CHAPTER XX

SANITARY AUTHORITIES AND THE COURTS

THE subordination of administrative authorities to statute law and the powers of the courts to enforce that subordination have been well summed up by an eminent legal authority, who says :

"The administrative system of England is dominated throughout by the principle that no power can be exercised unless it has been conferred by law, no obligation imposed on any citizen except by law and that if the exercise of discretion has been entrusted to any officer or department of the Central Government, or to any municipal body, this discretion must be exercised strictly according to the rules of law, which law will, in cases of dispute, be interpreted by the ordinary courts, not by an administrative tribunal." [1]

We have already seen [2] that sanitary authorities owe their existence and powers to the action of Parliament, that some powers must be exercised and that others are discretional, and as we have passed in review one after the other of the functions of the public health department we have repeatedly noticed that in the exercise of these powers the courts have to be appealed to in the last resort.[3] On the other hand, local authorities neglecting to perform duties imposed upon them by law may be compelled to do so by a *mandamus* of the High Court,[4] and if such neglect deprives a citizen of a right to which he is entitled he may

[1] E. Jenks, "The Rule of Law in English Local Administration," in *Problems of Local Government*, p. 204; compare Dicey, *The Law of the Constitution*, and Ashley, *Local and Central Government*.
[2] See Chapters III, IV and V.
[3] See Chapters XII and XIV for particular instances.
[4] Compare Public Health Act, 1875, s. 299; Housing Act, 1925, ss. 23 24, 50, 51 and 73, and Milk and Dairies (Consolidation) Act, 1915, s. 13.

bring an action for damages against a local authority [1] or official, but if the duty involves the exercise of discretion malice must be proved for the action to be successful.

It is, moreover, necessary that the authority and their officials, in the performance of their duties, act strictly within their legal powers, complying with the prescribed procedure and seeking the specified remedies, for no plea of public interest will protect them if they are guilty of illegal action against individuals; they can be made liable as if they were private citizens. Any action brought against a local authority or officials in respect of any act done in pursuance or execution or intended execution of any Act of Parliament or of any public authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, is, however, in general, subject to the conditions that it must be instituted within six months of the alleged offence, and sufficient opportunity of offering compensation must be given to the authority or officer.[2] But no matter or things done or contracts entered into *bona fide* for the purpose of executing the Public Health Acts subject authorities or officers to any action, liability, claim, or demand.[3]

In addition to the *mandamus*, which is by far the most important of the writs issuing from the High Court, and affecting local administration, a writ of *certiorari* may be applied for by any person aggrieved by a disallowance of a district auditor [4] or in order to remove an order of the council of a borough for the payment of money,[5] and writs of prohibition may be obtained directing local authorities to refrain from doing particular acts which they are not empowered to do or are prohibited doing.[6]

It is, however, in the performance by the local authority of their duty to enforce the various laws that resort to the

[1] Compare Public Health Act, 1875, ss. 42 and 43.
[2] Public Authorities Protection Act, 1893, s. 1.
[3] Public Health Act, 1875, s. 265.
[4] *Ibid.*, s. 247.
[5] *Ibid.*, s. 246.
[6] Cp. Public Health Act, 1875, ss. 17 and 19 and cases thereunder.

courts is most frequent. Even in those cases where in default of the owner or occupier complying with the notice of the sanitary authority, the authority are empowered to do the necessary work and charge the defaulter with the expenses, such expenses must in the last resort be recovered by an appeal to the courts ; and where such a remedy does not lie an order of a court must be sought by the local authority.

There are, however, some rather significant tendencies developing during recent years.[1] There is, firstly, the growth of the appellate jurisdiction of the Ministry of Health,[2] and, secondly, the appropriation by or endowment of the local authorities with quasi-judicial functions. It is the practice of some public health committees to summon before them persons who may be charged with breaches of the law, as in cases of offence against the Food and Drugs Acts, the Diseases of Animals Acts, or the smoke nuisance clauses of the Public Health Act, and to persuade such persons to agree to be dealt with by the committee who, after hearing evidence and explanations, inflict penalties. It is by no means certain that this procedure is to be commended, although it was embodied in the Milk and Cream Regulations of 1912,[3] and as regards the suspension or revocation of licences under the Milk (Special Designation) Order, 1923, the holder of the licence must be afforded an opportunity of stating his case to the licensing authority ; an appeal may be made within seven days to the Ministry of Health, whose decision is final.[4] The obvious objections to these methods are that innocent persons may often elect to be fined by the committee as being a cheaper course than fighting the case against a powerful authority in the courts ; it destroys publicity, which is often more than half the punishment, especially in cases of food adulteration ; and finally, and perhaps

[1] On this point see *Justice and Administrative Law*, by W. A. Robson.
[2] See Chapter XXV.
[3] Article VI, repealed by Public Health (Preservatives, etc., in Food) Amendment Regulations, 1926, article 15.
[4] Article IX.

most important, it puts a duty upon councillors that they were never intended to fulfil, and gives opportunity for the exercise of favouritism, if not corruption, to those who may be so inclined.

A useful power, against which there is no appeal, is given to local authorities by the Rent Restriction Acts under which a certificate may be granted to tenants of houses let below certain rentals that the house is not " in a reasonable state of repair." Possession of this certificate enables the tenants to make certain deductions from the rent and is a good defence to any claim by the owner that such deductions are arrears. When the house is made fit, the owner may obtain a certificate to that effect and the deductions must cease.[1]

The Housing Act, 1925,[2] gives local authorities distinctly judicial powers in respect to houses which appear to them to be " in a state so dangerous or injurious to health as to be unfit for human habitation." [3] They may make a " closing order," prohibiting the use of such house for human habitation until in their judgment it is rendered fit for such purpose, appeal lying, not to a court of law, but to the Ministry of Health within fourteen days after the order is served upon the owner. A similar appeal lies within fourteen days of the local authority refusing, on the application of the owner, to determine the " closing order." Where such an order has remained operative for three months the local authority must take into consideration the question of the demolition of the house, each owner being entitled to a month's notice of such proceeding and to be heard when the question is considered. If the house has not been rendered fit for habitation, or either cannot be so rendered or the necessary steps for the purpose are not being taken with all due diligence, the authority must make a " demolition order," the owner having the right of appeal to the Ministry of Health within twenty-one days

[1] Rent Restrictions Act, 1923, s. 5.
[2] Sections 11, 13, 14 and 15.
[3] See tabulated statements of orders, etc., at end of Chapter XIV.

from the service of the order upon him. The judicial character of these functions was well brought out in the course of a case which was ultimately taken to the House of Lords. An owner appealed to the Local Government Board against a "closing order," and the Board, after a local inquiry,[1] dismissed the appeal and confirmed the order without hearing the appellant. The local authority refused to determine the order, and the owner again appealed to the Board, who again confirmed the action of the local authority without disclosing their inspector's report to the appellant. The latter appealed to the Court of King's Bench, which upheld the decision of the Board, but the Court of Appeal, by a majority, reversed the decision and held that the Local Government Board must decide the appeal in their capacity of a statutory appellate tribunal in some more judicial way than merely reading a notice that "after an impartial and careful consideration" the Board decided to dismiss the appeal. This decision was, however, the subject of a further appeal to the House of Lords where the decision of the Court of Appeal was reversed and the order of the Divisional Court restored, the Lord Chancellor (Viscount Haldane) declaring:

"That the Act of 1909 had introduced a change of policy by transferring the jurisdiction both as regards original applications and as regards appeals from courts of justice to the local authority and the Local Government Board respectively, both of them administrative bodies, and although the Board was bound to act judicially, so long as it followed its usual procedure it was not bound either to disclose the report of its inspector or to hear the owner orally." [2]

Apart from these cases, when all other efforts of the local authority and its officers have failed to secure the carrying out of the requirements of the various Acts or to recover the expenses where they have themselves done the necessary work, recourse must be had to the courts of law. As a rule

[1] See Housing and Town Planning Act, 1909, s. 39; cp. Section 14 of the Housing Act, 1925.
[2] *Arlidge* v. *Local Government Board* (1913), 1 K.B. 463; (1914), 1 K.B. 160; and (1914) W.N. 328.

the court to which application must be made is a court of summary jurisdiction, from which appeal usually lies to a court of quarter sessions.[1]

To this, however, there are specific exceptions, such as in the case of the Rivers Pollution Act, 1876,[2] in which the county court is specified, or for the recovery of penalties for the pollution of water,[3] action for which may be taken in the superior courts. The persons who may take action may be either a local authority, an aggrieved party, or some one expressly authorized as required for the particular purpose; but the last two classes are only empowered to take action in specific cases. Thus, to enforce the provision of Section 41 of the Public Health Act, 1875, action is restricted to the local authority, whilst for the purpose of dealing with polluted wells the power is extended to "any person." [4]

Any aggrieved person is empowered to institute proceedings in respect to offences under the Rivers Pollution Act, 1876,[5] the consent of the Ministry of Health to such proceedings being necessary both for a person aggrieved or a local authority if the offence is created by Part III of the Act.[6] In like manner proceedings to recover penalties for the pollution of water require the consent of the Attorney-General,[7] and the authorization of a justice of the peace or of the Ministry of Health is required to enable a police officer to secure the abatement of nuisances.[8] Wherever a local authority is of opinion that summary proceedings would afford an inadequate remedy, they may take proceedings in any superior court of law or equity to enforce the abatement or prohibition of any nuisance under the Act, or for the recovery of any penalties from or the punishment of any person offending against its provisions relating to nuisances.[9]

As a general rule the alleged offence must have arisen

[1] See Interpretations Act, 1889, for definitions.
[2] Section 8.
[3] Public Health Act, 1875, ss. 68 and 69.
[4] *Ibid.*, s. 70.
[5] Section 8.
[6] Section 6.
[7] Public Health Act, 1875, ss. 68 and 69.
[8] *Ibid.*, ss. 105 and 106.
[9] *Ibid.*, s. 107.

within the district of the justices before whom it is heard, but their jurisdiction extends to cases arising within 500 yards of the boundaries of their district or within a river, lake, or arm of the sea, forming such boundary, or where the offence was either begun or finished within their district. It is, however, an invariable custom of local authorities to take proceedings at their own district courts, except in certain cases, e.g. when a nuisance arises outside their district,[1] or from an offensive trade outside their district.[2]

The procedure is by information which must not specify more than one offence, and which must be laid within six months of the date when the offence arose; the time is limited to twenty-eight days from the date of purchase of the alleged adulterated food for the purposes of the Food and Drugs Acts.[3] The information must be written, specifying the offence, signed by an officer of the authority, and sworn to before a justice of the peace, who issues a summons to the offender to attend before the court at a specified date and time.

The proceedings of the court, which may consist of not less than two justices of the peace or a stipendiary magistrate, are regulated by the various Summary Jurisdiction Acts. It is not desirable that a member of a local authority which is a party to the proceedings should adjudicate, but certain permissions to do so are given in various Acts,[4] and it is not necessary that a justice of the peace who has condemned food under Section 116 of the Public Health Act, 1875, should adjudicate in any subsequent proceedings.

Upon the particular officer concerned in the case falls the duty of obtaining and preparing the necessary evidence for the prosecution, which may involve the calling of witnesses by "witness summons" if otherwise unwilling, and the calling for any necessary documents by subpœna obtained from the Crown Office. The evidence, of course, varies with the case, but it must include proof of the

[1] Public Health Act, 1875, s. 108. [2] *Ibid.*, s. 115.
[3] Food and Drugs (Adulteration) Act, 1928, s. 27.
[4] Public Health Act, 1875, s. 258; compare Municipal Corporations Act, 1882, s. 158, and Justice of the Peace Act, 1867, s. 2.

existence of any local Act, bye-law or regulation, or of the adoption of an adoptive Act relevant to the case, and evidence that all the necessary procedure has been carried out, including in some cases a diligent search for the owner of the property involved, notices served, and observations or inspections made. As regards the appearance of the authority at the court the practice varies: in many cases the sanitary inspector appears, in others the medical officer of health, in a few the clerk, and in some of the large county boroughs a special prosecuting solicitor is on the town clerk's staff and takes charge of all cases.

The defendant or defendants, where a nuisance is wholly or partly caused by their joint acts or defaults,[1] may appear either personally or by solicitor or counsel, the court being enabled in default to either issue a warrant, adjudicate the case in his absence, or adjourn it to a future date. It is, however, essential, if the penalty may be imprisonment without the option of a fine, that the defendant be warned before the case that he may elect to be tried by a jury, since he may not exercise the option after the case is opened, and neglect to warn him of it invalidates the proceedings.

The penalties are prescribed in the various sections of the different Acts creating the offences, the court having power to order the costs to be paid. Failure to pay the penalties inflicted may be met by imprisonment in default of distress, but a defendant cannot be committed to prison for failure to obey an order to pay the expenses incurred by an authority, except by an order made on a judgment summons on proof that he has or has had means of paying.

Any decision of a court of summary jurisdiction may be the subject of an appeal to the Court of the King's Bench on either a point of law or excess of jurisdiction.[2] For this purpose application for a "special case" must be made to the justices within seven days of the decision contested, accompanied by a guarantee to prosecute the

[1] Public Health Act, 1875, s. 255.
[2] Summary Jurisdiction Act, 1879.

appeal and for costs. If the "case" is refused the King's Bench may order the court to state the case as required; if granted, the appeal must be lodged within three days, notice to all parties being given, the decision of the King's Bench, which may make any order or remit the case back for decision, being final.

Where the penalty may not be enforced by imprisonment in default of distress, appeal may be made within twenty-one days to the next court of quarter sessions, notice being given to the other parties and to the court of summary jurisdiction within fourteen days of the decision of the court, together with the ground of appeal and security of costs. The decision of the court is final unless it thinks fit to state the facts specially for the determination of a superior court.[1]

In the case where local authorities are entitled to recover expenses in a summary manner or to declare them to be private improvement expenses, any person aggrieved may object to the apportionment of the surveyor within three months of the service of the demand;[2] and may appeal to the Ministry of Health within twenty-one days of the final decision of the authority, stating the ground of complaint and delivering a copy to the local authority. The Ministry may make such order as seems equitable, and the order made is binding and conclusive on all parties.[3]

Considering the immense amount of work that sanitary authorities get through, the extent to which they resort to the courts is remarkably small. This, in the main, reflects great credit upon the officials, who perform difficult and oft-times delicate duties without friction or unpleasantness. But when such action is compelled by the stubbornness or wantonness of various persons, the penalties inflicted should be adequate and deterrent. In this respect, especially in the smaller districts, it is often a source of considerable dissatisfaction to officials that after exhausting all their powers of persuasion and patience, and being compelled at last to come to the court to secure the enforcement of the law, the court treats the matter lightly and either makes a simple order or imposes such an insignificant penalty as to encourage rather than deter opposition to administrative action and requirements.

[1] Public Health Act, 1875, s. 269.
[2] *Ibid.*, s. 257.
[3] *Ibid.*, s. 268.