basis for this discussion of liability of cities for construction and maintenance of sewers is to be found in Ingersoll on Public Corporations, Sec. 144.) There is a general agreement that a city is exercising governmental discretion in deciding whether or not to build sewers, and in selecting its plans for construction, and it therefore

⁷⁴ Danaher v. Brooklyn, 51 Hun, 563.

⁷⁵ Chicago v. Selz, 202 Ill. 545; Augusta v. Lombard, 99 Ga. 282; Whitfield v. Carrolton, 50 Mo. App. 98; Bailey v. Mayor, 3 Hill, 531; Stock v. Boston, 149 Mass. 410; Aldrich v. Tripp, 11 R. I. 141.

⁷⁶ Milnes v. Huddersfield, L. R. 10 Q. B. Div. 124; Keever v. Man- kato, 113 Minn. 55.

⁷⁷ Bailey v. Mayor, 3 Hill, 531.

⁷⁸ City of Toledo v. Cone, 41 Ohio, 149.

incurs no liability for the negligence or errors of its officers and employees in these matters.⁷⁹ Having adopted a plan the city is not liable for injuries resulting because adequate means have not been provided for carrying off the accumulated waters.⁸⁰ Neither is a city responsible for the condition of its sewers, though bound to use reasonable care in keeping them in repair.⁸¹

Although there is governmental discretion in deciding on the plans for a sewer system, the preponderance of judicial opinion recognizes the liability of a city for damages resulting from its neglect to properly discharge its ministerial duty to exercise reasonable care in the construction and maintenance of its sewers,⁸² and the fact that the sewer was originally constructed by the state does not affect the question as to the liability of the city for the care.⁸³ Municipal ownership is not essential to liability; municipal control will be sufficient.⁸⁴ On the other hand, municipal

⁷⁹ *Benthan v. Philadelphia*, 196 Pa. 302; *Pressman v. Dickson City*, 13 Pa. Super. Ct. 236; *Burger v. Philadelphia*, 196 Pa. 41; *Bealafeld v. Verona*, 188 Pa. 627; *King v. Kansas City*, 58 Kas. 334; *Champion v. Crandon*, 84 Wis. 405; *Cummins v. Seymour*, 79 Ind. 491; *Mills v. Brooklyn*, 32 N. Y. 489; *Perry v. Worcester*, 6 Gray, 544; *Johnston v. Dist. of Col.*, 118 U. S. 19; *Child v. Boston*, 4 Allen, 41.

⁸⁰ *Stevens v. Muskegon*, 111 Mich. 72; *Cooper v. Scranton*, 21 Pa. Super. Ct. 17.

⁸¹ *Weldman v. New York*, 84 App. Div. 321.

⁸² *Chalkley v. Richmond*, 88 Va.

402; *Donahoe v. Kansas City*, 136 Mo. 657; *Clay v. St. Albans*, 43 W. Va. 539; *Baltimore v. Schnitker*, 84 Md. 34; *Flori v. St. Louis*, 69 Mo. 341; *Stock v. Eoston*, 149 Mass. 410; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Kranz v. Baltimore*, 64 Md. 491; *Detroit v. Corey*, 9 Mich. 165; *Montgomery v. Gilmer*, 33 Ala. 116; *Semple v. Vicksburg*, 62 Miss. 63; *Gilman v. Laconia*, 55 N. H. 130; *Bates v. Westborough*, 151 Mass. 174; *Judge v. Meriden*, 38 Conn. 90.

⁸³ *Chalkley v. Richmond*, 88 Va. 402.

⁸⁴ *Taylor v. Austin*, 32 Minn. 247.

ownership of the land over which the drain or sewer runs is not sufficient to cause liability; municipal control is essential.⁸⁵ A sewer constructed chiefly along the public streets had its lower portion and its mouth located on private grounds. This location was improper, and the city had not used reasonable care in exercising its discretion. As a result the property of the plaintiff received the discharged sewage, and the city was held liable.⁸⁶ In other cases the city has been held liable for the damage resulting from the flooding of property by the discharged sewage, where the flooding was the natural result of the plan adopted,⁸⁷ or from the deposit of sewage.⁸⁸ The true rule in such cases seems to be that the city is not liable for the original error in the plans, unless the results could have been foreseen; but it is the continuance of the nuisance after it has been found to exist. In one case the court said:⁸⁹ "We are also of the opinion that the exercise of a judicial or discretionary power by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which from its nature is liable to be repeated and continued, but is remediable by a change of plan, or

⁸⁵ *Kosmak v. New York*, 117 N. Y. 361.

⁸⁶ *Stoddard v. Saratoga Springs*, 127 N. Y. 261; See *Beach v. Elmira*, 58 Hun, 606.

⁸⁷ *McCartney v. Philadelphia*, 22 Pa. Super. Ct. 257; *Semple v. Vicksburg*, 62 Miss. 63; *Imler v. Springfield*, 55 Mo. 119; *Ashley v. Port Huron*, 35 Mich. 296; *Stanchfield v. Newton*, 142 Mass. 110.

⁸⁸ *Bennett v. Marion*, 119 Iowa, 473; *McBride v. Akron*, 12 Ohio

Cir. Ct. R. 610; *Owens v. Lancaster*, 182 Pa. 257; *Bacon v. Boston*, 154 Mass. 100; *Magee v. Brooklyn*, 18 App. Div. 22; *Boston Belt- ing Co. v. Boston*, 149 Mass. 44; *Ft. Wayne v. Coombs*, 107 Ind. 75; *Attwood v. Bangor*, 83 Me. 582; *Nashville v. Comar*, 88 Tenn. 415; *Stoddard v. Saratoga Springs*, 127 N. Y. 261.

⁸⁹ *Seifert v. Brooklyn*, 101 N. Y. 136.

the adoption of prudential measures, renders the corporation liable for such damages as occur in consequence of the continuance of the original cause after notice, and an omission to adopt such remediable measures as experience has shown necessary and proper.”

A difference may very justly be made between the care of storm water, and sewage. A city is not liable because the storm water runs from the street onto adjoining lots.⁹⁰ So the city has a right to construct drains to carry such street water into natural water-courses, so long as reasonable care be exercised.⁹¹ But it may be held liable if the water contain sewage which pollutes the stream so as to render the water unfit for use by the riparian owner or occupier;⁹² and such pollution of a running stream has been called a public nuisance;⁹³ and for that reason in some cases the city has been enjoined from emptying its sewage into a running stream, where such nuisance was created.⁹⁴ The sewage problem is one of the greatest among the sanitary questions for city governments. Especially for our large cities it is a question which must be met. There seems to be no question as to the soundness of the decisions which hold cities liable for the pollution of running streams by untreated sewage. But with

⁹⁰ *Jordan v. Benwood*, 42 W. Va. 312; *Sievers v. San Francisco*, 115 Cal. 648. See *Denver v. Dunsmore*, 7 Col. 328; *Smith v. New York*, 66 N. Y. 295.

⁹¹ *Miller & Meyer v. Newport News*, 101 Va. 432.

⁹² *Pettigrew v. Evansville*, 25 Wis. 223; *Gould v. Rochester*, 105 N. Y. 46; *Inman v. Tripp*, 11 R. I. 520.

⁹³ *Mayor of Birmingham v. Land*, 137 Ala. 538; *Mansfield v. Balliett*, 65 Ohio, 451; *Owens v. Lancaster*, 182 Pa. 257.

⁹⁴ *Haskell v. New Bedford*, 108 Mass. 208; *Peterson v. Santa Rosa*, 119 Cal. 387; *People v. San Luis Obispo*, 116 Cal. 617.

the advances made in sanitary engineering gross pollution of waters is unnecessary. In a recent case in England the court appointed no less a person than Sir William Ramsey to make the investigation of the results of turning treated sewage into a stream, and he found that chemically and bacteriologically the water of the stream was better below than above the outlet of the sewer.⁹⁵

§ 376. **Municipal contracts, liability on.** There could be no question as to the liability of a municipality upon contracts, formally made, and legal in form, where the contract is within the power of the corporation; but because it is a corporation, and may thus engage in enterprises not strictly governmental, the opportunity for contracts, either formal or implied, is much greater than in ordinary governmental bodies. Further, because its officers and employees may sometimes bind the city without direct authority, in municipal business proper, questions as to liability may more frequently arise. Thus, where the party contracting with the officers of the city has in good faith performed his part of the contract, the city will be estopped from pleading the faults or shortcomings of its own officers or agents in all cases which are within the corporate powers.⁹⁶ But if the contract is *ultra vires*, that fact may be pleaded whether the action be by, or against the city.⁹⁷ Where a portion of the contract is within the powers of the corporation, and another portion is *ultra*

⁹⁵ Attorney General v. Birmingham, Tame & Rea Dist. Drainage Board, L. R. Chan. Div. 1910, Vol. 1, 48.

⁹⁶ Hitchcock v. Galveston, 96 U. S. 341; Thomas v. Richmond, 12 Wall. 349; Moore v. New York,

73 N. Y. 238; London, & Land Co. v. Jellico, 103 Tenn. 320; Sharp v. Teese, 9 N. J. L. 352.

⁹⁷ Thomas v. R. R. Co., 101 U. S. 71; Keen v. Coleman, 39 Pa. 299; Hodges v. Buffalo, 2 Denio, 110; Ellis v. Cleburne, 35 S. W. R. 495.

vires, the city may not seek to get out of the entire contract on account of the terms made. That portion which is within the authority of the city will be held binding, and the *ultra vires* portion will be annulled. A contract which was within the power of the city to make will not be set aside because it was stipulated in the contract that the payment was to be made in bonds, though the officers of the city had no power to issue the bonds.⁹⁸ A city may be bound by an implied contract, just as an individual may thus bind himself.⁹⁹ An action in assumpsit will lie to recover, *quantum meruit*, or *quantum valebant*, where no fixed compensation has been agreed upon, or where no express contract has been made.¹⁰⁰ A city which retains benefits under a contract which it had power to make, though the contract was void because of irregularity in its execution, is still bound, "not from any contract entered into on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial."¹

A distinction has sometimes been made in such matters between the use of money or property, and the receiving the benefit of personal services. "The money must have gone into her treasury, or been appropriated by her; and, when it is property other than money, it must have been used by her or been under her control. But with reference to services rendered,

⁹⁸ Hitchcock v. Galveston, 96 U. S. 341; Ill. Trust & Savings Bank v. Arkansas City, 76 Fed. 271.

⁹⁹ Austin v. Bartholomew, 107 Fed. 349; Wentick v. Passiac Co., 66 N. J. L. 65.

¹⁰⁰ Fox v. Richmond, 40 S. W. R. 251; Lincoln Land Co. v. Village of Grant, 57 Neb. 70.

¹ Marsh v. Fulton Co., 10 Wall. 676; Lincoln Land Co. v. Village of Grant, 57 Neb. 70.

the case is different. Their acceptance must be evidenced by ordinance, or express corporate action to that effect. If not originally authorized, no liability can attach upon any ground of implied contract; the acceptance, upon which alone the obligation to pay could arise, would be wanting."² Such a distinction seems unjust, and other authorities have not agreed to that dictum.³ Money and property are but the product of labor, and the capital of a professional man is generally more in his knowledge and ability, than in the accumulations which he has made in the bank. The man who assists in determining the plans to be followed in constructing a sewer system, or in finding the condition of a city water supply with reference to methods to be used for purification, thereby puts the city as truly under obligation to him as he who advances the money for the construction of the works; and if his services have been requested by an officer of the city, and reports made to him, the city has as truly accepted the services as where the treasurer, without corporate action accepts money for the use of the city. So where a Commissioner of Public Works finds a necessity for the doing of certain work, and he asks a suitable person to do that work, the city as truly accepts his services when rendered, as if it had taken the amount of the man's ordinary wage in money. But in these matters a distinction must be kept in mind between the purely governmental duty and authority of the city, and those activities which are strictly corporate.

² *Argenti v. San Francisco*, 16 Cal. 255.

Mayer v. Chicago, 38 Ill. 266;
Peterson v. Mayer, 17 N. Y. 450.

³ *Dillon, Munic. Corp.* 464;

§ 377. **Respondeat superior.** "To determine whether there is municipal responsibility, the inquiry must be whether the department whose misfeasance or non-feasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty primarily resting on the municipality."⁴ The city is not responsible for the acts of civil officers of government, even though they be appointed and paid by the city. But when the corporation is under an absolute duty to perform those services, or where the city derives a profit or income from their service, in its corporate capacity, it is then liable.⁵ The city may thus be liable for the acts of officers appointed by the state for it.⁶

Note. For the liability assumed by private persons or corporations for the spread of infection to other persons see Section 418, Chapter XIV.

⁴ *Pettingill v. Yonkers*, 116 N. Y. 558.

⁶ *Bailey v. Mayor*, 3 Hill, 531.

⁵ *Sievers v. San Francisco*, 115 Cal. 648.

CHAPTER XII

LEGAL REMEDIES

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|---|-----------------------------------|
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official excesses. | § 383. <i>Certiorari</i> . |
| § 381. Recovery of books and prop-
erty, <i>mandamus</i> or re-
plevin. | § 384. <i>Mandamus</i> . |

§ 378. **Civil and criminal actions.** According to the usages of the common law, revised to some extent by statutory enactments, there are certain legal remedies which have especial relation to the holders of public offices, and to their methods of conducting their offices and transacting the business imposed upon them. While the practices vary slightly in the several states, as prescribed in the statutes, there is in each a general similarity of usage. It will not be attempted here to give a full discussion of each, but rather to give a general statement of when each is to be used, and by what method. Our concern is particularly with executive officers whose duties involve the preservation of the public health. In the discharge of their duties it may frequently become necessary for them to proceed, either criminally or civilly, against violators of the laws pertaining to health. Such actions do not specially differ from ordinary criminal or civil proceedings, and do not need special attention here. Such

actions should not be brought in doubtful cases, unless it be desired to get a legal interpretation of some statute or ordinance. When there may be some doubt as to the legality of an ordinance or statute, or some question as to the extent of powers conferred under the statute, such doubts and questions should be settled by bringing them before the proper court. It may often seem best to assume that the enactment is legal, and that the desired power is granted, leaving the question to be raised by some presumably injured party, but it must be remembered that this course exposes the officer to a possible liability for exceeding his lawful authority. On the other hand, especially when an interpretation of the law is desired, it should be remembered that the scientific basis for the enactment must be properly presented to the court, or at least be prepared for presentation. It is not sufficient to show that there was a technical evasion of the letter of the law. The defendant will probably attempt to show that the operation of the requirement is unnecessary, and that it works a hardship upon him. Ordinances have been passed specifying that milk must have at least three and a half per cent of cream. The facts that certain milk is sold as it came from the cows, and that the average percentage of cream from an entire herd was below the required standard would, as they have in the past, be put forward to show that such a standard is arbitrary and unreasonable. The prosecutor must therefore be prepared to show what the variations are in the percentage of cream found in cow's milk. It must further be remembered by the prosecutor that cattle may be bred for gross yield of milk, without regard to quality, or they may be bred

for a maximum of butter fat or for casein content. He must also remember that by feeding brewery slops the gross yield of milk may be increased by dilution, and that not infrequently this alteration in quality may be essentially an evidence of disease. For these facts the prosecutor must naturally depend upon the health administrator. Consequently it is the duty of the health administrator to be fully prepared with the scientific data which may be needed.

Violation of the regulations of borough boards of health may not be punished by indictment; the proper procedure is a civil suit for the penalty.¹ Summary convictions had in such cases will be set aside upon appeal. The authority to preserve the health of the inhabitants is lodged in the municipality, and the members of the board of health are officers of the city. It is for this reason that suits to enforce orders of a board of health are uniformly brought in the name of the city or town.² A borough board of health is not a corporation; it can neither sue nor be sued.³ The court of common pleas has no jurisdiction to hear an appeal from the judgment of a police justice in a suit for a penalty for violating an ordinance of a board of health.⁴ "A sufficient answer to the argument about the right of appeal being arbitrarily burdened with oppressive and unnecessary conditions is that the right of appeal is neither a natural nor a constitutional right, but a statutory one which the legislature may give or not in its discretion, and if it gives the right

¹ Commonwealth v. Clark, 14 Lanc. L. Rev. 41 (1896).

² Winthrop v. Farrer, 11 Allen, 398; Trowbridge v. Tupper, 96 N. E. 1096.

³ Commonwealth v. Olyphant Borough, 2 Lack. L. N. 181.

⁴ Holzworth v. Newark, 21 Vr. 85.

it may give it on such conditions as it may deem proper.⁵ The provision in the Massachusetts Statutes of 1897, Chapter 510, Section 4, giving to persons aggrieved by an order passed by the state board of health the right of appeal applies only to the quasi-judicial acts, and does not apply to rules, regulations, and orders of a quasi-legislative nature.⁶

§ 379. *Quo warranto*. The only proceeding by which title to office may be determined is *quo warranto*, or information in the nature of *quo warranto*. (§ 281.) Originally this was a prerogative writ; later it became of more general application, and was criminal in form. Now as used either by information, or according to the revised practice prescribed in enactments, it has lost most of its criminal character, and is practically an action by which an imposter may be ousted from office. *Quo warranto* will not lie where there is any other remedy applicable.⁷ So where by statute some other method is provided to test title to office, that method must be pursued. *Quo warranto* proceedings are ordinarily brought in the name of the commonwealth, and properly by the attorney general or a state's attorney. The person asking leave to file the information must show that he has some interest in the matter to be decided, when the action originates in a private citizen,⁸ and if that interest is the claim to the office, he must show by *prima facie* evidence that he has a title thereto;⁹ but the interest of a citizen as

⁵ *McMillan Co. v. Minnesota State Board of Health*, 110 Minn. 145.

⁶ *Nelson v. State Board of Health*, 186 Mass. 330.

⁷ *State v. Marlow*, 15 Ohio, 114; *State v. Wilson*, 30 Kans. 661.

⁸ *Commonwealth v. Fowler*, 10 Mass. 290; *Commonwealth v. Walter*, 83 Pa. 105.

⁹ *State v. Dahl*, 65 Wis. 510.

a taxpayer is sufficient.¹⁰ What the court desires is to be assured that the relator is asking in good faith, that he has responsibility, and that his own conduct has been such that he has not become disqualified from making the complaint. Aside from such cases in which the action has been brought by the attorney general, acting for the state, the issuance of the writ is discretionary with the judge having jurisdiction.¹¹

Quo warranto is the proper method to determine the title of public officers only.¹² Right to employment must be tried by other means.¹³ Judge Cooley expressed a doubt whether the proceedings be applicable to any office not created by the state.¹⁴ Very evidently, the proceeding is not proper to oust a federal officer, although the office be filled under the power of the state.¹⁵ And the courts will be adverse to granting the writ when the term of the officer has nearly expired,¹⁶ or when the court is satisfied that if seated the relator could, and would be immediately removed.¹⁷

It is necessary that the party against whom the information is filed shall be in actual possession of the office,¹⁸ though the taking of the oath of office may be sufficient grounds, and action will be admissible where the officer has abandoned his office.¹⁹

¹⁰ Commonwealth v. Meeser, 44 Pa. 341; State v. Hammer, 42 N. J. L. 435; State v. Martin, 42 N. J. L. 479.

¹¹ People v. Waite, 70 Ill. 25; People v. Moore, 73 Ill. 132; State v. Tolan, 33 N. J. L. 195; State v. Smith, 48 Vt. 266; Commonwealth v. Jones, 12 Pa. 365.

¹² State v. Hixon, 27 Ark. 398; Cleaver v. Commonwealth, 34 Pa. 283.

¹³ State v. North, 42 Conn. 79; Eliason v. Coleman, 86 N. C. 235.

¹⁴ Throop v. Langdon, 40 Mich. 673.

¹⁵ State v. Bowen, 8 S. C. 400; Territory v. Lockwood, 3 Wall. 236.

¹⁶ People v. Sweeting, 2 Johns. 184; State v. Jacobs, 17 Ohio, 143; State v. Tudor, 5 Day, 329.

¹⁷ *Ex parte*, Richards, 3 Q. B. Div. 368.

¹⁸ King v. Whitwell, 5 T. R. 85.

¹⁹ State v. Graham, 13 Kans. 136; People v. Callaghan, 83 Ill. 128.

Quo warranto lies to oust from office one who has set up an office without warrant of law,²⁰ or when the statute under which he holds is unconstitutional,²¹ or where the officer has failed to file his bond, or to take his oath.²² It is also applicable against any officer who by his acts has forfeited his office, and in such cases it is not necessary to show that any other person has a legal title thereto.²³ "If the alleged ground for ousting the officer is that he has forfeited his office by reason of certain acts or omissions on his part, it must then be judicially determined, before the officer is ousted, that these acts or omissions of themselves work a forfeiture of the office. Mere misconduct, if it does not of itself work a forfeiture, is not sufficient. The court has no power to create a forfeiture, and no power to declare a forfeiture where none already exists. The forfeiture must exist in fact before the action of *quo warranto* is commenced."²⁴ Where the action is to oust the respondent, and install the relator, the court will not grant the application if the relator has concurred in the holding, acquiesced in the irregularities of which he complains, or delayed unreasonably the presentation of his claims to the office.²⁵

²⁰ *Rex v. Boyles*, 2 Stra. 836.

²¹ *Atty. Gen. v. Holihan*, 29 Mich. 116; *Dullam v. Willson*, 53 Mich. 392.

²² *In re Mayor of Penryn*, 1 Stra. 582.

²³ *State v. Collier*, 72 Mo. 13; *Comm. v. Walter*, 83 Pa. 105; *State v. Graham*, 13 Kas. 136; *People v. Bingham*, 82 Cal. 238; *Osgood v. Jones*, 60 N. H. 543; *Hyde v. State*, 52 Miss. 665; *People v. Cal-*

laghan, 83 Ill. 128; *Griebel v. State*, 111 Ind. 369.

²⁴ *Commonwealth v. Walter*, 83 Pa. 105; *Cleaver v. Commonwealth*, 34 Pa. 283; *Brady v. Howe*, 50 Miss. 624; *State v. Graham*, 13 Kas. 136; *State v. Allen*, 5 Kas. 213.

²⁵ *Reg. v. Green*, 2 A. & E. 460; *State v. Tipton*, 109 Ind. 73; *Dorsey v. Ansley*, 72 Ga. 460; *Reg. v. Anderson*, 2 A. & E. 740.

The exact steps in *quo warranto* proceeding differ in the different states. In general, the petition is filed by, or in the name of, the attorney general or the prosecuting attorney, and the petition should show with definiteness the name and existence of the office, and that the incumbent holds the same without warrant of law. "The people are not required to show anything."²⁶ "The state is bound to make no showing."²⁷ The burden of proof is upon the respondent. "The state has always a right to demand of any one assuming a public office or franchise to show his authority."²⁸ It is not enough that the respondent shall show that he originally held the office rightfully, but he must show that he still has a clear title thereto.²⁹ But if the proceedings be to oust the incumbent, and to seat the relator, the burden of proof is shifted to the relator, and he must show his lawful title to the office. In such cases the information should clearly state the fact that he was eligible, and properly elected or appointed.³⁰ So if it be claimed that the respondent has forfeited his right to the office the burden of proof is shifted to the state.³¹

Unless it be provided by the statutes of the individual state, trial by jury is not a matter of right in *quo warranto* proceedings,³² though under certain circumstances the contrary has been held.³³

The judgment may simply oust the incumbent, or

²⁶ *People v. Ridgely*, 21 Ill. 67.

²⁷ *People v. Mayworm*, 5 Mich. 146.

²⁸ *People v. DeMill*, per Cooley, J., 15 Mich. 164.

²⁹ *State v. Graham*, 13 Kans. 136.

³⁰ *State v. Stein*, 13 Neb. 529;

State v. Boal, 46 Mo. 528.

³¹ *People v. Thacher*, 55 N. Y. 525.

³² *State v. Johnson*, 26 Ark. 281; *State v. Lupton*, 64 Mo. 415; *State v. Vail*, 53 Mo. 97.

³³ *State v. Allen*, 5 Kas. 213; *White v. Doesburg*, 16 Mich. 133.

in addition to the ouster it may install the relator. Unless the matter be covered by statutes the judgment will not include the assessment of damages against the usurper. Action for damages is ordinarily an independent proceeding.³⁴

§ 380. Quo warranto not to restrain official excesses. *Quo warranto* is practically restricted to the determination of title to office, or right to franchise. It will not lie to restrain a lawful officer from official excesses, for the reason that there are other actions applicable. The person injured may bring civil suit against the officer or corporation. If the officer acts without legal warrant he will be held personally liable. "If that officer, it may be proved, has deviated ever so little from his legal authority, if with the best of intention, or with the best of intelligence, he makes a mistake of fact in applying the law to a particular case, he is by the principal doctrine, if applied to its logical conclusion, liable as a private wrong doer and responsible in such damages as may be proved."³⁵ Also, in many cases the law provides for appeal, and such right of appeal would take the preference over other proceedings, and as we have said in Chapter IV, it would be well if the right to appeal within executive departments be more generally provided in statutory enactments. But if there be no right of appeal, by which official excesses could be restrained, and if the injury worked would be irreparable, and where no other adequate remedy is applicable, an injunction will lie.³⁶

§ 381. Recovery of books and property, mandamus or replevin. Where the title to the office is decided,

³⁴ *People v. Miles*, 2 Mich. 350.

³⁵ *Wyman Ad. Law*, 15.

³⁶ *Mobile v. Louisville, &c. R. R. Co.*, 84 Ala. 115.

the newly installed officer may recover the possession of the books, records, seals, and other property through *mandamus*.³⁷ Replevin will not ordinarily lie against a public officer, but replevin will lie in favor of a public officer against one who has wrongfully taken possession of the property of the office, though he may claim possession as having been duly elected or appointed.³⁸ Also when the action is brought by a private citizen claiming title for books or other property deposited in his office, the only remedy is *mandamus*, not replevin.³⁹ Title to the office cannot be tried either in *mandamus*, nor in replevin proceedings. The title must have been previously decided.⁴⁰

§ 382. Writ of prohibition, or injunction. The writ of prohibition is probably never applicable to a health executive. (§ 281.) The writ of prohibition is an extraordinary judicial writ, issuing from a court of superior jurisdiction "to prevent the exercise, by a tribunal possessing judicial powers, of jurisdiction over matters not within its cognizance, or exceeding jurisdiction of matters of which it has cognizance."⁴¹ It is applicable to officers having quasi-judicial powers, as distinguished from discretionary powers.⁴² It does not lie to restrain executive or ministerial action, even where such action requires the use of judgment with discretion.⁴³ It does not lie where there is other

³⁷ *People v. Head*, 25 Ill. 325;

McGee v. State, 103 Ind. 444;

Stone v. Small, 54 Vt. 498.

³⁸ *Phenix v. Clark*, 2 Mich. 327;

Fletge v. Priest, 53 Mo. 540.

³⁹ *People v. Treasurer*, 24 Mich.

468; *Brent v. Hagner*, 5 Cranch

C. C. 71.

⁴⁰ *Hallgren v. Campbell*, 82

Mich. 255.

⁴¹ *Thomson v. Tracy*, 60 N. Y.

31.

⁴² *Ex parte Braudlacht*, 2 Hill,

367; *Smith v. Whitney*, 116 U. S.

167; *LeConte v. Berkley*, 57 Cal.

269.

⁴³ *Seymour v. Almond*, 75 Ga.

112; *State v. Columbia*, 16 S. C.

412; *LaCroix v. Fairfield County*

Commissioners, 50 Conn. 321;

remedy, as by appeal, or *certiorari*.⁴⁴ Nor will it take the place of *quo warranto* to restrain a person from attempting to assume an office.⁴⁵ It is therefore difficult to conceive of any way in which it could apply to a health official, though it might be used with reference to a court which is attempting to pass upon some problem of the health administration, but there only where the court has no jurisdiction, or where it is attempting to exceed its authority, and without a possible remedy by appeal or otherwise.

An injunction, on the other hand, is applicable to executive officers particularly, to prevent excesses in action. Because of the independence of the judiciary from the executive branch of government, the injunction is not intended in any way to restrain legal executive action.⁴⁶ It will not be used to direct, nor to restrain the exercise of discretionary authority. It may be used to restrain action which will destroy property rights, where the injury is irreparable.⁴⁷ It may be used to prevent the taking of property, or impairment of property, as in the draining of swamps,⁴⁸ or in the creation of nuisances.⁴⁹ It may also be used to prevent illegal expenditures of money.⁵⁰ In no way can it take the place of *quo warranto* to try the

Burch v. Hardwicke, 23 Gratt, 51;
Manhattan v. Hassin, 105 Pac. 44.

⁴⁴ Shell v. Cousins, 77 Va. 328;
Smith v. Whitney, 116 U. S. 167.

⁴⁵ Buckner v. Veuve, 63 Cal. 304.

⁴⁶ Whitman v. Hubbell, 20 Abb.
N. Cas. 385; Sage v. Fifield, 68
Wis. 546.

⁴⁷ Mobile v. Louisville, &c., R. R.
Co., 84 Ala. 115; City Council v.
Louisville, &c., R. R. Co., 84 Ala.
127.

⁴⁸ Belknap v. Belknap, 2 Johns.
Ch. 463.

⁴⁹ Upjohn v. Richland, 46 Mich.
542; Merrill v. Humphrey, 24 Mich.
170.

⁵⁰ Cooley on Taxation, 2nd Ed.,
764; State v. County Court, 51 Mo.
350; Drake v. Phillips, 40 Ill. 389;
Leitch v. Wentworth, 71 Ill. 147.

right to office, neither to prevent qualification,⁵¹ nor entering the office,⁵² nor to prevent the payment of salary.⁵³

§ 383. **Certiorari.** Because of the independence of the judicial and the executive and legislative branches, it is not the province of the courts in any way to interfere with the legal execution of the duties of the other branches. (§ 281.) *Certiorari* therefore does not lie to correct errors in the use of discretionary power, though it may lie against an executive officer holding quasi-judicial powers to see that the legal forms have been properly observed.⁵⁴ It will not lie to control the exercise of ministerial, purely executive, or legislative duties.⁵⁵ As in the case of the other writs, this will not lie when there is other remedy available.

§ 384. **Mandamus.** A duty which is ministerial must be performed. The function of the ancient prerogative writ of *mandamus* is to compel the performance of ministerial duties, whether they be purely so, or the ministerial portion of discretionary authority. (§ 281.) To a great extent it has lost its prerogative character. In many regards it is the exact antithesis of the injunction. "An injunction is essentially a preventive remedy; *mandamus* a remedial one. The former is usually employed to prevent future injury, the latter to redress past grievances. The functions of the injunction are to restrain motion and enforce inaction;

⁵¹ Moulton v. Reid, 54 Ala. 320.

⁵² Beebe v. Robinson, 52 Ala. 66.

⁵³ Stone v. Wetmore, 42 Ga. 601;

Tappan v. Gray, 9 Paige, 507.

⁵⁴ People v. Burnap, 38 Mich.

350; French v. Barre, 58 Vt. 567;

Miller v. Supervisors, 88 Ill. 26;

McGregor v. Supervisors, 37 Mich.

388; St. Charles v. Rogers, 49 Mo.

530.

⁵⁵ Atty. Gen. v. Northampton,

143 Mass. 589; *In re* Wilson, 32

Minn. 145; People v. Walter, 68

N. Y. 403; Supervisors v. Aud.

Gen., 27 Mich. 165.

those of *mandamus* to set in motion and compel action. In this sense an injunction may be regarded as a conservative remedy; *mandamus*, as an active one. The former preserves matters *in statu quo*, while the very object of the latter is to change the status of affairs, and to substitute action for inactivity. The one is, therefore, a positive or remedial process, the other a negative, or preventive one."⁵⁶

Mandamus does not create a duty; its only purpose is the enforcement of a duty already existing.⁵⁷ It cannot, therefore, be used to enforce a doubtful right, nor to compel the performance of a duty which is not clear and certain.⁵⁸ For the purposes of the writ it is presumed that he who occupies an office does so legally, and *mandamus* will therefore lie to compel action by an officer *de facto*,⁵⁹ but by disclaiming possession of the office, and resigning all pretensions thereto, he will be under no criminal or civil liability for his refusal to act.⁶⁰ The writ will not lie to compel the performance of an illegal act,⁶¹ nor one which is impractical.⁶² Neither will it lie to control discretionary authority.⁶³ "But though the officer vested

⁵⁶ High, *Extra Legal Remedies*, 6.

⁵⁷ *Meadows v. Nesbit*, 12 Lea, 489; *People v. Hatch*, 33 Ill. 9.

⁵⁸ *People v. Solomon*, 46 Ill. 415; *People v. Mayor*, 51 Ill. 17; *People v. Hayt*, 66 N. Y. 606; *Cook v. Peacham*, 50 Vt. 231.

⁵⁹ *Kelly v. Wimberly*, 61 Miss. 548; *State v. Fortenberry*, 56 Miss. 286; *State v. McEntyre*, 3 Ired. (N. C.) 171; *Runion v. Latimer*, 6 Rich. 126.

⁶⁰ *Olmsted v. Dennis*, 77 N. Y. 378; *Bentley v. Phelps*, 27 Barb. 524.

⁶¹ *State v. Sneed*, 9 Baxt. 272; *People v. Hyde Park*, 117 Ill. 492; *Ex parte Fleming*, 4 Hill, 581.

⁶² *People v. O'Keefe*, 100 N. Y. 572.

⁶³ *U. S. v. Boutwell*, 3 MacArthur, (D. C.) 172; *People v. Dulaney*, 96 Ill. 503; *People v. Knickerbocker*, 114 Ill. 539; *Stanley v. Monnet*, 34 Kas. 703.

with discretion will thus not be compelled to reach any particular conclusion, he cannot refuse, in violation of his duty, to act at all, and if he does, *mandamus* may be resorted to to compel him to act,—to take whatever action is necessary as a preliminary to the exercise of his discretion, as to hear a claim, or entertain the petition, or pass upon the bond, or meet to confer, or pass upon the matter, as the particular case may require.”⁶⁴

In other words, it is the province of the courts only to see that the laws are complied with, that executive officers do not exceed their authority, either in manner or matter, but that they do that which is their official duty. There is in such judicial regulation no attempt to control the proper exercise of any executive action. The obligation and authority for such matters rests entirely with the executive officers; but this also implies that the executive officers shall in all cases restrict themselves to legal methods and steps. It implies further, that they shall do their full duty, for the sins of omission may be quite as harmful as excess of activity.

⁶⁴ Mechem, Pub. Off. 946, citing cases.

CHAPTER XIII

VITAL STATISTICS

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| § 385. An index of healthfulness. | § 390. The physician a witness. |
| § 386. National control? | § 391. Confidential relationships. |
| § 387. State organization. | § 392. Morbidity reports. |
| § 388. Completeness of returns. | § 393. Tentative reports. |
| § 389. Records as legal evidence. | |

§ 385. An index of healthfulness. Vital statistics have sometimes been called the bookkeeping of a health department. The death rate of a community is its index of health. Where a community has an unusually high death rate, it generally shows that there is something wrong in the health administration. This is particularly true if the excess rate is among the infectious diseases. Not only the death rate, but the amount of sickness in a community is an important indication as to the efficiency of the guardians of public health. The death rate of infants can not be accurately gauged unless there be given the statistics as to birth rate. In these considerations it is the collective statement of all similar individual records which is the basis of judgment. Individual records of birth, or of death, or of illness, have little independent value for the health department except in cases of infectious disease. To say that vital statistics is the bookkeeping of a health department, therefore, obscures the important fact that the records upon which such statistics

are based are of great value in entirely different spheres of governmental action.

§ 386. National control? As stated in Chapter IX, (§ 216-227.) it has been customary to leave all legislation relative to vital statistics to state governments, though there seems to be a good reason for at least suspecting that congress may have jurisdiction over the matter. Statistics are of value in proportion to their quality; and quality includes the idea of extent of territory, lack of omissions, and completeness and accuracy of individual reports. Such quality cannot be attained unless the control of the matter be centralized as much as possible. If one state adopts a certain classification of diseases, differing from that used by the others, it makes comparisons indefinite and unsatisfactory. In death reports, some states ask the last occupation of the deceased; others, as favored by the bureau of census, simply inquire as to his occupation. There is no object in giving the occupation unless that occupation may possibly have some bearing upon the cause of the illness. A stone-cutter, or a bookkeeper, is very liable to contract consumption; and not infrequently, having contracted the disease, the patient changes his occupation and seeks employment where he will be out-of-doors, as in farming, gardening, grocery or milk delivery. If the death report gives simply the general occupation as stone-cutter or bookkeeper, that helps to show the causative relation between the occupation and the disease. If, on the other hand, the last occupation only be given, and that be farming or gardening, it is difficult to see of what possible value this item may be. A report of tubercular illness, giving the occupation which

requires the handling of food material, as in the grocery or milk business, would, of course, be a valuable pointer for an efficient health officer. But in a death report the item would be misleading under the supposed circumstances, and practically valueless. In order to secure widest uniformity, therefore, if it be legal to leave the control of vital statistics to national legislation, that would be evidently desirable.

§ 387. State organization. In the state control of vital statistics, it is important that registration districts be made sufficiently small so that they may be administered with the greatest accuracy and the least hardship. If districts be too large, reports will be slow in getting into the local registration office; and the local registrar will be unable of his own knowledge to judge as to the completeness of the returns. The local registrars should be appointed by, and responsible to, the state registrar. Otherwise it will be impossible for the state registrar to guard the local efficiency. If local registrars be appointed by, and receive their pay from, municipalities, though the state registrar may be satisfied that they are negligent in the performance of their duty, unless there be a gross malfeasance in office, it will be practically impossible to enforce efficiency. The state registrar though nominally the head of the department, becomes practically only a clerk, collecting and combining the reports from different sections of his territory. Unfortunately, local self-government is so important in the minds of many citizens, that such surrender of local registration is frequently violently opposed.

§ 388. Completeness of returns. The law requiring reports should not permit a body to be removed from

the place of death, buried, cremated, or otherwise disposed of, without the issuance of a permit from the local registrar. Absolute completeness of the returns is essential for the value of mortuary statistics; and if it be permitted even to remove a body from a hospital where the patient died, it opens the way for neglect in making a final report. In this insistence upon the issuance of a permit by the registrar there is an efficient check upon this portion of the work. In birth certificates, on the other hand, no such check is possible, but the law should insist upon an immediate report to the registrar's office. The chief duty of making these reports must of necessity fall upon physicians; and physicians as a class do not appreciate the importance of this service. The consequence is that if too much time be allowed the report will be delayed always "for a more convenient time" until the physician forgets the matter entirely. Such reports should be rendered by the physician certainly within six days even though the report be incomplete.

There is another reason for insisting upon this early report of cases of birth. In certain sections, in the practice of certain physicians, and among certain classes of patients it becomes necessary for the health department to be on its guard against possible ophthalmia neonatorum, and puerperal septicæmia. If the report be not promptly made, serious harm may occur before proper precautions are taken. Clearly, this extra supervision on the part of the health department need not be in cases in which the physician is both careful and competent; but, in order to catch other cases it is necessary to insist upon the prompt report by all physicians. Death reports sometimes are

important guides for the health executive in that they point out the presence of infection previously unsuspected. It therefore is apparent that there is a decided advantage in having the registrar connected with the local health service. This does not preclude the appointment by, and responsibility to, the state registrar of vital statistics, especially if the local health officer be regarded as a portion of the state service. In practice it is probable that appointment by the state officer, rather than by local government, will not interfere with the appointment and retention of competent men selected from the immediate neighborhood and in harmony with local sentiment.

§ 389. **Records as legal evidence.** There is a possibility that connecting vital statistics with a health department may work for inefficiency. As previously intimated, the individual records of births and deaths have their chief value not as guides in sanitation, but as *evidence*. Records of death or copies thereof may be needed to prove heirship, title to property, right to life insurance; they may also be needed in criminal trials: for example, a man may be charged with bigamy, and the record of the death of his former wife in another state may be all that is necessary to acquit or convict him. Records of birth also are needed to prove heirship, title to property, citizenship, and such various rights as may be dependent upon age, such as the right to enter a profession, to vote at elections, to be married, to labor, or to attend school. These records may also be needed in criminal trials to prove the responsibility or irresponsibility of the participant in a crime. The record of a girl's birth showing that she has or has not reached the age of consent may

send a man to prison or may free him. This use of the certificates of birth and death as evidence is becoming more and more important every year. In the city of New York, the registrar's office is annually called upon for more than forty thousand certificates of birth to be used for various purposes. In some countries the copy of the birth certificate is absolutely requisite before a person may be legally married. Official certificates of birth and death are the only evidence satisfactory in probate proceedings in some nations. In consequence of our former carelessness in this matter, our citizens have sometimes been put to great inconvenience, and even financial loss. After the death of a father and of the physician who was in attendance at the birth of a girl in Indiana, a relative of the father died in Switzerland, leaving property to which this little Indiana girl was the heir. But the Swiss government demanded in proof of heirship official copies of birth and death reports. Such reports had not been made nor recorded, and in consequence the child was left in poverty, and the property went to more distant heirs. Because the physician in attendance was dead, it was impossible to get his testimony, and therefore it was impossible to get evidence satisfactory to the Swiss government. In another case in Indiana, a grandfather died, leaving his property to the granddaughter to be acquired when she was of age, pending which time it was to be in charge of her father, who did not have the reputation of being a good manager of funds. When the young lady claimed her property, her father denied her claim, stating that she lacked as yet two years of being of legal age. There was no official record of her birth; that page from the family

Bible had been torn out. No other item of record directly connected with the birth of the young lady was obtainable. At last one of the neighbors remembered that upon the same day that the little girl was born a valuable cow belonging to the grandfather had dropped a calf; and remembering the old gentleman's methodical care, search was made in his farm books, and the birth of the calf was there found recorded. Upon this record of the birth of a calf the court awarded the young lady her property. Such a round-about proof would not always be either possible to obtain, nor acceptable in judicial proceeding.

It is possible that because of the ordinary connection between the records in vital statistics and departments of health even judges may have been misled in decisions. Many of the items in a birth report, for example, have little or no value for the health administrator. The name and occupation of the child's father, as well as his age, are only of indirect interest, but in proof of heirship those records are of greatest importance. The certificate of birth must positively identify the child by sex and color. As soon as possible the name of the child should be recorded. The record should further give the ordinary residence of the mother and the place of the child's birth, the date of the birth, the name of the father, his nativity, occupation, and age, the mother's age, her maiden name, and nativity. It should also state the number of previous children which this mother has borne and how many of them may still be living. Not a single item can be omitted from such a report without weakening it as documentary evidence in probate proceedings. A state law in Ohio providing for registration of births

directed that the physician in attendance upon the birth of the child, must make such a full report as above indicated, and if any item be omitted without satisfactory explanation being given, the physician should be deemed guilty of a misdemeanor and punished accordingly. The supreme court held ¹ that the act was unconstitutional and void, being an unreasonable and arbitrary exercise of police power. As a use of police power it clearly would be arbitrary, but as legislation providing for the presentation and preservation of evidence it is neither unnecessary, unreasonable, nor arbitrary. This use of the certificate apparently did not occupy the attention of the court.

In order to appreciate the importance of birth and death records as evidence, let us suppose a case. John Doe and his wife came to Chicago from England, with their infant son George, only a few months old. Arriving in Chicago in 1866, both parents were soon fatally stricken by the cholera; their baby was taken by Richard Roe and wife, who had previously lost all of several children in infancy. Shortly thereafter another boy, whom we will call Charles, was born into the Roe family. This, we will suppose was their last child: and soon after his birth, George Doe died. Some forty years afterward Richard Roe and his wife also die, leaving considerable property. Whether honestly or with malice, in order to obtain this property, brothers of Richard Roe set up the claim that the man who claims to be the real son of Richard Roe was, in fact, George Doe, and not Charles Roe; and that the last child of the Roes died like his brothers and sisters in

¹ State v. Boone, 95 N. E. 924,
84 Ohio, 346.

infancy. The death of the Doe parents, leaving a helpless babe, would naturally impress neighbors; while the death of a babe would be less likely to attract their attention and memory. Their testimony would therefore aid the contestants. George Doe, having been born in England, was there properly recorded, so that it would be easy to prove from legal record that there was one George Doe. Neither birth nor death records having been recorded in Chicago in 1866, no such records would be available in this case; and we will presume that any records which the family might have had were destroyed by the fire of '71. The most important witness as to the birth of the Roe children and as to the deaths in question would be the physician. Who that physician might have been, Charles Roe would probably not know, and the probabilities also would be that he too was dead before his testimony was needed. The fact that his birth was not legally recorded would therefore work great injury upon Charles Roe, and possibly deprive him of his property. On the other hand, exactly the same conditions might enable this Roe heir to unjustly claim property in England, to which George Doe might have been entitled, had he lived.

§ 390. The physician a witness. When a physician accepts the care of a case he thereby enters into a contract with the parties interested to use reasonable and ordinary care in the treatment of the case committed to him.² It is particularly those who are unable to protect their own interests, for whom the state assumes responsibility. Now the care of a confinement case

² *Barnes v. Means*, 82 Ill. 379;
Quinn v. Donovan, 85 Ill. 194.

naturally includes making a legal record of the birth of the child, thus protecting its possible interests. This certainly is true in states providing for such legal registration by returns made by the attending physician. He is the most important witness in the case because, though disinterested, he is in the best position for knowing the facts. This is one of the reasons why a physician is employed in such cases, and the statement of a New York court, though made with a different point in view, is equally applicable here, when it held that the physician "will use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge to accomplish the purpose for which he is employed."³

Physicians have sometimes objected to making reports of births and deaths unless they be paid fees therefor, and such fees are sometimes provided by the state statute. In the absence of such statutes apparently there is no ground for such contention; and the provision for fees may interfere with securing such reports because, as in Illinois where the statute provides that the fee should be paid by the county, appropriations may not be made to cover the expense. Where the statute provides for such fees and no appropriation is made by the county board, whose duty it is, physicians may with more justice feel reluctant about making reports. However, the statute makes it the duty of the physician to report. The failure of the county board to make the appropriation does not in the least lessen this duty of the physician. If he be not

³ *Carpenter v. Blake*, 10 Hun, 358; see also *Kuhn v. Brownfield*, 34 W. Va. 252; *Cayford v. Wilbur*, 86 Main, 414; *McNevins v. Lowe*, 40 Ill. 209; *Craig v. Chambers*, 17 Ohio, 253.

paid, he is entitled to a recovery of fees earned, by proper legal action. It may very properly be held that the physician is paid for these reports when he receives his pay for attending the case. The fact that he may not have been paid by his patient does not decrease his responsibility in the matter. Mr. Justice Pryor, in a suit for malpractice, made this statement:⁴ "It appears that the plaintiff was a charity patient; that defendant was treating her gratuitously. But I charge you that this fact in no respect qualifies the liability of the defendant. Whether the patient be a pauper or a millionaire, whether he be treated gratuitously or for reward, the physician owes him precisely the same duty and the same degree of skill and care. He may decline to respond to the call of a patient unable to compensate him; but if he undertakes the treatment of such a patient, he cannot defeat a suit for malpractice, nor mitigate a recovery against him, upon the principle that the skill and care required of a physician are proportionate to his expectation of pecuniary recompense. Such a rule would be of the most mischievous consequence; would make the health and life of the indigent the sport of reckless experiment and cruel indifference. Even though, therefore, the defendant was not to be paid for his attendance, he was still bound in law to treat the plaintiff with the requisite skill and requisite care." In *McNevens v. Lowe*,⁵ it was also held that the fact that services are gratuitous in no respect qualifies or diminishes the degree of care due in the treatment of the case.

In making reports of sickness, birth, or death, for

⁴ *Becker v. Janiski*, 27 Abb. N. C. 45. ⁵ 40 Ill. 209.

legal record, the physician is simply giving his testimony for the benefit of society. As in the case of infectious diseases it may be for the protection of the community in general as a health measure. Certificates of birth and death are chiefly of value as evidence in various forms of legal procedure and for the interest of individual citizens, many of whom will be absolutely unknown by the physician. Such evidence very frequently is of great financial importance many years after the event recorded has taken place, and often after the death of the physician witness. It seems, therefore, best that a little space be given to the consideration of this most important duty on the part of physicians.

Dean Wigmore, in his "On Evidence," says,⁶ "For three hundred years it has been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. We may start in examining the various claims of exemption, with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional and are so many derogations from a positive general rule." Willes, J., in *Ex parte Fernandis*, says,⁷ "Every person in the kingdom, except the sovereign, may be called upon and is bound to give evidence to the best of his knowledge upon any question of fact, material and relevant to an issue in any of the Queen's courts, unless he can show some exception in his favor." Also Chief Justice Tilghman said:⁸ "The general welfare will be best promoted by

⁶ 2192.

⁸ Baird v. Cochran, 4 S. T. R.

⁷ 10 C. B. N. S. 339.

397, 400.

considering the disclosure of truth as a debt which every man owes to his neighbor, which he is bound to pay when called on, and which in his turn he is entitled to receive." Physicians are called upon by the statute to give their testimony as to the facts within their knowledge by making legal returns of vital statistics. This knowledge is not their private property, but it is the property of the community which the physician is simply holding in trust. In an early case in Wisconsin, Mr. Justice Smith made this statement:⁹ "In no just sense can the requisition upon a citizen of his attendance upon court to testify as a witness be considered as a taking of private property for public use within the meaning of the Constitution." In an Illinois case,¹⁰ under this general reasoning, the court forced execution of a new deed by the heir of the grantor to replace one which had been lost. Physicians are citizens and members of the community, and as such owe certain duties to the community. Again quoting Mr. Wigmore:¹¹ "In the first place, it may be a sacrifice of time and labor, and thus of ease, and of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-requited favor. It is a duty, not to be grudged or evaded. Whoever is impelled to evade or resent it, should retire from the society of ordinary civil communities, and become a hermit. He is not a desirable member of society. He who will live by society must let society live by him, when it requires to." And further, "From the point of view of society's *right* to our testimony it is to be remembered that the

⁹ West v. State, 1 Wisc. 209-233.

¹¹ Loc. Cit.

¹⁰ Bennett v. Walker, 23 Ill. 97.

demand comes, not from any one person or set of persons, but from the community as a whole—from justice as an institution, and from law and order as indispensable elements of civilized life.”

§ 391. Confidential relationships. In several states statutes have been passed making the relation between physician and patient confidential. How far such statutes may operate to prevent physicians from making the returns in vital statistics may be a matter of question. Apparently such a relationship would excuse physicians from making reports of infectious diseases, or possibly from making reports of deaths, unless the vital statistics statute expressly waived the operation of the general statute of privilege. The same might possibly be held relative to the returns of certain birth reports under peculiar circumstances. If our interpretation be correct that the statutory requirement of birth and death reports forms a part of the necessary care of the patient and his interests, it would seem probable that the general privilege should not operate to prevent making such reports; for the interests of the heirs of the deceased, or of a child born of a parturient woman, would legally be considered as the same as those of the principle in the case.

§ 392. Morbidity reports. Morbidity reports are of interest almost solely for health administration. (§ 410.) Industrial accidents have a close relationship with commercial activities, and though they may be of interest in health administration, they are more likely to be collected by other departments of government. General morbidity reports are extremely difficult to get under our plan of government, and as a rule they

are inaccurate. For many years the Michigan state board of health weekly received reports from correspondents in different parts of the state, giving lists of the diseases prevalent and their relative prominence. Of necessity, such reports must be made largely from the impression of the reporter. Nevertheless, even these imperfect records were of value as showing the relationship of individual diseases to atmospheric and other conditions. Such reports and records must depend upon the voluntary coöperation of those interested rather than upon statutory enactment.

In order that a health department may be able to take the necessary steps to protect the community from infectious disease it is necessary that it be given notice of an infection at the earliest possible moment. (§ § 32, 410.) It is therefore quite customary that statutes and ordinances require physicians in attendance upon such cases to make such reports. In this day of the telephone it would be best that such reports be made at once by telephonic communication, or that the physician call personally at the health department. There should also be a notice in writing as by post card unless the physician have evidence that a verbal notice has been properly received, recorded, and acted upon. Unless the report be made promptly it may not be received in time to be of service. A delay of eight days, by the attending physician in making a report of a case of diphtheria to the proper health officer is unreasonable.¹² It seems to us that a delay of twenty-four hours after making a diagnosis in such a case should be regarded as unreasonable, unless the means of communication be difficult.

¹² *People v. Brady*, 90 Mich. 459.

Statutes requiring reports of infectious diseases generally specify certain diseases and add a blanket provision, such as, "or other disease dangerous to public health." In such a statute it was held that the clause includes and covers cases of consumption, if consumption is in fact a disease dangerous to the public health.¹³ To make such a decision effective the health department would be required to show that consumption is dangerous to the public health. Now in one case the court might be satisfied with evidence showing that that individual case was dangerous in fact to the neighbors. In another case, the court might desire evidence that consumption generally is a menace to the community. In still another, the court might be satisfied with nothing less than proof that consumption is always a menace to the community, as is yellow fever. Consumptives may be considered as nuisances *in posse*. Those who have dealt much with the disease know that the danger to the community lies not so much in the seriousness of the illness as in the care and habits of the patient. Many of these cases are not themselves of serious menace to the community because of the intelligent care with which the patients destroy all their discharges. Even such cases should be reported to the health department in order that the office may be able to trace doubtful cases and make sure that necessary precautions are taken. The responsibility for guarding the community must rest with the health department; it cannot be shifted to private individuals. On the other hand, the health department should not be held responsible if it be not furnished

¹³ People v. Shurley, 131 Mich.

either the direct evidence or sufficient funds to employ adequate aid to make frequent inspections of every person in the community, and thus not miss a single case. Because of its lessened degree of infectiousness, it is not necessary that reports of such a disease as consumption be made so promptly as should be expected, for such diseases as diphtheria, scarlet fever, yellow fever, and other acute infections. Statutes should therefore stipulate a very short limit of time for reporting cases of acute infections, though they might allow a longer period for those less acute.

There is no common law obligation upon any class to report cases of infectious diseases to the officers of government. The duty, and the manner in which it must be executed must be specified either by statute, or under the statute by ordinance, rule, or regulation. This duty is generally imposed upon physicians, and an ordinance so providing was held valid in Connecticut. The inequality of burden of which the defendant complains is only in seeming. Persons offering their services to the public as healers of disease, and requiring pecuniary compensation therefor, thereby assert their ability to detect the presence of it when the great mass of the people can not. The people accede to the truth of their assertion, and in the matter of life surrender themselves to their keeping. Of course an ordinance in the interest of life must detect the presence of a fatal contagious disease at the earliest possible moment. Therefore, with impartial action it compels that member of the community who is the first to have sight and knowledge of it to give note of warning to others from whom its presence is hidden. It would be idle to require, indeed it would

be dangerous to accept, this service from those who can not see or do not know. The burden is made to rest upon every member of the only class which is in a condition to contribute anything to the accomplishment of the purpose of the ordinance.¹⁴ "This is his duty as a surgeon, and is imposed as an obligation by the ethics of the useful and honorable profession of which he is a member," as well as by the statute of the state of Iowa.¹⁵ In a case in the District of Columbia it was held that a physician in charge of a charitable dispensary at which contagious diseases were not treated, who, after examining a child brought to the hospital for treatment, diagnosed the case as one of diphtheria, refused to prescribe but suggested that the child be taken home and isolated and that a physician be called, was not obligated to report such case of sickness to a degree that he was punishable for neglecting so to do.¹⁶ This decision is unfortunate. The law of the District provides, 29 Stats. 635, Sec. 2, "Every physician attending on or called in to visit, or examining any case of contagious disease in the District of Columbia, shall immediately" isolate and report the case. It would seem that this wording would cover the case in question. It is just such cases which especially need to be detected. The patrons of dispensaries are very apt to keep infectious diseases hidden as long as possible, in order not to run a risk of exclusion from ordinary occupations. The fact that he was in charge of a dispensary should indicate that the

¹⁴ State v. Worden, 14 At. 801.

¹⁵ Johnson v. District of Colum-

¹⁶ Robinson v. Hamilton, 14 N. W. 202.

bia, 27 App. D. C. 259.

doctor was unusually well versed upon the legal requirements of such cases. While he was under no obligation as to treatment, it seems that he should have been held very strictly responsible for the prompt reporting of the case, in order that it might be properly watched. In the state of Missouri it was held that a christian scientist believing that disease is a delusion of the mind, and teaching the sick such theory is not a physician who can be subjected to the penalty for failing to report a contagious disease.¹⁷ In *State v. Boone*,¹⁸ although it was held that a vital statistics statute was unconstitutional because it was an unnecessary and arbitrary use of police power, in that it required the physician to secure and file certain information relative to births purely for statistical purposes, or for governmental record, the court expressed a doubt whether the statute could be considered unconstitutional simply because it failed to provide for compensation to the physician making the report.

§ 393. Tentative reports. It should be understood and even provided according to law, that cases of acute infections be promptly reported as soon as suspected without waiting for confirmation of a diagnosis. Two forms of reports should be provided—one tentative and the other positive. The very early reports in an explosive epidemic are of immense importance, and the very fact of receiving simultaneously a number of suspect notices will often in effect make the diagnosis sure. It is impossible, for example, for a physician to make a definite diagnosis of scarlet fever at his very first call, or of diphtheria, until after he

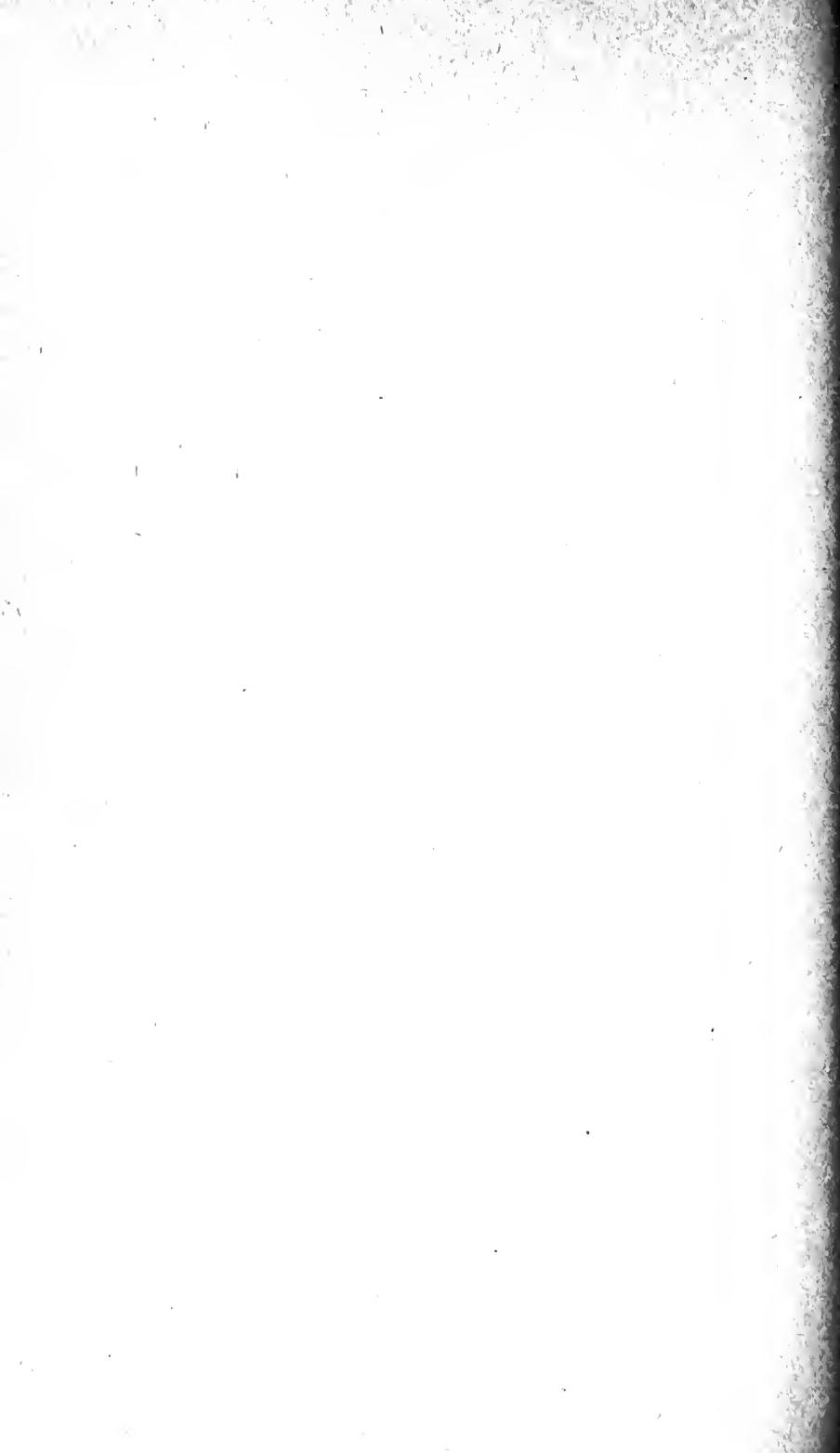
¹⁷ *Kansas City v. Baird*, 92 Mo. App. 204.

¹⁸ 84 Ohio, 346.

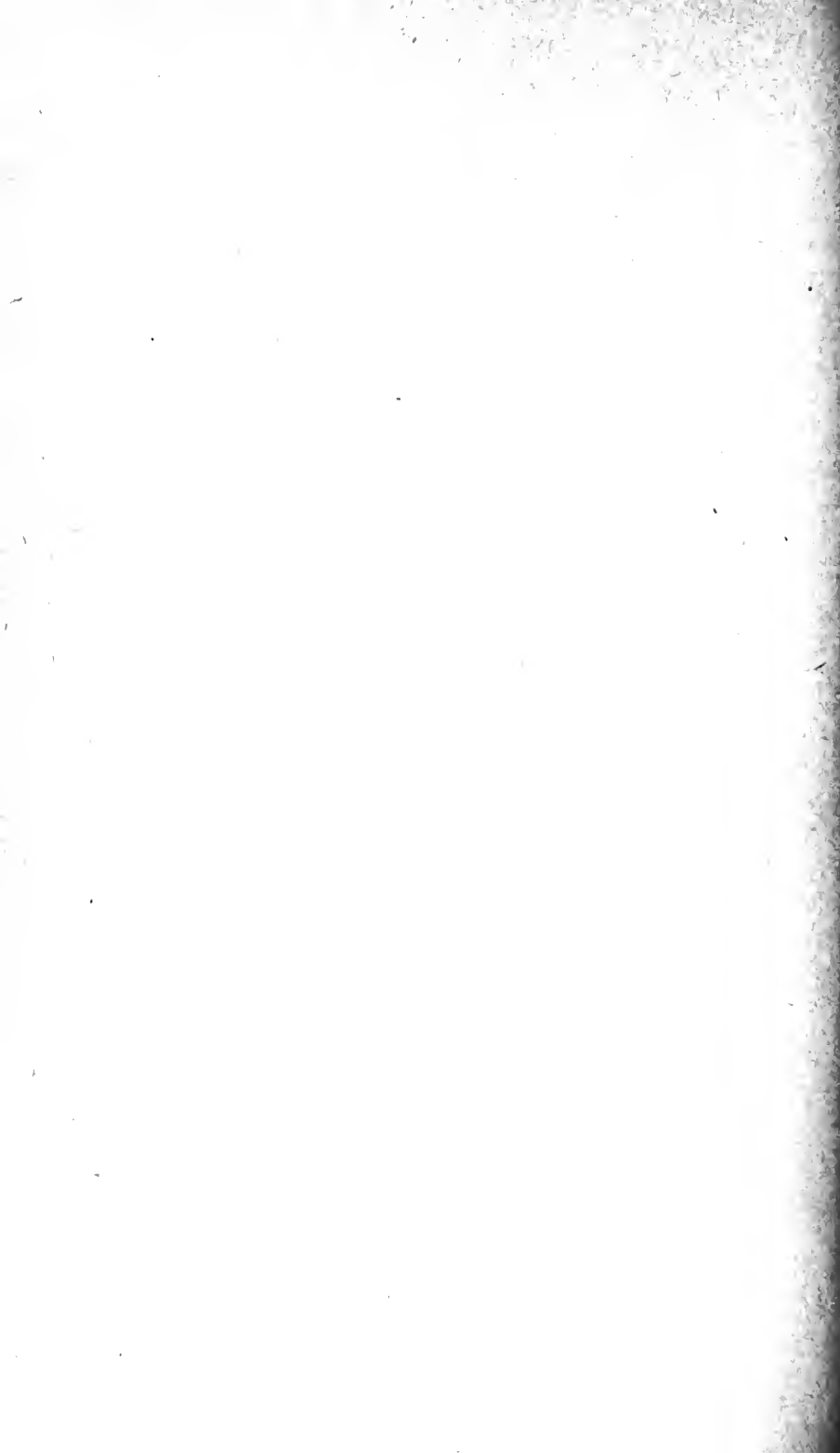
has had a bacterial examination of a throat smear. An explosive epidemic is generally due to a contamination of food or water supply: the morbid agents have generally been at work for a few days before a case is discovered. A delay of twenty-four hours in arousing the suspicion of the health department will probably result in a large increase in the number of cases.

By statutory enactment it is customary to impose the duty of making reports of births, deaths, and cases of infectious diseases, not only upon physicians, but in varying degree that duty devolves upon heads of families and others having responsibilities relative to the particular case. They may even make such demands upon keepers of boarding houses or lodging houses in which a case of infectious disease may be discovered. Since this duty of making reports is general, no fee or other compensation need necessarily be provided by the governmental body.¹⁹ Primarily in all these cases the duty of making the report falls upon the physician if one be employed. Other requisitions simply become effective in the failure of the physician to act.

¹⁹ *Sears v. Gallatin County*, 20 Mont. 462, 40 L. R. A. 405.



Part II
Special Subjects



PROLOGUE

§ 400. Heretofore we have discussed general principles pertaining to the governmental restraint upon the spread of disease, and the prevention of mortality. In the remainder of the book attention will be devoted to special subjects, with notations upon judicial decisions. Because of the fact that the science of prevention really may be said to have begun in 1898, it very naturally follows that in these special subjects many decisions will be found under the old regime which would hardly be applicable under our revised ideas, but those decisions still stand of record, and divergence from the principles therein laid down must be based upon definite facts of science. Not only has the science changed but the industrial and commercial conditions have changed also. That which would not have been specially dangerous a hundred years ago, even according to present scientific knowledge, would now be potent for harm, because of the sociologic, industrial, and commercial changes. On the contrary, things which a hundred years ago were regarded with dread, our advanced science has taught us are more annoyances than dangers. The odor of sewer gas is offensive, and the gas itself was supposed to be very dangerous, but more recent critical examinations and investigations have tended to show that in itself the gas is not dangerous.

It is therefore hoped that Part I may remain a safe guide for the future, though it is expected that much of Part II will sooner or later need to be revised; but the changes will, and should, depend largely upon advanced legislation.

It may not be inappropriate here to glance at how the change in methods has been brought about, and at the commercial consequences. Dr. Findlay at Havana had long been maintaining that yellow fever was spread by mosquitoes. When the United States found that it had Cuba on its hands it became important, if possible, to determine the cause of that disease which was always present around Havana, and which was spread, from time to time, to our shores. Surgeon General Sternberg, of the United States Army, therefore, detailed four surgeons to make the investigation. They made the study, and to prove the correctness of the hypothesis Surgeon Carroll first offered himself as a subject to be bitten by an infected insect. He had the yellow fever, and it left his heart in such a diseased condition that he was never again strong. Lazear was bitten and died. Major Reid, the chairman of the commission lived only a few years, having been seriously impaired in health through his sojourn in that sickly clime. Agramonte alone came out from the siege unharmed. As the result of the discoveries then made, with the studies by Major Ross of the British Army relative to malaria, the tropics are no longer "the white man's grave." Ports which were formerly regarded as pestholes are now the seats for immense commerce. The digging of the Panama Canal was made possible only through these investigations. The commercial profits for this country alone as the

result of the studies have been far greater already than the entire cost of the army for the whole period of our national history. And what reward has been given by a grateful country to these noble martyrs of science? Carroll, weak and sick, was no longer able to do his full duty as an army surgeon. He tried to support himself in making further investigations, but before he died he was permitted by his noble country to pawn his microscope—his means of support—in order to get bread to keep himself and his family from starving. He was no beggar, but he suffered, and died in silent poverty, leaving his home heavily mortgaged, and a family to be supported on a meagre pension. It was brother physicians, whose possible income he had reduced by showing how to eliminate sickness (not the commercial kings who had profited by his sacrifice) who paid off the mortgage and provided for the education of his children. Carroll, who enlisted as a common soldier, re-enlisted as a hospital steward, pursued his studies, graduated in medicine while still enlisted, and won his commission, gave his life literally to save others: yet those who have profited financially by the work which resulted in his untimely death have done nothing to show their appreciation, or to encourage further advances. They have permitted the patent medicine harpies to block all efforts towards obtaining a national health service equal to the dignity of the nation.

While a few commercial kings have endowed research institutions, it is still true that the commercial world is constantly opposing sanitary advancement. They are profiting by the benefits received, but are unwilling to share even a very small percentage of

those profits with the noble men who have devoted both time and strength to the advances. It is time that the business men see to it that trained men are encouraged to seek official positions in the health service of every part of the country, and that the service be made a vocation, rather than a dilettanti avocation for those who hold the offices. As a commercial proposition (for that is the only language which some Americans can understand) it will pay the mercantile world to assist in advancing scientific health administration, by aiding in legislation, and by securing the best men possible for the service. The open way for advances is obviously through intelligent legislation. Science is universal; it knows no "schools," and those who honestly block advances through fear of school domination, are but the dupes of sectarian schemers. An obstacle to progress is found in the altruistic efforts of misguided enthusiasts who are not thoroughly educated, and perceiving some error which should be corrected, hasten with reform, or misnamed "progressive" legislation. If sterilization of defectives is to be a real advance in governmental methods, it must be based upon minute examination of the problem, by those who are scientifically competent to weigh all evidence. The legislation for the prevention of industrial disease must be the product of close analysis of conditions rather than the emotional reaction from a few observations.

For reasons such as these it must occur that if knowledge of science and familiarity with legal methods are united in the necessary legislation of the future, the subjects in this second part will show a continued advance to a higher level. If, on the con-

trary, legislation rests upon emotional altruism alone, or upon biologic investigations without recognition of legality of methods under our system, then these special subjects must reflect a degree of uncertainty and confusion. Before a change shall be attempted it is necessary to be certain as to what the present condition may be, and the relationship of present science to legal status. Next, the point aimed at must be determined. Finally (and this is all important though often ignored), the bearing of proposed legislation upon other matters must be considered, and the product of other forces upon the change must be measured.

CHAPTER XIV

QUARANTINE AND ALLIED SUBJECTS.

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| § 401. Origin of quarantine. | § 410. Morbidity reports. |
| § 402. Meaning of quarantine. | § 411. Inspection. |
| § 403. Mechanics of quarantine. | § 412. Removal of cases. |
| § 404. Quarantine is a defensive procedure. | § 413. Pest houses. |
| § 405. Quarantine does not depend upon statute. | § 414. Disinfection. |
| § 406. What diseases are quarantinable? | § 415. Expense of quarantine. |
| § 407. Diagnosis. | § 416. Vaccination. |
| § 408. Quarantine powers, nation, state, municipality. | § 417. Control of insects and other carriers. |
| § 409. Quarantine <i>versus</i> Commerce. | § 418. Personal liability for communicating disease. |

§ 401. Origin of quarantine. The word "quarantine" was originally used to designate the forty days of Lent. Then it was applied in English law to the forty days after the death of her husband, during which a widow had the privilege of remaining in her husband's mansion house, and during which her dower was to be assigned. Next we find the term employed with reference to the forty days during which a vessel might be detained without intercourse with the shore, after arrival from an infected port. When it was found that forty days isolation was not invariably necessary the original signification was dropped, and the term denoted simply the isolation of the vessel. The same idea governed the use of the term in the

protection of land frontiers, and the isolation of persons or houses in the presence of infectious diseases. It is interesting to note that during the earlier years in Europe syphilis was a subject for land quarantine.

§ 402. Meaning of quarantine. Essentially quarantine is the method used to confine disease within the person in whom it is detected, or to prevent the healthy person from contracting the infection. With this definition it is apparent that true quarantine must include something more today than the separation of the sick from the well. The diseased person may be confined within a certain building, and thus the disease germs be also confined; but the mere confinement of the individual will not be effective quarantine if the germs be permitted to escape. So far as known today, the disease germs are not able to travel through the air unaided. They are carried by insects, by lower animals, in food, or on the hands of careless attendants. Effective quarantine must therefore be not so much the isolation of the person as the prevention of the communication of germs from the sick to the well. Thus in the case of yellow fever or malaria, effective quarantine may be maintained even in spite of permitting free access of the friends to the sick room, and the free movements of those friends among outsiders. On the other hand, in the case of typhoid fever effective quarantine must include very strict restrictions upon the movements of nurses and others who in any way come in contact with the sick person or his discharges. In the case of malaria or yellow fever, effective quarantine may be maintained even though little care be taken of the evacuations, either from the stomach by emesis, from the bladder, or from the bowels. In

the case of typhoid fever effective quarantine must include the destruction of the bacilli in all of these, and in cloths used to wipe the mouth of the patient. The quarantine of yellow fever or malaria consists in preventing any mosquito, capable of conveying the disease, from coming in contact with an individual. A town may be effectually quarantined against the yellow fever by preventing the breeding or importation of *stegomyia* mosquitoes. This is done by nature in many localities, or sections of the country. Since such absolute protection is uncertain, even in naturally protected locations one would be justified in screening all imported cases—imported, because in such a community no case could occur except by importation. There would be no violation of rational quarantine if the nurse of a yellow fever patient should spend a portion of her time in the milk business. Such an activity on the part of the nurse of a typhoid patient would be a most serious infraction of quarantine regulations. Quarantine, therefore, is not a definite and uniform measure, but it must vary according to the subject.

A vessel which has simply been prohibited from landing passengers is not in quarantine. Quarantine is “a term of surveillance, under prescribed regulations, to be performed and finished with a result.”¹

§ 403. **Mechanics of quarantine.** Under the old ideas relative to the spread of infectious diseases it was customary to build a fence around the infested house, and station a guard to prevent persons from passing the bounds. It is now recognized that such a method is unnecessary and inefficient. For yellow

¹ Gibson v. Steamer Madras, 5 H. 109.

fever or malaria, in the place of the fence, we now use screens at the windows and doors, and netting over the bed of the patient. Effective quarantine for the plague does not so strongly require such measures, as it demands that the building be made rat-proof, and that the house be freed from the presence of all rodents as well as fleas and other insects capable of carrying the bacillus. The mechanics of quarantine must therefore be variable, and determined by the character of the infection to be restrained.

A common resource in the administration of health departments is to make known the presence of an infectious disease by placarding the premises upon which it is, or by displaying flags. Such marks should be distinctive, giving notice to others who might be endangered, but the former fear inspiring signals are no longer justified by science. It is presumed that the officer making use of such placards will have due regard to the rights of others. By the general authority to take such measures as are deemed necessary for the safety of the inhabitants, it is not intended to confer unlimited authority on the board to control persons and property at its discretion.² When placards are used they should only be removed on the order of the proper officer. However, when the authorities wait to placard a house until after the mistake in diagnosis has been discovered by the reporting physician, their action is not justified, according to the Tennessee court, and a person is not subject to punishment for destroying a placard upon his premises after he has warned the authorities that no case of communicable

² *Brown v. Murdock*, 140 Mass.

disease exists in his house.³ As an abstract proposition this decision does not seem to be good public health law, though in the specific instance the decision was just. The fact is that the decision as to whether or not the original report was well founded should rest with the health office, and if the placard be used it should only be removed when the health office becomes convinced that there is no further danger. In view of the policy which requires communities to take at their own expense the necessary measures for the preservation of the public health within their limits, and under their general powers, a town is liable for the payment of the services of guards employed by a health officer to keep a quarantine effective.⁴

§ 404. Quarantine is a defensive procedure. It will be noted from the foregoing that quarantine is a method of defense against the inroads of disease. But defense is possible in some cases without any restrictions upon the person of the patient. Vaccination is a safe, and practically sure defense of the person so treated against small-pox. If the entire community be successfully vaccinated there would be no need for restricting the freedom of a small-pox patient. Vaccination might therefore be considered as a species of quarantine. So are antityphoid inoculations. A less effective measure is illustrated by the use of the spray of the lactic acid bacilli as a protection against diphtheria. It is less effective simply because in its use we cannot be sure that it reaches every possible hiding place of the bacteria of the disease. The use of diph-

³ *Memphis v. Smythe*, 58 S. W. Atl. 571. But see *New Decatur v. Berry*, 90 Ala. 432.

⁴ *Keefe v. Union*, (Conn.) 56

theria antitoxin, on the other hand, is a protection of the individual against the disease, but it is not a public health measure, because it is possible that, even without producing evidence of illness in the person, the diphtheria bacilli may still be able to grow and multiply, and the person will therefore be a source of danger in the community. Effective quarantine against diphtheria should therefore include some such measure as the use of the lactic spray upon all persons who are coming in contact with the patient. Since these bacilli may be expelled into the air by the coughing of the patient, or perhaps in his ordinary breathing, and thus gain entrance to the nose or throat of attendants, "contact" in the case of diphtheria must include all who have come into the room with the patient.

Since the essential feature of quarantine is protection against the spread of infectious diseases, it follows that it is quite proper, under this heading, to consider also such measures as tend to the destruction, or prevention, of the carriers of infection. This includes the draining or oiling of places in which mosquitoes are bred; the prevention of the breeding of flies; the destruction of rats and other rodents capable of conveying the bacillus pestis, even the supervision of food supplies, such as milk, which often act as carriers of disease; and the protection of the purity of water supplies. To show how broad a field these considerations may be made to cover, it is interesting to note that the Rocky Mountain spotted fever is communicated by a species of tick. It has been found that one effective means of eradicating the tick is by putting sheep to graze upon the land.⁵

⁵ Public Health Reports, Vol. XXVIII, No. 32, Aug. 8, 1913.

§ 405. **Quarantine does not depend upon statute.** As there is no department in government in which the power for good or evil is greater than that which guards the health of the people, so there is no governmental activity in which more depends upon the intelligent judgment of the officer than in matters pertaining to quarantine. Each case must be considered by itself, and without delay. On the one hand, the officer must protect the community, and by instant action; on the other, the interests of individuals must not be unnecessarily restrained. From the nature of the case this judgment cannot depend entirely upon knowledge of enacted statutes. The statutes cannot well be sufficiently exact to answer all of the questions. At their best, statutes are but the crystallization of accepted practice and information. In many cases the practice must antedate the enactment.

The validity of quarantine regulations made by state health authorities is a question for the state courts to decide.⁶ Where a special law authorizes a city to take, in case of epidemic disease, such measures as are in the opinion of the authorities demanded by the public health, the city board of health is not bound by the provisions in the general statutes regulating the establishment of quarantine, and were justified in requiring the whole of a double frame house to be quarantined when small-pox occurred in one-half of it.⁷ The orders of a board of health must be reasonable. An order of the State Board of Health of Mississippi prohibiting all persons from getting off from trains or boats at any point in the state, predi-

⁶ Louisiana v. Texas, 176 U. S. 1,

⁷ Highland v. Schulte, (Mich.)

82 N. W. 62.

cated on the fact that there is yellow fever at several places along the coast, and reported suspected cases at various points in the state, is unreasonable and void.⁸ Regulations with respect to quarantine against yellow fever, providing for an exception in the case of "vessels bound for ports in the United States north of the southern boundary of Maryland, with good sanitary condition and history, having had no sickness on board at ports of departure, en route, or on arrival, provided they have been five days from last infected or suspected port," were held not to constitute a discrimination within the meaning of the statute.⁹ The orders of boards of health are not like general laws, which all may be supposed to know. To obtain a conviction of a person charged with going upon the street in violation of a quarantine order, it must be shown that the accused had previous knowledge of the order.¹⁰ A regulation, prohibiting Asiatic persons from leaving the city without first submitting to inoculation with a preventive serum, in view of the presence of the bubonic plague, is illegal and void, as being an unconstitutional invasion of personal rights. No evidence was submitted to show that Mongolians were more subject to the disease than other persons.¹¹

While it is customary to provide by statute that the board of health, or sanitary officers shall quarantine communicable diseases, that power is implied by their appointment. It was primarily such duties which caused health departments to be organized. "The power to remove and quarantine persons who have

⁸ *Wilson v. Alabama, G. S. Ry. Co.*, 28 So. 567.

⁹ 1896, 21 Op. Atty. Gen. 446.

¹⁰ *State v. Butts*, 9 L. R. A. 725.

¹¹ *Wong Wai v. Williamson*, 103 Fed. 1.

been infected with communicable diseases, or exposed to contagion, need not, however, be conferred on sanitary authorities in express terms, but may be implied from the general power to preserve the public health, or to guard against the introduction or spread of contagious diseases. * * * Under powers similar to those which authorize the disinfection not only of property that has actually been exposed to contagion, but of all articles liable to convey infection, especially where it is impossible to ascertain their history or the place from which they originally came. * * * It is no defense to an order for disinfection that the owner has already caused the property to be disinfected on his own account, where the authorities regard such previous disinfection inadequate.”¹² It is the duty of the health officer to prevent the spread of an infection by such quarantine as is reasonable. Though quarantine may be independent of legislation, the directions of existing statutes must be strictly observed. Thus the laws of 1894 in Mississippi provided that the presence of three members of the executive committee of the State Board of Health is necessary to make a valid quarantine and under that restriction two members could not act.¹³ Authority granted by the statutes to a board relative to the care and responsibilities in an epidemic can not by the board be delegated to a health officer and so create in such officer any right or authority not previously existing.¹⁴

In an epidemic of small-pox in Kentucky, acting under the suggestions of the State Board of Health,

¹² 21 Cyc. 394, 395.

¹⁴ Taylor v. Adair Co., 119 Ky.

¹³ Wilson v. Alabama G. S. R. 374; Hickman v. McMorris, 149 Ky. 1, 147 S. W. 768.

another physician was employed by the County Board of Health to take charge of the cases. The county contested his claim for compensation, basing its objection upon the fact that there was a regular health officer, whose duty it was to take charge of such epidemics; and alleging that neither the county board of health, nor the fiscal court had authority thus to employ another physician. The court of appeals said:¹⁵ "It is clear that the ordinary duties of the county health officer, for which he is paid a yearly salary, are largely executive and supervisory in seeing that the rules and regulations provided by law, and the rules and regulations of the state board of health are enforced. As was well said by the chancellor, it is his duty under the statute to take general superintendence of all contagious diseases and to institute quarantine and fumigate premises, and to carry out these general purposes, the county board of health has power, under the law, to employ such other physicians and nurses, guards, and attendants as may be necessary to administer treatment and stamp out the disease." Such employment is not a delegation of authority, and in the case in question it was shown that the health officer retained his supervision of the case.

Rules, regulations, and orders, to be effective should be in writing, or printed, and the rules or ordinances of a board should be duly passed at a meeting of the board, and properly recorded in the meetings of the board. Unless they be thus recorded they can be of no effect except in emergency. Furthermore, to be fully effective they should be so published that all

¹⁵ Breckenridge County v. McDonald, 150 S. W. 549.

interested may have opportunity to learn what the rules may be. Otherwise the "due process" would be violated, in that the victim has no sufficient notice and opportunity to be heard.¹⁶

Under the statutes of North Dakota it is provided that meetings of local boards of health shall be held after three days notice. It is also provided that when it shall come to the knowledge of the board that there is a case of infectious or contagious disease within its jurisdiction, the board shall "immediately" examine into the facts of the case "and, if such disease appears to be of the character herein specified, such board shall adopt such quarantine and sanitary measures as in its judgment tend to prevent the spread of such disease, and may immediately cause any person infected with such disease to be removed to a separate house," etc. A physician having reported to the clerk of the board that the children and hired man in a certain family were ill with scarlet fever, the clerk called up the other members of the township board of health by telephone and discussed the situation. After such discussion the president of the board called up the clerk of the board by telephone and directed him to post a quarantine notice upon the infected farm. The validity of this quarantine was attacked by the owner of the farm on the ground that three days notice was not given before the action of the board. The supreme court of the state held ^{16a} that the provision relative to the three days notice did not apply to such an emergency as the establishment of quarantine. The fact that the statute provided that examination should be

¹⁶ *People v. Tait*, 103 N. E. R. 750.

^{16a} *Plymouth Township v. Klug*, 145 N. W. 130.

“immediate,” and that removal was authorized immediately indicated that it was the duty of the board to thus act, and it was therefore the duty of the clerk to thus act without waiting for the formality of a three days notice of meeting.

§ 406. **What diseases are quarantinable?** Generally speaking, all diseases which are of such a nature that they may be restrained by quarantine are subject to it. It is well to have such diseases distinctly specified in the statutes. Such a provision relieves the executive officers of responsibility in the matter of decision, and may possibly avoid annoying legal delays in the course of administration—delays, which may be fatal to efficiency. Still, under the general authority other diseases than those specified may be quarantined, and they often are so controlled. It must be remembered, however, that in such cases the health officer assumes a personal liability. It devolves upon him, in case of legal contest, to prove to the court that such quarantine is necessary for the protection of the public health. “It follows that boards of health may not deprive any person of his property or his liberty, unless the deprivation is made to appear, by due inquiry, to be reasonably necessary to the public health.”¹⁷ It is not enough that the health official shall determine this necessity for himself. If he deprive a person of his property or liberty unnecessarily the officer in that act is not regarded as an officer, but as a private wrong-doer.¹⁸ Under the general powers to quarantine contagious diseases the legislature grants authority to so restrict those diseases which are thus recognized. An attempt

¹⁷ Kirk v. Wyman, 65 S. E. R. (S. C.) 387.

¹⁸ Wyman, Ad. Law, 15.

to extend the operation of the law to diseases of questionable character would in effect be an act of legislation, and without authority. If the health officer attempts to quarantine a disease which is truly infectious, though unspecified by the statute, and he be haled into court, he must prove to the court that the disease in question is really covered by the general term. For this proof he should not depend merely upon the statement of physicians that in their opinion the disease is really infectious. The other side will doubtless be able to obtain contrary "evidence" from prominent members of the medical profession. What the court desires is not opinions but facts. Those facts the health officer should have in convincing form. If the question be relative to the confinement of a case of malarial fever the officer should have upon a slide samples of the blood of the patient showing the specific protozoal cause. That slide properly submitted as evidence, with other slides from different sources, may properly be shown to the "expert" witnesses before the court, and be a basis for questions which will go far towards distinguishing fact from theory. Unfortunately, because the specific germs are not fully determined, such a basis of evidence is not always possible; but at least the reasons for considering the disease dangerous to public health can be clearly and convincingly stated. If the court cannot be thus convinced the probability is that the disease should not be quarantined. It is not sufficient to show that the disease is caused by a specific germ, and that that germ when introduced into the body of a healthy person will produce the disease. The means must be demonstrated by which the germ is transported, and the possibility

for the spread of the disease must be explained. If the probability of such spread is very small it is doubtful if quarantine would be upheld. It must be shown that the deprivation of liberty is necessary. In determining the validity of the acts of boards of health the courts are disposed to be very liberal in their construction of authority considering the public good to be accomplished.¹⁹ In the absence of a statute the quarantine powers of a board of health are conceded,²⁰ but they must not unreasonably interfere with the liberty, property, and business of the citizens.²¹ Although a liberal construction should be given to the rules and regulations adopted by boards of health,²² whether such regulations are reasonable, impartial, and consistent with the state policy, is a question for the court to decide.²³ State policy is expressed sometimes in enactment and if so the wording of the enactment is binding. The law as it is worded must govern. So, where the state law provided that quarantine was to be established by a local board of health when a written notice was given by a physician, it was held that in the absence of such written notice quarantine might not be so established.²⁴ If the statute name the diseases for which quarantine may be established, quarantine of other diseases might be of doubtful legal authority.

§ 407. Diagnosis. Properly speaking, diagnosis or confirmation of diagnosis is within the discretion and authority of the health official. An infectious disease

¹⁹ Perth Amboy v. Smith, 19 N. J. L. 52; Hengehold v. Covington, 108 Ky. 752.

²⁰ Iowa v. Kirby, 120 Iowa 26.

²¹ Commonwealth v. Patch, 97 Mass. 221.

²² Wong Wai v. Williamson, (C. C.) 103 Fed. 1.

²³ State v. Speyer, 67 Vt. 502.

²⁴ State v. Kirby, 120 Iowa, 26.

is a nuisance. "The determination that a thing is a nuisance is final under the Pennsylvania statute, and in a suit to collect expenses, or abate the nuisance, the defendants could not offer evidence to show that there was no nuisance."²⁵ Speaking of the action of a health officer, a court said: "If there was any case for his judgment, or any fact, or appearance, or symptom, as to which a question of small-pox could arise, his determination was final as to the legality or propriety of removal."²⁶ In other words, the opinion in *Brown v. Purdy* practically affirms that the diagnosis of the health officer being within his discretion is law; and it is not subject to judicial review except in extreme cases. This has been more definitely stated in other cases. In Hawaii, "upon *habeas corpus* questioning the legality of the detention of a leper suspect, the only issue is the regularity of the proceedings under the statute, and the existence or non-existence of leprosy will not be determined collaterally, as this would enable every person regularly pronounced a leper to have the decision of the board of examining physicians reviewed by the court, which is not the tribunal designated by the legislature."²⁷ In this case the court further held that a leper suspect in custody, whether arrested under a warrant, or voluntarily surrendered, having selected a physician to make an examination under the statute, and having been forced without legal cause to select another physician, cannot be held to have forfeited or waived his rights, and proceedings with the second physician are void. Neither are county boards of supervisors in Michigan authorized

²⁵ *Kennedy v. Board of Health*, 2 Pa. 366.

²⁶ *Brown v. Purdy*, 8 N. Y. 143.

²⁷ *In re Kaiahua*, 19 H. 218.

to substitute their judgment in place of the board of health as to whether a person has a dangerous communicable disease.²⁸ It is the official duty of a health officer to make a diagnosis, and he is not entitled to compensation when called in consultation to make a diagnosis in a case of disease dangerous to the public health.²⁹ In the light of present knowledge as to infectious diseases, a positive diagnosis can only be made in some cases by means of bacteriologic examinations. These examinations require laboratory facilities, and not infrequently they occupy much time. Best results are obtained when the bacteriologist devotes most of his time to the laboratory. It is therefore becoming more common to appoint municipal bacteriologists. Ordinances, therefore, providing for bacteriologic investigation and research have a just and reasonable, not to say necessary, relation to the health and safety of communities. By the state statute in Alabama municipal corporations are given power to adopt ordinances not inconsistent with the laws of the state, to carry into effect or discharge the powers and duties conferred, and to provide for the safety, health, prosperity, morals, order, comfort, and convenience of the inhabitants of the municipality. The court found in this sufficient warrant for the municipal ordinance providing for the appointment of a city bacteriologist; and it did not find any conflict between this ordinance and the state health and quarantine law. It regarded the bacteriologist as an aid to the health officer, and not as a rival. The ordinance was therefore sustained.³⁰ Large discretion is vested in state and

²⁸ Thomas v. Ingham Supervisors, 142 Mich. 319.

³⁰ State *ex rel.* Sholl v. Duncan, 50 So. 265.

²⁹ Browne v. Livingston Co., 85 N. W. 745.

municipal authorities; but their action is not final. They may not arbitrarily interfere with private business, nor impose unnecessary and unusual restrictions; but the court will not ordinarily undertake to review the finding of the proper officers that the disease exists, and that the quarantine is necessary.³¹ The diagnosis of the health officer may properly be brought before the court for a determination of the fact whether it be made really under discretion, or arbitrarily. Any action which is unnecessarily severe must be considered as arbitrary. If property be seized and destroyed summarily, that is, without giving the owner an opportunity to prove whether or not it be dangerous, the court might very likely declare the action arbitrary. Thus, where a horse was ordered killed by a board of health for glanders, the court held the members of the board liable to the owner of the horse for its value, evidence having been presented that the horse did not have that disease.³²

§ 408. Quarantine powers, nation, state, municipality. Although the general public health powers of the nation, state, and city were discussed in Chapter IX, it seems best here to recapitulate somewhat as to matters pertaining to quarantine. We may epitomize by saying that the nation has authority over quarantine matters between states, or between any state and a foreign country. The state has all authority over quarantine within its limits, and the authority of the city, village, or county is subject to state authority. The inspection of maritime quarantines, state and local, as well as national, may be the proper subject of Treasury regula-

³¹ *Jew Ho v. Williamson*, 103 Fed. 10, relative to plague.

³² *Miller v. Horton*, 152 Mass. 540.

tions.³³ "While it is true that the power vested in Congress to regulate commerce among the states is a power complete in itself, acknowledging no limits other than those prescribed in the Constitution, and that where the action of the states in the exercise of their reserved power comes 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. Even if Congress had remained silent on the subject, it would not have followed that the exercise of the police power in this regulation, although necessarily operating on interstate commerce, would therefore be invalid. Although, from the nature and subject of the power to regulate commerce, it must be ordinarily exercised by the national government exclusively, this has not been held to be so where in relation to the particular subject matter different rules might be suitable in different localities. At the same time, Congress could by affirmative act displace the local laws, substitute laws of its own, and thus correct any unjustifiable and oppressive exercise of power by state legislation."³⁴ The larger the United States becomes and the more that it involves sections of the world widely different as to climate and population, the less likely is it to attempt to displace state laws relative to the direct restriction of infectious diseases. Still it must be remembered that Congress has that power,

³³ 20 Op. Atty. Gen. (1893) 645.

³⁴ Louisiana v. Texas, 176 U. S.

and because it has that power the federal courts also have power to check the unjustified attempts of states, in the interest of health, to interfere with interstate or foreign commerce. In the federal quarantine regulation authorizing the placing in quarantine of vessels arriving between May 1 and November 1 from "a tropical American port," the word "American" is to be construed as meaning the continent of America, or the Western Hemisphere, and not the United States.³⁵ The "port of departure" referred to in the act of Congress of 1893 at which a merchant ship bound for the United States must procure a bill of health from the consul or consular officer of the United States, is the port of clearance, and obtaining such bill of health at the last port at which a vessel stops before reaching the United States is not sufficient, unless that is the port of clearance.³⁶ But, the fullest respect is required by the federal laws from public and private vessels for local quarantine regulations adopted under the provisions of state laws.³⁷

The detention and disinfection of immigrants by order of a state board of health with the purpose of prevention of disease is not a regulation of foreign commerce by a state, within the measure of constitutional prohibitions. The right of the several states to establish and enforce quarantine regulations is not limited by any existing treaty. In enforcing its quarantine regulations a state may detain immigrants from noninfected places who have traveled with others from infected places. The enforcement of the quarantine regulations of a state against immigrants cannot be

³⁵ *Gow v. Gans S. S. Line*, 174 Fed. 215.

³⁶ *The Dago*, 61 Fed. 986.

³⁷ *The Dago*, *loc cit.*

restrained by injunction in a federal court, although the persons detained have been examined and passed by federal health officers. The costs and charges of quarantine inspection under state laws may be lawfully imposed upon the carrier which brings the suspected passengers into the country, as being incident to the business in which it is engaged.³⁸ In spite of the above citation, it is not probable that today such a decision would be given, for example, with reference to passengers from a yellow fever district seeking admission to a state like North Dakota. Such detention and disinfection would there be unnecessary and arbitrary, being based upon an old prejudice, rather than upon science. There is no evidence that the disease is carried by the fomites, such as the clothing, so that disinfection would be unjustifiable; and it is not likely that the stegomyia could be found in sufficient quantities in the Dakotas to make any danger to the community, were cases of yellow fever actually planted in their midst. While, therefore, the federal authority in such matters has never in recent years been questioned, such power has been allowed to remain in abeyance, doubtless in view of the different requirements of different climates and localities, and of the difficulty of framing a general law upon the subject, and Congress has elected to let the several states regulate the matter of protecting the public health as to themselves seemed best.³⁹ The authority of the states to enact such laws, even though interfering with interstate or foreign commerce, is beyond question, but it cannot be made to cover discriminations and arbitrary enact-

³⁸ Minn., St. Paul & S. S. M. Ry. Co. v. Milner, 57 Fed. 276.

³⁹ Bartlett v. Lockwood, 160 U. S. 361.

ments.⁴⁰ So a rule made in Michigan requiring the inspection of all baggage, without regard to whether or not it came from an infected district, aside from exceeding the statute under which the board was acting, was unreasonable and arbitrary.⁴¹ On the other hand, so long as the officer keeps within his discretion he may not properly be resisted. Thus, a health officer who has authority to pass on the sufficiency of the health certificate of a passenger on a railroad train, to entitle the latter to enter a city under quarantine regulations, has also, by necessary implication, authority to prevent him from entering such city, if the certificate, under the health regulations in force, was not such as to entitle him to do so. The conductor is not bound to contest with the health officer the propriety or legality of the exercise of his power and authority in the particular instance, as the sufficiency of the health certificate is a question for the health officer and not for the conductor.⁴²

The authority for interstate quarantine, in so far as it does not rest with the nation, is solely within the power of the state. In Kentucky it was held that though the county had authority under the statutes to establish quarantine against other parts of the same state, it had no such power to establish or maintain quarantine either against another state, or any portion thereof, unless that power be distinctly given by the state legislature.⁴³ But the right of a state through its proper officers to place in confinement, and to sub-

⁴⁰ *Simpson v. Shepard*, (U. S.) 33 Sup. Ct. 729; *Hannibal, etc., R. Co. v. Husen*, 5 Otto, 465.

⁴¹ *Hurst v. Warner*, 102 Mich.

⁴² *Baldwin v. Seaboard Air Line R. R. Co.*, 128 Ga. 567.

⁴³ *Allison v. Cash*, 143 Ky. 679, 137 S. W. 245.

ject to treatment those who are suffering from a contagious or infectious disease, on account of the danger to which the public would be exposed if they were permitted to go at large, is so free from doubt that it has rarely been questioned.⁴⁴ "The health of the inhabitants of the city is still a matter of concern to the state, and of such vital concern that the general assembly (of Ohio) has not thought proper to commit it exclusively to the control and discretion of men who may not have any particular ability or experience in sanitary affairs. The loss of a single life is a direct economic loss to the state, and, therefore, it wisely refrains from committing to inexperienced people final discretion as to the means and methods of preserving the life and health of its citizens, but aside from the concern of the state for the health and comfort of the residents of any one city, its vigilance seeks to serve a larger purpose. Cities are no longer enclosed by stone walls and separate and apart from the balance of the state. The sanitary condition existing in any one city of the state is of vast importance to all the people of the state, for if one city is permitted to maintain sanitary conditions that will breed contagious and infectious diseases, its business and social relation with all other parts of the state will necessarily expose other citizens to the same diseases."⁴⁵

A statute delegating to a city the power to make quarantine regulations is not unconstitutional.⁴⁶ "A municipality has no implied power to establish quarantine regulations, and is not liable for the compensa-

⁴⁴ State v. Berg, 70 N. W. 347.

⁴⁶ Metcalf v. St. Louis, 11 Mo.

⁴⁵ State Board of Health v. 102.

Greenville, 86 Ohio, 1.

tion of an officer employed to enforce quarantine regulations against a neighboring town in which an epidemic occurs.”⁴⁷ A municipal ordinance is void if it conflict with state quarantine laws. The public health is doubtless an interest of great delicacy and importance. Whatever power is in fact necessary to preserve it will be cheerfully conferred by the legislature and carried into full effect by the courts. But it can never be permitted that, even for the sake of the public health, any local inferior board or tribunal should repeal statutes, suspend the operation of the constitution, and infringe all the natural rights of the citizens.⁴⁸

Cities, villages, towns, and counties are parts of the state, and as such must use the general police power for the protection of the citizens. It is customary by the enactment of general statutes, not only to give these political divisions of the state authority to appoint health officials and to care for such matters locally, but also to impose a duty upon them to make such appointments and do such public service. “The obligation and the power of a city council to act as a board of health and prevent the spread of contagion is not lessened by their omission to create a separate board of health. Their power is a police power and commensurate with their board of health.”⁴⁹ A county board of health may charge a vessel for quarantine services where proper provision has been made therefor by statute.⁵⁰ But a county board of health cannot require a vessel to deviate six miles from its course to reach a quarantine

⁴⁷ *New Decatur v. Berry*, 90 Ala. 432.

⁴⁸ *People v. Roff*, 3 Park Crim. Rep. 216.

⁴⁹ *Rae v. Flint*, 16 N. W. 887.

⁵⁰ *Ferrari v. Escambia County Bd. of Health*, 24 Fed. 390; *Harrison v. Baltimore*, 1 Gill, 264.

station for inspection. If a vessel is not liable to quarantine, after the determination of that fact, any detention thereof, or any interference with the passage of the United States officers to and from the vessel is unreasonable. An existing and lawfully established quarantine is necessary to the validity of regulations made by a board of health restricting visits to vessels which enter a port, especially in the case of United States officers.⁵¹

§ 409. **Quarantine versus commerce.** Contrary to what is ordinarily considered to be the fact, quarantine is an aid to, rather than an opponent of, commerce. It may sometimes become necessary to restrain the passage of persons, animals, or goods from one section to another; but that is in order that the wider intercourse between localities may thrive and prosper. It sometimes becomes necessary to draw a strict line of interpretation between commerce and quarantine. The Idaho Sheep Law of 1897 made it unlawful to bring sheep into that state without having them dipped. This general provision was in order to prevent the importation of certain infectious diseases among the sheep. The dipping of sheep had no necessary connection with the presence of disease. A flock of sheep, absolutely free from disease and without any suspicion of exposure to an infectious disease, if imported into the state must be dipped, perhaps at great expense. This expense added to the cost of the sheep would naturally raise their price, and the law would therefore tend to restrict importation from other states. By cutting down the importation, thus decreasing the

⁵¹ Forbes v. Escambia County Board of Health, 28 Fla. 26.

supply, while the demand remains the same, the value of sheep within the state is increased. This law was therefore considered, not as a sanitary precaution simply, but as a restraint upon interstate commerce, and consequently infringing upon the rights of Congress and violating the Constitution of the United States.⁵² (§ § 250, 251.) The Missouri statute prohibiting the importation of cattle from certain territory which might possibly be infected with the cattle fever, was set aside on the same ground.⁵³ Likewise the Minnesota statute, which prohibited the sale of meat which had not been inspected within the state previous to slaughter, was declared unconstitutional.⁵⁴ On the other hand, where the act was clearly in the interest of quarantine, as requiring restrictions when in fact cattle came from a diseased territory,⁵⁵ or requiring an inspection of sheep before permitting them to be upon the highways,⁵⁶ it has been upheld. By the Idaho Act of March 13, '99 provision was made for quarantine of sheep upon a proclamation to be issued by the governor. The governor issued such a proclamation on account of the scab. The court held, however, that this proclamation was a restraint of commerce because in fact there was no disease epidemic.⁵⁷ It is sometimes necessary to establish a quarantine though it interfere with commerce even with foreign countries,⁵⁸ and even though there be no disease in such foreign countries. When a boat undertook to land in Louisiana

⁵² State v. Duckworth, 51 P. 456.

⁵³ R. R. Co. v. Husen, 5 Otto, 465.

⁵⁴ Minnesota v. Barber, 136 U. S. 313.

⁵⁵ Smith v. St. L. & S. W. Ry. Co., 181 U. S. 248.

⁵⁶ Rasmussen v. State of Idaho, 181 U. S. 198.

⁵⁷ Smith v. Lowe, 121 Fed. 753.

⁵⁸ Morgan Steamship Co. v. Louisiana Board of Health, 118 U. S.

445.

with passengers who had sailed from European ports free from disease, and though they came in accordance with treaties made with European nations, they were refused permission to land because yellow fever was prevalent at the points at which they wished to land. The passengers were themselves free from all suspicion of infectious disease. This refusal of the state authorities was upheld in the United States Supreme Court.⁵⁹

It may be necessary to temporarily suspend the mercantile transactions of a single establishment in order that the community may be able to conduct its business. This is really not a restraint of commerce, for if the local restrictions should be removed, the chance would be that so many persons in the community might become sick, as to effectually check all business. Such restriction of individuals or such a ban placed upon an individual business concern is for the benefit of the community as a whole; and for that general good every citizen is bound to contribute when called upon. "It seems to be well settled that a health officer, who by statute is authorized to take action for the prevention of the spread of disease, is not liable for injuries resulting from such reasonable and customary measures as he may in good faith adopt or direct for that purpose with regard to persons or matters subject to his jurisdiction."⁶⁰

In nearly all health and quarantine laws some are put to inconvenience and annoyance, and many, to a certain extent, are deprived of their liberty and free-

⁵⁹ *Compagnie Francaise de Navigation à Vapeur v. Louisiana State Board of Health*, 186 U. S. 380.

⁶⁰ *Allison v. Cash*, 143 Ky. 679;

citing 21 Cyc. 405; *Seavey v. Preble*, 64 Me. 120; *Whidden v. Cheever*, 69 N. H. 142, 44 Atl. 908, 76 Am. St. Rep. 154; *Beeks v. Dickinson Co.*, 131 Ia. 244.

dom of action. But, if the public necessity requires it, the convenience or even liberty of the individual citizen must give way for the welfare of the greater number. * * * The good of the many must be preferred to the convenience or supposed welfare of the few.⁶¹ The right of a person to a berth or passage on a sleeping car is not an unlimited right, but it is subject to such reasonable regulation as the company has prescribed for the due accommodation of the passengers, and for their safety and comfort. A rule to the effect that persons known to be insane, or afflicted with any contagious or infectious disease will not be permitted in the use of the cars of a company, it would seem was adopted by the company for the safety and comfort of the company's patrons or passengers, and, whether the company is to be treated as a common carrier or otherwise, the rule is a wise one and the court has no difficulty in reaching the conclusion that it is a reasonable one.⁶² If it should be ascertained that a passenger was suffering with small-pox, the carrier might not only cause him to leave the train before arriving at the destination pointed out in his ticket, but, under its duty for the protection of its other passengers, it might become necessary to compel him to do so.⁶³ But, a town ordinance, for example, prohibiting any person from entering the town from a certain place described as infected with small-pox is valid, but it does not apply to those who left the infected place before the passage of the ordinance, according to a North Carolina case.⁶⁴

⁶¹ *Laubaugh v. Bd. of Education*, 66 Ill. App. 159.

⁶² *Pullman Co. v. Krauss*, 40 So. 398.

⁶³ *Central Ga. R. R. Co. v. Madden*, 69 S. E. 165.

⁶⁴ *Salisbury Commissioners v. Powe*, 51 N. C. 134.

§ 410. Morbidity reports. The exact usage in different states relative to the discovery and care of infectious diseases must vary according to the laws. It must be remembered that statutes are but the crystallization of pre-existing usages, although the statute may carry the usage beyond its former limits. In the absence of specific legislation the health authorities must depend upon their own judgment, and must be prepared to defend the reasonableness of their conclusions before the courts. As has previously been intimated such a course leaves the health department liable to be seriously hampered at a critical period. It seems far better that the conditions should be foreseen, and that full preparations be made by the enactment of suitable statutes. It is quite customary that the statutes provide for the prompt report of every case of infectious disease by the attending physician; and to guard against any possibility of omission members of the family are usually required by law to see that such reports are made. (§ § 32, 392, 393.) These reports are moral obligations upon citizens. In order that each citizen may be protected from outside harm he must also assist in protecting others. Since this duty of notification is general, no compensation is due.⁶⁵ Statutes and ordinances requiring physicians to report cases of infectious diseases to the proper officers have generally been upheld.⁶⁶ Whether or not the expression "or any other disease dangerous to the public health" covers the particular case at bar is a question for the jury to decide.⁶⁷ Eight days after the discovery of a

⁶⁵ *Sears v. Gallatin County*, 20 Mont. 462, 40 L. R. A. 405.

⁶⁶ *State v. Wordin*, 14 Atl. 801; *Robinson v. Hamilton*, 14 N. W. 202.

⁶⁷ *People v. Shurly*, 91 N. W. 139, 131 Mich. 177.

case of diphtheria is not a reasonable time in which to make the report.⁶⁸ In the District of Columbia it was held that a physician in charge of a dispensary where infectious diseases were not treated, although he had examined a patient, and had diagnosed the case as one of diphtheria, was not violating the local requirement in failing to report the case, since he declined to treat it, and suggested that the child be taken home, isolated, and a physician called.⁶⁹ This decision does not seem to be in the interest of general protection of health, because such cases are frequently kept hidden from the authorities in order to avoid the restrictions of quarantine. In the state of Missouri we get another exception. A Christian Scientist believing that disease is a delusion of the mind, and teaching the sick such theory, is not a physician who can be subjected to the penalty for failing to report a case of contagious disease.⁷⁰ We may remark that the particular delusions of no person should be permitted to injure the public health. Either infectious diseases are realities, and are transmitted through the agency of visible objects, or our sense of vision (through the microscope) and all logic are unsafe guides about anything in this life. If the law permits a person to attempt to heal the sick, or to treat such sick person, it should be sufficiently explicit to demand from any such healer a prompt report of all infectious disease.

§ 411. Inspection. In spite of these requirements relative to reports of infectious disease, there are cases which demand official attention. There may be an hon-

⁶⁸ *People v. Brady*, 90 Mich. 459, 51 N. W. 537.

⁷⁰ *Kansas City v. Baird*, 92 Mo. App. 204.

⁶⁹ *Johnson v. District of Columbia*, 27 App. D. C. 259.

est question as to diagnosis, or there may be the attempt to hide disease on the part of those who are fearful of the effects of quarantine. Not seldom families delay or neglect to call physicians on account of the fear of financial loss through quarantine. Any course, therefore, which tends to lighten the restrictions of this procedure is to be desired. It is frequently necessary that the health inspector shall enter upon private property for the purpose of discovering infectious diseases. "The power of inspection is exercised as an incident to regulations for the prevention of disease, accident, or fraud. It operates almost exclusively on buildings and machinery or other apparatus, and on articles exposed for sale. The power of inspection is distinguishable from the power to search. The latter is exercised to look for property which is concealed; the former, to look at property which is exposed to public view if offered for sale, and in nearly all cases accessible without violation of privacy. Hence inspection does not require affidavit, probable cause, or judicial warrant. The right to inspect may be reserved as a condition in granting a license. The constitutional aspect of inspection is, however, different where it is extended to interior arrangements of private houses, or personal property kept therein in private custody. It appears that health authorities often claim the right to enter private houses, to inspect sanitary arrangements, in some cases by express legal authority."⁷¹ It is competent for the state to provide for inspection to ascertain if nuisance exists, and even to provide that

⁷¹ Freund, *Police Power*, 47; also, Chapin *Municipal Sanitation*, 112.

the reasonable cost of such inspection shall be paid by the property owner.⁷² The inspector has an unquestioned right, under such circumstances, to enter the premises.⁷³ But the law will not allow the right of property to be invaded under the guise of a police regulation for the preservation of health when it is manifest that such is not the real purpose of the regulation.⁷⁴

While this abstract right of entrance may be unquestioned, the right of entrance at unusual hours would be deemed unreasonable except in extreme emergencies. In other words, where the patient is not far distant from the health office, it would be deemed unreasonable for an inspector to insist upon entering the premises at night to discover a case of scarlet fever or measles. On the contrary, so serious may the plague become in a community that even unusual hours of inspection might be justified. In the ordinary case of infectious disease the cost of inspection is not assessed against individuals nor the owners of property. The inspection of a dairy district may be as strictly a quarantine measure as is the inspection of an ordinary city house suspected of containing a case of diphtheria. But the inspection of the dairy district is partially a commercial proposition and in the interest of the dairy company. If infection be permitted to get into a dairy territory so that the milk becomes dangerous for consumption, it may result in the total prohibition of that article of commerce on the part of the usual customers.

⁷² *C. W. & V. Coal Co. v. People*, 181 Ill. 270; *St. Louis Cons. Coal Co. v. Illinois*, 185 U. S. 203; *Railway v. Ala.*, 128 U. S. 96; *Morgan v. Louisiana*, 118 U. S. 255; *Train v. Boston Disinfecting Co.*, 144 Mass. 523.

⁷³ *Commonwealth v. Carter*, 132 Mass. 12.

⁷⁴ *Austin v. Murray*, 33 Mass. (16 Pick.) 121.

The inspection is a sort of health insurance; it is a commercial proposition for the company; it is insurance for the consumer. Very properly, therefore, the ordinance relative to the license of the dealer may require periodical inspection, and may charge that inspection up to the dealer. He will naturally and properly add the cost of inspection with the other expenses of milk production and receive full liquidation from his customers in the usual course of business.

§ 412. **Removal of cases.** Under the direction of the mayor of Bangor in Maine a police officer and a city physician took a child sick with small-pox out of its mother's arms, and carried it to the pest-house. Action for trespass was brought against them, and dismissed by the court because the statute permitted the health officer of the town to make such removal of a person dangerous to public health. But the court called attention to the fact that the action would not have been dismissed except for the fact that this specific authority was given in the statutes.⁷⁵ In an early case in Maryland the court held that the officer must send the patient to a hospital if in his opinion such a course were necessary, and it further held that the health officer alone could tell how much it was necessary to do, and the captain of the boat on which the small-pox had been found, must pay the bill.⁷⁶ In *State v. City of New Orleans*,⁷⁷ the legislative power of the state to decide where its small-pox patients were to be treated was upheld. In *Hengehold v. Covington*,⁷⁸ the court of appeals upheld the right to remove patients, and in

⁷⁵ *Haverty v. Bass*, 66 Me. 71.

⁷⁷ 27 La. 521.

⁷⁶ *Harrison v. Mayor of Baltimore*, 1 Gill, 264.

⁷⁸ 108 Ky. 752.

Twyman's Administrator v. Frankfort, the same court,⁷⁹ found that the city was not liable for the death of a patient from small-pox as the result of being taken "from a comfortable home to the pest-house used for small-pox patients, which was badly crowded, poorly ventilated, and wholly unfit for the purpose, for which it was used." According to the general principles anything which is done by the state or a portion of the state in its purely governmental capacity may not be the subject of an action in tort. (§§ 357-359.) "The municipal corporation in all these and like causes represents the state or the public. The police officers are not the servants of the corporation, and hence the principle of *respondeat superior* does not apply, and the corporation is not liable unless by virtue of the statutes expressly creating the liability."⁸⁰ Unquestionably this is correct law, and so long as the health officials use due care and diligence they would be exempt from any action. On the other hand, it would seem that a health officer, who so far lost his head as to take a small-pox patient from a "comfortable home to a crowded, poorly ventilated pest-house," might very properly be liable for any damages which might accrue. But such unwholesome conditions should be proven by professional testimony rather than by lay opinion. We know, for example, today that plenty of fresh air is far more important in the treatment of pneumonia and other diseases than would be a warm house. According to lay opinion a case might have been exposed to danger, when in fact he is put in the best circumstances

⁷⁹ 117 Ky. 518.

⁸⁰ Taylor v. City of Owensboro,
98 Ky. 271; also Forbes v. Es-

cambia Co. Bd. of Health, 28 Fla.
26, 13 L. R. A. 549.

for recovery. A statement made in a New York case seems to be very important, even though permission for removal be found in the statutes.⁸¹ The court said: "A person sick of an infectious, or contagious disease in his own house, or in suitable apartments at a public hotel or boarding house" is not a nuisance. In other words, necessity for removal must be found in the danger of spread of infection.

A board of health may be enjoined from removing tenants and closing up houses where it is not justified by the existence of a pestilential disease.⁸² It was held that under the Iowa statutes a local board of health is not justified in removing a case of infectious disease into the jurisdiction of another board, even onto property owned by the first mentioned corporation.⁸³ In Texas, on the other hand, it was stated that the right of a city council, acting under legal authority, to enact an ordinance providing for the removal from the city limits of persons with contagious diseases, is not to be questioned. If the continuance of such persons in the city is incompatible with the safety of the inhabitants, the city or its agents may remove them, but every reasonable provision must be made for their safety. If the city authorities cause the removal of a person with contagious disease, and in doing so fail to exercise the care and precautions the circumstances demand, and death results, they are responsible, even though acting under a city ordinance.⁸⁴

The time has passed for the hysterical fear of infec-

⁸¹ Bloom v. Utica, 2 Barb. 104.

⁸⁴ Aaron v. Broiles *et al.*, 64

⁸² Eddy v. Board of Health, 10 Phila. 94.

Tex. 316.

⁸³ Warner v. Stebbins, 82 N. W. 457.

tious disease. There is, in the light of present knowledge, perhaps less justification for the removal of the patients, if they may be in favorable surroundings, and if the regulations of the health department will be observed. Vaccination offers a safe and sure protection against small-pox, and there are measures which at least aid in the protection against other diseases. If the case be protected from stegomyia mosquitoes there would be no excuse for the removal of a yellow fever patient. It must be remembered that there is always a possibility that an infectious disease may be carried to healthy persons through the agency of insects, such as flies, mosquitoes, bedbugs, lice, fleas, ticks, etc. It may therefore be true, that even if the patient be in what would ordinarily be considered good surroundings, isolation might be more perfectly obtained elsewhere, and the public health be thus more perfectly guarded.

§ 413. **Pest-houses.** Sometimes conditions are such that it may be necessary for the health officer either to remove the patient to some house especially provided or else to take possession of the home, and thus establish a temporary hospital. In the state of Washington it was held that a qualified health officer of a county would have power to seize a private building in which to confine a small-pox patient without express authorization from the county board of health.⁸⁵ It has been held that a board of health has no authority to take possession of a dwelling without consent of the owner and occupant and to use such house as a hospital for the care of a person found sick with an infectious dis-

⁸⁵ Brown v. Pierce Co., 28 Wash.
345.

ease.⁸⁶ The house may be seized under eminent domain and all persons therein put under police regulation, but being under eminent domain presupposes compensation from the health department to the owner or occupant. (§ 171). The difference between taking property under police power and under eminent domain is that in the first case the governmental body is seeking to abate the nuisance; in the second, to use the property for the public good. In a similar manner where a small-pox hospital was established on property adjoining the plaintiff's premises, and a rope was placed around his doorway without his permission, use being made of the plaintiff's property for the passage of ambulances, etc., it was held that the board were liable.⁸⁷

A city board of health is not authorized to transfer one infected with a dangerous disease within the jurisdiction of another board.⁸⁸ The code of Iowa provided that cities might acquire and hold grounds outside of the city limits for use as a hospital; but a township in which such grounds may be located may restrain such action for the reason that the city was about to create a nuisance when it was about to use the property for the establishment of a pest-house.⁸⁹ A county board of health is entitled to the custody of the county pest-house, in which small-pox patients are confined.⁹⁰

A case arising in Wisconsin illustrates conditions which are frequently met by health authorities. A

⁸⁶ *Spring v. The Inhabitants of Hyde Park*, 137 Mass. 554; *Hersey v. Chapin*, 162 Mass. 176; *Dooley v. Kansas City*, 82 Mo. 444.

⁸⁷ *Barry v. Smith*, 191 Mass. 70.

⁸⁸ *Warner v. Stebbins*, 111 Ia. 86.

⁸⁹ *Warner v. Stebbins*, 111 Ia. 86; *Summit Township v. Jackson*, 117 N. W. 545.

⁹⁰ *Henderson County Board of Health v. Ward*, 107 Ky. 477.

domestic servant, employed in a hotel, was stricken with the small-pox, died and was buried from the hotel. Some of the respondent's goods, supposedly infected, were removed and destroyed, at the instance or with the consent of the respondent. The general law gave to the board of health authority to remove the patient to a separate building, but it also provided that if the patient be too sick to be moved the board shall make like provision where he is. When removed the patient is to be provided with nurses and other necessaries, "which are to be a charge to him, or the parent, or other person liable for his support." The case arose over the attempt of the respondent, the owner of the hotel, to collect from the city damages for loss of business, and for property destroyed, etc. Plainly there was no attempt in the statute to shift the responsibility for the expense in caring for such a case. "We cannot sanction the notion which seems to have prevailed here, that a domestic servant, as such, may be regarded as a pauper or an outcast. The deceased was a member of the respondent's household, entitled to consideration and protection as such. She was not ejected in life from the respondent's house; and it is not a question here whether she could have lawfully been so ejected, as she surely could not have been humanely, in her extremity. * * * We hold, and it is enough for this case, that the appellant did not confiscate the respondent's household goods which were burned, and is not liable to her for them, or for other damages accruing to her by reason of the sickness of the deceased."⁹¹ In Illinois it was held that a city has no

⁹¹ *Kollock v. Stevens Point*, 37 Wis. 348.

authority in its corporate character to maintain a hospital. Its conduct of a hospital was therefore in its governmental capacity, for charitable purposes, and it could not therefore be held liable for the negligence of its employees. If the hospital were conducted for profit, those so conducting it were exceeding their lawful authority, and the city could not be held liable for negligence on the part of those conducting it, or their employees.⁹² A municipal corporation having power to "remove or confine persons having infectious or contagious diseases," has power to rent a building for small-pox patients.⁹³ So also, in Missouri it was held that a city ordinance giving the board of health general supervision over the health of the city includes the power to rent a building to be used as a hospital, to protect the city from an infection of cholera.⁹⁴ But in New York it was held that the authority of a board of health to "procure" suitable places for the reception of persons with contagious diseases does not extend to the purchase of land for that purpose.⁹⁵ In Iowa it was held that in order to isolate a patient he may be removed to a separate house. If no suitable house may be had, or if a temporary pest house may be erected at less cost than the rent of such house, the board of health, in the exercise of wise discretion may provide such a building, and the expense thereof is a part of the expense incurred in rendering effective provision for the safety of the inhabitants, and it is chargeable to the county.⁹⁶ In Massachusetts the general

⁹² *Tollefson v. Ottawa*, 81 N. E. 283. See also *Having v. Covington*, 78 S. W. 431.

⁹³ *Anderson v. O'Conner*, 98 Ind. 118.

⁹⁴ *Aull v. Lexington*, 18 Mo. 401.

⁹⁵ *People v. Monroe County*, 18 Barb. 567.

⁹⁶ *Staples v. Plymouth County*, 17 N. W. 569.

statutes authorize the taking of land for a hospital, and the statute was upheld as constitutional. "A statute authorizing a city to take land for a hospital for the treatment of contagious diseases, although an exercise of the right of eminent domain so far as it affects the owner of the land taken, is in its general purpose an exercise of the police power for the protection of the public health. In this Commonwealth a city has authority without special legislation to erect a hospital for the treatment of contagious diseases on land purchased for that purpose." Such a hospital is under the supervision of the board of health, and in the absence of proof it will not be presumed to be a nuisance, public or private.⁹⁷ Boards of health have no authority for converting vessels into hospitals, nor to assume control and possession of them to the exclusion of the owner, and therefore cities are not liable for damages caused through such taking of possession by city officers.⁹⁸ The placing of a woman afflicted with leprosy in a private house of a laborer who is not an officer of the city does not amount to establishing a hospital for the isolation and treatment of contagious diseases as permitted by the statutes. The power to erect and maintain hospitals does not justify the making of a contract for keeping such patients at a private house located on city land in a settled district, since this would tend to facilitate the spread of the disease instead of protecting the community.⁹⁹ Since our scientific views of the contagiousness of leprosy are

⁹⁷ Manning v. Bruce, 186 Mass. 282.

⁹⁸ Mitchell v. Rockland, 41 Me. 363; 45 Me. 496; 52 Me. 118;

Spring v. Hyde Park, 137 Mass. 554.

⁹⁹ Baltimore v. Fairfield Imp. Co., 39 Atl. 1081.

being materially modified, the value of this decision is open to question.¹⁰⁰

Hospitals are not *per se* nuisances, though they may become such and be subject to injunction.¹ But in emergency the city should not be enjoined from using a park building for a pesthouse.² A pesthouse in close proximity to a public school is a nuisance, and the authority vested in the county authorities to maintain a pesthouse does not authorize them to maintain a nuisance.³ Persons who have not had small-pox, such as those sick with typhus, may be sent with small-pox patients to a hospital, in the reasonable discretion vested in the health officer.⁴

It was held in a Massachusetts case that the members of a board of health, acting in a quasi-judicial manner in the location of a small-pox hospital, could not be held personally liable for error in judgment; but if by reason of their neglect, if the hospital became a nuisance, by virtue of their malfeasance or misfeasance, as distinguished from nonfeasance, they might be held personally liable for such injury as might appear.⁵ No action can be brought against a city or town for the illegal taking possession of a house, to be used as a pest house;⁶ and where a house was so taken, because there was a case of small-pox therein, and then a lease was made out, and rent paid, the owner was estopped

¹⁰⁰ See *Kirk v. Wyman*, 65 S. W. 387.

¹ *Barnard v. Sherley*, 135 Ind. 547; *Manning v. Bruce*, 186 Mass. 282; *Stotler v. Rochelle*, 109 Pac. 788; *State v. Trenton*, 63 Atl. 897.

² *Manhattan v. Hessin*, 105 Pac. 44.

³ *Thompson v. Kimbrough*, 57 S. W. 328.

⁴ *Harrison v. Baltimore*, 1 Gill, 264.

⁵ *Barry v. Smith*, 77 N. E. 1099.

⁶ *Lynde v. Rockland*, 66 Me. 309; *Bloom v. Utica*, 2 Barb. 104.

from claiming damages to property; ⁷ but where mortgaged property was leased for a pest house the holder of the mortgage might reasonably recover for the amount that the property was decreased in value.⁸ The Massachusetts statutes are not intended to give the health officials authority to take possession of property without the consent of the owner, but it is expected that if a case of small-pox occurs which cannot safely be moved, a contract will be made for the patient's care and comfort where he is; if so, others may be moved, and suitable precautions taken.⁹ The failure of a city to provide a small-pox hospital does not prevent it from recovering in an action against another city, for expenses incurred in caring for a small-pox patient having a settlement in the defendant city.¹⁰ In Massachusetts we find a decision to the effect that the owner of a vessel under quarantine regulations is not liable for the expenses of a seaman at a hospital, to which he had been transferred by order of the board of health of a town, and which was under their care.¹¹ This is contrary to the classical case of *Harrison v. Baltimore*,^{11a} and also to *Board of Health v. Loyd*.^{11b}

§ 414. **Disinfection.** After the conclusion of a case of infectious disease it has been customary to use some variety of disinfection of the premises, furniture, and clothing, and of anything else which may have come in contact with the case. This disinfection may be accom-

⁷ *Sallinger v. Smith*, 192 Mass. 317.

⁸ *Delano v. Smith*, 92 N. E. 500.

⁹ *Brown v. Murdock*, 140 Mass. 314.

¹⁰ *Haverhill v. Marlborough*, 187 Mass. 150.

¹¹ *Provincetown v. Smith*, 120 Mass. 96.

^{11a} 1 Gill, 264.

^{11b} 1 Phila. 20.

plished by fumigation, by the use of dry heat in specially constructed machines, by live steam, by exposure to light and fresh air, or by destruction. Sanitarians are becoming convinced that far too much dependence has in the past been put upon fumigation. As popularly conducted it is worse than useless, for it gives a false sense of security. A quarter of a pound of sulphur burned in a room containing one thousand cubic feet makes considerable discomfort, but it is practically useless in its germicide effect. Eight pounds should be used in such space—four at the very least, yet the smaller amount is more likely to be burned by lay disinfectors.

There is no doubt as to the fact that sulphur fumes, or formaldehyde vapors, will kill disease germs when in an active state; but when bacteria are in the spore stage they are more resistant. Besides, the vapor in a room may not easily enter the cracks in the floor and wall, which often serve for the admission of fresh air. Moreover, it is well known today that the disease germs may be kept alive and communicated by means of insects. Formaldehyde does kill bacteria, and is very often used by health officials for disinfection; but it frequently simply stupifies insects in the disinfected room. For such reasons there is a tendency on the part of sanitarians not to put so much stress upon fumigation, especially of rooms, unless it be for the destruction of vermin with the sulphur dioxid. More stress is being put upon the use of hot soap and water. However, fumigation is still a recognized measure, and its use should not be forcibly resisted when ordered by the proper authority. It would seem that if a statute or ordinance call for "disinfection" simply, in view of

the present state of knowledge no variety of fumigation could be forced upon the officer. His discretionary judgment should determine the form of disinfection to be used. Fresh air and sunshine are bactericidal, and clothing may sometimes be thus effectually disinfected by hanging out of doors, in a place not exposing others.

For washable goods, boiling is the best disinfection. Live steam may be used to disinfect such articles as bales of rags. Dry heat under proper precautions is useful for many other articles. Often destruction is the simplest and best method of dealing with infected articles, especially clothing.

When in the judgment of the proper health official disinfection, as by fumigation, was advisable, even though no quarantine had been established, it was clearly within the discretion of the officer so to order, and (in Iowa) the county is bound to pay for such service, though the amount to be paid may be left to a jury for determination as to what is a reasonable amount.¹² But a health officer is not himself entitled to extra compensation for fumigation, as it is a part of his official duty.¹³ The health authorities cannot be held liable for damages, as to store goods accidentally injured in fumigation.¹⁴ Where the public health and human life are concerned, said the Maine court, the law requires the highest degree of care, and those in charge of dangerous diseases like small-pox are not entitled to experiment to see how little disinfection will do; ¹⁵ but soon after that the same court also said that the failure of a health officer to properly disinfect persons exposed

¹² Sawyer v. Wapello County, 133 N. W. 104.

¹³ Tabor v. Berrien County, 120 N. W. 588.

¹⁴ Allison v. Cash, 137 S. W. 245; 143 Ky. 679.

¹⁵ Seavy v. Preble, 64 Me. 120.

to small-pox does not make the community liable for damages caused to a third person who claims he contracted the disease through contact with the exposed person.¹⁶ There is no conflict between these cases. If the officer violates his discretion he is personally liable, not the community. In the light of present knowledge, as to the latter case, it is exceedingly doubtful whether a person may contract small-pox from a person who may have come in contact with a case, but who is not himself ill with the disease.

When it comes to interfering with interstate or foreign commerce there is not so much liberty for local officials as to disinfection. The authority in such matters must rest either in the state government, or sometimes in the nation. The president of a board of health, acting without authority of the law or of the board, except under a general authority to act in emergencies, is personally liable for damages caused by his action in ordering the fumigation of a cargo of fruit, where the vessel had a clear bill of health and came from a port in the West Indies where no sickness was known to exist.¹⁷ It was held in Florida that a county board of health cannot require a vessel to be fumigated or disinfected unless it is subject to and put in quarantine.¹⁸ Reasonable and fair expenses for fumigating an infected vessel may be charged against the vessel.¹⁹ "When the health authorities have furnished proper materials for fumigating a vessel, and distributed them around the steerage quarters, and given proper instructions before leaving the vessel, the duty devolves upon

¹⁶ *Brown v. Vinalhaven*, 65 Me. 402.

¹⁷ *Beers v. Board of Health*, 35 La. Ann. 1132.

¹⁸ *Forbes v. Escambia Co. Bd. of Hth.*, 28 Fla. 26.

¹⁹ *Harrison v. Baltimore*, 1 Gill, 264.

the captain and his subordinates to attend to the removal of the disinfecting apparatus and see that the passengers are not exposed to danger from this source. The captain may be held liable for negligence in leaving unprotected poisons within reach of a child."²⁰ As to the necessity for the fumigation of ships it must be remembered that those vehicles of travel are generally infested with rats, and that rats are particularly active in spreading the bubonic plague. Effective fumigation with the sulphur dioxide kills the rats, even when it may not kill disease spores. Captains often protest that their ships do not need fumigation for that purpose because they have an exceptionally good cat. Such was the case with the British steamship *Ethelhilda*, arriving at New Orleans March 18, 1914, from West Africa. Nevertheless the government surgeon ordered fumigation. When the vessel was again entered, dead rats were found in every part of the ship. By the irony of fate the cat had been forgotten, and she was found in the cabin with twenty-four dead rats.²¹

Certain cargoes of rags arriving at the city of New York were, by direction of the collector, sent to certain warehouses. The rags were disinfected, and the charge for lighterage and disinfection was demanded from the owners. Held that the charges for lighterage and disinfection were not brought within the statute, as they had not the official sanction of the health officer; that therefore the warehouse firm had no lien therefor, and were not entitled to recover.²² The Revised Statutes of the United States gave no authority to the collector

²⁰ *Kennedy v. Ryall*, 67 N. Y. 379.

²² *Lockwood v. Bartlett*, 130 N. Y. 340.

²¹ Reprint 182, Public Health Reports.

to take possession of the goods, and retain possession of them: his seizure of the goods, and causing them to be sent to the Baltic stores, was an unauthorized act. If he caused them to become disinfected, he became liable in damages. But it was held that the collector simply sent them for disinfection if the health officer so ordered—for such action as the health authorities might see fit to take, and his action was therefore proper. Since the health officer had not ordered the disinfection, the company had assumed the responsibility, and had no claim. Whether the health officer had, or had not, issued such order was a question solely within the jurisdiction of the state courts.²³

In the case of clothing, or furniture, for example, which have come in contact with a case of small-pox, the real nuisance is not the clothing, nor the furniture, but the contaminations which they may have acquired. The real nuisance must be abated, and if the abatement requires the destruction of the property, since that destruction is under the police power, in the absence of specific statutory enactment it would seem that the officials assume no responsibility for themselves, nor for their respective governmental body, as to compensation for the goods destroyed. Such destructions, except as to minor articles, would seldom be deemed necessary, and the health official should not let a hysterical activity force him to disregard the employment of judicial discretion. Whether or not the burning of wearing apparel was necessary is a question for the determination of the jury if it is to be reviewed, and then only to determine whether the officer exceeded his authority.

²³ *Bartlett v. Lockwood*, 160 U.

S. 368.

A city can no more destroy property in stamping out an epidemic than to check a fire, but to the same extent, and with exemption from liability in proper cases. The measure of damages for property wrongfully destroyed is the market value; where the property has no market value, the measure of damages is its value to the owner, not what it would cost him to replace it.²⁴ In a Massachusetts case the judge instructed the jury that the plaintiff was entitled to recover what the property was worth at the time it was taken, without taking into account how much the value had been affected by the exposure.²⁵ However, if the property be lawfully destroyed, in the absence of statutes allowing compensation, because it is an exercise of police power, not of eminent domain, no compensation is due the owner, and no recovery can take place from a city, and much less from a county.²⁶

In the state of North Carolina we are told, "Under authority to make rules and regulations to prevent the spread of communicable diseases, county authorities have no power to burn a dwelling house to prevent the spread of small-pox; and this act, being outside of their corporate powers, they would not be liable in their corporate capacity to an action therefor; nor have town commissioners such power under authority to have destroyed or disinfected furniture or other articles believed to be tainted."²⁷ So far as known a house may be cleansed from small-pox by the local use of disinfectants, but when it comes to dealing with the bubonic plague we have another element to deal with.

²⁴ Dallas v. Allen, 40 S. W. 324.

Trustee, 109 Va. 229; Creier v.

²⁵ Brown v. Murdock, 140 Mass.

Fitzwilliam, 83 Atl. 128.

314.

²⁷ Pritchard v. Morgantown, 36

²⁶ Louisa County v. Yancey's

S. E. 353.

That disease is spread by the partnership between the flea and the rat, and disinfection must therefore include the extermination of both members of the partnership. This is often a practical impossibility without destroying the buildings. This impossibility is found particularly where the buildings are of small value, and poorly constructed. Well constructed buildings may be rat-proofed and fumigated. It therefore follows that in such cases the health department may order such buildings, so infested with the plague, destroyed by the fire department, or by any other body or person.²⁸ "In an action on a policy of fire insurance for loss caused by spread of a fire started by order of the Board of Health, for the purpose of destroying, as being infested by plague, certain previously condemned buildings situated some distance from the insured building, an *ex parte* unexecuted resolution of the board adopted after the commencement of the fire, that all buildings in the block, which included the insured building, were so insanitary and infected by plague as to require destruction, is not even *prima facie* evidence that the building in question was so insanitary, or so much of a nuisance as to be absolutely valueless in the eye of the law, so as to entitle the defendant insurance company to a judgment."²⁹ The city council has no exclusive jurisdiction to determine what constitutes a nuisance, and in destruction of a house they are limited to the abatement of that which is in fact a common nuisance.³⁰ The mayor and town of Des Arc were sued for destruc-

²⁸ Ahana v. Ins. Co. of North America, 15 Hawaii, 636; Kwong Lee Yuen Co. v. Manchester Fire Assurance Co., 15 Ha. 704.

²⁹ Akwai v. Royal Ins. Co., 14 Ha. 533.

³⁰ Hennessy v. City of St. Paul, 37 Fed. 565.

tion of a building where within the specified time after the house had been condemned the owner had failed to abate the nuisance. Held, that the officers were within their rights.³¹ But a house must be shown to be a nuisance before it can be destroyed.³² The city may order a building infested with disease destroyed if that is the only method for preventing the spread of the disease.³³

§ 415. Expense of quarantine. As a general proposition it may be stated that in as much as quarantine is a public affair, and for the benefit of the community, all the reasonable expenses which may be incurred by the officers are chargeable upon the public. In practical application there are many problems in the determination between public and private duty, and as to limits of authority. Many of these questions are settled by enactment, and they may be differently ordered in different states. This difference must be remembered in looking through the special decisions. For example, according to different usages certain of the expenses are paid by the city, or the county, or by the state.

Because it is a public duty, and not a corporate privilege, a city cannot be held liable for any injury resulting through quarantine, as a result of any act of its officers.³⁴ If there be any liability it must be a personal one.

The necessary expenses of quarantine are a public charge.³⁵ The discovery of a contagious disease, like

³¹ Harvey v. Dewoody, 18 Ark. 252.

³² Cole v. Kegler, 19 N. W. 843.

³³ Sings v. Joliet, 86 N. E. 663.

³⁴ Richmond v. Long's Admr., 17 Grat. 375; Murtaugh v. St. Louis,

44 Mo. 479; Barbour v. Ellsworth, 67 Me. 294; Beeks v. Dickinson Co., 131 Ia. 244.

³⁵ Bardstown v. Nelson County, 78 S. W. 169; Bellows v. Seneca Co., 133 N. Y. 586.

small-pox in a thickly settled community, creates an immediate necessity for action on the part of those charged with the duty of preventing its spread, and creates a liability on the part of the town to pay any necessary expense incurred by its health board, or in the absence of an order of its health board, the expense incurred by its "health officer" under such an emergency.³⁶ The requirement that there shall be a board of health in every township and an examination of the law indicates that its duties cannot be discharged without expenditure of money. It is therefore the duty of a town meeting to raise funds to meet such expenditure.³⁷ In Iowa it was held that the county is responsible for the expenses incurred in disinfecting buildings, even when no quarantine has been maintained.³⁸ In Tennessee medical assistance rendered to persons quarantined by the board of health is a county charge.³⁹ In Oklahoma it was said that "One member of a board of county commissioners cannot bind the county to pay for services of a physician without first having been authorized thereto by a majority of the board while in session."⁴⁰

The expense of caring for quarantined patients in North Carolina is a county charge, even though the patient be not in a county pest house, but in a private concern.⁴¹ The liability of a county to pay for nurses, medical attendance, etc., in cases of quarantine does

³⁶ Knightstown v. Homer, 75 N. E. 13.

³⁷ Allen v. Bernards, 28 Vr. 303.

³⁸ Sawyer v. Wapello County, 133 N. W. 104.

³⁹ Allen v. DeKalb Co., 61 S. W. 291.

⁴⁰ Mahr v. Pottawatomie County, 110 Pac. 751.

⁴¹ Copple v. Davie County, 50 S. E. 574.

not depend upon the action of the town, in Minnesota. That the town has in fact so provided them is all that is necessary.⁴² Counties in that state are by statute liable to townships for necessary expenses incurred for medical treatment, and for maintaining quarantine of a resident family sick with contagious disease.⁴³ "The employment of physicians was within the authority conferred by the act, and that subsequent ratification made such claim a valid charge against the county."⁴⁴ Similarly, when in the state of Texas a county failed to appoint a county physician after the incumbent had resigned, and a ranchman furnished a physician, medicines, and provisions to employees who were quarantined for small-pox, it was held that under the statutes the county was liable to the ranchman for his expenditures, having apparently consented to this provision. The services of the ranchman were not entirely voluntary, but were forced upon him by the failure of the county to supply the needs of the men through its physician.⁴⁵ "The county board can, when acting within the jurisdiction conferred on it by statute, bind the county. But the health officer has no such power. He is merely a ministerial officer, a creature of the board, charged and instructed with carrying out its orders. His duties are defined and fixed by the statute, and it is only when he acts under the order and direction of the county board that the county is responsible for expenses incurred or made by him. Not only so, but

⁴² *Montgomery v. LeSuer County*, 32 Minn. 532.

⁴³ *Louriston v. Chippewa County*, 93 N. W. 1053; *Appeal of Bd. of Hth. Buffalo Lake*, 95 N. W. 221; *Ioseo v. Waseca County*, 100 N. W. 734.

⁴⁴ *Schmidt v. Stearns County*, 34 Minn. 112.

⁴⁵ *King County v. Mitchell*, 71 S. W. 610.

he must have the authority, in each case, in advance of any action on his part looking toward establishing quarantine, or doing any other act for which a claim is to be made against the county."⁴⁶ In the absence of statutory authority, or of action by the board, the secretary of a county board of health cannot bind the county for the expense of abating a nuisance.⁴⁷ There is no common law liability of counties to care for the poor, nor to meet the expenses of quarantine. All authority of the county must be found in the statutes. When the statutes impose the care of quarantine upon "the proper board of health," since there is no statutory authority for a county board of health it necessarily follows that the county has no liability in the matter.⁴⁸ In Kentucky, according to section 2059 of the state statutes it is the duty of every city having a population of over 2,500 inhabitants, to appoint a city board of health. Construing this section with section 3490 it is the opinion of the court that it is incumbent upon all cities of over 2,500 inhabitants to care for and maintain all cases of contagious disease and of such other matters as come within the jurisdiction of the city board of health,⁴⁹ and the expenses must be borne by the city and not by the county.

In the absence of statutory provisions cities are not entitled to be reimbursed by the state for expenses incurred in quarantine, even if this be done under the direction of the state authorities.⁵⁰ A theatrical troupe

⁴⁶ *Hickman County v. Scarborough*, 149 S. W. 1116.

⁴⁷ *Martin v. Montgomery Co.*, 27 Ind. App. 98.

⁴⁸ *Martin v. Fond du Lac County*, 106 N. W. 1095.

⁴⁹ *Bell County v. Blair*, 50 S. W. 1104; *Pulaski Co. v. Somerset*, 98 S. W. 1022.

⁵⁰ *Geneva v. New York State*, 128 N. Y. S. 470.

came to the city, in this case, and on the state board of health being notified, the state officials advised vaccination and quarantine. In doing this the city did only that which it was expected to do for the general good. "A minor whose legal residence was in another town was infected with small-pox in the town of Brattleboro. The select men furnished him with physicians, nurses, and necessaries, he being unable to pay for them, but his father sufficiently able to do so. Held, in an action brought by the town of Brattleboro against the other town to recover said expenses, that the latter town was primarily liable to the town of Brattleboro for whatever sum they had actually expended."⁵¹

A city having made an arrangement with the county by which the city cases are taken and treated at the county pest house, and having paid therefor its proportion for the maintenance of the pest house, the city will not be relieved from the payment of its proportionate expense on the ground that the arrangement is void, because it tended to create a debt extending beyond the present year, and to bind successors in office of the city.⁵² "Under statutory provisions, the conversion of a patient's residence into a hospital by the city authorities, without consultation with him, exempts the patient from liability for medical services, the taking of his house by the city being tantamount to assuming responsibility for his care in compliance with the provisions of the law."⁵³

A health officer, appointed by a local board of health,

⁵¹ *Brattleboro v. Stratton*, 24 Vt. 306.

⁵³ *Smith v. Hobb*, 45 S. E. 963.

⁵² *Macon v. Bibb County*, 75 S. E. 435.

is required to keep supervision of a case of infectious disease, seeing to it that the case is properly isolated and cared for. This involves expense, and implies the authority for the health officer to contract for medical care and nursing in an emergency which requires immediate action.⁵⁴ In a case in which a physician was called to treat a case of diphtheria and to quarantine the family, because he was called by the attending physician of the family, not by the legal authorities, it was held that the county was not legally liable, though it was so morally.⁵⁵ It is quite common to provide that the expense of treatment of cases of infectious disease shall only be borne by the community when the patient is unable to pay them himself.⁵⁶

"It is the undoubted duty of a board of health created for the purpose of preserving the public health to take immediate steps in case of an epidemic, not only to furnish care and treatment to the afflicted, but to protect residents of the town, and to this end they may incur any reasonable expense."⁵⁷ The town is therefore liable for the pay of guards employed by the health officer;⁵⁸ but (Miss.) a claim against the county as a quarantine guard is not maintainable by suit, unless the minutes of the board of supervisors disclose an order establishing a local quarantine, and

⁵⁴ *Hawthorne v. Cherokee County*, 79 Kas. 295.

⁵⁵ *Dykes v. Stafford County*, 121 Pac. 1112.

⁵⁶ *Thomas v. Mason*, 39 W. Va. 526; *Laurel County Ct. v. Penington*, 26 Ky. L. 124; *Jay County v. Fertich*, 46 N. E. 699; *Tweedy v. Fremont Co.*, 68 N. W. 921; *Walker v. Boone Co.*, 97 N. W. 1077; *Gill v. Appanoose Co.*, 25

N. W. 908; *Farnsworth v. Kalkaska Co.*, 56 Mich. 640; *Kellogg v. St. George*, 28 Me. 255; *Marsh Co. v. Rosen Co.*, 101 N. W. 164; *Dodge County v. Diers*, 95 N. W. 602; *McIntire v. Pembroke*, 53 N. H. 462; *Merty v. Columbus*, 27 O. Cir. Ct. Rep. 822.

⁵⁷ *People v. Eno*, 82 N. Y. 520.

⁵⁸ *Keefe v. Union*, 56 Atl. 571.

also show that a contract for such services was made. The record must also show that the claim founded on such a contract was presented to the board of supervisors and was disallowed.⁵⁹ In Michigan it is not necessary that when expenses are incurred in the care of indigent persons sick with contagious diseases the municipality shall first pay the claim and then present it to the board of supervisors, but the claimant may take his claim direct to the county board. Boards of supervisors have no power to reject a claim for services rendered by order of a board of health without giving the claimant an opportunity to be heard and to present proof in its support.⁶⁰ "The auditing of bills incurred by the public in case of communicable diseases is lodged by law in the board of supervisors of the county. The local board of health is required to keep an itemized and separate statement of expenses, and render the same to the board of supervisors by filing the same with the county clerk. The entire responsibility then rests on the board of supervisors to pass on the necessity of such expenses, the services performed, the justice and reasonableness thereof, and to allow such parts thereof as the board shall deem just."⁶¹ Under the Oklahoma law creating boards of health it becomes the duty of the board to audit and allow, or reject or modify, charges incurred against the county by the board, and certify them to the county commissioners. Individual members of the board have no power to certify to county commissioners.⁶² In determining what is a reasonable amount to allow

⁵⁹ Marion County v. Woulard, 27 So. 619.

⁶⁰ Bishop v. Ottawa Supervisors, 140 Mich. 177.

⁶¹ Dawe v. Board of Health of Monroe, 146 Mich. 316.

⁶² Cooke v. Board of County Commissioners, 13 Okla. 11.

for such services in the care of patients sick with contagious disease, the rule has been laid down, "that the plaintiffs were entitled to the value of their services according to the market value for such labor in other fever cases."⁶³

The matter of treatment is distinct from quarantine.⁶⁴ The act of quarantine is essentially keeping the person under arrest until danger of his further spreading the disease has passed. The treatment, in that it may tend to cut short that period of isolation, and directly reduce the contagiousness of the poison, may be a means of restriction, and so be a part of quarantine. Besides this, the attending physician may be a very great aid in keeping the patient under full control. It may, therefore, be important to the health service to have the case in the medical care of a proper person. In some sections the health officer may also treat the case. This is hardly an ideal arrangement, for the reason that health preservation and medical practice are essentially widely separated, and the same man is seldom proficient in both branches. The fact that a city council provided another officer to furnish medical attendance in the execution of the power of quarantine was held to show that the furnishing of such attendance was not committed to the health officers.⁶⁵ Under statutory provisions requiring the establishment of local quarantine by the county physician when proclaimed by the county commissioners, and authorizing him to select the necessary attendance, the county physician is not authorized to employ another

⁶³ Marion County v. Bonds, 99 S. W. 532.

⁶⁴ Cedar Creek v. Wexford Co., 135 Mich. 124; Pierce v. Gladwin

Co., 136 Mich. 425; Stroye v. Gladwin Co., 136 Mich. 425.

⁶⁵ Congdon v. Nashua, 72 N. H. 468.

physician to render medical service to small-pox patients at the county's expense, until quarantine is actually declared by the commissioners.⁶⁶ In Iowa a written order for the performance of the service, issued before the service is actually furnished, is a mandatory requirement, and unless the physician has such a written order it is a complete bar to his recovery of charges for his services.⁶⁷ So in Maine it was held that in the absence of an express contract for such service by a proper officer in behalf of the town a physician cannot recover for medical services rendered to the inhabitants while they were sick with the small-pox;⁶⁸ but in Michigan it was held that an express agreement is not necessary for the health officer to enable him to recover for his services in treating patients sick with contagious diseases, if the board knew that the services were being rendered and afterward allowed his bill.⁶⁹ The board, having made a contract with a physician to furnish medical attendance and medicines for the indigent of the district at a stipulated amount, cannot be compelled to pay more for extra services due to an epidemic, although these extra services were ordered by the board of health, and the board of health allowed the bill.⁷⁰ Neither can a physician, after he has presented his bill, his bill has been audited, and he has received without protest the amount allowed, claim balance as service rendered according to statute. His acceptance acts as an

⁶⁶ Barrett v. Hill County, 74 S. W. 811.

⁶⁷ Ruan v. Mahaska County, 137 N. W. 1003.

⁶⁸ Childs v. Phillips, 45 Me. 408.

⁶⁹ Cedar Creek v. Wexford Co., 135 Mich. 124.

⁷⁰ Zimmermann v. Cheboygan County, 95 N. W. 535.

estoppel.⁷¹ In Kentucky the employment of the physician, guards, nurses, etc., for a pest house rests with the board of health. The authority to fix the compensation of such employees, and of the board of health itself, rests with the fiscal court. Neither have the right to act in an arbitrary manner, and the physician having been rightly appointed, the fiscal court should allow reasonable compensation for the work rendered, or to be rendered.⁷² There is no public right which permits the officer to interfere with the privilege of citizens to employ such regularly authorized practitioners of medicine as they may choose, nor to interfere with the right of regularly licensed practitioners to practice when they are so employed.⁷³

A board of health cannot employ one of its own members to render medical services in an epidemic of contagious or infectious disease.⁷⁴ Neither can a health officer without the approval of a board, in Wisconsin, bind a town by the employment of a physician to attend a case of contagious disease.⁷⁵

It is manifestly impossible for the health officer himself to be personally with a case of infectious disease all of the time. It has therefore been generally agreed that the public may employ guards. A nurse may be a most efficient guard, and therefore the employment of nurses for service in the care of cases of infectious disease is a recognized aid. A county may not attempt to avoid payment of obligations for the employment

⁷¹ *Browne v. Livingston County*, 85 N. W. 745; but see *State v. Steele*, 57 Tex. 200.

⁷² *Walker v. Henderson County*, 65 S. W. 15.

⁷³ *Trabue v. Todd County*, 125 Ky. 809.

⁷⁴ *Bjelland v. Mankato*, 127 N. W. 397.

⁷⁵ *Collier v. Town of Scott*, 102 N. W. 909; also *Jacobs v. Elmira*, 132 N. Y. Sup. 54.

of nurses, destruction of infected clothing, etc., on the ground that the patients were able to pay, or that some of the taxpayers thought that the charges were too high.⁷⁶ The authority to prevent the spread of infectious disease implies authority to employ a nurse.⁷⁷ A city has been said to be liable for the expense of nursing a case of contagious disease, when the nurse was employed by a physician who was not the regular health officer, acting under the direction of the secretary of the state board of health, the emergency justifying the measure.⁷⁸ The fact that the Michigan statutes provide for the employment of "nurses" in these cases does not compel the employment of a nurse, nor of more than one if any be employed. The matter is left to the discretion of the officers.⁷⁹ In a case in New Hampshire a man attempted to recover for the services of his wife as nurse in caring for a boarder who had the small-pox. The claim was disallowed as she was not employed by the health officer in the case.⁸⁰

Since a city has power to provide for the care of a case of infectious disease, it has the power to create a debt; it may therefore be compelled by *mandamus* to provide the funds for its payment;⁸¹ but though legal provisions make all necessary expenses for local sanitation a public charge, and though they authorize local boards of health to compel by *mandamus* proper action by the city, they do not confer upon the board

⁷⁶ Elliott v. Kalkaska County, 58 Mich. 452.

⁷⁷ Frankfort v. Irwin, 72 N. E. 652; Labrie v. Manchester, 59 N. H. 120.

⁷⁸ Monroe v. Bluffton, 67 N. E. 711.

⁷⁹ Rohn v. Osmun, 106 N. W. 967.

⁸⁰ Creier v. Fitzwilliam, 83 Atl. 128.

⁸¹ Thomas v. Mason, 20 S. E.

580.

of health an unrestricted power to determine how much money it should spend in any one year, the amount being determined according to law by the mayor and council.⁸² The acts of both the council and the board of health are subject to the court review to determine as to their reasonableness.

Under the Michigan law the county is charged with the expense of all indigent persons afflicted with contagious disease, and villages are entitled to recover from the county expenses incurred;⁸³ but the village cannot bind the county over and above the charges preferred by the health officer for specific services;⁸⁴ and it is mandatory for the board of health to keep an itemized account of the expense for each person. So also in Minnesota it was held that when the county physician refused to attend and treat a person sick with an infectious or contagious disease, a city health officer was justified, for the purpose of restricting the disease, in employing a physician, and the expense incurred may be recovered from the county.⁸⁵ On the other hand in New Jersey it was held that though the patients were paupers, the city, and not the county, was responsible for the care of patients sick with contagious diseases.⁸⁶

A family under quarantine is prevented from earning the usual income. Since they are kept in restriction for the common benefit it has sometimes been claimed that the community is in duty bound to pro-

⁸² State v. New Orleans, 27 So. 572, 52 La. Ann. 1263.

⁸³ St. Johns v. Supervisors, 70 N. W. 131.

⁸⁴ Durand v. Shiawassee Supervisors, 132 Mich. 448.

⁸⁵ Mankato v. Blue Earth County, 92 N. W. 405.

⁸⁶ Rockaway Township v. Morris County, 52 Atl. 373.

vide for all their necessities. The legislature might make such provision, but ordinarily it is expected that the head of the household will care for all the members. In the same way a vessel is liable for the expense of all passengers held in quarantine, and not those only who are infected.⁸⁷ There is no reasonable excuse for a person being afflicted with the small-pox as vaccination gives ample protection. The same may be true relative to typhoid fever, though the preventive inoculation for that disease is of recent acceptance, and by no means general as yet. There is little call for sympathy for families afflicted with those diseases; but with scarlet fever, for example, conditions are very different. The cause is not yet definitely known, and no sure protection has been discovered. Innocent persons may be victims to such a malady, and perhaps the community might reasonably share in the expenses of the misfortune. Such has been the view taken by the courts in some cases. Thus in Iowa it was said that when quarantine is established the cost of bedding, food, and clothing to supply the place of that which had been destroyed, should be provided for those not actually sick, and the expense therefor may properly be included in the county's liability.⁸⁸ Likewise a Pennsylvania court recognized a certain degree of liability for the care of all those in quarantine, aside from the patient.⁸⁹

There is another reason why there is justice in paying for the keep of the well persons who may be in

⁸⁷ Peterson v. Carter, 6 Ha. 283; see also Minister of Interior v. Hackfield & Co., 4 Ha. 420.

⁸⁸ Clinton v. Clinton County, 16 N. W. 87.

⁸⁹ Borger v. Borough of Alliance, 28 Pa. Sup. Ct. 407.

quarantine with the sick—there may ultimately be some question as to the right of the health department to keep healthy individuals in quarantine. Physicians have less confidence today that disease may be carried from one person to another by a third party. That lessens the scientific basis for the confinement of such persons. In *State v. Rackowski*⁹⁰ it was said that under section 2549 of the General Statutes of New Jersey, giving authority to quarantine the patient sick with scarlet fever, "Before the health officer can order quarantine he must have reasonable grounds to believe that the person or persons ordered into confinement are infested with a contagious disease." Though another section gave authority for the confinement of those exposed the case illustrates what may easily happen. At the best statutes are imperfect, and if it be desirable, as it certainly seems to be necessary at present, to quarantine all of those exposed to certain diseases, the statute providing for quarantine should also cover those exposed. All exposed persons should be subject to quarantine, though in many cases the strict confinement of all persons may not be necessary, nor advisable.

An interesting case arose in Michigan touching the obligation of a landlord to a patient sick in his building. The patient was not a member of his family; she was not his tenant, nor in his employ. She was living with the janitor, and was not confined to her bed. She had erysipelas, and the physician warned the tenants of the danger of having the patient in the building. The landlord's duty was to his tenants, and he ordered her out of the building. She sued for injury,

⁹⁰ 86 Atl. 606.

as the result of being forced to leave. The court found for the defendant, as he was guilty of no legal wrong.⁹¹

§ 416. **Vaccination.** Few diseases have been more subjected to judicial inquiry than small-pox. It was a loathsome disease, inspiring great dread on the part of the people, and its contagious character was early recognized. Under modern methods it has lost much of its disagreeable features, and it is strange that the old hysterical fear still persists among the lay people. Whereas, when formerly it made its appearance in a community it found numerous victims, and left each badly disfigured for life, now its victims are few, and mutilation is slight. The chief change relative to the disease is due to the protective influence of vaccination. The scientific demonstration of the protective value of this slight operation is clear to any unprejudiced observer and investigator, and has been repeatedly recognized by the courts. Since the police power for the protection of the inhabitants of a state resides in the state government it naturally follows that the legislature may take such means as seem to it reasonable for utilizing such power. Thus we find the state of North Carolina saying:⁹² "Statistics taken by governmental authority show that while 400 out of every 1000 unvaccinated persons, exposed to the contagion, are attacked by it, less than two in a thousand take the disease when protected by vaccination within a reasonable period. There are those, notwithstanding these well established facts, who deny the efficacy of vaccination, as there are always some who will deny any other result of human experience, however well

⁹¹ Tucker v. Burt, 115 N. W. 722.

⁹² State v. Hay, 126 N. C. 999.

established, but the legislature, acting on their best judgment for the public welfare upon the information before them, has deemed vaccination necessary for public protection, and their decision being within the scope of their functions must stand until repealed by the same power."

A portion of the prejudice against vaccination is based upon the evils of its earlier use. When the virus was taken from the arm of one patient and directly inserted into another victim, without any precautionary measures, it was quite possible that other diseases aside from the cow-pox might be thus communicated. Except in extreme emergency it is no longer justifiable to make use of the humanized virus. The supply is now taken from carefully selected calves, after scientific observation, and under strict aseptic precautions. The virus is most carefully guarded from contamination, and tested before being issued for human use. Any intelligent physician uses like aseptic methods in performing the operation of vaccination. He is expected to cleanse, antiseptically, the surface where he is to operate, and after introducing the virus he should dress the surface aseptically until nature has sealed the wound. The antiseptic cleansing kills disease germs which may be upon the surface of the skin; the aseptic dressing prevents the entrance of germs into the open wound. After the pustule has been produced it is no longer considered necessary that the various septic germs should have undisputed sway. Unfortunately, there are those who pose as physicians, and are so recognized by the community, though they so far neglect their duty to their patients that they have failed to keep up with the advances of science.

Any legitimate objection that may still exist against vaccination must largely be chargeable to these negligent practitioners and their ancient methods. The fact remains that there is opposition to the practice, and to some degree this opposition is responsible, not only for a difference in legislation, but also for differences in interpretation.

Granting the fact that vaccination does protect against small-pox, and the further fact that this operation is of negligible danger as compared with the disease which it is intended to prevent or modify, it naturally follows that the legislature of the state may enact such statutes as seem reasonable in the matter. Thus the Georgia court said:⁹³ "With the wisdom or policy of vaccination, we have nothing to do. * * * The legislature has seen fit to adopt the opinion of those scientists who insist that it is efficacious, and this is conclusive upon us." This legislative authority of the states in the matter has been frequently upheld, and may reasonably be considered settled.⁹⁴ Before the Jacobson case came before the Supreme Court of the United States it had committed itself upon this subject in an *obiter dictum* in the case of *Lawton v. Steele*,⁹⁵ saying that a state might order the compulsory vaccination of children. In a number of cases

⁹³ *Morris v. Columbus*, 102 Ga. 792.

⁹⁴ *Jacobson v. Massachusetts*, 197 U. S. 11; *Commonwealth v. Pear*, 183 Mass. 242; *Commonwealth v. Jacobson*, 183 Mass. 242; *Osborn v. Russell*, 64 Kas. 507; *State v. Hay*, 126 N. C. 999; *State v. Shorroek*, 55 Wash. 208; *Abeel v. Clark*, 84 Cal. 226; *State Board of Health v. Board of Trustees*,

110 Pac. 137, 143 Cal. 658; *Bissell v. Davidson*, 65 Conn. 183; *In re Smith*, 146 N. Y. 68; *Viemeister v. White*, 179 N. Y. 235; *Field v. Robinson*, 198 Pa. 638; *Stull v. Reber*, 215 Pa. 156; *Blue v. Beach*, 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64; *Harris v. Cox*, D. C. Law, No. 53015; *McSween v. School Board*, 129 S. W. 206.

⁹⁵ 152 U. S. 136.

the right of the state thus to order was not properly before the court, and for that reason it was not given special consideration, the cases being decided upon the basis that the state had not so ordered through legislative enactment.⁹⁶ It has been claimed in some cases that the state may delegate this authority to local governmental bodies, like the board of health, or the school board;⁹⁷ and in other cases this authority has been hinted, though not affirmed.⁹⁸ In the absence of express delegation, it has generally been held that the local authorities have full power to enforce vaccination in the presence of the disease in an epidemic form; but there has been a divergence of opinion as to the local power in the absence of an emergency, and when no express delegation of authority has been made by the state. The local power has been sustained in many states;⁹⁹ though it may be that those states are more nearly correct in which the right to delegate such authority, except for emergent use, is questioned or denied.¹⁰⁰ Evidently the local governmental body may not use such power if the state has distinctly prohibited it. Thus after the decisions above mentioned, the states of Minnesota, South Dakota, and Utah

⁹⁶ *Jenkins v. Board of Education*, 234 Ill. 422; *Potts v. Breen*, 167 Ill. 67; *State v. Burdge*, 95 Wis. 390, 37 L. R. A. 157.

⁹⁷ *Commonwealth v. Pear*, 183 Mass. 242; *In re Smith*, 146 N. Y. 68; *Morris v. Columbus*, 102 Ga. 792; *State v. Board of Education*, 81 N. E. 568.

⁹⁸ *Jenkins v. Board of Education*, 234 Ill. 422; *Mathews v. Board of Education*, 127 Mich. 530; *Osborn v. Russell*, 64 Kas. 507.

⁹⁹ *Blue v. Beach*, 115 Ind. 121; *Duffield v. School Dist.*, 162 Pa. 476; *State v. Board of Education*, 21 Uta. 401; *McSween v. School Board*, 129 S. W. 206; *Auton v. School Board*, 83 Ark. 431; *State v. Cole*, 220 Mo. 697; *State v. Zimmerman*, 86 Minn. 353, 58 L. R. A. 78, 90 N. W. 783; *Hutchins v. Durham*, 137 N. C. 68; *Glover v. Board of Education*, 14 S. D. 139; *State v. Beil*, 157 Ind. 25.

¹⁰⁰ *Potts v. Breen*, 167 Ill. 67; *Laubaugh v. Board of Education*,

passed statutes forbidding compulsory vaccination. However, as Professor Freund well remarks,¹ if the protection of the public health allows quarantine, it is difficult to see why it should not justify compulsory vaccination. The difficulty of enforcing measures of personal compulsion is a strong, and, generally speaking, an adequate safeguard against an abuse of legislative power in this direction.

A town ordinance requiring vaccination will not be considered invalid because it makes no exception of persons whose physical condition would make vaccination dangerous to them.² "We are of the opinion that the school boards of Missouri have the right to enact and enforce rules of the character here in question, (i. e. excluding unvaccinated children from schools), at all times whenever there is either a small-pox epidemic in the district, or whenever there is a threatened small-pox epidemic. The very purpose of such regulations might be thwarted were we to actually await the epidemic itself."³ As was remarked in *Jenkins v. Board of Education*,^{3a} there is nothing in the nature of an emergency when occasional cases of small-pox occur in a large city like Chicago. The time for vaccination is not when the danger has become urgent, but before the case has occurred.

There may be some question concerning the relative powers of school authorities and boards of health. In an Ohio case the order was originally issued by the

177 Ill. 572; *Jenkins v. Board of Education*, 234 Ill. 422; *Mathews v. Board of Education*, 127 Mich. 530; *Osborn v. Russell*, 64 Kas. 507; *State v. Burdge*, 95 Wis. 390; *Morris v. Columbus*, 102 Ga. 792.

¹ *Police Power*, 447.

² *State v. Hay*, 126 N. C. 999.

³ *State ex rel. O'Bannon v. Cole*, 220 Mo. 697.

^{3a} 234 Ill. 422.

board of health, in the form of an ordinance. This the school board considered and decided to enforce. The court held that the board of health did not have authority to enact such an ordinance, but that the school board, being authorized to make such rules as were deemed necessary, had the authority under the circumstances to order all children attending school to present evidences of vaccination. In effect the board of health simply advised such action, and the school board practically made the ordinance its own.⁴ Legislative provisions making vaccination a condition for admission to schools do not conflict with other provisions, even when these are in the constitution, providing for the education of all children above a certain age.⁵ If the physical condition of a child is such that she cannot safely be vaccinated she should be excluded from school for the time.⁶ In Pennsylvania it is the duty of school directors to see that the school teachers exclude children who do not produce certificates of examination, but such directors may not be compelled by *mandamus* to do so.⁷ A certificate given by a duly licensed practitioner of medicine is conclusive upon school authorities, though they may take steps to determine its genuineness.⁸ It seems to us that such certificates should not be considered final; neither should they be accepted by the school authorities further than for transmission to the proper health office, and that the health officer should have the power to

⁴ Carr v. Board of Education, Vol. 13, Ohio Dec. 10 N. P. Rep. 1903, 430.

⁵ Stull v. Reber, 215 Pa. 156.

⁶ Hutchins v. Durham, 137 N. C. 68; Hammond v. Hyde Park, 80 N. E. 650.

⁷ Commonwealth v. Rowe, 218 Pa. 168.

⁸ Cousins v. Burgie, 13 D. R. 368.

accept or reject such certificates, subject to further proof. In other words, the certificates should be taken as evidence, not as proof.

In the state of Alabama we find a peculiar condition. By the Code of 1907, as amended in 1911, section 698 makes the State Medical Association the State Board of Health, and section 700 in like manner makes the county medical societies, affiliated with the state society, the county boards of health. The legality of this arrangement may be questioned, (See Sec. 284) and apparently the state supreme court doubts its legality.⁹ The county medical society of Perry County claimed the sole right to employ persons to vaccinate people, fumigate premises, and take such other measures as seemed fitting for stamping out the contagion of small-pox. The court, without deciding as to the statutory powers of the medical society did decide that it had no interest whatever in the disposition the constituted authorities make of the county funds.

The distinction between the treatment of small-pox cases and vaccination was made in a New Hampshire case, where it was held that the select men of the town had no authority to pay for the treatment of a family who were able to pay for themselves, but that the town must pay for the vaccination.¹⁰ A similar distinction was made in Kentucky.¹¹ In Maryland it was also held that the county must pay for vaccination.¹² Such obligation is recognized even where the authority was merely to prevent the spread of small-

⁹ Commissioners' Court of Perry County v. Medical Society, 128 Ala. 257.

¹⁰ Wilkinson v. Albany, 28 N. H. 9.

¹¹ Pusey v. Meade, 64 Ky. 217.

¹² Commissioners of Alleghany County v. McClintock, 60 Md. 560.

pox.¹³ Where the amount to be paid is fixed by law, and that amount is a ridiculously small amount, the authorities cannot be forced to pay more.¹⁴ The local board of health may not properly employ one of their number to perform the vaccination.¹⁵

There is good reason for believing that there is an essential unity between small-pox and cow-pox. In the place of using the virus of cow-pox for the protective inoculation, the attenuated virus of the small-pox is itself sometimes used. Before the days of vaccination it was customary to inoculate the virus of small-pox for protection, and this new method is but an improved technique upon the old custom. This method was declared not to be vaccination in a Pennsylvania case.¹⁶ Though in some of the lower courts in the state of Iowa a different conclusion has been reached, it may perhaps be questioned whether this administration of variolinum is advisable, or whether it is a legal method of vaccination. Successful vaccination has been legally defined as being indicated when the typical reaction follows the introduction of the virus of the vaccine disease.¹⁷

In recent times other diseases have been met by proceeding similar to vaccination. Antityphoid inoculation, with the killed bacilli of the disease, is being largely and successfully used to prevent typhoid fever in the army and navy, and it is also being used in civil life. Its use may be justified in health administration. Diphtheria antitoxin has been used, not only for

¹³ Hazen v. Strong, 2 Vt. 427.

¹⁶ Lee v. Marsh, 230 Pa. 351.

¹⁴ Mathias v. Lexington County,
60 S. E. 970.

¹⁷ State v. Shorock, 55 Wash.
208.

¹⁵ Ft. Wayne v. Rosenthal, 75
Ind. 156.

curative action, but also for preventive purposes. At present this use of the substance may not be unreservedly indorsed, for the reason that there are indications that it may simply serve to mask an infection, and to permit the bacilli to grow undetected. The use of antiplague serum is not entirely without danger, though in the condemnation of the measure in a case before the federal court more stress was laid upon the fact that the regulation in question was limited in its operation to Mongolians.¹⁸

§ 417. Control of insect and other carriers. In the light of our modern knowledge restriction of disease has taken on an entirely new character. In the place of paying so much attention to persons diseased, the chief warfare for many diseases must be against the insect and other animal carriers. (§§ 27, 28.) So far as has come to our knowledge, these new methods have not been the subject of many decisions in the higher courts, probably because the evidence is so overwhelmingly conclusive as to the necessity of such a warfare that no one has seen fit to make determined opposition. A breeding place for mosquitoes or rats is a nuisance, and as a nuisance old methods of procedure are sufficient for abatement. A house infested with rats is a nuisance *in posse* in a community, and in the presence of the bubonic plague, it becomes a nuisance *in esse*, by virtue of harboring the nuisance *per se*, rats, which in the presence of the disease may become exceedingly dangerous. As to the power of a city to require rat-proofing of buildings under construction there would probably be no question; but

¹⁸ Wong Wai v. Williamson, 103

after a building has been constructed, enforcement of such a regulation would depend upon the evidence of real necessity. Mosquitoes are nuisances, and may well be the subject of warfare under ordinary conditions. In the presence of malaria or yellow fever there is a positive obligation upon the health office to make an uncompromising fight. Under such conditions the communal sentiment would support a health officer in doing things which would not otherwise be tolerated. For example, the last time that the yellow fever made its entrance into New Orleans, Surgeon White of the public health service gave orders that any gutter upon a building found containing water be immediately punctured for complete drainage. This summary measure was necessary to save time. In the same contest an unscreened barrel of water was emptied and cisterns found containing wigglers were treated with oil. This oil treatment spoiled the water for domestic use. It was thus a destruction of property without compensation, other than the general compensation of protection against the disease. In all of these cases the authority for action and methods of procedure must be found in the well recognized principles for abatement of nuisances.

All efforts to abate these nuisances must be reasonable. An ordinance passed by a county in California declared ground squirrels to be a public nuisance, and required all owners of land within the county to exterminate all such ground squirrels upon their own property within ninety days. The ground squirrels have been regarded as a nuisance on account of their destruction of growing crops; but more recently they have assumed a more dangerous role. The bubonic

plague has been communicated from human beings to rats, and from rats to ground squirrels through the agency of fleas, and by the ground squirrels it has again been communicated to the human species. Previously these rodents were a commercial nuisance: now they are found to be also sanitary nuisances. Admitting, therefore, the necessity for their extermination still the ordinance in question was deemed by the supreme court of the state as arbitrary and unreasonable in form, and therefore void.¹⁹

There can be no question as to the power of the state to compel the filling or clearing and drainage of lands which might otherwise create malaria or other diseases.²⁰ The only way that such lands can have a causative action relative to malaria is by the breeding of mosquitoes. So a corporation may be liable for malaria produced by mosquitoes bred upon the company's property.²¹ The instrumentality of the fly as a carrier of various forms of infection, particularly those of the intestinal tract, is being recognized. Not only may we prohibit the maintenance of places in which the fly breeds, but we may also protect such food as is eaten without further cooking from the possibility of becoming contaminated in the shops by insects walking over it. The Minnesota ordinance requiring the screening of fruits exposed for sale was attacked on the ground that it worked a hardship. The court said that properly construed it was not burdensome, and it should not prevent the exhibition of goods in the open by the dealers.²² The ordinance was

¹⁹ *Ex parte* Hodges, 87 Cal. 162.

²² *Ex parte* Bacigalupo, 132 N.

²⁰ *Rude v. St. Marie*, 99 N. W. 303.

460.

²¹ *Towaliga Falls Power Co. v. Sims*, 65 S. E. 844.

upheld. So too the New Hampshire statute requiring the wrapping of bread was sustained,²³ the entire court concurring.

§ 418. **Personal liability for communicating disease.** An extragovernmental aid for the preservation of the public health is found in the assessment of damages against those who are guilty, through their carelessness, of causing sickness in others. This form of litigation is not new, but it may well be expected to be more frequent in the future. This is true because the science of medicine is more definite than formerly, and knowledge of sanitary matters is more general. On the other hand precedent may not be depended upon, perhaps, as confidently as it once might have been. For example, an old case is the English one in which it was held that a person might be indicted for carrying a child infected with small-pox along a public highway.²⁴ Truly one should not be oblivious to the rules of quarantine, but the danger to others in the simple carrying of the child along the highway would be slight, unless there were flies or other carriers of the virus present.

An early case in Illinois, though not pertaining to human disease, still has its bearing upon the subject. A farmer had a flock of sheep infested with the scab. The sheep were turned into a pasture. Owing to a defect in the portion of the fence which it was the duty of the owner of the sheep to keep up, the sheep broke through and communicated the disease to neighbors' sheep. The owner of the first flock was held liable.²⁵

²³ *State v. Normand*, 76 N. H. 541.

²⁵ *Herrick v. Gary*, 65 Ill. 101.

²⁴ *Rex v. Vantandillo*, 4 M. & S. 73.

A person having small-pox is duty bound to keep where he will not expose others.²⁶ So an innkeeper who receives a guest after he knows that there is small-pox in the house is liable to the guest so received if the latter contract the disease.²⁷ A landlord who leases a dwelling knowing that it has recently been infested with small-pox or diphtheria is liable to his tenant should any of the family of the latter contract a disease, even though the house has been fumigated.²⁸ A railroad company may be held liable to passengers who contract small-pox from the ticket agent. Since the ticket agent had reason to believe that he had the disease, the company was informed, and therefore liable.²⁹ But when there was doubt as to the nature of the disease, and the testimony failed to show actionable negligence on the part of the father when he put his child in a section house, the road should not be held.³⁰ Neither is the road liable for the communication of small-pox from its ticket agent if neither the agent nor his superiors had any knowledge that he had the disease.³¹ So when there was very slight evidence that a man had the small-pox, and none that he knew, or had reason to believe that he had it when he went upon the streets, the court should have peremptorily instructed the jury to find him not guilty.³² The liability of a physician to a man who took the small-pox

²⁶ *Franklin v. Butcher*, 129 S. W. 428; *Hendricks v. Butcher*, 129 S. W. 431.

²⁷ *Gilbert v. Hoffman*, 66 Iowa, 205.

²⁸ *Minor v. Sharon*, 112 Mass. 477; *Cutter v. Hamlin*, 147 Mass. 471; *Snyder v. Gorden*, 46 Hun, 538; *Cesar v. Karutz*, 60 N. Y. 229.

²⁹ *Mo., Kan. & Texas Ry. Co. v. Raney*, 99 S. W. 589.

³⁰ *Mellody v. M., K. & T. Ry. Co.*, 124 S. W. 702.

³¹ *Long v. Chicago, K. & W. Ry. Co.*, 15 L. R. A. 319.

³² *Lawrence v. Commonwealth*, 127 S. W. 1013.

when sent to whitewash a house in which both knew that a patient had recently died from the small-pox, depends upon the physician's negligence, and the man's contributory negligence, which were questions for the jury, where the physician assured the man that there was no danger because the house had been thoroughly disinfected.³³ But a city is not liable when small-pox is contracted by a man employed to tear down an infected building that had been used as a small-pox hospital, though the building had not been disinfected, nor the man warned of the danger. Even in case of his death the city cannot be held liable for the errors of its officers who were acting in a governmental capacity.³⁴ A hospital is liable if a nurse contract diphtheria from a patient, where cultures have been made and the diphtheria bacillus was found, but the nurse was not informed.³⁵ Likewise a lodger is liable who takes children afflicted with the whooping cough into a boarding house, knowing that they have the disease, if in consequence of her act others contract the disease.³⁶

The Missouri, Kansas, and Texas railway company established a small-pox camp in which to treat employees who had the disease. This camp was near to the house of one Wood who himself contracted the disease of small-pox, as did also his wife and child, and the child died. The said Wood thereupon sued the railway company for damages. In defense the railway company put in the claim that Wood was guilty of contributory negligence in that neither he, nor his

³³ Spa v. Ely, 8 Hun, 256.

³⁴ Nicholson v. Detroit, 129 Mich. 246.

³⁵ Hewett v. Woman's Hospital Aid Assn., 64 Atl. 190.

³⁶ Smith v. Baker, 20 Fed. 709.

family were vaccinated. The court held that the evidence does not show contributory negligence on the part of appellees in failing to have themselves or their child vaccinated.³⁷ This is an unfortunate precedent, for it but aids those who, as the court of North Carolina remarked: ³⁸ "will deny any other result of human experience, however well established."

The supreme court of the state of Washington sustained the assessment of damages against a physician for communicating gonorrhoea to a patient by the use of unclean instruments.³⁹ This was a civil damage suit, and when contrasted with the next to be mentioned illustrates how such actions brought by private parties may easily be more efficient than governmental methods. Under statutory provisions prescribing a penalty for wilfully and knowingly importing into the state or into any county of Texas any infectious disease, or for inoculating for infectious diseases after they may have been introduced, except as provided by law, an indictment that the defendant, having an infectious disease known as gonorrhoea, did wilfully, knowingly, and unlawfully inoculate a certain person by means of sexual intercourse, charges no offense.⁴⁰

There is another class of cases where this form of litigation promises to be still more efficient. It is found where the disease is communicated more or less indirectly, and often without the victim noting any suspicious warning. The city of Mankato, Minnesota, was assessed damages for communicating typhoid

³⁷ Mo., K. & T. R. R. Co. of
Texas v. Wood, 68 S. W. 802.

³⁹ Helland v. Bridenstine, 104
Pac. 626.

³⁸ State v. Hay, 126 N. C. 999.

⁴⁰ Austin v. State, 56 So. 345.

fever in its water supply.⁴¹ There are other similar cases.⁴²

In the *Engineering News*, Ap. 28, 1910, p. 506, there is an account of an English case in which the owner of a dairy was assessed damages to the amount of five hundred pounds by the civil court at the Liverpool Assizes for selling typhoid in the milk. It was shown that there was a case of typhoid on a dairy farm. For a time the patient was in a hospital, but after he returned home typhoid fever appeared in eight out of the twenty-five households supplied. Out of 200 adults using the milk, thirteen, or 6.57 per cent were infected. Out of forty-two children, eleven, or 26 per cent were infected. In 1905 there was a similar case in which substantial damages were assessed and sustained.⁴³ This dairy company took particular pains to emphasize the care which was taken to prevent infection. It might, on account of these advertisements, perhaps have been held a little more strictly to account than it would have been otherwise. It gave as a defense that it was difficult to make bacteriologic examinations which would detect the presence of the typhoid bacillus, on account of the length of time which must necessarily be consumed therein. Here also the disease was traceable to a typhoid case upon the farm, and as a result out of 430 customers at Ealing, 23 became infected; and out of 179 at Acton, 21 were infected.

There is still another class of cases in which delin-

⁴¹ *Keever v. Mankato*, 113 Minn. 55.

⁴³ *Frost v. Aylesbury Dairy Co.*, 74 L. J. K. B. 386.

⁴² *Milnes v. Huddersfield*, L. R. 10 Q. B. D. 124; *McGregor v. Boyle*, 34 Ia. 268.

quents may be assessed for damages as the result of breeding insects which are disease carriers. Here the recent scientific advances may cut an important figure. The owner of a tannery was sued for damages as the result of the death of a patient from malaria. It was alleged that the tannery odors weakened the patient and that she contracted the disease from the insanitary condition of the place. It was shown that there were many flies around the tannery yard, but it was not shown that there were mosquitoes. The court held that the evidence showed that malaria could not be communicated by miasm, nor through the agency of flies; and that it was not shown that there were anopheline mosquitoes bred in the yard; and that evidence showed that the disease could only be communicated by those mosquitoes.⁴⁴ On the other hand, in a Georgia case it was held that a liability was incurred as the result of maintaining a breeding place for mosquitoes which could carry the malarial infection.⁴⁵

A somewhat novel issue was raised in a Texan case. The mother of certain children was dead, and the father, after a second marriage, sought the custody of his children. The aunt contested, offering to show that the mother of the second wife was living in the family of the father, and was afflicted with tuberculosis. In their father's house, therefore, the children would come into close association with one suffering from a dangerous communicable disease. The lower court refused to receive this evidence, and awarded the custody to the father. Upon appeal, the Court of

⁴⁴ *Cohen & Co. v. Rittman*, 139 S. W. 59.

⁴⁵ *Towaliga Falls Power Co. v. Sims*, 65 S. W. 844.

Civil Appeals set aside the finding, holding that the lower court erred in refusing this testimony. What is for the best interest of the children is the question of prime importance in questions of this kind, and any evidence tending to show that their welfare would not be best subserved by placing them in the custody of a contending party should be admitted and considered.⁴⁶

⁴⁶ Kirkland v. Matthews (Tex.),
162 S. W. 375.

CHAPTER XV

LICENSES

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| § 420. License under taxing or police power distinguished. | § 424. How license is granted. |
| § 421. License under police power. | § 425. Medical licensure. |
| § 422. Permits. | § 426. Medical reciprocity. |
| § 423. Size of fee. | § 427. What is medical practice? |
| | § 428. Revocation of license. |

§ 420. **License under taxing or police power distinguished.** The license system may be used as a means of collecting special taxes, or for regulating and controlling certain occupations. The authority for the one must be sought in the taxing power, while the other is an exercise of police power. In case the object sought is purely the raising of revenue, the conduct of the business or occupation may be prohibited until the license fee or tax shall have been paid, and the license is in effect simply an evidence of the payment of the tax.¹ In some states, such as Ohio and Michigan, a sharp distinction is made between an occupation tax and a license; and where the licensing of certain occupations, the liquor business, for example, is prohibited by the constitution of the state, a law prohibiting the conduct of the business until the tax be paid, or a bond be executed, and making a failure to pay the tax or to execute the bond punishable as a misde-

¹ License Cases, 5 Wall. 462;
Banta v. Chicago, 172 Ill. 204.

meanor, was held to be in reality a license, not a tax, and therefore unconstitutional.² If the tax be regarded as a precedent to the right to conduct a business, it is considered as a license,³ but when no executive act is required as a preliminary to entering upon the business it is a tax.⁴ Ordinarily it is not necessary to draw the distinction between the taxing and regulative features of an act, and to a degree we may find the two combined.⁵

§ 421. License under police power. To justify a statute or an ordinance establishing a license requirement upon any business or occupation under police power it is essential that there be something in the nature of the vocation or calling which might prove detrimental to the health, peace, or morals of the community. ✓ The liquor business tends to have such an injurious effect, and it is therefore a frequent subject for license. ✓ The milk trade is frequently instrumental in spreading infectious diseases. It must be regulated, and to insure its regulation under police power it is licensed. In each of these employments a constant supervision is advisable. An unqualified person attempting to practice medicine may do great harm, and even cause death through his ignorance in dealing with disease. This profession is therefore a suitable subject for control by license. In this case the object sought is to guard against ignorance—hence it is required that the applicant present evidence of his qualification before the license shall be issued. After the license has been once issued further control is sel-

² State v. Higgs, 38 Ohio, 199.

539; Anderson v. Brewster, 44

³ Youngblood v. Sexton, 32 Mich.

Ohio, 576.

406; State v. Sinks, 42 Ohio, 345.

⁵ Boston v. Schaffer, 9 Pick, 415.

⁴ Adler v. Whitbeck, 44 Ohio,

dom attempted. Itinerant vendors have more opportunities to defraud than they would have as local storekeepers. To discourage such uncertain commercial ventures it is quite common that the fee demanded for the license be large and the size of the fee is the chief restraining power, though it may be advisable to require evidence of honesty. Pawnbrokers may easily be fences for thieves. In order to prevent this dishonest practice it is usual to forbid the business unless a license be obtained, and in that manner all thus engaged may be listed and kept under observation. Each of these uses of the license system depends for its authority upon police power.

§ 422. Permits. A temporary license, or one which covers a single act, is ordinarily called a "permit." As an instance of the use of a permit as a means for the collection of a tax we may mention the permit frequently issued for shows on payment of the fee. As is true relative to peddlers, there is also a slight excuse for this license under police power; but the amount of the tax obtained by the city is the important element. Under police power strictly the permit may be used to regulate one act, the result of which may be lasting in effect. For example: a house improperly constructed may be a constant source of danger in the community. If electric wires be not properly insulated, or if chimney flues be constructed with thin walls and close to combustible material, there is constant risk of fire. If plumbing be defective harm may result to occupants of the house. Lack of sufficient light or ventilation may also have an injurious effect upon all subjected to its influence. Such defects may be more easily detected during the construction of the building.

Under their police power, therefore, cities frequently require by ordinance that no building shall be erected until a permit shall have been secured. The permit is only granted after an examination of the plans, and it demands compliance with specified regulations. After the construction has once been completed there may be some question relative to the authority of the city to insist upon changes which might more properly have been arranged before. To demand that such alterations be made might be considered as taking property without due process of law. However, a new use for the building, especially when preceded by alterations in the arrangements, very properly reopens the opportunity of the city to demand that a permit be secured. So it was a valid use of police power when the state enacted a statute providing that no building subsequently constructed as, or altered into, a tenement-house, should be occupied in whole or in part for human habitation until after the issuance of a certificate (permit) by the health department, or such other department as had been designated for that purpose by a municipal ordinance, stating that the building conforms in all respects to the requirements of the act relative to the light, ventilation, and sanitation of tenement houses. The conditions and restrictions imposed relate to motives affecting public health, safety, and the public welfare.⁶ In this case which was heard before the District Court of Appeals, Second District, California, the court said that legitimate business, as well as those things which are nuisances in and of themselves, is subject to control if control be

⁶ *Ex parte Stoltenberg*, 132 Pac.

necessary for the preservation of the public health and welfare. Nor does the fact, that the section above referred to gives to certain officials authority to determine questions relative to compliance with the law, render the act invalid. It will not be presumed that authority will be exercised wantonly or for purposes of profit or oppression. Under police power licenses may be granted by the state or by the municipality. As to the authority of the city to regulate by license, it has been said: "It is undoubtedly the law that the right to license must be plainly conferred, or it will not be held to exist. The power to make by-laws relative to specified lawful occupations, or the general power to pass prudential by-laws in reference to them, would not as a rule authorize the municipal corporation to exact a license from those carrying on such a business."⁷ Practically the license system is frequently the most effective means for controlling occupations. With the license requirement it places the burden of proof upon the proprietor of the business to be controlled. He must demonstrate that he is in fact complying with all of the requirements. Without the license check a man may conduct a doubtful business without exciting the suspicion of the authorities; and when their suspicions have been aroused investigation may be greatly hampered, and the burden of proof is wholly upon the authorities. "A man's house is his castle." Among Anglican peoples there is a strong hereditary reverence for the sanctity of private rights, which is well illustrated by Chatham's speech on General Warrants. "The poorest man may in his cottage

⁷ State v. McMahon (Minn.), 72 N. W. R. 79.

bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement." Following out the same idea, there is a prevalent impression that, except after the issuance of a warrant, no governmental officer has the right to enter private property without the permission of the owner. Though this abstract statement is contrary to fact, the underlying feeling of Anglican peoples is thus expressed. As shown in the previous chapter, the right of entry must frequently be used by health inspectors, but under the license system the entry may be distinctly granted by the holder of the license as a portion of the contract. See § 411.

§ 423. Size of fee. The amount of license fee which can be required as a police measure varies according to the nature of the occupation which is licensed. If the amount be unreasonably large for the purpose for which it is required, it would be deemed a violation of the principle of license, and an ordinance making such requirement would probably be declared void.⁸ But when the amount of the license fee is determined by the state through legislative enactment its reasonableness cannot be determined by the courts.⁹ A license fee might be raised to such a figure as to be prohibitive for the occupation. Authority for such a rate could not be found in "authority to regulate." A fee of twenty dollars for a peddler's license was considered unreasonable in *State Center v.*

⁸ *Littlefield v. State*, 42 Neb. 223; *North Hudson Co. R. Co. v. Hoboken*, 41 N. J. L. 81.

⁹ *State v. Harrington*, 68 Vt. 622.

Barrenstein,¹⁰ and two hundred dollars was considered an unreasonable license fee for a butcher.¹¹ Sometimes the amount of fee must be gauged by the work required of the governmental officers in issuing a license; sometimes, by the necessary expense of supervision of the business; and sometimes more than a nominal charge would defeat the very object of the requirement. Where a business is of such nature that it might be easily conducted surreptitiously, but a certain degree of police surveillance is desirable, the conduct of the business may be prohibited under heavy penalty except under authority of license for which a nominal charge would be made. In this way such places of business may be easily catalogued. However, if the charge for license amounted to any considerable sum the keeper of the place would be very likely to run all the risks of conducting his business without legal authority, and hence, without registration. In the case of the milk business, which is a frequent subject of license, one must consider in determining upon the fee to be paid, not only the clerical work of making out the papers, but also the probable cost of such inspections as might reasonably be expected in carrying out the general terms of the enacted statutes, ordinances, rules, and regulations.

The city of Asheville, North Carolina, passed an ordinance which required all dealers in milk to pay a license tax of one dollar per head of cattle in their herds. Payment of this tax was opposed as unreasonable and excessive. The contesting dairyman set forth the fact further that he sold to only one customer, a

¹⁰ 66 Ia. 249.

¹¹ St. Paul v. Coulter, 12 Minn.

creamery. The court upheld the ordinance, on the ground that a refusal to pay the fee, if sustained, would seriously interfere with taking such sanitary precautions as were necessary for the city; and it was not material whether the dealer had one or many customers. Of course the products of the creamery would eventually be sold to other customers. If the fee charged were unnecessarily large for the purpose for which it was imposed, it was the dealer's privilege to set forth the facts before the proper city officers; and under such circumstances if the city authorities failed to reduce the fee the dealer might have recourse to the courts to compel such reduction. The size of the fee is primarily a matter to be decided by the discretion of the city. The ordinance requiring the license could not be set aside because of error in the use of the municipal discretion relative to the size of the license fee.¹²

It is customary at the present time to require state licenses from all who desire to practice medicine in any of its branches, pharmacy, or dentistry, for example, in order that the citizens may be protected from the venality of unqualified tyros. In such a case it is the fact of license which protects; it is not the fee which protects; neither is it any supervision of the conduct of the business. It is not customary today for the state authorities to accept diplomas as evidence of fitness. It is required that competent men shall *examine* candidates and thus determine their fitness. Such an examination may take several days. There is necessitated not only the expense of ordinary clerical work, but also there should be provision for the employment

¹² Asheville v. Nettles, 80 S. E.

of examiners who are really qualified for their work. There is a further necessity that suitable rooms be engaged for the holding of such examination, and it frequently happens that justice to the citizens of a state demands that such examinations be held at widely separated points. Very evidently in such a case more of a fee may reasonably be asked than where all that is desired is the registration of a pawn-broker's shop.

Sometimes, too, the amount of fee itself is an important factor in the regulation of the business, as only the better equipped concerns can afford to pay a large fee. It occasionally happens that this factor arouses the protest of the small dealer, but as a rule the small dealer is the man who needs the closest watching because he is likely to employ incompetent help and himself to lack sufficient education to appreciate the necessities. Take the milk business again, for an example. (§§ 8, 443.) A suitable plant today must have its sterilizers for bottles and for cans, its bottling machines, its pasteurizers, and other expensive machinery. The small dealer cannot afford such luxuries; the large dealer can run them economically. The small dealer under the circumstances is likely either to buy cheap or secondhand machines which work imperfectly, or to entirely neglect observing certain precautions. His very means of obtaining his supply is less likely to be sanitary. He gets a can or two of milk brought down by each of several farmers in a wagon which is used for various other purposes. The writer has often seen such a wagon bring down milk in the morning and carry back a load of manure. A large milk firm cannot afford to run such risks. It must

require that while being transported to the bottling plant the cans be carried in specially prepared wagons, and that the milk must be kept cool by ice in the summer time. The large company finds it a matter of economy to employ special inspectors to go from farm to farm and make frequent investigations as to conditions, keeping score cards upon their observations. The large company is also likely to employ a veterinarian to make frequent visits, and keep watch of the health of the cattle. This extra supervision is practically impossible for the small dealer. It is a very serious matter for a large company when an infection gets started through its dairy products. For the small man it may simply mean the loss of trade for a short time. It is seldom that a small dealer has a suitable apparatus in which to sterilize milk cans before returning them to the farmers; and the farmers practically never have such sterilizers. The consequence is that the cans passing from the farmer to the small dealer and back again may be the means of spreading infection in both directions. This was most graphically illustrated in an epidemic of typhoid fever which broke out at Stamford, Connecticut, in April, 1895. Between April 15 and May 28 three hundred and eighty-six cases living in one hundred and sixty houses had been reported.¹³ Ninety-one and two-tenths per cent of these cases lived in houses taking milk from one dealer. Sixteen others got milk from the same source indirectly, as at a café, making a total of 95.3 per cent of the cases directly traceable to one dealer, who obtained his supply from

¹³ Hygienic Laboratory Bulletin,
56 U. S. Pub. Health Service, p.
30.

several farmers. These same farmers also supplied milk to other parties, and each one had one or more cases upon his private routes. Only four cases out of the total showed no relationship with dealer B. The infection in this epidemic was traced to the rinsing of the milk cans, after washing, with water from an infected source at B's place. Such illustrations show a reasonableness under modern conditions in forcing the small man out of business, unless he be prepared to carry out in full sanitary provisions.

Sometimes the license fee is regarded as an occupation tax, although the prime reason for the requirement of the license may be for police regulation. A license requirement is sometimes attacked in the court on the ground that the fee charged has no relationship to the expense involved in its issuance. The Supreme Court of the United States thus deals with the matter: "The payment required as a preliminary to the license is in the nature and form of a tax, and is due to the state which may demand and 'exact from every one of its citizens who either will or must follow some business or avocation within its limits, to the pursuit of which the assessment is made precedent. It is an occupation tax, for which the license is merely a receipt, and not merely as incident to the general police power of the state, which, under certain circumstances and conditions, regulates certain employments with a view to the public health, comfort, and convenience.'" ^{13a} So a license fee of one hundred dollars required by a city ordinance of dealers in cigarettes was upheld.^{13b}

§ 424. How license is granted. The police power is under the jurisdiction of the state, and the state may

^{13a} Royall v. Virginia, 116 U. S. 572.

^{13b} Gundling v. Chicago, 177 U. S. 183.

therefore make such provision for license under its authority as may seem best. Where a business or establishment affects several communities it is manifestly fairer that the state at large shall use its control, than that the proprietor or practitioner shall be subject to the diverse demands of separate municipalities. On the other hand, where the business is essentially local, as in the conduct of a pawn-shop, the license may better be left to immediate local control. Therefore it is that the state legislature provides in some cases for the issuance of the license by state officers, and at other times it empowers municipalities or other local governmental bodies to make such regulations as seem necessary, including the authority to issue licenses. This issuing of license must not be arbitrarily exercised. There must be no discrimination between residents and non-residents, nor between different persons engaged in the same business, either by charging larger fees for some, or otherwise.¹⁴ Where authority is granted to the city to issue licenses it cannot leave to the mayor the power to determine the district within which a business may be licensed.¹⁵ A city cannot delegate to the mayor the power to grant licenses,¹⁶ though it may delegate the ministerial duties of making out licenses and issuing the same when certain general regulations have been complied with. "It is undoubtedly the law that the right to license must

¹⁴ Indianapolis v. Beiler, 138 Ind. 30; Clement v. Town of Casper (Wy.), 35 Pac. R. 472; Muhlenbrick v. Com., 44 N. J. L. 365; State v. Orange, 50 N. J. L. 389; Borough of Sayre v. Phillips, 148 Pa. 482; State v. Ocean Grove C. M. A., 55 N. J. L. 507.

¹⁵ State v. Cantler, 33 Minn. 69; *In re* Wilson, 32 Minn. 145.

¹⁶ Kinmundy v. Mayor, 72 Ill. 463; State v. Bayonne, 44 N. J. L. 114; Trento v. Clayton, 50 Mo. 541. 114; Trenton v. Clayton, 50 Mo. App. 535.

be plainly conferred or it will be held not to exist. The power to make by-laws relative to specified lawful occupations, or the general power to pass prudential by-laws in reference to them, would not as a general rule authorize the municipal corporation to exact a license from those carrying on such business. But in view of the very important bearing which the scavenger business has upon the public health, and the imperative necessity, from sanitary considerations, that such work should be entrusted only to those who are competent and properly equipped to perform it, we are of the opinion that the grant of power to make such regulations and to ordain such ordinance as may be necessary and expedient for the preservation of health and to prevent the introduction of contagious diseases, conferred authority on the common council, as one means of regulating the scavenger business, to require a license from those carrying it on, and to prohibit anyone from doing so without a license."¹⁷ When the city ordinance leaves to the mayor, or other officer, the issuance of the license, under conditions laid down in the ordinance, there is no prohibited delegation of power; neither does it violate the Fourteenth Amendment to the federal Constitution; neither does it confer upon the mayor arbitrary power.^{17a}

§ 425. **Medical licensure.** It has long been customary to put certain restraints upon the practice of medicine. Thus, under Statutes 4 and 5 of Henry VIII,

¹⁷ Mitchell, J., in *State v. McMahon* (Minn.), 72 N. W. R. 79; see also *Ex parte Garza*, 28 Texas App. 381; *Boehm v. Baltimore*, 61 Md. 259; *Chicago, etc., Co. v. Chicago*, 88 Ill. 221.

^{17a} *Gundling v. Chicago*, 177 U. S. 183; *Gundling v. Chicago*, 176 Ill. 340; *Chicago v. Drogasawacz*, 256 Ill. 34; *Swarth v. People*, 109 Ill. 621.

Chapter 5, we find the act by which the College of Physicians of London was established. In this King Henry said that he was following the example of Italy, and in accordance with the suggestions of Lord Woolsey, he "held it necessary to restrain the boldness of wicked men who professed physic more for avarice than out of confidence of a good conscience." By this act no one was permitted to practice medicine, either in the city of London, or within seven miles of the city, unless he should have passed a satisfactory examination before the censors of this college. Violations of this provision were punishable by a fine of a hundred shillings a month, so long as the practice continued. This act was confirmed by Statute I, Mary, Chapter 9, and extended in effect, permitting imprisonment for malpractice in a broad sense. It will be noted that the additions under Mary gave to the censors of the College a certain continuous control over parties licensed. One Thomas Bonham, in 1606 brought action against the censors of the College for false imprisonment. It was claimed that he was practicing medicine without the license of the College. The censors, therefore, assessed him a fine and kept him imprisoned for the space of seven days. The decision by Lord Coke became somewhat famous incidentally as a precedent for judicial supervision of legislative acts contrary to the common law.¹⁸ It was shown at the trial that the said Bonham graduated from the University of Cambridge with the degree of Doctor of Physics on July 2, 1595. He therefore claimed that since he had the diploma of the University, the College had no authority to restrain his practice as the College was a mere

¹⁸ 8 Coke, 107a.

subordinate to the University. On the other hand it was shown that the said Bonham had been before the censors several times for examination, and that he had failed to answer the questions satisfactorily. The censors, therefore, forbade his practicing medicine, and this prohibition he disregarded. Lord Coke held that they had no authority to imprison Bonham unless it could be shown that he was guilty of malpractice. As to his contention that the holding of a diploma from the University granted him the right to practice, Lord Coke quoted the statute and said that "*nemo*"—no one—was sufficient to prohibit any person practicing in London or within seven miles unless he have the license of the College of Physicians. For that violation the statute would permit a fine of five pounds a month to be recovered by the censors in an action at law. But, for less than a month's violation there could be no fine. Lord Coke said—and this expression has made the case famous in law—"the censors can not be judges, ministers, and parties; * * * and it appears in our books, that in many cases the common law will control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason; or repugnant or impossible to be performed, the common law will control it, and adjudge such act to be void." So much, therefore, of the statute as contemplated that the censors be both executives and judges in regulating the practice of medicine, Lord Coke held null and void. He said that there should be neither fine nor imprisonment without a legal record of the proceeding. In general the comments of Lord Chief Justice Coke in this case are valid today.

In order that the populace may not be imposed upon by unscrupulous persons who lack a knowledge which would fit them to practice medicine, it is customary at the present time for the individual states of our union each to require that candidates for admission to practice present certain evidence of their qualification. This being strictly a police regulation is within the authority of the individual states and according to the present Constitution of the United States, it in no wise comes within the jurisdiction of the federal government. Practitioners of medicine who are not posted in legal principles frequently urge that the federal government assume the responsibility of granting such licenses. The only legal authority for the restriction of medical practice as yet found in this country has been in police power. It has been repeatedly held that the states have authority in this power thus to regulate the practice, and that this power is reserved to the individual states.¹⁹ Apparently, therefore, the only way in which the federal government may undertake this regulation must be by first repealing the Tenth Amendment to the Constitution. It is then the province of the state legislature to determine the general conditions under which a license shall be granted, but the granting of such licenses is not ministerial in character; it must depend upon the exercise of discretionary judgment on the part of the officer as to whether or not the applicant may be qualified to assume the duties of the practice. On the other hand, neither the grant-

¹⁹ *Dent v. West Virginia*, 129 U. S. 114; *Hawker v. New York*, 170 U. S. 189; *Jacobson v. Massachusetts*, 197 U. S. 11; *State v. Hathaway*, 115 Mo. 36; *Reetz v. Michigan*, 188 U. S. 505; *Watson v. Maryland*, 105 Md. 650, 66 A. 635; *Ex parte Spinney*, 10 Nev. 323.

ing, nor the revocation of a license to practice medicine is an exercise of judicial power. The statutes determine the terms upon which the license is granted or revoked, and the issuance is purely an executive act, though exercised with discretion.^{19a} (§§ 183, 184.)

In addition to requirements as to educational qualifications of those who seek licenses to practice medicine, it is entirely proper that the state further safeguard the interests of the people by requiring that all who would enter into such intimate and confidential relationships with the citizens shall be of good moral character. It has been repeatedly held that, so long as it uses reasonable discretion, the legislature may determine what shall be the evidence of such good moral character.^{19b}

There are two principal methods for determining the fitness of a candidate, viz. by the requirement of a diploma from a recognized school of medicine, or by examinations conducted by governmental officers. Occasionally an exception is made in favor of experience permitting years of practice as a substitute for the training which a diploma represents. The questions arise relative to diplomas: first, is the diploma genuine; and secondly, does it represent a properly equipped school of medicine. Our American educational system is so exceedingly lax that it has been possible in the past for commercial establishments run by men often ignorant of the practice of medicine, though legally incorporated according to the laws of

^{19a} *People v. Apfelbaum*, 251 Ill. 18.

^{19b} *Dent v. West Virginia*, 129 U. S. 114; *Hawker v. New York*, 170 U. S. 189; *State v. State Medical Examining Board*, 32

Minn. 324; *Thompson v. Hazen*, 25 Me. 104; *State v. Hathaway*, 115 Mo. 36; *Eastman v. State*, 109 Ind. 278; *State v. Call* (N. C.) 28 S. E. 517.

some state, to issue diplomas which represent absolutely nothing on the part of the holder of the "degree" further than the payment of cash. If diplomas be accepted as a basis for issuing the license by the state, it becomes necessary to invest some officer or officers with the quasi-judicial function of determining the genuineness of the diplomas and the character of the school of learning; and this examining body must have power to reject all applications below a certain grade. Similarly, if the license is to be issued after an examination, again the licensing board must use its quasi-judicial authority in the determination of the question whether or not a license be granted. Such tests of fitness do not violate the principle of equal protection of the laws nor create any special privilege, provided the qualification required is obtainable by reasonable effort.²⁰

Discretion implies a fair judgment without discrimination against any individual. The right to practice cannot be dependent upon adherence to any particular school of medicine. Science is universal; it recognizes no particular school. The very idea of "school of practice" is essentially commercial, not scientific. What the state desires is evidence as to the moral character of the applicant and as to his knowledge. Therefore it is that individual "schools" must neither be given special privileges nor be discriminated against. The exclusion of members of the "eclectic schools" by a board of examiners is not in itself a discrimination unless it be shown that the applications for admission were improperly rejected.²¹ "In

²⁰ *Dent v. West Virginia*, 129 U. S. 114; *Ex parte Spinney*, 10 Nev. 323.

²¹ *Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358, 24 S. R. 809.

a case where it was clear from the evidence that discrimination had been made against a system of medicine, we should not hesitate to hold that the board had exceeded its power.”²² The decision either as to the personal knowledge of the candidate by examination, or the value of the diploma must be “with discretion,” and in no sense arbitrary. The standard for the school should be fixed by statutory enactment and the examiners should simply apply the standard to the case. When the board has attempted to make requirements not prescribed by statute the courts have offered relief by *mandamus*.²³ A similar relief might be given if the determination of the reputation of a school has been left to some foreign body, or if the board refuse to accept a diploma from an institution which it had recognized as reputable.²⁴

It is customary that statutes regulating the practice of medicine provide for the appointment of boards of examiners. The California Law provides for the election of medical examiners by different medical societies. This provision, so far as we are aware, has not been tested in the courts, but it seems to us contrary to good usage. The supreme court of Illinois held in a somewhat similar case that²⁵ such granting of power to special organizations was an unconstitutional delegation of authority, and a granting of special franchise which is contrary to the Illinois constitution. The people of the state elect officers to look after the business of the state. They are so elected, presumably, because people have confidence in their ability,

²² Nelson v. State Bd. of Health, 22 Ky. Law 438, 50 L. R. A. 383; State v. Gregory, 83 Mo. 123; White v. Carroll, 42 N. Y. 161.

²³ State v. Lutz, 136 Mo. 633.

²⁴ State Board of Dental Examiners v. The People, 123 Ill. 227.

²⁵ Lasher v. People, 183 Ill. 226.

integrity, and judgment. It is not apparent by what right or authority the legislature of California saw fit to thus take a portion of the governmental authority and confer it upon independent and private organizations.

“Such rights as inhere in the sovereign power can only be exercised by the individual or corporation by virtue of a grant from such sovereign power, and when the state grants such a right it is a franchise.”²⁶ Power to appoint to office is an attribute of sovereignty.²⁷ The legislature itself had no power to appoint to office. Therefore it could not give that power to non-governmental persons.

§ 426. Medical reciprocity. Although variously worded, the statutes regulating the practice of medicine require that the candidates shall be personally examined by the examining board. This seems to exclude the employment of readers of examination papers, or others to do anything more than the mere ministerial duties. Otherwise, there would be a delegation of authority with discretion. Few of the states have in their statutes any provision relative to the granting of license by reciprocity. Unless special exception be made in the statute, there may be some considerable question as to the legality of such a procedure. Some of the statutes specify that the examination shall be in writing, and that the examination papers shall be a part of the records of the examining board and kept on file in the office. It is difficult to understand how these provisions may be observed when the examination has been made in another state,

²⁶ *Lasher v. People*, 183 Ill. 226, 233; citing *Bd. of Trade v. People*, 91 Ill. 80; *People v. Holtz*, 92 Ill. 426.

²⁷ 1 Blackstone Comm. 272.

when these records are kept in another state, and when the judgment as to the qualifications of the applicant was exercised by residents of such foreign state.

“In these cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that good judgment and discretion, and, unless power to substitute another in his place has been given to him, he cannot delegate his duties to another.”²⁸ “Where, however, the question arises in regard to an act which is of a purely mechanical, ministerial, or executive nature, a different rule applies. * * * The rule, therefore, is that the performance of duties of this nature may, unless expressly prohibited, be properly delegated to another.”²⁹ So, also, Throop says³⁰ in speaking of the American practice: “Thus the rule is well settled here that ministerial powers may generally be executed by a deputy, but judicial powers may not.³¹ Where the powers are partly ministerial and partly of a judicial nature, the exercise of the former may be given to a deputy, but not that of the latter.”³² The ruling given above as to judicial duties applies also to quasi-judicial duties or powers.³³ Thus, a board of health

²⁸ Mechem, *Public Officers*, 567, citing *State v. Patterson*, 34 N. J. L. 163; *Sheehan v. Gleeson*, 46 Mo. 100; *Abrams v. Ervin*, 9 Iowa, 87; *Lewis v. Lewis*, 9 Mo. 183.

²⁹ Mechem, *Op. cit.* 568, citing *Abrams v. Ervin*, 9 Iowa, 87; *Edwards v. Watertown*, 24 Hun (N. Y.), 428; *Lewis v. Lewis*, 9 Mo. 183.

³⁰ *Public Officers*, 570.

³¹ Citing *Page v. Hardin*, 8 B. Mon. (Ky.) 648, 662; *People v. Bank of N. America*, 75 N. Y. 547; *Kirkwood v. Smith*, 9 Lea (Ky.), 228.

³² Citing *Powell v. Tuttle*, 3 N. Y. 396.

³³ *Abrams v. Ervin*, 9 Iowa, 87; *State v. Shaw*, 64 Me. 263; *Shee-*

cannot delegate to a committee its power to employ a physician.³⁴

Applying the above to the granting of medical license by reciprocity, if the statute permits the registration and license of all who hold diplomas from legally chartered medical colleges, the duty of the board may be considered purely ministerial, and as such the determination as to the variety of the diploma might be left to a foreign board. Even here, the case is not clear, for to a minor degree even this determination requires a semi-judicial consideration which will be the greater if the statute requires that the medical school granting the diploma shall be of approved standard. If, however, the statute requires that the applicant shall pass an examination before the board, that is certainly of a judicial nature, and the power cannot be delegated. The mechanical portion of the examination, the supervision of the room during a written examination, for example, can be delegated, but no part requiring judgment.

There is another legal objection to license by reciprocity. A foreign board is not under the jurisdiction of the commonwealth. Citizenship is one of the requisites for office. It is repugnant to our ideals of government that any of the attributes of sovereignty should be surrendered to a person upon whom the commonwealth could have no authority—who could not be punished for abuse of trust. If the law regulating the granting of the license does not require an examination, but simply requires that the board shall be satisfied that the applicant is a proper

han v. Gleeson, 46 Mo. 100;
Crocker v. Crane, 21 Wend. (N. Y.)
211.

³⁴ Young v. Blackhawk Co., 66
Iowa, 460; Taylor v. Adair Co.,
119 Ky. 374.

person to receive the license, the fact of license in another state may be taken as evidence of his fitness. For example: A is licensed in Illinois, and B in Minnesota. Both apply for license in Massachusetts. If the Massachusetts law simply required that the license board be satisfied as to fitness, but does not stipulate how they shall be so convinced, knowing the work of the Minnesota and Illinois boards, the Massachusetts board might be justified in licensing B and in rejecting A. In other words, the Massachusetts board does not surrender nor delegate its semi-judicial power, though it accepts the previous license as evidence of fitness. One Thomas, having been licensed to practice medicine in the state of Maryland, attempted by *mandamus* to compel the issuance of a license in West Virginia by reciprocity. The license board of the second state, however, had a rule requiring that an applicant for a reciprocal license must have been practicing in the state issuing the primary license at least one year.³⁵ This rule was sustained by the court. It will be presumed that a man is not a legal practitioner until he proves to the contrary.³⁶

Lieutenant Colonel Kean,^{36a} of the United States Army, has suggested that use may be made of the Medical Reserve Corps of the Army, and that of the Navy, to provide for license by reciprocity. His scheme requires that the state license boards voluntarily take the result of the army and navy examinations as a basis for license. This seems to be open to the objection that it involves the delegation of quasi-judicial duty.

³⁵ Thomas v. State Board of Health, 79 S. E. R. 725.

³⁶ Miller v. State (Miss.), 63 South. R. 269.

^{36a} Quarterly of the Federation of State Medical Boards, April, 1914.

It is possible that these commissions in the reserve corps may, however, be used to enable a physician to make a transfer to another state. It is a necessity for the national government that it have an efficient medical corps for the army and for the navy. There is need for a larger service in time of war than during peace. It seems advisable, therefore, that such additional surgeons be commissioned and trained before their services may be needed. This is the foundation for the reserve corps. It is not impossible that such commissions in the reserve corps may be sufficient authority for a physician or surgeon to practice in any state in the union. If the present law relative to the organization of the corps does not give that authority it is possible that it may be made to cover this point. Clearly, it is for the interest of the government that such men while in reserve shall not be objects of expense to the national government, and to prevent such governmental obligation, while at the same time keeping them in training for possible use, it is necessary that they be permitted to engage in private practice of their profession.

§ 427. What is medical practice? The exact wording of the statute governing the practice of medicine must decide in every case as to how far it may apply. It would seem reasonable to include everything pertaining to the practice of medicine as medical practice—adding the letters M. D. after one's name or calling oneself "doctor," and particularly when one advertises or holds himself out as competent to treat diseases. The courts have not always been liberal in their application of the statutes, and sometimes they have been rather too lenient, possibly, with real vio-

lators of the law. The fitting of glasses for defective vision is a legitimate portion of medical practice in the estimation of most members of the medical profession. The work requires something more than simply finding the lense which gives the greatest relief. The association of the action of the eye with the nervous system is so intimate that an ocular defect may have serious results upon the rest of the human system. An error in correction of visual defects might seriously increase the patient's troubles. Very frequently the visual defect is associated with some trouble which needs more than glasses, but because suitable glasses have been found the disease is neglected, and permanent harm results. Nevertheless, fitting glasses has been declared not to be practicing medicine.³⁷ On the other hand, the giving of ointments, salves, and eye-water for the eyes is practicing medicine.³⁸ The confusion which may be found between the statements of different courts as to the same question comes largely from the changing condition of the science of medicine, and the imperfect way in which evidence may be presented.

What is here said relative to the practice of medicine applies equally to each of the several professions which are being properly licensed in the interest of health. There may be too great a tendency to extend this system of license beyond its rational scope. Thus, to guard against the dangers which may lurk in the barber shop it may very well be that the regulation of the shop is far more important than the determination as to the knowledge of the applicant for license. How-

³⁷ *People v. Smith*, 208 Ill. 31.

³⁸ *State v. Blumenthal*, 125 S.

ever, barbers' laws have been upheld.³⁹ In the control of barber shops in the interest of health it is necessary to keep a constant supervision. The superficial knowledge which a barber may have of infectious diseases is not sufficient to dignify his art with the title of profession. With the exception of the disease commonly called barbers' itch, infection in barber shops is probably rare. The prevention of such ills must depend chiefly upon the strict observance of sanitary regulations. Because of their slight scientific knowledge and the superficiality of its character, barbers themselves are incompetent to make such rules and regulations. In proportion, therefore, as dependence is placed upon the barber's knowledge, rather than upon compliance with regulations formulated by the sanitary authorities of the state or municipality, it will be found that the protection of the state will be unstable. It is perfectly proper that barber shops should be licensed for control under police power. The license of barbers themselves as members of a profession does not seem to us justifiable. Pharmacy is a profession, and it is the pharmacist who should be licensed rather than the drug store. The pharmacist may properly be examined. There is little necessity for police supervision over a pharmacy which is under the control of a competent pharmacist. This distinction between the license of an individual and the license of his business for police control seems important.

The supreme court of Missouri upheld as constitutional a statute regulating the barber shops, even

³⁹ State v. Sharply, 31 Wash. 191; State v. Zeno, 81 N. W. 748, 79 Minn. 80.

though it applied only to cities of more than 50,000 inhabitants.⁴⁰ On the other hand, the Texas law was declared unconstitutional because in its operation exception was made of the barbers at certain schools and at eleemosynary institutions, and in towns of 1000 inhabitants or less, such exceptions amounting to a discrimination.⁴¹ The court said that sanitary regulations should operate upon all alike, when subject to the same conditions. In Rhode Island the barbers' law was attacked on several points: first, that the search authorized for the sanitary inspection of barber shops was a violation of the state constitution, which declared the people of the state to be secure against unreasonable searches and seizures. On this point the court said that the inspection authorized was no such search as was intended by that provision of the constitution. The examiner is not authorized to take any summary action, such as seizure of objectionable tools, appliances, or furnishings; but the examination is made only for the purpose of ascertaining the sanitary condition thereof, and to enable the board to judge whether or not the law is being obeyed. Other objections to the statute were based upon the fact that it applied only to towns, after adoption by town council. The law was upheld.⁴² The New Jersey court recognized the fact that local boards of health have ample power to prevent the spreading of contagious skin diseases in barber shops.⁴³

§ 428. Revocation of license. License under police power is only a means to an end. Its existence is an evidence that the particular business or occupation

⁴⁰ *Ex parte Lucas*, 61 S. W. 218.

⁴² *State v. Arneso*, 72 Atl. 216.

⁴¹ *Jackson v. State*, 117 S. W.

⁴³ *La Porta v. Board of Health*,

has in it a possibility of harm for the community; and to guard against that evil influence the state, possibly through the instrumentality of the city, attempts by means of the license to keep track of, and control the occupation or business. It would be contrary to public policy were the governmental body to resign, even for a given time, all control over the matter. In fact it has been generally recognized that the police power is so inherently a part of government that it cannot be alienated, and the constitutions of several of the states specially provide against this bargaining away of police control. (§ 212.) The granting of a license in the liquor business does not create a contract.⁴⁴ Though in some of the earlier cases it was held that a liquor license could not be revoked, it is now generally agreed that a liquor license can be revoked at any time during its life for cause. The fact that a milk dealer has obtained a license is no defense for him in continued violation of the ordinances of the city, and should he conduct his business in an insanitary manner, it would seem to be the duty of those in authority to cancel his license.^{44a} All statutes or ordinances providing for license under police power should also contain a provision for revocation of license. Such revocation must, of course, be made only for cause. In the case of *Hawker v. New York*⁴⁵ the revocation was on account of a crime committed years before. Professor Freund questions the justice of this revocation,^{45a} arguing that *Hawker* had acquired a right, and that the license was then essentially a contract. If, how-

⁴⁴ *Calder v. Kurby*, 5 Gray, 597.

⁴⁵ *Hawker v. New York*, 170 U.

^{44a} *State v. Milwaukee*, 121 N. S. 189.

W. 658; *People v. Health Department*, New York, 82 N. E. 187.

^{45a} *Police Power*, 546.

ever, the commission of crime is a moral reason why a man should not be licensed to practice medicine, it would seem to be a valid reason for denying him the right to practice whenever it might be discovered. Since the revocation must depend largely upon the statutory enactment, the exact wording of the enactment must govern the revocation. A case arising in Missouri was that in which a physician was denied the right to continue in practice on the ground that he was guilty of "unprofessional and dishonorable conduct", and that he was willing to commit a criminal abortion. The state statute under which he was suspended provides that the board may revoke licenses for, among other things, producing criminal abortion but the specifications in the act were not intended to exclude all other acts for which licenses may be revoked. The court says that the appellant, through his license to practice medicine, and through his ability and industry, had become possessed of at least a valuable privilege—perhaps a property right—which had been suspended by the action of the respondents for his alleged violation of the laws of the state. The court found nothing in the brief of the attorney general to intimate that the conviction and suspension of the appellant could be sustained on the advertisement which he published. There was no crime in the advertisement itself, nor was hearsay evidence of another physician to the effect that the appellant bore the reputation of being a criminal abortionist sufficient. The statute, in so far as it authorizes the revocation of licenses of physicians, is highly penal and cannot be expanded or enlarged beyond its letter or spirit. Its general specification is directed solely against certain acts, not

against evil thoughts or a willingness to perform wrongful acts.⁴⁶

It was not a question of what might have been done, but what was done in the Spriggs case. Doubtless the legislature might have made the publishing of an advertisement sufficient cause for revoking license, but it did not do so. Neither was the advertisement an open offer to commit abortion, though it might possibly be so interpreted. Neither was it a question of whether or not the doctor might commit abortions. That was really a question for the future. In fact, he had not been convicted of having performed abortions. The board had to deal with facts, not with theories or intentions.

Statutes providing for revocation of license should specify how the license is to be revoked. It would be proper to specify as a cause for revocation the commission of crime; a certification of conviction, duly filed with the proper officer might then be sufficient for the cancellation of the license. Ordinarily the revocation must depend upon some sort of trial. This trial might be before a regular court, upon complaint of the executive, and upon the filing of the finding of the court the license could be cancelled. Or the trial could be within the executive department. If so provided the statute should specify how notice is to be served upon the party whose rights are to be suspended. If the license is to be cancelled by a board, the meeting of the board should be formally recorded, and a copy of the certificate of the serving of the notice should be recorded in the minutes of the meeting. If

⁴⁶ State *ex rel* Spriggs v. Robinson *et al.*, 161 S. W. 1169.

the respondent be present he should be given trial. If he do not respond, or after trial in case he be present, the board may take such action as the facts warrant, and the action should be fully recorded. Unless otherwise provided by the statute, this executive hearing would be final, though questions of law might be reviewed in court.⁴⁷ (§ 141.) Purely *ex parte* findings, because they violate due process, should never be used, further than temporarily in emergencies.

There is another class of cases in which licenses might and should be cancelled or suspended. Statutes sometimes make habitual drunkenness a cause of revocation of medical license. That condition is, in a sense, a crime for which the culprit may be punished. It is a specific act, or result of such action. The reason why the license should then be revoked is that the person who deals with the sacredness of human life should be in his right mind, and with an unclouded brain. It sometimes happens, however, that physicians are in practice whose mental state is such as to unfit them for their work, though it would be difficult to get them committed to an asylum. The consequences of their errors of judgment may be serious. These are not cases of specific acts, but of conditions due to disease. Such persons would not be given licenses were they to request it in that state—why should they retain their right to practice when the rights of the citizens are no longer protected? It is only by revoking, or suspending, a license to practice medicine that the safety of the people is guarded, when the practitioner is in a mental state which prevents the use of clear judgment.

⁴⁷ Nishimura Ekiu v. U. S., 142 U. S. 651.

CHAPTER XVI

WATER SUPPLIES—DRAINAGE AND GARBAGE DISPOSAL

WATER

- § 430. Natural unity of problems of disposal of waste with water supply.
- § 431. State and municipal relationship contrasted.
- § 432. Duty of city to provide water supply.
- § 433. Franchise granted to private corporations.
- § 434. Municipal plants.
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SEWAGE

- § 440. Municipal sewage problem.
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GARBAGE

- § 450. Garbage as a municipal problem.
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- § 452. Ankylostomiasis or the hook-worm disease.

Water

§ 430. **Natural unity of problems of disposal of waste with water supply.** The subjects of water supply and of sewage and garbage disposal are intimately associated. The line between garbage and sewage is not always clearly drawn, and sewage is a frequent pollution of water supplies. In country districts neither of these problems may assume an aspect demanding public attention. They are solved upon the premises of the individual citizen—he digs his own well; what little sewage he may have may be easily diverted where it enriches the soil or is destroyed by nature. The household garbage is fed to the pigs and poultry. On the farm these materials have value

while in the city they are waste. The farmer may easily prevent these substances from being a nuisance to himself or his neighbors, and they become sources of profit in the place of causes for expenditure. Unfortunately, a growing proportion of our population live under the hampering restrictions of city surroundings. Many families reside in a single building crowded upon a small city lot. There may be no portion of the lot uncovered by the edifice, no place in which a well could be dug. Even in the larger city yards a well is an unsafe source from which to obtain the water for household purposes, for the drainage area is very likely to include points threatening pollution. Garbage might be burned upon the premises in many places; but where gas is used for fuel, where the rooms are small and crowded, and where ventilation is difficult, even such destruction is practically impossible for the individual family. The care of dejecta, dish-water, and laundry waste is even more impossible for the family residing in the city, except by communal effort. It has therefore become necessary that all of these subjects be at least regulated by some governmental authority.

Under modern methods of life the inhabitants of a city demand large quantities of water, and they must have an enormous amount of sewage. To insure its purity the water must frequently be brought from a distance. The sewage of a given city may make its way towards the point at which the water supply is obtained, as happened so long at Chicago; or, if diverted elsewhere, it may be a source of danger for other municipalities. It therefore seems increasingly necessary that the state become interested in both

problems. This it may properly do under its police power. The supply of city water is no longer purely a commercial matter. It is necessary that citizens and cities be protected from possible harm which may come in the waste from others.

§ 431. State and municipal relationship contrasted. It must be remembered that there is a marked difference between the relationship of the state and the municipality to the water and sewage problems. One of the prime objects sought in the incorporation of cities is to provide for such matters of common concern as individual citizens cannot so well manage themselves. Since the citizens may not, each for himself, obtain his needed water supply at home, he must arrange for it to be brought to him either in bottles, casks, or other retainers, or through a system of pipes. He may make his contract with an individual, or with a private corporation. As a part of its police power the city may supervise this business. In its supervision the municipality may grant franchises. Since, however, it is a subject which is of vital concern to all the inhabitants, the public corporation may generally enter the business itself, thus competing with the private corporations. In a small town where many of the citizens still obtain their supply from private wells, because of the fact that only a relatively small portion of the taxpayers find it necessary to buy water, the franchise may perhaps be the best solution; but in a more thickly settled community the city may transact all the business more economically than the private corporation. To divide the expense equably among the customers the city charges users in proportion to the amount each consumes. There may be a

net gain or net loss to the corporation, but in such a matter the city is a business corporation and as such it assumes certain responsibilities and liabilities.

The state, on the other hand, is not a corporation. It is not in the business of selling water; but in its governmental capacity of protecting its citizens from harm, it may, and should, protect the purity of water supplies. This protection is often impossible for the city because the source of supply is frequently not within the jurisdiction of the city. Similarly, when the city undertakes to take the place of private contractors in removing the garbage and sewage it may be considered as acting in its corporate rather than in its governmental capacity; but it is the duty of the state to protect other communities from being injured by the sewage which a city throws away. The interest of the city is to get rid of its waste; the state sees to it that one municipality does not commit a nuisance upon others.

§ 432. Duty of city to provide water supply. It is the duty of municipalities to provide a plentiful supply of pure water either as a corporation or in its governmental capacity. This means that the city must see to it that its inhabitants are provided with water of such a composition as will serve for all their needs and be free from injurious chemicals and pathogenic bacteria, or protozoa. This does not mean that the water must be chemically pure. The most satisfactory spring water, clear as crystal, and cooled by nature, contains a varying quantity of earthy salts, and those very salts may be useful in the nutrition of the body. Even salts which are beneficial in small quantities may be harmful in larger proportions. Decaying animal

and vegetable matter, on the other hand, is always objectionable. Such materials may contain harmful germs at any time, and they furnish food for pathogenic growths. Formerly the ordinary tests used to determine the character of the water were purely chemical. Today the chief tests are bacterial. It is not shown that the colon bacillus is *per se* harmful, but its presence is considered a sure indication of danger. Though the study of the Hygienic Laboratory in the Panama Canal Zone indicates that the colon bacillus may be present without pollution with human excrement, the only safe way is to regard it as an evidence of such contamination. If the colon bacillus derived from human sources find its way into the water supply we may at any time find it accompanied by its cousin which produces typhoid fever. Water containing the colon bacilli is suspicious in proportion to the number of those bacteria per cubic centimeter. It is the governmental duty of the city to prevent the use of water containing harmful germs, thus to prevent illness among the citizens.

It is the duty, therefore, of the city to see that there is furnished to its inhabitants plenty of water. As Mr. Justice Harlan remarked,¹ "The contrary cannot be maintained unless we hold that a municipal corporation may by mere implication bargain away its duty to protect the public health and safety, as they are involved in supplying the people with sufficient water. Nothing can be more important or vital to any people than that they should be supplied with pure, wholesome water." The fact that even an exclusive

¹ Vicksburg v. Vicksburg Water Works Co., 202 U. S. 453.

franchise has been given by the city to a water company does not, therefore, put a stop to its control over the subject. If the company furnishes unwholesome water it is the duty of the city to use its police power to stop such sale; and if the company does not then provide a safe supply, its non-user would justify the annulment of the franchise.

§ 433. Franchise granted to private corporations. It frequently happens, especially in smaller communities, that for financial reasons it seems best to meet the obligation of supplying water, gas, and electricity to the citizens by granting a franchise for this purpose to a private corporation. The amount of the initial cost of the plant may be temporarily prohibitive for the city. On the other hand, private investors will generally be loath to make such an outlay unless they be assured of sufficient permanency for the business to guarantee a safe profit. Exclusiveness is an important element in the contract. The authority of the city to make such a bargain must be clearly found in the charter or in the general statutes of the state; and such provisions will be very strictly construed by the courts.² Unless such authority be clearly given to the city, it will be presumed not to exist. Under the general authority to grant a franchise the city may not grant exclusive rights; but since municipal competition would be destructive of private business, policy may dictate that, in granting a franchise to a water company, the city may properly agree not to establish a competing plant within a specified time.³

² *Minturn v. Larne*, 23 How. 435; *Wright v. Nagle*, 101 U. S. 791.

³ *Walla Walla v. W. W. Water Co.*, 172 U. S. 1.

When the grant contains no covenant that the city will not itself establish a plant, it has been held that silence permits such establishment, but that it may not tax the corporation to meet the expense of such competing enterprise, nor discriminate either directly or indirectly in taxation against those citizens who continue to patronize the private corporation.⁴ A prior legislative grant of exclusive privilege has been held sufficient to prevent the grant of a municipal franchise, and is restricted only for real or presumed necessity for the protection of public health, or similar cause for the use of police power.⁵ Should the state courts hold that under the state constitution the legislature has no authority to bind its successors, there would be no valid contract; and the federal courts would probably follow the construction of the state courts except where the federal court itself holds that no contract exists.⁶ A franchise granting a monopoly against a common right may be granted for police purposes; and a water franchise may be thus interpreted. But such a contract is still subject to regulations in the interest of health and safety, and it would seem that in case of necessity it might be abrogated before the expiration of its term, but this necessity must be under police power as for preservation of health, not for commercial reasons.⁷ It might, however, be held necessary to

⁴ Skaneateles, etc., Water Co. v. Skaneateles, 161 N. Y. 154; s. c. 184 U. S. 354; North Springs Water Co. v. Tacoma, 21 Wash. 517; Glenwood Springs v. Glenwood Light and Water Co., 202 F. 678; Washington-Oregon Corp. v. Chehalis, 202 F. 501.

⁵ New Orleans Water Works Co.

v. Rivers, 115 U. S. 674; St. Taurmany Water Works Co. v. New Orleans Water Works Co., 120 U. S. 64.

⁶ Freeport Water Co. v. Freeport, 180 U. S. 587; Douglas v. Kentucky, 168 U. S. 488.

⁷ Butchers Union v. Crescent City, etc., Co., 111 U. S. 746.

acquire the original plant by the use of the power of eminent domain.⁸ Even a grant of exclusive franchise may not be so exclusive as at the first glance appears. Franchises must be literally construed. We may quote again from Mr. Justice Harlan:⁹ "We are forbidden to hold that a grant, under legislative authority, of an exclusive privilege for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of waterworks from a particular stream of water, prevents the state from granting to other persons the privilege of supplying during the same period, the same corporation and people with water drawn in like manner from a different stream or river."

A municipality cannot bargain away any portion of its police power.¹⁰ While it might violate a moral obligation to take advantage of a technicality in a grant of franchise to establish competing works, it becomes a duty to provide other means of supply when the first company fails to furnish pure water.

In making a contract with a private corporation or firm to supply water for the municipality it is very proper that a stipulation shall be made that the water shall be pure. This does not mean that it shall be chemically pure, but that it "shall be free from pollution deleterious for drinking and domestic purposes." It may not require the installation of a filter; but it does require that the contractor furnish means for preventing contamination under all conditions likely to occur.¹¹

⁸ Freund, Police Power, 680.

⁹ Stein v. Bienville Water Supply Co., 141 U. S. 67.

¹⁰ Freund, Police Power, 362, 561, 562.

¹¹ Mayor of Jersey City v. Flynn, 74 N. J. Eq. 104.

§ 434. **Municipal plants.** Providing pure water for its citizens is a legitimate use of the police power of a city.¹² The municipality may then enter upon the business and establish its own plant. This involves a large initial outlay which may sometimes exceed the authority of the city to pledge. It has been held, however, that when a city has contracted for waterworks to be paid for in annual installments, or monthly, if it can pay each installment when due without exceeding the limit there is no indebtedness, and therefore no violation of the constitution as there is no debt until the money is due.¹³

Adjacent cities may sometimes conserve the interests of their citizens by using the same municipal plant. For governmental reasons this cannot well be operated by the two or more corporations conjointly. One corporation must assume the responsibilities of maintaining the plant, and sell the water to neighboring cities as it does to its own citizens. The sale of water by the municipality to its citizens has been held to be business of a private nature.¹⁴ It would ordinarily be held, therefore, that if it may be done profitably in the interests of its own citizens, a city may sell also to neighboring municipalities; however, in at least one case it was held that authority to supply its own citizens did not include authority to carry water outside its limits, and to sell to another municipality.¹⁵ While

¹² Kennedy v. Phelps, 10 La. Ann. 227; Suffield v. Hathaway, 44 Conn. 521; Smith v. Nashville, 88 Tenn. 464; Hale v. Houghton, 8 Mich. 458.

¹³ Walla Walla Water Co. v. Walla Walla, 60 Fed. Rep. 957; Keihl v. South Bend, 76 Fed. Rep. 921.

¹⁴ Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. Rep. 271; Bailey v. New York, 3 Hill, 531; Cincinnati v. Cameron, 33 Ohio, 336; Helena Cons. Water Co. v. Steele, 49 Pac. 382; Western Savings Fund Soc. v. Philadelphia, 31 Pa. 183.

¹⁵ Haupt's Appeal, 125 Pa. 211.

this is apparently a correct statement of the law, it is unfortunate, and where so restricted common interests suggest that the law be amended. It has sometimes been held also that the power to sell water is not in the nature of a private business. It is granted for public use, and the corporation is not therefore liable for either non-use or misuse. "The imposition of water rents is but a mode of taxation and a part of the general scheme for raising revenue with which to carry on the work of government. * * * There is nothing connected with the work which is not of a governmental and public nature."¹⁶ One use of the water supply is for fire protection. The case quoted above arose from a failure to furnish sufficient water to extinguish the fire, and that failure was due to the works not being kept in proper condition. It seems to us that such a case is very different from injury due to the water actually used by the party. There is no contract with the customer to supply any stated quantity.

§ 435. Liability of municipality. According to the general rules a city is not liable for malfeasance, misfeasance, or nonfeasance when acting in its purely governmental capacity; but it is liable in matters in which it conducts a business for the profit of the corporation or its members. (§§ 374, 375.) When, therefore, it makes no charge for the water which it supplies, it is not liable *en tort*;¹⁷ but if it charge water rates upon users it may be held liable.¹⁸ As we stated before,

¹⁶ Fire Ins. Co. v. Keesville, 148 N. Y. 46.

¹⁷ Danaher v. Brooklyn, 51 Hun, 563; Dillon, Munic. Corp. 985a.

¹⁸ Ingersoll, Pub. Corp. 214; Dillon, Munic. Corp. 981; Milnes v. Huddersfield, L. R. 10 Q. B.

Div. 124; Chicago v. Selz, Schwab & Co., 202 Ill. 545; Augusta v. Lombard, 99 Ga. 282; Whitfield v. Carrolton, 50 Mo. App. 98; Bailey v. Mayor, 3 Hill, 531; Stock v. Boston, 149 Mass. 410; Aldrich v. Tripp, 11 R. I. 141.

there should be recognized a marked difference between an injury resulting from a failure in the supply, and an injury caused by a polluted supply. When a city undertakes to furnish its citizens with water for domestic use it is under obligation to furnish pure water. If, therefore, the water furnished be contaminated, as with the typhoid germ, and injury results it may well be assessed damages as they may appear.¹⁹

As to the liability of a city for damages in case that typhoid fever germs were distributed in the city water supply the case of *Keever v. Mankato*,²⁰ in Minnesota, promises to be a leading case in this country. The complaint set forth not a mere action against the defendant to recover damages because the city failed to provide an adequate supply of pure water. The question here was whether the city was liable for, among other things, recklessly causing dangerous substances like common sewage and other filth to saturate its water supply and the wells, mains, and appurtenances thereto. The first essential question was whether the city was exempt because it was carrying out a governmental function, or whether it was liable because it operated the waterworks in its private or corporate function. The defendant naturally insisted that it was performing merely a governmental function. But the court holds that it was liable for its negligence in its private or corporate capacity, and was not exempt as carrying out a governmental function. The defendant also insisted that the city could make no profit out of its operation of these waterworks. Doubtless this was

¹⁹ *Milnes v. Huddersfield*, L. R. 10 Q. B. Div. 124; *Keever v. Mankato*, 113 Minn. 55; see also *McGregor v. Boyle*, 34 Ia. 268.

²⁰ 113 Minn. 55.

in a general way true; at all events it might be here admitted. But the sequence which the defendant sought to draw did not at all follow: i. e. that therefore it should be exempted from all liability for mismanagement; for the city is liable for neglect in connection with its streets, sidewalks, and sewers, from which in their very nature no profit is or can be made. The city operates the waterworks for profit in the sense that it is voluntarily engaged in the same business which when conducted by private persons is operated for profit. The city itself makes a reasonable and varying charge. The undertaking is partly commercial. It is enough that the city is in a profit-making business.

Then the defendant insisted that it would not be sound policy to open the door and permit actions like the present to be maintained for the reason that as a result the defendant city, as well as any other city, would be liable at any time to have the same misfortune and would be bankrupted thereby. But the court must regard the defendant's figures as purely hypothetical. The question is one of general principles recognized by the law, and not of the private views of court or counsel as to what the convenience or necessity of a particular city may dictate under particular circumstances. The general experience of public and private waterworks is that ordinarily their operation involves no such financial disaster as the defendant portrayed. 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 would be held responsible for its conduct, and made to contribute to the innocent persons it may have damaged. The cases in which a city has been held responsible, or irresponsible, for damages by fire consequent on an inadequate supply of water are in a class by themselves. From many points of view the rule holding the city liable for its negligence is not inconsistent with the rule there announced. The law does not undertake to achieve the impossible.

The defendant also urged that in no case has the city been held liable for negligence in the operation of its waterworks unless the act involved a trespass, or an invasion of a direct property right. Thus water escaping from a city reservoir runs onto another's property and does damage; this is trespass and there is liability. But if the escaping water should do damage to a person on a public highway there would be no trespass, but the law would recognize liability. Liability of the city is recognized in the case of streets and sidewalks which cannot properly involve trespass. Nor did the defendant show any reason for imposing liability in the case of trespass or the breach of insurance of safety which does not logically apply to cases of negligence. On general principles liability for negligence is more just and more generally recognized because it is based on culpability.

Lastly, the court holds that, on the assumption that the plaintiff's intestate could have maintained an action against the city had he lived, his administrator, or administratrix, could maintain an action under the Minnesota statutes.

This responsibility of the city presupposes authority to guard its source of supply from infection.²¹ Such power may be given by legislative enactment but it must be reasonably exercised. This is illustrated by a New York case, which though abstractly correct, may be of doubtful propriety from a scientific point of view.²² In this case it was held that a health department prohibition of the harvestry of ice on a source of water supply was unconstitutional, as taking property without compensation, which is justified only by absolute necessity. Where the public good can be conserved by the regulation of a right, this power of prohibition does not exist. With the possibility of efficient regulation, to prohibit the cutting of ice is beyond the power of the health officer, and a contrary ruling would work public and private mischief.

§ 436. State supervision. Very frequently the source of a municipal water supply is beyond the jurisdiction of the corporation. It then becomes the governmental duty of the state to step in and use its police power. By statutory enactment this authority may be properly conferred upon the state department of health. As illustrating this method of action we may cite a Vermont case,²³ in which it was held that police powers may properly be delegated to boards of health, and when so delegated the agency employed is clothed with power to act as fully and efficiently as the state itself. Though a riparian's right to reasonable use of the water of a pond includes the right to bathe and swim therein, such right was not primary, but incident to the owner-

²¹ *Stone v. Heath*, 179 Mass. 385.

²³ *State v. Morse*, 80 A. 189.

²² *People v. Kirk*, 119 N. Y. 862.

ship of the land. Hence a regulation of the State Board of Health prohibiting bathing in a pond from which a city derives its water supply was a valid exercise of police power. A frequent necessity for state intervention is found in the prevention of sewage pollution of streams, ponds, and lakes used as sources of water supply, and the indications are that this use of state, and perhaps national intervention will become more frequent and more important in the future.

§ 437. **Water on trains and boats.** Whenever cars are designed for interstate traffic the company owning or using them is bound to equip them as required by act of Congress; and when it is shown that a railway company is using the car for transportation purposes between states, sufficient is shown to justify the court in ruling that the act of Congress is applicable to the situation.²⁴ In the state of Kentucky it was held that it was the duty of all persons in charge of railroads, steamboats, and private conveyances, to obey the regulations of the State Board of Health.²⁵ In the state of Georgia it was held that it is within the constitutional power of the general assembly to impose upon a railway company the duty of providing for an adequate supply of pure drinking water for its passengers while journeying upon its cars, and to provide that the corporation shall be indicted, prosecuted, and fined for a neglect of this public duty.²⁶ It has formerly been a custom for the railway companies to provide drinking water, and by each tank to keep a cup or glass. This has even been required in some states by law.

²⁴ Voelker v. Chicago, etc., R. Co., 116 Fed. 867.

²⁶ Southern Ry. Co. v. State, 125 Ga. 287.

²⁵ Mason v. Ill. Cent. Ry. Co., 77 S. W. 375.

Recently it has become popular for the legislative bodies to enact statutes abolishing the common drinking cup, but such abolition does not necessarily repeal a provision that the company must provide cups or glasses. The train may carry supplies of individual cups, or the road may keep a man in charge who shall cleanse the cup each time that it is used. The company may still be compelled to furnish drinking cups.²⁷ It must be remembered, however, that state regulations on interstate trains are only valid in so far as they do not conflict with legal requirements of the federal government.

Ordinarily but one system of water is provided for a city, and that is used for all purposes. Sometimes a separate system, in whole or in part, is provided for fire protection and mechanical purposes. The double system is always a sanitary danger, for connecting pipes are more or less common even in spite of municipal supervision. With such exceptions sanitarians have no concern with the second system.

Sewage

§ 440. Municipal sewage problem. The contractual, rather than the governmental relationship of the city to the sewage problems may not be immediately apparent to the modern cliffdweller, born and raised in a city apartment building. Originally, however, the city was moved to assume the sewage control as the agent of its individual citizens. The village house discharged its sink and laundry waste into a cesspool so

²⁷ Del. Lackawanna & W. Ry.
Co. v. Pub. Util. Commrs., 83 N. J.
L. 215.

constructed that the water might pass into the soil, and the organic materials would be decomposed by nature into harmless gas and water. There was, however, a certain residuum of sludge which necessitated occasional removal. Sometimes the owner buried this sludge upon his own premises; sometimes he had it transported to some other place where it could not be a nuisance. The same was true relative to the contents of the privy vault. Because the cleaning of vaults and cesspools was frequently performed by those who were careless of the rights of others, and the contents were emptied where they might endanger the public health, supervision of the business by the city was frequently necessary under police power. This supervision was sometimes exercised by means of license demanded of all who were engaged in the scavenger business. With increasing density of the population privy vaults especially became a menace. A single vault containing the typhoid bacilli may contaminate every house within two blocks in every direction through the agency of flies as carriers. Though this fact was not appreciated formerly as fully as at present, still privy vaults were long recognized as nuisances. The vault is not a necessity, and no person has a right to endanger others by maintaining a nuisance. A law directing the summary destruction of a privy vault, even pending appeal, is constitutional.²⁸ It is necessary for the citizen to dispose in some manner of his dejecta and of the sink and laundry waste. Very naturally he is moved to make use of natural provisions for drainage; but the nearest stream may be some distance away.

²⁸ *Harrington v. Providence*, 20
R. I. 223.

The rational result is that the municipality constructs sewers to take all sewage at the private lot line and transport it underground instead of by wagon, to a point where it may safely be emptied. In so doing the municipal corporation²⁹ is but acting as the agent of the citizens collectively, and the power is granted for the special benefit of the municipality.³⁰

Because, therefore, the municipality in this matter acts in its corporate capacity, it is liable for any injury resulting from malfeasance pertaining to the construction or operation of the system. Unless the duty of providing sewers is enjoined by the state, use of its power to construct such a system is discretionary;³¹ therefore the city cannot be held liable for a failure to construct, nor for a mistake by which an incompetent system is provided.³²

For various reasons it is not always practicable to have sewers constructed, and to a degree the use of the privy and the cesspool must continue. Because nightsoil has value as a fertilizer it has been used particularly in market gardening. Sewage farms have been found sometimes to be a source for municipal income. However, it has been demonstrated that lettuce, grown upon soil infected with the typhoid bacillus, may carry the germ. It has therefore seemed best to prevent such use of nightsoil. But, the denuncia-

²⁹ *Detroit v. Corey*, 9 Mich. 165.

³⁰ *Donahoe v. Kansas City*, 136 Mo. 657; *Ostrander v. Lansing*, 111 Mich. 693.

³¹ *Carr v. Northern Liberties*, 35 Pa. 324.

³² *Mills v. Brooklyn*, 32 N. Y. 489; *Henderson v. Minneapolis*, 32 Minn. 319; *Cummins v. Sey-*

mour, 79 Ind. 491; *Montgomery v. Gilmer*, 33 Ala. 116; *Jordan v. Benwood*, 42 W. Va. 312; *Perry v. Worcester*, 6 Gray (Mass.), 544; *Diamond Match Co. v. New Haven*, 55 Conn. 510; *Power to obtain extra territorial outlet, Maywood Co. v. Maywood*, 140 Ill. 216.

tion by statute of certain uses of the contents of cesspools does not inhibit municipalities from adopting cesspools as a part of its system of sanitation. Such an ordinance is neither oppressive nor unreasonable. The provision in the state constitution giving to the state board of health supervision over public health has no application when the board fails to act.³³ On the other hand, when cesspools and privies are permitted they are reasonable subjects for municipal regulation. Therefore, an ordinance or regulation of a city board of health prohibiting the maintenance of a privy vault within twenty-five feet of any door or window of any residence is reasonable.³⁴ It would seem, in the light of present information that it is quite as necessary that it be required that all privies be screened, so that flies shall be excluded. The power to designate a place for the deposit of nightsoil is a necessary incident to the power of boards of health over cesspools, and removal of their contents.³⁵ An act requiring that every building used as a residence, or in which persons are employed, if situated upon a street in which there is a public sewer "to have sufficient water closets connected with the sewer," is within the constitutional power of the legislature, as the guardian of the police power of the state.³⁶

As a municipality increases in size and its population becomes more dense, the power to construct sewers gradually assumes a governmental aspect, and the use of the authority which was discretionary becomes a duty. Such construction becomes increasingly neces-

³³ Logan v. Childs, 41 S. 197.

³⁵ Courter v. Newark, 25 Vr. 325.

³⁴ Cartwright v. Board of Health, Cohoes, 165 N. Y. 631;

³⁶ Commonwealth v. Roberts, 29 N. E. 522.

affirmed, 59 N. E. 1120.

sary in the protection of the public health.³⁷ Especially with this view of the case the legislature has the authority to impose upon municipalities the mandatory duty of constructing sewers.³⁸

It is customary to assess the cost of special improvements upon property which is thereby benefited. Since vacant property can generally not make immediate use of sewers it has been contended that vacant property cannot be assessed to pay for sewer construction. Such a contention is unfortunate, so long as the improvement be recognized as one to be thus paid for by special assessment, for it might prevent giving needed relief to isolated citizens. Property now vacant may in the future need sewers. The very presence of the sewer increases the value of the lot and makes it more available for use. The lot below grade may be filled up and so receive benefit from the sewer. Vacant property should therefore be assessed for sewer construction.³⁹

§ 441. Sewer a nuisance. The sewer itself may become a nuisance.⁴⁰ Whether the sewer be private, as constructed by an individual owner, or public and under municipal control, there should be no nuisance. (§ 375.) The fact, therefore, that a town board of health ordered a keeper of a hotel to discharge the sewage from his hotel into a watercourse was no defense to a suit brought by a riparian owner to enjoin such use.⁴¹ No prescription of usage can justify the pollution of a stream by the discharge of sewage

³⁷ *Cockrane v. Malden*, 152 Mass. 365; *Noble v. St. Albans*, 56 Vt. 522; *Springfield v. Spence*, 39 Ohio, 665; *Weis v. Madison*, 75 Ind. 241.

³⁸ *Dillon*, *Munic. Corp.* 73.

³⁹ *Downer v. Boston*, 7 Cush. 277; *Writ v. Boston*, 9 Cush. 233.

⁴⁰ *McGregor v. Boyle*, 34 Iowa, 268.

⁴¹ *Mann v. Willey*, 168 N. Y. 664.

therein in such a manner as to be injurious to the public health. A board of health has power to declare to be a nuisance and to abate whatever is *per se* a nuisance at common law.⁴² The fact that a stream has been used as a sewer may give a certain degree of presumptive right for such use, but it gives no greater right than past usage. That is to say, the fact that a stream has been used for the discharge of sewage in a certain quantity does not give to the city a right to discharge more than that quantity. Further, if the natural flow of water in the stream be decreased, as by diversion above, or by less rainfall, the same amount of sewage discharge would increase the pollution relatively. Either an increase in the total amount of sewage discharged or a decrease in the amount of water naturally in the stream might produce a nuisance where previously there was no nuisance. It is quite within belief that a changed use of the banks of the stream below might also change the aspect of such use of the natural watercourse from one of innocence to danger. It must always be borne in mind that a nuisance, especially a nuisance as against public health, is something which should not be tolerated.

The estimation as to whether discharge of sewage into a stream or other body of water is a nuisance, is not to be gauged solely by the amount of sewage produced in the city. Under modern methods the sewage may be so treated as to really be a benefit to the stream rather than a detriment. The old septic tank has not proven itself reliable in action, but the tank devised by Doctor Karl Imhoff of the Emschergenossenschaft

⁴² Commonwealth v. Yost, 11 Pa. Super. Ct. 323.

takes the crude sewage and pours out water much clearer than that found in many streams, and practically devoid of harmful bacteria. Sewage has also been treated by filtration, by electric currents, and by chemical reagents so that it may be harmless. In an English suit to enjoin the use of the stream by a sewage district, the high court appointed no less a man than Sir William Ramsay to make the investigation, and he found that the water of the stream was actually purer below than above the point of entrance for the sewer.⁴³ To enjoin the city, therefore, against committing a nuisance by discharge of sewage into natural bodies of water works no permanent hardship upon the city. On the other hand, simply because in times past a little village saw fit to empty its sewage into a neighboring stream is no excuse for the populous city, in getting rid of its sewage, to dump its filth upon its neighbors.

This whole subject was well discussed in a case brought by the attorney-general of Michigan against the city of Grand Rapids.⁴⁴ This was a proceeding to declare and to abate and restrain the continuance of an alleged public nuisance which was claimed to result from acts of the city in conveying through artificial means its sewage into the Grand River, which flowed down the river and was cast on the lands below that city, and particularly on those lands which are adjacent to and within the Village of Grandville. In the court's opinion the equities of the case were with the complainants, and the testimony made out a case of public nuisance. "If the city in emptying its sewage

⁴³ Atty. Gen. v. Birmingham, Grand Rapids (Mich.), 141 N. W. etc., L. R. C. D., 1910, Vol. I, 48. R. 890.

⁴⁴ Attorney-General v. City of

into Grand River, as shown by the evidence, created a nuisance to the public or riparian properties below the city, the continuance or creation of that nuisance might properly be restrained by injunction, and the attorney-general was a proper complainant. Undoubtedly the city has the right to make a reasonable use of the waters of the river as a riparian owner. But the court's attention has not been called to any statute giving the city the right to use Grand River below its limits as a sewer for the purpose of carrying away its waste and refuse in an unreasonable manner; and, if it were attempted by statute to give such a right, the statute would be unconstitutional, unless it first provided that the owners of property along the river should be compensated for damages to be first determined by constitutional methods for destruction of such property rights. If the city creates, or threatens to create, a public nuisance, particularly outside of its corporate limits, it is subject to the same rules as would be a private individual, particularly when in the creating of such nuisance it acts not in a governmental but in a private capacity. There can be no prescriptive right, that is from long usage, to pollute a stream by the discharge of sewage in such a manner and to such an extent as to be injurious to the public health. Even assuming that a prescriptive right to foul a stream with sewage can be acquired, such must be restricted to the limits of it when the period of prescription commenced; and if the pollution be substantially increased, whether gradually or suddenly, the court will interfere by injunction to prevent the wrongful excess; and, if it be impossible to separate the illegal excess from the legal user, the wrong-doer must bear the conse-

quences of any restrictions necessary to prevent the excess, even if it unavoidably extends to the total prohibition of the user. No person is entitled on the ground of ancient custom to the privilege to collect a mass of sewage matter and pour it at one point into a stream in such a quantity that the river cannot dilute it on its passage down to the lower riparian proprietors, as the effect of such an act is to create an evil which must be illegal, being such as no custom can authorize. The general rule is that sewage cannot be cast into the stream to such an extent as to pollute it. Sewage cannot be thrown into the stream in such a way as to render the water foul and unfit for use. Wherefore, the decree of the court below in favor of the defendants is reversed, and one entered for the complainants restraining the city, its boards, officials, servants, and agents from continuing to discharge the sewage of the city into Grand River, until the same shall have first been, by the use of a septic tank or tanks, so deodorized and purified as not to contain the foul, offensive, or noxious matter (which it now contains) capable of injuring the complainants or their property, or causing a nuisance thereto; such injunction to become operative one year after the date of the settling of decree. The complainants will also recover of the defendant city their costs of both courts."

Evidence that there were numerous cases of typhoid fever in a certain building, and that the sewage from that building was conducted by the defendant to certain filter beds, and that the sewage after filtering ran into the plaintiff's stream, was admissible in connection with evidence that the said plaintiff's stream continued to be contaminated by the sewage after the

use of the filter beds, as tending to show a diminished value in the use of the stream, even without further proof that the germs of the said disease actually reached said stream, and although it appeared that the water of the said stream was not then used for drinking purposes. Under such circumstances the plaintiff could neither be expected himself to use such stream for drinking purposes for his own cattle, nor to be able to procure others to so use it.⁴⁵

The Collingswood Sewerage Co. was incorporated under the New Jersey Act of 1898, to collect, treat, and dispose of sewage. The State Board of Health is vested with the powers and duties of a state sewage commission. The plans for the Collingswood Sewerage Co. were submitted to the State Board of Health and approved by the engineer of the board. Nevertheless, when the plant was put in operation it was discovered that it generated unpleasant and offensive odors, to the injury and discomfort of the community, and action was brought against the corporation. The defense of the corporation was that its plans had been approved by the engineer of the state board, and that owing to the cost of the plant it was not a profitable concern, as it did not meet its fixed charges. Upon conviction the corporation appealed. The court said that the state did not, with the permit to treat sewage, grant to the corporation the license to commit a nuisance. Nor did the fact that the plans had been approved absolve it from maintaining a nuisance. When put in operation the fact was demonstrated by the odors produced that there was some defect in the plans. No matter how much the plant might have cost, or how

⁴⁵ Gorham v. New Haven, 66 At.

unprofitable its operation might be, neither element was sufficient to absolve the company from maintaining a nuisance due to faulty construction of the plant, or by its negligent operation.⁴⁶

§ 442. Jurisdiction. Because a local board of health has jurisdiction only over a limited territory, the orders of a single board may not be sufficient to preserve the purity of a source of water supply. Thus, a nuisance maintained on land in two adjacent townships is equally within the jurisdiction of each township, and the orders of one town board would not extend into the territory of the other township. Although the state statutes conferred upon the state board of health supervision over streams, ponds, etc., used for water supply, a town board still may abate a nuisance in the pollution of a water supply.⁴⁷ Generally speaking it must devolve upon the state authorities to protect one community from the nuisance of another's sewage. Thus, the supreme court of Montana upheld the State Board of Health in prohibiting a city from discharging its sewage into a river.⁴⁸

Just as the state must stand guard between different municipalities, so it seems that it would be desirable if authority could be found to enable the national government to protect one state from a similar injury by another. (§§ 243, 244.) The only real protection possible at present is a suit before the federal courts brought by one state against another. The condition is at best anomalous. It would be essentially a suit for damages and enforcement of judgment might be difficult. In the case of *Kentucky v. Dennison*⁴⁹ applica-

⁴⁶ *State v. Collingswood Sewerage Co.*, 89 Atl. 525.

⁴⁷ *Stone v. Heath*, 179 Mass. 385.

⁴⁸ *Miles City v. State Board of Health (Mont.)*, 102 Pac. 696.

⁴⁹ 24 How. 66.

tion was made for a writ of *mandamus* to compel the governor of Ohio to surrender a fugitive from justice. The court held that while the case was a controversy between two states, it had no jurisdiction to grant the writ; that Congress could not coerce a state officer as such to perform any duty, nor could that duty be enforced by a United States court. In *Missouri v. Illinois and The Sanitary District of Chicago*⁵⁰ the court affirmed its jurisdiction of a suit in equity by the state of Missouri to restrain the defendants from receiving or permitting to be received and eventually discharged into the Mississippi the sewage of Chicago, which had previously been discharged into Lake Michigan. The court said in its decision: "An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded 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. If Missouri were an independent and sovereign state, all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering." Earlier in this same opinion, Mr. Justice Holmes said: "The Constitution extends the judicial

⁵⁰ 180 U. S. 208.

power of the United States to controversies between two or more states, and between a state and citizens of another state, and gives this court original jurisdiction in cases in which a state shall be a party. Therefore, if one state raises a controversy with another, this court must determine whether there is any principle of law and, if any, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature. Some principles it must have power to declare. For instance, when a dispute arises about boundaries, this court must determine the line, and in doing so must be governed by rules explicitly or implicitly recognized.⁵¹ It must follow and apply those rules, even if legislation of one or both of the states seems to stand in the way. But the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between states the same system of municipal law in all its details which would be applied between individuals. If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the states sanctioned by the legislature of the United States." Practically it amounts to this, that in a matter in which Congress has authority to act the courts could enforce action between states; but where Congress has not authority, the influence of the federal

⁵¹ Rhode Island v. Massachusetts, 12 Pet. 657, 737.

government must be chiefly by moral suasion. As has been previously stated, matters pertaining purely to sanitation come under the heading of police power, and are thus within the jurisdiction of the individual states rather than of Congress. If the discharge of sewage decrease the depth of water and thus interfere with navigation, Congress has authority to act, and the federal courts would therefore have jurisdiction.

There is another class of cases in which the federal government may be interested, viz. those in which a portion of the waters of a river may be diverted. Thus, in *Kansas v. Colorado*⁵² suit was brought to enjoin the diversion by the state of Colorado of a disproportionate share of the waters of the Arkansas River before it reached the Kansas line. Particularly when this diversion to any degree lessens the navigability of either the stream diverted or one into which it flows, Congress clearly has authority to act under the commerce clause of the Constitution. Such diversion may be the means on the one hand of lessening the sewage problem, and on the other, by decreasing the water of the river, of intensifying the difficulties of the situation.

§ 443. Relation of problems to natural drainage. At common law there can be no liability for natural conditions, but when there is added to those natural conditions some human element, the agency making the change may assume a liability. A natural pond is not at common law a nuisance, but if a man deposit decaying animal and vegetable matter upon its banks so that the composition of the water becomes offensive, a nuisance may be created for which he will be respons-

⁵² 185 U. S. 125; 206 U. S. 46.

ible and liable. Now the bank of that pond practically extends as far as drainage towards the pond exists. So, if the sewage from a neighboring house is permitted to flow into the pond, either directly or indirectly, or if the drainage from the barn-yard goes that way, the man is liable for the nuisance created. A running stream, especially when it aerates the water by successive falls, has power to decidedly reduce the harmfulness of sewage content. When, however, that stream has been dammed, the flow of water is decreased and solid portions of sewage become deposited on the bottom. In this way, without in any way changing the amount of sewage content, the stream may be changed from one of harmlessness to one of danger. Problems relative to water supply and to sewage disposal are thus frequently intimately associated with those of drainage. Ordinarily, drainage is a portion of the jurisdiction assigned in municipalities to departments of public works. Sewage disposal, therefore, comes under the same heading, and the care of water works is also assigned to a similar department. The influence of a health department in the control of these matters must therefore frequently be indirect, and by moral suasion.

Garbage

§ 450. **Garbage as a municipal problem.** Garbage is not necessarily a nuisance. In fact, it frequently has a money value. (§§ 171, 200.) It may be used for the nourishment of poultry, hogs, or other animals. After desiccation it may be used as fuel; sometimes it is decayed and used as fertilizer. On the other hand, on the crowded city lot accumulations of garbage serve

as food for rats and flies and so help to increase the number of these nuisances. The decaying garbage becomes offensive and sickening to sensitive nostrils. Ground soaked with the water from such filth becomes a breeding place for flies. There can be no use of such materials within the city to any extent. Chickens and hogs may not be kept on the crowded city lot. The garbage must therefore be transported to some other place where it may be used or destroyed. If it be transported in an open wagon not specially constructed for that purpose, the streets become littered and the effluvia from the decaying mass is very offensive. In the summer time the wagon is accompanied by hosts of flies. Garbage, therefore, is a nuisance *in posse*, and as such it must be dealt with. If it be left to the individual property owner to make such disposal of the material as he sees fit, the results will be very unsatisfactory for the community. Too few citizens have enough of public spirit to do their civic duty except by compulsion. It therefore becomes a duty of a municipality to use its police power in the regulation of the care of garbage. This must be done first by ordinances regulating the collection and storage of such substances until they shall be removed. A still more important regulation must be that which governs the work of scavengers who go about the city gathering the stored materials and transporting them to some point without the city, where they may be destroyed without causing offense. When these scavengers are permitted to work without restriction their services are always unsatisfactory: they take what they want and throw the rest upon the ground, thus really increasing rather than decreasing the garbage problem.

A case was recently decided by the appellate court of Indiana, showing a direct relationship between the subjects of garbage and water supply, and also showing that in considering the banks of a pond or stream we must not be limited by the immediate proximity to the water line. It is true that the case does not show that the water in question was used for a city supply, but it was used for a fish pond, and the pond was supplied by water from a flowing stream which had been dammed for the purpose of creating a pond. The city of Newcastle leased land on the side of a hill to be used for its garbage dump. The owners of the pond brought suit against the city on the ground that the garbage injured the waters of the pond. The court found in favor of the owners of the pond, saying: "As appellant (the city of Newcastle) contends, the town of Newcastle was charged with the duty of preserving the health of its citizens, and was within the bounds of its governmental functions when it provided a suitable place in which to deposit its garbage. But while it has such authority, it may not deposit garbage at such place in a careless and negligent manner, causing a nuisance, nor may it negligently permit the garbage and offal properly deposited, to escape upon the lands of another to his damage. * * * A municipal corporation has no more right to maintain a nuisance than an individual would have, and for nuisance maintained upon its property, the same liability attaches against a city as to an individual."⁵³ The general proposition may therefore be made, that a municipal corporation is liable for casting refuse,

⁵³ City of Newcastle v. Harvey,
102 N. E. 878.

sewage, or filth of any kind, either into streams, or upon the shores of streams.^{53a}

Without special authorization and under its inherent police power, a municipality may legislate to abate nuisances. The fact that garbage is not a nuisance *per se* prohibits the city from creating any monopoly in the same except in case of extreme necessity. What is said relative to ordinary garbage is also true relative to dead animals. The carcass of a dead animal may have a money value to the owner. On the other hand, if left in place it may become a nuisance. It therefore follows that opportunity should be given to the owners to remove garbage or dead animals and thus obtain for themselves such value as they may be able. Ownership is not lost with the death of the animal.⁵⁴ Ordinances have been declared void which donate the bodies of such dead animals to a third party as being a violation of due process of law, and without just compensation.⁵⁵ So it has been intimated that an exclusive privilege to collect and convey garbage cannot be made to apply to such matter as the owner may desire to use or sell, and which is innocuous and capable of being put to useful purposes.⁵⁶ A municipal contract giving exclusive rights and franchises by a city other than in the exercise of police

^{53a} Franklin Wharf v. Portland, 67 Me. 46; Chapman v. Rochester, 110 N. Y. 273; Spokes v. Banbury Board of Health, L. R. 1 Eq. 42; Goldschmid v. Tunbridge Wells, L. R. 1 Eq. 161; Haskell v. New Bedford, 108 Mass. 208.

⁵⁴ Underwood v. Green, 42 New York, 140; River Rendering Company v. Behr, 77 Mo. 91; State v. Morris, 47 La. Ann. 1660; Schoen

Bros. v. Atlanta, 97 Ga. 697, 33 L. R. A. 804; Knauer v. Louisville, 20 Ky. L. Rep. 193, 41 L. R. A. 219; Campbell v. District of Columbia, 19 App. D. C. 131.

⁵⁵ Town of Greensboro v. Ehrenreich, 80 Ala. 579; River Rendering Company v. Behr, 77 Mo. 91.

⁵⁶ State v. Orr, 68 Conn. 101, 34 L. R. A. 279.

power is void.⁵⁷ But a contract for the exclusive right to clear and dispose of the garbage of a city is not necessarily an illegal monopoly.⁵⁸ This authority of the city thus to make a special contract was in one case limited to nuisances *per se*.⁵⁹ While ordinarily, as in this matter of garbage, a city may not create a monopoly,⁶⁰ an ordinance can not be held as unreasonable and void if it be expressly authorized by the legislature.⁶¹ Though creating a monopoly in making a contract for the collection of garbage, the city of Indianapolis was expressly authorized so to do in its charter.⁶² It has been held that regulations relative to the removal of garbage must leave a way open to every person who is willing to comply with the requirements to engage in the business.⁶³ In North Carolina an ordinance was declared void as being unreasonable which required a license from anyone attempting to do scavenger work, and thus prevented owners from removing refuse from their own premises.⁶⁴ An ordinance requiring that garbage shall be removed in water-tight closed carts or wagons, which shall be marked with the word "garbage," is reasonable.⁶⁵ While the Board of Health of Philadelphia has discretionary power to declare the keeping of garbage, offal, and refuse matter upon the streets, alleys, and the premises of individuals, a

⁵⁷ Long v. Duluth, 49 Minn. 280.

⁵⁸ Grand Rapids v. DeVries, 123 Mich. 570; State v. Orr, 68 Conn. 101; Kerr v. Simmons, 82 Mo. 269; Smiley v. McDonald, 42 Neb. 5, 27 L. R. A. 540; Schultz v. State, 76 Atl. 592; Rochester v. Gutherlett, 133 N. Y. Supp. 541.

⁵⁹ Iler v. Ross, 90 N. W. R. 869.

⁶⁰ Chicago v. Rumpff, 45 Ill. 90; Landberg v. Chicago, 237 Ill. 117.

⁶¹ Coal Float Co. v. City of Jefferson, 112 Ind. 15; Cooley, Cons. Lim. 241.

⁶² Walker v. Jameson, 140 Ind. 591.

⁶³ Matter of Lowe, 54 Kan. 759, 27 L. R. A. 545.

⁶⁴ State v. Hill, 126 N. C. 1139, 50 L. R. A. 473.

⁶⁵ People v. Gordon (Mich.), 45 N. W. R. 658.

nuisance, it cannot declare the act of a private contractor in removing the garbage to be a nuisance, when he has adopted the precise manner for the purpose prescribed by the city ordinance.⁶⁶ In other words, the nuisance must consist in a given fact or condition, and that condition would not vary because of any difference in the persons committing the act. Laws must be just and equal with all persons.

As a practical matter of administration it may be necessary to restrict the collection of garbage and other refuse absolutely to the employees of the city government. On the contrary, even the requirement of a license in smaller towns may prove an obstacle to securing collection by private scavengers. It is sometimes said that such a requirement would absolutely stop all operations by private scavengers and throw the cost of collection entirely upon the city administration. This does not seem a reasonable result if the matter be handled diplomatically. Only by the license system can the collection be efficiently regulated.

§ 451. City collection. Many cities find it to their advantage to assume the responsibility of the collection of all the garbage and other refuse. Such collection by the city may to some degree be aided by private enterprise. In such cases private collectors should be obliged to take out licenses and to comply with such regulations as might be issued by the proper department in a municipal government.

§ 452. Ankylostomiasis or the hook-worm disease. A subject which a few years ago was not thought to be

⁶⁶ Philadelphia v. Lyster, 3 Pa. Sup. Ct. 475.

of special concern in this country has proven of great importance to the industrial portion of our southern states. All through the south there were individuals and families who were simply considered lazy, though sometimes they were thought to be infected with either consumption or malaria. They were able to work only a portion of the time, and then in an imperfect way. Now it is known that many of these cases are simply the result of infection with an intestinal parasite, and the condition is designated either ankylostomiasis or hook-worm disease. When the hook-worm is eradicated from the person, slothfulness gives way to ambition, and inactivity to energy. Families who have never been known to pay a bill become prompt financially, and even forehanded. This disease is spread through carelessness in the disposal of the evacuation from human bowels. Governmental investigations show that in the sections of the country where the disease is specially prevalent sanitary privies are practically unknown, and in fact most families have absolutely no privies. The discharge being thus permitted to mingle with the soil, eggs or larva get upon the vegetables, into water supplies, or even into the skin of the bare feet. Having made their entrance into the human body, either with food and drink, or through the skin, the worm makes its progress until it finds itself located preferably in the upper part of the small intestine. Here it anchors itself and begins to bleed the patient. This disease demands legislation and energetic administration. Through the southern states at least its importance is so great that extreme measures might be upheld as reasonable. Such regulations, in the land like that of the Dakotas, would

be deemed unreasonable because of the drier atmosphere, soil less easily infected, and a population more widely scattered. The rigors of the northern climate necessitate the wearing of shoes which are of themselves protective, and it is probable that the cold winters would exert a decided destructive influence upon the worm in the soil. So far as we are aware, this disease has not been a subject for special litigation. This disease does, however, illustrate how important may be the state control over strictly private matters, as in the care of the farm outhouse, to prevent the spread of disease. It shows how night soil may be a great danger to the community to which it is transported, and illustrates the necessity that health executives be ever wide awake for the discovery of new sources of infection.

CHAPTER XVII.

PURE FOOD AND DRUG REGULATION.

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| § 460. Two standards of purity. | § 466. Regulation of milk industry. |
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§ 460. **Two standards of purity.** There are two standards for the purity of foods. From a sanitary point of view any food might be regarded as pure unless it consist of, or contain, some poisonous substance, or some biologic principle capable of producing a poison. From the commercial standpoint an article can only be called pure when it conforms to a definite standard in composition, and is exactly what it is claimed to be. (§ 234 *et seq.*) We have no concern here with such fine legal distinctions in the interest of commerce as those which prohibit the term "Mocha" to be applied to coffee, unless it be shipped from the Arabian city of that name, but permits the designation "Irish" to be used for potatoes grown in America. From a sanitary point of view it matters not in what land Maraschino cherries grow. It does interest us when butter or milk contain harmful germs, and when they fall below a normal standard. The nutritional value of foods may thus be lowered by

adulteration. It may also be changed by the process of its manufacture. The ordinary gelatine capsules are freely soluble in the stomach, but after having been soaked in a solution of formaldehyde they are insoluble in that organ. Such a treatment of the capsules is unusual, and not to be expected; and a person buying such capsules would probably be disappointed in the results. This illustrates what may occur to a greater or less degree at any time. Again, for many years phenolphthalein was used as an "indicator" to prevent substitution in a certain kind of wine. It was supposed to be physiologically inert. Later it was discovered that this substance has a pronounced laxative action upon the system. It is therefore necessary from a sanitary, as well as commercial, standpoint that there be a definitely fixed standard of character and composition for articles of food and drugs.

In the administration of the national Pure Food and Drugs Act stress must be laid upon the commercial aspect, but even from a commercial point of view substances which are positively harmful must be excluded. Decomposed oysters, for example, are not proper articles of commerce: they have no real food value and they may be very dangerous. So the government condemns decomposed cans of meat or grains that are full of worms. The federal government condemns these articles because they are not legitimate articles for traffic. These same articles might be condemned under the police power of the state on the ground that they are nuisances. It would take no legislation to determine that decayed oysters, when exposed in the market for sale, are really a nuisance. It might, however, require legislation to determine that bulk

oysters containing more than a given percentage of water are adulterated. Under the national Pure Food and Drugs Act, Judgments No. 2583 and 2584, for example, are condemnations of cove oysters which the government claimed were adulterated and misbranded. Adulteration of the product was alleged on the information for the reason that an excessive amount of water had been mixed and packed therewith so as to reduce, lower, and injuriously affect the quality of the oysters. Misbranding was alleged for the reason that the statement on the label thereof "Cove Oysters" was false and misleading, as it conveyed the impression that the product was canned oysters packed without the use of an excessive amount of water, whereas it consisted of canned oysters, packed with an excessive amount of water. In this case the determination was made by a district court on a plea of guilty by the defendant.

§ 461. Standard fixed by legislation. There are many articles of food which have no definitely fixed composition by nature. Take, for example, the milk given by different cows—the product of one cow may contain four or five or even six per cent of butter fat, whereas that taken from another animal may contain less than two per cent. It is not sufficient guarantee as to quality, therefore, simply to say that the milk is as obtained from the cows. There must be some definite standard, and the only way that that standard may be fixed would be by legislation. We therefore have either in the ordinances of cities, or in the enactments of states, definite standards as to the composition of many articles. The standard which may be set for one city manifestly does not apply to another

city unless by further legislation, and the standard satisfactory to one state may differ from that of its neighbor. The standard of purity for drugs is primarily determined by the Pharmacopoeial Convention, composed of pharmacists and physicians, and meeting decennially. Their standard as so adopted becomes official for the United States through acts of Congress. The Act of Congress, in a few words practically re-enacts the whole Pharmacopoeia, and the standard for the purity of drugs is thus determined by legislation. Most of the states have also adopted that book as their standard. In its regulation of commerce the federal government enforces this standard as to goods passing, either into this country, or from one state to another. When, however, the goods have once been landed in a given state, or if they have never entered interstate traffic, the federal government has no authority. Standards of purity within the individual states must be enforced by state authority.

§ 462. **Misbranding.** In the enforcement of the federal act much stress is laid upon accuracy of label. For example, a certain brand of chewing gum has borne the label "Pepsin," and users are advised that it is therefore an aid to digestion. Judgment 1939 under the Pure Food and Drugs Act shows that the amount of pepsin in each tablet of the gum is not more than one-tenth of a milligram, a mere trace which would be without physiological effect. Such a statement on the label is therefore misleading, and contrary to the spirit of the act. Such an error might not be positively harmful in its effect. When, however, a medicine is put as a cure for headache and, either by its

name, or by statements printed upon the label, the buyer is induced to suppose that the product is harmless, if indeed it contain acetanelid, for example, or morphine or cocaine, the buyer may be positively injured thereby. Many of the proprietary medicines have been found to be thus misleading and harmful, and some are even dangerous. Sometimes it happens that when a large quantity of a mixture is put up containing some such poison as morphine or acetanelid, a very poisonous proportion may find its way into a single bottle. A patient who had been accustomed on her own responsibility to take a certain brand of effervescent salts, much used for the cure of headache, one day took a very small dose, but it chanced that she received a fatal dose apparently of acetanelid. Such "cures" which endanger health are of manifest interest relative to the preservation of the public weal.

§ 463. **Dealer bound to know quality.** The ordinary dealer in drugs, particularly, must sell his goods as he buys them, trusting to the honesty of the producer. While it is quite possible for a pharmacist to make a chemical examination of the articles which he sells, it is not commercially practicable. It will require too much time and expense. This time and expense the customers must needs pay for, and they would not be likely to willingly submit. But it is the legal duty of the pharmacist to know the quality of the articles which he is selling, and ignorance will be no excuse for him if he sells goods which in any way deviate from the standard.¹ In a similar way it has been held that a milk man is responsible for the standard of the

¹ District of Columbia v. Lynch, 16 App. D. C. 185.

milk which he is selling, and if that milk be below the standard fixed by law, even though it be just as it came from the cow, he will be deemed guilty of selling adulterated milk. He must *know* the quality of his milk.²

§ 464. Serial numbers. Under the Pure Food and Drugs Act it is possible for the local dealer to shield himself under the guarantee of the wholesaler. This guarantee may be written for an individual article and package or it may include a whole bill of goods. It is also provided in the operations of this law that a blanket guarantee may be filed with the government by a manufacturer, covering all of the goods which he manufactures. Goods so guaranteed bear a serial number issued by the department with the legend "Guaranteed under the Food and Drugs Act, June 30, 1906." This guarantee has been much misunderstood. The government does not guarantee anything. The goods may be the rankest imposition, either as to quantity, quality, or purity. The label simply means that the manufacturer has filed his statement that the goods so marked comply with the standard. Because of the misunderstandings which arose under the use of the statement "Guaranteed under the Food and Drugs Act," Food Inspection Decision No. 153 was issued, dated May 5, 1914, and amended by Decision 155, dated May 29, 1914, effective May 1, 1916, and provisionally effective Nov. 1, 1916. This decision cancels all guaranties on file, and prohibits the future use of the expression mentioned. All serial numbers are also canceled and prohibited. The original intent of the provision for the serial number was commendable.

² *Commonwealth v. Wheeler*, 91 N. E. R. 415.

Practically it was found that it served only as an aid to those who desired to conduct doubtful business, and its abandonment became a matter of necessity. The act further provides that if the goods be not manufactured by the party named, he must label them "Manufactured for," or "Distributed by," or simply the word "Distributers"; and the ruling of the department demands that those words be in letters not smaller than eight point capitals, except in case of small packages, when the size of type may be reduced proportionately. Some firms desiring to keep secret the fact that they are not really the manufacturers, attempt to evade this regulation by putting the word "Distributers" in smaller type and more difficult to read. The guarantee of the manufacturer thus made only covers the transaction between himself and his direct customer. For example, suppose a manufacturer in Philadelphia sends to a wholesaler in Baltimore under his general guarantee an article which is misbranded; the wholesaler, in turn, sells it to a jobber who disposes of the same article in the original package to a dealer in Washington. If this article be seized in Washington and there found to violate the law by virtue of being misbranded, even though it bear the legend "Guaranteed under the Food and Drugs Act, June 30, 1906," the Baltimore jobber will be held responsible. The original guarantee "cuts no figure" in the final transaction, and the jobber has absolutely no protection unless he may have secured a special guarantee from his wholesaler. The large number of judgments obtained by the government under this act for articles bearing serial numbers is of itself a clear evidence that goods so marked are not specially endorsed by the government.

An instructive case relative to the subject of guaranty is set forth in the Notice of Judgment No. 2471 of the Department of Agriculture.^{2a} The D. B. Scully Syrup Co., of Chicago, manufactured sorghum for Loverin & Browne Co., also of Chicago, and sold the same to said company. This latter firm, without in any way changing the product otherwise than repacking it, shipped it to New Mexico. Since it bore the label "1 Gal. Loverin's Sorghum, Loverin & Browne Co., Chicago, Ill.," whereas examination showed that it contained only .845 of a gallon, the package was considered misbranded, and information was filed in the U. S. District Court at Chicago against the Scully company because that company had given the following guaranty to the Loverin & Browne Co., which guaranty had not been revoked, but was still in force:

Food Guaranty

The undersigned D. B. Scully Syrup Company of Chicago, state of Illinois, United States of America, does hereby warrant and guarantee unto Loverin & Browne Co., a corporation, having office at Chicago, Illinois, that any and all articles of food or drugs, as defined by the Act of Congress approved June 30, 1906, entitled "An Act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein, and for other purposes," which the undersigned has sold since October 1st, 1906, or shall at any time hereafter prepare, manufacture for, sell or deliver to said Loverin & Browne Co., will comply with all the provisions of said act of Congress and are not and shall not be in any manner adulterated or misbranded within the meaning of said Act.

It is expressly understood that this shall be a continuing guaranty until notice of revocation be given in writing and notice of acceptance of the guaranty is hereby waived.

Dated at Chicago this 31st day of December, 1906.

D. B. Scully Syrup Co. Seal.

M. H. Scully Seal.

On February 18, 1913, the case having come on for trial before the court and a jury, after the submission of evidence the following charge directing a verdict of

^{2a}F. & D. No. 2174, I. S. 14094 b and 2726 c.

not guilty was delivered to the jury by the court (A. B. Anderson, J.):

“I might explain to you gentlemen here that this is an Act of Congress, and Congress has no right to legislate on this pure food question except so far as it affects interstate commerce. We all understand that. And, now, there isn't any showing here at all, passing by some other questions, that the Scully Syrup Company, defendant, had anything whatever to do with the shipment. The evidence showed that the Scully Syrup Company made this for Loverin & Browne Company and that Loverin & Browne Company shipped it, so that they have got the wrong defendant here. The government undertakes to claim that by reason of the statute which provides that the dealer shall be immune when the manufacturer guarantees to him that the article is not misbranded—that in that case the dealer is out, Loverin & Browne Company, and that the other people are in. That does not relieve the government of the responsibility of proving some connection with the shipment by the Scully Syrup Company. And in the next place, the guarantee set forth is no guarantee at all. The guarantee is no guarantee at all under the statute. It isn't anything in the world but a promise that in the future—made six years ago—they will not violate the law. Let the record show a verdict of not guilty.”

Clearly, in this case it was the Loverin & Browne Company which had violated the national Pure Food and Drugs Act, though they may have been innocent of any intentional wrongdoing. At civil suit it would seem that this firm could recover from the manufacturers for such damages as might appear. In addition,

the Scully company would be liable to prosecution under the Illinois laws, if in fact it should be shown that the state statutes had been violated; but so long as this firm did not ship their product outside of the state, nor give such a guaranty as the federal act required, the Scully company would not be liable under the national law.

§ 465. **Commercial motive in food legislation.** Very frequently statutes are enacted or ordinances passed apparently for the one object of securing honest goods and free from harm, when the real object is to cut off competition. One of the best illustrations of this matter is found in the various laws relative to oleomargarine. This substitute for butter is produced from animal fats or vegetable oils, and contains chemically the same ingredients practically as ordinary dairy butter. It differs in color from butter; it is wholesome and nutritious, and much less expensive. There is no reason why it may not properly be largely used as a substitute for butter. Were the facts properly presented to the people the oleomargarine would be more generally used. The dairy interests early became alarmed, and demanded that laws be passed for their protection. In some states the manufacture was absolutely prohibited; in others, it was decreed that oleomargarine must not be colored to represent butter, ignoring the fact that most dairy or creamery butter is artificially colored to a greater or less degree. One state required that oleomargarine must be colored pink if sold. The apparent object in all these various forms of legislation was evidently to prevent people from buying oleomargarine under the supposition that they were buying butter made from cream.

The court of appeals in New York found that oleomargarine was wholesome and nutritious, and that the matter of fraudulent imitations of butter was covered by another act, so that the fact that it competed with another industry and thus reduced the price of an article of food remained as the sole reason for prohibiting the manufacture. The court added: "Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race?"³ Prohibition of manufacture was early approved in the state of Pennsylvania,⁴ and this decision was later confirmed by the Supreme Court of the United States.⁵ In both of these decisions the statute was upheld because of the difficulty in preventing substitution. The Minnesota supreme court took a similar view,⁶ as did that of Maryland.⁷ The Pennsylvania statute prohibited the sale as well as the manufacture of the article. In *Schollenberger v. Pennsylvania*⁸ the Supreme Court of the United States held that while the prohibition was effective as against the manufacture within the state, it could not prevent the sale of oleomargarine imported from other states. The prohibition of the manufacture of oleomargarine in the imitation of yellow butter by adding ingredients which change its natural color is

³ *People v. Marx*, 99 N. Y. 377.

⁴ *Powell v. Commonwealth*, 114 Pa. 265.

⁵ *Powell v. Pennsylvania*, 127 U. S. 678.

⁶ *Butler v. Chambers*, 36 Minn. 69.

⁷ *Wright v. State*, 88 Md. 436, 41 Atl. 795.

⁸ 171 U. S. 1.

found in many states and has been generally upheld.⁹ This prohibition of the imitation of butter has been upheld as to oleomargarine imported from other states and sold in original packages, on the ground that the object of the statute is only to suppress false pretenses, and that the freedom of commerce among the states does not demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country.¹⁰ Professor Freund says:¹¹ "The validity of provisions requiring oleomargarine to be distinctly labeled as such, to be sold in prescribed forms of packages, or in rooms separate from those in which butter is sold, or that the purchaser be expressly informed of the nature of the article, is, in principle, not questioned."¹² Such provisions, which do not forbid imitation, are found in a number of states. The requirement of some laws that oleomargarine be given a color or a name calculated to prejudice purchasers and to make the article odious, is evidently of a different character; it has been upheld in several cases as an exercise of legislative discretion beyond the control of the courts, but the Supreme Court of the United States treats prejudicial requirements as virtual prohibition, and holds them to be invalid as far as interstate commerce is concerned."¹³ In New Jersey it was held that the

⁹ *People v. Arensberg*, 105 N. Y. 123; *McAllister v. State*, 72 Md. 390; *State ex rel. Waterbury v. Newton*, 50 N. J. L. 534; *State v. Addington*, 77 Mo. 110; *Ex parte Plumley*, 156 Mass. 236; *McCann v. Commonwealth*, 198 Pa. 509; *Beha v. State (Neb.)*, 93 N. W. 155.

¹⁰ *Plumley v. Massachusetts*, 155 U. S. 461.

¹¹ Freund, *Police Power*, 284.

¹² *State ex rel. Bayles v. Newton*, 50 N. J. L. 549.

¹³ *State v. Marshall*, 64 N. H. 549; *State v. Myers*, 42 W. Va. 822, 35 L. R. A. 844; *State ex rel. Weideman v. Horgan*, 55 Minn.

prohibition against the coloring of oleomargarine did not exclude the use of a substantial ingredient like cotton-seed oil, although it does give color to the product.¹⁴ In Ohio it was held that coloring matter may not be added although it gives an aroma and flavor, thus drawing a distinction between ingredients which are substantial and those which are not.¹⁵ We may practically say that anything of intrinsic value may be added unless its purpose is imitation.¹⁶ Upon a similar ground the supreme court of Illinois upheld a statute prohibiting the coloring of distilled vinegar so that it would resemble cider vinegar. The court remarked that a false color may sometimes be more liable to deceive than a false label. It is quite as necessary to protect the customer as the dealer. In point of fact much vinegar is sent out from the stores without label. Genuineness of label would be no protection for the consumer. As the court remarked in this case, such prohibitions as those of the statute under consideration may embarrass dealers in that class of goods. The prudence of such a regulation may be debatable, but it is not indefensible.¹⁷ It is the duty of the government to protect its citizens from fraud. It is therefore a duty to prohibit the use of coloring matters intended evidently to deceive, but unless the coloring matter be in itself harmful, or if it aid in the sale of substances in themselves harmful in the place of harmless or useful articles, the problem is purely commercial, and not for the attention of a

183, 56 N. W. 688; *Collins v. New Hampshire*, 171 U. S. 30.

¹⁴ *Ammon v. Newton*, 50 N. J. L. 543.

¹⁵ *Weller v. State*, 53 Ohio, 77, 40 N. E. 1001.

¹⁶ *People v. Biesecker*, 169 N. Y. 53.

¹⁷ *People v. William Henning Co.*, 103 N. E. R. 530.

public health official, unless the duty be specifically assigned to him by law.

One of the difficult problems relative to pure food legislation is illustrated by the subject of alcohol. This article is much used for its preservative quality, and for its ability to extract certain active principles from crude drugs. The result is that most liquid medicines contain a larger or smaller quantity of alcohol. Alcohol is the natural result of fermentation of sugary solutions, and minute quantities may therefore be found in many articles of food. It is admitted without question that alcohol is an intoxicant, but that does not show that an article containing alcohol is necessarily so, and in the matter of drugs, though a large proportion of the bulk may be alcohol, still owing to its weaker action, it may not be important. Definite standards must be fixed, either by legislative or executive decision, and in fixing these standards extremes should be avoided.

§ 466. Regulation of milk industry. For the public sanitarian no other subject so fully represents the various matters pertaining to pure food regulation as does the milk industry. (§§ 8, 423.) Practically every possible phase of the general problem is covered. It illustrates the fact that our interest in pure food must not depend upon chemical analysis, nor bacteriologic investigations only. The industry must be controlled from the beginning to the end. In order to have good milk it is necessary that the cows be healthy and kept in well lighted and well ventilated places, and that all stables and barnyards be kept clean. It is now customary in all of the better regulations to require that the udders be washed before milking, and that the

milkers wear clean white suits when at work, and wash their hands before milking. The milk must be immediately cooled and should be kept cool until delivered to the customers. No person who comes in contact with infectious disease should have anything to do with the milk business. The strictest cleanliness is necessary in bottling plants, and, to prevent possible violations of regulation, the caps to the bottles, as well as the bottles, should bear such definite marking that the goods may be traced. It is more or less a habit of small dealers to buy miscellaneous bottles from junk dealers. The junk men buy them from boys who find it profitable to gather bottles from all sources. Boys are thus taught to steal the bottles which have been left out of doors to be picked up by the regular drivers. They also gather bottles which have been used for purposes which makes their further use as milk containers dangerous. There is also evidence tending to show that some milk sellers make a habit of stealing bottles of milk left by other drivers. Milk thus stolen is transferred to other bottles in the wagon and new caps are applied. The bottles thus filled frequently have been simply rinsed out, and they are therefore dangerous. If the regulation be strict that the dealer must only use bottles and caps bearing his own name, there would be no excuse for having in his possession any other supply, and the fact of having in his possession such foreign bottles would be *prima facie* evidence of crookedness. Another class of cases is illustrated by the following incident. An officer of health received a bottle of impure milk from a customer, and made complaint against the dealer (A), whose name was blown in the bottle. The customer

was not a patron of A. and on investigation it was learned that the bottle had been purchased at a grocery, which also was not a customer of A. It then developed that the grocer obtained his supply from a small dealer who had previously given trouble by his carelessness in handling his milk, and by his disregard of all sanitary regulations. What we have said relative to the milk itself must of necessity be applied to all milk products.

The importance of regulations pertaining to the conduct of the milk business is many times greater in the large cities than it is in the country; (§ 8.) but the milk is produced in the country, perhaps in another state from that in which it is used. Formerly all regulation of the industry was left to the local government; but the local government has no authority outside of its own limits. In so far, therefore, as the regulation is left to the local government it must make a distinction between milk produced within its limits and that produced from outside sources. Such difference in requirements as may be based upon this distinction is reasonable.¹⁸ Cows within the city may be frequently inspected by local officers, and if found sick, or infected, they may be kept under isolated observation. Cows kept outside of the city are not under the jurisdiction of the city, and they cannot be inspected frequently by city officers. In fact, the city officer attempting to make an inspection outside of his jurisdiction might be regarded as a trespasser. Since the same dairy district may supply different cities, it

¹⁸ Adams v. Milwaukee, 129 N. W. 518; Adams v. Milwaukee, 228 U. S. 572.

becomes important that the real regulation of the industry be no longer left to municipalities. States may enact such reasonable laws for the purpose as seem most fitting to the legislature. Of recent years the federal government has found it necessary to take an active part in breaking up the commerce in impure, or disease-bearing milk. This was necessary because the states were unable to cope with the problem, though essentially one of police power. Under the authority of the pure food and drugs act officers of the government have secured numerous convictions for attempting to send milk from one state to another, when it was either overloaded with bacteria, or was watered, or otherwise below standard.

It is the duty of the local government to take such measures as are necessary for the preservation of the local health. In the settlement of the questions "By whom shall this local power be exercised?" and "To what extent are they justified in regulating?" much depends upon the constitutions and statutes of the respective commonwealths. In general it seems wise to leave all semblance of legislation to the ordinary legislative body of the city or town—the village or city council—and to leave to the health department the purely executive duties. The health department is not always legally justified in taking all precautions for the preservation of the public health. It is well known to health officials that "open" milk, that is milk kept in receptacles from which portions are dipped or poured out for customers, is a great source of infection. From a sanitary point of view such a practice is absolutely inexcusable. A dealer who sells good milk would not dare to expose his prod-

uct to the possibilities of contamination presented by that old method. The consequence is that, as a rule, today only milk which has been carelessly produced and handled would be found marketed in that manner. Such milk should be recognized as a nuisance *in posse*. For such reasons a Massachusetts board of health prohibited such sale. The matter finally came before the supreme court of the state which held that the board had no authority to make such a regulation.¹⁹ "If the board should be certain that the smoking of cigarettes by boys affects their health injuriously it would have no power to make a regulation forbidding the smoking of them by boys under a certain age or the sale of them to such boys. It has no power to make general regulations as to conduct or practices injurious to health which, if indulged in by many persons, affect the health of the public. The statute above quoted gives the board jurisdiction to deal with 'nuisances, sources of filth, and causes of sickness within its town.' Plainly, the milk question was not a nuisance or a source of filth. In determining the meaning of the words 'causes of sickness' the doctrine of *noscitur a sociis* is to be applied. This is a little broader term than the two terms that precede it, but it is of the same general character. Primarily it refers to something local, and the board is directed 'to destroy, remove, or prevent the same.' In section 67 we have another indication of the meaning of these words in the requirement that the board shall order the owner or occupant of private premises to remove any 'nuisance, source of filth, or cause of sickness

¹⁹ Commonwealth v. Drew, 208 Mass. 493.

found therein.' So under section 74, he may obtain a warrant directed to an officer or to a member of the board commanding him to destroy, remove, or prevent any 'nuisance, source of filth, or cause of sickness,' in reference to which they have made complaint to a magistrate. We are of opinion that, within the meaning of the language of these sections, milk kept in a vessel, as this was kept by the defendant, was not a 'nuisance, source of filth, or cause of sickness,' which gave the board of health jurisdiction to take any action or make any regulation under the revised laws, Chapter 75, section 65.'" It must be remembered that the court did not in the least condemn the idea expressed in the regulation. It only affirmed that under the statutes such power had not been given to the board of health.

In a similar manner, when the city of Chicago passed an ordinance which prohibited the sale of dairy products by those who also sold such other merchandise as drygoods, it was considered a manifest effort of the small retailer to cripple the department stores, rather than a genuine health measure. It was not, therefore, a true use of police power by the city, and was therefore illegal.²⁰

On the other hand, an ordinance of the city of St. Louis which prohibited, as injurious to health, milk being sold, offered, or exposed for sale, which contained any foreign substances or preservatives of any kind, was not only sustained, but it was interpreted to include watered milk, on the ground that the dilution reduced the nutritious value of the article.²¹ In New

²⁰ Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707.

434; also People v. Chipperly, 101 N. Y. 634.

²¹ St. Louis v. Amel, 139 S. W.

York state it was held that the authority to enact a sanitary code, conveys also authority to make further regulations as to the conduct of the milk business, beyond those found in the statutes of the state.²² So, realizing that dirty milk bottles furnish a good place for the production of bacteria, and that thus market milk may become contaminated with even dangerous germs, the New York city ordinance made it necessary that users of milk immediately wash the bottles, and that the dealers must not have in their possession such unwashed receptacles. This regulation was supported by the court.²³

It is generally agreed that local governments have the right to regulate the milk industry, and it is customary that the regulation shall be aided by requiring licenses from all engaged in the business, and the city may require a license tax to be paid.²⁴ "If the board should add unreasonable and improper overinquisitorial questions to be answered, and the applicant should refuse for that reason to comply with the form, the question of the propriety of those questions might be raised by him;" but a board may be given power to withhold licenses to sell milk, for proper cause based on the existence of defective sanitary conditions.²⁵ When the city has the power to license, restrain, and regulate the sale of milk, it also has the power to revoke licenses, and it may vest such power in the health commissioner, with the right to exercise

²² Polinsky v. People, 73 N. Y. 65.

²³ People v. Roth, Court of Special Sessions, City of New York, Nov. 1912.

²⁴ State *ex rel.* Niles v. Smith, 57 So. 426.

²⁵ State *ex rel.* Niles v. Smith, 57 So. 426.

the same without notice and summarily.²⁶ Though no order has been adopted by the board of health to that effect, a board may revoke the license to sell milk, and a person who has been convicted four times of selling or offering for sale adulterated milk is an unfit person to receive a permit to deal in milk.²⁷

Statutes and ordinances relative to the milk industry should be as definite as possible, but at the best something must be left to executive discretion. A provision of the sanitary code of the city of New York which made the right to sell milk to depend upon conditions imposed by the board of health, although those conditions were not stated in the code, was upheld by the court.²⁸

It is becoming well recognized that much of human tuberculosis, especially among the children of the cities, comes from milk taken from tubercular cows. A cow which is well advanced with tuberculosis may be easily detected by inspection, but even in the early stages a cow may be producing dangerous milk, and at that stage it is exceedingly difficult to detect the disease either by physical examination or inspection. By injecting such a cow with tuberculin a typical reaction is produced, and by this test fairly accurate results are obtained by competent operators. The test works no injury to the cow. In the later stages the results of the operation are not trustworthy, but then the test is not so necessary. When made, it is essential that the test be performed by a competent observer, and under proper conditions. Manifestly, health

²⁶ *State v. Milwaukee*, 121 N. W. 658.

²⁸ *People v. Van De Carr*, 175 N. Y. 440, 67 N. E. 913.

²⁷ *People v. Health Department*, New York, 82 N. E. 187.

departments should, as far as possible, prevent the use of raw milk from diseased cows. It is easier to detect the danger in the cows than in the milk, and consequently it has been ordered in many cities that no milk be sold except from cows which have successfully passed the tuberculin test. This requirement has been upheld in several cases, and may now be considered as a definitely accepted method of eliminating this one danger.²⁹ Whether or not a municipality is supplied from cows that are tubercular is primarily a question to be settled by the health department, and in making their selection of methods for test that board should select a method which is well recognized, thoroughly approved, and as reliable as any.³⁰ The selection of method is an executive problem, or legislative problem, and not one for judicial determination.³¹

The tuberculin test applies only to the one disease of tuberculosis. In the Nelson case,³² those attacking the requirement of tuberculin test argued in favor of a requirement of pasteurization for the above reason. The court declined to be drawn into that controversy, saying that it was a question which must be settled by those who made the laws or ordinances. It may be stated, however, that when properly performed the operation of pasteurization does kill most of the disease producing bacteria without materially injuring

²⁹ *Borden v. Board of Health, Montclair*, 80 Atl. 30; *Nelson v. Minneapolis*, 112 Minn. 16; *Adams v. Milwaukee*, 129 N. W. 518; *Adams v. Milwaukee*, 228 U. S. 572.

³⁰ *Borden v. Montclair*, 80 Atl. 30.

³¹ *Nelson v. Minneapolis*, 112 Minn. 16; *Knobloch v. C., M. & St. P. Ry. Co.*, 31 Minn. 402; *Duluth v. Mallett*, 43 Minn. 204; *St. Louis v. Liessing*, 190 Mo. 464.

³² *Nelson v. Minneapolis*, 112 Minn. 16.

the food value of the milk. What is called "commercial pasteurization," which means the rapid heating, and rapid cooling of the article, when at a relatively low temperature does not kill the germs. When at a high temperature, sufficient to kill disease germs, it injures the taste of the milk, and, to some degree at least, it seems to lower its nutritive value, or its digestibility. Properly performed it should be kept at a temperature of about 140° for twenty minutes. This treatment of milk is being required not only for milk to be used as milk, but also for milk to be used in the manufacture of butter and cheese, for certain disease germs may exist for a long time in those milk products. It does not, as has sometimes been said, make dirty milk pure, but it does reduce the dangers lurking in milk produced under unfavorable conditions. It is, therefore, a reasonable provision, and one which has the approval of scientific observers and administrators, though it has not received approval in a high court, and certain dairy interests were able to secure the passage of a law in Illinois forbidding any city in that state from making such a requirement. Such a statute, though contrary to the judgment of sanitarians, was within the discretion of the legislature, and its prohibition was therefore binding upon city governments.

Having become satisfied that the conditions under which the milk is produced make it an unsafe article for consumption by its citizens, it is the duty of a health department to prevent the entrance of such milk into the city.³³ Most milk is produced outside

³³ *Bellows v. Raynor*, 101 N. E. 228 U. S. 572; *Reid v. People of* 181; see also *Adams v. Milwaukee*, Colorado, 187 U. S. 137.

of the municipality in which it is consumed. In the Bellows case the court said:³⁴ "It is unreasonable to say that the department of health, in exercising such a power, renders itself amenable to the charge of exercising an extraterritorial jurisdiction. In notifying the creamery company not to include the plaintiff's milk in its shipments to the city, it was acting for the protection of the inhabitants of the city of New York, and therefore for local interests. There was no interference with the plaintiff's conduct of his farm or business, except as he proposed to supply milk to the city of New York; there was simply an embargo laid on the introduction, within the city of New York, of any milk not produced by him under conditions specified by the department. It had the right to exact from all shippers of milk a compliance with such conditions as would reasonably tend to a pure product for the use of the citizens as a condition for permitting its sale in the city of New York."

Under the Minnesota state regulations operators of what is called the "Babcock Test" of cream were required to hold licenses. An operator who did not hold a license undertook to restrain the enforcement of the law by bringing an action of injunction to prevent criminal proceedings being instituted against him. The case was carried to the supreme court which said that injunction proceedings would not be entertained unless it be evident that the prosecution involve some trespass upon property or the invasion of property rights which would cause irreparable injury.^{34a}

³⁴ Bellows v. Raynor, 101 N. E. 181.

^{34a} Cobb v. French, 111 Minn. 429.

§ 467. **Composition of the product.** The standard of milk may be fixed so as to prevent the addition of water or coloring matter.³⁵ In a New York case the milk was found to be adulterated and so condemned, because it contained water, though it was not shown that the water was harmful.³⁶ An ordinance in the city of Washington requiring three and one-half per cent of butter fat was not considered unreasonable by the court, although it did presume an unusual amount of care in the selection and feeding of the cattle.³⁷ A Minnesota ordinance prohibiting the sale of cream which contained less than twenty per cent fat was upheld.^{37a} The use of preservatives in milk is generally prohibited on the ground that if the milk is properly produced and cared for it will require no preservative. The legislative power was held to be absolute in imposing prohibition of such preservatives.³⁸ Admitting that a large amount of boric acid in milk might be harmful, it is not evident that a small quantity would be injurious, though that small quantity might be sufficient to prevent putrefactive changes in the milk. Remembering the fact that bacteria are almost sure to get into the milk before it is delivered to the customers, some dealers have been accustomed to use a small percentage of formalin or boric acid to prevent possible changes. The New York court upheld this

³⁵ *Commonwealth v. Wetherbee*, 153 Mass. 159, 26 N. E. 114; *Commonwealth v. Schaffner*, 146 Mass. 512, 16 N. E. 280; *St. Louis v. Amel*, 139 S. W. 434.

³⁶ *People v. Chipperly*, 101 N. Y. 634.

³⁷ *Wiegand v. Dist. of Columbia*, 22 App. D. C. 559.

^{37a} *State v. Crescent Creamery Co.*, 83 Minn. 284, 54 L. R. A. 466.

³⁸ *State v. Schlenker*, 112 Ia. 642, 51 L. R. A. 347; *Commonwealth v. Gordon*, 159 Mass. 8, 38 N. E. 709.

use of a small quantity of preservatives in *People v. Biesecker*.³⁹

(This same question comes up in the use of benzoate of soda as a preservative in ketchup, for example. Some sanitary enthusiasts would have the use of the benzoate absolutely prohibited. If we grant that large quantities of the benzoate are injurious to the human system, it by no means follows that a small amount, used as preservative, would have any such action. In fact, it might often times be healthful by restraining the action of putrefactive germs which are so common in the intestinal tract. Its harmfulness in small quantities has been frequently asserted, but never scientifically demonstrated. Some tests which seem to show it very evidently omit to take into account possible psychological influences. Contrary to a frequent assertion, the use of a small quantity of the benzoate does not render decayed or spoiled tomato pulp usable. It simply prevents further changes. On the other hand, the opponents of the benzoate for use as a preservative advocate the use of "natural" preservatives, such as spices; and experience has demonstrated that putrid tomato pulp may be rendered quite acceptable to sensitive palates by the use of such spices, and its true character is not easily detected.)

An interesting decision relative to the character of milk is published by the Department of Agriculture under the Food and Drugs Act.⁴⁰ The case came up before the court of appeals, District of Columbia. The

³⁹ 169 N. Y. 53, 57 L. R. A. 178.

⁴⁰ Notice of Judgment, 2516; *Dade v. United States*, No. 2466, App. D. C., Feb. 25, 1913. See also F. & D. No. 1357, I. S. 1459b;

F. & D. 1519, I. S. 14636b; F. & D. 1520, I. S. 13439b; similarly, F. & D. 1743, I. S. 17415b, which relates to tomato catsup containing yeasts and molds.

contention was made by the government that the milk contained the colon bacillus and streptococcus. Since the colon bacillus originates in and is a normal content of the colon of all warmblooded animals, and is discharged in the excreta, if it be found in the milk it is an evidence of fecal contamination of the milk, either directly or indirectly. If directly, it comes from carelessness in permitting particles of manure to get into the milk during the process of milking or afterwards; if indirectly, it must come from dust, vegetation, or water, none of which have any reasonable excuse for being present in the milk. Therefore, it was held that the milk containing the colon bacillus was adulterated within the provisions of the act. Again, the presence of the streptococcus, which is a germ instrumental in putrefactive changes, is of itself an evidence that the milk must be regarded as putrid. It is very common for ordinances today to specify a maximum bacterial content for the milk, and such ordinances would always be upheld as reasonable unless the number be arbitrarily too low.

§ 468. Inspection. In order to safeguard the production of milk it is customary for ordinances to require licenses, and the very granting of the license imposes certain restrictions upon milk production. This is proper use of police power.⁴¹ Under the license, inspection of the whole process of milk production is possible. But the department is not dependent alone upon that inspection; it must have the right to secure samples for analysis. Therefore, ordinances have been upheld which require the dealer to give not exceeding a half pint⁴² on the ground that the property value is

⁴¹ *Blazier v. Miller*, 10 Hun, 435. Ann. 577; *Commonwealth v. Carter*,

⁴² *State v. Dupaquier*, 46 La. ter, 132 Mass. 12.

of trifling amount, and in view of the legitimacy of the purpose it does not violate the spirit of the Constitution. In many states the inspector is obliged to tender the price of the sample taken. An ordinance in the city of Washington required the dealer to sell upon demand "a sample sufficient for the purpose of analysis" to the inspector. The inspector asked for less than a pint. The dealer refused to sell less than a pint as he sold only full bottles, and that was the size of his smallest bottle. The court upheld the dealer on the ground of reasonableness.⁴³

Under the general powers granted by the state the city of Asheville, N. C., passed an ordinance requiring dealers to take out licenses, and requiring that for such licenses the dealers pay one dollar per cow. The money so provided was to be used by the municipality in the payment of office expenses connected with the supervision of the dairy business, and the needed inspections. One Nettles refused to take out such license, setting forth that the fee charged was unnecessarily large; that his herd was outside of the municipality; and that he sold to only one customer, and that was a creamery. The court held that the ordinance was valid. To permit a dealer to refuse to take out a license on account of the size of the fee might very seriously interfere with the operations of the municipal authorities for the preservation of the public health. If the fee be excessive there are other means open for the dealer for relief. (See § 423.) The powers granted by the state to the city are intended to protect the health of the citizens. The fact that

⁴³ Dist. of Columbia v. Garrison, 25 App. D. C. 563.

the herd of dairy cattle is outside of the city does **not** lessen the necessity for inspection, and it is generally to be expected that the cattle will be outside of the city. Inspection of the cattle and surroundings is evidently safer than mere inspection of the milk; but where the herd is far removed from the city the local officers must depend chiefly upon the inspection of the milk itself. The fact that the only customer of the dairyman was a creamery did not in the least lessen the necessity for supervision of his business.⁴⁴

§ 469. **Confiscation.** Milk which is below standard may still have a commercial value. If it contain less than the normal proportion of butter fat it might be sold properly as skimmed milk; but when detected on sale as straight milk if it be left with the dealer it would simply enable him to continue in his evasion of the law. To preserve it until a case could be tried and decided would be expensive, and practically impossible. Milk which contains an abnormal amount of bacteria may be rendered usable sometimes by pasteurization, or it may be used in certain manufacturing processes where it does not become an article of consumption as food. Such milk, moreover, is especially dangerous to leave in the possession of one who has already sought to evade the requirements of sanitary law. Summary destruction is therefore demanded under police power, and such destruction has been repeatedly upheld by the courts.⁴⁶ Property which is in itself harmless, but which has been put to an unlawful use may be confiscated. Thus the forfeiture of a

⁴⁴ Asheville v. Nettles, 80 S. E. 236.

⁴⁶ Nelson v. Minneapolis, 112 Minn. 16; Blazier v. Miller, 10

Hun, 435; Deems v. Mayor, 80 Md. 164; Shivers v. Newton, 45 N. J. L. 469; Adams v. Milwaukee, 129 N. W. 518.

vessel engaged in unlawful oyster fishing was upheld by the Supreme Court of the United States.⁴⁷ A dealer who seeks to evade the requirements of the law, and bring milk into a city for sale contrary to the requirements, is on a par with the smuggler, and it would seem that he could have no cause to complain if his merchandise be confiscated as a penalty for his law-breaking. In *Adams v. Milwaukee*⁴⁸ the claim was made that the ordinance which provided for the confiscation and destruction of property was a violation of the Fourteenth Amendment; but the Supreme Court of the United States said: "The police power of the state must be declared adequate to such a desired purpose. It is a remedy made necessary by plaintiff acting in disregard of the other provisions of the ordinance; that is, failing to have his cows tested and their milk authenticated as prescribed. The city was surely not required to let the milk pass into consumption and spread its possible contagion. * * * Criminal pains and penalties would not prevent the milk from going into consumption. To stop it at the boundaries of the city would be its practical destruction. To hold it there to await judicial proceedings against it would be, as the supreme court has said, to leave it at the depots 'reeking and rotting, a breeding place for pathogenic bacteria and insects during the period necessary for notice to the owner and resort to judicial proceedings.' We agree with the court that the destruction of the milk was the only available and efficient penalty for the violation of the ordinance. The case, therefore, comes within the principle of the cases

⁴⁷ *Smith v. Maryland*, 18 How.

⁴⁸ 228 U. S. 572.

we have cited and of *Lieberman v. Van De Carr*.⁴⁹ In other words, as the milk might be prohibited from being sold, at the discretion of the board of health, and even prohibited from entering the city,⁵⁰ a violation of the conditions upon which it might be sold involves as a penalty its destruction. Plaintiff sets up his beliefs and judgment against those of the government and attempts to defeat its regulations, and thereby makes himself and his property a violator of the law. In *North American Storage Co. v. Chicago*⁵¹ we said, by Mr. Justice Peckham, that food which is not fit to be eaten, 'if kept for sale or in danger of being sold, is itself a nuisance, and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it.' And it was decided that in such case the food could be seized and destroyed, and that a provision for a hearing before seizure and condemnation was not necessary. It was also decided that the owner of the food had his remedy against the arbitrary action of the health officers." The executive who thus seizes and destroys such an article as milk must therefore be sure of his evidence, or he may be held liable for trespass.

§ 470. Poisonous substances. There are many articles of commerce which may be properly restricted as to sale because of their essentially dangerous character. Such are habit producing drugs, or articles containing poisonous substances. Unless clearly within the powers granted by its charter, or by statute, a city would not have the authority to prohibit the

⁴⁹ 199 U. S. 552.

⁵¹ 211 U. S. 306, 315.

⁵⁰ *Reid v. People of Colorado*,
187 U. S. 137.

sale of such articles as are ordinary subjects of commerce. (§ 256.) The state, on the other hand, may regulate or prohibit the sale of such articles. The state of North Dakota passed an act which made it unlawful to manufacture, import, distribute, or give away snuff, or any substitute therefor. This act was upheld as constitutional by the supreme court of the state.⁵² The court called attention to the fact that although the United States Supreme Court held in *Austin v. Tennessee*⁵³ that cigarettes or tobacco were not so much of a nuisance as to be not properly objects of interstate commerce, in the same case the authority of the state legislature was recognized to prohibit the sale of cigarettes. So in this case the court recognized that the tobacco habit is uncleanly, and its excessive use is injurious. It is particularly injurious on young persons. Snuff is largely used between the cheek and the gum, or along the gums. It is absorbed, rather than chewed. This form of tobacco may be used by boys, when they would not use tobacco in a more open manner. Opium may easily be added as a habit producing adulterant. The court further recognized the fact that local paralysis of sensory nerves may be produced by the use of snuff on the gums. There seemed to the court sufficient reason to justify the legislation in question.

⁵² *State v. Olson*, 144 N. W. R.

⁵³ 179 U. S. 343.

CHAPTER XVIII.

INDUSTRIAL REGULATION.

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| § 480. Questionable legislation. | § 484. Buildings. |
| § 481. Necessity for accurate studies. | § 485. Special occupations. |
| § 482. Increased importance. | § 486. Industrial regulation should be definite. |
| § 483. Hours of labor. | |

§ 480. **Questionable legislation.** There is perhaps too great a tendency in legislation today to interfere with the ordinary lives of individuals. The agitation is frequently the product of emotional theorizers, unsupported by analytical study of the facts involved. It is the natural result of organized society. Recognizing certain truths, one class of citizens secures the enactment of laws designed to remedy specific defects, not realizing that in correcting those defects they may work even greater injury. For example, it is manifestly desirable that children be permitted to attend school, and that they should not be unduly ground down by the monotony of labor while their bodies are developing. But a law prohibiting child labor, not infrequently results in driving upon the street those who should be using a portion of their time at least in some sort of work. A storekeeper, we will say, who desires an errand boy for a portion of the time might very willingly employ such a one out of school hours, though such employment may be prevented by the statute. The consequence is that the boy grows up

with a feeling of irresponsibility, and a repugnance to all forms of work. Because he is unoccupied he is very likely to form evil associations and consequently evil habits. In such a case the law designed to protect and benefit the boy has worked a lasting injury. In other words, laws regulating industrial pursuits need to be judiciously drawn, not by partisan advocates, but by those who are well informed in the principles of law and in the sciences of sanitation and sociology

§ 481. **Necessity for accurate studies.** In many ways industrial occupations are important to study from a sanitary standpoint. Legislation in the past has been chiefly directed to the commercial side of the problem. There has always been present the conflict between capital and labor, and most of the legislation has arisen from this conflict. There has been the attempt to guard the labor from oppression; and there has been the effort to secure capital against the unnecessary demands of labor. It is probable that in the future more attention will be devoted to the sanitary side of the subject. Because of its close connection with commercial questions, the enforcement of all these special laws has been in the past, and probably will in the future be entrusted to some other agency than the health department. Until very recently sanitary data have not been used in the legal contests. Previously sanitary arguments were based rather upon general statements and mere opinions; but there has been a growing recognition of the necessity for accurate studies. It is just such studies as these in which the health department should assist as far as it is possible to determine the effect of poisons upon the system, and the means by which these detrimental influ-

ences may be mitigated in manufacture. As instances of such action we may refer to the poisonous results of match making, and of lead, as it is found in many lines of manufacture. Then, too, there are the studies relative to fatigue. In considering the hours during which persons may be engaged in any kind of labor, fatigue is a most important element. In this investigation of fatigue, one must discriminate between workers of different age and sex. A man may endure much longer confinement of labor than could a growing youth; and while a woman's constitution may enable her with less fatigue than a man to do certain kinds of fine mechanical operation, she would be less able to stand many hours of heavy toil. Then, too, there must be considered the divergent results as to the labor of a woman in ordinary condition and one who is in pregnancy. There is the difference between considering the effect upon the one life and the added result upon an unborn child. Period in pregnancy must also be considered.

The right to regulate and control persons engaged in any trade or occupation that affects the health of the people is no longer an open question.¹ The legislature may regulate in such manner as it may think proper callings that are related to public health.² Formerly the most that was attempted under these powers was the regulation of such callings as affected not those engaged in them, but neighbors, or customers. In the prevention of industrial diseases the protective power of the state is used in behalf of those who are engaged in doing the particular kind of labor.

¹ Commonwealth v. Ward, 123 S. W., 673.

² State v. Smith, 135 S. W. 465.

It is here that the scientific facts pertaining to the occupation are of the utmost importance. The action of the state in these cases must depend upon legislative enactment, best by the state legislature, though sometimes it may be through the municipal ordinance. This whole matter is very well set forth in an Illinois decision.³ The court said that statutes to prevent occupational diseases are referable to the police power of the state. Whether the state legislature's classification has a reasonable basis is a judicial question. The legislature may classify persons or occupations for the purpose of legislative regulation and control, provided such classification is not an arbitrary one, but is based upon some substantial difference, which bears a proper relationship to the classification; and the question whether such classification is reasonable or arbitrary is a judicial one. So the court held that the act of 1911 to prohibit the use of emery wheels or emery belts in any basement room lying wholly or partly beneath the ground is invalid, as making an arbitrary discrimination without regard to the question of ventilation or other sanitary conditions. The Michigan court held that the law requiring emery wheels to be provided with blowers to carry away the dust was valid, saying that where, under our institutions, the validity of laws must be finally passed upon by the court, all presumption should be in favor of the validity of legislative action. If the court find the plain provisions of the constitution violated, or if it can be said that the act is not within the rule of necessity, in view of facts, of which judicial notice may be taken, then the act must fall. Otherwise the act should

³ *People v. Schenck*, 257 Ill. 384.

stand.⁴ It must be remembered that the dust from emery wheels is particularly irritating upon the respiratory organs, and acts as a predisposing cause of tuberculosis.

§ 482. **Increased importance.** With our modern industrial development conditions have been greatly altered, and dangers are intensified. Before the days of mechanical sewing we had simply the long hours of labor with the needle, often with imperfect light, in poorly ventilated rooms. Now, in better lighted factories (for manufacturers have learned that good light and pure air are essential to efficiency), we find some machines manipulated by a single operator carrying twelve needles, so that the operator must constantly watch twelve lines of sewing, and other machines set about four thousand stitches a minute. Many machines working in the same room, with a constant vibration and noise, cause such a confusion as of itself to be trying upon one's nerves, even when not employed in labor. But when we consider such a picture as that drawn by Miss Goldmark we can but wonder that anyone is able to do good work under such conditions. "In the well equipped shops each girl has a brilliant electric light, often unshaded, hanging directly in front of her eyes over the machine. Her attention cannot relax a second while the machine runs its deafening course, for at the breaking of any one of the twelve gleaming needles, or the twelve darting threads, the power must be instantly shut off. The roar of the machines is so great that one can hardly make oneself heard by shouting to the person who stands beside one."⁵ Definite facts relative to degrees

⁴ *People v. Smith*, 66 N. W. 382.

⁵ *Fatigue and Efficiency*, p. 54.

of purity of atmosphere, of temperature, and of light, need to be recorded as bases for reasonable legislation and adjudication of enacted statutes. In all this the health department should act more as an adviser than as an administrator or legislator. At present these subjects are still veiled in the haze of considerable uncertainty. Legislation should be based, not upon uncertain theories, but upon established facts.

§ 483. Hours of labor. The cases which have been adjudicated relative to industrial affairs have been largely centered upon hours of labor. It must be remembered that if the hours of labor be shortened it will naturally result in the employment of more laborers, or if certain classes be excluded from certain kinds of labor it will give greater opportunity for employment of those not belonging to the excluded classes. Practically it demands that the wages be increased; in other words the expense of production must increase. There is, consequently, a dread on the part of the community against increased cost of living. Such legislation is not difficult to obtain, because politicians recognize the importance of the laboring man's vote. When the acts come before the courts for review the question to be decided is not whether they are inherently good or bad, but whether the legislature was justified in its conclusions as embodied in the laws, and whether the terms of the act comply with the forms prescribed by the constitution. The act should be in such form that with the least possible oppression for others it will accomplish its purpose of protection for the class it is designed to aid. "Necessity is the plea of tyrants." It is a plea which will be frequently made in attacking labor laws. The owner of a cran-

berry bog in Massachusetts made this plea in defense of his violation of the law prohibiting Sunday labor; the berries were suddenly ripening, and with danger of frost he feared that he would be unable to harvest his crop unless he worked on Sunday. The supreme court said: "Without going over the evidence in detail, it is sufficient to say that there was no extraordinary, sudden, and unexpected emergency. The crop was large, it is true, but that it was likely to be large had been known for weeks. The weather was only what might have been expected. The substance of the testimony was simply that in gathering the crop it was somewhat less expensive and more convenient to work seven days in the week rather than six. That is not enough. Such testimony falls far short of showing 'necessity' within the meaning of the statute."⁶

The Mosaic law demanding a rest of one day in seven was not an arbitrary requirement. It is based upon a physiologic necessity, and this same necessity must be remembered in all laws relative to time spent in labor. In the first Ritchie case,⁷ decided in 1895, it was declared that an eight hour law for women employed in factories was not sanctioned under police power, and that there was no "fair, just, and reasonable connection between such limitation and the public health, safety, or welfare, proposed to be secured by it." Three years later a case was decided in Utah,⁸ and sustained by the federal Supreme Court,⁹ involving the validity of a mining law fixing an eight hour day

⁶ Commonwealth v. White, 190 Mass. 578.

⁷ Ritchie v. People, 155 Ill. 98.

⁸ State v. Holden, 14 Utah, 71, 37 L. R. A. 103.

⁹ Holden v. Hardy, 169 U. S. 366.

for men employed in the mines and smelters. The court sustained this law on the ground that the men were deprived of fresh air and sunlight, and exposed to foul atmosphere filled with noxious gases and at high temperature. In this case the court called attention to the fact that the different parts of the state did not stand upon an equality, one with another, in the economic sphere, and it was therefore necessary that the state should act as an arbiter. "But the fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The state still retains an interest in his welfare, however reckless he may be. The whole is not greater than the sum of all the parts, and when the individual's health, safety, and welfare are sacrificed or neglected the state must suffer." A similar case¹⁰ was declared invalid in Colorado, though it has since been expressly authorized by an amendment to the state constitution adopted in 1902.

The state of New York enacted a statute limiting the hours of labor for men in bakeries to ten hours in one day, or sixty hours in one week, overtime being allowed for the purpose of shortening the last day of the week. This act, when attacked, was sustained by the New York court, but declared unconstitutional by the Supreme Court at Washington in 1905.¹¹ In each of these cases it may be noticed that the legislation was secured by the laboring class, while the attack

¹⁰ *In re Morgan*, 26 Col. 415, 47 L. R. A. 52.

¹¹ *Lochner v. New York*, 198 U. S. 45.

was made upon it by the employers. The grounds of the attack in each case were upon the protection of the right of contract in the Fourteenth Amendment to the federal Constitution. Similarly, the New York supreme court declared unconstitutional a law prohibiting the labor of women in factories between the hours of 9 P. M. and 6 A. M., the judge saying,¹² "I find nothing in the language of the section which suggests the purpose of promoting health except as it might be inferred that for a woman to work during the forbidden hours of the night would be unhealthful." A ten-hour law for women in Michigan was attacked as class legislation because a different class of workers was omitted, but the supreme court sustained the act as a valid use of police power.¹³ An act in Pennsylvania limiting the hours of labor for women was upheld.¹⁴ "A prohibition upon unhealthy practices, whether inherently so, or such as may become so by reason of prolonged and exacting physical exertion, which is likely to result in enfeebled or diseased bodies, and thereby directly or consequently affecting the health, safety, or morals of the community, cannot, in any just sense, be deemed a taking or an appropriation of property. The length of time a laborer shall be subject to the exhaustive exertion or physical labor is as clearly within legislative control as is the government inspection of boilers, machinery, etc., to avoid accidents, or of the sanitary conditions of factories and the like to preserve the health of laborers."¹⁵ The court of appeals in New York said: "In the interest

¹² *People v. Williams*, 189 N. Y. 131.

¹³ *Withey v. Bloem*, 163 Mich. 419.

¹⁴ *Commonwealth v. Beatty*, 15 Pa. Sup. Ct. 5.

¹⁵ *Commonwealth v. Beatty*, 15 Pa. Sup. Ct. 5, 15.

of public health, of public morals, and of public order, a state may restrain and forbid what would otherwise be the right of a private citizen. * * * It may limit the hours of employment of adults in unhealthy work, and it may be that it could prohibit the performance of excessive physical labor in all callings.”¹⁶ It will be noted that the Williams case made no distinction as to character of work. There was no regard for the different kinds of labor, and there was nothing in the statute itself to show that such a law was reasonable and just. In this it differs from the first Ritchie case, in which the apparent defect was in the presentation of evidence to show that a law was in fact reasonable. Long hours of labor *per se* may be harmful; certain kinds of labor may be harmful; long hours at harmful labor would be doubly harmful. In 1910 the Illinois court sustained a ten hour day for women employed in laundries and factories in what was known as the second Ritchie case.¹⁷ Three years previous a law in Oregon fixing a ten hour day for women employed in factories and laundries had been sustained by the state court,¹⁸ and upon appeal to the United States Court, was again sustained purely upon sanitary grounds.¹⁹ The defense of this law, before the federal Court by Mr. Louis D. Brandeis of Boston and Josephine Goldmark of New York, was a radical change in method of defense, and emphasizes more strongly than any other similar argument, the necessity for a basis of sanitary fact for such laws.

¹⁶ People v. Orange County Road Construction Co., 175 N. Y. 84.

¹⁷ Ritchie & Co. v. Wayman, 244 Ill. 509.

¹⁸ State v. Muller, 48 Ore. 252.

¹⁹ Muller v. Oregon, 208 U. S. 412.

The Illinois ten hour woman's law was attacked on the ground that it included hotels, but did not include boarding houses. Recognizing the fact that such distinctions must have a reasonable basis, the court agreed that the hours in a hotel might be much more varied than they would reasonably be in a boarding house, and upheld the law, remarking, however, that the wisdom of the law was not a question for the courts.²⁰ The law was also held to include nurses in a municipal hospital.²¹ It was held by the court, in this case, that although the hospital was used for infectious diseases, it was conducted by the city in its corporate capacity. In this the court seems to have gone in opposition to the general consensus of the bench, which seems to practically agree that the care of infectious diseases is a governmental matter, and that municipalities are not liable for the conduct of such hospitals. (§ 413.)

In order to render the carrier liable under the federal Hours of Service Act of 1907, there must be proof tending to show a direct connection between the working overtime and the happening of an accident. An accident happening within a few minutes of the close of the sixteen hours could hardly be reasonably due to the violation of the act.²² When several employees are kept on duty beyond the specified time of sixteen hours, the penalty of the hours of service act of 1907 is incurred for the detention of each employee, although occasioned by the same delay of the train.²³

²⁰ *People v. Elerding*, 254 Ill. 579.

²¹ *People v. Chicago*, 256 Ill. 558.

²² *St. Louis, I. M. & S. Ry. Co. v. McWhirter*, 229 U. S. 265.

²³ *Missouri, K. & T. Ry. Co. v. U. S.*, 231 U. S. 112.

§ 484. **Buildings.** A crowded room, poorly lighted and unventilated, is not conducive to good work. Such a room may be regarded as a nuisance, but, as has frequently been said, nuisance is a question of fact, not purely of statement. As a matter of fact it might be possible for the health officer to enforce better conditions without special enactment. However, it is customary for municipalities, and to some degree for states, to enact laws regulating the construction of buildings. Such laws specify material of construction, window space in proportion to floor space, ventilation, plumbing, etc. The act incorporating the city of Paterson, New Jersey, provides that the health department, for the preservation and promotion of the health of the city, shall have power to regulate and control the manner of erecting and constructing buildings in the city. The court held that this did not give authority to require outside walls of a given thickness.²⁴ Deviation from approved plan of construction is not excused by the permission of the inspector when he had no authority to give such permission.²⁵ When the plans for plumbing have been approved by a local board, the owner must conform thereto.²⁶ A law requiring the placing of water closets in certain buildings is a valid use of police power.²⁷ Although the sanitary code may not have provided that the health department shall have power to make a special order as to ventilation in buildings, when in a condition of

²⁴ Hubbard v. Paterson, 45 N. J. L. 310.

²⁵ Health Department New York v. Hamm, 24 N. Y. Supp. 730.

²⁶ Johnston v. Belmar, 13 Dick. 354.

²⁷ Tenement House Dept. v. Katie Mosschen, 85 N. Y. S. 1148; affirmed, 72 N. E. 321; affirmed, 203 U. S. 583.

danger to life or health, such power has been recognized.²⁸

Very closely associated with the sanitary construction of factory buildings we find the questions relating to private houses, and particularly those which involve the plans of construction and the management of apartment houses and tenements. It is quite as important where the people live as where they work. In fact, it is more important, for it involves the welfare of the entire family, and the children are more susceptible to detrimental conditions than are adults. While it is permissible that a tenement shall not be occupied until it has received the certificate of the board of health, or other sanitary officer, it is not presumed that his action will be arbitrary, nor that his authority will be used for purposes of profit or oppression.²⁹ A police regulation relative to such buildings which would be reasonable and proper in a metropolis might be unreasonable when applied to the state at large. If the requirements be made impracticable on account of unnecessary expense, or because of absence of facilities (such as a requirement that they be connected with sewers where there are no sewers), the enactment would be considered nul. In a Wisconsin case a law making every habitation in which another than the family of the proprietor sleeps a boarding or lodging house was declared unreasonable.³⁰ In the same case it was held that the requirement in the construction of tenement houses which called for a width of six feet between lot line and building for street courts was unreason-

²⁸ Health Department New York v. Knoll, 70 N. Y. 530.

²⁹ *Ex parte* Stoltenberg, 132 Pac. 841.

³⁰ *Bonnett v. Vallier*, 116 N. W. 885.

able in some conditions and localities. When a building is really insanitary, under ordinances so providing, it may be ordered vacated without previous notice to the owner.³¹

§ 485. **Special occupations.** The power to regulate the sale of an article includes the power to require license for such sale.³² In a like manner the community may require license for manufacture, and it may, under police power, specify on what conditions the license shall be granted; but those conditions must be reasonable. Thus, while it has been held that it is proper to require that emery wheels and belts be equipped with blowers to carry away the dust³³ (§ 481), it has also been held that the absolute prohibition of the use of such emery wheels or belts in basements was unreasonable.³⁴

From time to time there have been efforts to frighten the people relative to the danger which lurks in sweatshop goods, particularly articles of clothing. Although it is probable that these dangers are infinitesimal as compared with the great danger for the workers in these shops, it is very proper that the customers refuse to buy such merchandise. It is the purchaser's human duty to refuse such articles. It is probably true that goods may be made and sold more cheaply by the sweatshop, but it is at the expense of human lives. If so, the purchaser is *particeps criminis* in the sacrifice. Laws forbidding such manufacture come within the proper scope of police power.³⁵ Bakeries are fre-

³¹ *Egan v. Health Department*, New York, 45 N. Y. Supp. 325.

³² *Gundling v. Chicago*, 176 Ill. 340; *Kinsley v. Chicago*, 124 Ill. 359.

³³ *People v. Smith*, 66 N. W. 382.

³⁴ *People v. Schenck*, 257 Ill. 384.

³⁵ *State v. Hyman*, 57 Atl. 6.

quently the subject of such restrictive legislation. Chicago passed what was called "the bread ordinance," regulating the size of the loaf, and requiring the maker to stick his mark upon the loaf. This was essentially not a health measure, but purely commercial, and designed to prevent bakers from defrauding their innocent customers. This was attacked on several grounds, but was upheld by the court.³⁶ Later the city passed another ordinance requiring bakers to take out licenses, and making certain regulations relative to the conduct of the business, among them being a prohibition of the use of basements for bakeries. One of the grounds upon which this ordinance was attacked was that the city had already exhausted its legislative power in the passage of the bread ordinance, but the court overruled the objection, and held that the city has the authority under police power to make such regulation of the conduct of the bakery business as seems reasonable.³⁷ Unfortunately in this case the court did not specifically approve of the stipulations in the ordinance, though at the time many so understood. The ordinance is still under contest. In Wisconsin, however, a somewhat similar ordinance, prohibiting basement bakeries, was upheld.³⁸

Laundry regulation has been a frequent subject for legislation, and municipal ordinances making such regulation in the interest of sanitation have been upheld in the United States Supreme Court,³⁹ as well as by many state courts.⁴⁰ But when the real purpose

³⁶ *Chicago v. Schmidinger*, 243 Ill. 167.

³⁷ *Chicago v. Drogasawacz*, 256 Ill. 34.

³⁸ *Benz v. Kremer*, 142 Wis. 7.

³⁹ *Barbier v. Connolly*, 113 U. S. 27.

⁴⁰ *Ex re San Chung*, 105 Pac. 609; *The King v. Tong Lee*, 4 Ha. 335; *Territory v. Ah Chong*, 17

of the enactment did not seem to be sanitation, but rather that it was directed against a particular class of workers, namely, the Chinese, and gave to the city authorities an arbitrary power in the matter, the ordinance was held to be a violation of the Fourteenth Amendment.⁴¹

Perhaps no case relating to the sanitary problems of manufacture has been more severely, and even bitterly, criticised than that of *In re Jacobs*,⁴² in New York. An act was passed "to improve the public health" which prohibited the "manufacture of cigars or preparations of tobacco in any form, on any floor, or in any part of any floor in any tenement house, if such floor or any part of such floor is by any person occupied as a home or residence for the purpose of living, sleeping, cooking, or doing any household work therein." This act was declared unconstitutional, the court saying that it is plain that this is not a health law, and that it has no relation whatever to the public health. Professor Freund makes this comment upon the decision:⁴³ "Assuming the sanitary object to have been colorable, there was no valid ground to support the act, and the chief interest of the case must be found in the fact that the court undertook to override the legislative judgment, which conceivably might have been based upon sufficient evidence."

Without questioning the statement that in its form the act was not clearly a sanitary regulation, as it claimed to be, it does seem that the opinion of the court merited severe criticism from the sanitarian's

Ha. 331; *District of Columbia v. Shong Lee*, 38 *Was. Law*, 460.

⁴² 98 *N. Y.* 98.

⁴³ *Police Power*, 151.

⁴¹ *Yick Wo v. Hopkins*, 118 *U. S.* 356.

point of view. It may well be that the merits of the underlying proposition were not properly put before the court. The court said: "It has never been said, so far as we can learn [of tobacco] * * * that its preparation and manufacture into cigars were dangerous to the public health. We are not aware, and are not able to learn, that tobacco is even injurious to the health of those who deal in it, or are engaged in its production or manufacture." There has been considerable evidence as to the harmfulness of tobacco upon the human system. Specific evidence should have been placed before the court showing definitely the effect of tobacco manufacture upon those engaged in the trade, and upon those closely associated with the industry.

§ 486. Industrial regulation should be definite. Granting the right of the state, or municipality, to enact regulations governing the conduct of industries, for the purpose of saving life or health, it follows that the laws passed should be definite and should not delegate legislative power to executive officers. This is illustrated by the case of *Schaezlein v. Cabaniss*,⁴⁴ in which it was held that, though it was within the police power of the state to require safety appliances in factories, it was not proper to leave the selection of the particular form of appliance to the inspector. A nuisance may be ordered abated, but it is not within the authority of the executive to determine just how it is to be abated.⁴⁵

⁴⁴ 135 Cal. 466.

⁴⁵ *Belmont v. New England Brick Co.*, 190 Mass. 442.

CHAPTER XIX

SCHOOL INSPECTION

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| § 490. Characteristics of medical inspection of schools. | § 493. Medical problems in education. |
| § 491. Injurious effects in school life. | § 494. Medical inspection normally educational. |
| § 492. Authority of health department. | § 495. School nurse. |

§ 490. Characteristics of medical inspection of schools. The systematic inspection of schools is of comparatively recent origin, and in consequence has given rise to little or no litigation in this country. There can be no reasonable question as to the authority of a health department to make such inspection of the pupils in the school as may be necessary to detect unrecognized cases of infectious diseases, and to institute such measures as may be necessary for the control of the same. But this is only a small portion of the work of medical school inspection. Gulick states that only about four per cent of the cases needing attention were excluded for infectious disease. While the work of a medical school inspector admittedly pertains to hygiene, a large proportion of it is much more closely associated with the normal work of the school than with that of the ordinary administration of a health department.

§ 491. Injurious effects in school life. It is necessary for the state to educate the children, but it is

found in the first place that as the schools have been conducted a very large proportion of the scholars are more or less permanently injured as the result of the hours spent thus in the public school. This of itself shows that there is something wrong. Secondly, it is recognized that individual instruction is a practical impossibility according to our system. The consequence is that either the more able scholars are held back by the dullards or else they will set the pace and the dullards will be obliged to go halting along, dropping back in their work year after year, thus occupying more time than even they need. Further, where scholars attend irregularly, the progress made in studies is retarded for the class. If, therefore, the scholars are obliged to be frequently absent on account of slight illnesses, it means that the state is actually paying much more for the maintenance of schools than is properly necessary. The time spent by each scholar in school is abnormally lengthened; more schoolroom is therefore needed; more teachers need to be employed; and in every way the school expenses are increased. If this overexpense can be lessened by different management it is clearly the duty of the community to try to effect this saving. Investigation shows that a very frequent cause of backwardness on the part of scholars is due to defects of eyesight or of hearing, though neither the scholar, his parents, nor the teacher may have suspected it. The child is considered dull of comprehension, and he comes to regard himself as less bright than his fellows. Never having seen distinctly, he does not realize that others see better than he; or, not having heard normally, he fails to realize that he loses the distinguishing marks of audi-

ble sounds. Enlarged tonsils and the associated adenoids are frequent causes of deafness, and through their influence on respiration they weaken the entire system. Not only so, but they serve apparently as gardens in which pathogenic bacteria thrive.

Many of these physical defects might be detected by non-medical observers. It takes but very little training to discover by the use of Snellen's test type that a scholar has defective vision. It may take much more skill to discover the exact conditions. Anyone may find decayed teeth, but not everybody appreciates how important good teeth may be for the health of the child. Nor do they realize the distinction between first and second teeth. It takes the trained scientific mind to discover the cause of many physical defects, even though that cause may be found in that school itself. Recent studies on the subject of fatigue show that the relative periods of time devoted to study and to play are very important factors. Temperature of school room and supply of fresh air—these are proper subjects for medical study. Those of us who think back upon the long hours spent in overheated and poorly ventilated school rooms long ago can but wonder that we learned as much as we did; and the blackboards placed in dark corners, or between windows, oftentimes with glazed surface, make our eyes ache even yet.

§ 492. Authority of health department. All sanitary authority over schools should reside solely in the health department. It has been the custom in many places in the past for schools to readmit pupils after absence from infectious disease with, at the most, the certificate of the attending physician. More frequently

no medical evidence was requested. Experience demonstrates that it is not safe for the school authorities to depend upon the certificates of private practitioners. It opens the way for errors due either to the ignorance of the physician or to his willingness to accommodate his patrons. These certificates should clearly be sent to the health department which will be better able to estimate their true value and issue permits to return to school when conditions seem safe. The same may be said relative to certificates of vaccination. Some years ago the writer was engaged in examining the pupils of a certain school exposed to smallpox. Each scholar was obliged to produce a certificate of vaccination. Incidentally it was learned that one physician who did not believe in vaccination was going through the form of the operation and issuing certificates thereon, using no other virus than hydrant water. It is not probable that the ordinary school authorities would detect such a fraud.

Although the sanitary authority should properly reside in the health department, its authority is purely sanitary. Assuming, without deciding, that the Indiana State Board of Health has authority to condemn a school building on purely sanitary grounds, and prevent its use in its then present condition, such an assumption does not imply also a presumption that the condemnation carries with it a requirement for the destruction of the building. At most, the State Board of Health can require that the building be made sanitary. Whether this shall be done by repairing the old structure, or by building a new one in its place, is a question for the proper local authorities to deter-

mine.¹ Although a building may be ordered destroyed when it is a nuisance *in esse* which cannot otherwise be abated, as by disinfection, that is a question of fact to be determined,² and the finding of the sanitary board is not sufficient of itself to determine that fact.³ It must be remembered that a school building would not be likely to become a nuisance *per se*. Even if it were no longer possible to use it for school purposes its mere existence might not be dangerous to health. It might, perhaps, be put to other uses. The health authorities have authority to require that the building be sanitary, but it is very questionable how far they may go in determining just how the disability shall be removed.

§ 493. Medical problems in education. Every successful school management must make a study of the individual scholars in order to get the best results in education. If the scholars, passing through a certain room uniformly show the acquirement of certain defects it indicates that there is something wrong in the arrangement of the room or of the school work. The most perfect results as to the study of the scholars may reasonably be expected from a physician trained in medicine, experienced as a teacher, and with a practical knowledge of psychology and of physical development. It seems, therefore, that under ordinary circumstances unless there be some special provision in the constitution or statutes of the state, any school board would have the authority to employ such an

¹ Coal Creek Township v. Lewandowski, 84 Ind. 346; see also Pasadena School District v. Pasadena, 134 Pac. 985.

² Kwong Lee Yuen Co. v. Man-

chester Fire Assurance Co., 15 Ha. 704; Abana v. Insurance Co. of North America, 15 Ha. 636; Singa v. Joliet, 86 N. E. 663.

³ Cole v. Kegler, 19 N. W. 843.

inspector, just as much as it has authority to employ janitors, engineers, or teachers. Such an inspector may very properly devote a certain amount of time, if available, to the work of teaching. It has been found that the grammar schools have been of the greatest aid in disseminating sanitary knowledge and in inaugurating the proper system of management. When Sir Rupert Boyce visited the West Indies, making a governmental investigation relative to yellow fever, he found the children in the grade schools becoming experienced entomologists. A little girl showed him a fine sketch of the larva of the stegomyia mosquito which she had made. The scholars were enthusiastic in their search for the breeding places of the pests, and were expert in detecting violations of the sanitary regulations. In a similar way modern sanitary ideas are being carried in our own country from the schools to the parent. In order that the scholars may get such education properly someone must be employed who has that special education. Then, too, there is that most important factor in the prevention of sickness, poverty, and dependency—sexual education, which may properly be given by medical school inspectors. To remove all possible question as to the authority of school boards thus to establish medical supervision, state statutes should be enacted clearly giving this authority.

The education of a child means much more than merely communicating to it the contents of textbooks. But even if the term were to be so limited some discretion must be used by the teacher in determining the amount of study each child is capable of. The physical and mental powers of the individual are so

interdependent that no system of education, although designed solely to develop mentality, would be complete which ignored bodily health. And this is peculiarly true of children whose immaturity renders their mental efforts largely dependent upon physical condition. It seems that school authorities and teachers coming in contact with the children should have an accurate knowledge of each child's physical condition, for the benefit of the individual child, for the protection of the other children with reference to communicable diseases and conditions, and to permit an intelligent grading of the pupils. For these reasons the Minnesota court upheld the authority of school boards, as a part of their regular educational supervision, to employ suitable persons to ascertain the physical condition of pupils.⁴

§ 494. Medical inspection normally educational. Although very much of the work of the medical officer in the schools is in the line ultimately of the preservation of the public health, it must be remembered that essentially it is educational, and in every way it is directly connected with the proper work of the school. It seems to us, therefore, that he should be a school officer, rather than an officer in the health department. It is the duty of a physician in private practice, when he discovers a case of infectious disease, to report the same to the department of health. This same duty devolves upon the school physician, and the care of the infectious disease prevention must rest with the department of health. Private physicians or school physicians, private families and school boards

⁴ State *ex rel.* Schomberg v. Brown, 128 N. W. 294.

—all are subject to the regulations issued by the health department. The school physician must therefore work in harmony with the health department. So long as he promptly reports all cases of infectious disease, and assists the department in tracing up sources of infection, it is immaterial whether he draw his pay and receive orders from the school board or the sanitary department. It is equally important for the school board and the health department to ferret out the source of every epidemic. Their interests being common, there is no reason why there should be the slightest antagonism.

§ 495. **School nurse.** It is customary when the school inspector discovers that a pupil has defective teeth, enlarged tonsils, adenoids, eyes needing spectacles, ankylostomiasis, or pediculosis, that a card be issued to the pupil setting forth the defect and referring the case to the family physician. Having discovered that very frequently, owing either to the ignorance or carelessness of the parents, these cases do not receive attention, many schools have employed the school nurse to visit the homes of the children. All of this work requires a high degree of tact. But the school nurse has proven the most efficient aid “just incidentally.” The nurse is able to instruct many mothers in the care of infants; she makes suggestions for improving the family menu without increasing its cost; she aids the family to secure better hygienic surrounding; and she helps to make the immigrants desirable American citizens. As to the legal authority of a school board in the absence of statutory regulation to employ such a nurse there may be some question. Her work is educational in character, and authority should

be expressly granted by statutory enactment. The work of the school is to make good citizens, fitted for their civic responsibilities. Unfortunately many of our citizens never have come in contact with our school system. They have had their schooling under foreign ideals, and come to this country when fully grown. They need, and their families need, the helpfulness of our educational aid. This assistance can be given better through the school nurse than by any other present agency.

Although it is apparently within the normal work of a school to supervise medical inspection whenever the school authorities fail to act, it is proper that the local health administration should establish such a service. Under the school management the inspector is expected to make a thorough examination and show all defects. Under the health administration the chief force of the inspection must be devoted to discovering evidence of infectious disease, determining upon exclusions from school for such cause, and deciding when individual pupils may re-enter.

CHAPTER XX

EUGENICS

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| § 500. What is eugenics? | § 507. Sterilization. |
| § 501. Eugenics positive. | § 508. Court decisions. |
| § 502. Cast universal. | § 509. Reasonable precautions. |
| § 503. Mendel's Law. | § 510. Galton's Law of Regression. |
| § 504. Like characters in parents
and children not necessarily hereditary. | § 511. Eugenics versus low infant mortality. |
| § 505. Disease not hereditary. | § 512. Legislation based on biology. |
| § 506. Ante-nuptial examinations. | |

§ 500. **What is eugenics?** Though not strictly a part of regular health administration, the subject of eugenics is sufficiently closely allied to warrant consideration here. The science of eugenics is still in its formative stage. The name was suggested by Dr. Francis Galton (a cousin of Charles Darwin). That grand old man in science originated many movements, and this was the culmination of his scientific career. The object of eugenics is the improvement of the human race. It must be based upon an accurate knowledge of the laws of heredity. Most of our knowledge of heredity is of necessity derived from a study of the development of plants and animals. The laws of nature are universal. The laws of heredity are practically the same, whether we consider the ancestry of a pea or a mouse, a chicken, a sheep, or a human being.

§ 501. **Eugenics positive.** Eugenics is a positive science; it is the positive application of known facts to produce a better progeny. The negative phase must of necessity be kept in mind, but it should not be emphasized. Unfortunately, enthusiastic sociologists and embryo philanthropists have magnified the negative phase until it has become, in many minds, synonymous with eugenics. This is greatly to be regretted, and the results are of questionable character.

The chief aid in eugenics must be education. This education may be imparted in the schools, by general lectures, by books, and by periodicals. It must consist in the clear statement of the laws of heredity with their application to human beings. Legislation can have but very slight application. It is true that laws have been proposed to increase the birth rate, as by giving pensions to mothers. The trouble is that this tends to increase the birth rate at the expense of quality. Quality, not quantity, is the aim of eugenics. It costs no more to raise a good horse, a valuable dog, or a blooded cow, than it does to raise stock of very little value. The ultimate result of breeding scrub stock is a loss financially. A man who uses little potatoes for seed may get a large crop, but they are only good for hog feed. The same rules apply to human beings.

§ 502. **Caste universal.** Though to some degree opposed to the ordinary American idea, caste is universal in nature. Eugenics has for its object the increase in the size of the upper castes and the elimination, as far as possible, of the lower grades. This classification must be based upon intrinsic worth, not upon the mere accidents of society, nor upon financial ratings.

The chief elements to be considered are physical strength and health, and mental power. A strong mind in a weak body is hampered in its operation. In fact, so dependent is the brain upon physical health that it is easily wrecked by bodily weakness.

§ 503. **Mendel's Law.** As we have stated, eugenics is still in the formative stage. An enormous amount of work has recently been done, both in the general study of heredity and in the recording of the traits of human families. In general biological investigations certain laws have been evolved. These studies have been both inductive and deductive. Facts have been observed, theories formed and put to test by direct experimentation. The most important discovery was probably that of Mendel's Law. The Abbé Mendel, in the garden of a monastery at Brünn, laboriously tried the crossing of different kinds of peas. He found that where a wrinkled pea was crossed with a plump smooth variety, the resulting hybrid would show only the smooth, plump character. Permitting these peas to self-fertilize, in the next generation he found that practically one quarter would be wrinkled; one quarter would be plump and would breed true; the remaining half, though plump, would have the hybrid characteristics, and in subsequent generations would continue to split into the three varieties. The wrinkled peas were of pure heredity, that is, they would always breed true. He called the plumpness a dominant character, and the wrinkledness a recessive character, because it does not appear in the hybrid. It must be remembered that though it does not appear, the wrinkled character is still present in the hybrid round pea. It will be noted that we have here *opposing*

characters, rather than a *degree of development* of one character. This division of characters in progeny is called Mendel's Law of Dominance.

The divisions of characters is found to depend upon the mathematical distribution within the germ cells of the character carrying elements from the two parents. This mathematical grouping is spoken of as Mendel's Law of Segregation.

More critically examined, it is found that the opposing characteristic is really due to the absence of some element in one parent. Chlorophyll was absent in one of Baur's plants. (See page 782.)

Mendel's observations were published in 1865. But, owing to the greater attention inspired by Darwin's "Origin of Species," they attracted little notice. In 1900 three observers simultaneously—Hugo de Vries in Holland, Correns in Germany, and Tschermak in Austria—rediscovered Mendel's Law, and the Abbé's publication was brought to light. Since 1900 thousands of investigations have been made demonstrating the truth of Mendel's Law of Dominance, and Mendelism may be taken as a strong evidence that a character is truly hereditary.

§ 504. Like characters in parents and children not necessarily hereditary. Many observers without close scientific training have mistaken the recurrence of parental characters in children as evidence of heredity. In fact, such recurrence is very frequently the result of environment. Environment includes surroundings and education. The parent's example has much to do with forming the character of the child.

Professor Davenport,¹ in charge of the eugenics lab-

¹ Heredity in Relation to Eugenics, p. 157.

oratory at Cold Harbor, publishes family records showing splenic enlargement, dependent upon heredity; but he neglects to eliminate other possible factors. Now, enlargement of the spleen is very commonly caused by malarial infection, so that Ross, for example, uses splenic enlargement as an index to the percentage of malarial infection in a community. If, therefore, these children mentioned by Davenport were living in a malarial country, the same cause which produced enlargement in the parents probably produced it in their offspring, without any reference whatever to heredity. This one example is mentioned simply to show the necessity of care in drawing conclusions.

§ 505. Disease not hereditary. It may be stated as a general fact that disease is seldom, or never, inherited. A child may be born with disease, and the disease, therefore, be congenital: but it is not hereditary unless transmitted from parent to child through the germinal cell. Physical defects are distinct from disease, and may be transmitted through heredity. This distinction is important. A character in a child may not be strictly hereditary, though it may depend upon some inherited defect.

In efforts at legislation relative to eugenics a most serious error has frequently been made in attempting to limit the production of crime by the act of sterilization. Contrary to common ideas we have no evidence that crime, or the criminal tendency, is transmitted by heredity. There are family records showing criminals in generation after generation. Generally those same individuals show other weaknesses, many of them being of imperfect mental development. Now

such family records do not clearly distinguish between the heredity of crime and the dependence of crime upon physical defects; and particularly, they fail to eliminate the possible influence of environment. The fact that a man's father, or grandfather, committed a certain crime and that he himself was guilty of a similar offence is no evidence that the crime was hereditary. The second offence may have been due to the suggestive influence of the first, or, they may have originated from similar causes. It must be remembered that morality is a relative rather than an absolute standard. That which is a crime in one country, or age, has been perfectly allowable in others. That a man should marry his own sister is highly repugnant to us, though to the ancient Assyrians it seemed perfectly proper. All of our studies seem to show that criminality is chiefly dependent upon environment, and particularly upon education.

It is to be noted and regretted that most laws relative to eugenics have originated among sociologists, rather than biologists, and they have been stimulated more by emotion than by science. We have little or no evidence to show that from a biological standpoint there is any objection to the intermarriage of people of different races. On the contrary, such union has sometimes produced highly desirable results. The Araucanian Indians of Chile, the only aboriginal nation in America which never was conquered by Europeans in war, when intermarried with the most sturdy Spanish immigrants from the Basque provinces, have produced a strong people. So the union of Spaniard and Aztec has produced some of the leaders in the Mexican nation. Nevertheless, we early find laws in this coun-

try prohibiting such mixed marriages. Thus, North Carolina in 1715 passed an act forbidding the marriage of whites with negroes, mulattoes, or Indians, under a penalty of fifty pounds, and providing punishment for clergymen performing such marriage ceremonies. Maryland, in 1692, passed an act against the marriage or promiscuous sexual relations of whites and negroes or other slaves. In Massachusetts, in 1692, the marriage of a white person with a negro, Indian, or mulatto was forbidden.² Because such laws are based purely upon emotional standards, they are outside of the domain of public health.

§ 506. Ante-nuptial examinations. It is very proper that parties intending marriage should pass a physical examination and present, each to the other, evidence of sound health. Though disease itself may not be transmitted by heredity, it may often be communicated from person to person; and its presence may cause a weakened physical condition which will show itself as a defect in future generations. Defects are by nature to a degree self limiting. The alcoholic parent may beget healthy children, but family histories show that with continued debauchery of parent the children become progressively less rugged in constitution and finally later pregnancies result in abortion. In Darbshire's experiments with peas, according to Mendel's Law, he found that the recessive pea evidently had a smaller degree of vitality, and vacant spaces in pods corresponded to the numbers of wrinkled peas lacking. So Baur, the German botanist, found a variegated snap-dragon, which when self-pollenated, produced

² Indian Slavery in Colonial Times, Lauber, p. 253.

two variegated plants to one green. This was apparently an example of Mendelism with the omission of the chlorophyll free specimens. More careful examination showed that the missing plant germinated but did not develop. These illustrations have their bearing upon ante-nuptial physical examinations. Too frequently those most deserving the bar of condemnation will be able to find physicians sufficiently careless or mercenary to furnish a satisfactory certificate. At the most, these examinations simply protect the contracting individuals from direct infection, especially from venereal diseases. Because gonorrhoea is a frequent cause of sterility this may slightly protect the birth rate; but in addition the results of such precaution will be negligible for subsequent generations. It is possibly questionable whether the requirement of ante-nuptial examinations by law will be effective for eugenic good.

Experience has demonstrated that the fact of making marriage difficult has little influence upon the birth rate. This is shown in France, Spain, and Latin America, where owing to the legal, or church demands marriage is frequently omitted. In a like manner, if the law requires that each individual pass a physical examination before marriage, it is to be expected that those who fail thus to pass will indulge in illicit intercourse. The effect here would be to preserve the purity of pure blood, and the unfit would be largely limited to their own class. The natural result would be to intensify the distinction between the two classes, with such an intensification of defectiveness as to favor natural self limitation among the defectives.

Laws demanding medical ante-nuptial examinations

may very easily overstep the reasonable legal boundaries. January 20, 1914, Circuit Judge F. G. Eschweiser of Milwaukee gave an opinion upon the Wisconsin eugenic marriage law, holding it unconstitutional because, in the first place, the fee prescribed (\$3.00) was too small to insure a thorough examination. He held that the law would require the Wasserman test for syphilis, and if it be not made, a physician giving a clear bill of health might be liable for perjury. He held, further, that the law was unconstitutional because it conflicted with religious liberty in that it tended to halt marriages. It is interesting to note that the effect of the law actually has been to substitute a civil contract for religious marriage. The state supreme court has since upheld the main features of the statute.

From the eugenic standpoint it is more important to examine into the family record, than it is to examine the persons who are intending to be married. This point is well recognized among breeders of horses and cattle. The individual may not show serious defects which may be discovered by an investigation of the history of the previous generations, especially including the grandparents and the uncles and aunts of the parties to be married. Further, it is not the absolute character of each individual which is alone important. The question, from a eugenic standpoint, is, what will be the natural result in the next two generations. A may not be a proper person to marry B, though the union of A and C may be highly commendable; B should not marry A, but B and D may make, from the eugenic point of view, an ideal combination. All of this simply shows that the subject must be cov-

ered by education, rather than by legal enactment and enforcement.

Another suggestion has been made by La Reine Helen Baker,³ which is at least worthy of consideration. From the eugenic standpoint it must be admitted that many illegitimate children are comparatively of high grade. Physically and intellectually they may represent the very best of blood. That such children should be stamped from the moment of birth with the mark of shame is to put environmental influences at work to drag them into the criminal class. They are not to be blamed by society for the sins of their parents. Were such children placed upon an equality before the law with those born in wedlock it would assist in removing the ban of society which is now placed upon the innocent, and it is not impossible that such a course would go far towards limiting illicit intercourse.

§ 507. Sterilization. Several states have recently passed laws providing for the legal sterilization of criminals, imbeciles, idiots, and other mental defectives. If criminality be not transmissible by heredity, such sterilization has no right for consideration in eugenics. With the possible use of sterilization as a punishment under criminal law, we have no concern. Criminals and mental defectives should not be included in the same sterilization law. We shall therefore omit further consideration of the sterilization of criminals from our discussion, and confine ourselves to sterilization as a possible eugenic aid. There is no question as to the fact that mental degeneracy is trans-

³ Race Improvement (1912),
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missible by heredity. Because such individuals are attractive only to their own class, if permitted freely to commingle, the tendency is to intensify the defects. As previously suggested, defectiveness is to a degree self-eliminating. In other words, to a degree the defect tends to cure itself. However, the most of these defectives become public charges, and society has a right to defend itself from this expense. In the *Journal of Criminal Law and Criminology* for September, 1913, Mr. Charles A. Boston published a protest against the laws authorizing the sterilization of criminals and imbeciles. He failed to distinguish between those cases in which heredity plays an undoubted part and those in which the hereditary influence is slight or indirect. He speaks of undesirable citizens, and by way of ridicule, suggests that the over-rich are "undesirable citizens," and therefore should be sterilized. The over-rich, however, are not "undesirable citizens" in the sense that they are public charges. They do not themselves enter almshouses or insane asylums at the expense of the community. Though they may prey upon the individuals in a state, the state, as a state, runs no risk of being made financially responsible for their care and keep.

§ 508. **Court decisions.** There have been but three decisions upon the constitutionality of sterilization laws. In *State v. Feilan* the supreme court of the state of Washington held⁴ that the Washington statute authorizing vasectomy upon a person convicted of rape is not a cruel punishment, and it therefore refused to annul the act of the legislature. This being a decision in criminal law, it has no interest for us.

⁴26 Pac. R. 75.

As applied to an epileptic woman who was an inmate of a state institution, it was held that the New Jersey statute in question was based upon a classification that bore no reasonable relation to the object of such police regulation, and hence denied to the individuals of the class so selected the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.⁵

While these forms have been in the printer's hands news comes from Keokuk, Iowa, that in the United States District Court, held there June 24, 1914, Judge Smith McPherson pronounced the Iowa vasectomy, or sterilization law unconstitutional, and in his opinion Judges Walter I. Smith, United States Circuit Judge of the eighth district, and John C. Pollock, District Judge for Kansas, concurred. It seems that the prisoners in the state institutions united to test the law, and Rudolph Davis, a prisoner in the state penitentiary, applied for an injunction to prevent the members of the board of parole, the warden, and physician of the penitentiary from performing or causing to be performed this operation in compliance with the terms of the law. Judge McPherson granted a temporary injunction which is now made permanent. In part he said: "Our conclusion is that the infliction of this penalty is in violation of the Constitution which provides that cruel and unusual punishment shall not be inflicted. The punishment prescribed is of course to follow the man during the balance of his life. The physical suffering may not be so great, but that is not the only test of cruel punishment; the humiliation, the

⁵ *Smith v. Examiners of Feeble-minded*, N. J. Supreme Ct., Nov. 18, 1913.

degradation, the mental suffering are always present and known to all the public, and will follow him where-soever he may go. This belongs to the dark ages." The Court recognized the fact that it is desirable that certain classes of persons, degenerates, should beget no children; but from the telegraphic report before us it appears that the eugenic character of the law is not apparent in the case of criminals, and that the operation must be considered purely as a punishment. Apparently the decision in this case is more reasonable than that in the Feilan case, and unless it be set aside by the Supreme Court it will effectually dispose of the attempted sterilization of criminals.

§ 509. **Reasonable precautions.** Under the police power of the state it might be proper for the legislature to pass a law providing for the sterilization of mental defectives where it is probable that their progeny will become public charges. It seems reasonable, however, that certain safeguards for the individual should be provided to prevent excessive activities. It is not sufficient that the decision be left as according to the Indiana statute, to two surgeons and a physician. The proper judges in such matters should have a very wide experience and education. At least one of them should be thoroughly versed in biology. It might be well if it could be provided that the final decision should be in some form of court action, and that the patient might be represented by proper counsel. Without such precautions, it might be considered that the law violates the Fourteenth Amendment to the federal Constitution.

It may be well questioned whether or not the scientific basis is yet ready for such radical action as com-

pulsory sterilization acts. It has not yet been accurately determined how much degeneracy may be the result of heredity, and how much is the product of environment. A great deal of the degeneracy found in the southern states, which through the last century was supposed to be hereditary, has recently been demonstrated to be dependent upon the hook-worm disease, and easily curable. Though there may be a heritable condition which makes an individual liable to become insane, it takes some other exciting cause to throw the mental operations off the track. Insanity is not a necessary result of the heritable character in many, if not all of these cases; and, in fact, that very heritable character may be essentially a mark of superiority. Segregation works no permanent harm, and if future progress in science is able to remove the stain the individual may be accorded full liberty. Perhaps no other condition is more distinctly cacogenic than epilepsy. Not only do we have the unfortunate convulsions, but with them we have a progressively weak mentality, with dangerous insanity as a sequel in many cases. These individuals are frequently prolific. Their progeny become public charges in large numbers. It may well be that the sterilization of epileptic males may be therapeutically helpful, and the state may be warranted by eugenic reasons in demanding the sterilization of all epileptic males who are not strictly segregated. However, most of the sterilization laws are operable only upon inmates of public institutions, rather than upon those who are at liberty; and from a eugenic standpoint such segregated individuals do not need sterilization.

The power of procreation is a defense for a woman

with defective mentality. So long as she is in an institution sterilization should be useless. If not, conception indicates a degree of mismanagement which the operation would intensify, rather than correct. Such a weakminded woman at liberty, if possessing the procreative faculty, is thereby protected to a degree against misuse by unprincipled individuals who might be detected in their nefarious acts if she conceived. Moreover, any sterilizing operation upon the woman is more dangerous, and more difficult, than upon the man. It is therefore very questionable whether any law providing for such compulsory sterilization of women, simply to prevent the bearing of degenerate children, ever will prove to be reasonable or necessary.

The state has a perfect right to prohibit the marriage of such persons as are likely to increase the number of state charges. In *Gould v. Gould*⁶ the court said that among the rights of equality guaranteed under the Constitution we find that one is marriage, "but it is a right that can only be exercised under such reasonable conditions as the legislature may see fit to impose. It is not possessed by those below a certain age. It is denied to those who stand within certain degrees of kinship. * * * One mode of guarding against the perpetuation of epilepsy obviously is to forbid sexual intercourse with those afflicted with it, and to preclude such opportunities for sexual intercourse as marriage furnishes. To impose such a restriction upon the right to contract marriage, if not intrinsically unreasonable, is no invasion of the equality of all men before the law, if it applies equally to

⁶78 Conn. 242, 61 Atl. 604.

all, under the same circumstances, who belong to a certain class of persons, which class can reasonably be regarded as one requiring special legislation, either for their protection or for the protection from them of the community at large. It cannot be pronounced by the judiciary to be intrinsically unreasonable if it should be regarded as a determination by the general assembly that a law of this kind is necessary for the preservation of public health, and if there are substantial grounds for believing that such determination is supported by facts upon which it is apparent that it was based."

§ 510. **Galton's Law of regression.** Dr. Galton found that there is a constant tendency in any race for regression toward the mean. In other words, if the parents be shorter than the average, their children will be taller than the parents; or, if the parents be taller than the average, the children will be shorter than the parents. This is called Galton's Law of Regression. The question may be asked whether this law of regression would not show that the children of mental defectives would have a like tendency to return toward the normal. It must be remembered that mental degeneracy is not a matter of degree so much as a representation of a positive loss of a character, comparable with Baur's snap-dragon, deficient in chlorophyl. If the parents do not possess a character they cannot transmit it. If both parents, therefore, be degenerates, their children would be degenerate also, possibly with a few exceptions, in which cases the children might inherit some character not expressed in the parent. Such a possibility is improbable. If the defects of the parents be the same they will be unable to transmit

that which they lack. We find in nature several instances in which the parental defects may appear similar, though really distinct. It is then possible that each parent may thus supply the deficiency of the other, and in the first hybrid generation defects may disappear, to reappear in subsequent generations. By Mendel's Law we may know that in case of a union between a degenerate and a normal person, the degeneracy might be shown in a portion only of the offspring; and by a continuance of such union with normal persons in future generations, degeneracy might be obliterated. Such union of the normal with the degenerate is not to be commended on biologic grounds, for it would take the place of the blending of two normal strains, which should result in only normal offspring. In the one case, we have still the production of individuals who would be public charges; in the other, none should be public charges. The state, therefore, has a perfect right in self protection, to prohibit by any reasonable means the breeding of degenerates.

§ 511. **Eugenics versus low infant mortality.** The tremendous movement for the bettering of conditions in childhood cannot be wholly eugenic in its effect. By lessening infant mortality, the tendency is to keep alive many who represent a weak general vitality coupled with weak mentality. It is a singular fact that these movements—providing playgrounds for the children, furnishing the services of visiting nurses, free hospitals, and dispensaries—are very largely promoted by a generation of men and women in whom there are distinct signs of decaying parental interest. Many of those who are active in such movements are

themselves childless. Such eugenic efforts are like the man trying to lift himself over the fence by his bootstraps. A physical fact is plainly stated by Professor Karl Pearson, when he said, "No degenerate and feeble stock will ever be converted into healthy and sound stock by the accumulated effects of education, good laws, and sanitary surroundings. Such means may render the individual members of the stock passable, if not strong, members of society; but the same process will have to be gone through again and again with their offspring, and this in ever-widening circles, if the stock, owing to the conditions in which society has placed it, is able to increase its numbers." Professor George E. Dawson, in *The Right of the Child to be Well Born*, has given the ⁷ keynote to real eugenics: "Children will never be well-born until they are desired by the men and women who are potential parents. A generation that does not desire offspring will be as weak in its power to propagate fit children as would a generation that did not desire culture or wealth in the power to become educated or prosperous." While all movements directed towards the saving of life and health are to be commended we must remember that they may be distinctly opposed to eugenics.

§ 512. Legislation based on biology. The foregoing clearly illustrates that all laws on the subject of eugenics should be based upon the science of biology. No sociologist should attempt to force such legislation without its approval by competent biologists. No legislation is safe upon the subject unless it be reasonable; and to be reasonable, it must be grounded upon

⁷ p. 43.

fact, rather than theory; upon science, rather than emotion.

At present the state of our knowledge does not warrant much legislation. There is a condition sometimes found present in which persons bleed excessively from the slightest injury. They are familiarly known as "bleeders." It is shown by experience that this condition is transferred from mothers particularly to the children, and that it is not safe for such women to have children. Legislation seems to be unnecessary in such a case, as the same end may be obtained through education. Even the educational value of eugenic legislation must be slight. If legislation be unnecessary it is therefore not to be desired. In the New Jersey case attention was called by the court to the fact that the patient, being in a state institution, was protected from procreation. Unnecessary legislation is especially to be condemned until a full development of the science upon which it should be based has been attained.

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