

**ADMINISTRATIVE POWERS OVER  
PERSONS AND PROPERTY**

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# ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY

A COMPARATIVE SURVEY

*By*

ERNST FREUND



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## INTRODUCTORY NOTE

The Commonwealth Fund in 1920 set aside certain funds for the encouragement of legal research and appointed a committee to recommend projects and to have executive responsibility for the carrying on of such research as might be approved. That Legal Research Committee was constituted as follows:

†JAMES PARKER HALL, Dean, the University of Chicago Law School, *Chairman*,

MAX FARRAND, late Adviser in Educational Research, the Commonwealth Fund, *Secretary*,

CHARLES C. BURLINGHAM, of Burlingham, Veeder, Masten and Fearey, New York,

BENJAMIN N. CARDOZO, Chief Judge of the Court of Appeals in the State of New York,

JOHN G. MILBURN, of Carter, Ledyard and Milburn, New York,

ROSCOE POUND, Dean, Law School of Harvard University,

BARRY C. SMITH, General Director, the Commonwealth Fund,

HARLAN F. STONE, Associate Justice, United States Supreme Court, resigned and succeeded by

CHARLES E. HUGHES, of New York.

The Committee decided to devote a portion of the funds to studies in administrative law—a branch of the law which, by reason of the striking growth of regulative and fiscal legislation since the beginning of the century, has been rapidly gaining in importance, and the problems of which command the attention of the legal profession and of students of government alike. It therefore appointed a special Committee on Administrative Law and Practice consisting of:

ERNST FREUND, Professor, the University of Chicago Law School, *Chairman*,

WALTER L. FISHER, of Fisher, Boyden, Kales and Bell, Chicago,

FELIX FRANKFURTER, Professor, Law School of Harvard University,

FRANK J. GOODNOW, President, Johns Hopkins University.

The Committee was of the opinion that administrative practice could best be studied by the investigation of some of the new govern-

† Died March 13, 1928, while this note was in press.

mental activities in special fields, and these investigations have been carried on in the main under the direction of Professor Frankfurter. A study of the Federal Trade Commission by the late Gerard C. Henderson, published in 1924, was the first fruit of this part of the program. There has also been published a brief study on administrative procedure in connection with statutory rules and orders in Great Britain by Professor J. A. Fairlie of the University of Illinois (1927), and there are now in progress investigations of the Interstate Commerce Commission and of certain phases of administrative rule-making powers.

For the purpose of gaining a comprehensive view of the major problems of administrative law it was also decided to make a comparative survey of administrative powers in regulative legislation, which would reveal the extent to which statutes operate through powers, and the relative use of licenses and orders, and of discretionary and non-discretionary action. This part of the work was undertaken by the Chairman of the Administrative Law Committee, and the result is submitted in the present publication.

It is hoped that the book will stimulate further research in administrative law.

## PREFACE

The following Survey presents somewhat the appearance of a systematic treatise on administrative law, and it should therefore be pointed out that it covers only one section of the subject, namely, powers determinative in their nature and exercised with regard to private rights which are in a sense of a normal character. The limitation can perhaps be more clearly expressed by specifying aspects of administrative law not covered. These are:

1. Powers exercised over dependents, defectives, and delinquents, or what is now generally designated as public or social welfare administration. Since in this field large discretion is conceded to be legitimate, legal problems are of relatively minor importance as compared with problems of social service technique.

2. Powers exercised within the governmental organization or by virtue of governmental right of property or under contract, and the corresponding liabilities. There are comprehensive treatises on the law of municipal corporations and of public officers with which the legal profession is familiar and which fall mainly within this division, but there has been no systematic treatment of "service" powers so far as they relate to state or national government.

3. Powers exercised by way of preparing for judicial action or by way of carrying out judicial mandates, or what may be called "enforcing powers." A legal study of law enforcement, whether designated as a branch of administrative law or not, pursued in a comprehensive and systematic way, would be of great interest and importance, but would present very different problems from those discussed in the present study.

4. Powers of an administrative character similar to those discussed in the present publication, but vested in courts of justice. These, like enforcing powers, are so closely tied up with judicial constitution and procedure that they would require a separate study.

5. On the Continent of Europe, administrative supervision is co-extensive with legislative control, and university courses in administrative law therefore cover the entire field of regulative legislation. We define administrative law more narrowly; and yet it is true that the economy of administrative powers cannot be fully understood without realizing to what extent it is possible, and is the legislative practice,

to dispense with them. A comprehensive study of the ways and means of regulative legislation is therefore a logical complement to the present study. It is needless to say that this likewise lies beyond the scope of this volume.

A study of law based on the text of statutes presents the inevitable drawback that the data set forth are apt to be superseded by the progress of legislation. The present volume endeavors to summarize, from the point of view of administrative powers, an era of regulation which combined respect for private right with a growing sense of the social obligations of property and business, and which fully recognized the paramount claims of public interest. That seemed to be the dominating note of the legislation of the end of the nineteenth and the beginning of the twentieth century. The plan was at first to carry the survey down to the beginning of the World War; but eventually this plan was adhered to only for Germany, while the statutes of the other jurisdictions were examined to the end of 1925. But not even this limitation has been strictly observed. Where later developments were significant, they have been noted, if it could be done without undue labor. Thus the changes of the revenue law by the act of 1926 have been taken into account, but not the changes of the state administrative organization in New York by the act of the same year; a study of that act left the impression that alterations, so far as they affected problems discussed in this book, were in many respects nominal rather than substantial, and did not warrant the labor of purely formal corrections extending through the entire book. It would have been impossible to deal adequately with German post-war legislation, which is still largely in a state of transition; and in Germany more than in the other jurisdictions there is a new order of things. German pre-war legislation presented in many respects a model of the traditional type of administrative powers, and it was for that reason that Germany was selected as one of the four jurisdictions surveyed. The new German law can no longer be described as conservative. It is, of course, possible that this new law foreshadows developments to come also in England and America; in that event administrative law will assume a new aspect, and the picture presented in this book will be of the past; but the change will not come in a day, and it will not come until our constitutions are altered or receive a new interpretation.

Readers of the legal profession should be warned that they must not expect to find in the book a repertory of case law such as is appropriate to a treatise intended for the use of the practitioner. While

it is hoped that principles are adequately supported or illustrated by judicial decisions, an exhaustive citation of cases would, in view of the scope and the nature of the study, have served no valuable purpose and would have swelled the book far beyond its present size.

Where so many statutes are cited, errors are inevitable, and indulgence is asked for such as may be discovered.

Since some features of the present volume may appear to reflect Continental methods of legal writing, the meagerness of reference to treatises and articles will perhaps be noted. Systematic discussion is, however, so much more represented by German and French than by English and American writers that an adequate notice of theories and controversies would have given the book an even more unfamiliar and foreign aspect. It seemed, therefore, wiser not to enter at all into the views of other writers. Great benefit has naturally been derived from the abundant French and German literature on administrative law.

I desire to express my great obligation to the Commonwealth Fund for making the publication of this study possible.

E. F.

UNIVERSITY OF CHICAGO

February, 1928

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## GENERAL PLAN

§1. *Systematic and descriptive parts.*—The following study is divided into two parts: the one, analytical or systematic (the system of administrative powers); the other, descriptive (statutory provisions operating with the aid of administrative powers).

The systematic part states principles upon the basis of the material compiled in the descriptive part, and logically perhaps should follow it in order of arrangement. The practical use of the entire study will however be facilitated by the less logical arrangement, giving the more prominent place to a comprehensive view of the law, which may be checked by those who desire, by reference to the substantiating digest of statutes. With regard to the statutes likewise the attempt has been made to summarize the policies underlying the administrative phases of the several branches of legislation; but the presentation of a good deal of rather dry detail has been inevitable.

An estimate of the place of administrative powers in regulative legislation is attempted in a concluding section.

§2. *The statutory basis of the survey.*—Practically all administrative powers over persons or property appear upon the face of some text of written law and, barring cases of local ordinances (e.g., in the matter of building regulations) or special or local laws (e.g., the charter of Greater New York), upon the face of the general statutes.

By way of exception, however, it should be noted that in the European systems a few powers are exercised on the basis of inherent executive authority; but the province of this is constantly being reduced. Very similar in operation is an executive power, not inherent, but resting on some very general text such as the provision of the Prussian Code, that it is the function of the police to make the necessary arrangements for the preservation of public peace, safety, and order and for warding off dangers from the public or individuals (Title 17, §10)—a provision which is the foundation of a general order-issuing authority unknown to English or American law. It is as though a similar authority were read into the usual clause of American constitutions, making it the duty of the chief executive to see that the laws are executed—a construction repudiated by American courts.

In America equally general texts support the exercise of judicial power, which for practical purposes may be said to operate in many instances by virtue of unwritten common law. The common law also affects many or most statutory administrative powers by determining their subjection to judicial control. This injection of common law into statute law rests upon a widely prevailing legislative practice. English and American statutes are explicit as to the methods of enforcing the powers which they grant, but often silent as to the methods of affording relief against their abuse. This, the remedial side of the law, legislatures are content to leave to the operation of general principles, or, as in New York, to general provisions of codes of procedure. It follows that while a study of the statutes may give a full view of administrative powers in one sense of the word, it does not give a full view of administrative law; for the effect of powers cannot be understood unless it is known how far they can be judicially controlled. It must also be a matter of conjecture whether and to what extent the possibility of that control entered into legislative policy; in a few cases, as in the Rate Act of 1906, history shows that the legislature preferred to leave the matter in as ambiguous a form as possible.<sup>1</sup> It will be understood that in the descriptive account of legislative practice the control over powers will appear only when expressed in statutory provisions, a fuller view of judicial control being given in the systematic analysis of administrative powers.

Where the legislature relies upon the aid of administrative powers only as a means of checking compliance with its requirements, so that the power operates as a ministerial function, the provisions of the statute give a complete view of the regulations to which private interests are subjected. It is otherwise where the administrative power is discretionary. A discretionary power either means the "province of the arbitrary" in public control or it means a deferred standard in the sense that the legislature expects that administrative discretion will eventually evolve some rule, which it is for some reason deemed inexpedient or impracticable to give, at least for the present, statutory formulation. If that is the case, the statute fails to disclose completely how private interests are regulated. This complete view will be obtainable only by a study of administrative practice; and that study may be expected to produce what might likewise be legitimately designated as "administrative law"—law, that is to say, that is produced

<sup>1</sup> See §147, *infra*.

by the administration, instead of, as the term is generally used, law controlling the administration. We should, of course, realize that law produced by the administration has a more precarious status than law produced by the courts. Judicial decisions may throw light on this phase of administrative law exactly as constitutional decisions throw light on legislation, enforcing a *minimum* instead of an *optimum* in the way of standards, since they may declare to be lawful what administrative practice may in the long run repudiate and discard. Administrative law as law controlling the administration is a form of general legal technique, capable of comprehensive and systematic treatment; while administrative law as law produced by the administration must for the present at least be treated as falling into as many branches as there are subjects of administrative discretion, and, with our limited information, as incapable of unified treatment.

No attempt has been made to cover the entire case law relating to administrative powers. It has been assumed that while there is no case that may not be of value from a professional point of view, minutiae of interpretation are frequently without general interest. It has also been assumed that an extended course of legislation may be as legitimately treated as a source of legal principle as a body of judicial decisions, and that it is entirely proper to base a legal treatise in the main upon the former, using the latter only by way of supplementation.

§3. *Jurisdictions selected.*—The survey covers the legislation of the Congress of the United States, of New York, and of Great Britain or England,<sup>2</sup> and pre-war German or Prussian laws. This range of the survey will permit comparisons more fruitful than would be possible upon the basis of exclusively American jurisdictions. While there are interesting differences between such states as New York, Massachusetts, Illinois, and Wisconsin, in most cases the practical impossibility of tracing their origins makes them appear as accidental; and in broad outlines of policy and methods of control, these and other states are substantially alike. Great Britain and Germany present in part vital differences from American legislation and in part striking resemblances to it; and differences and resemblances are equally instructive.

Of Continental systems, the choice lay between France and Germany; and the selection of Germany may be justified partly by the

<sup>2</sup> No attempt is made to distinguish between laws applying to Great Britain as a whole and those applying to England only.

fact that in the latter part of the nineteenth century German legislation has been more systematic and comprehensive than that of France and partly by the fact that more of French administrative law has been absorbed by the German system than vice versa.<sup>9</sup>

<sup>9</sup> German writers regularly discuss the French law, while the contrary is not true. Otto Mayer, the author of one of the leading German treatises on administrative law, was at one time professor at the University of Strassburg, where he taught French administrative law which continued operative in Alsace-Lorraine during the entire period of the German régime; the result of this teaching was an excellent treatise on the theory of French administrative law. As an inheritance of the Napoleonic era, French public law also prevailed in some respects in the Prussian Rhine province, until gradually superseded by Prussian or German federal legislation.

**PART I**  
**(ANALYTICAL PART)**  
**THE SYSTEM OF ADMINISTRATIVE POWERS**  
**FIRST: PRELIMINARY**

## CHAPTER I

### SCOPE, CLASSIFICATION, AND TERMINOLOGY

§4. *Service and control.*—It is proposed in the following analysis of powers to consider only administrative control and to exclude administrative service. This limitation imposes itself as a consequence of the general plan of making the analysis subsidiary to a statutory survey of administrative powers. The functioning of government by way of service cannot be conceived of without the aid of administrative agencies, and a catalogue of powers would resolve itself into an unilluminating catalogue of laws. On the other hand, government by way of control may function without administrative agencies; and the calling into aid of these involves, therefore, special conditions or policies that require consideration. Administrative control, in other words, is a special phase of control by government and law; while administrative service and governmental service are identical.

The exclusion of service powers may also be justified by their relatively minor legal interest. From the practical point of view, functions of service, whether measured by the proportion of place they hold in the organization of the state or by the proportion of public funds spent, and disregarding the more difficult criterion of value or benefit, are more important than functions of control. When the federal government was established, of the administrative departments, only the Treasury, in so far as it collected federal revenues, exercised powers over individuals; and even today, when federal control functions have greatly expanded, they consume only a small fraction of the annual appropriations.

But the legal questions in connection with service powers are preponderatingly questions of statutory interpretation, raised by inevitable ambiguity of language in the laws creating and governing the various services; aside from this, the functions of service operate either through extra-legal forms such as the gathering or dissemination of information or the giving of advice or moral support, or through the legal forms of payment of money, disposition of property, contract of employment, and so forth; and the legal problems to which they give rise are analogous to those of the private law, modified by governmen-

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tal immunity or privilege.<sup>1</sup> In the main, however, the study of public administration on the side of service is a study of problems of organization, or, to use the current phrase, of economy and efficiency.

Functions and powers of control, on the other hand, have no precise parallel in private law. Subordinating, as they do, rights of person and property to a paramount public authority, they involve concepts in the application of which considerations of efficiency encounter the ideal interest of individual right and liberty.

The difference is frequently decisive as a matter of constitutional law. The fundamental limitations upon the government operate much more weakly, if at all, in service than they do in control. It is one question how far the state may control education in public institutions; quite another question how far it may control private schools. There is some check upon the expenditure of public funds (disregarding the checks imposed by specific provisions) owing to the fact that they are derived from taxation; but that check does not operate where resources (such as public lands and their proceeds) do not involve the taxing power. It is of doubtful value to discuss the delegability of legislative power upon the basis of a case concerning public lands without stressing that factor, or, in determining the legitimacy of administrative finality, to place undue reliance upon cases arising under the laws regulating pensions or even the postal service.

The distinction is particularly striking where service is made the vehicle of control. English control over local government operates largely through "grants in aid." Through this device it is open to the federal government to expand its power; and while occasionally there is some resistance (e.g., in the matter of maternity aid under the Sheppard-Towner Law), generally that aid is welcomed. The position of the Federal Reserve Board in the field of money and credit cannot

<sup>1</sup> There is some controversy among German jurists to what extent private-law doctrines are applicable to public-law relations. For a summary see 11 *Archiv des Oeffentl. Rechts* (1926), 230-86. Generalizations on this subject seem to me to serve little purpose. In America, where we have no distinctive system of administrative courts with jurisdiction confined to public law, we are even relieved from the necessity of drawing a theoretical line of demarcation between private and public law. Where the courts have attempted such a distinction, as notably in the law of municipal liability, they have been conspicuously unsuccessful. *Vestigia terrent*. There are, of course, many relations in which the public character of parties or of subject matter qualifies the normal principles of the law of property, agency, contract, etc. The law of municipal corporations is the most important repository of these special doctrines.



be measured by its legal powers over private individuals or even over banks. If there are difficulties in connection with foreign investments, the good offices of the home government, rendered through diplomatic channels, may be of great value; and the possible need of aid renders bankers amenable to the wishes of the government. In 1922 it was announced that American concerns that wished to ascertain the attitude of the Department of State regarding any projected foreign loan should request the Secretary of State, in writing, for an expression of the Department's views. It was added that "the Department of State cannot, of course, require American bankers to consult it." Practically, an intimation is almost as effective as an order; legally, it is influence and not control, and falls outside of the province of administrative powers over persons and property.

§5. *Powers over functional and subordinate status.*—The elimination of service powers covers powers exercised within the official organization of the state and in connection with public elections, since government here controls public functions and not private rights, and is by reason thereof conceded correspondingly greater powers. As regards elections, the process of voting may be subjected to searching checks in order to insure the integrity of the ballot, saving only the constitutional right of equality and secrecy. As regards official status, the individual who enters the public service surrenders some of his civil rights. The difference in administrative-law principles appears when we compare removal from office with the revocation of a license: if occasionally the law gives a power to revoke a license at pleasure, this is, to say the least, a constitutional anomaly; but the power to remove an official at pleasure presents no general constitutional difficulty and may under circumstances be perfectly legitimate.

Closely related to functional status is that of special privilege. If the issue of notes intended to circulate as money is the monopoly of one bank or of a few designated banks, there may be a correspondingly greater control over such banks than is exercised over banks in general irrespective of any note-issuing privilege. Such greater control stands outside of general principles applicable to administrative powers. In reason, however, this status cannot be conceded to exist in every case in which the state, having power to prohibit or withhold, grants a right subject to conditions, as it does in incorporation or license laws. In so far as these laws involve administrative powers, they will require consideration.

The survey also excludes powers over dependents, defectives, and

delinquents. So far as the two former classes are concerned, control and service are closely combined, whether the care is institutional or extra-institutional. The institutional care of delinquents is *sui generis*; the extra-institutional (probationary) care of delinquents, exceptional and novel; both always rest upon a prior conviction; and the execution of the judgment of a court is administration of a special type.

§6. *Non-determinative powers.*—A further limitation of the present survey and analysis can be most readily explained by observing the field occupied by administrative control in the scheme of legislative ways and means. Laws governing personal and property rights are normally self-executing, that is to say, those subject to them are expected to, and in the majority of cases do, voluntarily conform to their provisions. In cases of resistance or controversy the governmental machinery called into play is that of the courts. Administrative machinery is required to make the judicial process effective, arrest and execution being thus essential functions in the background of government; and the sheriff and the constable, who attend to these functions, are ancient officers of the common law. From the beginning of American government there has been organized as an adjunct to criminal justice the office of the prosecuting attorney. Out of the office of the constable has grown the modern police. When in the course of the nineteenth century administrative functions were taken over by central governments, a new form of police supervision was organized in inspecting and examining officers. In the English and American system, which on the administrative side operated largely through local self-government, there must be added the administrative functions of the governing authorities of counties, boroughs, cities, and towns. In England some of the most important of these tended to be vested in the justices of the peace, bearing both an administrative and a judicial character; they acted as licensing authorities and issued administrative orders in the form of judicial decisions.<sup>2</sup> In most of the American states justices of the peace came to be confined to judicial business, and their administrative functions were conferred on local governing bodies or executives, who became the chief depositaries of local licensing powers. The practice of having recourse to administrative orders became of general importance with the organization of boards of health, but was fully developed only in connection with railroad and similar commissions, with which we chiefly associate the modern concept of administrative law. The barest outline of the history of organ-

<sup>2</sup> Sidney and Beatrice Webb, *The Parish and the County*, p. 309.

ization thus also furnishes the skeleton of a classification of administrative control powers, based upon the difference between action possessing, and action lacking, determinative quality.

Sheriff and constable, police and inspection officers, and prosecuting attorneys do not pass upon rights except in a purely provisional manner. Sheriffs and constables have always been described as ministerial officers, i.e., ministerial to the courts whose determinations they carry out. The police is to most persons the most familiar embodiment of governmental authority, but the policeman acts merely by way of prevention or by way of preparation for judicial action. Inspection is, from a legal point of view, merely a license to have access to property. The last step in inspection may be a formal charge which is the first step in prosecution. Prosecution proceeds in close affiliation with the courts, and the prosecuting attorney is an officer of the court. His office serves alike all branches of public administration and is distinct from all of them. He prepares and conducts cases for determination by another authority; he himself is not vested with determinative power, and in the few cases where an express discretion is given whether to prosecute or not, it is likely to be vested in executive officers rather than in the prosecuting attorney.

If all these officers are often spoken of as "enforcing" authorities, the term "enforcement" indicates ancillary or dependent action as distinguished from the function of determination.

In any system of public administration, enforcing powers are of the utmost importance. Inspection may be more vexatious than determinative control; the Federal Trade Commission exercises the latter, but powers of inspection (as the term is understood in connection with banks) have been withheld from it, because public opinion would not have tolerated the grant of such power coextensive with the order-issuing power of the Commission. In the form of search, the power is restrained by constitutional limitation. If in the protection of health and safety, inspection has been one of the most powerful and beneficent of administrative agencies, it has been so because in practice it has not unduly put forward the control side but has endeavored to function as far as possible as service; its main problem is therefore one of organization: how to place it on a high professional plane and make it an agency for advancing standards, checking the inevitable dangers of abuse of the power in various directions. Similar considerations apply to the police. The functioning of prosecution is closely allied to the functioning of the judicial machinery of criminal justice.

The organization and operation of enforcing powers of the non-determinative type requires a separate study; the foregoing observations account for their not being included in the present survey.

§7. *Determinative powers.*—The administrative powers to which this survey is confined are thus those of a determinative character, and in the main they naturally fall into two classes which may be designated as “enabling” and “directing” powers, respectively. The former are illustrated by the license requirements which have been a familiar feature of English legislation at least since the sixteenth century; the latter by the powers of corrective intervention vested in public utility commissions, by various powers under the poor laws which are exercised over dependents, and by assessing powers under revenue laws. The assessing power has likewise been long established, but otherwise directing powers are of recent development in Anglo-American jurisprudence. Notwithstanding their later origin, or perhaps because of it, the latter class of determinative powers has received in its legal aspects more consideration than the former. The enabling power, if favorably exercised, is not felt as a serious invasion of private right, nor even if adversely exercised, as an invasion comparable to the issue of an administrative command or prohibition; the latter appears as an innovation because traditionally the power to coerce private action has been a judicial prerogative. It is therefore in the field of directing powers that the demarcation of the province of administration from that of the courts has encountered particular difficulty.

§8. *Directing powers of a purely judicial type.*—The type of directing power with which Anglo-American jurisprudence is most familiar is the injunction issued by a court of equity. From this the administrative directing power differs in substance (apart from questions of enforcement and conclusiveness) mainly by having for its object the furtherance of public rather than of private interest. If orders reducing railroad rates were matter of purely private concern, we should not have such orders issued by public utility commissions; the public interest appears in the fact that the administrative commission is given primary jurisdiction on the exclusion of the courts (*Texas & P. R. Co. v. Abilene etc. Co.*, 204 U.S. 426). Such an order may enure in the first instance to the benefit of some particular shipper, but it is intended to operate also on behalf of all others similarly situated. In any event such an order operates prospectively.

Such public benefit attaches, however, only in the remotest sense (in the same sense in which all administration of civil justice is for the

public benefit) to an order which attempts to deal with controversies as to amounts due or losses suffered by reason of past transactions, and which gives pecuniary redress to one of the parties to the controversy. This is no longer public administration, but remedial justice. In the past, administrative authorities have been vested with functions of this type, in European jurisdictions only very exceptionally, in America not at all. This may be illustrated by reference to petty disputes between shipmaster and seamen. In Germany specified controversies may be provisionally adjudicated by the marine office which is not a regular court (Act, 1902, §§69, 71, 74, 79); in England, without consent of both parties, only in connection with fishing boats, or, generally, only up to an amount of £5 (Merchant Shipping Act, 1894, §§ 137, 387); while in America the jurisdiction is founded exclusively on the consent of both parties (U.S. R. S., §§4554, 4555).

More recent American legislation has, however, introduced two new types of compensatory relief by administrative action: reparations by public utilities to shippers and other customers, and awards under workmen's compensation laws.

The reparation provision of the Interstate Commerce Act (§ 16) which is discussed elsewhere,<sup>1</sup> was apparently inspired by a provision of the English Railways Act of 1873, which was of a much more conservative and non-judicial character; even the subsequent enlargement by the English act of 1888 did not go as far as the American law, and in any event the power was in England vested in a body constituted as a court. Since the grant of administrative power encounters the difficulty that it may violate the constitutional guaranty of trial by jury, the phrasing of the law is hesitating and obscure: the award of reparation by the Interstate Commerce Commission is enforceable only by an action brought in court, and in that action the award is only *prima facie* evidence (Interstate Commerce Act, §§9, 13, 16). The reparation power of the Interstate Commerce Commission has been taken over by state public utility statutes, including the Public Service Commission Law of New York (§§48, 96); it has been withheld from the Federal Trade Commission but granted to the Shipping Board and to the Secretary of Agriculture under the Packers' Act of 1921. The origin of the reparation power stamps it as somewhat of an anomaly, and it is significant that its wisdom is doubted by the Interstate Commerce Commission itself (Reports, 1916, pp. 75-78; 1919, p. 18;

<sup>1</sup> See §178, *infra*.

1921, p. 58; also 21 New York Senate Documents, No. 47 [1917], 187-88).

The administrative instead of judicial determination of workmen's compensation awards is likewise an anomaly. In England the determination is placed under judicial control; in Germany, while it is administrative, the entire system is in part assessment for the purpose of creating or maintaining a public fund and in part administration of that fund, just as it is in Washington and some other American states. This latter theory of relief appears to have been influential in those jurisdictions which have substituted commissions for courts in the enforcement of an individual liability of the employer, upon the assumption that in fact payment will likewise be made out of insurance funds created for that purpose. Constitutional doubt has always been felt with regard to this method; in some states they have been disposed of in a somewhat perfunctory fashion (*Grand Trunk R. C. v. Industrial Commission*, 291 Ill. 167) or by the device of somewhat illusory "election" (*Hawkins v. Healy*, 243 U.S. 210; *Booth Fisheries Company v. Industrial Commission*, 271 U.S. 208); in New York they are supposed to have been removed by express constitutional provision.

Both reparations and compensation awards under the New York type of law belong to the system of remedial justice and will not be included in the following analysis of administrative powers.\*

§9. *Regulative or rule-making powers.*—The statement that directing powers have been introduced into Anglo-American legislation at a relatively recent period has reference to powers exercised from case to case and not by way of general regulation; regulations are much more frequently of a mandatory than of a permissive character and have for a long time been familiar as a form of legislative delegation. In practical importance administrative regulations rival permits and orders; but they raise problems of a different character. If an individually operative power is resorted to by legislation, it is because it is believed that the same effect cannot be obtained by general rule; but since a regulation does operate by way of general rule, it is obvious that there must be some other reason why the legislature has recourse to delegated regulative power instead of incorporating the rule directly into the statute.

The reason is one of convenience, primarily to relieve the legislature from a mass of detail, secondarily perhaps to gain greater flexi-

\* See Reginald Heber Smith, "Administrative Justice," 18 *Illinois Law Review* 211.

bility. In our constitutional system regulative powers present a problem of the validity of the delegation of legislative powers; under any legal system they must raise more important problems as to the propriety or desirability of such delegation. Apart from this, both method and form of enactment, and the operation of administrative regulations as compared with statutes, are of considerable legal interest. However, the regulative power is legislative in substance and is not necessarily part of a study of administrative powers. In any event it is inexpedient to include them in the present statutory survey: an exhaustive collation of these powers would not have a value commensurate with the magnitude of the task; and a study of all the powers, if it were possible, would be incomplete without a supplementary study of rules made under the powers, which alone can give an indication of the extent of delegation in actual practice. It may be possible to indicate, on the basis of the legislation examined, the probable scope of regulative powers; but an authoritative scientific study would have to pursue the method of a series of more special investigations. In many cases regulative powers are subsidiary to powers operative from case to case; if so, they should of course be considered as part of the latter.

The line between powers operative from case to case and powers operative by way of general rule is of course a fluid one, since "general" and "particular" are relative terms. Rate-making illustrates the gradations: (1) a rate for a particular person for a particular shipment; (2) a rate for a particular person for many shipments, or for a particular shipment for many persons; (3) a rate for a particular class of merchandise between two specified places; (4) a mileage rate for a particular class of merchandise; (5) a tariff of charges for a particular road; (6) a tariff of charges for many roads. There are other intermediate categories. The U.S. Supreme Court has said that rate-making is a legislative function (211 U.S. 227), having probably in mind the rates from No. 3 on. But for practical purposes, i.e., legislative treatment and administrative procedure, probably only No. 6 is truly legislative. Even the Transportation Act of 1920 did not abandon the treatment of rate-making on quasi-judicial principles; in the English Railways Act of 1921 the transition from quasi-judicial to quasi-legislative treatment is much more marked.

§10. *Powers of abstract determination (defining or finding powers).*—These powers contemplate in themselves neither permission nor requirement, but their exercise may serve as a basis for either or both. The forms of abstract determination are definition, valuation, classifi-

cation, or fact-finding. Powers to define are rarely granted in express terms, but definitions are commonly found in administrative regulations intended for the guidance of interested parties. They give notice of how the administration will exercise its function of primary interpretation; and, while this as a question of law is always subject to judicial review, the primary interpretation is in many cases practically controlling and may eventually influence the courts.

The power of the Interstate Commerce Commission to value the railroads is the most conspicuous illustration of that form of abstract determination, while in the exercise of the taxing power valuation is merely a step toward the imposition of a tax or duty (assessment). The power to value is nearly always exercised from case to case; exercised by general rule, it lays down a principle of valuation, and is merely of primary operation, being judicially reviewable.

The power to classify is illustrated by the provision of the English Coal Mines Act leaving it to the secretary of state to determine whether a person is a workman or to what class he belongs, or by the provision of the German Game Law giving power to decide whether a property or aggregate of properties satisfies the conditions required for recognition as a hunting preserve. Such provisions appear to be uncommon in American legislation. True, they may resolve doubts of law as well as of fact, and thus may be regarded as running counter to principle; but if they are confined to details of classification of no great importance, and in any event arbitrary or more or less conventional, the objection disappears and they constitute forms of power of great practical convenience.

A fact-finding power is a form of limited delegation. Instead of giving to an administrative authority the power to permit or direct on the basis of facts, the legislature itself permits or directs upon the basis of facts to be administratively established. Such is the provision of the Interstate Commerce Act forbidding a railroad company to control a competing water-carrier, the fact of competition to be conclusively established by the Commission (§5 [9]). In the dumping clauses of the Tariff Act of 1922 this form seems to be chosen to make it appear that legislative power is not unduly delegated to the President. A fact-finding declaration may also be desirable by way of notice or caution, preliminary to the exercise of powers, as in provisions for declaring areas infected. The fact-finding power does not otherwise call for special consideration.



§11. *Dispensing, examining, and summary powers.*—To complete the classification of administrative determinative powers, three other categories should be mentioned which will be respectively designated as “dispensing powers,” “examining powers,” and “summary powers.”

(1) Where the law contemplates that a general policy of prohibition may have to be relaxed under exceptional circumstances, it may vest an appropriate dispensing power in administrative authorities to be exercised either from case to case or by general rule; in the latter case, the power is legislative in character; in the former case, it is in its outward form quite similar to an enabling power (the term “license,” or “permit,” may be indiscriminately used for either), but it differs in function or purpose and therefore presents practically a distinct problem.

(2) An examining power becomes determinative in character where it demands more than passive toleration of its exercise, i.e., steps from mere inspection to requisition of active information. It may be either in aid of statutory publicity requirements or in aid of other administrative powers. Where it is in aid of an enabling power, it takes the form of a power to demand proof, and failure to furnish such proof carries its penalty automatically; where it is in aid of a directing power, it takes the form of a power to demand reports or the production of documents or a power of examination by questioning; and in either case the power in order to be effective must be accompanied by some penal sanction. The questioning power must be exercised from case to case; other examining powers, either individually or by general rule. Examining powers show a tendency toward expansion, and considerable legal interest attaches to them by reason of the possibility of their vexatious exercise.

(3) The summary power constitutes an exception to the general rule that final compulsion cannot be exercised except upon the mandate of a court of justice. The legislature is therefore not free to create at pleasure powers of administrative execution. The permissible cases belong to tolerably well-defined categories. Those which belong to the military power (martial law) will be ignored in this survey.

§12. *Resulting limitation.*—The following analysis will thus cover enabling and directing powers, dispensing powers, examining powers, and summary powers; it will exclude inspection, prosecution, and administrative regulation. It will also exclude strictly judicial powers

and powers vested in courts of justice. It will treat of administrative powers, determinative in their operation, in so far as they are exercised over rights of persons and property other than those of a functional or subordinate or subnormal character, but not in so far as they are exercised in connection with public services.

The various eliminations that have been indicated will permit a more adequate survey of the restricted field and more reliable conclusions. Even thus reduced, the survey will cover the legally most significant powers exercised in connection with police and revenue legislation.

## CHAPTER II

### LEGISLATION OPERATING WITH OR WITHOUT THE USE OF ADMINISTRATIVE POWERS

§13. *Civil and criminal law.*—Without much information concerning the history of statutes, which is not available, generalizations regarding the factors which determine the use of administrative powers in legislation must be hazardous, and the following statements cannot claim to be more than tentative in character.

In French and German terminology, administrative law, both in the teaching of law and in legal literature, covers all branches of legislation, whether in the nature of service or in the nature of control, outside of civil and criminal law and procedure. This division roughly indicates a line of cleavage, which may be expressed by saying that civil and criminal law furnish those rules which in a given state of society are deemed indispensable to human relations or to the settlement of controversies, leaving a domain of possible liberty, while regulative legislation in some form or other reduces that possible domain.

Much of civil legislation consists merely in the statement of principles which are normally effective without official intervention and, in case of controversy or non-compliance, call only for the machinery of the courts of justice. Of this nature are the branches of commercial law recently codified in the American states by uniform legislation (negotiable instruments, sales, partnership, etc.). Some of the great changes which the common law has undergone in America—abolition of primogeniture, emancipation of married women, tort liability for death, abolition of fellow-servant doctrine—have likewise been carried through by the direct and unaided operation of statutes.

On the other hand, the reforms in the transfer of real property and in the administration of decedents' estates have called for administrative arrangements: the function of the recording officer is however service and not control, and decedents' estates are committed to courts and not to administrative officers. And this indicates generally the relation of official action (aside from litigation) to the civil law: either it is dispensed with entirely, or it is in the nature of service, or it is committed to the courts. The tendency of administrative intervention to assume a service character is illustrated by the course of

incorporation legislation in New York, England, and Germany; the issue of a marriage license, while it must be classified as a power, is of a ministerial type; the most conspicuous American administrative power in the domain of private law, the issue of a patent, is inconclusive and subject to judicial control. The liquidation or readjustment of tied interests (partition, sale of property of persons under disability, adoption, dissolution of corporations) assumes the form of special judicial proceedings. Thus, generally speaking, the place of administrative power in civil legislation is subordinate and almost negligible.

It is the distinctive feature of criminal law that proceedings to punish crimes are brought in the name of the sovereign. In England, until relatively recent times, the prosecution was conducted on private responsibility, and theoretically this system has not been entirely abandoned; but in America as well as on the Continent of Europe, there is a special administrative organ, the official prosecuting attorney, for the conduct of these proceedings. In this respect criminal legislation is inoperative without the aid of administrative agency. But this administrative agency is sharply differentiated from all others by its close affiliation with the courts; the prosecuting attorney, like other attorneys, is an officer of the court. He does not, however, exercise determinative powers; he merely sets them in motion. In any comprehensive system of classification, criminal prosecution is part of the machinery of justice, and legislatively it is treated as such. It is therefore correct to say that ordinary criminal legislation operates without the aid of administrative power of the type considered in this survey.

§14. *Regulative legislation.*—A full account of the administrative powers created in connection with the several branches of regulative legislation is given in the descriptive part of this survey, and some summarizing observations are offered under each head; but it may serve to clarify the following analysis if some of the more striking conclusions of the survey are anticipated at the outset.

(1) *Public utilities.*—In the field of public utilities, nearly all phases of operation (initiation and abandonment, consolidation and related arrangements, finance, service facilities and services, safety, charges and return) are at present publicly regulated, but the system of public control differs in the various jurisdictions. In Germany, the principal railroads are state-owned, and local utilities are either municipally owned or governed by contract relations with municipalities, so that the place of regulative legislation is relatively subordinate.

The characteristic feature of English public-utility legislation has been the system of special or private acts for each undertaking; and while the field of delegation for administrative control has been constantly expanding, the original system has not been abandoned in principle, and the more important administrative powers are frequently subject to parliamentary confirmation or veto. In New York there was a long period (from 1850 to 1880), when railroads were controlled exclusively by statutes operating directly, without the aid of administrative powers; but the statutes, being general in character, went much less into details than the English private acts, leaving correspondingly more room for any eventual supplementary administrative control. American federal legislation set in late (1887), but the Interstate Commerce Act mingled at once direct regulation with delegation for administrative control, and the latter has experienced a greater development than the former. In 1907, New York modeled its administrative powers upon those of the federal legislation. Administrative powers over public utilities are thus more important in America than they are either in England or in Germany, and in America there is no field of legislation in which administrative powers play so important a part as in the regulation of public utilities.

(2) *Navigation.*—In contrast to land transportation, sea-borne commerce has for centuries, in the United States from the beginning of government, been subject to legislation relying upon the aid of administrative agencies. This has been due to the fact that a great part of sea-borne commerce was foreign commerce, bound up with revenue and with nationalistic or monopolistic policies, and in any event with the use of ports and port dues. The objectives of legislation have been the enforcement of fiscal obligations, the conservation of privileges, and the checking of treaty rights—very different from those of railroad control. Protective policies of social or economic character (safety, emigrants, sailors) have been of more recent origin, while the effect of foreign competition has been to render rate and service control an almost negligible factor in legislation. Altogether, of all forms of private activity, navigation appears to be the one most completely subjected to administrative checks, with interesting results as to the extent of administrative power, which reduces penalties to secondary importance.

(3) *Banking and insurance.*—The subjects of banking and insurance illustrate interesting differences of legislative policy. England has been extremely conservative in imposing legislative regulation, and

the scarcity of legislation is reflected in a corresponding scarcity of administrative control; the act of 1923 relating to what we should call "fraternal insurance" marks, however, a new departure in this respect. In Germany a similar policy of abstention as to banking was abandoned in 1899 with regard to mortgage banks which were subjected to an incisive administrative control, while other branches of banking, down to 1914 at least, remained free; insurance, on the other hand, had always been subject to special charter requirements and was in 1901 by a general imperial act subjected to regulation operating through strong administrative powers. In America, the federal government has nothing to do with insurance; the national banking law uses administrative powers on the whole conservatively. In New York, separate departments of the state government exist for the supervision of banking and insurance; and, probably owing to the influence of these departments, there has been a marked tendency to enlarge discretion in administrative powers. Perhaps New York is not a typical American jurisdiction in this respect.<sup>1</sup>

There is a striking difference in the matter of stock exchanges: while in England and in New York they are entirely unregulated, they are in Germany treated as quasi-public institutions.

(4) *Trade legislation.*—In the control of ordinary gainful occupations, the nineteenth century witnessed a recession in the use of administrative powers; while more recently some movement toward the revival of such powers has been noticeable. The medieval trade policy acknowledged some collective responsibility for quality of goods and services furnished. Originally exercised by trade organizations (guilds, etc.), this responsibility was in course of time in part at least assumed by public authority, and resulted to a less extent in certification of quality, to a greater extent in official certification of qualification (licensing requirements). The former tended to assume a perfunctory character ("inspection" laws); the latter was suspected of favoring monopolistic restrictions, and with regard to ordinary trade and industry the principle of freedom from official supervision asserted itself in the course of the nineteenth century.

This movement was common to England, Germany, and America. It led in England to the repealing acts passed in the reigns of

<sup>1</sup> See Patterson, *The Insurance Commissioner in the United States* (1927), p. 60 and *passim*. This treatise permits a view of the use of administrative powers in American insurance legislation, which can be had of few, if any, other subjects of state control.

George III and of Queen Victoria; was perhaps most systematically epitomized in the German Trade Code of 1869; and in America found its most marked expression in the abrogation of the so-called "inspection laws" (in reality, certification laws) of New York by the constitution of 1846. The reversionary tendency above alluded to has been more pronounced in America than in England or in (pre-war) Germany. In New York it is represented by the revival of licensing requirements and by the administrative control over dealings in agricultural produce incorporated in the Farms and Markets Law. The strong American movement toward grading requirements for various kinds of staples is checked in New York by the constitutional prohibition of inspection laws, but manifests itself with increasing strength in Congressional legislation. Federal trade legislation restricts itself in the main to the repression of monopolistic practices, the two principal acts being the Sherman Anti-Trust Act of 1890 and the Federal Trade Commission Act of 1914. The act of 1890 is perhaps the most conspicuous illustration of the method of promoting an economic object by merely stamping reprobated practices as new criminal offenses without further measures of restraint or amelioration; the act fails to establish any conventional requirements in the way of publicity or otherwise, or to create new administrative agencies for the suppression of the penalized practices. In striking contrast to this, the act of 1914 deals with unfair competition by merely creating a new administrative power without creating a new statutory offense; unfair competition, while made unlawful, is not made a crime, and it is only the disobedience of an administrative order, confirmed by a judicial decree, that is penalized. We have thus in the same field and, as it were, in close juxtaposition, economic repression on the one hand through mere penalization, and on the other through administrative power guided only by a vaguely defined statutory concept and checked by judicial review; whereas the earlier act of 1887, dealing with the transportation side of interstate commerce, combined the two methods, declaring not merely unlawful, but also punishable, a number of reprobated practices, and at the same time for the purpose of more effectually dealing with them, creating an administrative commission vested with powers of corrective intervention.

(5) *Labor*.—Labor legislation is partly specialized sanitary and safety legislation applying to places of employment (factories, mines, stores, tenements), partly employment legislation, chiefly regarding women and children, partly accident compensation legislation; the lat-

ter, operating through administrative commissions as a novel form of remedial agencies, is ignored in this survey. Legislation concerning work-places operates to a minor extent through administrative enabling or directing powers, to a larger extent through directly operative legislation aided by powers of inspection. The latter method is also applied in labor legislation for women. The employment of labor is, generally speaking, subject to official checks only in case of children, there being a marked difference in this respect between industrial labor, both male and female, and the officially supervised employment of seamen.

(6) *Professions*.—Very much longer than ordinary trades, the two great liberal professions, law and medicine, continued to be corporately organized and governed. In England this system persists in a modified manner; but both in Germany and in most American jurisdictions, including New York, it has been superseded by administrative powers vested in purely official organs of the state. The mechanism of approbation for the practice of a profession has everywhere the same general features, involving the passing on educational and moral qualifications; but there are important differences as to whether approbation is compulsory or optional, to what extent the determination of prerequisites is delegated, and whether or not there are administrative powers of revocation. There is, in America, a tendency to extend license requirements to vocations of a less pronounced professional character and to institutions organized for the care of persons.

(7) *Safety and health*.—The great amount of legislation which the mechanical and scientific progress of the nineteenth century brought in its train for the protection of safety and health against new and old dangers also called into being new administrative agencies and authorities; but powers of inspection have on the whole been more important than ruling powers, particularly in food legislation (the American certification of meat products is due to foreign trade exigencies), and licensing requirements more important than directing powers. Oleomargarine statutes (which at first were claimed to be sanitary measures) were for a time distinguished by exacting and even odious provisions, but managed to dispense with licensing or certification requirements; in England oleomargarine factories are registered, but not licensed. Determinative powers have been rather freely bestowed in dealing with nuisances. The English Public Health Act of 1848 was in some quarters resented as an insidious supplanting



of the common law by bureaucratic government,<sup>2</sup> and the Metropolitan Board of Health Act of New York of 1866 first brought home to American lawyers the issue involved in the substitution of administrative for judicial processes. In the federal government, administrative powers (outside of revenue) were first localized in the interest of safer steam navigation. In Germany, where the protection of health and safety was part of the established executive police power, the movement was rather in the direction of checking and standardizing administrative powers, which was in part accomplished by the Trade Code of 1869, modeled upon the earlier Prussian Act of 1845.

(8) *Morals*.—Administrative powers have been conspicuous in legislation for the control of amusements and of the liquor traffic. In the latter domain particularly, licensing powers have been long established, and the technique of discretionary and restrictive licensing has received its most elaborate development in the English Licensing Act of 1910. An interesting contrast to this is furnished by the New York system of purely ministerial certification which prevailed from 1896 to the introduction of prohibition. Prohibition calls for licensing in connection with the legitimate uses of alcohol, and licensing powers are carefully regulated by the National Prohibition Act.

(9) *Status legislation*.—From the point of view of administrative powers the two branches of status legislation which are of particular interest are incorporation laws and the laws concerning aliens. In the jurisdictions under review, the mere acquisition of corporate status, whether for business or for social purposes, has ceased to be a matter of administrative discretion; in New York and in Germany the effective step is registration rather than certification; the anomalous approval requirement in the New York membership corporation law designates a judge, and not an administrative officer, for the purpose.

As regards aliens, the United States for obvious reasons occupies an altogether special position. It places naturalization in the hands of the courts, making it almost a matter of right; while in England it is matter of the most absolute administrative discretion. A systematic restriction of immigration is enforced by fully regulated administrative powers, while such regulation in England is slight and in Germany altogether absent. The expulsion of aliens is in Germany an inherent executive power, uncontrolled by law; in England the grounds of expulsion are specified by legislation, as they are in America; the

<sup>2</sup>Toulmin Smith, *Local Self-Government and Centralization* (1851).

power is in some respects more conservatively circumscribed than in America; the notable feature of the American law, perhaps not foreseen by the legislature, is the way in which the writ of habeas corpus has been developed into what is practically a writ of error to secure a fair hearing in deportation cases.

(10) *Use of Land.*—The term “conservation” is now commonly applied to legislation falling under this head. Fish and game laws, while differing in foundations and in detail, are alike in the free bestowal of administrative powers, and in America furnish one of the principal fields for summary official action. As land becomes more intensively settled, administrative powers are found necessary to control nuisances, and the law in this respect was in a manner codified both in England and in Germany about the middle of the nineteenth century; in New York regulation was local until the advent of tenement-house and zoning legislation; the latter, seeking to secure plan and method in the development of urban areas, seems to be of a bolder type in New York than in England and Germany, and as an offset has evolved the power of variation, an interesting new departure in administrative law.

Agrarian and mining legislation has in Germany for a long time operated with administrative powers of an incisive type; neither in England nor in New York has legislation in the past attempted to deal with the exploitation of mineral resources. The English legislation of the present century for the protection and encouragement of small holdings is administered through courts. Otherwise agrarian legislation both in England and in New York has dealt chiefly with the drainage of land; in America the time-honored method of effectuating such schemes has been through special judicial proceedings and self-governmental organizations; in England the requisite determinations have been vested in administrative authorities, and it is a significant development that this method has now also been adopted in New York.

(11) *Revenue.*—The main questions in the attitude of revenue legislation toward administrative powers are whether tax liability shall arise from the law itself or from an administrative act, and whether summary powers of collection are to be granted or not. The former question is controlling in the choice between ad valorem and specific duties, and makes also one of the principal differences between the general property tax and the federal income tax. The principle of a

direct statutory tax liability carries with it correspondingly definite and (under our system) judicially enforceable rights on the part of the taxpayer, but this advantage is reduced if the revenue authority has summary powers at its disposal to give at least provisional effect to its own view of the tax liability. Administrative powers over property rights are thus nearly always an important feature of revenue legislation.

A summary view of law and legislation thus indicates at least in a general way the province of administrative power.

§15. *Inappropriateness of administrative power.*—There appears to be no room for administrative power in combating plain illegality. The method of criminal enforcement here has a monopoly. This applies notably to gambling and vice. We reprobate licensed gambling houses and brothels; and the toleration of prostitution is an extra-legal matter. The status of outlawry is inconsistent with systematic inspection; instead, there are police raids which are a form of repression and a step toward prosecution. Legal toleration would mean administrative power; and vice versa, administrative power would mean legal toleration. Where, as in America, legislation with respect to moral evils is controlled by an uncompromising attitude of public condemnation, administrative power has no place.<sup>8</sup>

On the other hand, a professed régime of liberty is likewise intolerant of administrative power. The practice of religion is not exempt from criminal legislation (prohibition of polygamy, of ecclesiastical divorce, etc.), but it is in principle exempt from licensing requirements and from inspection. Certification has a place only where the church claims secular privilege (solemnization of marriage) or exemption from the law of the land (sale of liquor for sacramental purposes). Similar considerations apply to political action. The war-time espionage acts operated without recourse to administrative power; so do the recent criminal anarchy statutes. During the war the foreign-language press was subjected to filing requirements but not to censorship. There was administrative power with regard to admission to second-class mail (*Milwaukee Publishing Co. v. Burleson*, 255 U.S.

<sup>8</sup> Registration requirements, operating as they do irrespective of administrative power, are not impossible, although anomalous—so under section 6 of the White Slave Act of 1910. See also *U.S. v. Sischo*, 262 U.S. 105; *U.S. v. Katz*, 271 U.S. 354; *U.S. v. Sullivan*, 47 Supr. Ct. Rep. 607.

407), but this was treated as a matter of privilege. In Germany newspaper mail privileges are withdrawn from administrative discretion—a truer perception of the law of political liberty than was displayed by the Supreme Court in the *Milwaukee Leader* case. The German statutes concerning press (1874) and association and assembly (1908) are instructive: restraints deemed necessary are placed in the law itself; administrative action is purely provisional, to be followed by immediate submission to a court; and licensing requirements are dispensed with, although some notification requirements are retained. In French legislation likewise the inauguration of the freedom of assembly was marked by the substitution of a notification for a permit requirement. In connection with the printing press, license requirement has come to be associated with unfreedom; the same has not been true with regard to education: in the Prussian Constitution (Art. 22) the freedom of teaching is recognized with a reservation for the proof of proper qualification, which is apparently not regarded as impairing the guaranty; in New York the licensing of degree-conferring institutions by the Regents has never been questioned; but the so-called “Lusk Law” of 1921 was opposed as an attack upon liberty, although its requirements were more circumscribed, and it was soon repealed.

§16. *The proper province of administrative power.*—If we say that the proper province of administrative power lies in the legislative control of action recognized as legitimate but attended with peril or liable to abuse, we simply express in another form that it is appropriate to regulative legislation. In some cases it is clear that it would be very difficult to separate what is lawful from what is unlawful without administrative arrangements. If the exclusion of children under fourteen years of age from factories is to be made practicable, the age of children slightly above that age must be certified; convictions for employment of children close to the borderline would otherwise be difficult. The prohibition of intoxicating liquors for beverage purposes is facilitated by licensing legislation for the sale of liquor for non-beverage purposes; and such legislation is therefore “appropriate” under the Eighteenth Amendment. The legislative object might perhaps be achieved by presumptions to be avoided by certification facilities; but the practical result would not be very different; and a presumption would be resented more than a licensing requirement. These, then, are conspicuous and obvious instances of legitimate administrative power.

The striking recourse to administrative powers in recent federal economic legislation (Interstate Commerce Commission, Federal Trade Commission, Shipping Board) is due to another condition, namely the inability of the legislature to formulate standards sufficiently definite for private guidance. This inability in turn may be due either to the inherent inapplicability of uniform standards to varying individual cases or to the temporary failure to discover such principles. If the latter, administrative power represents the "trial-and-error" method of discovering a rule by which it will be ultimately superseded; if the former, it is a legislative makeshift to appease the demand for public control, setting up a power which is in a sense a negation of law. This aspect of administrative power can be discussed profitably only in connection with an analysis of administrative discretion.

Where administrative power is not a substitute for a legislative standard, it is a method of ascertaining and declaring compliance or non-compliance with it: in other words, it is an advance check upon the legality of action. This may be a great convenience from the point of view of public control and even from the point of view of private interest; it is perhaps in no case absolutely essential. In the field of private law we find an analogy in connection with wills: a will of personal property always called for probate, while a will of real property did not. At present the probate requirement extends to all wills; and this is generally acknowledged to be a desirable change in the law; yet the older practice shows that it was possible to dispense with it; and the probate in the English and American sense is not part of the German law. The difference between private and public law is that in public law administrative power operates under the sanction of penalties, while in private law administrative co-operation is generally only a validity requirement; but as an incentive to compliance with the administrative requirement the fear of civil loss may be more effective than the fear of a penalty. The penalty indicates the value that the legislature sets upon the advance check, but its requirement or non-requirement must depend upon tradition or upon considerations of expediency.

The function of administrative power does not only vary as between different statutes but the same statute may use it for different purposes. The following categories may be distinguished: standardization without recourse to power; recourse to power instead of stand-

ardization; and standardization checked by recourse to power. But practically these may be combined by standardizing up to a certain point and leaving the residue to power; by using standards of the vaguest description which fail in ordinary cases, or others ordinarily definite which fail in border-line cases. Under every regulative statute there is, moreover, an express or implied reservation for liberty of private action, varying in content, but within its scope exempt from control.<sup>4</sup>

\* See further §271 for an estimate of the place of administrative powers in regulative legislation.

## CHAPTER III

### THE ORGANIZATION OF ADMINISTRATIVE AUTHORITIES

This subject will be considered under the following heads: (1) concentration and delegation, (2) centralization and localization, (3) board versus departmental organization, (4) tenure and qualification, (5) lay co-operation, and (6) the German system.

#### I. CONCENTRATION AND DELEGATION

§17. *Administrative compared with judicial action.*—It is a commonplace observation that in any government the administrative branch is composed of a vastly greater number of persons than the judiciary. This disproportion is greatly reduced or disappears altogether if we consider only officials vested with determinative powers. Thus in the American federal government, if the total number of ruling administrative officials exceeds the number of judges it is because the former include a few services in which a great multitude of cases require administrative rulings based on physical inspection resulting in determinations by officials of subordinate grade (immigration, steamboat, and locomotive-boiler inspection, sailors' wages allotments, meat inspection); apart from these there are fewer federal officers with ruling powers than there are federal judges. The difference between the administrative and judiciary in point of numbers is therefore in the main a difference in the number of staff officials and employees.

In the judiciary, the number of judges bears some relation to the amount of business, and personal disposition is supposed to be possible by exclusive devotion to the function of determination; the subordinate personnel is therefore negligible. In the administration, even where service functions do not greatly preponderate over control functions, as they do in all executive departments, but where control or determination constitutes a principal or the exclusive business of the office (Patent Office, Federal Trade Commission, Comptroller of the Currency, Interstate Commerce Commission), the amount of determinative business manifestly exceeds the personal capacity of the nominal authority, necessitating staff assistance, with the effect that the chief in the main supervises, and personally determines only in exceptional cases.

In other words, totally different methods or principles of official action prevail in the two services: judicial action is personal, while administrative determination is normally, as a matter of fact, delegated.

§18. *Delegation in administrative action.*—The course of legislation is to commit administrative functions to departments, bureaus, boards, or commissions, and to vest the entire power of the department (or bureau) in its head, designated as “minister,” “secretary,” or “commissioner.” The chief executive is rarely called into action, in England (Orders in Council) mainly for quasi-legislative acts, in the United States chiefly where foreign relations are involved (“fighting” tariffs, prohibition of imports, suspension of immigration, admission of aliens under the act of 1918, also war powers); in New York the governor is given direct power to abate nuisances. The staff personnel is ignored, except in provisions for organization or for delegation.

Provisions for delegation vary. Occasionally they relate to the entire range of powers exercisable under a given statute—so in section 5 of the Trading with the Enemy Act of 1917 (*Stoehr v. Wallace*, 255 U.S. 239); in the act of March 3, 1927, permitting delegation by the Secretary of the Treasury to the Commissioners of Customs and of Prohibition; and in section 82 of the English Railways Act of 1921, which provides that “anything by this act authorized or required to be done by the Board of Trade may be done by the President or a Secretary or Assistant Secretary or any person authorized in that behalf by the President.” But this is uncommon. More common is some provision for delegation in connection with the statutory organization of some office, particularly the creation of deputies, or that a board or commission may act through a division or committee or member (Interstate Commerce Act, §17, as amended in 1917; New York Public Service Commission Act, §11; English Public Health Act, §200); sometimes a general and indefinite provision, but sufficient, in connection with usage, to support a liberal construction (U.S. R. S., §§161, 177-79; English New Ministries Act, 1916, §§11, 12, incorporated by reference in later acts creating ministries); more often a specific delegation or power of delegation relates to subsidiary, especially examining, powers (Interstate Commerce Act, §20 [10]; Revenue Act, 1926, §1104; English Ministry of Transportation Act, 1919, §§19, 20).

But very often there is no provision for delegation, and in the absence of such provision it is doubtful whether and to what extent action can be legally sustained which does not purport as a matter of form to



proceed from the nominal holder of the authority (*Wilcox v. Jackson*, 13 Pet. 498; *United States v. Weeks*, 259 U.S. 326; *Crane v. Nichols*, 1 Fed. [2d] 33; *Kain v. Farrer*, *London Times*, May 9, 12, 1879, commented on in 2 *Encyclopaedia of Laws of England* 313).

The "course of office" is then for the nominal holder of the authority to act nominally. That this nominal action is generally not actual personal action, as in the case of a judge, follows from obvious conditions: the cumulation of duties in a few principal offices, the bureaucratic organization of these offices, the non-differentiation in the statutory form of vesting functions between those which by no possibility can be given personal attention and those which can, the obvious necessity of acting through subordinates in the case of the former, and the resulting habit of so acting in practically all cases except those presenting important issues.<sup>1</sup>

The legal responsibility for the act rests upon the nominal authority, and the subordinate who has handled the case with a view to a determination and has recommended the determination assumes no responsibility whatever therefor to the party affected by it.

The difference between administrative and judicial action in this respect may be put in a way disparaging to the former by saying that it involves a habit of assuming responsibility without personal cognizance; it may be given a much more favorable aspect by saying that it presupposes the organization of a staff of experts acting under responsibility to an official chief.

§19. *Administrative functions of courts and judges.*—Some appreciation of the latter aspect may be gained when we compare with administrative action the action of judges in the exercise of functions which are administrative rather than litigious. Four types of cases may be selected for this purpose: the organization of drainage districts; the adoption of children; the naturalization of aliens; and the approval of membership corporations.

Drainage proceedings in America generally assume the form of an adversary proceeding in which both formal and substantial allegations have to be established to the satisfaction of the court. The substantial prerequisites relate to technical matters, with regard to which the court must rely upon the testimony of expert witnesses or

<sup>1</sup> That actual personal cognizance of the official nominally and formally acting is not necessary, was finally settled for England in the *Arlidge* case. Compare the observations of Lord Shaw in the House of Lords [1915] A. C. 120, 136, with those of Vaughan Williams, L. J., in the Court of Appeal [1914], 1 K. B. 160, 179.

referees. The guaranties of a correct decision are likely to be less than if the matter were bureaucratically determined. It is therefore not surprising that not only in England and Germany but also under recent legislation in New York this subject is committed to an administrative department rather than to the courts.

Adoption may assume either the form of an adversary proceeding (as in Illinois and other states) or of an *ex parte* application with appropriate notices or consents, as in New York or in Germany. In Germany the judge passes only on formal regularity; in New York, also upon the question of interest of the child. The New York judge is likely to act upon personal conscientious consideration of the case, but without special social experience and without adequate machinery of investigation. There is a movement in America toward requiring a reference of adoption petitions to child welfare boards or administrative adjuncts of juvenile courts, and in some courts the practice of such reference is voluntarily observed. This would mean the injection of a "bureaucratic" feature into the proceeding.

Naturalization was until 1906 a purely *ex parte* judicial proceeding; since 1906, the government may appear in opposition to the application. The judicial character of the proceeding is still predominant and has the effect that in presence of the statutory qualifications admission to citizenship is practically treated as a right. So far, however, as these qualifications involve the exercise of some discretion (character, attachment to constitution, well disposed to good order) or depend on investigation, their determination tends more and more to be controlled by the government examiners. While they are vested by law (even under the amendment of 1926) with no determinative powers whatever, the impression has gained ground that the conditions for naturalization depend upon the rulings of the Bureau of Naturalization, which instructs the examiners. This shows the influence of bureaucratic organization. The subject is discussed in the descriptive part of the survey.<sup>2</sup>

The requirement of the New York statute that the organization of any membership corporation be approved by a justice of the Supreme Court is likewise discussed elsewhere in this treatise, and its anomalous character commented upon.<sup>3</sup> It is impossible to ascertain upon what principles the power is exercised, or rather it is certain that there can be no principles controlling the exercise of so unorganized a power, unless it be that approval must be given in the absence of ille-

<sup>2</sup> See §247, *infra*.

<sup>3</sup> See §242, *infra*.

gality. Again, it is characteristic that for certain kinds of membership corporations more recent statutes require the approval of the State Board of Charities, which may be presumed to insist upon definite standards.

It thus appears that there is a noticeable tendency to supplement or supersede judicial action in administrative matters by administrative action which is expected to be bureaucratically exercised through expert aids. This is the natural effect of the limitations of personal action: such action is appropriate where a case is carefully prepared in advance, where the vigilance of representatives of adverse interests may be depended on by the ruling authority, and where attention may be centered on a definite issue calling for professional judgment. In the absence of these conditions, personal action is inferior to delegated action, and will tend to be either perfunctory or arbitrary. This would not apply to cases in which the sole function of the court is administration, and where the amount of the business is not beyond its capacity, as in the orphans' courts in Germany; but there are no strictly analogous cases of judicial administration either in America or in England.

§20. *Consequence of concentration.*—The principle of concentration results in the vesting of ruling powers in officials of high grade; in England and in New York the choice lies between superior state officials and local authorities; the state officials are apt to be directly responsible to the chief executive (i.e., in England to Parliament), the local authorities are either governing bodies or local chief executives or their immediate appointees. In the United States federal service, the choice lies between heads of departments, heads of bureaus, and independent boards. The choice between the two former is not determined by the nature or importance of the function (except that general regulations are uniformly required to have the approval of the head of the department even if they proceed from the chief of a bureau), but is a matter of historical development. In the departments of Agriculture and of Labor no determinative powers are given to the bureaus (not even to the Commissioner-General of Immigration);<sup>4</sup> while in the Department of Treasury, the Commissioner of Internal Revenue and the Comptroller of the Currency, respectively, exercise all the ruling powers pertaining to their branches of administration;

<sup>4</sup> However, such powers are exercised by the purely subordinate meat inspectors—an anomaly, but practically inevitable. It is proposed to transfer the power of deportation from the Secretary of Labor to the Commissioner-General of Immigration.

the general direction of the Secretary, of which the statute speaks, does not mean an appellate review of these determinations, and there is no organization for purposes of appeal to the Secretary.<sup>5</sup> The independence of the Patent Office makes its transfer from the Department of the Interior to the Department of Commerce (effected in 1925) a matter of slight interest from the point of view of private right, whatever effect it may have upon the initiation of legislative policies.

It is not the practice in American federal legislation to grade functions in the same branch of administration according to their importance, and assign the more important to an officer of higher rank. As has been noted before, an exception is made in the case of certain powers affecting foreign relations (immigration or imports), in which the authority to act is given to the President. The President is then likely to act through the head of a department;<sup>6</sup> but in connection with the modification of import duties under the Tariff Act of 1922 Congress has provided a Tariff Commission directly advisory to the President. It would then be inappropriate for the President to act through the head of a department; and if, after a majority and dissenting opinion of the Commission, the President issues a full statement refusing to accept the majority view, it must be left to conjecture by whose advice he acts and who formulates his conclusions.<sup>7</sup>

The concentration of power has also the effect that service and control functions are combined in the same head. This has been criticized,<sup>8</sup> but the exercise of power through subordinates would make it possible to utilize staff organization for purposes of practical separation up to a certain point. It is probable that whatever theoretical arguments speak in favor of separation, practical considerations make in favor of combination; for the informal stages of control preceding its final exercise often give opportunity for the most effective forms of

<sup>5</sup> In the Department of the Interior there is a Board of Appeals, recognized by the appropriation acts, through which the Secretary hears appeals from the Land Office.

<sup>6</sup> See, e.g., in the matter of conditioning the admission of an alien, the *Karolyi* case of 1925.

<sup>7</sup> See President's statement, June 14, 1925, printed in 120 *Com. & Fin. Chronicle* 3142. For a presidential statement and proclamation in pursuance of the advice of the Tariff Commission see 118 *Com. & Fin. Chronicle* 1217 (March 15, 1924). Such a statement may of course be prepared with equal propriety by the Tariff Commission or by the Treasury Department.

<sup>8</sup> *Report of the President's Agricultural Conference to the President*, February 1, 1925.

service. A statutory separation would have to be more rigid than an administrative separation and would encounter great difficulties of delimitation.

## 2. CENTRALIZATION AND LOCALIZATION

§21. *Centralizing tendencies.*—Centralization means administration conducted from the center of the government instead of being conducted by the localities.

Both in England and in the American states the established organizations for local self-government—cities, counties, etc.—have always exercised delegated administrative powers in connection with justice, peace, and finance; and certain phases of public health administration have been added in the nineteenth century. In addition, cities and similar municipalities possess an autonomy within which they legislate as well as administer. This autonomy covers in the main health, safety, public order, local trades, and the use of land and of streets, and may be exercised by the use and the delegation of determinative powers; in smaller localities the governing body often acts both legislatively and administratively, while in large cities administrative powers are more likely to be delegated to the mayor or other officials. Local self-government to the extent that it operates is of course the very opposite of centralization.

The tendency of modern legislation is to execute state laws through state-appointed organs, and in New York this tendency is particularly marked. Even the purely local administration of public utilities in the city of New York is committed to a transit commission appointed by the governor, and the creation of a board of transportation appointed by the mayor for very limited purposes was considered a special achievement for home rule. In the matter of taxation the reliance upon local assessors represents a survival from earlier conditions, which is being abandoned for the more modern forms of revenue. None of the important state-wide regulative acts (public utilities, banking, insurance, professions, labor, farms and markets, conservation except for the ordinary hunting and fishing licenses) are executed through local self-governmental organs; and while a state department may have local agents, no determinative powers are vested by statute in officials appointed for definite localities.

In England, while it is more difficult to generalize, the extensive powers of the Home Secretary under the Factory and Workshops Acts, of the Local Government Board (now Ministry of Health) in connection with the health acts, and particularly of the Board of

Trade with regard to public utilities, merchant shipping, and all trade legislation, indicate a strong centralizing policy; but the licensing laws are still administered through the local justices of the peace, and local commissioners are used for the assessment of taxes. There is also considerable local administration under the merchant shipping laws; and under the Explosives Act of 1875 and the Coal Mines Act of 1911 local inspectors (who are, however, centrally appointed and controlled) are given powers to act in the interest of safety. But the great majority of determinative powers are either exercised or controlled by the central government in London.

In the United States the federal government has within the territory of the states no local self-governmental organizations controlled by it that might be utilized for purposes of administration, but there is, of course, the possibility of creating local administrative divisions, such as exist for the public-land administration and the collection of revenue. Administration is also locally organized where local inspection is combined with ruling powers, as in the case of steamboat, boiler, and meat inspection, and immigration.

In the administration of the revenue there is an interesting difference between customs and internal revenue. For purposes of collection both services are organized in districts; but while in the customs service determinative powers are locally exercised, they are in the internal revenue service centered in Washington. This change seems to have been effected by the act of December 24, 1872, 17 St. L. 402, incorporated in R. S., §3182, while formerly there were assessors in the collection districts (acts of July 1, 1862, 12 St. L. 433; June 30, 1864, 13 St. L. 228; also act of July 22, 1813, 3 St. L. 25).

With the exceptions before noted, determinative powers in the federal administration are centralized in Washington, even when examining and enforcing powers are locally organized or exercised. Steamboat inspection is the only instance of organization from the bottom up, i.e., starting as a local force with gradual centralization of supervision (inspectors, 1838; supervising inspectors, 1852; supervising inspector-general, 1871).

Public welfare administration is now more strongly centralized than the administration of justice. Even in England, the former tendency to center civil justice in the courts of Westminster was broken by the creation of county courts in 1846; and in America the exercise of original jurisdiction, both civil and criminal, and both state and federal, has always been localized; it is also significant that the district

courts have been given concurrent jurisdiction with the Court of Claims. Centralization of justice is confined to appellate review. On the other hand, administration is now centralized as justice formerly was in England; the Interstate Commerce Commission and the Federal Trade Commission exercise all administrative jurisdiction (within the federal sphere) with regard to transportation or unfair competition, as all equity jurisdiction in England formerly was exercised by the High Court of Chancery.

Decentralization is not inconsistent with centralized appellate review; it may indeed be claimed as one of the advantages of decentralization, that it affords an opportunity for the exercise of administrative appellate jurisdiction; and conversely, it may be charged against centralization that it militates against organization for appellate purposes. Practically, however, the difference is not as important in the administration as it is in the judiciary, for the reason that in the former the local organs rarely are independent in the sense that courts are independent, but are nearly always subject to central instructions. It was for that reason that the former appellate power of the Secretary of the Treasury over assessment of customs duties was regarded as unsatisfactory and was transferred to the Board of Appraisers. At the present time the decisions of the Commissioner of the Land Office are subject to appeal to the Secretary of the Interior, and a Board of Appeals has been organized in the Department for that purpose. But it may be doubted whether that appeal operates very differently from the former Committee of Review and Appeals in the office of the Commissioner of Internal Revenue. In an extensive bureaucratic organization, though legal power is concentrated, it is always possible to provide for the review of the decisions of subordinates by special staff officials assigned to this function by the head. Since the head unites in himself all powers, the arrangement has ordinarily no statutory recognition; practically, however, this is what is in effect being done when a statute provides for rehearings by commissions of their own decisions, a very common statutory provision in connection with commission powers.

It is also possible for decentralization to assume the form of absolutely autonomous local self-government with no central powers of supervision or review. Such is the general organization of local powers in the United States. Within the range of municipal charter autonomy, administrative ruling powers may be committed to local officials which are possibly of considerable significance, e.g., the right to hold public

meetings. Instances can be cited in which such power has been arbitrarily exercised in a partisan spirit, with no redress except an expensive and dilatory resort to the courts. Generally speaking, although of course not always, power exercised at or controlled from the central seat of government has greater intrinsic guaranties of fair exercise than a power untouched by any but local influences.

It is to be particularly noted that this centralizing tendency in administrative organization has been spontaneous and unresisted. If there is a demand for home rule in American states, it relates to municipal activities that can be controlled by cities legislatively; and it is for this reason that the demand includes public utilities in which the control is so little standardized that administrative powers are quasi-legislative in character. But even here there is a large acquiescence in centralization; and on the whole it is felt that local control is of value only where it means control of policy or a veto on law enforcement, and that there is no particular gain in it where administrative powers, though to some extent discretionary, can be standardized by statute, and where technical expertness and impartiality can better be supplied centrally than locally. In any event centralization versus decentralization of administrative powers has not been made a political issue.

### 3. BOARD VERSUS DEPARTMENTAL (SINGLE-HEADED) ORGANIZATION

§22. *General considerations.*—The old question whether power should be given to one, or to several acting jointly, has never been answered by a generally accepted formula. The French compromise of a solely responsible executive, acting after hearing the advice of a consultative body (*agir est le fait d'un seul, délibérer est le fait de plusieurs*), is not a common form in Anglo-American practice, although we find it in the recent American Tariff Commission and find something like it in the English Orders in Council.

Something of a consensus of opinion may perhaps be found to the effect that legislative powers should be vested in an assembly, and appellate powers in a small number of persons; and in state and nation the legislative and judicial departments are organized in accordance with that principle. But within the administrative department it would be difficult to discover a consistent principle of organization in this respect, and both regulating and appellate powers are vested in individual heads of departments without any sense of impropriety. In New



York, however, when in 1921 the Labor Department was placed under a single commissioner, an industrial board consisting of him and other officials in his department was created for the purpose of establishing regulations. We are in the habit of entrusting public utilities control, because tending toward a quasi-legislative nature, to commissions; while in England, where the major points of control are reserved to Parliament, administrative powers are given to the head of a department, and a commission has been established primarily for the judicial function of passing on rate controversies. The Railways Act of 1921 distributes the power to issue orders relating to the providing of facilities between the Minister of Transports and the Railway and Canal Commission in such a way that farther-reaching measures are apparently left to the direction of the former. The controlling consideration must have been to invest the exercise of the larger power with political responsibility. We find in the same act, and in connection with the same matter of service facilities, that authorizations are granted by the Minister while orders are issued by the Commission; this apparently goes to show that enabling powers tend to be bureaucratically, and directing powers tend to be "magistratuallly," exercised—a matter to be discussed later on.<sup>9</sup> But any generalization as to form of authority would be unsafe.

There is this difference between the action of a board and the action of the head of a department, that in the case of the latter nominal action means far less than in the case of the former. A mere signature may mean practically nothing in the way of personal cognizance. Where a board acts as such, all the substantial preliminary work may be done by a clerical staff; but formal ratification by the board, if in a sense perfunctory, is in the nature of things less perfunctory than a signature, and the formalities of board procedure (motion, putting the question, and the vote, and the subsequent approval of the minutes of the meeting) tend to insure at least some degree of personal cognizance.<sup>10</sup>

These observations apply of course only to acts done formally at a meeting; many board acts of a routine character, particularly ordinary permits or certifications, issue in the name of the board by its in-

<sup>9</sup> See §§33, 34, 84, *infra*.

<sup>10</sup> See 36 Senate Doc. 1915 (No. 69) 736 *New York Public Service Commissions Legislative Inquiry*, showing the insubstantial character of the public sessions of the Commission, which were rehearsed beforehand.

formal or implied direction; but these are not apt to give rise to legal questions.<sup>11</sup>

§23. *Present status.*—The present status regarding the employment of boards and departmental heads for the exercise of administrative ruling powers appears to be as follows:

(a) *England.*—In England these powers are mainly exercised by ministers. The great administrative departments are in part nominally boards; as late as 1899 the Committee of the Privy Council on Education was superseded by a "Board of Education," but its composition makes it clear that it is not intended to act as such, just as the Board of Trade has long since become merely a name to stand for its President;<sup>12</sup> the Local Government Board has become the Ministry of Health with an individual head, and the Board of Agriculture has given way to a Minister. In the control of professions the Privy Council is given certain powers, but the Privy Council never acts as a body except on purely formal occasions. The collection of the revenue is administered by Commissioners of Customs and Commissioners of Inland Revenue, who, it may be presumed, act occasionally as a board. The Railway and Canal Commission was doubtless intended to act as a body, and its powers, originally of an almost purely judicial nature, have in course of time become more administrative. Commissioners with important quasi-legislative powers also exist for the control of the supply of electricity.

In contrast with the central government, local administrative powers are exercised to a considerable extent through boards or other bodies. It is sufficient to refer to boards of health, borough councils and county councils, pilotage authorities, licensing justices, and tax commissioners. Indeed there are few local officials, other than magistrates acting judicially, in whom ruling powers are vested individually.

This summary of English practice leaves out of account the em-

<sup>11</sup> See *Chicago & N. W. R. C. v. Dey*, 35 Fed. 866, 883.

<sup>12</sup> *Hansard Debates (Lords)* (1911), p. 196: Archbishop of Canterbury: "I stand before your Lordships in an unwonted capacity—as a member of the Board of Trade. I do not know who the other members are, or whether they ever meet. I have never heard of a meeting, and I believe there is some doubt in the popular mind as to what the Board consists of."

As to the Board of Education, see the full discussion regarding the Scotch Department in *School Board v. Scotch Education Department* (1913, 1 Scots Law Times 457), holding that the act of the Vice-President of the Department is the act of the Department.

ployment of co-operating boards constituted on a non-professional basis, of which something will be said presently.

(b) *United States*.—In the American federal system the departmental form of organization dominates. The board form is used where action is by way of review (boards of appraisers, board of tax appeals, boards of special inquiry under the immigration law), and in a few "independent agencies": the Interstate Commerce Commission, the Federal Trade Commission, the Federal Reserve Board, and the Shipping Board. In the former two the plurality of persons was believed to be suited to the exercise of powers primarily directive or magistratual in character; in the latter two the analogy of corporate directorship was perhaps influential; and in the case of the Federal Reserve Board there were also political considerations.<sup>13</sup>

The secretaries of War, Agriculture, and the Interior constitute *ex officio* a water power commission. The secretaries of the Treasury, Agriculture, and Commerce are required to establish rules for the execution of the Food and Drug Law of 1906, but are not constituted a board for the purpose.

It is noteworthy that in the Packers' Act of 1921 functions analogous to those of the Interstate Commerce Commission or of the Federal Trade Commission were vested in the Secretary of Agriculture, the bureaucratic form of action being regarded as the more effective. The relative merits of departmental and commission power were also the subject of discussion with radio legislation, with a resulting compromise in the Radio Act of 1927.

(c) *New York*.—In the state administration of New York, the control of public utilities, the assessment of taxes, and the admission to professions are placed under the principal direction of commissions or boards, and licensing or certifying powers are vested in the state board of charities, in a motion-picture commission, and a license committee acting under the state athletic commission; in the local administration there are boards of health and boards of assessors. The state departments of banking, insurance, farms and markets, labor, and conservation are administered by individual commissioners. It is therefore difficult to speak of a definite preponderance of either system, although there seems to be a legislative tendency to favor single-headed departments; this appears for instance, in two acts of 1921 (c.

<sup>13</sup> For the purpose of steamboat inspection, an inspector of hulls and an inspector of boilers in a local district are constituted a "board of local inspectors" (R. S., §4415).

§§249 and 300) permitting second- and third-class cities to substitute for boards of health and boards of assessors departments headed by individual commissioners.

Differing in this respect from the federal administration, New York utilizes boards in conjunction with departmental organization. A public health council establishes sanitary regulations (Public Health Law, §2a, 2b), a water control commission administers the law concerning drainage and water supply (Conservation Law, §2); a water power commission licenses water power schemes (Conservation Law, §615); a council of farms and markets advises the commissioner (F. & M. Law, §5); and an industrial board, in addition to administering the workmen's compensation law, makes all rules and regulations under the labor law (Labor Law, §27). The latter provision is apparently a definite recognition of the special fitness of a board for the exercise of quasi-legislative functions.

#### 4. TENURE AND QUALIFICATION

§24. *Judicial and administrative service.*—Provisions concerning tenure and qualification have a bearing upon competence and independence in the exercise of functions and upon public confidence therein. While in the judicial service it is only the status of the judges themselves that calls for comment, in the administrative service it is necessary to take account of the staff as well as the holders of legal power.

Occupants of the bench have both a professional status as lawyers and a political status in the sense not of partisanship but of standing outside of the ranks of regular bureaucratic service; once having been selected, their affiliations are professional rather than political. In England and in the United States life-tenure is intended to secure independence, and the same consideration tends to relatively long terms of office in the American states. Independence of outside control being regarded as of the essence of the judicial function, judges are virtually irremovable.

Executive officers with ruling powers have a less uniform status. In England and in the United States federal service, the heads of departments are avowedly political officers, without necessarily any professional training or qualification, selected for party service, holding by political tenure, and amenable to political control. Commissions and commissioners are more difficult to place. The English Railway and Canal Commission has the full status of a court, while revenue

commissioners (both inland and customs) belong to the permanent professional bureaucratic service, with an independence practically, if not legally, equal to that of judges.

In the United States federal service, the commissioners (heads of bureaus)<sup>14</sup> and commissions are politically appointed (a legally prescribed bipartisan constitution of commissions induces rather than prevents political selections) and hold by a fixed tenure; commissioners are freely removable, members of commissions or of boards only for cause. The legislative intent is to give commissions a quasi-judicial status, and they are certainly made independent of the political heads of departments; but only the Board of General Appraisers has a tenure practically equal to that of the judges, and its name has recently been changed to that of Customs Court. The impression is received that Congress has never quite made up its mind how to place these "independent agencies"; they should have full judicial status.<sup>15</sup>

In New York three of the administrative officers within the scope of the present survey, besides the Governor (Secretary of State, Comptroller, and State Engineer and Surveyor), are provided for by the constitution and, being elective, are political officers; but one of them (the Engineer) is required to have a professional status. The other heads of departments are appointive by the executive for definite terms and removable for cause; there are certain incompatibilities

<sup>14</sup> See A. W. MacMahon, "Selection and Tenure of Bureau Chiefs in the National Administration," *20 American Political Science Review* 548, 770. The positions considered are chiefly service positions, not vested with determinative powers over private rights.

<sup>15</sup> They also seem inferior in rank to heads of departments. See H. P. Willis, *The Federal Reserve System*, "Social Status of the Board," p. 674: "Soon after the organization of the Board, the social authorities of the State Department were called upon to determine the "status" of members at official receptions, dinners, and the like. They determined that members of the Board must enter dining rooms after Assistant Secretaries of the Treasury and after Assistant Secretaries of other departments of the government, thus placing them substantially upon the same sort of basis as the Interstate Commerce Commission and other similar bodies which had always had a notoriously unsatisfactory position in official society. . . . Eventually the Board decided not to accept the social status assigned to it and thus never obtained any definite position in that regard. . . . The notion of a 'Supreme Court of Finance' which had been carefully fostered in many quarters and had been accepted with pleasure by the new appointees, was thus given a severe blow; and taken in conjunction with other influential factors . . . this blow tended to impair very greatly the feeling of independence and freedom from subordination to political authority which it had been hoped to develop."

(not to be interested in the concerns over which they exercise control), but professional qualification is required only of the Commissioner of Public Health (physician of ten years' experience) and of the Tax Commissioners (known to possess knowledge of the subject of taxation and skill in matters pertaining thereto [Tax Law, §170]). It is interesting to note that with regard to public nuisances the Health Commissioner merely examines and reports, while abatement orders are issued by the Governor (Public Health Law, §6); but otherwise all powers formerly belonging to the state board of health are now vested in the Commissioner (§15). On the whole the position of the chief administrative officers in New York is more like that of heads of bureaus or of commissions than like that of the heads of departments in the federal service.

Where in England or in New York administrative powers are delegated for local self-government, they are as a rule exercised by the politically constituted authorities, i.e., by the governing body or by the chief local executive; delegation to other officers (chief of police, commissioner of licenses, tenement house department, health department) occurs occasionally, particularly in the large cities, but these officers are likewise politically constituted.

§25. *Staff officials.*—Since staff officials not vested with legal powers have so large a share in the actual process of bringing about an administrative determination, it is important to note that in England, in the United States federal service, and in New York, clerical and technical positions are filled and held on what are known as civil service principles. This means some guaranty of fitness and security of tenure, and thus makes for expert and impartial performance of duty. At its best this service has no less independence than the judiciary, though its point of view may be less favorable to private right.<sup>16</sup> The English system has one advantage over the American in that it in-

<sup>16</sup> *Literary Supplement of the London Times*, July 12, 1923, review of *The Bulwark of Parliament*: "The establishment of a skilled and independent Civil Service was a reform not less momentous than the establishment of independent courts of justice. It limited the temptations and it moderated the struggles of party; it secured a uniform and consistent system of administration; it prevented the vicissitudes of politics from plunging the civil life of the nation into confusion. Moreover it drew into the public service able and educated men who had too much self-respect to serve the nation on any other terms. So that we may put it that England learned how to use the character and judgment of men of education under conditions that enabled the nation, and not merely this or that government, to profit by them."

cludes all positions except a few recognized as distinctly political, filling places corresponding to the headship of the federal bureaus by promotion from below;<sup>17</sup> in America there is also the tendency to exempt in the classified service the legal positions which are called for in varying degree in the branches of the administration dealing with private right. But in the majority of the more recently developed services, technical (engineering, accounting, economic) predominate over legal questions, and the experts dealing with these questions have generally civil service protection.

#### 5. LAY CO-OPERATION

§26. *Utilization of private action without, or with qualified, official status.*—In attempting to secure desirable standards, the legislature may deem it advisable not to establish such standards directly by law or even by administrative regulation, but to rely upon parties to put their own house in order. There are three methods of bringing this about: requiring rules to be framed by an owner (mines and insane asylums in England; factories and discipline on ships in Germany); or requiring rules to be framed by the owner in conjunction with representatives of his employees (German mining legislation); or adopting rules made by private organizations (American Railway Association in matters of safety; English Railway Clearing House as to forms of accounts; insurance rating organizations; New York Jockey Club; Germanic Lloyd). These forms of control are beyond the range of a study of administrative powers.

Another form of such utilization is the official employment of organizations having a recognized monopoly of representation of interests. This type is found in the regulation of professions. It was formerly common, but is somewhat inconsistent with modern principles of public law. New York dropped the system in 1910, but it still survives to some extent in England (Royal College of Veterinary Surgeons). The General Council of Medical Education in England, which controls examinations for admission to registration, is in part composed of members elected by medical societies and universities—a modified type of employment of semi-public organizations. In Montana the Nurses' Registration Law allows an appeal from a refusal to license to the State Association of Registered Nurses (*State v. Dis-*

<sup>17</sup> It has been pointed out that in the federal steamboat-inspection service, the places of supervising inspectors are filled by promotion from the rank of local inspection, but that the latter by this promotion lose the protection of the classified service (L. M. Short, *Steamboat Inspection Service*, p. 86).

*strict Court*, 50 Mont. 289, 146 Pac. 743). This form of vesting administrative power is not at present of sufficient importance to call for extended comment.

A third form is the official recognition of persons or institutions acting in a professional capacity. The conspicuous illustrations are the recognition of physicians' certificates and of school certificates. Both are used in child labor laws; physicians' certificates also in prohibition and anti-narcotic legislation; while the recognition of an institutional diploma as a title to admission to a profession tends to give way to examinations conducted under public authority. In the recognition of religious marriages and the admission of wine for sacramental purposes the certificates of non-official persons are likewise used. The persons thus recognized do not thereby gain an official status. It is merely a matter of accepting as authentic an act done under supposedly inherent guaranties of regularity. The practice may involve problems in the way of insuring impartial and reliable certification,<sup>18</sup> and perhaps also service on reasonable terms;<sup>19</sup> it is a compromise arrangement due to expediency or practical necessity; the secularization of marriage in Germany represents a repudiation of the compromise in favor of pure officialism.

§27. *The organization of the office in a whole or in part on the basis of lay service.*—The difference between "lay" and "professional" in official employment means less in America than in England. The traditional American theory and practice accepts pure professionalism only for the army and the navy; for civil office fixed terms and rotation have been regarded as democratic standards, only recently and only in part abandoned in favor of a classified civil service with relatively permanent tenure of place, but carefully excluding superior positions the holders of which exercise ruling powers. Where thus all office-holding is in a sense non-professional, the setting apart of some of it as lay must have a special meaning, which may perhaps be best expressed by the difference between whole-time and part-time service;<sup>20</sup> "lay service" means that the official function is exercised without

<sup>18</sup> See in this respect the British Factories and Workshops Act, §65.

<sup>19</sup> The Wisconsin "Eugenics" law of 1913 required of each person applying for a license to marry, a health certificate to be issued by a physician for a legal fee of three dollars, but failed to make it obligatory upon physicians to act. In the case sustaining the act (*Peterson v. Widule*, 157 Wis. 641) it appeared that four physicians had refused to make the examinations for so small a fee, but the point was not noticed in the opinion.

<sup>20</sup> The English Electricity Act of 1919 uses the term "whole-time officer."



constituting the principal portion of a person's activities or responsibilities. In this sense, of the three departments of the government the legislative is the only one that is constituted on the basis of lay service, while in the judicial and administrative departments, reliance on lay service is intermittent or exceptional.

We may distinguish three types of lay service as "lay officials," "lay referees," and "lay assessors," respectively.

**Lay officials.**—Under simple conditions it may be possible for a person to fill an individual office without giving it more than occasional attention (e.g., that of the mayor of a small municipality, or a justice of the peace in a rural locality); but practically, the use of lay officials is confined to membership on boards or commissions. Besides local boards (governing bodies, boards of health, etc.) there are constituted in this manner in New York the Regents of the University, boards of examiners, and the State Board of Charities; in England the tax commissioners, and the councils that have to do with admission to the professions. The offices named in the New York Boards and Commissions Law, which are either of the same type or are made up of *ex officio* members, do not exercise powers that are within the scope of this survey. It is clear that this form of organization is of secondary importance in the vesting of administrative powers. Some account of the working of the system in connection with the English income tax is given in the descriptive part of this survey.<sup>21</sup>

**Lay referees.**—The typical "lay referee" institution is the jury. Originally used to a great extent for administrative purposes (the grand jury is a relic in this respect, so far as it exercises inquisitorial powers), it is now confined to the administration of justice. English legislation in many cases has recourse to arbitrators for the settlement of disputed points arising in the course of administration (compensation, refusal of licenses, etc.); the instances are too numerous to specify but are noted in the descriptive part of this survey. The reference committees under the Coal Mines Act, 1911 (§126), are a recent and interesting agency of this type. The Greater New York Charter has several provisions referring questions concerning safety to the judgment or arbitration of technicians or technical bodies or their representatives (§§343, 630-39, 770; until 1902 also §769). Federal legislation formerly had recourse to merchant appraisers for the purpose of settling duties on imported merchandise, but after an existence of a hundred years the institution was dropped in 1890. An appeal in

<sup>21</sup> See §269, *infra*.

patent cases to a board of three disinterested persons appointed by the Secretary of State, given by an act of 1836, was superseded in 1839 (cf. 5 St. L., pp. 120 and 354). For some reason or other the lay referee plays no important part in the American system of administration.<sup>22</sup>

Lay assessors.—In the administration of justice, lay assessors differ from juries in that they sit with the judge and not apart from him. American legislation recognizes the institution under the name of "associates" in connection with the exercise of consular jurisdiction in more important cases (U.S. R. S., §§4106, 4107). Outside of judicial administration, the earlier customs legislation of the United States used merchant appraisers acting with the collector, i.e., as assessors. At present there seem to be no analogous cases either under the legislation of Congress or of the state of New York.

In England assessors are used in the administration of justice where practice is influenced by the civil law, i.e., particularly in admiralty (see County Courts Admiralty Jurisdiction Act, 1868, §§11, 14; 1869, §5; *Encyclopaedia Laws of England, h. t.*). In the field of administration, the most important instance of the use of the institution is the Rates Tribunal of the Railways Act of 1921 which performs functions similar to those of the Interstate Commerce Commission. This tribunal (which is given the status of a court of record) consists of three permanent members (a lawyer who presides, a business man, and a railway man) to whom in any particular case, if the tribunal on the application of a party or otherwise so requests, or if the Minister of Transport thinks it expedient, there may be added two additional members on the nomination of the minister, one selected from a general panel and one from a railway panel. The general panel consists of thirty-six persons, of whom twenty-two are nominated by the President of the Board of Trade after consultation with bodies representative of trading interests, twelve by the Minister of Labour after consultation with bodies representative of the interests of labor and of passengers, and two by the Minister of Agriculture after consultation with bodies representative of agricultural interests; the railway panel consists of twelve, eleven nominated by the Minister of Transport after consultation with the Railway Companies' Association and one representing railways not parties to that association. The additional members have for the purpose of the case the same powers as the permanent mem-

<sup>22</sup> In connection with certificates to practice medicine, note Laws of Montana, 1907, c. 100, providing for a trial of appeals by a jury of six physicians.

bers of the Rates Tribunal (§§20-25 of Act). "Specially qualified" assessors may also be called in aid in any case by the Railway and Canal Commission, and cases be heard wholly or partially with their assistance (Ministry of Transport Act, 1919, §19).

§28. *Interest representation.*—It is assumed that lay, like regular, officials, will not act in cases in which they have a personal interest; and presumably even in the Rates Tribunal, selections from the panels will be made with a view to relative impartiality. For the performance of quasi-legislative functions the law may, however, have recourse to bodies constituted in part or mainly on the basis of interest representation. The English wage boards are typical in this respect. There are two types: the trade boards under the acts of 1909 and 1918, which fix wages for the sweated trades, and the joint district boards under the Coal Mines Act of 1912. The trade boards are constituted by the Board of Trade in such a way that less than one-half are officially appointed, while the other members represent equally the employers and employees of the trade, a quorum to contain at least one appointed member; action by these boards requires confirmation by the Minister. The joint district boards are bodies of persons which in the opinion of the Board of Trade fairly and adequately represent miners (workmen) and operators (employers); and the chairman of each board is an independent person appointed by agreement of the representatives of the two interests or in default of agreement by the Board of Trade. These then are as nearly as may be extra-official bodies having official recognition, but whose determinations are made legally binding.

An amendment added in 1909 to the Prussian Mining Law provides for security men and miners' committees elected by the miners, who have however only powers of inspection and of advice.

The English Fisheries Act of 1923 vests regulating and also licensing powers in fishery boards created for fishery districts. These boards are made up of appointed, representative, and ex officio members; appointments are made by the county council or councils of the district; representatives are elected by licensed fishermen on the basis of license fees paid (one for each £50 or fraction thereof); ex officio members are owners or occupiers of fisheries. The appointed members are limited in number, and the representative members are not to exceed one-half of the total number of the preceding year. The board constitutes a corporation and acts much like other local authorities (§§44-55).

Neither in the United States federal service nor in New York are there bodies constituted on the principle of interest representation.

Altogether, lay co-operation seems to be utilized more in England than in America. Probably this is due to the higher development in England of professionalism in the civil service. Nominally, it is true that ruling powers in England are largely in the hands of politically constituted officials; but in substance, decisions are inevitably controlled by the professional staff. It serves then to temper the odium of adverse rulings and to remove resulting friction, if a popular element enters into the administration. This consideration was certainly conspicuous in the creation of the English tax commissioners. But in America there is no similar contrast between professionalism and non-professionalism. The classified civil service is a relatively recent thing, and not permanent or a career in the English sense. Officials are not as yet a class apart. We accept the jury system but are not inclined to apply a similar idea to the administration. The sporadic instances of lay service in the administration have shown no vitality.

#### 6. ORGANIZATION OF ADMINISTRATIVE AUTHORITIES IN GERMANY

§29. *Summary of the principal features.*—In the foregoing account there has been little, if any, reference to Germany or Prussia for the reason that administration there is organized upon a basis quite different from that adopted either in the United States or in England, making running comparisons a difficult matter and calling for a separate statement. This will be confined to what are believed to be the salient characteristics of the German-Prussian system, not taking account of changes introduced since the war. They are the following:

First: imperial and state administration.—Germany, like the United States, has a federal constitution, but it pursues with regard to the federal government an administrative policy different from ours. The province of federal legislation is much wider; the province of federal administration much narrower. Of the subjects considered in this survey (ignoring public utilities), all but revenue and those directly connected with the soil (land and improvements, mining, conservation) are controlled by imperial statutes, but none of them are imperially administered in their entirety; the federal government exercises directly only a few administrative powers specified by law. The federal administrative organs are correspondingly few: the Chancellor, the Federal Council (particularly for the enactment of administrative regulations), the consuls (for functions abroad under the merchant

shipping laws), a patent office, and a supreme insurance authority. Postal and telegraph services are imperial, but they exercise no power over private rights.

It is to be noted that the Insurance Act of 1901 creates an imperial supervisory board but permits arrangements for assistant commissioners appointed by the state governments. The Mortgage Bank Law of 1899 provides for initial licenses by the Federal Council, but otherwise constitutes the member states supervisory authorities, so that they determine by whom the other provisions under the act are to be administered. The two principal administrative organs of the Empire are the Chancellor and the Federal Council, and they of course act only in exceptional cases. It is characteristic that even such a matter as the expulsion of aliens is left to the state governments.

Second: regionalization of administration.—Not only is German legislation administered by the states, but in Prussia the state administers in the main through local officials. The rulings that affect the individual do not emanate from Berlin but from local seats of government, subject merely to the general instructions, supervision, or review of the central authorities. The important local organization for the exercise of administrative powers is not the province but the government district with a government president (the "Regierung"); below this is the county (*Kreis*) with a prefect (*Landrat*) as chief official; as in England, the larger cities constitute counties, the urban authorities (council or mayor) acting as governmental agents in addition to exercising their self-governmental authority. The "Regierung" has a general residuary delegation of administrative power; for specific delegations to other authorities either the particular statutes or the General Administrative Act of 1883 have to be consulted.

This system stands in sharp contrast to the centralized administration of England, the United States, and New York. To illustrate again from the expulsion of aliens, it is the government president who exercises this power, although of course where political interests are involved he may receive his directions from the minister. In matters belonging to the domain of the Civil Code, the central government generally acts in the first instance (legitimation; approval of gifts to corporations; authorization of negotiable evidences of indebtedness).

Third: non-differentiation of local authorities according to subject matter.—The delegation of administrative powers to the general representatives of the central government in local districts has the further effect that while the central government is organized into min-

istries according to general divisions of subject matter much as it is in England and the United States, there is no similar statutory differentiation for the local governments. There may be factory inspectors, bank examiners, etc.; but for the exercise of ruling powers (permits or orders) the statute simply refers to local or superior administrative authorities. The "government" is departmentally organized, but this is merely an internal bureaucratic arrangement—all power being legally concentrated in the government president. The non-identification of definite officials with the execution of particular statutes may result in loss of zeal or interest in the pursuit of a statutory policy; but from another point of view this may occasionally be an advantage. The staff officials are likely to be experts in particular branches of administration; and, where merely general administrative or legal services are called for, the system admits of flexibility in transferring an official from one department to another.

Fourth: systematic utilization of boards.—The German practice appears to attach a special value to the board (*Kollegium*) as a depository of legal power. In the administration of justice the court corresponding to our county court frequently sits with two assessors, and the court corresponding to our district or circuit court acts through a bench of three judges. The central administrative authority in Prussia is a cabinet of ministers, which (different from the British and American cabinet) acts as a legally recognized body. Until 1883 the Prussian district government, the principal local representative of the general government, acted as a board; but in that year the powers were vested in the "government president." Taxes are assessed by boards. The principal authority for the execution of the Insurance Act of 1901 is organized in board form. Especially characteristic is the provision of the Federal Trade Code concerning trade (nuisance) licenses. The admissibility of a license requirement is determined by the federal law; licensing authorities and licensing procedure are left to be determined by state law; but the federal law prescribes that either the original decision or the decision on appeal must be made by a board (Trade Code, §21). In part, undoubtedly, the value attached to the board form is explained by the fact that it lends itself to the injection of a lay element into the exercise of official power.

Fifth: the administrative service as a profession.—While the bureaucracy has survived the monarchy and has had a considerable share in making the transition possible, it is perhaps safer to speak of

this phase of organization, in part at least, in the past tense. All the higher posts in the administration (except the office of the minister) require university training and the passing of state examinations; and, except in the technical services, the training is legal, legal education being organized with that end in view. Of the men taking up the study of the law, a considerable proportion (including members of the aristocracy of birth and wealth) always expected to enter the administrative service. The tenure of office is the same as that of the judges except that administrative officers are somewhat more freely transferable from place to place. There is this difference from the English civil service that the system includes posts of political character like the local representatives of the general government, and representatives that appear in parliament to defend or explain measures; moreover, members of the civil service are not debarred from election to the legislature. While there is a regular system of promotion, it was so managed that the higher posts were regularly filled by friends of the government. The social standing of the superior officials was very high. At its best the system produced an unsurpassed type of public service; and if it had the defects of its qualities, at least incompetence or lack of integrity was not charged against it.

Sixth: lay co-operation.—Reference has been made to the wide use of board organization and to its utilization for lay service. In the judicial service the jury system is not used in civil cases, but it is used in the more serious criminal cases; and in petty criminal cases the judge sits with two lay assessors. Every principal local officer (government president, county prefect, mayor) has by his side a board (city "magistrat," county committee, district committee) made up in part of professionals, in part of laymen. Taxes are assessed with the assistance of non-professional co-operation. The organization of security men in connection with inspection of mines has been referred to. The Prussian Water Law of 1913 operates with a Principal Water Council and a Central Water Board. The functions of the Council are advisory; it consists of an appointive chairman, and members are elected one-third by the provincial diet and two-thirds by the recognized agricultural, commercial, and craft organizations. The Water Board consists of a chairman and permanent members qualified for judicial and superior administrative office, and unpaid lay members appointed by the chief executive, all details being left to executive ordinance. It exercises judicial functions and decides in divisions composed of three permanent and two lay members (Water Act, §§367-73). The Im-

perial Insurance Act of 1901 creates a Supervising Insurance Board consisting of a chairman and the "requisite" number of permanent and non-permanent members—the permanent members appointed by the chief executive, the non-permanent members elected by the Federal Council; in addition there is an advisory council of experts appointed by the chief executive on nomination of the Federal Council for terms of five years (§§70-72). It thus appears that there is some diversity in the organization of lay co-operation, and it would be impracticable to enter into details. Lay officers are unpaid or receive per-diem compensation. There is regularly co-operation of lay and professional members on the same board, with a preponderance of professional authority. The system is used both for legislative and judicial, particularly appellate, functions. Clearly it is intended to offset the bureaucratic character of a professional service.

In speaking of the German system, the question naturally arises to what extent it has been or will be modified by the recent constitutional changes; this question is, however, beyond the range of this survey. So far only one of the features outlined appears to be seriously affected: the relation between the Reich and the states in matters of administration. The old method of relying upon state governments was due to historical conditions: the predominant position of Prussia, the desirability of saving the susceptibilities of the southern states, and the close connection of the bureaucracy with the monarchy. This last factor has disappeared. It is likely that the Reich will more extensively administer by its own organs than in the past. But the relation between federal and state government is in any event primarily political and does not necessarily control administrative technique.<sup>28</sup>

<sup>28</sup> See Lassar, "Reichseigene Verwaltung," 14 *Jahrbuch des Oeffentlichen Rechts* (1926), 1-231. This very full discussion, published since the above was written, shows an expansion of direct imperial administration, but apparently it does not affect subjects of legislation, other than revenue, treated in this survey.



## **SECOND: THE REGULATION AND OPERATION OF POWERS**

## CHAPTER IV

### THE CHOICE BETWEEN ENABLING AND DIRECTING POWERS

§30. *Actual practice.*—The traditional form of administrative control of private action in Anglo-American legislation has been through enabling powers exercised by way of license, permit, consent, approval, or certification. The question of a choice between these and administrative directing powers (orders) could hardly arise before the latter had become well established and familiar to legislators, and this development did not take place until after public utility statutes had passed beyond their initial stages. Under these circumstances, the almost exclusive reliance of federal interstate commerce legislation, until quite recently, upon directing powers is a striking fact; it must be explained in part by the influence of English precedent (although in England the power was judicially exercised), and in part by the fact that a purely tentative form of power seemed appropriate to a purely tentative legislative policy. Important enabling powers were first introduced into interstate commerce legislation by the Transportation Act of 1920.

The Interstate Commerce Act, in its turn, has been of influence in subsequent federal trade legislation: both the Federal Trade Commission Act and the Packers' Act operate through directing powers. Federal food control, on the other hand, relies a great deal on license and certification. In the control of shipping, directing powers are less important than enabling powers. Trade legislation in the states is largely licensing legislation; the same is true of the control of professions; and in banking and insurance legislation directing powers are on the whole of recent date. In the protection of health and safety the legislative tendency is to rely upon both classes of powers, while morals legislation (liquor and public amusements) has always been conspicuous for its use of licensing powers.

Altogether, there is a wider use of enabling than of directing powers in American legislation. This is still more true of English legislation, while in Germany the two forms of power appear to be more evenly balanced; in the German Trade Code a distinct policy appears of superseding license requirements by powers of prohibition.

§31. *Administrative considerations.*—From the point of view of the administrative official, there are considerations that seem to tell in favor of the enabling power. It operates automatically, putting the burden of moving upon the individual affected, making the official action merely responsive to an application, with all the advantage that this implies. The mechanics or technique of the permit may be, and usually is, simpler than that of the order; and in the case of a contest, the incidental delay operates against the individual. For if an order is issued and it is disobeyed, a penalty is incurred which must be enforced by judicial proceedings. If the individual so chooses, he may at his risk disregard the order upon the theory that it is inoperative if unwarranted by the facts, and by appealing from a conviction he may delay enforcement until the conviction is confirmed on appeal; or he may, if the order is backed by summary powers, sue to restrain the authority from interfering, in which event he may induce the court to keep the injunction in force until it is finally dissolved on appeal. On the other hand, the permit requirement normally makes an act without permit unlawful, although the license is illegally refused, the individual's remedy being by mandamus to compel the permit; and this mandamus, in case the authority should appeal from a favorable decision of the lower court, may be rendered inoperative until after the appeal has been decided in his favor.<sup>1</sup>

Inasmuch as the directing power does not operate automatically, its effective exercise requires either systematic inspection or the possibility of reliance upon adverse interests that will be alert to detect conditions calling for intervention and bring them to the attention of the authorities. There can be no such reliance where the adverse interests are economically dependent, which accounts for the importance of inspection in factory legislation and for the pitiful inadequa-

<sup>1</sup> This distinction disappears under the decision of the Federal Circuit Court of Appeals for the Seventh Circuit in the case of *Chicago v. Fox Film Corporation* (1918), 251 Fed. 883. The court granted an injunction restraining the police officials of the city from interfering with a performance which they had refused to license, although under the city ordinance the production of the film without permit was illegal. The appellate court sustained the injunction in a brief opinion, and the particular point that, even conceding the right to relief, the method pursued was irregular, was not noted by the court and does not appear to have been strongly pressed by the city. The fact that the federal district courts cannot issue mandamus may have been of influence. The Supreme Court of Illinois does not permit an injunction in such cases (*Grace Church v. Zion City*, 300 Ill. 513). See also the observations on unreasonable delay in *Smith v. Illinois Bell Telephone Company* (1926), 270 U.S. 587; §54, *infra*.

cy of the older provisions to insure proper conditions for seamen.<sup>2</sup> While the licensing power may be likewise aided by appropriate requirements of notice to adverse interests, it is not equally dependent upon their co-operation; and such co-operation is usually dispensed with.

On the other hand, a licensing or certification requirement may be administratively undesirable if a great number of cases to be passed upon renders its execution unduly burdensome; and if the requirement is in consequence handled in a perfunctory fashion, it may tend to become a mere fiscal exaction; that tendency appears to have been the cause of the abrogation of the inspection laws in New York in 1846. It was probably also the great number of tariff changes in connection with railroad rates that led Congress in 1910 not to require preliminary approval, but mere notification. However there may be countervailing considerations that make certification desirable notwithstanding a great resulting burden upon the administration: the most conspicuous illustration is to be found in the federal inspection and certification of meat products for foreign export, intended to disarm foreign objections to the admission of American meat.

§32. *Legislative considerations.*—From the point of view of legislative facility, the directing power offers the advantage that it can be conferred as a blanket power by mere reference to general categories of abuse or illegality, without specification of the classes of business or activities in connection with which they arise; while licensing requirements must be specific. This difference is commented on in the chapter setting forth the administrative powers under the health legislation of New York, which vests boards of health with power to issue orders for the protection of health in the most general terms, while the state law itself contains only few license requirements, which naturally have to be imposed for enumerated acts or conditions. It was possible for the Federal Trade Commission Act to provide for orders with reference to the entire range of interstate and foreign commerce; while a policy of license requirements would have had to single out specified classes of concerns and practices, which would have been a very much more complicated task and would probably have presented practically insuperable difficulties. On the other hand the legislative task of making provisions effective against resistance or non-observance is simpler in the case of license requirements than it is in the case of directing powers.

<sup>2</sup> See §185, *infra*.

§33. *Private-interest aspect.*—If the matter is considered from the point of view of private right rather than of administrative or legislative convenience, the relative position of the two classes of powers may be a matter of some doubt. Advance certification is a convenience to private interests, which usually know how to accommodate themselves to license requirements. These tend to assume a formal and routine character (which can never be true of directing powers), and also lend themselves to the exercise of personal influence.

On the other hand, as a matter of abstract right the individual occupies a better position in the face of a directing than of an enabling power. The procedural advantage has been explained before. And a deliberately liberal policy of legislation may recognize this by changing enabling into directing powers. This may result in the establishment of a system intermediate between license requirement and occasional corrective intervention, and which may be designated as a "veto system." The method is to require the individual to give notice of his proposed action to the administrative authority, which is then given an appropriate time to forbid the action; but after the lapse of the designated time without administrative prohibition, the individual is free to proceed. The system may or may not exclude subsequent corrective intervention by new orders.<sup>3</sup> Administratively this ranks with license requirements, since it constitutes a routine check; while legally it ranks with directing powers, throwing the affirmative with consequent burden of making a case upon the administration. This is the method of dealing with rate increases under the act of Congress of 1910, which however, as noted before, appears to have been induced simply by considerations of convenience. The adoption of the system has been plainly due to consideration for private right in the English Theatre Act of 1843 and in the Town Improvement Clauses Act of 1847 (§§38-41, 110, 111), and in the Prussian Mining Law and the German Trade Code as regards mine or factory regulations made by the owner. It is impossible to discover in America any distinct legislative policy in favor of the veto system.<sup>4</sup>

<sup>3</sup> Note also the form: operative two months after submission unless sooner approved, but disallowable at any time (English Railways Act, 1840).

<sup>4</sup> In the case of corporate consolidations depending upon approval, there is also the inconvenience of the unfavorable effect of premature publication of plans upon bargaining power. See observations of the Interstate Commerce Commission in disallowing the proposed merger of the M. K. & T. R. Co. with the St. L. & S. W. R. Co. (— I.C.C. —, 124 *Com. & Fin. Chron.*, 2984, 2986 [1927]).

§34. *Bearing on discretion.*—The choice between enabling and directing powers has also a bearing upon the matter of administrative discretion.

Normally an enabling power is conditioned upon compliance with statutory requirements, while a directing power is conditioned upon default or delinquency. The legislature has it in its power to frame its requirements in such a manner, particularly as to proof, that the enabling power can be exercised upon a readily ascertainable basis. Default or delinquency on the other hand tend to proceed in devious and elusive forms, so that it is difficult to lay down definite criteria for establishing them. Hence it is possible to eliminate discretion from the grant of a license entirely, and enabling powers tend toward routine administration; whereas a directing power is rarely entirely devoid of discretion, and it is difficult to conceive of a successful application to a court to compel an officer to issue such an order.

On the other hand, the freest kind of discretion is more easily granted and exercised in connection with a permit than with an order. For if the legislature chooses to give power on the basis of unspecified factors, such as public advantage or detriment, the possibility of exercising an enabling power adversely by a mere negative gives freedom of decision; whereas the adverse exercise of the directing power involves an affirmative with corresponding burden of making out a case, and the incidental procedural checks invest the adverse decision with a judicial character which makes it more susceptible to review.

The effect which the introduction of hearing requirements into the exercise of enabling powers may have in reducing the latitude of discretion will be discussed later on.<sup>5</sup>

§35. NOTE: *The Armour-Morris case.*—The foregoing somewhat abstract observations upon the difference between enabling and directing powers may be illustrated by reference to the case of the merger of the two packing firms of Armour and Morris in Chicago. The Packers' Act of 1921, like the Federal Trade Commission Act upon which it was in part modeled, contains no license requirements; but while this absence in the Trade Commission Act was due to inherent difficulties of specification, it would have been easy in 1921 to require official consent to consolidations of packers, as had been done with regard to carriers in 1920. Congress apparently preferred in the Packers' Act to avoid advance certification and sanction, but gave the Secretary of Agriculture merely a power of corrective intervention in case of an attempt at monopoly. Before acquiring the Morris concern, the Armour interests desired to sound the administration on its prospective attitude. Senator La Follette, perhaps not improperly, protested against any advance bargain, but in his turn procured the passage of a Senate

<sup>5</sup> See §55, *infra*; also §137, *infra*.

resolution calling upon the Secretary of Agriculture to report what action, if any, he had taken or contemplated in respect to the proposed merger. Naturally the government stood upon its inability to commit itself before a case for its intervention had arisen. At this stage a permit might have appeared desirable to the parties concerned. After the purchase had been consummated, the Secretary of Agriculture instituted a complaint, charging monopoly; and this proceeding continued from February, 1923, to September, 1925, when the complaint was dismissed by a succeeding Secretary of Agriculture for lack of evidence establishing a monopoly, without prejudice to further proceedings upon the future appearance of forbidden practices. A permit would of course have been preferable to this long drawn-out administrative proceeding; however, it may well be that the law operated favorably to the private parties. For if there had been a license requirement, and in connection with it a discretion had been vested in the Secretary, and if, in view of the strong political opposition, the Secretary had refused the permit, the only chance for the parties in interest would have been to obtain a mandamus on the ground of abuse of discretion or of its illegal exercise, and it might have proved impossible to establish a case for judicial intervention. By providing for a prohibiting order, the affirmative and the consequent burden of proof was thrown upon the government, which found it impossible to meet it even in an administrative proceeding. Or, had the administrative proceeding been successful (it was the Secretary who conducted the case before himself) a judicial overthrow upon the basis of the record would have been easier than the obtaining of a judicial order compelling the favorable exercise of discretion.

## CHAPTER V

### NON-DISCRETIONARY ADMINISTRATIVE DETERMINATIONS

§36. *Non-discretionary and ministerial.*—It is common in speaking of administrative powers to use the term “ministerial” as the opposite to “discretionary.” Abstractly speaking, however, while every ministerial act is non-discretionary, it is not equally true that every non-discretionary act is ministerial. This appears when we attempt to extend the terminology to judicial powers; for courts in adjudicating controversies, while they have to exercise discrimination of a high order, are not, except in a few cases, vested with discretion, yet their judicial acts are not designated as ministerial. And even within the sphere of administration, the act of a chief executive (e.g., in surrendering a fugitive from justice) may be non-discretionary without being called ministerial; the Supreme Court in the case of *Decatur v. Paulding* (14 Pet. 497) therefore made a distinction between executive and ministerial acts. On the whole it is more accurate to oppose “discretionary” and “non-discretionary,” although the familiar term “ministerial” should be freely used when there is no danger of confusion.

The aspect under which the difference of non-discretionary from discretionary presents itself in a study of administrative powers, is that of a private right to the exercise of the power, and it is therefore only necessary to deal with enabling powers or licensing requirements. Not that a directing power may not also be non-discretionary (e.g., in the case of an income tax assessment, or of an order of deportation in an appropriate case), but the question of official duty as distinguished from official power will rarely, if ever, be made an issue either in an administrative or in a judicial proceeding.

§37. *Non-discretionary factors in discretionary powers.*—Many statutes which confer discretion in connection with enabling powers establish in addition to the discretionary matter other prerequisites or conditions not involving any element of discretion. These then operate in either of two ways: either the statute is so worded as simply to forbid the favorable exercise of discretion in the absence of the definite conditions, leaving unfavorable action discretionary as to the entire range of conditions, or the statute confines discretion to one ele-



ment or condition, giving a right to favorable action, if by reason of undisputed or conceded facts the adverse exercise of discretion granted with regard to these becomes impossible; in the latter case the administrative determination is pro tanto non-discretionary. The latter type is illustrated by statutes regulating admission to professions, where discretion may be confined to character qualification, the former by statutes which, after enumerating qualifications, add the words "in their discretion," or "if deemed proper" (residuary discretion).<sup>1</sup> Observations regarding non-discretionary action apply both where the action is entirely and where it is only pro tanto non-discretionary.

The legislative intent to make the administrative action ministerial is clearly expressed by using the term "shall," which is not uncommonly found in licensing statutes. The instances are pointed out in the descriptive part of this survey and are too numerous to be cited. The emphatic term "shall, without question or objection" in connection with the grant of fishing licenses under the English law deserves notice as a curiosity. The term "may" is not inconsistent with a pro tanto ministerial determination, involving discretion only with regard to specified factors or considerations.

§38. *Passing on facts.*—Action is non-discretionary where the only question to be passed upon by the officer is one of fact, the fact itself being objectively certain. The marriage license is typical of this class of cases. The law permits a license only for a valid marriage, and the clerk should refuse it if one of the applicants is already married; and he may be given power to ascertain the existence or non-existence of the impediment by questioning the parties. He has no judicial power to determine the fact, for a wrong decision on his part does not validate a forbidden marriage, just as he has no power to determine the law, although he will of course refuse the license if the facts stated in the application reveal a legal impediment. His action is correctly held to be ministerial, for ordinarily there is no issue, either of law or of fact, and if there is one, its decision will be left to a court.

§39. *Evidential requirements.*—Where an administrative finding of fact must in the nature of things be practically conclusive if it is in favor of the individual and there is at the same time a serious risk of error or carelessness or wilful indifference to truth, the law may tie the certifying official, and thereby mark the ministerial nature of

<sup>1</sup> For a case confining discretion, notwithstanding such a phrase, to the enumerated particulars, see *State v. Justices*, 15 Ga. 408.

the function, by prescribing in detail the evidence to be accepted by him: the typical illustration of this is to be found in the age certificates required in connection with the employment of children or young persons (New York Education Law, §631, subd. 12; English Factories Act, §64). In other cases evidence requirements aim chiefly to prevent imposition upon the official, and care should then be taken that they are not made unduly burdensome, thereby impeding the establishment of qualification requirements; it has been charged that this is the effect of the provisions of the Naturalization Act of 1906 concerning the proof by witnesses of the prescribed five years' continuous residence in the United States.<sup>2</sup> On the other hand, a statute may permit the official to dispense with the normally prescribed evidence, if he is satisfied that it cannot be obtained (Tariff Act, 1922, §484).

§40. "*Satisfactory*" evidence.—There are statutory provisions which make the exercise of enabling powers dependent upon the establishment of the necessary conditions by evidence satisfactory to the official (or words to the like effect)—so where the Federal Act of 1907 permits a statutory presumption of repatriation to be overcome by evidence satisfactory to diplomatic or consular officers under rules of the Department of State. The phrase is also used in the English Companies Act of 1908 (§255), the Friendly Societies Act of 1896 (§34), and the Merchant Shipping Act of 1906 (§51). Such a provision appears to vest a discretion as to proof; but since in any event legal proof must be accepted as sufficient, it should be interpreted as meaning that the official may be satisfied with less than legal proof, or, in other words, as a sort of dispensing power.<sup>3</sup> In the presence of legal proof his action is non-discretionary. In German legislation it is not uncommon to substitute probability (*Glaubhaftmachung*) for proof as the basis of official certification or license.

To permit adverse administrative action on less than legal evidence is in substance equivalent to giving discretion with reference to matters of fact. The provision of the National Bank Act (R. S., §5169) to the effect that the comptroller may withhold his certificate whenever he has reason to suppose that the association is formed for

<sup>2</sup> John Palmer Gavit, *Citizens by Choice*, pp. 126-35.

<sup>3</sup> The wording of the statute may be such as to require both proof and satisfaction of the officer—so the Chinese Exclusion Act, May 5, 1892, §3: "shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner." See 118 Fed. 442, 455-59; 223 U.S. 673, 681.

any other than the legitimate objects contemplated by the act, is of this character, but such a power appears to be exceptional.

§41. *Action on basis of statements.*—If it is the legislative purpose to eliminate even the extent of administrative power that is involved in the finding of facts, it is possible to do so by requiring the favorable exercise of the power upon the basis of statements in the application showing the legal prerequisites. Such statements must of course form the basis of a permit where it relates to matter to be carried out in the future, e.g., plans and specifications; and statements are also commonly required where the official must in addition be satisfied that the requirements as stated have been complied with (e.g., in the New York Insurance Law). Perhaps the most prominent instance of deliberate substitution of statements for facts to be ascertained was the New York Liquor Tax Law of 1896 (Raines Law), now superseded by the Eighteenth Amendment. The provisions are fully set out elsewhere.\* The required statements cover all requirements and prohibitions connected with the retailing of liquor, and they are enforced by full bonding provisions. It is only with reference to the sufficiency of the sureties that any approving or disapproving power exists; otherwise the certificate must be issued if the application is found to be correct in form and does not show on its face that the applicant is disqualified. False statements, in addition to being punishable, entail forfeiture of the certificate (§§15, 16, 17, 36, of the Liquor Tax Law). Both under American federal and under English legislation the registry of a ship is likewise based on declarations without any duty or power to inquire into their truth (U.S. R. S. §§4141, 4142, 4143, 4320; Merchant Shipping Act, 1894, §§1-14; also as to sale of ship *ibid.*, §§39-46, 60).

§42. *Mere registration.*—It is a further step in the same direction to dispense altogether with official certification as the enabling act, or reduce it to the mere function of authenticating the completion of the steps which the law requires of the parties themselves, to entitle them to a certain right or status. Incorporation is effected in this way under the Stock Corporation Law of New York, under the English Companies Act, and under the German codes. The provisions of the New York law are explicit: "three or more persons may become a stock corporation . . . by making, subscribing, acknowledging, and filing a certificate . . . which shall state: etc." (Stock Corporation Law, §5). The Secretary of State is merely required to index (General

\* See §234, *infra*.

Corporation Law, §5). A certificate of compliance from the Secretary of State is, however, required in the case of a foreign stock corporation (§110). The English Companies Act, 1908, provides that persons may form an incorporated company by subscribing a memorandum of association and otherwise complying with the requirements of the act in respect of registration (§2); the memorandum is delivered to the registrar who certifies that the company is incorporated (§16), and his certificate has the advantage of being made conclusive evidence of compliance (§17).

The difference between requiring certification, but making it purely ministerial, and requiring only registration while dispensing with certification as a requirement, will in many cases be practically inconsiderable (though in the latter case there is eliminated the risk of official delay or what has been called the "red tape of applications, inspections, and official sanctions"), so long as registration is made a condition precedent to status or validity. Where this is the case, the possible civil hardship resulting from non-registration makes it, as it were, automatically effective, and makes it possible to dispense with penalties; thus, while the American law imposes a penalty for failure to register a ship, the English law does not (though there is a power to detain an unregistered ship), relying upon the manifest difficulty of operating a ship without national status or papers. This sanction of invalidity or lack of status is, however, meaningless in some cases, e.g., where an oleomargarine-manufacturing establishment is required to be registered (English statute), and a penalty is then indispensable.

The substitution of a mere penalty-sanctioned registration requirement for a certification requirement, though the latter be ministerial in character, assumes special significance where it is a deliberate method of eliminating official control. We find it used in this way in the history of political legislation both in France and in Germany. Thus the German Press Law of 1874 requires that a copy of each number of a periodical publication be delivered to the police against immediate receipt; but while failure so to do entails a penalty, it does not warrant confiscation of the issue (§§9 and 19). In like manner, the Association Law of 1908 requires notification of the authorities of each public political meeting, the notification to be immediately acknowledged; there is a small penalty for non-notification, but the meeting is not thereby rendered unlawful (§§5 and 6). The provisions of the French law of June 10, 1881, are similar. The provision for an immediate receipt acknowledging the notification, and the framing of

penal provisions in such manner as not to affect status or validity by reason of failure to notify, seem essential to this type of legislation. As a form of policy it seems to be unknown to English or American legislation; but in New York the provision for parades happens likewise to be a mere notification requirement (City Law, §5; New York Charter, §1457).<sup>5</sup>

§43. *Conclusion.*—A view of the entire field of legislation operating with the aid of licensing or certification requirements fails to reveal a clear principle determining the choice between granting or withholding discretion. It is not easy to account for the stressing of discretionary powers in the Banking Law of New York and the preference of non-discretion in the Insurance Law of the same state, as well as in the federal legislation concerning national banks. New York chose non-discretion for the liquor traffic, but retained discretion in dealing with amusements. It does seem that a long-established control, and particularly where the controlled interests are strong and alert, tends toward non-discretion; merchant-shipping legislation may be cited in confirmation of this. English liquor-licensing legislation may be cited to the contrary, but the retention of discretion there is part of a deliberate policy of a gradual curtailment of the traffic. The more carefully legislation is worked out, the more marked are the provisions for circumscribing discretion; while some recent instances of strong accentuation of discretion mark an apparently experimental and not fully developed policy, e.g., in the control of public utilities.

One who favors non-discretion may be tempted to see in the trend of legislation a gradual movement toward substituting rule for discretion; in any event, the observation may be hazarded that a policy of non-discretionary determination once adopted is not readily abandoned, thus proving this type of action to be effective for purposes of control.

\* Registration requirements should be judged in the light of their secondary provisions. If the proposed law for registering aliens in the United States should provide that failure to register has the effect that the alien is unlawfully in the United States, it is a requirement of undue hardship; for registration requirements imposed upon persons in their private capacity are notoriously liable to be overlooked, and almost inevitably so, if periodical re-registration is required.

## CHAPTER VI

### ADMINISTRATIVE DISCRETION

§44. *Meaning of discretion.*—When we speak of administrative discretion, we mean that a determination may be reached, in part at least, upon the basis of considerations not entirely susceptible of proof or disproof. A statute confers discretion when it refers an official for the use of his power to beliefs, expectations, or tendencies instead of facts, or to such terms as “adequate,” “advisable,” “appropriate,” “beneficial,” “competent,” “convenient,” “detrimental,” “expedient,” “equitable,” “fair,” “fit,” “necessary,” “practicable,” “proper,” “reasonable,” “reputable,” “safe,” “sufficient,” “wholesome,” or their opposites. These lack the degree of certainty belonging even to such difficult concepts as fraud or discrimination or monopoly. They involve matter of degree or an appeal to judgment. The discretion enlarges as the element of future probability preponderates over that of present conditions; it contracts where in certain types of cases quality tends to become standardized, as in matters of safety; on the other hand, certain applications of the concepts of immorality, fraud, restraint of trade, discrimination or monopoly are so controversial as to operate practically like matter of discretion. In other words, there is no sharp line between questions of discretion on the one hand and questions of fact on the other; and where an administrative finding of fact is permitted to be conclusive, it will usually be a case on the border line between fact and discretion. It may be practically convenient to say that discretion includes the cases in which the ascertainment of a fact is legitimately left to administrative determination.

The subject of discretion will be discussed under the following heads: (1) inherent differences in discretion, (2) prudential discretion in legislative practice, (3) mediating discretion in legislative practice, (4) terms and provisions affecting the scope of discretion, (5) unqualified discretion, (6) subordination of discretion to scope and policy of statute, (7) discretion as a matter of abstract construction and as a matter of actual practice, (8) the function of discretion.

§45. *Inherent differences in discretion.*—Quite apart from the effect of statutory qualifications, to be discussed presently, and apart also from the natural effect upon the official mind of the difference

between the two alternatives of favorable or adverse exercise of discretion, there are gradations in the freedom of discretion dependent upon the nature of subject matter and the considerations involved. They may be put as follows:

(a) *Entire freedom, so that practically no issue as to correct or incorrect exercise can be made successfully on the basis of facts.*—Such freedom will exist in two cases: First, where the discretion is in the nature of a power to relax the normal operation of a statutory provision (relaxing discretion, dispensing power). The refusal to relax is of course an adverse exercise of discretion, but the result is merely that the general statutory policy prevails. Theoretically an issue might be made upon the principle of equality, where undue discrimination is practiced in the exercise of the discretion; but administrative law remedies have not been developed for that purpose, and the enforcement of a possible constitutional doctrine would operate to nullify the power rather than its exercise. The practical tendency is all toward the favorable exercise of a relaxing discretion, with a strong presumption against the equity of a claim to relaxation where the discretion is adversely exercised; the absence of judicial cases may be accounted for on that ground. The subject of dispensing powers will be separately considered. Second, where there is a power to choose between two equally legitimate determinations. The legislature has expressed its sense of indifference as between two or more specified courses, and has thus approved in advance what might otherwise be an adverse exercise of administrative discretion. Thus a power to grant a hearing raises the ordinary question whether there is a discretion and on what principles it should be exercised; but where there is express power to make a determination "with or without notice, hearing, or the making or filing of a report" (Interstate Commerce Act, §1 [15]), it is clear that the discretion is meant to be entirely free.

(b) *Considerations of expediency.*—These relate to the prospect of advantage or disadvantage offered by a proposed course of action or undertaking, e.g., the construction and operation of a new railroad. A discretion of this type may be designated as "prudential discretion." It is a perfectly normal type of discretion to be delegated by the state to officials in dealing with the state's own property, resources, or services,<sup>1</sup> but presents obviously a totally different problem where

<sup>1</sup> As to the delegation of discretion in connection with congressional appropriations, see "The Need for a National Budget," 62d Congress, 2d Session, Document No. 854, pp. 94-112. For an attempt to control the discretion of Federal Reserve banks in making loans, see Federal Reserve Act, §4.

it is a power to veto or require an undertaking which will have to be conducted on private responsibility and at private risk. Since the controlling considerations are generally of a conjectural or speculative character, the scope of the discretion is correspondingly wide.

(c) *Considerations of fairness.*—These relate to the equivalence of service and return, and involve questions of value and of reciprocal accommodation. The main problem is that of a just and reasonable rate. In English legislation the determination of wages in certain classes of industries is of a similar character. The discretion may be designated as "arbitral" or "mediating." The mediating character appears to be clearly recognized in the machinery adopted for settling wage disputes. The process of rate-making endeavors to find an objective basis; and if that should prove possible, it would represent a different grade of discretion. At present it operates with the semblance of a scientific apparatus, the foundations of which are controversial. The check upon discretion lies in the judicial recognition of absolute constitutional rights, but short of the protection of these the discretion is a wide one.

(d) *Considerations of conformity.*—The criterion is a conventional standard of right or wrong. The standards may vary for different fields of action or surroundings, and a divergence from common standards may be sanctioned or demanded by special traditions and conventions. The censorship of plays or films presents a conspicuous illustration of this type of discretion, which is perhaps best designated as "censorial." The latitude of the discretion results from the inherent difficulty of standardizing the limits of tolerance; practically the choice lies between grant of freedom within the limits of the criminal law and subjection to discretionary control.<sup>2</sup>

(e) *Considerations of fitness.*—These constitute the most familiar type of discretion, to which the term "judicial," or "quasi-judicial," is frequently applied; if that term seems undesirable, the terms "expert discretion" or "technical discretion" may not be inappropriate. This discretion relates to questions of safety, health, traffic, finance, professional competence, or serviceability of commodities, equipment, or improvements. It has a bearing upon the freedom of choice between favorable and adverse determination, whether the fitness relates to personal or impersonal qualities, to intrinsic condition or the relation of a condition to extraneous factors; thus where power is given to declare an assembly unsafe by reason of the uncontrollable

<sup>2</sup> See, as to this, the concluding observations in the discussion of legislation concerning morals, §239, *infra*.



reactions of others which may produce a breach of the peace, the consideration really shifts from fitness to expediency. On the other hand, as before noted, fitness may become so standardized as to present a question of fact rather than one of discretion.

(f) *Considerations of regularity.*—Quite commonly the obvious expectation of the legislature in giving an apparent discretion to grant or withhold consent is that in the ordinary run of cases the consent will be forthcoming as a matter of course and will be withheld only on grounds plainly implied in the law or in case of manifest impropriety. We may then speak of a “reserve discretion.” Many cases of unqualified discretion are of this type, and they will be further discussed under that head.

§46. *Prudential discretion in legislative practice.*—The recognition of a general principle of freedom of pursuing any lawful business is not inconsistent with qualification requirements checked by license, but is inconsistent with the requirement of an official finding whether or not a particular proposed undertaking is or not in the public interest. The same is true with regard to any particular transaction in connection with a business, and liberty is even more curtailed by an official power to require action in the public interest than by a restraining power. The subjection of private action to a prudential discretion represents therefore the strongest kind of government control.

While the nineteenth century development of trade and industry resulted in a strong sentiment in favor of private liberty—expressed particularly in the gradual recognition of the right to corporate organization—there was also a general consensus that certain classes of business could not have such liberty. There was no occasion to formulate the principle of unfreedom abstractly. In the two most conspicuous cases—railroads and banking—the conduct of the business was usually attended with the exercise of privilege, the exercise of the power of eminent domain, and the issue of notes to circulate as money; banks not claiming the exercise of the latter privilege were free; in Germany the principle of unfreedom also applied to insurance, to higher education, and to all forms of organized activity for non-economic purposes. Prior to the enactment of general incorporation laws, moreover, every undertaking desiring corporate organization had to seek special government authority. In Germany, furthermore, it has long been recognized that the conduct of certain local businesses, the multiplication of which appeared socially undesirable, may also be restricted by reference to local need; this principle is applied chiefly to the retailing of

spirituous liquors, to pawnbrokers, and to employment agencies. Without explicit provision to that effect, it is clear that the present English Licensing Act of 1910 pursues a similar policy.

The government consent required for the "unfree" classes of business (other than petty local trades) was given by the sovereign authority directly, in Germany by the monarch, in England and America by the legislature. In England it took the form of what became known as "private bill legislation" and was obtained through a gradually standardized procedure. Parliament by a self-denying ordinance substituted rule for discretion in the exercise of its power, but by retaining the requirement of a special act for each undertaking, marked the political character of the control. There was some delegation of its authority with reference to light railways in 1896—later on also with regard to electrical works (1899, 1919)—but it is interesting to note with what solicitude Parliament reserves to itself the chance of a last word. For details, reference is made to the descriptive part of this survey.<sup>3</sup>

In America the grant of special charters by the legislature never became regularized,<sup>4</sup> and fell into disfavor. In New York, without being absolutely prohibited, it was practically superseded by general enabling acts operating with a minimum of, or without, administrative intervention. From 1850 to 1892 even the organization of railroads was absolutely free; indeed, during this period there was no business that remained "unfree" in the sense here indicated under the laws of New York. As for federal legislation, Congress during the nineteenth century exercised no effective control over railroads; the subject of insurance was beyond federal powers, and national banks were authorized by general legislation in 1863 upon the principle that the business was open to anyone upon compliance with the statutory prerequisites.

The revision of general laws in New York in 1892 brought two changes in the direction of unfreedom by establishing administrative control on the basis of expediency: the Superintendent of Insurance was authorized to refuse a certificate to a foreign or unincorporated insurer if in his judgment the refusal would best promote the interests of the people of the state, and the revised Railroad Law required

<sup>3</sup> See §163, *infra*.

<sup>4</sup> For some systematization of legislative control over public utilities see L. D. White, "Origin of Public Utility Commissions in Massachusetts," 29 *Journal of Political Economy* 177.

for the construction of a new railroad a certificate of convenience and necessity ("that public convenience and necessity require the construction," etc.). Upon refusal of the latter certificate, application may be made to the Appellate Division of the Supreme Court which for reasons stated by it may in its discretion order the issue of the certificate (§59, now §9). The requirement is repeated for railroads, and a similar certificate required for other public utilities, by the Public Service Commission Law of 1907, the statute providing in each case that the Commission shall grant permission and approval when it shall, after due hearing, determine that construction or operation or exercise of franchise or privilege is necessary or convenient for the public service (§§53, 68, 81, 99), but without the appeal provision contained in the Railroad Law.

The Public Service Commission Law also authorizes the Commission to order improvements or additions and changes in the interest not merely of security (which would represent expert discretion) but also of convenience and adequate service. The only qualifications are reasonableness and provision for a hearing (§§49-51, 55, 66, 97).

In 1908 (c. 125) New York introduced a discretionary consent requirement for the business of banking, and extended it to private banks in 1914, the provision being that the Superintendent shall ascertain from the best sources at his command and by such investigation as he may deem necessary, whether the public convenience and advantage will be promoted by permitting the proposed bank to engage in business; for savings banks the law also refers to greater convenience of access to depositors, density of population, and prospect of adequate support.

In 1910 the power of the Superintendent of Insurance to refuse a certificate when the refusal is for the promotion of the best interests of the people, was extended from foreign and unincorporated insurers to domestic corporations. In the case of promotion schemes it is not the refusal but the grant of the permission that is conditioned upon the promotion of the best interests of the people (§66).

Congress began only in 1920 to delegate the widest type of discretion to any considerable extent. Until then the Interstate Commerce Act did not operate through consent requirements (excepting the dispensing power under section 4), and the service obligations were in the main directly imposed; thus the act of 1906 established the duty to grant switch connections, and merely left it to the Commission to determine practicability, sufficiency of business, and reasonable

terms. In 1912 the Commission was authorized to "establish" (order?) physical connections between rail and water carriers when reasonably practical and justified by a sufficient amount of business, and to determine terms and conditions of operation (now §6 of the act). The Transportation Act of 1920 introduced the certificate of convenience and necessity (that present or future convenience or necessity will require or permit, etc.) and required such certificate for extension, acquisition, new construction or operation, and abandonment (§1, Nos. 18 and 19); also for stock acquisition ("if in the public interest" [§5, No. 2]); for consolidation (finding that the public interest will be promoted [§5, No. 6]), for interlocking directorates (showing that neither public nor private interests will be unduly affected [§20a, No. 12]), and for pooling arrangements (interest of better service or economy of operation, not to restrain competition unduly [§5, No. 1]). The law now also authorizes the Commission to order, after hearing, adequate facilities in aid of car service, and extensions reasonably required in the interest of public convenience and necessity, the expense of neither to be such as to impair the ability of the carrier to perform its service to the public (§1, No. 21).<sup>5</sup>

As pointed out before, public utilities have always required special authorization in England as they do now in America; but the development of the law has been such that the act of authorization, being a special act of Parliament, remains a political act, and yet is so highly standardized as to preclude any substantially free discretion. Delegation of this discretion in particular classes of cases (light railways) has been qualified by reserving parliamentary veto powers; and at the same time the procedure of granting the "special order" is so elaborate as to give it almost the character of a judicial determination

<sup>5</sup>The terms of discretion in connection with the authorization of issues of securities ("lawful object," "reasonably necessary and appropriate," §20a [2]), are apparently intended to be narrower, and are so construed by the Commission. See 105 I. C. C. p. 751: "The terms of the transportation act, literally construed, give to this Commission very broad powers with respect to the issue of securities by railroad corporations. In relying, however, as Congress deliberately did, upon private capital, management, and enterprise for efficient transportation service, Congress, by implication, instructed us in carrying out our regulatory task to leave to management all possible scope, subject to considerations clearly affecting the public welfare. . . . Unless a course of action proposed to us by managers of a railroad corporation definitely threatens the public welfare, it is, I think, our duty to refrain from interfering with managerial judgment, even though the law, literally construed, may give us the power to do so." The discretion is in reality an expert discretion.

between adverse contentions. The appearance of any free discretion is carefully avoided. This policy applies to dealing with the main project of the undertaking; with regard to working agreements between railroads the delegation of discretion is less circumscribed, though the order is still required to be laid before Parliament. The consent requirements for banking and insurance have no parallel in England.

The power to order service facilities is more conservatively bestowed in England than in the United States. For public utilities other than railroads such powers are specified and circumscribed instead of being sweeping as in New York; for railroads the powers before 1921 were so worded and judicially interpreted as to be practically non-existent. The act of 1921 changes this: the Minister of Transports may make comprehensive orders looking to the gradual standardization of railroad operation; they are quasi-legislative and yet technical in character, and are prepared by a representative committee. Other special orders are made by the Railway and Canal Commission; they are merely required to be in the interest of the public, of the trade, or of any particular locality; and they may include minor extensions or improvements not to exceed a specified cost. The orders are not to be made, if the necessary capital expenditure will prejudicially effect the then existing shareholders. The phrasing of the law is more cautious than that of the Interstate Commerce Act.

The Interstate Commerce Act contains, in addition to the directing powers above mentioned, two others involving a wide prudential discretion: the power to require the use of the terminal facilities of one carrier by another (§3, No. 4), and the power to require physical connections between rail and water carriers (§6, No. 13). The provisions of section 1 as to finding of public convenience and necessity are made applicable to the latter power; no form of procedure is required for the former, but there must be a finding of public interest and of practicability without substantial impairment of the owner-carrier's ability to handle his own business; and there is the special provision that the terms of compensation are subject to judicial review.

Co-operation between common carriers in aid of transportation service is a substantive duty established by legislation. There is no common-law duty of co-operation on the part of owners of property so situated that joint use in specified respects would be reciprocally advantageous. There is, however, legislation for joint improvement in the matter of drainage of wet lands. An undertaking of this kind in-

volves considerations both of practicability and of expediency. In most American states this matter is handled judicially; however, in New York, in England, and in Germany the proceeding is administrative. The determination of public interest (which as a matter of form is regularly required in addition to the joint interest) is clearly an exercise of prudential discretion. The justification of such power lies in the tying of interests through natural conditions, and in the "uniqueness" of land which makes it impossible to substitute general rules for particular determinations. The reluctance to interpose public power in such a situation is characteristic of the American law; German legislation is more "socialized" in this respect.

The general policy of all systems of law not to force an unwilling owner into the economic use or exploitation of his property is probably due, in part at least, to the impossibility of working such a policy without recourse to administrative discretion of the prudential type. In Germany two exceptions to this policy are recognized, the one relating to mining, the other to patents. For preponderating reasons of public interest the discontinuance of a mine may be prohibited; the opening of new mines is encouraged by subjecting land to a general servitude of mining in favor of anyone who is willing to search; again, however, for preponderating considerations of public interest, such searching may, in particular cases, be prohibited. The adequate exploitation of patents is one of the conditions of the grant; and the grant of licenses may be compelled, if the public interest requires it and the owner refuses the license on reasonable terms.

The same two exceptions are now also recognized in English legislation. Instead of the perfunctory phrases of the German law, we find, however, an endeavor to specify with care the qualifications of the power. The provisions of the patent law of 1907, and particularly of its amendment in 1919, are instructive in this respect: the conditions justifying the issue of compulsory licenses are meticulously specified and an elaborate definition is given of what constitutes failure of adequate exploitation. Under a law enacted in 1923, the working of a mine by a person other than the owner, if expedient in the national interest, may likewise be permitted only under specified conditions: in addition to the case where it is impracticable to obtain the owner's consent, an unreasonable refusal or the exaction of unreasonable terms may justify the grant of the right.

Neither in the case of mining nor in the case of patents is the compulsion to grant such permits recognized by American legislation.

The place of prudential discretion in administrative powers over persons and property is thus a limited one: it is confined to a very few classes of business, and in these is of recent appearance; but there has been a marked increase in its use. Its extension by the New York amendment of 1910 to the entire insurance business is puzzling, and perhaps not due to carefully considered policy. The certificate of convenience and necessity in connection with public utilities has avowedly a restrictive purpose and represents a new policy; its requirement for the banking business in New York seems likewise to serve a restrictive tendency, though the policy is neither avowed nor clear. The establishment of consent requirements for intercorporate arrangements between public utilities appears to have been due to a perception of abuses without a corresponding perception of remedies. The power to require facilities and extensions represents a very strong assertion of public control, and its limits have not yet been ascertained. On the whole a conservative spirit in bestowing this type of discretion appears to be well justified.

§47. *Mediating discretion in legislative practice.*—The prevailing policy of legislation is to leave prices of goods, wages of labor, charges for services, and rent of property to the free agreement of parties. Apart from the doctrine of constitutional freedom of contract, this policy is due to a conviction that the free play of economic forces, competition, and the law of supply and demand operate more satisfactorily than authoritative determination based upon the theory of an ascertainable *justum pretium*. Where the law forces an owner to permit the exploitation of his property, as in the case of mining or patent licenses in the German and English law, it is inevitable that the law should also provide for the fixing of reasonable terms; but this kind of compulsion is unknown to the American law. We do, however, recognize compulsory joint improvements in the matter of land drainage, and this involves an arbitral discretion in assessing payments on the basis of benefits—a particular phase of the problem of assessment as an administrative function. The irrigation laws of the western states present in addition the problem of apportioning water benefits, which has become a special topic of administrative law in jurisdictions affected by it.<sup>6</sup>

<sup>6</sup> S. C. Wiel, "Administrative Finality," 38 *Harvard Law Review* 447.

The subject of mediating discretion in connection with "tied" interests might be profitably pursued into other branches of law judicially administered. There appears very slight inclination to submit the rights of ownership to such discre-

The established exceptions to the doctrine of freedom of contract have not in the past presented great practical difficulties: the obligation incumbent upon certain public callings, including the common carrier, to render services at reasonable rates was left to judicial enforcement in sporadic cases; the rate of interest on money, where fixed by law, is fixed at a figure higher than the current commercial rate; the rate provisions of early railroad charters or statutes were likewise such as to place no practical restraint upon railroad carriers; moreover both interest rates and charter rates were fixed by the legislature, i. e., by political authority, and the discretion exercised was correspondingly free; the same was true of the many traditionally sanctioned local charge tariffs fixed by authority for cab, porter, and similar services in most European countries.

In public utility legislation there is some power to apportion rates for through traffic which is a relatively small matter as compared with the problem of rate regulation in general; the general obligation of carriers to afford reciprocal traffic facilities is established by mere reference to the principle of non-discrimination, and where the Interstate Commerce Act gives the Commission power to force a carrier to grant the use of his terminal facilities to another carrier, it permits him to go into court to recover damages or compensation (§3, No. 4).

In view of the general reluctance of the law to dictate economic terms, recent legislation dealing with charges through delegated authority has encountered a new problem. The main legislation concerns public utility rates; New York has also legislation regarding insurance rates, England regarding wages, and Congress has dealt with rents in the District of Columbia. All this legislation proceeds upon the theory that the money return for some economic value given or service rendered can be determined otherwise than by free bargaining: either by an imposed compromise or by some objective standard. Practically it is only the money return that is in question; if the law seeks to determine the quantum or quality of service or accommodation to be fur-

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tion, a little more in the civil than in the common law. The Roman law knew an arbitral power to adjust uncertain boundaries; our law goes on the theory that a judgment declares the true boundaries. The German Civil Code recognizes rights to the readjustment of easements unknown to our law. We recognize the power to partition, but without an incidental power to create new easements; and the law of New York is in a curiously obscure state as to the power to liquidate life and remainder interests. Equity jurisprudence has been averse to arrogating to itself any mediating discretion; and legislation has been almost equally conservative.



nished, it does so by reference to public welfare requirements, and not by reference to money paid; it is assumed that the proper amount of money will elicit any desired service. The question therefore always concerns value in terms of money.

The indefinite and often speculative character of the factors involved makes the rate-fixing function an exercise of discretion; and the question is whether the discretion should be classed as a technical or expert discretion or whether it occupies, in the grades of discretion, a place of its own. This question can best be answered by examining the law of railroad-rate regulation through delegated authority, a subject which has had more attention than any other form of administrative power. It is instructive to compare the treatment of the problem in England and in the legislation of Congress. For New York reference may be made to the descriptive part of the survey,<sup>7</sup> from 1892 to 1907 the law was an obvious perfunctory compromise, giving with one hand and taking away with the other, and in practice the power amounted to nothing; in 1907 the law was modeled on the Federal Rate Act of 1906, and in recent years the expanding federal control has left state railroad-rate regulation a matter of secondary importance.

For a full account of English and Congressional railroad rate legislation reference must likewise be made to another part of the treatise.<sup>8</sup> The following is a brief statement of the salient features.

In England there was, prior to 1888, only one act delegating authority: in 1844 the Commissioners of the Treasury were empowered at twenty-one-year intervals to reduce charges in order to reduce profits to a stated percentage. The special railway acts dealt with charges, but without creating administrative powers with reference thereto. The regulating acts of 1854 and 1873 gave no power to fix charges. The act of 1888 made a gesture in that direction but stopped half-way: it gave to the Railway and Canal Commission the power to forbid greater charges for a shorter than for a longer haul, but no jurisdiction by reason of unreasonable rates; complaints concerning these might be taken up with the railway company by the Board of Trade, but could result at most in a report to Parliament. Actual power over unreasonable rates was first given in 1894: an increase might be forbidden by the Commission upon complaint, and the burden of proving reasonableness was thrown on the company. The odium of an adverse exercise of discretion was thus in a large measure taken from the Commission. Finally the act of 1921 gives general power to determine rea-

<sup>7</sup> See §176, *infra*.

<sup>8</sup> See §§177, 178, *infra*.

sonableness in cases where no authorized charge is applicable (§28), but this act deals with charges in a new and comprehensive way. It creates a rates tribunal, partly official and partly representative in character, and requires it to settle standard charges so as to yield a revenue determined by reference to a number of specified data, one of them being the revenue of 1913, with additions specified in part in a definite manner, in part by using such terms as adequate remuneration and insuring maximum development; there appears to be no attempt to base rates on the value of railroad property, but an obvious endeavor to make determining factors as objective as possible.

The rate-fixing power of the Interstate Commerce Commission dates from 1906, since earlier provisions had been deprived of any substantial effect by narrow judicial construction. The power was to find, upon complaint, any rate to be unreasonable, and to declare what should be the reasonable rate with binding effect upon the carrier. This was a greater power than the one at that time existing in England, which operated only in the case of an increase of rates; and in 1910 the provision borrowed from the English law was added, placing in case of an increase the burden of proving reasonableness upon the carrier. In 1913 provision was made for valuing railroads as a basis of rate-making, requiring, however, values based on different theories to be determined separately, i.e., leaving the valuation inconclusive. In 1920 the power was given to establish minimum as well as maximum rates, and rates were directed to be so fixed as to produce a fair return upon the value invested in railroads in the aggregate or in groups of railroads. The fair return was first fixed by Congress, but was left to be fixed subsequently, and is now fixed, by the Commission.

The rate-fixing power of the Interstate Commerce Commission has thus always been a power of corrective intervention, i.e., to be exercised upon a showing that the existing rate is wrong; the shipper may complain that a rate is unreasonably high (the element of discrimination is for the present ignored), the carrier (upon the veto of a proposed increase), that the rate is unreasonably low; since 1920 an unreasonably low rate may also be complained of by a competing carrier or by the Commission. The only standard given at first was reasonableness; this was subsequently sought to be given "objectivity" by fixing valuation and then by fixing a fair return. Both the determination of value and of return are delegated to the Commission—the former in a somewhat inconclusive manner, leaving the last word to the courts; the latter with the guidance of an initial figure set by Congress

which presumably is not to be lowered, and, if lowered, may be scrutinized by the courts with a view to avoiding unconstitutional confiscation. Altogether, however, the bases of rate-fixing are left more indeterminate than they are in the English act of 1921.

The foregoing account of the history of rate-making power in England and the United States hardly makes a good showing for the practicability of a mediating administrative discretion; a mere standard of reasonableness will not in the long run be a satisfactory basis for a delegated power to determine the value of services rendered. There seems to be a strong tendency toward replacing this standard by more definite criteria intended to turn the mediating into an expert discretion or perhaps even into a question of law or fact. It is quite likely that in the long run a rent commission guided only by the same standard of reasonableness, such as was set up by the emergency act of October 22, 1919, for the District of Columbia, would have proved equally unsatisfactory, notwithstanding the procedural and judicial review apparatus copied from other commission laws. It is perhaps too early to judge of the power given over insurance rating associations by the New York law of 1922; since these associations perform themselves a regulatory function, a review of their conclusions by a representative of the state presents a somewhat different aspect. As for wage laws, they differ from railroad rate laws in two respects: there is not merely the standard of fairness of the quid pro quo, but the more definite standard of a living wage; and the determining authority being organized upon the basis of interest representation, there is a frank avowal that the matter is to be settled not upon definite principles but rather as a forced compromise. It will also be remembered that compulsory wage legislation for ordinary callings has been declared unconstitutional by the Supreme Court (*Adkins v. Children's Hospital*, 261 U.S. 525).

If public policy requires the exercise of a mediating discretion which cannot be turned into an expert discretion, it seems on the whole that it should be exercised by a politically constituted authority, i.e., normally by the legislature; from this point of view the delegation by Congress to the Interstate Commerce Commission of the power to fix a fair return appears as an anomaly; and the constitution of the English Rates Tribunal of 1921 on a partly representative basis reveals a sense of the shortcomings of purely objective processes.

§48. *Terms and provisions affecting the scope of discretion.*—It has been pointed out before that the same statute dealing with the same subject matter may operate in part through direct and definite

requirements or prohibitions, in part through administrative non-discretionary determinations, and in part through discretionary powers. The latter are indeed nearly always mingled with the two former elements. Every definite provision has the effect of limiting the scope of discretion. It is a different and more delicate matter to attempt to temper the indefiniteness of discretion by limitations or directions likewise indefinite in character; but the attempt is made in connection with many, if not most, grants of discretionary power, usually in the direction of restriction, occasionally in the direction of enlargement, of the discretion. A simple adjective like "reasonable" may lend itself to either purpose. If the law provides for the authorization of an issue of securities, if reasonably necessary or appropriate for the purpose indicated in the law, the idea seems to be that there shall be some latitude as to necessity and some strictness as to appropriateness. It would serve no useful purpose to trace these somewhat perfunctory qualifications in detail; in American statutes dealing with new powers a reference to reasonableness seems to be regarded almost as a constitutionally required qualification of discretion. In a very indefinite way the legislature may also seek to qualify by requiring the discretion to be exercised in accordance with rules and regulations to be issued by the licensing or some superior authority, as in the American law relating to passports. This cannot fail to operate as a substantial check, though its precise character does not appear on the face of the statute.

The more difficult the exercise of discretion, the more interesting are the attempts to qualify it; and for illustration reference may again be made to the matter of rate regulation in its most recent stages. The mere standard of reasonableness of the earlier law appears in the Transportation Act of 1920 elaborated into a duty to make the rates such that (omitting a number of details) carriers as a whole or as rate groups will under honest, efficient, and economical management, and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate net annual operating income equal, as nearly as may be, to a fair return (which is fixed at a definite percentage first by Congress and later on by the Commission) upon the aggregate value of the railway property of these carriers (§15a, No. 2). The supposedly definite factors are percentage and value; and the determination of value is of course a much controverted problem into which discretion cannot fail to enter.

With this may be compared the English Railways Act of 1921. The charges of each amalgamated company are to be such as will,

together with the other sources of revenue, in the opinion of the Rates Tribunal, so far as practicable, yield with efficient and economical working and management an annual net revenue equivalent to the aggregate net revenues of the constituent companies in 1913, together with 5 per cent on specified capital expenditures, and allowance necessary to remunerate adequately certain specified additional capital, and such allowance as appears to the Rates Tribunal to be necessary in respect to certain other specified capital expenditures. With a view to encouraging economies, the tribunal shall make such allowance in respect thereof as it may consider fair and equitable, not exceeding one-third of the value of such economies. The tribunal shall have regard to the means in their opinion best calculated to insure maximum development and extension of railway transportation in the public interest, and whether the charges fixed tend toward increase or diminution of traffic; and in accordance with its findings may reverse the allowance last mentioned.

The directions in the English Railways Act are far more elaborate than those of the Transportation Act, and all but the first two items of the standard revenue must be determined by reference to some discretion; but the English act does not call for a basic valuation of railway property as the American act does, thus eliminating the most controverted discretionary factor; the revenues of a given year are a comparatively definite item of computation.

It should be noted that the English Railways Act repeals the provision of the former law, throwing the burden of proving the reasonableness of an increase of charges upon the carrier; while a similar provision of the American law is not superseded by the changes made in 1920. In a matter so complex as the adjustment of railroad rates, it might appear that the benefit of a presumption greatly facilitates the adverse exercise of discretion; even with a definite value and a definite percentage it might be impossible to satisfy a hostile commission that management has been efficient or economical, or expenditures reasonable. Even apart from that, the presentation of all the data entering into a rate structure for the purpose of justifying an increase places a heavy burden in time and money upon the carrier. The provision for a full hearing is, however, of benefit in that it forces the Commission to support its final conclusion by reference to the testimony presented, and the conclusion may be vitiated by failure to consider relevant evidence or by its misinterpretation.

The rate-making function presents such difficulties that the elab-

oration of statutory provisions is perhaps not typical of the qualification of discretionary powers in general; and if experience should show that the task imposed upon administrative discretion is an impossible one, the abundance of precautions might appear to be a work of super-erogation.

The method of qualifying discretion by directing the consideration of specified factors is more common in England than in America. In America it is most conspicuous in the Interstate Commerce Act, and there it is fortified by the judicial effect given to the hearing requirements. Apart from such effect, it is somewhat in the nature of "hortatory" legislation; and the favor it enjoys in England may be due to the desire of the government to persuade critical members of Parliament that the draftsman of the statute has done his best to curb administrative discretion. In America the impression gained from qualifying clauses is that they have been inserted to forestall constitutional objections on the score of an undue delegation of legislative powers. German legislation seems to prefer qualification of a more definite character, as where the law provides that a required license is to be granted irrespective of any question of need (Insurance Law, §5), or that an association may be deprived of corporate capacity, if illegal conduct of the governing body endangers the public welfare (i.e., more than technical illegality [Civil Code, §43]), or recognizes the right of assembly subject only to police restrictions for safeguarding life and health of the assembled persons from immediate danger (Association Law, §1). It also prefers that form of license requirement which, instead of stating the affirmative power in discretionary form, specifies the ground on which alone the license may be refused. A comparison of provisions set forth in the descriptive part of this survey will show that discretion is more carefully qualified in England than it is in America, and more effectively qualified in Germany than in England.

Legislative provisions dealing with discretion through the control of underlying considerations may perhaps be divided into the following categories: (1) Specified considerations are excluded; as for instance in the provision of the German Insurance Law that an application for authorization to organize is to be disposed of without reference to the question of local need. (2) Only specified considerations are permitted; for instance, a peddler may be refused the right to peddle printed matter only because it is morally or religiously (i.e., not politically) scandalous (German Trade Code, §55); note particularly the constant German practice of permitting licenses to be re-

fused only upon the basis of *facts* showing unreliability, etc. (3) The permit may be refused only for specified reasons; this likewise is a general German practice (see Insurance Law, §§50, 57); of course if one of the specified considerations is of great latitude, the restriction may become illusory. (4) Certain otherwise questionable considerations may be expressly permitted; for instance, permitting, in the grant or refusal of liquor licenses, the preponderant opinion of the community to be given some weight (see *Re Sparrow*, 138 Pa. 116). (5) Specified considerations are required to be taken into account without dictating the conclusions to be drawn from them; this is a constant English practice. (6) The thing is forbidden except in the absence of specified objections, and if they are absent, may be permitted as a matter of discretion; so the removal of the licensed retail sale of liquor to another place under the English Licensing Act.

Qualification of discretion by formal and procedural provisions will be considered later on.

Occasionally terms are used which emphasize discretion. The British Naturalization Act of 1914 provides that "the grant of a certificate of naturalization to any such alien [i.e., qualified under the statute] shall be in the absolute discretion of the Secretary of State, and he may with or without assigning any reason, give or withhold the certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision." Such accentuation of the legislative intent is rare, if not unique; the German statutes express a similar intent simply by referring to "free discretion" (*freies Ermessen*, e.g., Insurance Act, §§86 and 91, relating to foreign companies). The discretion is moreover absolute only in the direction of refusal, the grant being dependent on statutory conditions; absolute discretion in both directions is an exercise of sovereign power and is probably never delegated.

Another form of emphasizing discretion is by referring for the exercise of the power to the widest scope of considerations, such as public interest (advantage of, or detriment to, the people), or to tendencies instead of present defects. In America this scope of discretion is found in connection with the admission of foreign insurance companies, and in New York it was in 1910 extended to all domestic insurers (power to refuse if refusal will best promote the interests of the people). Such a form may make judicial control difficult or impossible; in administrative practice however the effect of such a clause is apt to be much modified by the presence of more specific qualification requirements in the

statute; these are very much fuller in the New York than in the German insurance law, and therefore the German discretion is practically wider although the law dispenses with the extravagant phrase used in New York. However, the wide form of discretion will count in exceptional cases.

Much more common are the instances in which the common permissive terms are supplemented by an explicit reference to discretion. The natural effect of this will be to preclude a construction confining discretion to specifically mentioned considerations or qualifications; an early judicial decision to the contrary must be doubted (*State v. Justices*, 15 Ga. 408). Apart from this, it is questionable whether much is gained by thus emphasizing discretion. The New York Banking Law provides (§48) that "in any case in which this chapter makes the approval of the superintendent a condition precedent to the doing of any act, it shall lie within his sound discretion to grant or refuse his approval." Under this section permissive terms should not be construed as mandatory, and specified grounds of consideration should not be construed to be exclusive; but there is clearly no intent to make discretion absolute.

§49. *Unqualified discretion*.—Discretion is unqualified or unregulated where private action is made dependent upon official approval or consent by reference to simple permissive terms without stating the grounds upon which the official power is to be exercised. The legislative delegation of such discretion has been attacked as unconstitutional, with success in a considerable number of cases, without success in others;<sup>9</sup> but its occurrence in American legislation is too common to be disposed of by reference to isolated judicial decisions rendered without a realization of the legislative situation in its entirety.

One of the adverse decisions is the case of *Chicago v. Trotter*, 136 Ill. 430. An ordinance of the city of Chicago prohibited parades, processions, or open-air meetings without a permit from the police department, to be issued without fee, and designating the route to be followed. This was held to be unregulated discretion, and the ordinance was declared void. Another ordinance was thereupon enacted which provides that the chief of police shall issue the permit without fee or charge if he finds that the parade is not to be held for any unlawful pur-

<sup>9</sup> See 2 *American Bar Association Journal* 454, 463-66. For two recent contrasting decisions see *Larkin v. Schwab*, 242 N.Y. 330 (sustained as to location of gasoline station), and *Bauer v. Chicago*, 321 Ill. 259 (denied as to certain factory licenses; "reliable" held to furnish no standard).



pose and will not tend to breach of peace or to interfere unnecessarily with the public use of streets or the quiet of the inhabitants. Had there been an intention to create a discretion occasionally exercisable for a political purpose, it could not have been better accomplished than by vesting discretion by reference to a tendency to breach of peace, one of the most elastic terms to be found in any statute. A form of power which was susceptible of quite a conservative construction was exchanged for one liable to abuse, and in any event not easily controllable by a court.

The cases of unqualified discretion may be divided into three classes: In the first class the legislative intent appears to be to leave it to the authority to find its own standards or to be guided by the circumstances of each case; the discretion, in other words, is absolute. Of this character seem to be the consent requirements of the German Civil Code for the establishment of incorporated trusts, for donations to corporations, and for the issue of notes to circulate as money, and also the consent requirement to the establishment of a mortgage bank. This view is supported by the reservation of the discretion to the state governments without delegation to any particular administrative authority. In English and American legislative practice, only dispensing powers are of this character; the relaxation of capital requirements for national banks in small places with the consent of the Secretary of Treasury (U.S. R. S., §5138) seems to belong to the latter class.

The second class covers cases in which some statutory qualification or guidance of discretion might reasonably be expected, since the apparent legislative intent is that the discretion should be substantial and yet not absolute. Instances are scattered through statutes and ordinances and cannot be accounted for by any general statement; they may be due to lack of legislative care or to a sense that the grounds of the discretion are obvious. The former must be the explanation of the unqualified approval requirement for membership corporations in New York, the latter, of the very numerous unqualified license or permit requirements in the New York City sanitary and building codes, in which discretion is of an expert character, so that it is not difficult to check abuse even in the absence of statutory qualifications.

The third class covers what may be called "minor consent requirements" in such cases as change of name or of location of a licensed business, or the consolidation of concerns where there is no strong public policy to the contrary. As regards change of name, it is

interesting to compare the ordinary unqualified provisions with the substantial discretion required to be exercised in case of the change of the name of a ship, which in Germany may be authorized only by the Chancellor and only for urgent reasons.<sup>10</sup> In these minor matters the presumable legislative intent is that the approval is to be given in normal cases and to be withheld only if there is something abnormal or irregular; they are cases of what may be called "reserve discretion." To say that the change of name requires the consent of some authority (Prussian law) is practically equivalent to making approval mandatory in the absence of a reasonable objection, as provided in New York (Civil Rights Law, §63). There may be a reasonable objection, which is not a legal objection, to the adoption, for example, of a name which is borne by some other well-known living person, so that the approval is not altogether non-discretionary.

The unqualified discretion in these cases may indeed shade into practically ministerial action, for the reasonable objection may be an objection implied in law, and an objection implied in the law will be a ground of refusing approval even though the law purports to enumerate all qualifications without any reference to discretion. The analogy of the English decision that a libelous passage in a will may be refused probate applies to other cases of non-discretionary determination (Theobald on *Wills*, p. 24).<sup>11</sup> The practical difference between "reserve" discretion and ministerial approval is that in the latter the official is not required to, and as a rule does not, look beyond the prerequisites specified in the statute, while in the former he is expected to be on the lookout for possible objections.

§50. *Subordination of discretion to scope and policy of statute.*—Delegated discretion is subject to unexpressed limitations which follow partly from the supremacy of the statute over its instrumentalities, and partly from the presumptive reservation of certain considerations for exclusive legislative control. It is clearly improper to reconsider what the legislature has already considered, and to exercise discretion on the theory that the statute is unwise or unjust, e.g., by refusing liquor licenses on the ground that liquor should not be sold at

<sup>10</sup> In America, and England likewise, the statutory provisions indicate that consent is not to be given as a matter of course: act of Congress, February 19, 1920; English Merchant Shipping Act, §51.

<sup>11</sup> However, there appears to be no reported case in which copyright registration was refused for an immoral publication, though it is not entitled to protection. See Bowker on Copyright, p. 96.

all and therefore no person is fit to sell it (*Martin v. Symonds*, 4 N.Y. Misc. 6; *Reg. v. Boteler*, 4 B. and S. 959). Discretion being also a trust, it must neither be delegated nor abdicated (*Ellis v. Dubowski* [1921], 3 K. B. 621); it must not be exercised in entire deference to popular demand (*Re Sparrow*, 138 Pa. 116); and if the statute requires independent consideration, discretion must not become a mere instrument of carrying out an inferential legislative intent (*United States v. N.Y. Central R. Co.*, 263 U.S. 603).

The principle that a matter should not be regarded as delegated matter of discretion, if it is generally regarded as matter appropriate for legislative consideration, is more difficult to apply. Abstractly speaking, fitness may be affected by citizenship, residence, or sex; but legislative silence should be ordinarily construed as making these qualifications irrelevant and removed from discretion; however, in exceptional cases discretion has been held to cover such matters (*R. v. London County Council*, 113 L. T. R. 118).<sup>12</sup> If a statute provides that a foreign insurance company may be admitted to business in the state, if the insurance commissioner is satisfied that it is a safe and reliable company, entitled to confidence, it is not for the commissioner to exclude a company because it combines lines of insurance which in his opinion should not be combined and because it is therefore "theoretically" though not actually unreliable (*United States etc. Co. v. Linehan*, 73 N.H. 41). In New York, where the statute permits the commissioner to refuse authorization if the refusal will in his judgment tend to promote the best interests of the people of the state, the same circumstances might justify a different conclusion. Under an express reference to "public policy" a refusal to file a certificate of incorporation was sustained which was based upon an excessive disproportion of preferred to common stock, it being assumed that there may be a public policy not expressed in common law or statute (*Lloyd v. Ramsay*, 192 Iowa 103). The widest terms of discretion may thus negative the presumptive reservation of a matter for legislative consideration.

Considerations otherwise applicable to the exercise of discretion may be excluded by the fact that they are foreign to the subject matter of the statute or to the general scope of the duties to which the office or department executing the statute is generally confined. But this otherwise very helpful criterion may disappear where the discretion is vested in an official of general authority like the chief executive, or

<sup>12</sup> Also *Noble v. English*, 183 Iowa 893, sustaining a general rule against granting licenses to non-residents.

where the statute prescribes considerations in terms covering the entire range of public welfare. Thus a provision for the issuance of passports under rules to be prescribed by the Secretary of State would hardly justify regulations for the protection of the revenue; but since the passport law referred to rules prescribed by the President for or on behalf of the United States, a regulation was considered proper which required proof of payment of income tax before a passport was issued.

Generally, the limitation of discretion by the scope of the statute is of considerable importance. In accordance with this principle a local authority having power over the construction of buildings may not refuse a permit on account of the supposed unsuitability of the building to the neighborhood (*R. v. Mayor of Newcastle*, 53 J. P. 788). It has been held that the Interstate Commerce Commission may not regulate rates with a view to giving American producers protection against foreign shippers and thus reinforcing the provisions of the tariff laws (*United States v. A. T. & S. F. R. Co.*, 190 Fed. 591; *Texas & Pacific R. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 221; *So. Pac. R. Co. v. Interstate Commerce Commission*, 219 U.S. 433). In requiring the consent of the Commission to new construction or extension of railroads, the Transportation Act speaks simply of public convenience and necessity; but may the Commission take into account considerations other than those bearing on transportation? In passing upon an application of the Virginian Railroad Company for consent to the building of a brief extension to an undeveloped coal mine owned by it, the Commission referred to the excessive number of coal mines in the country, but was careful to relate this to the most efficient use of carriers' equipment and inadequacy of car supply; and eventually the application was favorably disposed of entirely upon the basis of railroad and traffic considerations (79 I. C. C. Rep. 631; 86 *ibid.* 27). Had the Commission stood by the original refusal of the application, the reference to the excessive number of coal mines might have been seized upon to make out a case of illegal exercise of discretion. Again, the Commission is given a strong emergency control over car service, having power to make such just and reasonable directions as will in its opinion best promote the service in the interest of the public and the commerce of the people (§1, No. 15); may it exercise that power to control prices of commodities? This question became practical in 1922; and although the issue was never presented

for formal determination, the disposition of the matter may be gathered from contemporary accounts and is of some interest.

When it appeared as a consequence of the prolonged coal strike of 1922 that there was a tendency in certain quarters to charge extortionate prices for coal, the Secretary of Commerce (who has no powers under the Interstate Commerce Act) conceived the plan of using the power of assigning car service priorities for the purpose of controlling prices. The Attorney-General gave an opinion to the effect that the power of the Interstate Commerce Commission was ample for that purpose (33 O. A. G. 254). The Commission issued an amended order declaring service priorities in the transportation of coal, but carefully refrained from indicating in express terms that any right to priority should be based upon prices charged. From current reports, however, it appeared that under this order and during the emergency, about 70 per cent of the coal was moving from the mines on a fair-price basis; and the Secretary of Commerce in a letter referred to the creation in various districts of the necessary administrative machinery by which priority orders could be directed to those operators who co-operated in protecting the public on prices (115 *Commercial and Financial Chronicle*, 500, 501, 715, 716, 946, 1054). On September 22, 1922, Congress passed an emergency act to be in force no longer than twelve months, authorizing the Commission to exercise its powers with regard to car-service priorities so as to prevent the purchase or sale of coal or other fuel at prices unjustly or unreasonably high (42 St. L. 1025).

The incident illustrates several points in relation to discretion: a political officer of the government, the Attorney-General, charged with no direct responsibility, and advising an officer likewise without responsible power, inclined to the view that a power over car service, given in terms to promote the interest of the public and the commerce of the people, might be legitimately exercised for price control; the Commission, charged with direct responsibility, did not, in promulgating general rules, venture to adopt that view by basing priorities in terms upon price considerations; Congress was finally appealed to, and granted the power in express terms, but only for a limited period of time.

It will, moreover, be noticed that while the amended rules did not in terms refer to prices, yet it was possible to direct priorities in 70 per cent of the cases in favor of fair-price dealers. This calls attention to an inherent difference between discretion exercised by way of gen-

eral rule and discretion exercised by way of particular permit or direction. The general rule can hardly fail to carry its purpose on its face and thus check discretion by reference to the consideration moving it, while in the particular permit or direction the consideration moving it may remain undisclosed or disguised. It was possible for the Supreme Court of Illinois to declare invalid a rule of a board announcing a policy of favoring union labor (*Adams v. Brennan*, 177 Ill. 194); but how would it be possible to reach a similar, even constant, practice not announced, but merely followed from case to case? The difficulty inheres in all discretion exercised in particular cases, but it is of greatest practical importance where it is merely a matter of keeping discretion within statutory policy; for the policy pursued by the official will seem to him laudable, so that the common moral checks on abuse of discretion will not operate, and with some skill the real motive can usually be covered up.<sup>18</sup>

§51. *Discretion as a matter of abstract construction and as a matter of actual practice.*—A study of administrative law as a branch of the common law is a study on the basis of decided cases, and it is therefore natural to read the law in the light of judicial decisions. Even though it be realized that judicial law is one thing and administrative practice another, it is also true that in theory at least the practice is normally subject to judicial control, and that judicial construction is therefore a very legitimate test of the limits of discretion. A recognition of the fact that administrative practice has, so to speak, its own law, is not inconsistent with the recognition of the importance of the judicial or legal aspect of discretion, and vice versa.

It is not entirely improper to speak of the hazard of judicial construction; for construction is in the nature of a sovereign act and unpredictable. Upon no known principle is it possible to account for such a decision as *Harrison v. People*, 222 Ill. 150, in which a discretion was recognized notwithstanding the plainly mandatory language of the ordinance in question. A full examination of cases, while valuable for practical purposes, would yield only a demonstration of

<sup>18</sup> The whole subject of what may be called "considerations guiding discretion" has been fully discussed by French and German writers; the most recent essays that have come to my notice are: Gaston Jèze, "Théorie générale sur l'influence des motifs déterminants sur la validité des actes juridiques en droit public français," 39 *Revue de Droit Public* (1921) 377-444, and Friedrich Tezner, *Das freie Ermessen der Verwaltungsbehoerden* (Leipzig, Wien, 1924). See, also treatises by Rudolf von Laun, 1910, and Walter Jellinek, 1913.

the impossibility of laying down reliable rules of construction. Some reference should however be made to common problems and their treatment.

While it is forcing language to construe "shall" as "may," the converse is not true, for every official duty presupposes an official power to act, and the legislature may be content to express the power, leaving the duty to inference. The possibility of construing "may" as "shall" is generally recognized and noted in treatises on statutory construction.<sup>14</sup> There is no definite rule to determine when this is the proper construction. The construction may be negated by the history of the particular statute. This was the controlling point in *People v. Grant*, 126 N.Y. 473, where "shall have authority to grant" was held to give a discretion; the elaborate justification of the construction shows that prima facie the opposite construction would have appeared more natural.<sup>15</sup>

Where the word "may" (not "may in his discretion") follows a full specification of prerequisites and considerations, the case in favor of construing "may" as "shall" is strengthened. In the leading English case of *Sharp v. Wakefield* [1891], A. C. 173, the licensing law carefully regulated the procedure for renewal, concluding: "subject as aforesaid, licenses shall be renewed, and the power and discretion of justices relative to such renewal shall be exercised as heretofore"; this was held to justify non-mandatory construction; but discretion in the matter of renewals has since then been strictly limited (Act of 1910). The English Cinematograph Act of 1909 forbids exhibitions where inflammable films are used unless regulations for securing safety are complied with, or elsewhere than in licensed premises; it further provides that the county council may grant licenses to such persons as they think fit to use the premises specified in the license on such terms and conditions and under such restrictions as, subject to the regulations, the council may by the license determine. This reads like a discretion limited to specified particulars. However, the county council refused the renewal of a license to an English company for the sole reason that one-half of the directors and a majority of the preference shareholders were alien enemies, and the court upheld this action (*R. v. London County Council*, 113 L. T. R. 118). Still stronger is the

<sup>14</sup> In England it seems to be a matter of courtesy to say "may" when the Crown is to act, although the plain intent of the statute is to impose a duty; see Trade Boards Act, 1918, §2.

<sup>15</sup> See also *Samuels v. Couzens*, 215 Mich. 328.

case where the county council thought it had no right to consider the fact that the applicant was a naturalized subject and the court held that it had not only the right but the duty to consider that fact in exercising its discretion (*London, etc. v. Wolff*, 80 J. P. R. 453). These cases show that the word "may" is always capable of supporting the recognition of what may be called a "residual discretion," and that in times of stress such construction will be favored to the point of permitting considerations which ordinarily are matter of legislative policy exclusively.

The case last cited presents the rare instance of a conservative administrative being opposed by a liberal judicial construction; in the nature of things, if there is a difference of attitude it will be the other way, because it is only the assumption of discretion that will call for judicial review, not its disavowal. Apart from this, it may well happen that a power may appear as discretionary when considered abstractly, and as non-discretionary when considered practically. This is illustrated by the law and practice regarding the issue of passports, fully set forth in the descriptive account of powers.<sup>10</sup> The statute simply says "may"; the Attorney-General has given his opinion that this means discretion (23 O. A. G. 509). The matter is not likely to be ever presented as an issue in court, and if, in a test case, it were, the court would probably accept the same interpretation; yet in practice it is clear that the Department of State acts upon the theory that it must grant the passport unless there is some circumstance making it a duty to refuse it. Any other attitude would indeed be intolerable; it would mean an executive power of a political character over individuals quite out of harmony with traditional American legislative practice.

§52. *The function of discretion.*—The plausible argument in favor of administrative discretion is that it individualizes the exercise of public power over private interests, permitting its adjustment to varying circumstances, and avoiding an undesirable standardization of restraints, disqualifications, and particularly of requirements. Under this view, the main advantage of discretion is the flexibility of its operation, and its main province would be the regulation of interests in which public policy demands both maintenance of minimum standards and the possibility of variation. One aspect of the problem of variations from standards will be discussed under the head of dispensing powers. And upon a general theory of flexible control, a case might be made for the liberal grant of discretionary powers throughout the do-

<sup>10</sup> See §248, *infra*.



main of the police power in matters affecting public safety, health, or morals. Perhaps this accounts for the profusion with which such powers are bestowed in the ordinances of the city of New York. But these powers largely relate to petty matters and operate in the relative obscurity in which they originated; and the adjudicated cases show that while large claims of power are abstractly made and theoretically supported by the courts, their practical administration is conservative (*Metropolitan Milk & Cream Co. v City of New York*, 113 App. Div. 377; *People v. Department of Health*, 189 N.Y. 187). But health and safety statutes are, generally speaking, by no means conspicuous for the use of discretionary powers; on the contrary, in much of that legislation such powers are conspicuously absent. This will appear from the descriptive part of this survey: thus British factory legislation has found it possible to rely practically altogether upon general rules (though to a large extent framed by administrative regulation); the Tenement House Law of New York operates in the main with specific requirements, confining discretion to minor matters (halls *adequately* lighted, etc.); many building codes are framed with a minimum of administrative discretion, practically all regulation being limited to requirements capable of standardization; even to the problem of railroad safety the system of discretionary powers was for a long time applied with extreme conservatism. In all these cases the consideration of flexibility yielded to the higher consideration of the certainty of private right, without any apparent sacrifice of essential public interests.

Discretionary powers are now prominent in the regulation of public utilities for economic purposes, so in connection with rate making and the initiation of new undertakings. Is the discretion involved in rate control due to a demand for flexibility? It may be conceded that a legislative body cannot deal as intelligently with complicated rate tariffs as a commission; but this may mean only that the construction of a tariff can be better handled by administrative regulation than by statute. As a matter of fact in America it is handled by neither, since tariffs are made by carriers and are subject only to government correction or approval. If it is then asked whether in the exercise of this control discretion is preferable to rule, there can be little doubt that this answer should be in the negative. The whole course of rate legislation and action under it has been an effort to discover some principle of rate control; discretion represents a present inability to discover such principle. Legislation apparently proceeds upon the assumption that a

principle is finally discoverable, with the ultimate effect that the margin of discretion will become so close as to be equivalent to a question of fact.

In the more recent requirement of the certificate of convenience and necessity for new undertakings, a legislative striving for the discovery of a principle is less discernible; still, the provision for a hearing is construed by the Supreme Court as requiring evidence to substantiate the conclusion reached in granting or refusing the certificate, and it can hardly be otherwise than that in the long run this will result in the development of some definite basis of action. Where the commission is given power to approve or disapprove issues of securities, it is even clearer that principle and not discretion should prevail. Prior to the Transportation Act of 1920, the question whether certain improvements were chargeable to capital or to operating expenses, presented itself as an accounting problem, and as such was required to be dealt with by general rule, that is to say, in form of a principle; now the question may arise on an application for approval of a bond issue, and is permitted to be dealt with from case to case, as a matter of unguided discretion; but the question has not changed its character, and if it is a question proper for authoritative regulation it ought to be regulation by definite rule.<sup>17</sup>

A particularly clear instance of discretion as a means of finally evolving a definite rule is found in the function of the Federal Trade Commission. The purpose of the law is to leave the indeterminate concept of unfair competition to administrative handling in order to avoid the hardships and failures of penalization without definition, and to accumulate a body of precedents from which that concept will emerge with legal certainty. This is an admissible, if novel, method of dealing with practices which appear detrimental to the public when it is difficult to formulate with clearness either the evil or the remedy. Obviously, however, the doctrine of unfair competition ought not to be variable from case to case.

A somewhat different aspect is presented by the discretionary powers of medical and similar boards to revoke licenses for unprofessional conduct, or conduct infamous or disgraceful in a professional respect. Such conduct may consist in the dissemination of knowledge of birth control, in giving assistance to an unqualified practitioner, or perhaps in certain undignified forms of advertising—in any event, in

<sup>17</sup> See the observations of the Interstate Commerce Commission upon bond issues versus stock issues in the Chesapeake and Ohio case, 105 I.C.C. 748.

practices not reprobated by the criminal law. Nor can it be said that there is here an obscure and difficult concept merely awaiting clarification to be accepted as a legal rule of conduct. On the contrary, it is distinctly not contemplated that the conduct characterized as unprofessional should amount to illegality; it is expected that it will be something less than illegal, violating merely professional and not general social or business standards. Discretion stands for a special kind of rule.

It is interesting to pursue this idea farther into the character qualifications commonly found in connection with licensing requirements. To judge of character calls for the type of discretion designated as "censorial," based upon conformity to conventional or moral standards. This type of discretion may be exercised with substantial freedom when it is a question of passing upon the character of a book, a work of art, an exhibition, or a performance; when applied to persons, it is practically certain to go by definite criteria; for it is almost impossible to deny good character when there has been no conviction or at least no charge of crime. A person with a criminal record, on the other hand, is very likely to be denied a license for lack of character qualification. There are statutes denying a person convicted of felony the right to practice medicine (*Hawker v. New York*, 170 U.S. 189); but if this legislative policy were extended to many callings the result would be to prevent persons who have served a criminal sentence from earning a livelihood in vocations in which they might otherwise find their best opportunity of "making good." It is certainly not the practice of criminal legislation to make permanent civic disqualification a part of punishment. Yet more and more trades call for licensing laws with character qualifications. Is not the effect of discretion here to permit the setting up of standards which the legislature would hesitate to incorporate directly into general rules? The naturalization law requires attachment to the principles of the constitution; naturalization is denied to a person who operates a saloon across the border line, the court thus setting a standard for admission to citizenship which is not exacted of citizens.<sup>18</sup> This may be a legitimate exercise of discretion where a privilege is sought; but it is a different matter to have discretion operate similarly where the claim is only to exercise a calling for which a person is technically qualified.

The foregoing review tends to establish two functions of discretion (in addition to its service as an instrument of flexibility), only

<sup>18</sup> *Ex parte Elston*, 299 Fed. 352.

one of which is perhaps readily conceded: it may be a "trial-and-error" method of establishing a definite rule, and it may be a disguised form of setting up a standard not yet reached, or perhaps not fit to be set up, as the law of the land. The first function would, in the long run, be self-eliminating with regard to any particular subject matter; but with new problems, new applications of such discretion might be called for. The second function may likewise result in a new standard; thus if the certificate of convenience and necessity is an undisclosed recognition of the monopoly character of public services (monopoly as such being reprobated by a number of state constitutions), it may ultimately yield to a definite rule of exclusiveness of service; if the standard is one not fit to be set up as an avowed policy, discretion may yet serve as a concession to the demand of each organized group to establish for itself a rule variant from, and supposedly superior to, the law of the land.

However, in the face of such a discretion as that which is exercised in requiring railroad extensions, the functions that have been analyzed do not exhaust the field. In the matter of public utilities there is apparently a claim on the part of the state to be recognized as a quasi-partner with paramount powers unattended by obligation or liability. It may be that such a claim cannot be denied and that it will express itself in a discretion governed solely by expediency and not displaceable by rule. It has been shown that our law is slow to grant such discretion; and, if inevitable, it is more appropriate for political than for administrative exercise.<sup>19</sup>

It is also likely that by reason of the possible uniqueness of any local situation the discretion which is exercised in forcing unwilling owners into joint improvements is not displaceable by rule. But there is perhaps enough of the typical element in most of these situations to

<sup>19</sup> It may be contended that all administrative discretion represents the paramountcy of public over private interests and the freedom to determine what the public interest demands; that this differentiates regulatory legislation from the civil and criminal law; that in the care of public interests the government deals with its own sphere as the individual does with his when he controls his own property where no public interest is involved; that in this care of public interest the official is responsible to the government but not to the individual; that, in other words, administrative law (*droit administratif*) is a law outside and beyond the common law. This may be the French or Continental theory (see Dicey, *The Law of the Constitution*), but it must be repudiated, if we accept administrative law as part of the common law; and if there is need for acting outside of the rules of the common law, the action should be political, so far as such action is compatible with American constitutions.

make technical or expert judgment applicable and to reduce the margin of discretion correspondingly. It is, however, significant that in America the general method of dealing with such problems is to refer determinations to majority rule, with a checking function in a court, based upon the theory that fundamental considerations of fairness are "justiciable."

A comprehensive view of administrative discretion discloses a tendency toward standardization with a small residual margin for flexibility which approximates the inevitable question of fact. The function of discretion would then be not to displace rule but to prepare the way for it. On any other terms administrative discretion would be an anomaly. It would mean that administrative authorities are superior to courts in their capacity to deal with private rights, or that under modern conditions the public welfare demands personal government instead of government by law. The French say that "personal" in government is equivalent to "arbitrary." And while there is undeniably some tendency on the part of administrative authorities, as an abstract proposition, to claim the necessity of discretionary powers, it will probably be found, upon examination, that in practice the desire to standardize the exercise of discretionary power is as strong as it is in the administration of justice.

And this discussion of discretion may perhaps be fitly closed by a quotation which illustrates the judicial attitude. The English Matrimonial Causes Act of 1857 provided that if the case of the petitioner for a divorce is proved, and he has not connived, condoned, or colluded, the court shall pronounce a decree dissolving marriage, provided that the court shall not be bound to pronounce the decree if the petitioner has during marriage been guilty of adultery or has been guilty of unreasonable delay or of cruelty or desertion or neglect or misconduct conducing to adultery. Ordinarily, "shall not be bound to" operates as if the statute read "shall not," resulting in a normal refusal of the decree under the conditions specified. The court points out that the discretion given to it has been exercised in favor of the petitioner (i.e., by granting him the decree) in only three classes of cases: where he believed his wife was dead, and married again; where the petitioner (if the wife) has been compelled by her husband to lead a life of prostitution; and where the husband's adultery had been fully condoned by the wife; and then proceeds to say:

There would, I think, be great mischief in this Court assuming to itself a right to grant or withhold a divorce upon the mere footing of the petition-

er's adultery being, under the whole circumstances of each case, more or less pardonable, or capable of excuse. A loose and unfettered discretion of this sort upon matters of such grave import, is a dangerous weapon to entrust to any court, still more so to a single judge. Its exercise is likely to be the refuge of vagueness in decision, and the harbour of half formed thought. Under cover of the word "discretion" a conclusion is apt to be formed upon a general impression of facts too numerous and minute to be perfectly brought together and weighed, and sometimes not perfectly proved; while the result is apt to be coloured with the general prejudices, favourable or otherwise, to the person whose conduct is under review, which the course of the evidence has evoked. Upon such materials so used two minds will hardly ever form a judgment alike, and the same mind will often appear to others to form contradictory judgments on what seem to be similar facts. This invites public criticism, and shakes public confidence in the justice of the tribunal.

I hold, therefore, that the discretion to be exercised under the 31st section of the statute should be a regulated discretion, and not a free option subordinated to no rules. It was probably reposed in the Court because the legislature found it impossible to foresee and specify the classes of cases fit for its application which might arise under the new law. The duty of reducing its exercise to method devolves upon the Court. Past experience has already pointed out some classes of cases to which it is fitly applied; and the future may probably furnish more. But the facts of this case present no definite features beyond mere lapse of time to justify its exercise; and the Court must refuse a decree."<sup>20</sup>

<sup>20</sup> *Morgan v. Morgan* (1869), L. R. 1 P. & D. 644. The passage is quoted as a judicial view of judicial discretion. The proper construction of the particular statute is another matter, and it has since been more liberally interpreted; see *Wickins v. Wickins* (1918), Prob. 265; *Holland v. Holland* (1918), Prob. 273.

## CHAPTER VII

### REGULATION AND OPERATION OF ENABLING POWERS (LICENSE OR PERMIT REQUIREMENTS)

#### A. LICENSE OR PERMIT REQUIREMENTS IN GENERAL

§53. *Terms of power and its regulation.*—The statutory grant of administrative power may be accomplished by a very few words; if the English Merchant Shipping Act requires a ship to be marked, or to be equipped with signaling devices, to the satisfaction of the Board of Trade (§§7, 435), it is even left open whether this means a permit or an order, and the difference is of little practical importance. The provision that certain things may be done with the consent of a designated official authority or subject to its approval, or shall be unlawful without such consent or approval, is a common one, it being assumed that no further statutory direction is necessary. The Public Health Law of New York, the Charter of the city of New York, and the New York City Sanitary Code are conspicuous for the absence of detailed regulations in connection with license requirements.

The absence of regulation may be in part supplied by rules established by the licensing authority, either under express power or duty (quite common as to form of applications) or under general rule-making powers. Such rules will be an aid to applicants and an instruction to subordinates, tending to standardize the exercise of the power; they may have an advantage over statutory regulations if they are of minor legal effect so that their disregard or violation does not jeopardize the validity of the permit, but on the other hand they will not ordinarily give to the applicant a judicially enforceable right to the benefit of their observance; and while they may provide for remedial relief within the administrative organization, they cannot create judicial remedies, which only a statute can give. Municipal ordinances regulating the grant of licenses are likewise affected by the lack of the latter power.

The cases in which there is no statutory regulation are apt to be the cases of unqualified discretion, the nature of which has been discussed before. If, on the other hand, the legislature is careful about terms of discretion, it is merely another step in the same direction to control the exercise of the power in other respects.

In connection with some subjects there is considerable fulness of regulation, dependent apparently upon the circumstances surrounding the history of the enactment of some particular piece of legislation. Thus, while in England and America, in contrast to Germany, the licensing of public amusements is generally provided for without much attention to detail, a much more careful method appears in the dance-hall ordinances which were generally enacted in the period about 1910.<sup>1</sup>

For each jurisdiction it is possible to point to some acts in which the matter of licensing has received considerable care: in England the Light Railways Act of 1896 and the Licensing Act of 1910; in Germany the authorization of noxious trades (Trade Code, §§16-22, 25, 26); in New York the Raines Liquor Tax Law of 1896 and the Employment Agency Law of 1910; also the Tenement House Law of 1916. In the legislation of Congress the rejection of immigrants is dealt with quite elaborately, owing partly to the pronounced human factor in the situation, and partly to the fact that the supervision of immigration calls for administrative methods of a very specialized character.

§54. *Grant or refusal.*—The terms of statutes occasionally reveal a difference of attitude toward grant as compared with refusal. Thus under the law of New York a permit to carry weapons may be refused for reasons, while under the English law it may be granted for good reasons; in New York the change of the location of a bank to another place in the same locality is to be approved in the absence of reasonable objection; if to a place in another locality, the application is to be refused if the change is undesirable or inexpedient. The difference gains in importance if it expresses itself in formal or procedural provisions: in New York the approval of the Commissioner of Banking must be in writing, but not his refusal to approve; in England the question of refusing a liquor license must be delegated to a committee, but the grant must be confirmed by a superior authority. The English Licensing Act also permits rules to provide for an interval of time to elapse between a refusal and a new application. In a number of cases formal checks are made applicable to refusals, particularly by requiring, absolutely or on demand, a statement of reasons (New York, dance-hall and motion-picture laws); the London Building Act gives in certain cases (sky signs) a right to make changes to meet the

<sup>1</sup>In New York the matter is dealt with by statute: 1910, c. 547; 1921, c. 226.



grounds of refusal (§130). The same act provides that in certain other cases an application must be either sanctioned or disapproved within two months and that if there is neither the one nor the other, it is deemed a sanction (§§9, 10; also Town Clauses Act, 1847, §111). The New York Employment Agency Law merely provides that the application should be acted on within thirty days, a much less effectual provision.<sup>2</sup> An effective time limit for acting upon an application may be essential to the practical enjoyment of the right or privilege sought. In the case of the *City of Duquesne v. Fincke*, 269 Pa. 112, it appeared that three applications were made in proper form for a permit to hold a public meeting but were ignored. The Supreme Court of Pennsylvania said:

There is necessarily implied in the power . . . a corresponding duty to grant or refuse a permit whenever an application therefor is made. . . . The failure to reply tended to bring the administration of the law in the city of Duquesne, and through it our entire system of government by law, into disfavor.

The court, however, held that failure to act did not justify the applicant in proceeding as if he had a permit; and under the law as it stood, the remedy of the applicant was at best a theoretical one.<sup>3</sup>

A mere failure to act upon an application may in an appropriate case be ground for a mandamus, but only after a reasonable lapse of time for reaching a decision; while a refusal of an application will justify an immediate resort to the proper remedy.

The American Immigration Law regulates in considerable detail the procedure to be observed in rejecting a disqualified alien, safeguarding with particular care the public interests adverse to his entry, but evincing also some solicitude for the alien's rights. The law

<sup>2</sup> See also New York Tenement House Law, §121.

<sup>3</sup> See also *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587: "Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief."

A French law of July 17, 1900, provides: "In contested matters which cannot be brought before the Council of State except by way of appeal from an administrative decision, if there has been a delay of more than four months without a decision having been rendered, parties in interest may treat their application as rejected and proceed before the Council of State" (Berthélemy, *Droit administratif* (1916), p. 974.

has this peculiar feature that while an alien cannot enter the country without being passed through the inspection provided by law, yet he receives no formal permit to enter. The certificate of arrival provided for by section 1 of the Naturalization Act of 1906 is not a certificate of admissibility, and the endorsement of the visa applies both to those rejected and those admitted. The informal admission has no probative value (85 Fed. 422; 300 Fed. 90), and in all subsequent proceedings against the alien the burden of proving admissibility is thrown upon him (Act, 1924, §23). The failure to provide for affirmative certification, where for all practical purposes there is a consent requirement, is exceptional.<sup>4</sup>

§55. *Notice and hearing.*—Provisions for giving in some form public notice of the application serve the purpose of acquainting the administrative authority with possible grounds of objection to the application. They will naturally lead to some kind of hearing at which the objections may be disposed of, and which may supplement other inquiries.

Notice may also be required to be given to holders of specified interests, although provision for such notice does not appear to be the usual thing. A provision for notice to competitive interests requires special attention. This is found in the New York Banking Law and creates the impression of an invitation to existing banks to oppose the organization of a new bank, although that purpose is not expressed in the law.

Hearings in connection with applications serve primarily the purpose of eliciting objections and disposing of objections, if any are made. In the absence of objections, the hearing has not been generally regarded or treated as a requirement of due process on behalf of the applicant, who by reason of taking the initiative in the matter is pre-

<sup>4</sup>A distinct policy of withholding affirmative certification appears in the Illinois Securities ("Blue-Sky") Law, in which the passing of the proposed issue is manifested by a mere filing of the papers submitted; the obvious purpose is not to commit the state even to a semblance of an approval of the issue on its merits; this is reinforced by prohibiting any reference by the issuing concern to the state's action in the matter (Illinois Securities Law, §§17, 21).

Every official license or permit presents this question of policy whether the state should set upon persons or things, acts or undertakings, the apparent stamp of its approval. The possible undesirability of this is an argument in favor of publicity or notification as against license requirements; but the argument does not appear from the history of legislation to have weighed heavily in the balance.

sumed to have in the nature of things the fullest opportunity of presenting his case.

Under these circumstances it is important to note the hearing requirements of the Transportation Act of 1920 in connection with its various consent and approval provisions. The act prescribes hearing, notice and hearing, due showing, or rules as to hearings, for the commission's consent to pooling, interlocking directorates, control acquisition, consolidation, extension, new construction or abandonment; in the case of capital issues there is the optional alternative of investigation without hearing.<sup>5</sup>

"The provision for hearing," the Supreme Court has said, "implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action" (*Chicago Junction Case*, 264 U.S. 258).

The hearing provision thus circumscribes discretion by requiring its exercise to be substantiated by evidence. It remains to be seen how this will affect the exercise of prudential discretion, particularly upon the basis of the widest considerations of expediency. How will it be possible to prove or disprove "public interest"? In many cases it is clear that the requirement will be mainly one of form: there must be something in the record tending to show public interest, or the opposite, and a corresponding finding. This may inure to the benefit of the applicant if he makes a good prima facie showing, and no evidence is introduced to the contrary, and if he sees to it that the consent order contains the appropriate finding.

If in the absence of such showing and finding the application is nevertheless granted, there is a technical illegality which may remain remediless. The Supreme Court has, however, held that a competing carrier may be permitted to intervene; and, thus becoming a party to the proceeding, it may contest the consent order (*Chicago Junction*

<sup>5</sup> New York likewise requires hearings before the grant of a certificate of convenience and necessity for public utilities; in the case of banks merely an investigation is required; investigation and hearings prior to the approval of capital issues are optional; the Joint Legislative Inquiry into public utilities brought out the fact that such an investigation seldom consumed less than eight months and was apt to result in the loss of favorable market opportunities (21 Senate Documents, No. 41 [1917], 180).

The hearing requirement will in New York have the important effect that the refusal may, in an appropriate case, be reviewed by certiorari.

*Case*, 264 U.S. 258; see also *People v. Public Service Commission*, 195 N.Y. 157).

The combination of a provision for hearing with a provision for competitors becoming parties to the application proceeding, may thus turn the latter into a contest of a semi-judicial character. The hearing requirement is, however, the exception rather than the rule; and ordinarily competitors have not the requisite locus standi to contest the grant of an application.

It remains to be seen whether the hearing requirement will become a permanent feature of licensing provisions; it may be appropriate as a prerequisite to refusal;<sup>6</sup> but there is little purpose in making it a prerequisite to a grant unless a definite right to contest the application is given to other interested parties, and this is not done even by the Transportation Act.<sup>7</sup>

§56. *Duration of permits.*—In some kinds of licenses the time element settles itself; a license for an open-air meeting exhausts itself by being acted upon, while a permit for a permanent building must likewise be of permanent operation. The difficulties arising in connection with public utility undertakings involving costly plants and carried on under franchises or corporate charters limited in time transcend the law of administrative powers and need not be dwelt upon.

The matter of duration becomes a question of legislative policy mainly in connection with occupations, trades, and professions. Circumstances may even here call for occasional, temporary, or provi-

<sup>6</sup> See *Smith v. Foster*, 15 Fed. 2d. 115.

<sup>7</sup> While it is difficult, in view of the scant material, to estimate the effect of a hearing requirement, it is also difficult to overestimate its potentialities. It may lend additional importance to the difference between stressing grant and stressing refusal. Under the Insurance Law of New York, the certificate of authorization may be refused by the superintendent if the refusal will best promote the interests of the people of the state—a latitude of discretion extremely difficult to control. If the statute established a hearing requirement and this were construed in accordance with the decision in the *Chicago Junction* case, the superintendent might find it as difficult to justify his refusal as it is now difficult for the applicant to demonstrate that the refusal is unjustified.

The decision in *Bratton v. Chandler*, 260 U.S. 110, may be cited as supporting the contention that the refusal of a license without a hearing violates due process of law. In that case the statute was found to give full opportunity to be heard, and the court was therefore not required to consider the effect of the absence of such opportunity.

To hold that a power to refuse without a provision for a hearing is unconstitutional would cast doubt upon a great mass of legislation never hitherto ques-

sional licenses;<sup>8</sup> but the choice usually lies between permanent licenses and licenses running for a definite period.

The German law is opposed to time limits, and the Trade Code forbids them expressly for the principal classes of licenses which it authorizes; nor do such limits appear to be sanctioned by other important German licensing laws.

In England and America the practice varies. It is not always easy to distinguish an annual license from an annual tax; but apart from that, the licenses for the more important professions and for banks and domestic insurers (but not for insurance agents) are unlimited in time;<sup>9</sup> while petty trade licenses are limited, usually annual, so under the New York Code of Ordinances (Title 14, §1). Liquor licenses used to be annual; in England they run for one year with facilities for renewal, and for seven years without them. English amusement licenses usually run for one year. It deserves notice that English pilotage certificates are annual; since they are otherwise regulated with great care, this seems to point to a long established practice of annual renewal; the remedies for non-renewal are the same as for revocation. Real estate brokers' and salesmen's licenses in New York are annual (Real Property Law, §441*a*).

Renewal facilities not uncommonly accompany annual licenses, and they are worked out with special care in the English Licensing Act of 1910; they are absent in the New York Employment Agency

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tioned. It has been assumed in the past that enabling powers are either ministerial or discretionary. If ministerial, they are controllable by mandamus, and due process is thereby secured. If discretionary, a determination is regarded as legitimate though not reached by judicial methods. A licensing authority passing adversely on reputation or competency has, in the past, been generally supposed not to adjudicate a fact; but, if this supposition is incorrect, and the adverse judgment does amount to the adjudication of a fact, it ought to be judicially controllable. But it ought to be the denial of a judicial remedy, not the refusal of a license by traditional non-judicial methods, against which the charge of denial of due process should be directed. Otherwise, we shall have to revise the entire law of license provisions.

Very similar considerations apply to an investigation requirement as an alternative to a hearing requirement; but the distinction between the two does not appear to be sufficiently clarified to permit of extended comment.

See further, as to the entire problem, §§137, 146, *infra*, and *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117.

<sup>8</sup> See English Licensing Act of 1910. Permits for purchases under the National Prohibition Act run for periods of thirty or ninety days (Title 1, §6).

<sup>9</sup> Note the amendment of the National Bank Act in 1927, making bank charters indefinite in duration, while originally they were for ninety-nine years.

Law, otherwise a very carefully drawn licensing statute.<sup>10</sup> If the facilities are such as to make the renewal a ministerial act, the difference between the annual and the permanent license may be practically inconsiderable; without such facilities an annual license may be more precarious than a revocable license, since the burden of establishing qualification is laid again and again on the licensee.<sup>11</sup>

§57. *Limitation of numbers.*—These are very uncommon at the present time in connection with license requirements. Occasionally liquor licenses were thus limited, and the quota provisions of the Immigration Act of 1924 have made this form of limitation an apparently permanent feature of American law.

A legal maximum of the number of permits presents the problem of non-discrimination: on what principle is the necessary selection to be made? It is surprising that the Immigration Act contains no guidance; the number of applicants must greatly exceed the possible number of visas, and the pressure upon consuls for preference must be great. Some kind of priority regulation would seem to be imperative. As a matter of fact, the rule of giving preference according to priority of application appears to be observed.<sup>12</sup>

§58. *Effect of irregularities.*—Of the legal questions which may arise in connection with the operation of permits and licenses, and which usually are not settled by express statutory provisions (e.g., who may act under a license, status of unlicensed property or of unlicensed persons or their acts, effect of license upon adverse private rights), there is one which involves the construction and effect of ad-

<sup>10</sup> Under the New York Insurance Law a contest of a refusal to renew automatically effects a temporary renewal of agents' and brokers' certificates (§§91, 143). This is an exceptional provision.

<sup>11</sup> Perhaps the only thing that can be said in favor of annual occupation licenses is that they create an interest of solidarity on the part of license-holders in resisting excessive administrative powers; where licenses are permanent, there may be a tendency to favor considerable administrative discretion, which may bar entrance to the trade or profession without touching those already in it.

<sup>12</sup> See "Deportation Hearings," 69th Congress, 1st Session, p. 141.—In the city of Chicago, liquor licenses used to be restricted in number, and at the same time were grantable for one year only. This raised the problem of how to deal with renewals or new grants of expired licenses. To give the holders a right to renewal would have accentuated the monopoly feature, and an ordinance provision to that effect was declared unconstitutional (*People v. Harrison*, 256 Ill. 102). At the same time the mayor was held to possess a discretion as to renewals which the court would not control by mandamus. Naturally the mayor would exercise the discretion in favor of existing holders, for to do otherwise

ministrative powers, namely, the question of what is the consequence of a defect of prerequisite or procedure prescribed by the law as a condition for granting the license.<sup>13</sup> This depends in part upon the nature of the subject matter: it is obvious that a license does not validate a void marriage; on the other hand, under provisions penalizing the practice of a profession without having obtained the license, the practice is lawful, though the license may have been irregularly obtained, until it is rescinded or revoked. The matter is of greater importance where the license requirement is in the nature of civil regulation than where it is a penal regulation. In the former case the license generally serves to establish the existence of prerequisites deemed essential to the acquisition of a status; and, as in the case of marriage, lack of these prerequisites might be regarded as fatal unless the licensing or certifying official is deemed to have power of conclusive determination, which an administrative official usually does not possess. An express statutory provision making a certificate or license conclusive evidence of compliance may therefore in a proper case be valuable; it is found in the English Companies Act and in the Light Railways Act of 1896. The Tenement House Law of New York makes the certificate of compliance conclusive in favor of purchasers—an obvious desideratum. Provisions of this kind are, however, rare both in English and in American legislation.<sup>14</sup>

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(e.g., by recognizing annual equality upon a principle of priority of application) would have thrown the business into the hands of the least desirable persons, since responsible parties would hardly have entered it with no assured prospect of continuance beyond one year. This was a case in which administrative discretion was able to correct an impossible legal situation.

The problem of limitation of numbers will also have to be dealt with in the regulation of radio licenses, since possibilities of interference forbid the indefinite multiplication of broadcasting stations; but the Radio Act of 1927 gives no guidance, referring merely to public interest, convenience, or necessity, and relying apparently on administrative regulations and upon administrative and judicial reviewing powers. See also the discussion in the Senate, *Congressional Record*, June 30, 1926, p. 12373.

<sup>13</sup> As to insurance company licenses, see Patterson, *The Insurance Commissioner*, pp. 79-81.

<sup>14</sup> The following list of topics discussed in a German treatise in connection with building permits is instructive: requirement of writing; rubber stamp signatures; time limit for acting upon the permit; permit not involving an obligation to act; power to supply omissions; rights of third parties not prejudiced; city may not refuse permit by reason of adverse proprietary claims of its own; conditions annexed in accordance with law must be "motivated" and are ap-

## B. ADMINISTRATIVE IMPOSITION OF TERMS AND CONDITIONS

§59. *Question whether power implied.*—We read in a decision of the Supreme Court (*So. Pac. R. Co. v. Olympian Dredging Co.*, 260 U.S. 205): “the power to approve implies the power to disapprove, and the power to disapprove necessarily includes the lesser power to approve on condition.” In that case the condition operated as a protection and not as a burden, and the power to approve was unqualified; but it is obvious that where there is no arbitrary power to withhold the approval, the proposition quoted in that general form involves a fallacy.

This much may be conceded, that, as compared with a refusal, a conditioned approval is a less incisive exercise of power; and there are statutes in which there is only a power to approve on conditions without power to deny an application altogether (Prussian Forest Law, 1880, §48). However, no instances of this have been found in English or American legislation.

In the absence of express statutory provision the power of administrative authorities to annex conditions to licenses should be denied, and such appears to be the better law (*R. v. Bowman* [1898], 1 Q. B. 663; see 76 Just. Peace 507; *Van Nortwick v. Bennett*, 62 N.J. L. 151; *Volp v. Saylor*, 42 Oreg. 546; *Thompson v. Gibbs*, 97 Tenn. 489; the power has been recognized in *People v. Owen*, 116 N.Y. S. 502, a special-term decision.<sup>15</sup> This means of course that a condition annexed without authority is inoperative, or is ground for rescinding the license; for to hold that acceptance of the license means submission to the condition is practically equivalent to holding that the condition may be imposed (*Re Sarlo*, 76 Ark. 336; also *Malkan v. Chicago*, 217 Ill. 471).

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pealable; permit not revocable by reason of error in exercise of discretion, revocable on account of error in fact; not refusible by reason of adverse private claims; not refusible for aesthetic reasons; refusal does not preclude new application; no relief against grant of permit (*Arnstedt, Polizeirecht*, Vol. 2). Most of the above points are not covered in America either by statutes or by case law.

<sup>15</sup> A licensing power may be vested in a municipal governing body as a legislative power to be exercised by ordinance or by-law; in that event the subjection of licenses to terms and conditions is simply a form of regulation; it is not an exercise of administrative power. The English film-license cases fall under this class (see [1916] 2 K. B. 504; also 86 N.Y.S. 445). The liberal rule laid down in *Hamilton v. Dillin*, 21 Wall. 73, may be explained by reason of the exceptional nature of the power (licensed commercial intercourse with the southern states during the Civil War).



§60. *Express grant.*—Where the power is expressly given by the legislature, it may be qualified by specifying with reference to what matters, or in what respect, conditions may be annexed, so the provisions of the English law that in granting agricultural gang masters' licenses the justices may impose conditions as to the amount of foot travel that may be done by children. In the New York charter provision concerning lodging houses (§1315), not only is the subject matter of the conditions specified, but they must operate as general rules; the power is thus virtually one of regulation. To the extent that statutory specification of the scope of conditions narrows discretion it reduces the objection to this form of power; there is, however, a serious question whether the licensee, by way of condition expressed in the statute, may be required to submit to the exercise of powers, which the legislature may not directly authorize, such as search or seizure without warrant (see South Carolina Dispensary Law, §15, quoted in *Scott v. Donald*, 165 U.S. 58, 74; and *State v. Le Blanc*, 115 Me. 142, 98 Atl. 119). The statutory specification of conditions is the exception and not the rule.

An express power to impose conditions appears to be more common in English than in American legislation. In England it is particularly conspicuous in the delegation of power to the Board of Trade with reference to public utilities, where occasionally very wide terms are used, as in section 11 of the Light Railways Act (all other matters, whether similar or not, ancillary to the objects of the grant); but Parliament here requires the Board of Trade to do what it usually does by special act, namely, the regulating of each undertaking according to its peculiar requirements. The power is also found in the explosives acts, and in town planning and improvement acts. In America it is liberally granted by the New York City Code of Ordinances; about one-fourth of the license and permit requirements of the Sanitary Code are subject to the imposition of conditions. In the legislation of Congress the conditional permit has assumed striking importance through the Transportation Act of 1920, which authorizes it in connection with pooling, leases, consolidations, new construction, extension, abandonment, and the issue of securities, without tying the Interstate Commerce Commission by any qualifying provisions; while the Public Service Commission Law of New York withholds the power in connection with similar permits.

§61. *Resulting discretion.*—An unqualified power to condition licenses confers the widest possible discretion. It is a power of special

legislation, i.e., with the freedom of legislative discretion without the check inherent in a rule that must operate generally. It may introduce new policies, which should be settled by the legislature itself. In connection with the approval of issues of securities it has been suggested that permits should be conditioned upon the financing being made a matter of competitive bids (86 I. C. C. 529), and this condition has been actually imposed with regard to equipment trust certificates (111 I. C. C. 434, 671). It is a legitimate question whether, as a general policy, this is matter of legislative or of administrative determination. A condition once imposed, moreover, is not easily altered, even if a power of modification is given by statute or reserved in the permit; we find in the reports of the Interstate Commerce Commission itself a reference to the necessary inflexibility of regulation when imposed by way of condition (71 I. C. C. 642). While such a power is of course subject to some judicial control, there is entire uncertainty upon what principles that control will be exercised. The indiscriminate grant of the power by the Transportation Act of 1920 is indicative of the tentative character of the policies introduced by that act.

Inflexibility can be charged against a conditional license only after the license with condition attached has been issued; it is one of the main arguments in favor of such licenses that as a matter of initial grant they admit of flexibility by way of adjustment to varying circumstances; and the question is only whether this variability is not too dearly purchased at the expense of excess of discretion, particularly since under this argument the purpose of the law is better served by varying than by uniform terms and conditions. In view of this individualizing function of the conditional license, it may perhaps appear to be least objectionable in connection with local improvements; and this might account for the authorization of conditional trade-nuisance licenses by the German Trade Code (§18), were it not for the express provision that the conditions may include stipulations for specified labor conditions; under the English Factory Act it is found possible to secure these entirely by general rule. In German and English legislation the power is sometimes checked by requiring conditions to be accompanied by a statement of reasons and by making them appealable.

§62. *Private plans and variations.*—There is, practically, a considerable difference between a power to annex conditions to licenses, and a power to approve or disapprove a plan submitted by private

parties with a discretion exercisable as to the merits of the plan. Under the latter form of power, the initiative rests with the private party; and while official pressure may be brought to bear in favor of a particular plan or particular features of it, the final alternative is rejection or approval of the plan as submitted.<sup>16</sup> Where, however, the power is to disapprove or to approve with modifications (Shipping Act, 1916, as to agreements between carriers; English Explosives Act, Metalliferous Mine Act), the difference is very much attenuated, and perhaps only means that conditions cannot be standardized in the form of general regulations.

A conditioning power would operate as a sort of dispensing power if it were presented in the form of leaving open to private parties an optional alternative to statutory requirements or prohibitions, the alternative being either proposed by the party subject to official approval, or offered by the official for acceptance of the private party.<sup>17</sup> In effect this is done by the "variation" provisions of the New York building and zoning laws (New York Charter, §§410, 411; Laws, 1914, c. 471; Labor Law, §30). It is not difficult to think of other applications.<sup>18</sup> The desirability of such a compromise can be judged only from case to case, and the statutory material is insufficient for a general estimate.

§63. *Unsettled questions.*—Should the legislative practice of permitting terms and conditions to be annexed to licenses become better established than it is at present, it will become necessary to settle

<sup>16</sup> It is interesting to note that in the Pennsylvania-Panhandle Lease case one of the Interstate Commerce Commissioners took the view that section 5, No. 2, of the Interstate Commerce Act should be so construed. The act provides that when upon application the Commission is of opinion that the acquisition of control is in the public interest, it may authorize such acquisition under such rules and regulations and for such consideration and upon such terms and conditions as shall be found just and reasonable. Commissioner Potter expressed the opinion that the Commission had power to consider only the terms and conditions contained in the instrument of acquisition presented by the application (72 I. C. C. Rep. 128, 135). Whatever one may think of this view as a matter of construction, a good deal is to be said for the policy underlying it.

<sup>17</sup> See §68, *infra*.

<sup>18</sup> The English Railways Act of 1845 (§66) presents one of the earliest instances of the power of variation. It reads as follows:

"Where a public improvement affects a railway with a consequent difference between the railroad company and the public authority, and a strict compliance with the law appears impossible or inconvenient, either party may apply to the Board of Trade, and the Board may authorize an arrangement in substantial

questions which are now in doubt or in an unsatisfactory condition. They relate partly to the modifying of conditions and partly to their enforcement. A power of modification is now sometimes expressly granted (so in connection with the issue of securities under the Transportation Act of 1920), in England with the apparent purpose of possible relief to the licensee. An express power is needed to alter conditions in the public interest; for while a power of regulation is inherently continuing, a licensing power exhausts itself by one exercise, subject to powers of revocation, if any. If it is true that the power to alter may be reserved as one of the terms of the license, this would accentuate the latitude of official control which the power to annex conditions carries with it.

Without express provision to that effect—which is unusual—the violation of a condition annexed to a license is not covered by ordinary penalty clauses (*State v. Le Blanc*, 115 Me. 142). Occasionally, but not often, a power of revocation is given by statute for non-compliance with terms or regulations. In the absence of either penalty or statutory power of revocation, it is doubtful whether the condition can be contractually enforced, or whether a method of enforcement (penalty or revocation) may be stipulated as one of the terms. Unless the provision for terms and conditions is to be rendered ineffectual, the courts will probably be compelled to recognize the validity of enforcing powers reserved by way of stipulation.

### C. REVOCATION OF LICENSES

§64. *Legislative practice as to grant and terms of power.*—There is no general rule, analogous to the federal rule concerning appointment to and removal from office (*Ex parte Hennen*, 13 Pet. 230), to the effect that a licensing power in the absence of a positive provision carries with it a power to revoke the license. It is true, however, that according to the terms or the intent of a statute a power to approve may be continuing in the sense that under appropriate circumstances

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compliance with the law, or calculated to afford equal or greater accommodation to the public, without injury to existing private rights.”

The following quotation is given for what it is worth :

“Some of the earlier plans of forest tax reform involved special favors to the forest owner, in return for certain specified management of his forest, under a contract with the state. Forest owners have been very reluctant to bind themselves by such contracts, and laws containing this feature have everywhere failed to produce results” (*Proceedings National Tax Association, 1922, p. 132*).

the approval may and should be withdrawn; so if the trade name of a food product is required to have the approval of an official, a change in the ingredients of the product which makes the trade name misleading justifies the revocation of the approval. This explains the decision of the Supreme Court in *Brougham v. Blanton Manufacturing Company*, 249 U.S. 495. It does not follow that every license dependent on the finding by the official of certain conditions may be revoked when these conditions cease to exist or are found not to exist; that requires express provision, as where the law permits an official to direct the discontinuance of the employment of a child or young person found to be unfit (English Factory Act, §7; German act of 1903, §21).

In the case of business, occupation, or institutional licenses, there is no inherent reason why a system of administrative control through an advance determination of the existence of prerequisite conditions should be accompanied by an administrative or even a judicial power to declare a forfeiture of the right or privilege granted; the question whether a power of revocation should be given or not is one of policy to be settled for each particular statute. It may be surmised that in some cases the absence of a power of revocation is due to legislative inattention (New York: pawnbrokers, veterinary surgeons, embalmers, and undertakers); if, however, New York generally provides for revocation in the Insurance Law, but not in the Banking Law (except for specified classes [see §29]), we must assume the latter to be a matter of deliberate omission; the judicial winding up of an insolvent bank is not in the nature of a power of revocation. The National Bank Act is similar in this respect to the New York Banking Law.

When in 1882 the English Board of Trade was given power to revoke electricity supply licenses for failure to perform duties regarding supply, for failure to carry powers into effect, or for discontinuance of the exercise of the powers (Act, 1882, §3, No. 6, and §6f), it was observed by a contemporary author that this was the largest power so far given to any government department in England (Clifford, *Private Bill Legislation*, Vol. 1, p. 326). The compilation of commission powers over electrical companies made by the American Telegraph and Telephone Company in 1913 shows no powers of revocation. When the Transportation Act of 1920 introduced license requirements into the control of interstate commerce, it refrained from making them revocable even where revocation would in the nature of things be possible (permits not yet or not fully acted upon, permission of pooling),

although the wide powers to impose terms and conditions may be used for that purpose. It is at least doubtful whether the new form of indeterminate permit with its vague phrase "termination according to law" can be construed as giving a power to revoke, and in any event such a power is not delegated to administrative authorities. It thus appears that while public utility legislation operates freely with license requirements, it is rather conspicuous for the absence of revoking powers.

In contrast to this withholding of the power of revocation we should place its grant in unqualified terms or as a matter of free discretion. Subject to such a power are, in Germany, all foreign insurance companies (Law, 1901, §§86, 91), stock exchanges, emigrant agencies, and saccharine-manufacturing establishments; but the power is not found in the Trade Code. It is not favored by English legislation. In New York we find the unqualified power in the charter and ordinances of the city of New York (serving liquor at musical entertainments [Charter, §1483]; certificates in connection with hazardous trades and explosives [Code of Ordinances, 10-2-26]). The phrase "at pleasure" appears to be used in the milk-selling permits issued under the Sanitary Code of the city of New York (*Metropolitan Milk Co. v. New York*, 113 App. D. 377); we find it in the statutes of Massachusetts in connection with amusement licenses; and in Michigan all fourth-class city licenses are made revocable at pleasure (Compiled Laws, §3022). If this phrase means that the power is to be exercised upon the sole responsibility of the official without any liability to account for its misuse, it can hardly be justified except where the power is vested in a high political authority, or where the revocation applies to something enjoyed by mere sufferance (projections beyond building-lines in New York [Ordinances, 5-171]). Perhaps some of the licenses under the New York Conservation Law which are revocable at pleasure come under this head.<sup>19</sup>

The phrase "for cause," "for sufficient cause," or the like, negatives the idea that the power can be exercised without any accountability; and the same is probably true where without specification of cause revocation can be pronounced only after notice and hearing (English Companies Act, 1908, §20). A mere reference to cause is commonly found in New York statutes, not only for the relatively

<sup>19</sup> "Revocable at pleasure" has been held unconstitutional in *Vincent v. Seattle*, 115 Wash. 473; it has been recognized without question in *Com. v. Kinsley*, 133 Mass. 578; *Child v. Bemus*, 17. R.I. 230; *Grand Rapids v. Braudy*, 105 Mich. 670.

minor interests under fish and game laws, but also in connection with professional licenses (pharmacists, nurses, accountants). It might be presumed to cover conditions or defaults falling short of illegality were it not for the fact that even charters of educational institutions are revocable "for sufficient cause." There is perhaps not enough material for any settled definition of the term.<sup>20</sup>

Specific grounds of revocation may be divided into several classes, according as the acts or omissions specified are or are not subject to criminal prosecution; and again, according as those not criminally punishable are or are not "justiciable," i.e., capable of being readily dealt with by a court of justice.

Where the ground of revocation is an act criminally punishable, it is possible to contend that revocation need not wait on criminal conviction. The question arose under the former liquor law of New York and, in consequence of an inconclusive attitude of the Court of Appeals (*Re Lyman*, 160 N.Y. 96; 161 N.Y. 169), was settled by statute in favor of the independent revocation proceeding, which, however, under the statute was a judicial proceeding (Laws, 1900, c. 367). In Louisiana the necessity of a previous conviction was established as a matter of statutory construction (*State v. Auditor*, 37 La. Ann. 316).

It is readily seen that an independent proceeding may lead to undesirable consequences. A revocation will not bar a subsequent prosecution, which may result in an acquittal. What course should then be pursued is not clear. A revocation after an acquittal would be still more of an anomaly (*Re College of Physicians*, 18 Ontario Weekly Reports 38). Partly on account of these inconveniences, partly because there will be a natural reluctance to proceed upon the basis of supposed criminal offenses without having the offense first duly established by a conviction, revocability by reason of a criminally pun-

<sup>20</sup> An act of Congress of June 10, 1910 (36 St. L. 464) provides for the licensing of custom-house brokers by collectors of customs, and makes the license revocable for good and sufficient reasons. This phrase was discussed at a conference of customs officials: Should the broker annually notify the collector that he is still in business and give his address, failure to be good and sufficient reason? Answer, No. Should the fact that the broker has gone into other business or removed from the port be considered a reason for revocation? Answer, No. Should the existence of a judgment against the broker for duties be considered a reason? Answer, Yes. And the Department, in concurring, was of the opinion that refusal of the broker to pay duties to the government, whether reduced to judgment or not, constitutes sufficient ground. (30 Treasury Decisions, No. 17, 21.)

ishable act should perhaps be construed as revocability by reason of conviction. Sometimes the statutes so provide in terms.

Quite commonly the ground of revocation is an illegal act or conduct, or a violation of some specific requirement, not amounting to a crime: a contravention to rules or orders or terms of licenses, or fraud; in case of insurance companies, misleading statements, violation of standard provision requirements, failure to maintain reserves, or non-payment of taxes; in case of associations, the pursuing of forbidden objects. These are facts capable of being adjudicated by a court, and the revocation proceeding might therefore be judicial; in most cases, however, the proceeding is administrative, although not infrequently with provision for judicial review.

It remains to notice grounds of revocation which do not even amount to illegality, actionable tort, or contravention to specific prohibitions and requirements. The following are instances: not in good faith conforming to law (National Prohibition Act); infamous or disgraceful conduct in a professional respect (English medical acts);<sup>21</sup> unfitness and incompetence (English sea captain's licenses); not conducive to interests of legitimate racing, or detrimental to interests of boxing and wrestling (New York laws); hazardous business; or simply a reference to the interests of the people of the state (New York Insurance Law).

While it is not absolutely impossible that grounds of this character should be passed upon by a court, an administrative expert body might in some respects be considered more competent to weigh the merits of a case, and the practice of legislation prefers administrative revocation. The question of preference as between methods leaves, of course, the question open as to whether or to what extent powers of revocation upon a basis of such discretionary considerations are from a legislative point of view legitimate.

Where revocation requires a justifying cause, the general rule is that it must be preceded by notice and hearing, whether this is provided for by statute or not (*People v. McCoy*, 125 Ill. 289). The Court of Appeals of New York has however held that in the absence of such an express requirement a revocation without notice is not necessarily illegal. This is, however, qualified by holding that such a revocation is not conclusive but may be contested in court, an alternative manda-

<sup>21</sup> The term "unprofessional conduct" does not seem to occur in the jurisdictions reviewed but is found in some states; in Utah it is carefully defined (Comp. Laws, §4448).



mus being the appropriate proceeding. In this judicial contest the licensee must show the injustice of the revocation, and while lack of notice may constitute injustice, it does not necessarily do so (e.g., where delinquency has been established by a conviction); the result is in any event that mere technical procedural defects cannot be relied upon to defeat the revocation (*People ex rel. Lodes v. Department of Health*, 189 N.Y. 187; *People v. Wallace*, 145 N.Y. S. 1041). Ordinarily of course, there will be some notice, but the procedure is rarely prescribed in detail; a jury trial is not required (*People v. Board of Commissioners*, 59 N.Y. 92), and since there is no power of arrest, a default determination is valid. If a complaint is required, it must show the statutory cause (*State v. Sullivan*, 58 Ohio St. 504).

Without anticipating a fuller discussion of remedial provisions, it should also be stated that where the revocation proceeding is in the first instance administrative, many statutes provide for a judicial review by way of correcting errors in the first proceeding. Such provision is found in nearly all the more carefully drawn statutes.

Taking a general view of powers of revocation, there is a striking lack of standardization both in England and in America, while in Germany rather definite principles have been introduced both by the Imperial Trade Code and by the Prussian administrative codes. We find differences even in the same law, or in closely related matters, still more, of course, as between entirely distinct statutes. This is illustrated by the various revocation provisions in the New York Insurance Law, in the medical and allied acts both in New York and in England, and in connection with the various licensed trades, as will appear by reference to the descriptive part of this survey. The differences relate to recognition or non-recognition of revoking powers, grounds of revocation, character of revoking authority, procedure, and review.

§65. *Comment.*—Perhaps the following observations may be hazarded with regard to these various phases:

(a) *Revocable or not.*—A general provision subjecting any license to forfeiture for violation of law, in analogy to the forfeiture of a franchise, would be theoretically possible, and the Illinois Quo Warranto Act has been held to be available for that purpose (*Swarth v. People*, 101 Ill. 621); but, forfeiture being an extreme penalty, such a comprehensive provision would not be desirable. It would on the other hand be desirable to have a general provision for rescinding any license illegally obtained or granted. The better view is that

there is no inherent administrative power to rescind by reason of initial defect (*Schaffer v. Schroff*, 123 Wis. 98; *Noble v. Union River Company*, 147 U.S. 165; *Volp v. Saylor*, 42 Oreg. 551, *contra*), but there appears to be sufficient authority that there may be rescission by judicial proceedings (*Lantz v. Hightstown*, 46 N.J. L. 102; *Decker v. Board of Excise*, 57 N.J. L. 603; *Van Wortwick v. Bennett*, 67 N.J. L. 151; *Cooper v. Hunt*, 103 Mo. App. 9; *State v. Zachritz*, 166 Mo. 307; *Brown v. Grenier*, 73 N.H. 426); in Nebraska the board may be compelled by mandamus to revoke the license illegally granted (19 Nebr. 165; 31 *ibid.* 514; 34 *ibid.* 237; 37 *ibid.* 362). A general statutory provision might determine the form of the proceeding and authorize it to be brought as well by the licensing authority as by the attorney-general.

In some American states we find general statutory powers to revoke municipal licenses (Iowa, Michigan, Minnesota, Texas, West Virginia). In the city of New York such a power is given by ordinance (Code, 14-1-5) to the commissioner of licenses, on complaint, without specifying any cause.

The absence of general statutory powers of revocation in most jurisdictions, including those under review, is well justified on principle; but it is not easy to discover a principle on which in particular statutes the power is granted or withheld. It is significant that the English Licensing Act of 1910 (relative to intoxicating liquors), summing up the experience of generations, cuts down revoking powers to a minimum with regard to a business which has ordinarily been subjected to such powers in the freest manner almost as a matter of course.

The German Trade Code expressly provides that the right to pursue a trade or profession may not be forfeited either by judicial or by administrative decision except in the cases provided by imperial law; this places it beyond the power of state statutes and municipal ordinances to make occupation licenses revocable (Trade Code, §143).

(b) *Grounds of revocation.*—The phrase “at pleasure,” which may be justifiable for removal from office, seems inappropriate to the revocation of a license, which should not be arbitrary or oppressive even in a matter of mere sufferance (projection beyond a building-line). The phrase “for cause” is undesirable by reason of its uncertainty; it subjects the exercise of the power to judicial review and ordinarily to elementary procedural safeguards; but while it thus affords some check upon gross abuse, it leaves the revoking authority without

adequate guidance or limitation, and does not even indicate whether the power is to be exercised upon legal or discretionary grounds; and a statute ought to be clear at least upon that point.

If specific grounds of revocation should be insisted on, it should on the other hand also be conceded that they may legitimately include default or delinquency not amounting to crime (insolvency in the case of an insurance company, drug addiction in case of a physician). The question is whether the definition of default may fall short of legal certainty, using such terms as "unprofessional conduct" or "conduct infamous in a professional respect," or other phrases expressive of non-conformity to extra- or supra-legal conventional standards.<sup>22</sup> The answer should be in the negative where the license relates to matters not legitimately subject to prohibition; and, quite apart from constitutional doubts under American constitutions, the tendency of legislative practice does not seem to favor such vagueness; the use of the terms indicated in the English medical and allied acts is somewhat of a solecism. But such latitude may not be inappropriate where the whole matter is one of sufferance, as in the New York statutes regarding boxing and racing, where revocation is permitted for practices not conducive to the legitimate interests of the sport, or under the National Prohibition Act (§9), where not in good faith conforming to the statute is a ground of revocation. The power under the New York act of 1910 to revoke a public-dance permit, if it appears probable that the dance will not be conducted in accordance with regulations, seems to fall under this head.

(c) *Character of revoking authority.*—If grounds of revocation involving legally undefinable default are legitimate, it must also be legitimate to intrust the exercise of such power to administrative authorities, which are better qualified than courts to estimate and enforce such standards. Apart from these exceptional cases, theoretical objections may be urged against administrative revocation: boards or heads of departments are apt to be supervising authorities and therefore also prosecuting authorities, so that their acting as judges is in a sense an incompatible function; they lack the judicial habit of mind, and they are rarely organized for trying cases. These objections however count for a good deal less where the fact of delinquency is judicially established. Where revocation is for a criminal offense, it is preferable, as pointed out before, to have it preceded by a conviction. The

<sup>22</sup> See observations in connection with Discretion, *supra*, §51.

law may make conviction ipso facto a forfeiture of a license<sup>23</sup>—particularly a second or third conviction for an offense in connection with the subject matter of the license—with proper provision that the fact of forfeiture is brought to the notice of the licensee (see *People v. Myers*, 95 N.Y. 223). But the law may also leave revocation after conviction to the administrative authority. If this is made a mandatory matter, little is gained, and provision for clerical notification and cancellation may be more effective.<sup>24</sup> It is otherwise where the revocation after conviction is discretionary, or where there must be aggravating circumstances in addition to mere violation of law to justify revocation (the English Dentists Act excludes offenses which under the circumstances do not disqualify; the English Pilotage Act speaks of misconduct affecting capability). The fact of the offense having been judicially established, the question whether its character or circumstances disqualify the holder of the license from further acting under it, will ordinarily be passed upon as competently by the administrative authority as by a court, and the inquiry will not be in the nature of a retrial.<sup>25</sup>

<sup>23</sup> The automatic forfeiture of a license as a consequence of acts or conduct not judicially established (English Theatre Act; Petroleum Act, 1891) can be explained only as a legislative inadvertence, and has been corrected by judicial construction (*State v. Green*, 112 Ind. 462).

<sup>24</sup> Revocation is not uncommonly made mandatory without previous conviction, so by the New York Insurance Law, §§33, 34, 209, 237, 305; also the New York Employment Agency Law. It is difficult to see how the duty can be made effective, and it is futile where there is no provision against the reissue of the license. In one case commissioners of excise were held criminally liable for failure to act upon a complaint which might or should have resulted in a mandatory revocation (*People v. Meakim*, 133 N.Y. 214).

<sup>25</sup> It is a very questionable policy to make revocation either mandatory upon conviction or an automatic consequence of conviction. The commission of a crime, even if it is a felony, is no evidence of lack of qualification; and it may not even be evidence of lack of character. Few people will believe that if a person is a criminal anarchist he is therefore unfit to practice medicine; opinion will be divided if he has been convicted under the Mann White Slave Act, where the case is not one of commercialized vice; if he has been convicted under the Harrison Drug Act, his disqualification would ordinarily be clear. But it is doubtful whether conviction under a federal act would be covered by a state statute. It is also doubtful how a pardon would affect a revocation. If conviction perpetually disqualifies, the handicap under which a discharged offender inevitably suffers will be greatly increased. Liberal powers of restoration might be of value, but they are only occasionally bestowed in express terms.

(d) *Procedure and review.*—The question then remains how revocation for legally defined defaults falling short of criminality is to be dealt with. Here it might be appropriate to have a judicial proceeding prosecuted by the licensing authorities.<sup>26</sup> But the preponderance of legislative practice appears to prefer an administrative proceeding in which prosecuting and adjudicating functions are not sharply separated.<sup>27</sup> If administrative revocation is appropriate for some cases, it may be convenient to admit it for all cases, provided that rights can be reasonably safeguarded. This may be done by procedural requirements and by judicial review. The New York rule that in the absence of express provisions summary revocation subject to judicial correction of actual injustice may be justified in the interest of vigorous administration, particularly in a metropolitan community (*People v. Department of Health*, 189 N.Y. 187), can hardly be accepted as satisfactory; a revocation of a license demands a stricter rule than removal from office.

In a number of the important English and American licensing acts there are at least some procedural requirements for revocation, although they are rarely elaborated with any fullness. A provision for charges, notice, and hearing can under judicial review be made to secure the substantial demands of justice. In New York the writ of certiorari serves that purpose; and it is not only available in such cases on general principles, but it is expressly provided for in some of the more recent statutes. The National Prohibition Act makes revocation reviewable by a proceeding in equity. In England many of the important licensing acts provide for an appeal to a court; while the Medical Act of 1858 lacks it, the more recent acts for allied professions have it; so also the Friendly Societies acts and the Merchant Shipping Act. According to the varying provisions or the nature of the remedy, the judicial review may be a retrial or a correction of errors; the latter, if it has the liberal scope of the New York certiorari, will as a rule answer the purpose of safeguarding the rights of the licensee.

NOTE.—The most careful provisions for revocation are not found either in New York or in England. It may therefore be instructive to give abstracts of provisions from other jurisdictions, relating to the revocation of a license to practice medicine.

<sup>26</sup> So in Utah for medical licenses, Comp. Laws, §4447 (See note, *infra*).

<sup>27</sup> In New York City the judicial revocation of amusement licenses was changed to administrative revocation by ordinance amendment of the Charter (§1476).

Utah illustrates the method of revocation through a judicial proceeding. The ordinary method of procedure in civil cases is to be followed except as otherwise prescribed. The trial is to be without a jury, unless the court calls an advisory jury. The Board of Medical Examiners is plaintiff. The complaint is to be in writing verified by oath of a board member or other person having knowledge of the facts, and shall pray a decree canceling and revoking the license, and an injunction perpetually enjoining the defendant from practicing medicine. When the defendant is found guilty (either upon trial or on default, as in other civil cases), the court must decree revocation and enjoin. Upon the entry of the decree the secretary of the Board must file a certified copy with the county recorder who must make a prescribed entry upon the margin of the copy of the certificate. There is a two years' limitation for the bringing of charges (Compiled Laws, §4447).

Illinois illustrates the method of revocation through an administrative proceeding: The holder of the license is summoned to appear before the Department of Registration by a citation signed by the director and given a hearing. The citation is issued upon a sworn complaint setting forth the particular acts charged. If the complaint sets forth grounds of revocation, the director issues a citation containing a copy notifying the person of the time and place of hearing, commanding him to file a written answer under oath within twenty days, and notifying him that upon failure default will be taken against him. Upon failure, the license may be revoked in the discretion of the Department, if the acts charged constitute sufficient grounds. Citation and any notice may be served by registered mail. At the hearing the person shall be given opportunity to present his defense in person or by counsel. The Department furnishes a stenographer and preserves a record of the proceedings at the hearing. The director may extend time, grant continuances, and within thirty days after an order of revocation may set it aside upon the recommendation of the Department's committee of physicians; upon the like recommendation, it may restore a revoked license. The revocation may within twenty days from notice of the decision be reviewed by writ of certiorari, and the court may suspend the operation of the decision.

The Illinois statute fails to specify the grounds of review, perhaps owing to some doubts as to the proper scope of the writ and of the constitutional power to extend it under the decision of *Aurora v. Schoeberlein*, 230 Ill. 496. There ought to be no doubt as to the power of review; and the review should be as wide as it is under the certiorari in New York. If it is not, the statute falls short of adequately safeguarding the rights of the person charged, in the matter of judicial review.

It is also difficult to see wherein the administrative procedure in Illinois is superior to the judicial procedure in Utah.

An Illinois act of 1927 regulates in similar manner the revocation procedure for all licenses under the jurisdiction of the Department of Registration.

§66. *Concluding suggestions.*—It may not be amiss to measure legislative practice by the test of what are believed the sound principles of revocation.

1. There should be a general provision for rescinding licenses il-

legally obtained. There is no such general provision, but possibly a remedy under general principles of law.

2. Occupational licenses should not be annual, but not uncommonly they are.

3. Revocation should not be mandatory, but frequently it is.

4. Revocation should be based on "non-justiciable" grounds only where the matter is one of mere sufferance, and subject to entire prohibition; but such grounds are more widely recognized.

5. If the ground of revocation is a criminal act, the commission of the act should be established by a criminal conviction. The legislative tendency is that way.

6. Revocation should not be for crime, or even felony generally, but only for crime affecting the qualification for the licensed occupation or acts; and revocation should be distinctly pronounced, and not be an automatic consequence of conviction. In the more carefully drawn statutes this seems to be recognized. Except perhaps in the case of specified offenses, revocation upon conviction should not be mandatory.

7. Revocation by administrative authorities may be preferable to judicial revocation where the grounds are non-justiciable, or where revocation follows conviction.

8. Administrative revocation should be subject to judicial review upon the principles recognized by the law of New York concerning certiorari. This implies previous notice and hearing. If in petty cases summary revocation seems legitimate, there should be a right to unrestricted judicial review.

Principles governing revocation of licenses have received so little consideration that the unstandardized state of legislation is not surprising.

#### D. DISPENSING POWERS

§67. *Dispensing power and direct statutory exemption.*—The term "dispensing power" is used in the history of English constitutional law with reference to the alleged royal prerogative to suspend in favor of particular individuals or cases the operation of a general law—a power, the exercise of which by the Crown was finally declared illegal in the seventeenth century, and which is not claimed in America as an executive power.

The term is here used to designate a similar power conferred by legislation upon administrative officials. In form and as a matter of

legislative terminology, the power may be indistinguishable from a licensing power, but it differs from it in purpose: the licensing power sets or assumes a standard, while the dispensing power sanctions a deviation from a standard. There are border line cases in which the two classes of power shade into each other, but on the whole they perform different functions in the economy of legislation.

As compared with direct statutory exemptions, a dispensing power possesses certain advantages, some of which are perhaps more apparent than real. As a matter of legislative tactics, it permits relaxation without disclosing its object. The most remarkable instance of this is section 78 of the British Merchant Shipping Act of 1906, which allows the Board of Trade to withdraw any ship from the operation of the entire act—the reason for this being left to conjecture.<sup>28</sup> A provision of the Money Lenders' Act of 1900, permitting the Board of Trade to exempt any body corporate from the registration requirement (after a number of specified classes of exemptions), is less extreme in that it must be done under general regulations (§6e). In American legislation such latitude is unusual, and of questionable validity. The New York "one-day-of-rest-in-seven" law provides that it shall not apply, if the Commissioner of Labor in his discretion approves, to specified classes of employees; the Court of Appeals has expressed strong doubts as to the constitutionality of this (214 N.Y. 121). If unconstitutional, the exemption is invalid. A requirement with a provision that in specified cases it shall not operate unless required by administrative authority (New York Labor Law, §81, No. 2) operates in the opposite way, for if the administrative power is invalid, the exemption stands.

A direct statutory exemption cannot be equally obscure, but it may be phrased in indefinite terms. A typical illustration is afforded by the usual exception in favor of works of charity and necessity in Sunday statutes. This results in a certain peril to the individual, who must decide at his own risk; but since he is not likely to be punished for resolving a doubt in his own favor, the indefiniteness weakens the law. The peril to the individual is greater when there are other consequences besides penalties. The Contract Labor Act of 1885 in its original form permitted the importation of skilled labor under contract, if

<sup>28</sup> *Hansard's Debates* give no information concerning this provision. Note, also, the power of the Board of Trade under the Merchandise Marks Act of 1926 to direct that certain provisions shall not apply to goods if difficulties in their application are apprehended (§1 [3]).



skilled labor of the kind could not be found unemployed in the United States; if an employer thought that a case for importation existed, and the immigration authorities thought otherwise, he might escape punishment, but the laborers imported by him might be excluded or deported; now the law makes importation dependent upon a determination of the Secretary of Labor that the statutory condition exists, and this is obviously the only way in which the exemption can be made to work satisfactorily. The exemption of mines from section 43 of the English Coal Mines Act where the Secretary is satisfied that the mine will be worked out in three years, is similar. The provisions last cited show the dispensing power in a very conservative form, reduced to a mere determination that the statutory ground of exemption exists. The administrative power reaches the vanishing point in the English Licensing Act of 1921, which postpones closing hours in favor of places with regard to which the authorities are satisfied that they are structurally adapted and bona fide used for the service of refreshments to which the supply of liquor is merely ancillary, but requires merely a notification by the licensee and not a permit to him (§3). There is here a studied avoidance of affirmative administrative action.

§68. *Variation left to administrative approval or to administrative regulation.*—Reference has been made before to cases in which the legislature feels the need of precautionary regulation, but is prepared to tolerate or even favor private regulation subject to official approval—a policy applicable, of course, only to undertakings large enough to operate under some plan of organization. If in such a case the legislature has a plan of its own, the legislative acceptance of an alternative plan may be regarded as being in the nature of dispensation; but if the undertaking is permitted only on condition of having an approved plan, it is clear that there is a licensing and not a dispensing power. In any event the administrative power here operates from case to case. Dispensing powers of this character are a prominent feature of English and German mining legislation.

There are, on the other hand, cases in which the legislature prohibits or requires, but permits exceptions from the prohibition or requirement, because it realizes that there are types of cases not fitting the general rule. There is, in other words, occasion for differentiation, which the legislature prefers not to elaborate itself, either because of the complexity of task, or because it cannot foresee the abnormal types. Such a power of exemption ought to be exercised by general rule as it is invariably under the English Factory Act. Under the New York La-

bor Law there is a peculiar compromise whereby the exemption is in the first instance individual, but is directed to be applied to all cases in which the facts are substantially the same (Labor Law, §30). The provision in connection with the one-day-of-rest-in-seven law (§151, subd. 5) reads as follows:

If there shall be practical difficulties or unnecessary hardships in carrying out the provisions of this section or the rules of the board, the board may make a variation therefrom if the spirit of the act be observed and substantial justice done. Such variation shall be by resolution adopted by a majority vote, shall describe the conditions under which it shall be permitted and shall apply to substantially similar conditions. The variations shall be published in the same manner as the rules of the department and a properly indexed record of variations shall be kept by the department.

Similar powers of exemptions apply to building and zoning laws (New York Charter, §§410, 411; Laws, 1914, c. 471).<sup>29</sup>

Such unelaborated differentiation probably underlies some other dispensing powers in which apparently an absolute discretion is to be exercised from case to case—so where the Board of Trade may permit the registration of a company without the word "limited," or consent to the payment of interest out of capital (Act, 1908, §§20, 91); where the New York Public Service Commission may permit the issue of evidences of indebtedness, for purposes in whole or part chargeable to operating expenses (P. S. C. Law, §55); or where the Interstate Commerce Commission may permit newly constructed railroads to retain excess earnings for a specified period (§15a, subd. 18); or where the New York Public Service Commission Law may relieve from compliance with specific requirements of the Railroad Law (§§56, 75, 180). It is difficult to see how such power can be exercised, except either as a matter of indiscriminate favor or in accordance with principles to be evolved by experience.

§69. *Emergency dispensations.*—Where it is apparently impossible to evolve any principle of differentiation, the dispensing power assumes its most characteristic aspect. Most newly formulated re-

<sup>29</sup> Another form of power of variation is found in New Zealand: "If in the opinion of the council a full compliance with any part of these or any other of the borough by-laws or any provision thereof would needlessly or injuriously affect the course and operation of business, or be attended with great loss and inconvenience to any person without corresponding benefit to the community, the council may on special application waive the strict observance of any provision or modify the same, provided that such other terms as they may impose be complied with by the applicant" (35 N.Z. L. R., 713).

strictive policies bring temporary hardships to legitimate interests; and there is always pressure to temper that hardship in cases where it should appear to be excessive, and particularly in "emergencies." There is little need to make express provision for the overriding emergencies of calamity or disaster, which take care of themselves. The economic emergency or claim to special consideration stands in a different category. Where a rule serves merely administrative convenience, it is legitimate enough to make concessions to private convenience (e.g., unloading vessels at other places than ports of entry under official permits [Tariff Act, 1922, §§447, 449]),<sup>80</sup> but it is otherwise where the rule serves some non-administrative public interest. In Germany both the Sunday law (Trade Code, §105*e, f*) and the women's hours-of-labor law (§138*a*) provide for emergency exceptions, attempting to safeguard the power from undue exercise by careful checks (rules of Federal Council, writing, records); in America it is generally considered that they tend to break down the law, and they are consequently avoided. The English Trade Board Act, which provides for the fixing of wages, admits exceptions for infirm workers (Act, 1909, §6 [3]); this appears to be legitimate and is also found in American statutes of the same kind. The Prussian Income Tax Law makes provision for administrative reduction of rates in the lower brackets when special circumstances, which the law indicates generically (sickness, losses, etc.), reduce the paying capacity of the taxpayer (§19). We should be averse to granting such power to an administrative official, but prefer to specify the exemptions in the law. It seems that dispensing powers are more frequently granted in German than in English or American legislation, and the careful safeguards that are found in the laws for the protection of labor are by no means typical of the other German instances of the power.

A special case may be made in favor of dispensing powers based on considerations of humanity. The argument has been pressed in connection with child labor laws to meet the supposed necessities of family support, but in view of the probably nullifying effect of relaxation, generally without success; the toleration of children on the stage represents rather a statutory exception than a special dispensing power. The dispensations provided for by the German law in connection with marriage formalities and impediments, and minority disabilities, fall perhaps under this head; but they are unfamiliar to our law. We have

<sup>80</sup> The most common form of dispensing power, the granting of extensions of time, seems to fall under this head.

a conspicuous illustration of humanitarian dispensing powers in our immigration law: admission of unaccompanied children, of persons liable to become public charges or suffering from physical disabilities, of wives or minor children of resident aliens under circumstances where they would be otherwise inadmissible; admission to hospital treatment; readmission of aliens who have had a long domicile in the country (§§3, 18, 21, 22, of act of 1917); also under the act of 1924 where inadmissibility under the quota provisions was unknown and unascertainable.<sup>31</sup> There is in the operation of alien exclusion laws an intensely human element which cannot be overlooked. To let the law take its course results in many cases in tragedies of broken lives and broken families. A dispensing power is a legitimate method of tempering the rigor of the law. The experiences of the quota law of 1921, with its lack of adequate notice to those affected by it, raise indeed the question whether a more general dispensing power should not be intrusted to the President. It is also noteworthy that there is nothing analogous to the pardoning power to offset the mandatory operation of the law regarding deportation.<sup>32</sup>

§70. *Relaxing questionable policies.*—There are cases in which the dispensing power reveals a legislative doubt concerning the main rule. When we find in the Education Law of New York (§68, No. 5) the provision occasioned by the McGraw-Fish case (111 N.Y. 66) that the Regents may authorize the acceptance by an institution of gifts beyond its charter capacity within one year from the delivery of the instrument of gift or the probate of the will, we can only wonder under what circumstances the authorization could be refused, or why a restriction should be maintained that may be relieved from in so extraordinary a way. Apparently there was a reluctance to meddle directly with many special charters of which the legislature knew nothing.

More frequently the dispensing power accompanies the enactment of the law from which it may relieve, and reflects the legislative sense

<sup>31</sup> The temporary admission under bond of otherwise inadmissible aliens under conditions prescribed in section 3 is of a different character; it is controlled by general rules, and during the war the power was used to admit Mexican contract laborers, obviously in the interest of the United States.

<sup>32</sup> See the observations of Louis F. Post, Assistant Secretary of Labor, in favor of a wide equitable dispensing power, in 10 *American Political Science Review* 255, 256. There are grave difficulties in the way of vesting such powers in the regular administrative officials.

of uncertainty of the wisdom or practical enforceability of the law; in a conspicuous instance, the limitation on life insurance business by the amendment of 1906 of §96 of the New York Insurance Law of 1892, the dispensing power was superimposed by subsequent amendment. It is natural that we should meet with such dispensing powers in connection with tentative economic policies, and we find them therefore repeatedly in recent federal legislation; the power tempers the long-and-short-haul provision, the prohibition of pooling, the prohibition of ownership by a land carrier of a competing water carrier, the rate restriction of the Merchant Marine Act of 1920, and certain citizenship requirements of the La Follette Seamen's Act of 1915.

The dispensing powers last mentioned, except the one regarding ownership of competing water carriers, are circumscribed by formal or procedural requirements: under the long-and-short-haul section an investigation is prescribed, under the pooling section, a hearing; under section 28 of the Merchant Marine Act a certification of the Shipping Board to the Interstate Commerce Commission; and the long-and-short-haul and pooling dispensations are otherwise qualified. The other two dispensations involve a suspension unlimited in time of the operation of the entire provision—in the case of the competing carrier, in favor of specified services; in the case of the rate restrictions of section 28 of the act of 1920, for the entire range of its application—the latter constituting practically an exercise of legislative power, but within the limits of permissible delegation, since the conditions of suspension are set forth in the act.

§71. *Theoretical and practical aspects.*—Formal or procedural qualifications of the dispensing power are the exception and not the rule; the differences in the power relate to the extent to which a given law or provision may be relieved from. The nature of the power, also, almost excludes any remedial provisions; the grant of the dispensation is theoretically a matter of grace, and the discretion involved in the refusal practically absolute. For the effect of a refusal is not as in the case of a licensing power the denial of a conditional statutory right: it merely leaves in operation what the legislature has indicated to be the normal and proper rule.

If this is the theoretical aspect of the power, its practical aspect is very different. The very fact that the power is unqualified makes it difficult to exercise it adversely in particular individual cases. A denial must either be based on some general rule or it will be felt to be an exercise of invidious discrimination. Experience shows that dispensing

powers, unless regulated, are affirmatively exercised; and in so far as regulation is impracticable, they tend to nullify the law or provision to which they are annexed.

§72. *Discretionary non-enforcement.*—While mere enforcing and prosecuting powers, being non-determinative in their nature, lie outside of the scope of this survey, it seems appropriate to refer, in connection with dispensing powers, to the relaxation of statutory provisions by failure to enforce them. In being of a purely negative character, this differs from the dispensing power which always involves a positive act.

A distinction should be observed between enforcing and prosecuting powers: the former consist in vigilant supervision, inspection, and information, the latter in carrying proceedings through the courts; the former are represented by inspectors or police officials, the latter on the administrative side by magistrates and prosecuting attorneys.

(a) *Enforcing powers and information.*—Is the inspector or police officer under a duty to see that every violation of law is punished? A statute may of course speak of a duty to “arrest all persons guilty of violating any law or ordinance” (Greater New York Charter, §315), but a duty “to enforce” a law does not necessarily imply a duty to “go to the limit” in every case of violation. The case law is inconclusive. A denial of a mandamus against the enforcing officer may be explained on the ground that the duty is not ministerial in the sense of being capable of enforcement by contempt process (*People v. Francis*, 95 Mo. 44; *State v. Williams*, 45 Ore. 314; *People v. Listman*, 82 N.Y. S. 263; *Gowan v. Smith*, 157 Mich. 443; *People v. Dunne*, 219 Ill. 346, 238 Ill. 593); in a case where a mandamus was granted (*Goodell v. Woodbury*, 71 N.H. 378), the existence of a certain discretion was admitted. The few cases of criminal liability for failure to enforce (*People v. Meakim*, 133 N.Y. 214; *People v. Herlihy*, 66 N.Y. App. D. 534) were likewise not cases involving the discretion here referred to.

If the matter is viewed as one of practical administration, it is clear that a duty to carry every petty and technical violation of a statute or ordinance before a court would defeat the purposes of the law. Even if the offense concerns public peace and security, common sense will demand occasional oversight or mere warning in petty cases; if the offense is one against statutes introducing prohibitions or requirements unknown to the common law, a certain degree of leniency becomes a matter of public policy. The study undertaken by the Ameri-

can Association of Labor Legislation on the administration of the labor laws of New York in 1915<sup>33</sup> shows a deliberate practice not to resort to prosecution until after non-compliance with a previous specific order, except in special classes of cases. The purpose of the law is that the office of the factory inspector should be educational as well as repressive or punitive; and this, the more important of his functions, would be entirely lost if he were under a duty to treat every violation or non-compliance as a crime. Officials supervising banks and insurance companies take a similar view of their functions.<sup>34</sup> In every case, of course, the assumption will be that official advice will bring a more effective remedy than punishment; and where that is not the case (e.g., in the case of building laws), there is no legitimate place for official indulgence, except in petty cases. To the extent indicated, it must be concluded that a power of enforcement vested in inspectors and similar officers carries with it a certain discretion to refrain in particular cases from enforcing the law by taking steps toward criminal prosecution.

This discretion is not likely to be expressed in statutes, and it is not easy to formulate it as an abstract legal proposition. Occasionally some check is placed on indiscriminate prosecution by preliminary hearing requirements; this we find in the Federal Food and Drug Act, 1906, §4, copied in the Insecticide Act of 1910; §4: if adulteration appears upon examination, the Secretary of Agriculture notifies the party and he is given a hearing; if it appears that the provisions of the act have been violated, the Secretary shall at once certify the facts to the proper district attorney. An express grant of discretion is thus carefully avoided. A hearing prior to penalty proceeding is also provided for in the Public Health Law of New York (§84) in connection with the discharge of industrial waste into public waters; it is only after such hearing that the Commissioner of Health may sue to recover penalties.

A much farther reaching provision is found in connection with the same matter in the English Rivers Pollution Prevention Act of 1876. Proceedings are to be taken only by a sanitary authority, and only with the consent of the Local Government Board. The Board, in giv-

<sup>33</sup> Volume 7 of the *American Labor Legislation Review*.

<sup>34</sup> Testimony of Comptroller Dawes before Joint Congressional Committee, October 3, 1923: "The unadvertised but chief function of the office of the Comptroller of the Currency is keeping banks from failing, and not operating receiverships."

ing or withholding their consent, shall have regard to the industrial interests involved in the case and to the circumstances and the requirements of the locality, and shall not give consent unless satisfied after due inquiry that means to render trade effluents harmless are reasonably practicable and available under all the circumstances, and that no material injury will be inflicted on the interests of the industry (§6). This amounts to a statutory toleration, in the interest of industry, of noxious effluents that are practically inevitable; under these circumstances non-enforcement is not matter of discretion but of duty. The provision is much more specific than the mere reference to public interest in the Federal Trade Commission act to be presently noted.

(b) *Prosecution*.—When we come to magistrates and prosecuting attorneys, the position is different. As regards magistrates, the law seems to be clear that in a proper case, upon complaint, they are under duty to issue process (*R. v. Adamson*, 1 Q. B. D. 201; *R. v. Martyr*, 13 East 55); it is of course otherwise where the law requires complaint to be accompanied by proof and the proof is deemed insufficient (*U.S. v. Lawrence*, 3 Dall. 42).

It is also generally understood to be the law that prosecuting attorneys have a duty to prosecute when there is a case for prosecution. On the continent of Europe this question has been the subject of a controversy, and the German Code of Criminal Procedure has established the duty (§152). Discrimination must of course be exercised as to whether there is a case within the law, whether there is sufficient evidence to go to trial, and probably also whether there is a reasonable prospect of securing a conviction. This discrimination comes very close to discretion; it was probably within the bounds of this discrimination when an Attorney-General of the United States gave district attorneys full liberty of action upon complaints of violation of the so-called Mann White Slave Act in cases of suspicion of blackmail (newspaper report of September 28, 1914).<sup>55</sup>

The Sherman Anti-Trust Law presents the question of discretion in two aspects. Section 6 of the act provides that property owned by any combination shall be forfeited to the United States and may be seized and condemned by appropriate proceedings. This section has

<sup>55</sup> Section 604 of the Tariff Act of 1922 provides for inquiry by the district attorney whether the needs of public justice require proceedings for fines, penalties, or forfeitures; and, in the event of a negative decision, for a report of the facts to the Secretary of the Treasury for his direction. Discretion is thus withheld from the prosecuting officer.



never been enforced. It is not like a case of alternative penalty (fine or imprisonment) where, while the law gives discretion to the court, the court is largely guided by the recommendation of the prosecuting attorney who in consequence also exercises discretion; for the forfeiture is the subject of a distinct provision.

The subject of remission of forfeitures has been carefully regulated by acts of Congress beginning as early as 1797 (R. S., §§5292-94); these, however, relate only to forfeitures under laws relating to vessels and importations. The non-enforcement of the forfeiture clause of the Sherman Act is not surprising in view of the extraordinary character of the provision; but general acquiescence in an exercise of discretion not given by law, in this particular case, can hardly furnish a precedent for other cases.

By reason of the difficulty of applying the criteria laid down in the Standard Oil and Tobacco cases, the Sherman Act presents an additional special situation. When in 1922 the merger of several large steel manufacturing corporations was planned, the Senate called on the Attorney-General for an opinion concerning the legality of the plan, and the Attorney-General gave his opinion to the effect that the proposed acquisitions did not violate the Sherman Law (33 O. A. G. 225). The Attorney-General did not purport to exercise any discretion, but merely examined the situation as he would do in any case where he has to determine whether proceedings are to be brought or not. He might have refused to give an opinion to the corporations concerned, reserving freedom of action; still, it is conceivable that in similar cases he might be approached for an advance opinion, and while an unfavorable opinion would not for the time being bar the consummation of the plan, a favorable opinion would under such circumstances operate very much like a licensing power. The difficulty of finding the point at which monopoly and consequent illegality begins would give him considerable latitude of judgment; yet he would only judge of facts and the law, and would not consider himself as vested with discretion. The operation of the Clayton Anti-Trust Act of 1914 is similar: it forbids price discrimination and acquisition of stock control with qualifications which make it a matter of difficult judgment to determine whether or not the prohibition is violated. Yet in vesting the enforcement of the act in the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission, respectively, the act simply provides that whenever the commission or board vested with jurisdiction shall have reason to believe that any

person is violating any of the provisions of the act, it shall issue and serve upon such person a complaint stating its charges, etc. The phrasing is that of duty, and not of discretion.

On the other hand, the Federal Trade Commission Act provides that whenever the Commission shall have reason to believe that any person is using any unfair method of competition in commerce, *and if it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public*, it shall issue and serve upon such person a complaint stating its charges, etc. The phrasing is here distinctly that of discretion, and the duty is merely to exercise that discretion according to law and in good faith. The statutory policy is clearly that the administrative machinery is not to be used to settle private disputes or as a remedy for mere private wrongs, just as in the English Rivers Pollution Act there is a distinct statutory policy not to sacrifice industry to other public interests.

The impression derived from a comprehensive view of legislation is that enforcement is looked upon as a matter of duty except where the object of the law will be better accomplished by preliminary warnings, and that an express power to dispense with prosecution is given only where a definite end is to be subserved thereby.<sup>86</sup>

<sup>86</sup> There must of course be many cases in which administrative authorities relax the rigor of the law without statutory warrant; in a study based upon the text of statutes it is impossible to trace these. It is, however, important to note the effect of administrative organization in this respect. If administration is decentralized, with ruling powers vested in local officials, particularly elected officials, with a system permeated by "politics," but even without that particular feature, it must be expected that many lenient and liberal determinations will be made, for which a subordinate in a bureaucratic centralized organization would not dare to assume the responsibility. In many cases such leniency will be in the interest of substantial equity; in other cases it may lend itself to favoritism or corruption. The difference between the administration of local taxes and of the federal income tax will illustrate the observation, which cannot be pursued beyond this mere suggestion.

## CHAPTER VIII

### REGULATION AND OPERATION OF DIRECTING POWERS (ADMINISTRATIVE ORDERS)

§73. *Legislation granting directing powers.*—In contrast to the law prevailing in the greater part of Germany, which recognizes on the basis of old and vague statutes, if not as a matter of common law, a power vested in police authorities to order the remedying of conditions which are immediately dangerous to safety or order, the Anglo-American law knows no general administrative power to issue orders to individuals. Such a power belongs in our system only to courts of equity, and, as a power to subpoena witnesses and to compel them to give evidence, to the courts of common law.<sup>1</sup> The power of the sheriff to summon the posse comitatus does not serve ordinary administrative purposes; if there is an official power to abate nuisances, it is not a power to order an individual to abate a nuisance for which he is responsible.

(a) *Germany.*—In Germany the general power of the police authorities to issue particular orders extends to the correction of all conditions threatening harm to public peace, safety, or order.<sup>2</sup> A power so vaguely circumscribed is difficult to define, and its bounds are controversial. The matter has been discussed a good deal by various writers, and there is ample case material, bearing perhaps more on general regulations than on particular orders; but the source of power being the same in both cases, it is obvious that if a regulation is ultra vires, an order would be likewise. The courts have on the whole been conservative, in some cases more so than some authors have

<sup>1</sup> The common law writ of mandamus does not run against private individuals.

<sup>2</sup> The clause usually relied upon is section 10 of Title 17 of the Prussian Code of 1794, which says: "To make the necessary provisions for preserving public peace, security, and order, and for averting dangers threatening the public or individuals, is the function of the police." An act of March 11, 1850, which regulates the exercise of the police power, does not refer to the making of particular orders; but the particular order (*Verfügung*) is as familiar to administrative practice as the general regulation (*Verordnung*).

thought necessary.<sup>3</sup> But the power covers probably most of the specifically authorized orders in English or American legislation, which are listed in the descriptive part of this survey under the heads of Safety, Health, and Morals; certainly all those contained in the English statutes concerning explosives and mines; and all those contained in the New York City Code of Ordinances; and this without specific statutory delegation. Some of the powers under the English public health acts relating to the requirement of sanitary improvements in houses would probably exceed the bounds of the ordinary Prussian police order, and the latter would also probably not extend to the requirement of major safety arrangements in connection with railroad transportation (installation of block systems, etc). The general power may of course be qualified by particular legislative provisions, this being a matter of statutory construction. Many German statutes contain specific delegations of directing powers: the very general power to give directions for safety, health, and comfort in particular factories (Trade Code, §§120a-120d) should be contrasted with the absence of such power in the English factory law of 1901; under the Mortgage Bank Law the power extends to all violations of law; under the Insurance Law to all reprehensible practices; the power to require arrangements for minimizing the pollution of waters by trade effluents is more liberal than under the English law; under the Prussian mining law the exploitation of a mine may be required for preponderating considerations of public interest. The German law also substitutes, with regard to specified trades or callings, administrative prohibiting powers for license requirements (Trade Code, §35: instruction in dancing, gymnastics, and swimming; dealing in secondhand goods or junk or in explosives; certain kinds of brokerage; and the business of the auctioneer).

(b) *England*.—England has been more conservative than Germany in the use of administrative orders, and there is no blanket power comparable to that of the Prussian police authorities. Directing powers first become conspicuous in public health legislation; those in the Town Improvement Clauses Act of 1847 relate to matters affecting public ways (obstructing projections, §69; outward opening gates, §71; openings in sidewalks, §73), and a policy against the letting of cellar dwellings is to be put into effect gradually by individual notices (§113); in the matter of removing ruinous buildings a notice from the

<sup>3</sup> See criticism in Rosin's *Polizeiverordnungsrecht* of decisions declaring illegal police prohibitions against double insurance (prevention of arson) and against selling liquor on credit.

surveyor, if not complied with, is to be followed by an application to two justices (§§75-78). The Public Health Act of 1848 operates through administrative notices, enforced partly by penalties and partly by substitutional execution, in the matter of privies, manure, water supply, and purification of houses (§§51, 52, 59, 60, 76); while unsanitary food is dealt with through justices' orders (§63).<sup>4</sup> Justices' proceedings are also required in the Nuisances Removal Act of 1855 (§12), but in the Public Health Act of 1875 this provision appears altered by authorizing a preliminary administrative notice to remove (§95). The Housing Act of 1890, in providing for the closing of houses unfit for human habitation, required the closing order to be made by a justice, with an appeal to the quarter sessions (§32); but the amending act of 1909 transferred the power to the local sanitary authority, with an appeal to the Local Government Board. This was the provision which was the occasion of the Arlidge case, which is discussed farther on.<sup>5</sup>

Directing powers are also granted in connection with explosives, mines, and fisheries; the Merchant Shipping Act has a provision under which a surveyor, in case of an accident to a ship, may require the ship to be taken to a dock for the purpose of surveying the hull (1894, §725); but, apart from that, the only power to deal with unseaworthy ships is that of detention (§§459, 692)—a summary, and not a directing, power. Medical inspectors may issue deficiency notices with regard to ship provisions which likewise result in detention of the ship (§202).

Quite striking is the scarcity of directing powers in the English factory laws;<sup>6</sup> the "special orders" of the act of 1901 are regulations applicable to classes of industries, and the provisions for orders in particular cases are almost negligible. It was not until 1916 that a general power to order certain improvements and arrangements in individual cases was given, apparently to add to the comforts of munition workers, and without comprehensive reference to the promotion of health and safety. It is also significant that at the International Labor Con-

<sup>4</sup> Under the Public Health Act of 1925 the cleansing of verminous premises may be directed by administrative order, while dealing with verminous persons without their consent requires the order of a petty sessional court (§§46, 48).

<sup>5</sup> See §79, *infra*.

<sup>6</sup> However, the Public Health Act of 1848 authorized special orders for privy arrangements in factories (§52).

ference at Geneva in 1923 the English delegates opposed the vesting of mandatory powers in inspectors.<sup>7</sup>

Order-issuing powers for the safety of railroad operation were evolved slowly: it is true that as early as 1842 the Board of Trade might postpone the opening of a railway until a satisfactory report of compliance with the law was obtained, but after the road was opened an inquiry instituted by the Board in case of accident resulted merely in "observations," not in orders (1871, §§6, 7). An act of 1863 gave power to require works to deal with grade crossings; an act of 1889 gave power to require the instalment of specified safety devices; an act of 1900 gave general power to make particular orders for the safety of employees; finally the Railway Act of 1921 gave a general power to issue orders in the interest of safety as well as for other purposes; but this power is divided between the Railway and Canal Commission and the Minister of Transports.

Powers serving economic purposes (service facilities and rates) were vested in the judicially constituted and acting Railway and Canal Commission, and, until 1921, were much more conservatively bestowed than in America.

The factory, shipping, and railway laws seem to be characterized by a certain aversion to the vesting of ruling powers in officials not acting in judicial form.<sup>8</sup>

(c) *New York*.—In New York the history of directing powers is associated with public health legislation. Two statutes enacted for the city of New York toward the end of the eighteenth century deserve notice. The one, of 1797 (c. 16), attempted to deal with noxious trades (then believed to be the breeders of disease) by agreement with the owner for removal, or, in default thereof, by impaneling a jury to award compensation for removal; the other, of 1798 (c. 65), provided for an inquiry by the commissioners of health resulting in

<sup>7</sup> *League of Nations, International Labor Conference, 1923*, p. 146; *ibid.*, p. 341, "Nature of the Functions and Powers of Inspectors," par. 6: "That the inspectors should be empowered, in cases where immediate action is necessary to bring installation or plant into conformity with laws and regulations, to make an order (or, if that procedure should not be in accordance with the administrative or judicial systems of the country, to apply to the competent authorities for an order) requiring such alterations to the installation or plant to be carried out," etc. See, also, the account of the discussions in the *Survey* of December 15, 1923.

<sup>8</sup> The Land Drainage Act of 1926 provides for county council orders directing that drains be put in order. An appeal is given to a court of summary jurisdiction (with further appeal to the Quarter Sessions) or to an arbitrator.

an order requiring the abatement, removal, or discontinuance of the nuisance within a time to be limited; if not complied with, it was made the duty of the mayor to issue his warrant to the sheriff to see to the removal, and in addition, non-compliance was made a misdemeanor. The order-issuing power thus early created was confined to the city of New York; as late as 1850 a law enacted for the state at large and creating local boards of health made effective provision only for regulations (c. 324, §3, No. 6), and it was only after a judicial decision to the effect that a violation of a particular order was not punishable (*People v. Reed*, Parker Cr. R. 481) that very tardily, in 1867, the power of these boards was extended "to make without publication such orders and regulations in special and individual cases not of general application as they may see fit concerning the suppression and removal of nuisances and concerning all other matters in their judgment detrimental to the public health" (c. 790). This very wide power has remained in the Public Health Law of New York ever since. A year before, in 1866, the Metropolitan Board of Health Act for the city of New York had provided a semi-judicial procedure for dealing with nuisances, which for some reason gave rise to constitutional doubts (*Reynolds v. Schultz*, 27 N.Y. Superior 282). The Court of Appeals never dealt squarely with any constitutional issues in connection with this act, although it was generally assumed that the validity of the act was settled in the cases of the *Metropolitan Board v. Heister*, 37 N.Y. 661.<sup>9</sup> The sweeping directing power of the Public Health Law is commented upon in the descriptive part of this Survey, and the grant of more conservatively circumscribed powers with reference to specific matters is noted (sewage and refuse disposal, communicable diseases, unsanitary bakeries, dairies, animal and plant diseases, and tenement houses). The Labor Law refrains from granting directing powers of as wide a scope as the Public Health Law, or as the German Trade Code; the most general power, that of prohibiting the use of machinery until made safe in accordance with the directions of the Commissioner (Labor Law, §256), was introduced in 1892 (c. 673, §8). As has been shown before, this power is still withheld in England. The sweeping

<sup>9</sup> An earlier act for the city of New York (1850, c. 275) had authorized an inspector to give directions and adopt measures deemed by the mayor and health commissioners necessary to deal with noxious trades, and had provided for "summary punishment" of disobedience; it had also undertaken to make removal orders of the board of health final and conclusive (Title 3, Art. 6, §1). This act does not appear to have been passed upon by the Court of Appeals.

power vested in the Superintendent of Banking to order the discontinuance of unauthorized or unsafe practices and to require explanations in defense of practices which he questions, was given him on his own recommendation in 1908.<sup>10</sup> The directing powers over insurance companies are less general, and in the main apply only in case of danger of insolvency. As regards public utilities, New York as early as 1882 gave power to make orders regarding railroad charges in the most comprehensive manner, but rendered the power practically harmless by an untrammelled judicial control; directing powers, both as regards charges and service facilities, became, however, a conspicuous part of the Public Service Commission Law of 1907, and now present very much the same aspect as they do in the Interstate Commerce Act. Directing powers are also granted with reasonable liberality in the Conservation Law.

(d) *United States*.—In the earlier legislation of Congress there was occasion for directing powers only in connection with shipping and with revenue. Under the customs revenue acts, the subject of assessments received some attention from the beginning; and eventually a good deal of administrative law grew up around it.<sup>11</sup> A considerable amount of legislation was called for by the safety problem of steamboat navigation, and the act of 1852 gave effective directing powers with regard to repairs to the boards of inspectors (now R. S., §§4453-54), to which the act of 1871 added a power of individual inspectors to require all necessary provisions to guard against loss or danger by fire (R. S. §4470). These powers should be contrasted with the ineffective provision of the first act of 1790 for protecting seamen against unseaworthy ships, a provision relying entirely upon judicial action without administrative aid (R. S., §§4556-58).<sup>12</sup>

The immigration acts developed one altogether special form of directing power, the exclusion or rejection of aliens, with some care. But above all it was the Interstate Commerce Act which brought this phase of administrative power into prominence. In a sense modeled upon English precedent, a power, which in England was vested in a commission organized as a court, was given to an administrative commission, and given more liberally. While under judicial construction the grant in its original form proved abortive, the Rate Act of 1906 placed it upon an effective footing; and the directing power, a power

<sup>10</sup> See §191, *infra*.

<sup>11</sup> See §§80, 162, 262, *infra*.

<sup>12</sup> See §185, *infra*.



of corrective intervention, became the chief instrumentality of federal economic legislation, adopted by subsequent acts (Federal Trade Commission Act, Shipping Act, Packers' Act), and written into the public utility laws of practically all of the American states.

§74. *The directing power as a method of effectuating indefinite statutory provisions.*—The provisions of the Prussian Code of 1794 and of the Public Health Law of New York, already referred to, illustrate the directing power in its widest form: the statute indicates the occasion for administrative intervention only in the most generic way by reference to such large categories as "safety and order," or "public health," and does not indicate at all what may be ordered, but leaves that to be determined by the nature of the occasion. With this generality may be contrasted the power given under the laws of New York, in the case of communicable disease, to prohibit communication or intercourse and to require purification; the power to order discontinuance of discharge of sewage, or the cleaning and disinfection of dairies, or the lighting of halls and painting of rooms in tenements; the power of the Commissioner of Labor to prohibit the use of machinery until made safe in accordance with his directions; and many others of the like character, in which both the occasion and the measure are sufficiently indicated, without being precisely specified, by the statute.

The scope of the directing power presents interesting problems which have received little judicial attention in England or America, owing to the novelty of this form of power, while there is considerable case material in Germany, although German legal writers have given the matter more theoretical than pragmatic treatment.<sup>18</sup> The problems relate to content, discretion, and enforcement, and depend partly upon the inherent logic of typical situations and partly upon fundamental constitutional relations between the administration and the judiciary.

Normally there is no occasion for administrative directive or corrective intervention unless the statute is phrased in indefinite terms; otherwise the intervention, if provided for, is in the nature of a convenience or benefit, not in the nature of a burden. Compare a poll tax and the general property tax. The former is definitely fixed by statute, and the statute might impose the duty to pay without an administrative order; the administrative order, if any, serves the purpose of a

<sup>18</sup> This is true of the treatises of Mayer, Meyer, Rosin, and Fleiner; the handbook by Arnstedt on *Polizeirecht* deals adequately with all the practical phases of the subject.

warning and is purely beneficial. The general property tax, on the other hand, imposed according to value, requires a directing order by way of assessment. The same is true of the federal estate tax; the income tax, on the other hand, is in most cases theoretically definite, and, as shown in the descriptive account of revenue legislation, the law does not provide for a primary, but merely for a deficiency, assessment. Unless this deficiency assessment is called for by reason of clerical error or fraud or disputes as to facts or the law, it is due to the fact that the law operates with terms that have no clearly defined content (depreciation, depletion, etc.).

The operation of the administrative order in a definite statute, by way of warning, is illustrated by section 47 of the New York Farms and Markets Law: the Commissioner is to notify all persons violating the section; and if such notice is complied with within ten days, no prosecution, civil or criminal, for a violation of the section shall be instituted. The order is thus a benefit; it would be in the nature of a charge or burden if the intervention of an order would serve to aggravate the consequences of violation by increased penalties; but such a use of administrative orders in connection with definite prohibitions or requirements is probably unknown to legislative practice; an offense, in other words, is never made more serious by reason of the fact that an official order, and not merely a statute, is disobeyed. A contrary rule would not be in conformity with our notions of law and illegality. A mere compliance order, neither beneficial nor aggravating, serves no purpose; of this character was section 21 of the New York Labor Law of 1909, omitted in the revision of 1921.<sup>14</sup>

If a statute is phrased in indefinite terms, an administrative order merely directing compliance with the statute or prohibiting its viola-

<sup>14</sup> "The Commissioner of Labor shall enforce all the provisions of this article. He shall investigate complaints made to him of violations of such provisions and if he finds that such complaints are well founded he may issue an order directed to the person or corporation complained of, requiring such person or corporation to comply with such provisions, or he may present to the district attorney of the proper county all the facts ascertained by him in regard to the alleged violation, and all other papers, documents or evidence pertaining thereto, which he may have in his possession."

As a matter of practice, administrative departments, even in the case of specific requirements, probably always issue compliance orders in the nature of warnings before instituting enforcement proceedings; the examination of almost any departmental report will disclose this practice. See also the report of the American Association of Labor Legislation on the Administration of the Labor Law of New York, 7 *American Labor Legislation Review* 493, 496.

tion would still less serve any useful purpose. Where the order consists in a prohibition, this is simply a matter of common sense; an order of the Interstate Commerce Commission to a railroad company not to charge unreasonable rates, or of the Federal Trade Commission to a firm to cease and desist from unfair methods of competition, would in that general form leave the statute exactly where it would be without the Commission. But while this would be generally conceded, the Supreme Court in the *Queen and Crescent* case (*Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U.S. 479) rendered a decision which made the law equally devoid of common sense. The Interstate Commerce Act gave the Commission power to entertain complaints of unreasonable rates and to issue orders to desist from charging such rates. The court denied that this gave power to determine what rate should be reasonable.<sup>15</sup> But a mere prohibition applied to something quantitatively defined makes nonsense; it gives absolute safety so long as the forbidden limit is avoided by a negligible fraction—the reverse of Shylock's pound of flesh. The decision of the Supreme Court nullified the statutory directing power, which was reinstated in clearer terms by the Rate Act of 1906. Where the condition to be remedied does not relate to matter of quantity (excessive charges, inadequate wages, excessive hours of labor, etc.), but to qualitative matter (business practices, etc.), there is not the same objection to a merely negative order. Ceasing and desisting from a practice found to be an unfair method of competition,<sup>16</sup> or from a banking practice found to be unsafe under section 56 of the Banking Law of New York, may leave a theoretical liberty to indulge in other equally obnoxious practices; but it will take time to develop them; and the cease-and-desist order may in these cases practically accomplish its purpose, while it would not in a matter of quantity. The alternative to such a merely negative order would, in any event, be a regulative power which the legislature may not desire to give.

It appears from the foregoing that the normal function of an administrative order is to make a generic statutory prohibition or requirement definite. The directing power is given because the legislator finds himself incapable of foreseeing the precise duty of the indi-

<sup>15</sup> Yet in awarding reparation under the act the Commission had necessarily to fix upon a reasonable rate! This "anomalous state of affairs" was later commented on by the Supreme Court (*Baer Bros. v. Denver & R. G. R. R.* 233 U.S. 479, 487).

<sup>16</sup> See Henderson, *Federal Trade Commission*, pp. 72-77.

vidual; the order consequently should be complementary or specifying, and not a mere direction to comply. The specification may relate to the occasion calling for remedial action, or to the remedial measure, or to both. Where the statutory provision is in the nature of a requirement and not in the nature of a prohibition, the further important question arises how specifically the remedial measure may or should be directed, whether it should specify a definite result to be obtained (e.g., to maintain a given temperature in a workroom or railroad station), or also a definite method to be adopted (e.g., the installation of some mechanical system)—a question that will not arise in connection with a prohibiting order. Often the statutes are so worded as to leave this point ambiguous, for the power to direct necessary or suitable measures may equally mean necessary or suitable in the judgment of the individual, and necessary or suitable in the judgment of the authority. In the matter of sanitary powers the tendency in England, both judicial and legislative, has been to permit specification by sanitary authorities (compare *Ex parte Whitchurch*, L. R. 6 Q. B. D. 545, with *Ex parte Saunders*, L. R. 11 Q. B. D. 191, and *R. v. Wheatley*, 16 Q. B. D. 34; and section 36 of the act of 1875 with section 39 of the amending act of 1907). It even seems that the order not only may, but must, specify (*R. v. Horrocks*, 64 J. P. 661). From an administrative point of view a power to specify may be desirable, while a duty to specify may occasionally be undesirable; and the Scotch Public Health Act of 1897 provides for a notice requiring the author of a nuisance to remove the same, and to execute such works and do such things as may be necessary for that purpose, *and, if the local authority thinks it desirable (but not otherwise), specifying any works to be executed*. American courts have in the absence of clear language leaned rather against an administrative power to specify methods, so long as the required result would be obtained in some manner (*Eckhardt v. Buffalo*, 19 App. D. 1; *Morford v. Board of Health*, 61 N.J. L. 386).

A complementary or specifying order, as distinguished from a compliance order, normally involves the exercise of discretion, or at least the determination of questions of law or fact calling for judgment or discrimination; it has no tendency to become ministerial or matter of routine like a permit. On the other hand, the discretion is rarely, if ever, quite as free as it may be in the exercise of a licensing power: inherently, there is a greater check upon requiring a railroad

extension or consolidation than upon refusing to permit one. The typical cases of administrative orders are those on the border line between discretion and discrimination: rate or service orders of railroad commissions; the order of the Superintendent of Banking of New York to discontinue unsafe practices; orders of repairs on ships; a cease-and-desist order of the Federal Trade Commission; a deficiency assessment of the Internal Revenue Commissioner—the latter probably coming closest to an entirely non-discretionary function, requiring the determination of difficult questions of law and of accounting, and perhaps to be classed as a mere compliance order.

§75. *The question of judicial re-examination.*—A proper estimate of the operation of directing powers involves the consideration of the question of enforcement. The regular method of enforcing an administrative order is by punishing its violation, and punishment requires a judgment of a court of justice. In the case of an enabling power the law starts with a prohibition and punishes action without a permit; in a proceeding to impose such punishment the rightful or wrongful exercise of the enabling power is not involved, unless—which is usually not the case—the unlawful refusal of a permit is regarded as equivalent to a permit.<sup>17</sup> But in a proceeding for the violation of an administrative order the issue is not merely the fact of violation of the order, but also the legality of the order. Any other view would assume the conclusiveness of an administrative order. So far as that order involves discretion, the fair exercise of that discretion may be made final, if the legislature so desires and secures to the individual the fundamentals of notice and hearing; and this is recognized in the finality of a fair appraisal or valuation for taxing purposes (*Hilton v. Merritt*, 110 U.S. 97). In the case of police orders the situation is different in New York from what it is in Germany or England. In New York enforcement proceedings open the question of the validity of the order in its entirety, since there is no hearing in the first instance (*Fire Department v. Gilmour*, 149 N.Y. 453); in Germany and England there may likewise be no statutory hearing requirement in the first instance, but there is the opportunity for an administrative appeal, in Germany always, in England at least under the public health acts; and therefore in the enforcement proceedings the factual conditions underlying the order are not open to examination (*Hackney v. Hutton* [1897], 1

<sup>17</sup> A case so holding, under very exceptional conditions, is *Padgett v. State*, 93 Ind. 396. See also §31, *supra*.

Q. B. 210; *Robinson v. Mayor* [1899], 1 Q. B. 751; 2 *Kamptz und Delius, Rechtsprechung*, 250; see also *Stevens v. Casey*, 228 Mass. 368).<sup>18</sup>

The possibility of drawing in question the validity of an administrative order in a judicial enforcement proceeding naturally impairs its force. A mere compliance order will be in effect simply a warning notice; a complementary or specifying order will, on the other hand, even without an express statutory provision to that effect, create a strong presumption in favor of the official determination that a particular condition stands in need of some remedy. In a great multitude of cases, and particularly of minor cases, the administrative specifying order will perform a valuable function and may effectuate the statutory purpose, where mere advice coupled with the threat of prosecution based upon indefinite statutory provisions might fail to produce an effect; on the other hand, the experience of early railroad and public utility legislation goes to show that, with strong resistance on the part of private interests, the entire reopening of the order in a judicial en-

<sup>18</sup> The New York doctrine assumes that unless the statute expressly requires notice and hearing, administrative action lacks the essential safeguards of justice and is therefore entirely inconclusive; voluntary administrative arrangements affording a fair hearing prior to the issuing of an order are ignored. These voluntary arrangements are sometimes quite elaborate (see, e.g., Henderson, *Federal Trade Commission*, pp. 49-52, as to the procedure observed before a formal complaint is issued). The report of the Department of Health of the city of Chicago for the years 1911-18 shows what steps are taken before prosecutions for violations of ordinances are instituted, and it is obvious that orders in the few cases in which they are provided for (e.g., Code of Ordinances, §§2167, 2195, 2198) would not be issued more summarily. When an informal complaint is received concerning unsanitary conditions, an inspector is sent out who makes his report within four days. A recommendation by this inspector that a notice be sent is examined by a reviewing inspector as to completeness of statement, fact of violation, whether the notice covers the violation, and the time necessary for compliance. The notice is then sent, and in ordinary cases also a letter requesting co-operation. If upon reinspection compliance is ascertained, the notice is abated. If the notice is not complied with, the party is summoned before a hearing board to show cause why suit should not be instituted. If no satisfactory assurance is given, the record is forwarded to the prosecuting attorney, and on the day preceding the trial a reinspection is had to determine the exact status. The report shows that on 1,000 complaints, 496 notices were sent, of which 450 were complied with; 96 hearings were held; and 38 suits instituted (*Report*, pp. 645-50). This, of course, applies to a large department in a metropolitan community; but in a smaller unit greater informality will be offset by better opportunities for actual notice. Lack of statutory provision does not necessarily mean absence of fair notice and hearing.

forcement proceeding may tend to discredit the administrative directing power by successful contests in the courts.

§76. *Methods of strengthening the effect of the order.*—There are three methods by which the weakness of the administrative directing power resulting from its dependence upon judicial enforcement may be remedied: by an aggravation of penalties, by the creation of summary enforcing powers, and by the restriction of judicial control in enforcement proceedings. While the three methods may be used in combination, it does not appear that in legislative practice all three are combined in connection with the same power.

An aggravation of penalties entails no increase of administrative power. If this is an advantage, it is offset by considerations bearing upon the equity of the remedy. The usual form will be to make each day's continued disobedience to the administrative order a distinct offense, or to measure the penalty by the duration of the disobedience or by others units. This coercion is not, however, available to force submission to the order until its validity has been judicially established. The Supreme Court has held that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of an order, by reason of objections not apparent upon its face but depending upon a showing of extrinsic facts; and that if in a judicial proceeding the order is found to be valid, penalties may be imposed for subsequent violations, but not in respect of violations prior to the adjudication (*Wadley Southern R. Co. v. Georgia*, 235 U.S. 651, 662, 669; also New York Public Service Commission Law, §24).

Since every new administrative order is likely to be based upon a new state of facts, the cumulation of penalties can be avoided by appropriate direct proceedings against the order. The Supreme Court, however, intimates that if such available contest is neglected and the person affected chooses to await penalty proceedings, cumulative penalties may be imposed. This may work considerable hardship upon one who is not alert in noticing the order, or unwilling to take the initiative in judicial proceedings, and—barring exceptional cases—there is something repugnant to the sense of equity in piling up penalties, which makes courts reluctant to enforce them (*Fitzmaurice v. Turney*, 256 Mo. 181); and happily this method of strengthening an order is more conspicuous on the statute book than in actual enforcement. There appears to be no reported case of enforcement of cumulated

penalties for non-compliance with orders, in the making of which procedural formalities had not been observed.

The second method of strengthening an administrative order is by granting summary powers in aid of it. This may be illustrated by the income tax. A deficiency assessment is a mere compliance order; it does not add to the content of the statute, and it is inconclusive since it can be questioned in court. But the collector need not sue for the tax, which might place upon him the burden of proving the correctness of the assessment; he may distrain and collect without prior judicial sanction; and the law forbids his being enjoined. He is therefore in a position to give his order effect, and the individual has to sue him to recover back any excess paid by him over what he believes to have been due. Some change in this state of the law has come through the Board of Tax Appeals.

Administrative powers outside of taxation have in England and America no long established or common law summary methods of enforcement at their command, while the German law is different. The common law right of abating nuisances is not generally available to administrative authorities; but statutes may vest them with analogous summary powers where the condition is in the nature of a nuisance, and that is very generally the case where safety or health is at stake. If abatement may be resorted to in the first instance, it may of course also be used as a means of enforcing compliance with orders. Section 6 of the Public Health Law of New York vests such a directing and enforcing power with reference to nuisances in the Governor of the state. So, under the Banking Law of New York, the power of the Superintendent to take possession of the business and property of the bank may be used in case of non-compliance with his orders (§57). Generally speaking, however, the summary power appears in our statutes as a statute-enforcing rather than as an order-enforcing power, and it will therefore receive separate consideration as an independent power. Nor is the summary power coextensive with the directing power; and in the field which at the present time is most conspicuous for the exercise of directing powers, that of public utilities, the summary power is generally withheld. Outside of taxation, therefore, the directing power does not lean greatly upon the support of summary enforcing methods.

In Germany, on the other hand, direct action is the regular method of enforcing police orders. The Prussian Administrative Code of July 30, 1883, provides (§§132, 133) that in case of disobedience or



non-compliance the methods to be resorted to are: first, to have the required thing done by a third party, collecting the expense by way of execution; second, if substitutional performance is impracticable, or if an omission is to be enforced, administrative imposition of a moderate fine, and commitment in case of non-payment; third, direct force, if without it the order cannot be made effective. Orders under the factory law are however directly enforced only after the court has pronounced a penalty.

The third method of strengthening the administrative order is by restricting the judicial re-examination of the order in enforcement proceedings. This may be done in two ways: by shifting the burden of proof in court, or by not admitting any new evidence in court. The original Interstate Commerce Act made the orders of the commission *prima facie* evidence of the facts found, but the effectiveness of the orders was not greatly increased thereby. It is also to be noted that where, as in New York, nuisance or similar orders are regarded as inconclusive for lack of notice and hearing, the Court of Appeals has repeatedly spoken of the right of the owner to show in court that the order was unjustified, as though the burden were on him; obviously, in administrative cases the burden of proof is not of the same importance as in ordinary civil or criminal litigation. In modern public utility statutes it is common therefore to give to the administrative findings underlying an order a stronger effect than that of mere *prima facie* evidence, excluding new evidence before the court and providing at most for a judicial power to refer the case back to the commission for the taking of additional evidence. In the Federal Trade Commission Act the orders are in enforcement proceedings made conclusive if supported by evidence, and this has been followed in the Shipping Board and Packers' Acts. This matter will have to be further considered in speaking of judicial control.<sup>19</sup> The important thing to note in this connection is that to give the administrative finding the weight of *prima facie* evidence or greater weight in court, necessarily means that the administrative finding must itself be surrounded by some quasi-judicial safeguards. And this makes it necessary to discuss the procedural aspects of administrative orders.

§77. *Administrative hearing.*—An administrative order differs from an administrative regulation in that it operates by way of individual discrimination, imposing a duty or restraint upon A which it does not impose upon B. Provision for some kind of notice and hear-

<sup>19</sup> See §§146, 147, *infra*.

ing, which in the case of a regulation is at best a matter of legislative requirement in the interest of equity and intelligent action, becomes in the case of an order a constitutional requirement under the due process clause of the Fourteenth Amendment, as well as under similar clauses of state constitutions. This was recognized by the Court of Appeals of New York with reference to special assessments for local improvements (*Stuart v. Palmer*, 74 N.Y. 183) and applies generally to tax assessments involving valuation or appraisal. The notice may be of the most general character; it is sufficient if the statute indicates a time or period during which assessments may be contested before a board of review (*Felsenthal v. Johnson*, 104 Ill. 21; *Corcoran v. Board*, 199 Mass. 5). In the case of *Hagar v. Reclamation District*, 111 U.S. 701, the Supreme Court held that the constitution was satisfied if ultimate judicial proceedings to enforce collection afforded an opportunity to contest the assessment. It is, however, obvious that at that stage, when other assessments have already been paid, an owner will find it very difficult to convince a court of an unfairness of apportionment, which would necessitate a readjustment by supplemental assessments, if not a nullification of the entire proceeding. New York, however, adopted a similar view with reference to nuisance orders in the case of *People v. Board of Health of Yonkers* (140 N.Y. 1). A statute authorizing, without provision for notice and hearing, orders for the suppression and removal of nuisances, was sustained by reason of possible emergencies requiring prompt action, and was reconciled with the constitution by holding that the order is not conclusive but may be attacked when the authority tries to enforce it, or, in case of summary action, in an action against the authority by reason of such action. This view was reaffirmed in *Health Department v. Trinity Church*, 145 N.Y. 32, and in *Fire Department v. Gilmour*, 149 N.Y. 453, and was applied to the revocation of licenses in *People v. Department of Health*, 189 N.Y. 187. As in the matter of taxation, it is apparent that a hearing after the event cannot do the same justice as an advance hearing, and in the case of police orders, if it results in success for the contestant, and he recovers damages against the officer who may have acted in good faith, the latter suffers unjustly; and the prospect of possible personal responsibility will paralyze his efforts in behalf of public health or safety—a vicious circle, which convicts this branch of administrative law of lack of common sense.

A very much more rational view may, however, be taken of this New York doctrine. A closer examination of the leading cases denying

the requirement of a previous hearing reveals the fact that the absence of notice was always presented and dealt with as an abstract constitutional question; nowhere does it appear that the complaining party was actually taken by surprise or suffered actual injustice from lack of notice. A notice-and-hearing requirement is in New York construed as making applicable judicial rules of evidence, particularly by shutting out information possessed by the authority and not presented in the form of testimony (*People v. French*, 119 N.Y. 502); and the courts are apparently unwilling to transform the preliminaries to a nuisance order (and the same is true of revocation of license and removal from office) into a formal trial in which advantage may be taken of technical errors, relying upon their power to correct substantial injustice by eventual judicial relief appropriate to the case; and it is by no means clear that acting without any notice whatever will not be treated as an abuse of power; that case does not appear to have arisen. Under this view the New York doctrine merely means that notice and hearing preceding the order is not a technical requirement provided that substantial justice is observed. The correlative of this doctrine would be to hold the officer personally liable only in case of arbitrary action.

If there is provision for notice and hearing prior to the order, supposed to satisfy the constitutional guaranties, the character of that hearing becomes of importance. The matter is fundamental to the relation of administrative law to the common law, and there are judicial decisions which require comment. The problem may be conveniently presented by considering three illustrative applications: the law and practice of assessments under the general property tax; the decision of the House of Lords in the *Arlidge* case; and the history of the federal customs legislation.

§78. *Assessment under the general property tax.*—As pointed out before, notice and hearing in this matter is very informal. A decision of the Supreme Court of Illinois is characteristic, if not typical. The assessments of express companies that had been made by the assessors were discussed informally around a table by the representatives of the companies and the members of the Board of Review. No specific valuations were taken up, nor was any decision then reached or announced. Thereafter the Board increased the assessment without informing the companies of the evidence on which the increase was based. The Supreme Court sustained this, saying: "If appellant desired to make any showing to the Board that the schedule and valuations of its property were correct and should not be changed or in-

creased, it had the opportunity to do so, and it cannot complain that the Board did not produce the evidence upon which it acted in making its increase" (*American Express Company v. Raymond*, 189 Ill. 232) —a brief and unsatisfactory decision.

In ordinary cases the law provides for an original assessment and for a review; but in the case of railroads (except for real estate) there is generally only one assessment by a central state board. This means that while a railroad company has the right to present its case, in the absence of fraud the valuation made by the board is final, although the company has no further opportunity to correct errors. "A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings and new trials are not essential to due process of law, either in judicial or in administrative proceedings" (*P. C. C. and St. L. R. Co. v. Backus*, 154 U.S. 421). This bare minimum of due process is clearly not adequate justice in such a complex matter as railroad property valuation. It enables the tax commission to operate in the dark, preventing a fair contest as to the correctness of the valuation. It is indeed stated by economic writers that tax commissions practiced secrecy for fear that their methods might be attacked,<sup>20</sup> attacks which they thought unfair since they were engaged in a bona fide effort to evolve a fair system of taxation, which of course was impossible without occasional errors in methods (*Lutz, State Tax Commissions*, pp. 201, 260, 630; *Adams, 23 Journal of Political Economy* 11-15).

In part, at least, the unsatisfactory character of assessment procedure is accounted for by the peculiarity of the property tax itself. It is notorious that, mandatory statutory provisions to the contrary notwithstanding, property is hardly ever assessed at full value, and a good deal in the way of administrative action goes by favor and compromise. It is only in exceptional cases that insistence upon stricter justice will avail the taxpayer for the purpose of reducing his assessment. The valuation sustained in the *State Railroad Tax Cases*, 92 U.S. 575, and which had been set aside by the federal court below (Federal Cases, No. 7300), had raised the railroad assessment from about twenty-three million to about one hundred and thirty-three million dollars; but it was not shown that the latter figure was in excess of actual

<sup>20</sup> This, however, was not true of the assessments sustained in the *State Railroad Tax Cases*, 92 U.S. 575; see 76 Ill. 561, 586.

value.<sup>21</sup> A system of which looseness in result is expected is not conducive to the development of strict methods of procedure. Fairness can only mean relative fairness, and the desideratum would be a guaranty of equality. It is difficult to see how notice and hearing to one individual can secure to him the same degree of indulgence that is accorded to others. The burden of proving inequality is necessarily upon him and requires an independent proceeding. If such inequality is systematic, relief may in a number of jurisdictions and in the federal courts be afforded on general principles of equity (*Lake County v. Wakefield*, 247 U.S. 350); but the task of establishing systematic inequality is not a simple one. In New York the statute gives a judicial remedy for unequal as well as for excessive assessment, thereby recognizing that in this branch of administration equality is a controlling factor, owing to the abandonment of any attempt to secure other than relative correctness of valuation.<sup>22</sup>

§79. *The decision in the Arlidge case.*—The case of the *Local Government Board v. Arlidge*, decided by the House of Lords in 1915 ([1915] A. C. 120), regarded as one of the leading cases in English

<sup>21</sup> The Flagler estate in Florida was probated at \$32,000,000; it was then assessed at \$16,000,000, and this was reduced to \$5,000,000; during Flaglers' lifetime his property had been assessed at \$75,000. See Lutz, *op. cit.*, p. 580.

<sup>22</sup> The law and practice of assessments in matters of taxation would require a separate study. The treatise on *State Tax Commissions* by Lutz gives a great deal of valuable material but does not claim to deal with local boards. The state tax commissions represent the first serious attempt at standardization. There are now also various plans on foot to systematize real estate valuations, but the proceedings as to personalty are still generally arbitrary. Conditions in England used to be apparently even worse than in this country, according to the data given by Sidney and Beatrice Webb in their volume on the *Parish and the County*. As in this country, the courts made no serious attempt to control the equity of assessments (see *Soady v. Wilson*, 3 Ad. and El. 248). It is not that the general property tax is intrinsically incapable of a fair assessment but the tradition of looseness is too strong to be overcome, particularly under a system of assessment by local elective officers. However, it is a significant fact that in England, and in Prussia likewise, the function of assessment is committed to non-professional, self-governmental officials; although in England there is an increasing tendency to utilize the bureaucratic machinery of Somerset House. Self-governmental assessment means loose and lenient assessment, in accordance with an apparently universal desire for undervaluation for purposes of taxation. The bureaucratic organization of the federal income tax administration with its deficiency assessments aiming at absolute accuracy is a novel experiment, incapable of being carried into effect with regard to large categories of taxpayers and classes of income, and probably impossible, if the element of appraisal were not reduced to a minimum.

administrative law, involves the question of what is essential in the procedure upon which an administrative order may be based. The case concerned a closing order under the English housing acts. Under the act of 1890 the closing of an unsanitary dwelling required an order of a justice of the peace, appealable to the Court of Quarter Sessions; but the act was changed in 1909 by transferring the power to make a closing order in the first instance to the local authority, with an appeal to the Local Government Board, one of the executive departments of the central government. The statute authorizes the Board to make rules regulating the procedure on appeal, and expressly provides that an appeal is not to be dismissed without a previous public local inquiry; any question of law may be brought before the High Court. It must of course be remembered that in England there are no constitutional requirements or limitations controlling statutory powers, and that, apart from the common law, there are only questions of statutory construction; still the process of construction permits considerations concerning fundamental justice. The appeal procedure was complained of as violating natural justice; and while this term came in for some criticism in one of the opinions (p. 138), it was conceded that the rules of the Board for determining an appeal must observe substantial justice. Arlidge, the owner, had appealed from a local closing order; a government inspector had held a public local inquiry at which the owner was represented by his solicitor; the inspector submitted to the Board a shorthand note of the proceedings and evidence together with his report. The Board informed the owner of its willingness to consider further statements that he might wish to submit in writing; of this he did not avail himself. It did not, however, communicate to him the inspector's report, and we find a statement that it is the practice of the Board to refuse to disclose to an owner the nature and contents of inspectors' reports. The appeal was dismissed by the Board after a full and careful consideration of the reports made by their inspector and of the evidence and documents which accompanied these reports ([1914] 1 K. B. 161-66, 183). The owner sought to have this dismissing order quashed by writ of certiorari. The attack was based upon three grounds: that the order did not disclose by which officer of the Board the appeal had been decided; that the owner was entitled to be heard orally before the Board; and (an argument apparently first advanced in the Court of Appeal) that he was entitled to see the report of the inspector. The Court of Kings' Bench (Divisional Court) decided against allowing the writ, but was reversed by the Court of Ap-

peal ([1913] 1 K. B. 463; [1914] 1 K. B. 160). The decision of the Court of Appeal was widely commented on as a triumph of the common law over bureaucratic government; but the House of Lords without dissent reversed the Court of Appeal. The decision settles the important principle (before adverted to) that in administrative determinations the nominal authority need not take actual personal or mental cognizance of a case, but may assume responsibility for conclusions vicariously reached, and this apart from the provision of the Local Government Board Act, 1871, §5, which makes a board order valid if made under the seal of the Board and signed by the president and countersigned by a secretary (the present order complying with those requirements). Lord Haldane says (p. 133):

Unlike a judge of a court he [the Minister] is not only at liberty but is compelled to rely on the assistance of his staff. When, therefore, the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it. This point is not, in my opinion, touched by s. 5 of 33 and 34 Vict., c. 70 [the section just cited].

The opinions delivered do not sharply separate the other two points of denial of oral hearing and non-disclosure of the report, disposing of the former rather briefly. After the public local inquiry, which was oral, it is difficult to attach any particular importance to the question whether or not the case was heard upon written or oral argument, provided the owner knew upon what evidence the final conclusion was reached.

As regards the latter point, the Court of Appeal thought that if the inspector made a report on a public inquiry held by him, it should be made public. The respondent had no real opportunity of presenting his case if he was not permitted to see the report. The House of Lords denies this, and the essential issue of the case seems to lie at this point.

Lord Shaw says (p. 137):

I incline to hold that the disadvantage in very many cases would exceed the advantage of such disclosure. And I feel certain that if it were laid down in courts of law that such disclosure could be compelled, a serious impediment might be placed upon the frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks. The very same argument would lead to the disclosure of the whole file. It may contain, and frequently does contain, the views of inspectors, secretaries, assistants and consultants of various degrees of experience, many of whose opinions may differ, but all of which form the material for the ultimate decision. To set up any rule that that decision must, on demand, and as a matter of right, be accompanied by a disclosure of what

went before, so that it may be weakened or strengthened or judged thereby, would be inconsistent, as I say, with efficiency, with practice, and with the true theory of complete parliamentary responsibility for departmental action.

Twice in the opinions of the Lords, the earlier decision of *Board of Education v. Rice* [1911], A. C. 179, is referred to with approval, in which it is held essential that there be given "a fair opportunity to those who were parties to the controversy to correct or contradict any relevant statement prejudicial to their views" (pp. 133, 141); and Lord Parmoor says (p. 143):

If I thought that this non-disclosure [of the inspector's report] deprived the respondent of a fair hearing in accord with the terms of substantial justice, I should accede to the argument on behalf of the respondent and should hold the same view whether the appeal is to be regarded as a quasi-judicial act or as a decision on review of the administrative action of the local authority. I am unable, however, to come to any such conclusion. . . . If the report of the inspector could be regarded as in the nature of evidence tendered either by the local authority or the owner of the premises, there would be a strong reason for publicity. In my opinion it is nothing of the kind. . . .

These last observations might make it appear that a distinction should be made between the report and the evidence, that the decision was required to be supported by the evidence, and that the report was merely in the nature of a confidential communication without legal bearing on the case; but apart from the difficulty of drawing such a distinction, the Board explicitly stated that its decision was based upon a consideration of the report. The Court of Appeal treated it as part of the case before the Board, and it seems impossible to look upon it in any other way. Notwithstanding Lord Parmour's opinion, the decision of the House of Lords cannot be considered otherwise than as holding that upon the construction of the statute the applicant is not entitled to be informed of the entire case against him. A judicial hearing involves two things: that the party be heard as to his own case and that he hear the case against him. According to the House of Lords, Parliament, where it permits a case to be determined by a government department, is supposed to have taken into account the necessity of vicarious action, and with it, the secrecy involved in confidential reports; and to this must yield the second element of a hearing, the requirement that the party be informed of the entire case against him. As to whether the opinions of the House of Lords are as well



reasoned as those of the Court of Appeal, jurists may differ; the important thing is that the House of Lords adopted for administrative order procedure a theory of bureaucratic action variant from the traditional practice of courts of justice.

§80. *The history of customs legislation.*—The history of the appraisal provisions in the federal customs administration is set forth in the descriptive part of this survey; read in connection with the leading judicial decisions, they throw an interesting light upon the problem of what constitutes a proper hearing in administrative procedure.

The Customs Administration Act of June 10, 1890, re-enacting section 2902 of the Revised Statutes, required the appraisers to ascertain the value of imported merchandise "by all reasonable ways and means." Regulation 474 of the Treasury Department instructed the appraisal officials that the appraisal "should not assume the nature of a judicial inquiry, but should be conducted as an investigation of experts." The character of the appraisers' hearing is described and commented on in 30 Fed. Rep. 360. It appears that the importer was not informed who the government witnesses were, or what they testified to, was not allowed to cross-examine them, and that lawyers were excluded; he was allowed to be in the room where his goods were and point them out to the appraisers with appropriate statements on his part. The circuit court thought that this was a sufficient hearing, and the decision was sustained by the Supreme Court in the case of *Auffmordt v. Hedden*, 137 U.S. 310, the Court approving what the circuit court said without expressing an independent opinion. In the subsequent case of *Origet v. Hedden*, 155 U.S. 228, the Supreme Court stated that the information obtained by the appraisers was not public property, and that there was no statutory authority for the public examination of the government's witnesses, nor for their cross-examination by the importer or his counsel. The Court thus was of the opinion that the importer was not entitled to be informed of all the evidence on which the government relied, on the theory, apparently, that this publicity might jeopardize the government's sources of information—an attitude not unlike that taken by the House of Lords in the Arlidge case.

In 1907, after diplomatic remonstrances on the part of Germany against American methods of appraisal, a commercial agreement with that country incorporated a note from the Secretary of State to the German ambassador showing certain instructions to customs and consular officers. These read in part as follows:

In reappraisal cases the hearing shall be open and in the presence of the importer or his attorney, unless the Board of Appraisers shall certify to the Secretary of the Treasury that the public interest will suffer thereby; but in the latter case the importer shall be furnished with a summary of the facts developed at the closed hearing upon which the reappraisal is based.

This reasserts the policy of possible and partial secrecy, but in a modified form.

The Tariff Act of 1909 in section 28 (relating to reappraisal and appeal therefrom) expressly provided that the Board of General Appraisers may exercise both judicial and inquisitorial functions, the term "inquisitorial" apparently implying the idea of some secrecy; and while the act gave the Board the powers of a circuit court to compel the attendance of witnesses, it also left the question of open hearings and of the examination of witnesses to the discretion of the general appraisers (Fed. Stat. Annot. Suppl., 1909, pp. 815, 816).

In contrast to all this preceding history, the Tariff Act of 1913 (Fed. Stat. Annot. Suppl. 1914, pp. 114, 119, 120) provided for a hearing at which the parties or their attorneys should have opportunity to hear evidence and examine and cross-examine witnesses for either party, and to inspect all samples and all documentary evidence or other papers offered—a reversal of the formal policy. This provision appears unchanged in section 501 of the present Tariff Act of 1922.

This history shows that, notwithstanding an impression even on the part of the courts that the traditional methods of judicial trial are unsuitable to administrative hearings, a strong pressure of private interests may eventually force the transformation of the administrative hearing, with its reservations of secrecy, into a trial with substantially all of the guaranties of judicial procedure.<sup>23</sup>

§81. *Recent statute law.*—There appears to be nothing in the course of English legislation since 1915 to offset the decision in the *Arlidge* case, analogous to the displacement of the theory of the *Heden* cases by the changed reappraisal procedure. The acts of 1919 and 1925 amending the Housing Act of 1909 do not touch the provisions discussed by the House of Lords,<sup>24</sup> and appeals entertained by the bureaucratic departments will presumably for the present continue to have the privilege of a partly secret procedure. However, the cases in which appellate or ruling powers over individuals are lodged in such

<sup>23</sup> See, also, an article on "Judicial Review in Customs Taxation" by George Stewart Brown, one of the General Appraisers, in *Forum*, July, 1918.

<sup>24</sup> See especially section 115 of the act of 1925.

departments are in England few. The procedure of the Rates Tribunal under the Railways Act of 1921 is to be governed by rules made by the Lord Chancellor and the Minister (§22), a method which may be relied upon to secure judicial safeguards; the Dentists' Act of 1921, giving the General Council power to erase from the register, directs it to receive a report from the Dental Board and to hear any observations which the person affected or the medical authority may desire to make with reference to the report (§8)—the very thing denied by the rules of the Local Government Board.<sup>25</sup>

Considering that at the present time the most important administrative orders outside of the field of taxation occur in connection with public utility legislation, the procedural provisions of these statutes require a word of comment. The main requirements are few: the Public Service Commission, or the Interstate Commerce Commission, must proceed under its own rules; forms of notice, etc., are to be similar to those of courts; and in all important cases orders affecting rights must be made after hearing. This is construed to mean that the order must rest on findings supported by evidence and that this must be shown on the face of the record (*United States v. Abilene R. Co.*, 265 U.S. 274).<sup>26</sup> The Supreme Court adds that "the mere admission by an administrative tribunal of matter which, under the rules of evidence applicable to judicial proceedings, would be deemed incompetent, does not invalidate its order"; and the statute of New York declares technical rules of evidence inapplicable; but the Supreme Court holds that the requirement that in an adversary proceeding specific reference be made to the supporting evidence is essential to the preservation of the substantial rights of the parties (265 U.S. 289).

On the other hand, this insistence upon the substantiation of the order by evidence justifies the acceptance of the findings so supported as final. Neither the Interstate Commerce Act nor the Public Service Commission Law of New York are quite explicit upon this point; but neither the Supreme Court nor the Court of Appeals of New York will permit the enforcing or reviewing court to re-examine facts or substitute its own judgment for that of the commission (*Interstate Commerce Commission v. Ill. C. R. Co.*, 215 U.S. 452, 469, 470; *People v.*

<sup>25</sup> For an example that evidence not brought to the attention of the person will vitiate a decision which may have been influenced by it, see *Stock v. Central Midwives' Board* [1915], 3 K.B. 756.

<sup>26</sup> See 266 Ill. 567 to the same effect. As to the use of commission reports, tariffs, etc., in Wisconsin, see 156 Wis. 47.

*McCall*, 219 N.Y. 84; 245 U.S. 345). The rule under the Interstate Commerce Act is by judicial construction substantially the same as that formulated in the Federal Trade Commission Act, requiring the order to be enforced if supported by evidence, while under the law of certiorari as codified in New York, the order may also be reversed under the same conditions which justify a court to set aside the verdict of a jury.<sup>27</sup> It is indeed not incorrect to say that under adequate procedural safeguards the commission in making its orders operates very much like a jury in determining questions of fact.

If the reviewing court believes that a proper decision of the case requires additional evidence, statutes not uncommonly provide for the taking of additional evidence before the administrative body (Clayton Anti-trust Act, § 11; Interstate Commerce Act, § 19a [j]).

The development of the law has thus been to produce two different grades of administrative orders, those which upon judicial enforcement or contest proceedings will not be re-examined as to their foundation in fact and those that will; this applies also to the foundation in fact of the exercise of discretion, since a hearing requirement in connection with discretionary powers can have no other meaning. Of the orders that will not be re-examined on new evidence, the public utility orders are the most important; in the matter of duties on imports the statute gives a review by a board which is virtually a court, but the review is upon the record made by the general appraiser and upon samples produced; in New York the statute also makes the assessment of property judicially reviewable; and the federal income tax assessment, unsafeguarded by statutory procedural requirements, is the most important of the orders that are inconclusive. Also inconclusive in New York, however, are all sanitary and safety orders for which the statutes provide no procedural safeguards (*Fire Department v. Gilmore*, 149 N.Y. 453); the prescribing of such safeguards would result in making the order reviewable by certiorari only, and it may be assumed that the court would not re-examine facts in a proceeding to collect a penalty for violation of an order so safeguarded; but there is no clear decision on this point. The Banking Law of New York empowers the Superintendent, whenever it appears to him that a bank is conducting its business in an unauthorized or unsafe manner, to issue an order directing the discontinuance of such unauthorized or unsafe

<sup>27</sup> The Court of Appeals has however said that the scope of review on certiorari is the same as that declared in the Illinois Central case (215 U.S. 452); see 219 N.Y. on p. 90.

practice and requiring the delinquent to appear before him to present any explanation in defense of the practice. It is difficult to say whether this is equivalent to a hearing requirement or not; but the courts would probably review the reasonableness of the order.

§82. *Administrative complaints.*—A provision for a complaint or charge in connection with an administrative order may serve one of two purposes, or both combined; it may serve to advise the party affected of the grievance or condition to be remedied; or it may recognize someone as legitimately representing the public interest to be subserved by the order.

(a) *Specification of charges.*—The complaint as a specification of charges strengthens the hearing requirement. The hearing must be confined to the complaint, which therefore also determines the scope of the order. It performs a function which the law has always considered as essential in a well-ordered system of procedure. To require a complaint is therefore to give the party a right to the observance of the essentials of pleading, without making merely technical rules applicable by analogy. This is recognized in the practice of commissions.<sup>28</sup> In many, probably in most, cases of directing powers, however, a complaint is not in terms required; and public utility statutes authorize commissions to proceed upon their own motion—so the Interstate Commerce Act, §13 (2), and the Public Service Commission Act of New York, §§48, 49. Presumably then the order of investigation performs the function of the complaint, under the voluntary practice of the Commission; but in the absence of a statutory requirement, the notice to which the party is entitled as a matter of due process must depend upon the nature of the proceeding, and in the absence of judicial decisions it is unsafe to generalize.

(b) *The complaint as the voicing of the public interest.*—It is natural that in most cases the initiation of a proceeding which results in an administrative order will be due to some private complaint, although it may also be the fruit of official inspection. The private complaint, if any, may be purely informal; and if it leads to a preliminary official investigation, the original complainant need not even appear as a witness. This is a matter of some importance in the case of factory laws, where the complainant may be an economically dependent person whose position might be jeopardized by adverse testimony.

<sup>28</sup> As to procedure before the Interstate Commerce Commission, see the treatises by Daish, and by Hartman.

It is partly for this reason that the legislature may deem it wise not to require a complaint even where it authorizes one.

The right to make a complaint is of special importance in connection with public utility orders. The most important phases of public utility legislation serve economic interests,—interests regarded as public from the point of view of legislative policy, but the primary incidence of which may be private. In the provision for reparation demands and orders this is frankly avowed; and as has been pointed out before, they are a species of remedial justice in administrative form. But where a prospectively operative order is sought, the private grievance is only a manifestation of public prejudice—a relation which finds legal expression in the lack of a private remedy against the refusal of the commission to make the order (*Procter-Gamble case*, 225 U.S. 282). In view of this it might perhaps be logical to accord the status of a formal complainant only to those occupying a semipublic or public position, such as municipalities, trade associations, and similar bodies (also state commissions in interstate matters), and this aspect has always been conspicuous in the English railway acts; in America the express provision of the Interstate Commerce Act (§13, No. 2), that no complaint shall be dismissed because of the absence of direct damage to the complainant, rather points to the direct pecuniary grievance as the normal occasion for the complaint; and while the act also recognizes mercantile, agricultural, or manufacturing societies or other organizations, and bodies politic and municipal organizations, as entitled to make complaints, it prevents the private party peculiarly aggrieved by an unreasonable rate to have primary recourse to the courts for redress, thereby making the administrative remedy at least in the first instance exclusive (*Texas, etc., R. Co. v. Abilene Co.*, 204 U.S. 426). Under the Public Service Commission Law of New York, however, not less than twenty-five consumers of gas or electricity must join in a complaint to the commission concerning service or charges (§71).<sup>29</sup>

<sup>29</sup> The administrative remedy is not only primarily, but probably absolutely exclusive, if it results in a decision denying relief, even so far as a claim or reparation for unreasonable charges is concerned, i.e., it seems that the action of the Interstate Commerce Commission holding a rate to be reasonable cannot be questioned in a common law action for overcharge. The *Procter-Gamble case* merely held that the Commerce Court could not entertain an action to recover money by reason of charges which the Commission had refused to hold unreasonable, and that decision was based on the limited jurisdiction of that court (225 U.S. 282, 301); but general considerations lead to the conclusion that a court cannot in

The status of the complainant who petitions for a public utility order is, even apart from a possible claim of reparation, *sui generis* in the law. He appears as a formal party to the proceeding, controls the issue by his allegations and evidence, is entitled to have his case brought to a hearing, and may defeat it by non-prosecution; yet he is not liable for costs and has no right to appeal from a dismissal of his petition. It is in the latter aspects that the public character of the proceeding is revealed, while the former give it almost the appearance of a private suit. This admixture of private prosecution is absent not only from criminal procedure (except in England), but also from proceedings leading to sanitary or safety orders, and from proceedings under the Federal Trade Commission Act (Henderson, *Federal Trade Commission*, p. 49). It appears, however, also in the provision of the Tariff Act of 1922 (§516) for complaints by American manufacturers, etc., against appraisals or classifications by which they feel aggrieved.

The formal recognition of the private complaint emphasizes the inherent difficulties of public utility administration. Where economic grievances are made the basis of public corrective intervention, the dividing line between public and private interest is inevitably obscure and confused. The obscurity is conceded by the legislature when it undertakes to operate its policies without definite standards, leaving the elaboration of economic justice to a commission which it guides only by a vague reference to reasonableness, adequacy, or convenience, leaving additional limitations to constitutional guaranties. The creation of presumptions of reasonableness is a counsel of despair. The admission of private prosecution may be looked upon as an attempt to relieve the commission of part of its burden, but the result must often be the opposite, forcing the commission to take up a problem which on its own initiative it might prefer to leave alone. English railway legislation is much more conservative in permitting mandatory action on private complaint; such complaints under the act of 1888 led to orders only where the violation of a definite standard was alleged; a complaint of mere unreasonableness led only to a demand by the Board of Trade upon the railway company for an explanation, and an endeavor

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favor of a shipper, consumer, etc., hold a rate or practice unreasonable, which the administrative tribunal may by proper procedure hold as against him to be reasonable. The English view seems to be the same; see *Clegg v. Earby Gas Company* (1896), 1 K.B. 592. An administrative decision favorable to the individual in the matter of reparation is, however, inconclusive when it is sought to be enforced judicially, under the express provision of the Interstate Commerce Act.

to settle the difference amicably, reports of complaints to be submitted to Parliament with such observations as the Board of Trade should think fit.

§83. *Procedural and formal detail.*—It is impossible to set forth or comment upon all statutory provisions relating to administrative orders, since they are too sporadic or too recent to have reached any considerable degree of standardization, and since there is not a sufficient amount of case law to permit a clear understanding of the effect of some of the phrases used. There is some tendency to relax the strictness of judicial procedure—so in the matter of notices and manner of service (see New York Public Service Commission Law, §23; English Regulation of Railways Act, 1873, §35; Public Health Act, 1875, §267; Factory Act, 1901, §148; Dentists' Act, 1898, §39), and in the admissibility of evidence.<sup>30</sup>

There appears to be no common law rule to the effect that an administrative order needs to show on its face the jurisdictional prerequisites to the making of it, though these must appear somewhere on the record to which the party has access. The rule that a warrant protects the executing officer, if fair on its face, implies that the jurisdictional foundation need not affirmatively appear; and what is true of a warrant is probably true of other orders.<sup>31</sup> Appropriate references are, however, as a matter of practice, common.

The former provision of the Interstate Commerce Act that orders remain in effect for only two years (§15) has been abrogated; under the Public Service Commission Law of New York the order continues in force for a period therein designated unless earlier modified or abrogated (§23); while under the Interstate Commerce Act, as worded at present, it continues in force in the alternative either for a specified period or until the further order of the commission (§15 [2]). A time limit, where it is intrinsically suitable, would seem to be an ap-

<sup>30</sup> New York Public Service Commission Law, §20: "shall not be bound by the technical rules of evidence." Note also the provisions in section 72 that in determining gas and electricity charges the Commission may consider all facts bearing upon the question although not set forth in the complaint and not within the allegations contained therein.

<sup>31</sup> In *Mahler v. Eby*, 264 U.S. 34, the warrant of deportation supplied the only evidence of any finding by the Secretary of Labor, and that finding did not satisfy the statute, and it was for that reason that the warrant was defective. The court says (p. 44) that the fulfilment of the condition must appear in the record of the act, but does not say that it must appear on the face of the order.



propriate feature distinguishing an administrative order from a truly legislative act, indicating its adaptation to transitory conditions.

*Note on administrative evidence.*—On evidence in workmen's compensation cases see F. A. Ross in 36 *Harvard Law Review* 263; on evidence in board or commission procedure, John H. Wigmore in 17 *Illinois Law Review* 263. The argument that rules of evidence in compensation awards should be different from those in other similar civil cases is not convincing, particularly in view of the legislative liberal policy of eliminating the factor of negligence. On the other hand, the strictness of the criminal law of evidence has clearly no place in proceedings to remove from office, and may very legitimately be abated in proceedings to revoke licenses and even in deportation cases. The privilege of standing mute may well be removed; and rules more liberal to the state regarding the burden of proof may be adopted. This, however, does not mean that a reversal of the burden of proof without qualification is legitimate. Some of the provisions of the law concerning deportation seem to be extreme in this respect. The subject requires more searching inquiry than has been given to it in connection with this survey.

§84. *Intermediate position of the directing power.*—It has been stated before that England has on the whole been slow in the granting of administrative directing powers: for a long time they were kept out of the factory laws; the health acts preferred to vest such powers in many instances in the justices of the peace; the railway acts gave them to the judicially organized Railway and Canal Commission instead of to the Board of Trade; and England has not yet ventured upon the policy of our Federal Trade Commission legislation. In America there has been much less reluctance to creating administrative directing powers. The objection that they violate the principle of the separation of powers has not been held fatal to the validity of these powers—fortunately so, in view of the difficulty of operating this principle as a strict legal rule. Legislative practice has recognized the substance of the principle by withholding final enforcing powers from administrative authorities, and reserving some degree of ultimate control to the courts.

With the growing tendency to make administrative findings of fact, based on notice and hearing and supported by evidence, conclusive, the objection that the proceeding involves a confusion of functions cannot be dismissed as being entirely devoid of merit. The same body acts as prosecutor and judge, and is expected to pursue and enforce policy and to make impartial determinations. Abstractly, this is perhaps not as it should be; but practically the combination of supervising and determinative functions does not seriously jeopardize the capacity for impartial action, so long as there is the possibility of

checking abuse by judicial control; in any event, the order-issuing power appears to have gained a place in American government from which it is not likely to be speedily dislodged.

The combination of executive with quasi-judicial functions may even have certain advantages. Mention has been made of the conservative policy of the English Railways Act of 1888, giving the Board of Trade power to entertain complaints, but withholding the power to issue mandatory orders. A similar policy is observed with reference to insurance companies (Act, 1909, §7). A recent Royal Commission on food prices makes a recommendation to the like effect. It suggests the creation of a food council to deal with unfair prices. When satisfied that a person is behaving contrary to the public interest, the council is to instruct the person to desist, and, if necessary, to issue "consequential directions." In the event of non-compliance, the council should report to the President of the Board of Trade, who should lay the report before Parliament. "For the moment we suggest no further sanction" (1925 Cmd. 2390, p. 139).

The Farms and Markets Law of New York authorizes the Commissioner to investigate the complaints of any parties aggrieved by practices relating to dealings in food in violation of the law or of rules. The result may be an action to enforce a penalty, or an order compelling compliance with the law. The order is reviewable by court proceedings, if reasonable grounds for review are shown, and in these proceedings the party may ask to have all questions of fact tried and determined by a jury (§§32-37 of act). This provision gives the order much less effect than belongs to an order of the Public Service Commission.

The so-called Webb-Pomerene Act concerning export trade associations, of April 10, 1918, authorizes the Federal Trade Commission, when it has reason to believe that an association is acting in restraint of trade, to investigate the alleged violations of law. If it concludes that the law has been violated, it may make to the association recommendations for the readjustment of its business, that it may thereafter conduct its business in accordance with law. If the association fails to comply with the recommendations, the Commission refers its findings and recommendations to the Attorney-General for such action thereon as he may deem proper (§5 of act). This is an even more conservative provision than that of the New York Farms and Markets Law.

It is possible to look upon the provisions last cited as merely introductory stages to fully developed administrative directing powers,

but it is also possible to assign to them a more special place in the economy of administrative functions. It is a reasonable legislative thought to leave something in the way of control to influence and suasion, and to hold the last word of power in reserve. In Massachusetts administrative railroad control operated in this way for over forty years, and in a number of other states it started in the same way. If it is true that ultimately in all states administrative railroad control has become mandatory, this is due in part at least to the tendency of legislative methods to become uniform. If there is a legitimate place for pressure through influence, it is of course best exercised through administrative action, since the organization of courts does not lend itself as readily to this form of governmental action. And it is an argument in favor of vesting full directing powers in administrative authorities, that the combination of policy-pursuing with determinative powers affords an opportunity for the mingling of power with influence. Judicial action is intermittent and necessarily formal; administrative action is continuous and in its preliminary stages informal. The following is quoted from the *Fifteenth Annual Report of the Interstate Commerce Commission* for 1901:

The work of the Commission which pertains directly to regulation involves two distinct kinds of procedure: One based upon formal petitions filed with the Commission under section 13 of the law, and involving regular hearing and investigation, the preparation of a report setting forth the material facts found and conclusions reached by the Commission, and issuance of an order dismissing the case or directing the carrier or carriers complained against to correct the rate or practice which may be held unlawful. The other kind of procedure arises in the performance by the Commission of its duty, under the twelfth section, to "execute and enforce the provisions of the act" and relates to complaints presented by letter, the examination of tariffs on file in the office in connection with such complaints, and correspondence with shippers and carriers concerning the same. Complaints of the latter class are called informal complaints, to distinguish them from the formal petitions or complaints which constitute the basis of contested cases.

No order can be issued upon an informal complaint and inquiry. The main object of that method of procedure is the speedy disposition, through settlements, readjustments plainly required by the statute, or advice given by the Commission, of matters in which regulation is demanded, and thus to limit the number of contested cases upon the docket. It would be an injustice to complaining shippers and communities, amounting frequently to denial of relief, to compel the institution of a regular proceeding every time cause of complaint is brought to the attention of the Commission; and the

number of cases requiring the hearing of witnesses, oral or written argument, and formulated decision, would probably be greater than the Commission could dispose of properly or without intolerable delays. The great mass of complaints are handled and disposed of by the Commission by preliminary investigation and correspondence or conference with carriers and shippers. The matters considered and acted upon in this way range from overcharges upon small shipments to rate relations affecting the interests of entire communities and are of the same nature as those which find their way to the regular case docket of the Commission.

Attention is called in the descriptive account of administrative powers under insurance legislation to the extra-legal activities of insurance departments by way of mediation between insured and insurer.<sup>82</sup> Where controlling powers, whether by way of direction or renewal of licenses, are added to powers of supervision, the former furnish an effective background for efforts to secure fair and equitable business service. There is, of course, also opportunity for the abuse of power, and any extra-legal influence may be looked upon with disapproval; but it is another question whether this function does not enter into the popular conception of an administrative department.

We may properly speak of the policy underlying the grant of directing powers as a policy of corrective intervention; and the effectiveness of that policy may be increased rather than diminished by the informality of the administrative process. Formality should of course attend a proceeding to which a certain degree of legal finality attaches; but there is no reason why there should not also be a place for informal proceedings which at the option of the party are inconclusive. We may expect statutes and judicial decisions to give prominence to the formal aspects of directing powers, while informality will find expression and exercise its influence in the relative obscurity of administrative practice.

The fact that England and America have adopted the directing power but tardily, and apparently with some reluctance, raises the question whether it has a permanent and legitimate place in the legal system. Perhaps it is too early to answer this question. But it cannot be overlooked that the power has accompanied the advent of commission control over public utilities, that this control is economic control, and that its principles are controversial. The somewhat conjectural character of this control places it, upon principles before stated, within the province of discretion; and a certain degree of discretion is con-

<sup>82</sup> See §195, *infra*.

formable to the directing power. On the other hand, the discretion of the directing power is quasi-judicially exercised, and to a considerable extent amenable to the control of the courts. By contrast, the enabling power permits a virtually uncontrollable discretion, but it also lends itself very much better than the directing power to the elimination of all discretion, performing then only the function of an advance check upon compliance with legal requirements. It is therefore quite possible that the most desirable form of discretion is found in the directing power. The directing power would then constitute the appropriate instrument of legislative policies that attempt to establish control by the trial-and-error method of corrective administrative intervention; and there is no prospect of the speedy disappearance of such control.<sup>33</sup>

<sup>33</sup> See further §271. Estimate of the place of administrative powers.

## CHAPTER IX

### EXAMINING POWERS

§85. *General aspects.*—This survey, according to its general plan, deals with examining powers only in so far as they are of a determinative character, that is to say, are powers to question or to demand the production of evidence, and not merely powers of inspection. The latter approach a determinative character where the law permits the throwing of the expense of an inspecting examination upon the private concern, for in that case a positive duty is added to mere passive acquiescence (e.g., where the superintendent of insurance may at any time order an investigation of an insurance company at its expense); but ordinarily the legal aspect of the inspecting power is that it justifies what without it would be a trespass, and that it raises problems under the constitutional guaranty against unreasonable search and seizure.

The examining power here dealt with takes the form of subpoenaing, swearing, and interrogating persons, and of calling for the production of books and papers, for answers to written questions, or for reports. It touches less of substantive right than the ordinary administrative order, particularly where trade secrets are protected from disclosure; and according to its nature, the exercise of the power does not call for the jurisdictional prerequisites of notice and hearing. The main problems relate to the scope of the examining power, both as to subject matter and persons, and to the handling of the privilege of refusing to answer incriminating questions.

§86. *Examining powers in the German law.*—In Germany it seems to be assumed that an administrative power to act carries with it the power to ascertain facts necessary for intelligent action, and that for this purpose administrative authorities may resort to the customary coercive measure of an executive penalty, or use direct force when it is a question of instituting a necessary search.

A leading treatise on the case law of the highest courts in matters of administration (*Kamptz-Delius*, p. 252) summarizes a decision of the Imperial Court of March 12, 1883, as follows:

As well under the older common law principles which until the dissolution of the old empire (1806) determined the content of the executive po-

lice power, as after the constitutional changes which have since occurred, the holder of the territorial police power is authorized, with reference to matters concerning which he may issue police orders, also to make preliminary orders required for determining whether there is occasion for administrative intervention, and particularly, in pursuance of complaints and to ascertain whether a condition of public danger exists, to require information from the parties concerned, even as to their civil relations, if these touch public interests requiring administrative action. To this right of police authorities to demand information corresponds the duty of those who are subject to them to give the information required; they may neither simply refuse, nor demand a judicial declaration whether sufficient reason exists for the police order—a question which in the absence of legal rules can not be legally determined and is therefore unfit for submission to a court. The performance of the duty to give information may be compelled by administrative measures, since an administrative directing power implies the power to apply appropriate compulsion and particularly to impose pecuniary penalties.

This general power is not, however, a power to examine on oath. Under the somewhat complicated Prussian statutes codifying administrative jurisdiction and procedure, the more important cases of administrative orders, and refusals or revocations of licenses, are dealt with, on demand of the party affected, by so-called "deliberative proceedings" which are regulated in analogy to the trial procedure in administrative courts. The boards conducting these proceedings exercise the same power as a court of justice in procuring evidence (Act of July 30, 1883, §§115-26; Act of August 1, 1883, §§114-20).

As has been pointed out before, important imperial statutes are administered by state authorities, so that their historic executive powers are available; thus the factory inspectors administering the federal Trade Code are state officials and have the powers of state police officers (Stengel, *Dictionary of Administrative Law*, h. t.). The federal Mortgage Bank Law of 1899 gives power to demand of these banks any information (§2), but apparently considers it unnecessary to provide how this power is to be enforced; the federal Insurance Law of 1901 gives the like power, but fortifies it by a right to impose penalties for non-compliance, collectible like land taxes (§65).

Under the Prussian Income Tax Law, information is obtained in the first instance through declarations made by the taxpayer, who must affirm that they are in accordance with his best knowledge and belief; if the income must be ascertained by appraisal (e.g., rental value of the taxpayer's property occupied by himself), he may give

facts instead of figures (§§24, 27). If the tax authority questions the declaration, it must inform the taxpayer, stating reasons, and requiring an explanation or answers to specific questions. On default of the taxpayer, or if his explanation or answers fail to satisfy the authority, it may take the testimony of witnesses or experts (not apparently of the taxpayer) and make other inquiries. The testimonial privileges of the Code of Civil Procedure apply (§38).

As pointed out in the descriptive part of the survey,<sup>1</sup> post-war legislation shows a tendency to strengthen inquisitorial powers. Under the imperial Tax Administration Law of December 13, 1919, the taxpayer may be summoned for personal examination and must give information according to his best knowledge and belief—if necessary, by aid of his books and papers; the examination is apparently not under oath (§§172, 204, 205). The production of books and papers is as a rule to be required only when the information given by the taxpayer is insufficient or there are doubts as to its correctness (§207). Other persons than the taxpayer are to be examined only when communications with the taxpayer turn out to be unsuccessful. Locked boxes are to be inspected only when necessary to get at the truth or when the result is in jeopardy; an oath or affirmation in lieu of oath is to be demanded only when there are no other means of ascertaining the truth (§209). If the oath is refused, the authority estimates the tax (§210).

§87. *English legislation.*—There is nothing in the English or American law like the German general executive authority to obtain information by requiring answers to questions, whereas courts possess such power by virtue of their jurisdiction to hear and determine, without further explicit grant. In England, the royal authority to issue commissions of inquiry has been denied; in the case of that name (12 Coke 31), it was said that “to inquire only is against law, for a man may be unjustly accused by perjury and he shall not have any remedy.” In the case of the Royal University Commission, the authority given to call persons and call for and examine books was criticized, notwithstanding the absence of any penalty imposed on disobedience. “Even without any such express and manifest transgression of constitutional limits (i.e., by addition of penalty powers), a royal authority to control the actions of individuals, whether by summoning them to give evidence, or in any other manner, is in itself an assumption which cannot be indifferent in character.” (See 15 *Law Mag.*, N.S., 79, 85; also an article on the Corporation Commission,” 11 *Law Mag.* 69).

<sup>1</sup> See §270, *infra*.



Parliament has created administrative powers of inquiry in connection with the more important subjects of regulative legislation. The normal form is to give power to require attendance of persons, to compel production of papers and to examine on oath, and to provide for a penalty for refusal to comply. Such power belongs to the Local Government Board (now Ministry of Health) and inspectors appointed by it, with reference to any matter concerning the public health in any place and to any matter concerning which the sanction, approval, or consent of the Board is required (Act of 1875, §§293, 296); to inspectors appointed by the Board of Trade under the Merchant Shipping Act (1894, §729; originally, 1854, §15); to the Board of Trade with regard to companies on the application of members (Act, 1908, §109) and under the Regulation of Railways Act, 1868 (§8), the power under the latter act being only to examine officers and agents of a railway company with regard to its business, and not extending to the examination of third parties; to the Electricity Commissioners under the act of 1919 (§33); and to the Ministry of Transport under the act of 1919 creating that ministry, this power being exercisable through any person appointed by the Minister (§20). The Industrial Assurance Act of 1923, which is notable for extensive administrative powers, authorizes the Commissioner to require specified information, but gives him no general examining power for the purposes of the act.

The railway, factory, coal mine, and shipping acts give the Secretary of State or Board of Trade power to institute formal inquiries in the case of accidents. These are conducted either through courts of summary jurisdiction or through other specified officials, or through persons appointed for the purpose, acting, if deemed proper, with the aid of assessors, the tribunal *ad hoc* being designated as a court and exercising for the purpose of procuring evidence the powers of a court of summary jurisdiction (Railways Act, 1871, §7; Merchant Shipping Act, 1894, §466; Factory Act, 1901, §22; Coal Mines Act, 1911, §83). These courts of inquiry do not appear to occur either under acts of Congress or under the laws of New York, perhaps owing to the constitutional difficulty of requiring courts to act as mere aids to the executive branch of the government.<sup>2</sup>

<sup>2</sup> On the continent of Europe, *ex parte* official findings, with reference to facts witnessed or examined, appear to make *prima facie* proof. The British delegates at the International Labor Conference of 1923 declared this to be contrary to their law. See *League of Nations, International Labor Conference 1923*, p. 342; "That in countries where it is not incompatible with their system and

Under the English Income Tax Act of 1918 there are no examining powers prior to the appeal stage. As regards lands, assessors and surveyors may enter and view, and measure and survey, if they cannot otherwise ascertain the actual value (§116); and generally a surveyor may make additional assessments and surcharges upon "discovery" that assessments have not been made correctly in the first instance; if then the person surcharged delivers a return or declaration to which the surveyor objects, the delivery operates as a notice of appeal (§§126-30). If, on appeal, it appears to the commissioners by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is overcharged, they shall abate or reduce, but otherwise the assessment or surcharge stands good (§137). They may issue a precept to the appellant ordering him to deliver to them a schedule containing particulars concerning his property, business, and profits or gains, default being punishable by pecuniary penalties (§139). They may also put any questions in writing and require answers in writing; the person to be charged must then either answer the questions in writing or tender himself to be examined orally, and he may object to and refuse to answer any question; but the substance of any answer given orally is taken down in writing and must be verified on oath subscribed by him (§143). They may also summon any other person (except one confidentially employed by the person to be charged) to be examined, and may examine such person on oath, refusal to appear or answer being subject to penalty (§144). If under the foregoing provisions the desired evidence is unobtainable, the commissioners ascertain and settle according to the best of their judgment the sum properly chargeable and make an assessment accordingly (§145); and in case of neglect or refusal on the part of the person charged, they may treble the amount (§146).

§88. *New York legislation.*—The legislative policy of New York is to grant examining powers with liberality, but the details necessary to make the power effective are not always carefully elaborated. A distinct purpose to withhold power may perhaps be discovered in the Tax Law.<sup>3</sup> Assessors are to "ascertain by diligent inquiry" taxable property and persons (§20), and the value of moneyed capital is to be

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principles of law, the reports drawn up by inspectors shall be considered to establish the facts stated therein in default of proof to the contrary"; and comments, pp. 147-49, 151, 153-55, 156, 157.

<sup>3</sup> As to the former practice of accepting the taxpayer's oath as conclusive for the purpose of his assessment, see *People v. Barker*, 48 N.Y. 70, 74, 77.

declared under oath (§23a); if the taxpayer complains of his assessment for purpose of the general property tax, a statement under oath is likewise required, and the assessors may administer oaths, take testimony, and hear proofs; and if they are not satisfied that the assessment is erroneous, they may summon the taxpayer or any other person to appear and be examined or produce papers; full testimonial powers thus appear only in the appeal stage (§37). The Tax Commission, however, has power to examine wherever it is called upon to assess (§§195, 235).

Examining powers are found in all the important regulative statutes of New York: the Banking Law, the Conservation Law, the Farms and Markets Law, the General Business Law, the Insurance Law, the Labor Law, the Public Health Law, and the Public Service Commission Law. They are, however, not granted in form sufficiently general as to be available for every purpose for which they might be called into play; thus the power generally does not accompany the power to revoke licenses, or is left in doubtful terms, while, rather oddly, it is given in connection with the grant of licenses in the case of private detectives and employment agencies. To meet practical requirements, the right to swear and examine witnesses is also given to the subordinates who conduct examinations. Some further points will be noted in discussing the particulars of examining powers.

§89. *Legislation of Congress.*—In the legislation of Congress, examining powers have become conspicuous since the advent of comprehensive regulatory legislation beginning about 1880. Before that time provisions were rather loose, as for example, the duty of appraisers under R. S., §2902, to ascertain, estimate, and appraise “by all reasonable ways and means in their power” (a form giving no specific power whatever), and the rather inadequate provisions in connection with internal revenue incorporated in R. S., §§3165 and 3173, and still in force, and apparently available for the enforcement of the Prohibition Law (§28); these should be compared with sections 508 and 509 of the Tariff Act of 1922, and sections 1002, 1004, 1017, and 1018 of the Revenue Act of 1924 (1926, §§1102, 1104, 1114, 1115), aided by the unrepealed section 1310 of the Revenue Act of 1921. The Revised Statutes also give examining powers to shipping commissioners in connection with wage claims and discharge (§4555), and to bank examiners over officers and agents of banks, providing expressly that banks shall not be subject to any visitatorial powers other than such as are authorized by law (§5240).

Under the regulative statutes since the Revision of 1874, examining powers appear to have been less freely bestowed on the departments than on the commissions; thus the Secretary of Agriculture did not receive such powers until the Packers' Act of 1921 incorporated the corresponding provisions of the Federal Trade Commission Act (§402);<sup>4</sup> the Postmaster-General has no examining powers in connection with fraud and similar orders. There are, however, adequate provisions under the Immigration Law (§16); ample powers were also given in 1903 to the Commissioner of Corporations, the predecessor of the Federal Trade Commission. For the commissions, section 12 of the Interstate Commerce Act is typical; both the Federal Trade Commission Act of 1914 (§§6, 9) and the Shipping Act of 1916 (§§27, 28) contain the requisite powers in fairly standardized form.

A quite extraordinary power is the one given to the Commissioner of Internal Revenue to require the keeping of records by any person, either generally or in particular individual cases (Revenue Act, 1926, §1102), a power enforced by the penalty provision of section 1114. The records are such as the commissioner deems sufficient to show whether the person is liable to tax. It is difficult to see how such a power can be made practically effective in case of a private individual, unless he can also be required to employ the necessary assistance.

§90. *Legal effectiveness of power.*—With adequate funds and personnel an administrative authority may acquire information through the same channels that are open to any individual, and express statutory provision is needed only to authorize expenditure for that purpose, or to impose a duty to collect information. A statute accomplishes this purpose when it speaks only of a power or duty to investigate without other powers in aid (see Federal Trade Commission Act, §6a), or a power to "ascertain by diligent inquiry" (New York Tax Law, §20).

A provision that an administrative authority may hear, receive evidence, or take proof, contemplates personal questioning but does not by itself imply a power to compel. Coupled with a power to administer oaths, it may, depending upon the statutes concerning perjury, make false testimony given under such provision punishable; otherwise a provision of this character may be of value as implying a duty to hear evidence at the request of the party affected, but this

<sup>4</sup> He was given examining power by an act of August 10, 1917, passed for the duration of the war.

again depends upon the construction given to the statute (*Tomlinson v. Board*, 88 Tenn. 1; *Ekiu v. United States*, 142 U.S. 651).

Compulsory powers may of course be given so widely as to apply to any investigation or hearing.

Inquiries operate through examining powers when the administrative officer or board is authorized to require information or reports, or to require the attendance and testimony of persons and the production of papers, or the answering of questions in writing. The power to require information or reports is more burdensome than either the power to require testimony or the statutory duty to render reports, for the latter is limited to definite periods and often also to prescribed matters and the former is generally confined to a particular charge or investigation, whereas the power to demand information may be, and sometimes is, unspecified as to occasion or purpose, and is likely to involve expense which in the case of large concerns may be very considerable. This power is given chiefly with regard to public service corporations, banks, and insurance companies; but the Federal Trade Commission has it with regard to corporations engaged in commerce generally, though not with regard to individuals (§66b of Act).

The power to require information or testimony may need some sanction to make it effective, and, while administrative authorities are frequently given the right to issue "subpoenas," they cannot themselves penalize disobedience, according to the prevailing American constitutional doctrine (*Langenberg v. Decker*, 31 Ind. 471);<sup>5</sup> nor are they given that power in England; the Railway and Canal Commission, which has it, is a court; in Germany administrative penalties are permitted. In England and America the power is made effective either by making disobedience a misdemeanor or subject to penalty, or by authorizing the administrative authority to invoke the aid of a court for the requisite compulsory process; in the absence of either, we have a *lex imperfecta*, and a number of New York statutes seem deficient in this respect (Banking Law, Labor Law, Insurance Law; a penalty for violating any provision of the act does not cover a disobedience of an order under the act).

The power to invoke the aid of a court was contested in *Interstate Commerce Commission v. Brimson* (154 U.S. 447) as imposing non-

<sup>5</sup> In New York local boards of health are given the powers of justices of the peace (Public Health Law, §21); by the act of Congress of August 30, 1852, steamboat inspectors were given power to compel attendance "by the same process as in courts of law" (§9, No. 13).

judicial functions upon a court and making it a mere ancillary agency to the Commission. The Supreme Court sustained the power by pointing out that it meant only doing in a more direct way what would be done in prosecuting for a penalty for disobedience; the Court exercises judicial functions in determining whether the Commission has power to examine and to ask the particular question, thus placing an important check upon a possible abuse. However, there would be considerable question whether the court could be required to conduct the examination and report the results to the Commission, instead of merely determining that the party is bound to answer and requiring him, under penalty of contempt process, to answer the Commission; it is significant that American legislation does not appear to recognize the courts of inquiry into accidents resorted to by the English shipping, mining, railway, and factory laws.<sup>6</sup>

In New York it has been recognized that where the Attorney-General contemplates the institution of legal proceedings, he may apply to a court for a preliminary examination to elicit facts, this being likened to a bill of discovery in advance of bringing a suit, and legitimately a judicial function because in aid of litigation. The court sustained this method, believing that it did not go beyond what was constitutionally permissible (*Ex parte Davies*, 168 N.Y. 89). This procedure, first applied in connection with anti-trust legislation, was subsequently extended to inquiries as to the character of securities suspected of being fraudulent (General Business Law, §§343, 344, 354).

Where extra-judicial summary methods of administrative compulsion are available, they may by express statutory provision be placed at the disposal of an examining power. So the New York Banking Law (§57) permits the Superintendent to take possession of the business and property of the bank, if the corporation or banker has refused to be examined upon oath regarding its affairs. The examining powers in connection with the internal revenue seem to be supported only by judicially enforceable remedies (§1114a of the act of 1926 and §1310a of the act of 1921) and not by a possible recourse to summary powers. The Tariff Act of 1922 (§§508, 509) provides for the case of refusal to be examined or to produce documents, in addition to a penalty, merely that the last appraisal shall be final and conclusive; prohibition of importation and non-delivery of merchandise (which are forms of extra-judicial compulsion) are reserved for failure

<sup>6</sup> New York uses the form: "may examine before him or before a magistrate or court or judge." See General Business Law, §352; Public Affairs Law, §34.

to permit inspection (as distinguished from refusal to be examined), but are extended to manufacturers and exporters abroad (§§ 510, 511). Of course the claim to an extra-territorial exercise of the inspecting power depends upon methods of enforcement exercisable within the United States or at its border line; to what extent it is compatible with treaties of commerce is a question that would have to be settled through international channels. The law purports to make the compulsion a matter of duty, and not merely a matter of power, on the part of the Secretary of the Treasury.

In judging provisions for examining powers or their absence, it is useful to consider their general relation to other administrative determinative powers. It is obvious that they will not ordinarily be needed in connection with enabling powers, for it is incumbent upon the applicant to present a satisfactory case for favorable action, and should statements made in an application appear unconvincing to the authorities, a refusal to furnish further evidence would justify the refusal of the license or permit. The situation is not so simple in case of an order, so far as the authority must make an affirmative case in support of it. But circumstances must be very exceptional indeed in which the authority cannot make a *prima facie* case on the basis of information procured without resource to compulsory powers; in other words, the right of the individual to a hearing does not generally call for the exercise by the authority of any examining power *in invitum*. The Postmaster-General will not be embarrassed by the lack of examining powers, where the law gives him power to issue a fraud order on evidence satisfactory to him; and the same is true of the absence of examining powers in connection with revocation of licenses.<sup>7</sup> The examining power will be most useful where an inquiry is made simply to elicit the fullest information in matters not directly affecting an individual; or in the exceptional cases in which the proceeding against some particular concern approximates the nature of an investigation, i.e., where the purpose is to ascertain whether charges can be preferred. It will also be important in administrative appeal proceedings, where the appeal-

<sup>7</sup> The recent decision of the supreme court in *Missouri v. North* (1926), 271 U.S. 40, may be understood as holding that in a revocation proceeding the party must as a matter of due process have the right to the testimony of witnesses who do not voluntarily appear. Since in that case the statute did give the right, it was not necessary to pass upon the validity of an act withholding it. There must be many statutes that do not give the right; and statutes apparently giving the right may, on close scrutiny, be found to lack provision making the examining power legally effective by authorizing appropriate judicial proceedings in aid thereof.

ing party may desire the testimony of administrative officials; thus it is properly given to the Board of Tax Appeals, although a provision for power to invoke the aid of a court appears to be omitted.

The power to require information or reports will naturally be limited so as to be exercisable only over those subject to the regulatory provisions of the statute; on the other hand, the power to require testimony may be also granted over strangers. Commonly the power, if given, is to require the attendance of witnesses and compel production of papers, and in this general form the power applies to third parties as well as to the concerns or parties investigated or proceeded against. It is particularly to be noted that taxing authorities are given this wider power, if given testimonial powers at all; thus the Commissioner of Internal Revenue for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made may require the attendance of any person having knowledge in the premises (Revenue Act, 1924, §1004; 1926, §1104); national bank examiners, on the other hand, may examine only officers and agents of banks (R. S., §5240), while the power under the New York Banking Law appears to extend to any person whose testimony may be required (§39). This point does not appear to have had much legislative attention.

§91. *Scope of examining power.*—The scope of the examining power in judicial proceedings is ordinarily determined by the questions of fact involved in a particular controversy, which furnish a definite criterion of relevancy. Where an administrative examining power is exercised in entertaining an appeal or in disposing of a charge or complaint, the scope of the power presents a similar aspect. The most characteristic of these examining powers are, however, of a different sort: they relate to inquiries undertaken with a view to obtaining information which will permit more intelligent action with regard to the performance of administrative powers or duties, either having no connection with any wrong, or based on mere suspicion of delinquency without any definite charge. Under these circumstances it is of vital interest to the parties or concerns subject to the power to know what the inquiry may cover and what may be called for in the way of information.

As has been pointed out before, in England under the Income Tax Act, and in New York in connection with the general property tax, the examining power sets in only at the appeal stage, and this fact serves to limit its scope. The powers under the federal Revenue



Act are, however, much wider: whenever necessary in the judgment of the Commissioner, he may require any person to make a return or render under oath such statements as he deems sufficient to show whether or not such person is liable to tax (§1102*b*); and for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, he may, by any revenue agent or inspector, examine any papers bearing upon the matters required to be included in the return, and may require testimony with reference thereto (§1104). The additional provision that only one inspection of books of account shall be made each year, unless the Commissioner certifies the necessity of an additional inspection (§1105), shows that, apart from the provision, no special order is required for the inspection. The extent of the power is particularly noticeable in view of the fact that it may be exercised over any private individual possessed of moderate wealth. While the examining power under the Tariff Law is likewise comprehensive, covering any matter or thing deemed material respecting imported merchandise in ascertaining classification or value (§508), it is naturally confined to business concerns.

Under the regulatory statutes of New York the examining powers are generally comprehensive, although the Labor Law, the Public Health Law, and the Public Service Commission Law as to common carriers, are less explicit than might be expected. The provision of the Business Law (§352) with regard to fraudulent securities illustrates the tendency to give wide powers: the Attorney-General may investigate and examine, not only when it appears on complaint or otherwise that there is any fraud in the issuance of securities, but also where he believes it to be in the public interest that an investigation be made. In the Banking Law a specification of matters is followed by the addition: or such other matters as the Superintendent may prescribe (§39); under the Farms and Markets Law the power extends to all matters pertaining to the powers and jurisdiction of the department (§32).

The Interstate Commerce Act, the first of the great regulatory acts of Congress, gives power to inquire into the management of the business of all common carriers; to keep informed as to the manner and method in which the same is conducted; to obtain from common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts,

agreements, and documents relating to any matter under investigation (§12).

The Federal Trade Commission Act provides in section 9 that for the purposes of the act (which includes the investigation of the organization, business conduct, practices, and management of corporations engaged in commerce) the Commission or its agents shall have access to, for the purposes of examination, and the right to copy, any documentary evidence of any corporation being investigated or proceeded against, and power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.

This provision is incorporated by reference in the Packers' Act of 1921 (§402).

The examining power of the Federal Trade Commission was passed upon by the Supreme Court in the case of the American Tobacco Company, decided March 17, 1924 (264 U.S. 298). The Commission desired the production of records, contracts, memoranda, and correspondence for inspection and making copies, and petitioned the Court accordingly. The petition was denied and the denial upheld by the Supreme Court. The Court holds that the act does not authorize "fishing expeditions" into private papers on the possibility that they may disclose evidence of crime. It does not explicitly say that the power denied could not be constitutionally granted;

We do not discuss the question whether [Congress] could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. We cannot attribute to Congress an intent to defy the Fourth Amendment [unreasonable searches and seizures] or even to come so near doing so as to raise a serious question of constitutional law.

The petition had referred to complaints filed; in one place the Court says this may be disregarded since the Commission claims an unlimited right of access; in another place it says: "the investigations and complaints seem to have been only on hearsay or suspicion . . . but even if they were induced by substantial evidence under oath, the rudimentary principles of justice that we have laid down would apply." The Court, however, also relies upon the fact that the act gives a right of access only to documentary evidence; so that some ground must be shown for supposing that the documents called for do contain evidence. The term "documents" is much more common than "documentary evidence" in grants of examining powers; however, where the

term is, as in the Interstate Commerce Act, "documents relating to any matter under investigation," the decision seems to require that some ground must be shown for supposing that the documents have such relation.

The decision further says: "the question is a different one where the state granting the charter gives the commission power to inspect." This observation would place examining powers under state law over banks, insurance companies, and public service corporations on a special footing, and would also apply to federal examining powers over national banks; but it is difficult to see why a business requiring a license, or which may be placed under a license requirement, would not be subject to the same powers as a corporation requiring a charter, and indeed the entire distinction as to the basis of the regulatory power seems artificial. Congress may require of common carriers in interstate commerce the utmost publicity, although they do not operate under federal charters or licenses.

The conflict between the legislative tendency to extend examining powers and the judicial tendency to hold them within bounds also appears in connection with the Interstate Commerce Act. Notwithstanding the wide phrase "for the purposes of the act" used in section 12, the Supreme Court held in the Harriman case (211 U.S. 243) that the examining power was confined to the cases where the commission was exercising quasi-judicial powers. At that time section 13 read that the Commission "may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made." The section was then amended to read that the Commission may at any time—

institute an inquiry on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before said commission by any provision of this act, or concerning which any question may arise under any of the provisions of this act, or relating to the enforcement of any of the provisions of this act.

This was held to qualify the ruling in the Harriman case (*Smith v. Interstate Commerce Commission*, 245 U.S. 33). In *United States v. L. & N. R. Co.*, 236 U.S. 318, it was held that the words, "accounts, records, and memoranda," did not include correspondence, and an amendment thereupon added "documents, papers, and correspondence" (§20).

It might be concluded that in the race between wording and construction the legislature is bound to win, and that an effective check

upon the extension of examining powers can only be found in the interpretation of constitutional limitations, particularly in the guaranty against unreasonable searches. While that guaranty does not apply to papers required to be kept, it might shield to some extent papers voluntarily kept, though kept contrary to law. However, it is not altogether easy for the legislature to avoid in the grant of examining powers some qualifying terms that may be seized upon by the courts as imposing a check upon unlimited scope. In any event, if Congress intended to confer either upon the Interstate Commerce Commission or upon the Federal Trade Commission inquisitorial powers entirely untrammelled, it has not so far accomplished its purpose.

It is interesting to observe that the British Privy Council found it possible to apply a constitutional limitation to a colonial examining power. The Australian Royal Commission Act of 1902-12 gave power to the Governor-General to issue commissions requiring the commissioners to make inquiry into and report upon any matter "specified in the letters patent and which relates to or is connected with the peace, order, and good government of the commonwealth, or any public purpose or any power of the Commonwealth." This was held not to extend to matters which could be brought under Commonwealth jurisdiction only by amendment of its organic act (*Attorney-General v. Colonial Sugar Refining Company* [1914], A. C. 237).

Another illustration of the judicial attitude in England is furnished by the decision in *Dyson v. Attorney-General* [1912], 1 Ch. 158. A statute gave power to require returns as to any matters which may be properly required for the purpose of the valuation of land and which it is in the power of the owner to give. A return form required among other things, if the owner is occupier, to state the sum for which the property is worth to be let to a yearly tenant. It was held that this item could not be required, being matter of opinion, and since the entire form must under penalty be filled out, the item is not surplusage, but invalidates the entire requirement.

In view of the foregoing, some interest attaches to the New York act of 1917 (c. 595), amending the Executive Law in relation to the duties of the Attorney-General (Executive Law, §62 [8]). It simply provides that whenever in his judgment the public interest requires it, the Attorney-General may, with the approval of the Governor, and, when directed by the Governor, shall, inquire into matters concerning the public peace, public safety, and public justice. He, or any officer designated by him, may subpoena witnesses, compel their attendance,

examine them under oath before himself or a magistrate, and require the production of any books or papers which he deems relevant or material to the inquiry. Additional provisions are in the main intended to secure secrecy; the Attorney-General may appoint and remove assistants without reference to the civil service laws; the appointments are to be reported only to the Governor, and disbursements are to be subject to no audit except by the Governor and the Attorney-General. Any officer participating in the inquiry and any person examined as a witness who discloses to any person other than the Governor or the Attorney-General the name of any witness examined or information obtained, except as directed, is to be guilty of a misdemeanor. This measure was passed, apparently by a panic-struck legislature, shortly after the beginning of the war, but as a permanent law. It does not appear to have been passed upon judicially.

With this should be compared the English Tribunals of Inquiry Act, 1921, a post-war measure, its object perhaps not so dissimilar from that of the New York law, but its method of approach and attitude toward the traditions of legislation altogether different. A resolution of both Houses of Parliament must declare, if expedient, that a tribunal be established for inquiring into a definite matter described as of urgent public importance. The tribunal is then appointed with the powers of the High Court in procuring evidence; punishment for contumacy being, however, reserved to the High Court. Proceedings are to be public, unless in the opinion of the tribunal, for reasons connected with the subject matter of the inquiry or the nature of the evidence, it is expedient in the public interest to exclude the public; the tribunal may permit or refuse to permit parties to be represented by counsel. The requirement of a definite matter of inquiry, the publicity of a concurrent vote of the two houses of the legislature, and the limitation of secrecy, contrast favorably with the inquisitorial character of the New York statute.

§92. *Immunity provisions.*—Under the constitutions of the United States and New York, as well as by a rule of the common law, a witness has the privilege of refusing to answer a question if the answer would tend to incriminate him. The fact that it would tend to expose him to civil liability is not sufficient to justify his refusal to answer. On the other hand, while the constitutions speak of a "criminal case," the protection is applied irrespective of the nature of the proceeding, and therefore extends to administrative proceedings, and cov-

ers a demand for information in any form, and not merely in form of a question.

In cases where the legislature deemed it of importance to obtain certain evidence, the difficulty presented by the privilege against self-crimination was sought to be overcome by removing the peril of punishment, which by supposition would take away the basis of the privilege, and therefore the privilege itself—so, for example, in connection with certain offenses, such as bribery, in which normally conviction depends upon the testimony of accomplices. Immunity clauses were therefore from time to time introduced both in English and in American statutes.

In 1868 Congress, in consequence of a difficulty experienced in certain suits arising out of the Civil War, in which it was necessary to have the testimony of parties who pleaded that by disclosing their relations to the late Confederate government they would expose themselves to forfeiture, enacted a measure subsequently incorporated into the Revised Statutes as section 860, which provides as follows:

No pleading of a party nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or in any foreign country shall be given in evidence or in any manner used against him or his property or estate in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture

A provision is added that the party shall not be exempt from the penalties of perjury.

In administrative inquiries the obtaining of information is ordinarily more important than the punishment of wrongdoing, and an immunity clause is therefore particularly appropriate. It was therefore introduced into the Interstate Commerce Act by the following clause of section 12:

The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The Supreme Court in the case of *Counselman v. Hitchcock* (142 U.S. 54) held this provision inadequate for the reason that while the testimony itself could not be used against the testifying party in any criminal proceeding, yet it might lead to the discovery of other facts which without the use of the original testimony might be made the basis of a successful criminal prosecution. The clause was therefore

changed by act of February 11, 1893, so as to protect the testifying person from subjection to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence before the Commission or in obedience to the subpoena. In the case of *Brown v. Walker* (161 U.S. 591) this clause was held sufficient to overcome the constitutional privilege.

In *Hale v. Henkel*, 201 U.S. 43, it was held that the privilege against self-crimination does not apply to a corporation (although the protection against unreasonable searches and seizures does), and that therefore an officer or employee of a corporation may be required to testify or produce documentary evidence, although the result may be to expose the corporation to a penalty.

This doctrine was given express effect with reference to the immunity act of 1893 by the act of June 30, 1906, providing that the immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath. This incidentally changes the protection of the act of 1893 by restricting it to evidence given in obedience of a subpoena and to evidence given under oath.

In this form the immunity clause is found in the Federal Trade Commission Act which provides in section 9 as follows:

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it [saving penalties for perjury].

It will be observed that upon a literal reading the compulsion is wider than the immunity, and that therefore, unless conformity can be secured by judicial construction, the compulsion encroaches upon the constitutional guaranty.

Apart from this constitutional doubt, the policy of the restriction of the immunity is very questionable. It should be entirely indifferent whether the evidence is forthcoming in obedience to a subpoena or not; the law penalizes the voluntary witness who may rely upon a supposed immunity which the law does not give him, or the commission may lose the benefit of information not covered by the immunity. As regards

the compulsion against the corporate officer or employee to give evidence against the corporation, theoretically no evidence is lost; but practically evidence might be expected to be forthcoming more freely if it were accompanied by immunity. If the protection against self-crimination is based upon considerations of wise policy, the subtlety of distinction between the corporation and the officer or employee through whom alone the corporation can testify is to be deprecated, and the reason for making a difference between protection against self-crimination (which is denied) and protection against unreasonable search (which is conceded) is difficult to understand.

§93. *Information and publicity.*—The statute material does not permit an adequate statement as to how the examining power is safeguarded with reference to secrecy or publicity. Occasionally publicity of hearings is prescribed—so for the Interstate Commerce Commission upon the request of any party (§17)—but more importance appears to be attached to provisions shielding information obtained from undue publicity, particularly in connection with taxation;<sup>8</sup> and in England we find provisions for guarding trade secrets which are analogous to immunity provisions. But statutes are frequently entirely silent upon this point; and since there appears to be no general requirement of publicity as in the case of judicial proceedings, much must depend upon actual practices observed, a study of which is beyond the scope of this survey. No attempt will therefore be made to comment upon this phase of the examining power.

§94. *Oaths in connection with examining powers.*—There is a striking difference between Anglo-American and the Continental practice in the matter of requiring oaths or affirmations legally equivalent to an oath. In Germany and other Continental countries the oath is reserved for the testimony of witnesses in court, and is then administered with considerable solemnity; declarations before administrative authorities are not required to be made on oath, and a general power to ascertain facts and examine persons does not mean that a party may be sworn, nor is that power explicitly conferred.

In America the practice is to require statutory declarations relating to facts to be verified, and verification is generally understood to require an oath, which may be administered by any notary public; where an officer is authorized to call for information or to examine persons, the power to require statements under oath and to administer

<sup>8</sup> U. S. R. S., §3167; Tariff Act, 1922, §516d.



oaths is likewise very liberally granted, frequently also to subordinates who do not otherwise exercise determining powers.<sup>9</sup>

A few provisions of acts of Congress are of interest, because they touch foreign practice.

Section 2862 of the Revised Statutes authorizes consular officers, before certifying invoices, to require satisfactory evidence, either by oath or otherwise, under regulations of the Secretary of State, that the invoices are correct and true (Act of 1865).

The Customs Administration Act of June 10, 1890, abolished all oaths administered by customs officers upon entry of goods, except as provided in the act. The Act of 1913 authorized the Secretary of the Treasury to levy additional duties on merchandise imported by a foreign exporter who should refuse to submit his books and accounts to a duly accredited investigating officer of the United States, this provision however not to apply where the laws of the country provide for the administration of oaths in cases in which consuls are directed by the Secretary of the Treasury to require oaths before the certification of an invoice.

This provision is dropped by the act of 1922, which makes it mandatory to prohibit importations as a penalty for refusing to submit to American examination abroad (§510). However, the act of 1922, while it requires entry declarations by the consignee to be sworn to (§485), requires declarations accompanying invoices (made abroad) to be merely verified under Treasury regulations (§482), and it would seem that verification in this instance does not necessarily imply an oath (see *Treasury Decision 39390*).<sup>10</sup>

§95. *Judicial control.*—In view of the vexatious possibilities of the examining power, the question of relief against its abuse is of importance. The controlling fact in this connection is that for the enforcement of the power judicial aid must be invoked, and this affords an opportunity for protection. Even in tax proceedings compulsion cannot be directly exercised; although a pressure, in many respects equivalent, may be exerted by estimating powers in case of contumacy and by summary distress powers to give them effect. A court be-

<sup>9</sup> Occasionally the oath may be required by administrative regulation (*U.S. v. Bailey*, 9 Pet. 238; *Caha v. U.S.*, 152 U.S. 211).

<sup>10</sup> The Revenue Act of 1926 (§1102c) introduces an infinitesimal concession by permitting the substitution, by regulation, of attestation for an oath, in returns where the tax is not in excess of \$10.00; but this is not to apply to returns under income or estate tax laws.

ing called upon to aid administrative examination will judge independently of the existence of the power, its scope, and the relevancy of the information sought. But of the necessity and the expediency of the examination, the administrative authority judges alone; this is a case of necessarily free discretion, since in undertaking the examination the authority is engaged in its own business of administration, and, within the law, must determine what is useful or wise. It is not a case, as in other directing powers, of a determination of a right of property, but is merely a provisional measure. In this it resembles an arrest, with the difference that an arrest normally requires a judicial warrant. Such a warrant is also required in case of a search; but, for some reason or other, the practice of a warrant requirement has not established itself in the case of examining powers.

## CHAPTER X

### SUMMARY POWERS

§96. *General aspects.*—The term “summary power” is used to designate administrative power to apply compulsion or force against person or property to effectuate a legal purpose, without a judicial warrant to authorize such action. In Anglo-American jurisprudence such a power constitutes an anomaly, since normally the way to compulsion leads through the courts. If a directing power is disobeyed, the usual consequence is the judicial imposition of a penalty, and the individual automatically gets his day in court; a summary power leaves no room for disobedience, but at most for resistance, which will ordinarily be overcome by superior public force, and the individual who claims that he has been unjustly dealt with must seek redress by bringing an action of trespass. The summary power thus puts him at an initial disadvantage, and his ultimate vindication may be barren if the officer cannot pay damages.

As will appear, the German law, in contrast to the Anglo-American law, recognizes as a normal attribute of the administrative police power that it may assert itself by force, if necessary, against private disobedience or resistance, and may act directly upon dangerous conditions in order to safeguard public interest. This principle is in part incorporated in, and in part modified by, express statutory provisions.

German jurists also recognize as inherent in executive government an administrative power to meet extreme emergencies by appropriate measures, and this power is probably covered by the general definition of the functions of the police in Title 17 of the Prussian Code of 1794. Apparently a similar power is practically conceded in America without any attempt at elaborate theoretical justification; and in the absence of a clear theory of what may be done, the acts of public authority have sometimes the appearance of lawlessness or excess of power.<sup>1</sup> In the case of *Cunningham v. Naegle*, 135 U.S. 1, the Supreme Court of the United States had an opportunity of establishing a general principle of emergency power, but preferred to place its decision upon narrower grounds, holding that the constitutional

<sup>1</sup> See Ballantine, “Military Dictatorship in California and West Virginia,” 1 *California Law Review* 413.

duty of the President to take care that the laws be faithfully executed, is a warrant for issuing through the Department of Justice an order to a United States marshal to take all necessary measures for the protection of the person of a judge while performing his judicial duty. It may well be contended that such a right of defense should reside in whoever represents at the time and place the executive arm of the government, irrespective of any special order from the chief executive.

§97. *Provisional seizure.*—Provisional measures are to be distinguished from those that are intended to operate as final determinations. The objection of the common law to summary methods is manifested in a striking manner in the requirement of a judicial or magistral warrant for an arrest in ordinary cases; however, in specified cases an arrest without warrant is lawful, and statutes have extended these cases.

The law of arrest illustrates the legitimacy of summary administrative action by way of precaution; a provisional seizure of property is analogous, although it does not appear to be sanctioned by any rule of the common law, except that by custom the indicia of crime found upon a person arrested for felony may be taken from him.

The power of seizing property provisionally is perhaps carried to its greatest extent in connection with banks. Under the Banking Law of New York, the Superintendent may in specified cases forthwith take possession of the business or property of a bank or banker (§57), the latter being given the right to apply for a judicial order requiring the Superintendent to show cause why he should not be enjoined from continuing possession (§60).<sup>2</sup> A similar power is given to the Comptroller of the Currency with regard to national banks which are in default (R. S. §5234). The power is not given to the Superintendent of Insurance in New York, who must proceed through the courts; nor is it given either to the Public Service Commission of New York or to the Interstate Commerce Commission. It may be explained in the case of banks by reason of the peril to depositors; it should, however, be observed that in New York it is given not only where a bank is unsafely conducted (a ground leaving considerable discretion), or for other specified delinquencies, but also for mere non-compliance with orders of the Superintendent—certainly a large power in view of the disastrous effects which unwarranted action must have upon the credit of the bank. However, as pointed out by the Supreme Court (*Title*

<sup>2</sup> So also in Massachusetts: *Cosmopolitan Trust Co. v. Mitchell*, 241 Mass. 95, 136 N. E. 413.

*Guaranty Company v. Idaho*, 240 U.S. 136), with regard to a similar statute, the law does not authorize liquidation except as the result of judicial proceedings. It thus differs from the Chief Registrar's "award of dissolution" under the English Friendly Societies Act of 1896, which, although made only on application of members, is made conclusive upon the society and all persons having claims on its funds, without appeal (§80).

§98. *Summary action with regard to mail.*—Summary powers standing in a manner outside of the common law are exercised through the post-office. The transportation of the mails is a service function of the government, but it is in part a legal monopoly function, and it is indispensable for purposes of business or social communication. A refusal to carry or deliver may be equivalent to a prohibition against carrying on a business; yet such refusal may be authorized by law without judicial sanction. The statutes of the United States provide for such a summary method of dealing with obscene matter, lottery tickets, and fraudulent schemes. Revised Statutes, §3983, declares every obscene, lewd, or lascivious writing, print, or publication, and any article or drug intended or adapted for any indecent or immoral use, or advertisement calling attention to it, non-mailable, and provides that it shall not be conveyed in the mails or delivered from a post-office or by any letter-carrier; and section 3984 has a similar provision for lottery matter. No procedure is prescribed for determining whether matter falls within the forbidden categories, the individual who finds himself debarred from the mails being remitted to such remedies as are available on principles of common law or equity (187 U.S. 94). The principal provision for fraud orders is found in section 3929 of the Revised Statutes as subsequently amended, and authorizes the Postmaster-General, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent scheme for obtaining money through the mails, to instruct postmasters at post-offices, at which letters or money orders arrive for such persons, to return the same, marking the letters as fraudulent. The words "on evidence satisfactory to him" are the only check which the statute places upon the Postmaster-General, but no independent power is given to local postmasters.

§99. *Control of navigation.*—In the system of summary powers a place apart also belongs to the control of navigation and maritime imports and exports. A ship cannot move in international commerce without the papers required by the usage of all nations; upon entry of

a port these papers are delivered to the port officers, and they are returned upon departure, which constitutes the clearance of the ship. Refusal of entry or of clearance is therefore normally equivalent to physical detention of the ship, and the English Merchant Shipping Act expressly provides that where a ship is ordered detained, clearance papers must be refused (§692). Under the English law this detention is used in the main as a provisional measure, pending other proceedings required by law (unsafety, undermanning, equipment, §§420, 421, 459, 103), and is used only for purposes connected directly with the ship or its officers or crew.

Under the legislation of Congress the summary power over the movement of ships is used to enforce restraints and prohibitions in connection with foreign commerce. Thus, under an act of 1891 meat to be exportable must have its condition certified before the carrying vessel can get its clearance, and in 1908 this was extended to dairy products; under the act of 1891 violations of regulations regarding the carrying of cattle are also enforced by refusal of clearance.

The new Shipping and Merchant Marine Acts carry this policy even farther: the former provides for withholding of clearance in specified cases of refusal of freight (§16), the latter authorizes the Secretary of Commerce to refuse entry to ships where the foreign owner acts contrary to the provisions of the American law (§14a).

§100. *Powers with regard to aliens.*—Some of the summary powers in connection with alien and immigrant legislation likewise link up with the movement of ships. This is particularly true of the provision of the Immigration Act, that when it appears to the Secretary of Labor that an alien was afflicted with a loathsome or contagious disease at the time of foreign embarkation, and that the existence of the disease might have been detected at the time, the owner or consignee of the vessel shall pay a specified penalty and no vessel shall be granted clearance papers while the fine so imposed remains unpaid. This provision is extraordinary as permitting the imposition of a penalty by administrative act, contrary to American constitutional usage, the withholding of clearance being merely a means of enforcing the penalty; the Supreme Court, however, sustained the provision as an expression of the absolute power of Congress over foreign commerce, and made a distinction between criminal punishment and the imposition of a penalty (*Oceanic Steamship Company v. Stranahan*, 214 U.S. 320).

The exclusion or expulsion of aliens is not affected by the objections urged in the *Oceanic Steamship Company* case; for it is gener-

ally recognized that administrative process is due process in determining the right of aliens to enter or remain in the country, although not in subjecting them to punishment.<sup>3</sup> It is true that in England under the Aliens Act expulsion of a resident alien is provided for only as a consequence of conviction; the Chinese exclusion acts formerly also required judicial action for deportation of Chinese subjects unlawfully in the country; but in Germany the expulsion of aliens has always been an exercise of executive power; and under the present American immigration laws not only exclusion, but deportation, is finally determined by the Secretary of Labor either originally or on appeal. The process of exclusion is carefully regulated; the acts providing for deportation differ as to procedural requirements; the exclusion of judicial intervention is either implied or expressed in somewhat ambiguous form.

§101. *Summary methods in connection with the revenue.*—Summary enforcing methods are commonly authorized in the exercise of the taxing power, usually against the delinquent taxpayer, occasionally also, though at present less frequently than formerly, against tax collectors who fail to account; it was in connection with this latter provision that the Supreme Court, referring to long established usage, sustained these methods as due process (*Murray's Lessee v. Hoboken Land Company*, 18 How. 272). The usual provision is for sale of the delinquent's property by administrative process to satisfy the unpaid tax and incidental charges; provisions for compulsion against the person by commitment are at present so uncommon that they may be ignored.<sup>4</sup> Summary tax enforcement is common to all legal systems.

In New York the collector, in the case of any tax unpaid, is directed to levy upon any personal property in the county belonging to or in the possession of the person who ought to pay the tax, and to cause it to be sold at public auction; and no claim of property made by any other person shall prevent the sale (Tax Law, §71). Real property is sold by the State Comptroller, but only for non-payment of any tax on such property (§120; see §150 as to sale in certain counties by the county treasurer). The franchise or privilege tax is collected upon warrant of the Tax Commission by levy of the sheriff upon real or personal property of the delinquent (§201); the same is true of the tax on business corporations (§219e) and of the income tax, and in the case of the latter, the warrant is entered by the county

<sup>3</sup> *Wong Wing v. United States*, 163 U.S. 228.

<sup>4</sup> New York forbids imprisonment expressly. Tax law, §300.

clerk upon the judgment docket, whereupon it becomes a lien like any other judgment (§380).

A full regulation of distraint and sale for unpaid taxes is found in connection with the internal revenue of the United States in sections 3187-3205 of the Revised Statutes.

Subject to distraint and sale are the goods, chattels, or effects, stocks, securities, bank accounts (added by §1016 of the Revenue Act of 1924), and evidences of debt of the delinquent; and if sufficient of these cannot be found to satisfy the taxes, his real estate may be seized and sold (§§3187, 3196). Property may be sold as a whole only if indivisible (§§3195, 3197). Successive seizures and sales are permitted until claims are satisfied (§3205). Certain personal property is exempt, but no real estate. The collector may levy in person, or by warrant may direct a deputy to make the levy (§3188). Anyone in possession of books containing evidence or statements relating to the subject of distraint must on demand exhibit the same (§3189), and property may be distrained in the hands of the possessor as well as of the owner (§3190).<sup>5</sup> A copy of the account of the effects distrained must be left with the owner or possessor or at his place of dwelling or business with a notice of sale, which must be also published or posted, specifying the property. The place of sale must be within five miles from the place of distraint (§3190). By payment of the amount due with all charges, before sale, the owner may obtain restoration (§3193). Otherwise the sale is made at public auction, and the amount demandable is retained out of the proceeds (§3193). When the amount bid is not equal to the tax, the collector may purchase on behalf of the United States, when the property is of a kind subject to tax; and property so purchased may be sold under regulations (§3192). The certificate of sale is prima facie evidence of the collector's right to sell, and conclusive evidence of the regularity of the proceedings (§3194).

Real estate is to be sold at a minimum price covering all charges; and if that price is not offered, it is declared purchased for the United States (§3197). There is a one year's right of redemption (§3202). The deed is prima facie evidence of the facts therein stated (real estate purchased, for whose taxes sold, name of purchaser, and price paid); it is also to be in accordance with the laws of the state on the subject of sales under execution; and if the proceedings set forth

<sup>5</sup> The Revenue Act of 1926 adds that the possessor must on demand surrender the property to the collector (§1114e).



have been in substantial accordance with the law, it is to operate as a conveyance of the right of the delinquent in the land (§§3198, 3199).

Courts have always insisted upon the strictest observance of the prerequisites to a tax sale, and tax titles are proverbially uncertain; in view of this the wording of sections 3198 and 3199 of the Revised Statutes is not as clear as it might be. The tax sale is aided, in the law of New York and under acts of Congress as well as in other jurisdictions, by statutory presumptions of regularity; these are generally only rebuttable presumptions, and, in view of constitutional limitations, cannot be made conclusive as to jurisdictional matters which the legislature may not dispense with in the first instance. This technical subject is, however, beyond the scope of this survey.

There is no difficulty in the way of the summary collection of unpaid customs duties; since imported merchandise automatically passes into the custody of the customs officers, its sale is a simple matter; it is authorized by section 559 of the Tariff Act, formerly Revised Statutes, §2973.

§102. *Summary police powers.*—Perhaps the most numerous instances of grants of summary powers in American legislation are found in connection with the protection of safety, health, and public order, and are associated with the doctrine of abatement of nuisances. In Germany it is considered that the executive police power, either inherently or by general delegation (such as Title 17, §10, of the Prussian Code of 1794), extends to the taking of appropriate measures to remedy immediately dangerous physical conditions. The Prussian General Administrative Act of July 30, 1883, which is rather a codification of existing principles than an innovation in the matter of powers, summarizes the law in this respect. It is noteworthy that the law contemplates, in the first instance, not direct administrative action, but an order to the responsible party. These orders may be issued by the respective chief local officers, being the regular police authorities (head of district, county, or municipality), in the exercise of their magistratual power or statutory jurisdiction. The orders may be carried into effect, in case of non-compliance, by the following measures, to be resorted to successively: first, so far as practicable, by having the required thing done by a third party and collecting the expense incurred by levying on the property of the delinquent; second, if this is not practicable, or if it is clear that the expense will not be collectible, or if an omission is to be enforced, by administrative penalties; third, as a last resort, if the order cannot be effectuated

without it, by direct compulsion (§132 of act). The term "direct compulsion" has been held to include direct action (*Supreme Administrative Court Decisions*, Vol. 9, p. 280; Vol. 23, p. 431). Direct action in the first instance is authorized by special statutes providing for the taking of necessary measures in emergencies, e.g., to combat the spread of animal disease. The administrative authorities have no power of commitment in the first instance to enforce obedience, analogous to the contempt power of an English or American court; but detention of a moderate duration may be ordered as an alternative to a penalty that cannot be collected.

The common law permits the removal of immediately and physically injurious or obnoxious conditions by a private act appropriate for the purpose, without recourse to legal proceedings. Blackstone states the law with reference to one species of a nuisance, the purpresture on a highway, as follows: "If a new gate be erected across the public highway, which is a common nuisance, any of the king's subjects passing that way may cut it down and destroy it," and "such nuisance may be abated—that is, taken away or removed—by the party aggrieved thereby, so as he commits no riot in the doing of it" (Book 3, c. 1). The right does not extend to a condition constituting merely a violation of law, e.g., the illegal sale of liquor (*Brown v. Perkins*, 12 Gray 89). This follows from the limitation of the common law right that the party aggrieved must be specially injured, the other limitation being that the abatement must not be accompanied by a breach of the peace.

The opinion has been occasionally expressed that officials have an analogous power to abate nuisances within the general scope of their jurisdiction. The Supreme Court of Wisconsin applied this to highway officers with regard to encroachments, but later limited the power to the removal of obstructions wilfully placed (compare *Neff v. Paddock*, 26 Wis. 546, with *Hubbell v. Goodrich*, 37 Wis. 84). An official has, of course, the power that every individual has; if therefore any individual could abate a public nuisance irrespective of special injury, as was formerly held in New York (*Meeker v. Van Rensselaer*, 15 Wend. 397), this doctrine would support an equally wide official power. The requirement of special injury (*Ft. Plain Bridge Co. v. Smith*, 30 N.Y. 44) is, however, fatal to the claim of official power, since the sheriff or constable is not likely to be specially affected by a public nuisance; although a mayor may abate, where the city has property interests affected by the nuisance (*Fields v. Stokley*,

99 Pa. 306). The English authorities are silent as to the power of officers, such as surveyors of highways, etc., to remove or abate nuisances, apart from statute, without judicial order or conviction (Shaw's Parish Law, 1750). The conclusion must be against the existence of any common law official power.

§103. *Statutory provisions.*—This lack of common law power has not been supplied by any grant in general terms to the principal officials exercising executive authority, particularly sheriffs and constables, of a statutory power to abate nuisances. Such general power is found in city charters but, thus granted, means a power vested in the council to be legislatively exercised; and again it is uncommon to grant by ordinance the power in general terms to the mayor or police officers. In a reasonably general way the power was perhaps first granted with reference to obstructions of highways, a matter beyond the scope of this survey; and American colonial legislation appears to have been more liberal in this respect than contemporary English legislation. A general power to abate and remove highway nuisances is found in the colonial laws of Massachusetts, 1693-94, c. 6, while the Revised Statutes of New York (1829, Vol. 1, p. 521) spoke only of orders to remove enforceable by penalty, adding the summary power of removal only in 1840 (c. 300); the City of London Act of 1817 (57 Geo. III, c. 29) permitted removal of obstructions or encumbrances only after summary conviction (§§65, 67).

As regards nuisances, not on public highways, but arising out of the condition of private property, English legislation appears reluctant to dispense with judicial sanctions. Perhaps the most conspicuous case of administrative action carried into final effect without intervention of a court is the demolition of an unsanitary dwelling (Act of 1890, §§33, 34; Act of 1909, § 18; the latter act substituting an appeal to the Local Government Board for the appeal to the Court of Quarter Sessions). The Public Health Act of 1875 permits orders for alteration or amendment of drains, cesspools, etc., and, on default after notice, the execution of the necessary works at the expense of the owner (§41); but the recovery of the expense requires judicial action. Where otherwise the Public Health Act provides for "summary" abatement of nuisances (§§91 ff.), it requires orders of a court of summary jurisdiction for final compulsory measures; such orders are also required for the condemnation of food (Public Health Act, §116; Food Act, 1899), for dealing with obscene publications (act of 1857), and for the confiscation of fish illegally taken (Act of 1923, §74). Tea

may be destroyed without a judicial order (act of 1899). The summary powers of destruction vested in the Board of Agriculture to combat animal disease or insect pests (acts of 1894, 1877, 1907) can be exercised only on payment of compensation. Occasionally summary powers may be found in local statutes (Metropolitan Local Management Act, 1855, construed in 14 C. B. N. S. 180).

In the legislation of New York, summary powers are granted rather liberally, particularly where sanitary conditions are involved. Under the Public Health Law the Governor may order what he declares to be nuisances to be changed, abated, or removed as he may direct, the order to be presumptive evidence of the existence of the nuisance; he may order the district attorney, sheriff, and other officers of the county to take all necessary measures to execute the order (§6). Local boards of health may issue warrants to any constable or policeman to apprehend and remove such persons as cannot otherwise be subjected to its orders or regulations (§21)—a power evidently referring to communicable disease and quarantine. With regard to nuisances the power is vaguely worded: "Every such local board shall order the suppression and removal of all nuisances and conditions detrimental to life and health found to exist within the municipality" (§26). Courts would probably by construction avoid the recognition of summary powers of such comprehensive scope.

The Farms and Markets Law is more specific: the Commissioner may destroy animals or carcasses affected with communicable disease (§85); he may seize and condemn, destroy, or otherwise dispose of, any article of food in cold storage found to be unfit for human consumption (§237), while no similar power is granted with reference to adulterated foods; and he may deal as he may deem necessary or proper with diseased nursery stock or trees, shrubs, plants, vines, or their products, or boxes or containers, which he has reasonable cause to believe infected or infested (§168). Under the New York City Sanitary Code, food or drink unfit for human use or found in a forbidden condition may be immediately condemned, if possible, denatured, and removed or destroyed; and the same rule applies to animals intended for food (§137). Adulterated milk or cream may likewise be seized or destroyed (§153). A system of labeling or tagging ("seized by order of the board of health") is applied to drugs, medicines, hair, skins, or hides found contaminated or unfit for human use or in a forbidden condition; when so labeled, the matter is not to be disturbed, but awaits the final disposition of the Board of Health by way of re-

lease, destruction, or otherwise (§129). A similar system of tagging is applied to cans and receptacles used in the sale of milk which are in an unfit condition and cannot be rendered fit (Farms and Markets Law, §49); to dangerous machines (Labor Law, §256[3]); to unclean workrooms and articles (*ibid.*, §297); to uncertified ovens (§337), to unsanitary tenements, and to unlawfully tenement-manufactured or infected articles (§§359-62). The Commissioner of Labor may destroy unclean articles upon non-compliance with an order to clean (§361), and the Board of Health may destroy infected articles (§362). The Farms and Markets Law gives also power to kill unlicensed dogs (§§114-17), and to destroy false weights and measures, the latter power being vested in local authorities (§186). Under the Conservation Law any fish, bird, wild animals, or parts thereof, or any devices used in taking the same illegally, when found in the possession or under the control of any person contrary to law "shall be seized and confiscated in the name of the State" (§154); and any prohibited nets shall be summarily seized, abated, and destroyed by any game protector, or may be sold by the conservation commission at public auction (§282). The present provision relating to nets appears to be more conservatively worded than the former one passed upon by the Supreme Court in *Lawton v. Steele*, 152 U.S. 133.

It appears from the foregoing that summary powers of abatement are more freely granted in New York than they are in England; still, aside from the fish and game laws, they are on the whole confined to things immediately and physically dangerous or obnoxious; they do not on the whole apply to unlawful matter, the illegality of which is merely matter of public policy. The declaration of something to be a nuisance, simply because it is prohibited by law, does not seem to be in accordance with the traditions of English legislation; in the very severe laws against the Catholic religion enacted in the reign of Elizabeth there was apparently no thought of treating the paraphernalia of the forbidden faith as nuisances (13 Eliz., c. 5, §8);<sup>6</sup> our legislation is more drastic in this respect; but it is to be noted that under the National Prohibition Law unlawful liquor may be destroyed only by order of a court (§26).

§104. *Summary forfeiture.*—A distinction is generally made between summary measures in the nature of nuisance abatement, and

<sup>6</sup> However, the act forbidding the erection of steel furnaces, etc., in the American colonies declared any such furnaces to be common nuisances, subject to abatement (1750, 23 Geo. II, c. 29, §10).

confiscation by way of penalty, usually resulting in a sale. The latter is in the nature of a forfeiture and should require judicial proceedings. In the case of *Lawton v. Steele* (152 U.S. 133), the Supreme Court sustained what was virtually a forfeiture of nets unlawfully used by summary administrative proceedings, relying upon the slight value of the property involved (\$15.00 a net). This precedent appears to have been followed in the distinction made by the Tariff Act of 1922 between judicial and administrative forfeiture of property used in the violation of the customs laws, according to its value, although the line is here drawn at as high a value as \$1,000 (§§586, 587, 593, 597). But this is exceptional; as a rule forfeiture is enforced by judicial proceedings.

§105. *Notice and hearing.*—It has been held, as a matter of constitutional law, that where a summary power is legitimate it may be exercised without notice and hearing, although there may be no actual emergency (*North American Cold Storage Company v. Chicago*, 211 U.S. 306). In England a notice requirement has been read into a statute granting summary powers (*Cooper v. Board of Works*, 14 C. B. N. S. 180). The federal postal fraud order law does not in terms require notice, and it has been said that the hearing customarily granted is matter of favor and not of right (*Official Bulletin* of May 11, 1918). In the Japanese Immigrant Case, however, the Supreme Court held that deportation without hearing would be arbitrary power (189 U.S. 86, 100), and, without statutory provision to that effect in the principal deportation act, a hearing requirement has ever since been enforced in deportation cases. In New York, where the courts regard notice and hearing as unnecessary even in administrative police orders, they would still less regard it as essential to the exercise of summary powers; and as a matter of fact the statutes do not provide for it.

§106. *Grade of officers.*—Summary action is the exercise of determinative power of peculiarly incisive effect, and it might therefore be expected that such power would be vested only in superior officers. We find, accordingly, that the power of deportation is vested in the Secretary of Labor, the power to issue fraud orders in the Postmaster-General; both in England and in the United States the detention of a ship by refusal of clearance is determined by a government department acting through its head or his deputies. In the federal internal revenue administration, however, while determinative powers are generally reserved to the Commissioner of Internal Revenue, dis-

traint and sale proceeds upon the authority of the Collector; and in New York a warrant of the Tax Commission is only required in case of the more recent taxes other than the general property tax (franchise tax, corporation tax, income tax).

The mode of summary action in the nature of nuisance abatement is generally left unregulated by statute. Where the English Public Health Act authorizes summary dealing with nuisances (§41, drains and cesspools), it is said that the power to enter, which can be given by the authority only to their surveyor or inspector, must be in writing, and should be under the hand of the clerk of the authority (4 Encyclopaedia of Local Government 644). In New York the statutes give the power to a commissioner (farms and markets, labor) or a board (of health), and, while there may be general authority to delegate to assistant commissioners or heads of bureaus, a power to delegate to inspectors or subordinates is not ordinarily expressed; it is found in connection with milk cans and receptacles which may be dealt with by assistants or agents (Farms and Markets Law, §49). Under the Sanitary Code of the city of New York, summary powers are, however, freely given to subordinates (inspector or other officer, duly authorized representative, etc. [§§137, 153]).

Under the German statutes, not only must summary action in every case be authorized by the order of the holder of the police authority for the particular locality, but the hierarchical organization of all police authorities, culminating in a central cabinet officer, makes it possible to control the exercise of the power by general instructions and by appellate supervision.<sup>7</sup>

§107. *Order preceding action.*—The provisions of the German law make it appear moreover, that administrative force is applied only after non-compliance with an administrative order. In revenue cases a distraint warrant will in America likewise be issued only after a fruitless demand for payment. An examination of the provisions of

<sup>7</sup> If the power belongs to the superior officer, it will in the nature of things be exercised through the ministerial agency of a subordinate. The order of the superior will then be normally expressed in a warrant. Whether this warrant protects the subordinate is an unsettled question of minor importance; the important thing is that it places a responsibility upon the superior. Incidentally, the warrant will also furnish a record, which may be lacking, if destruction of the offensive thing is permitted on view. The record may also be an advantage from the public point of view. Thus an immigration patrol might turn back an alien interloper caught on the Canadian or Mexican border; but it is more advisable to arrest him and proceed against him, so as to make a record against him.

the New York laws for summary abatement, however, fails to show any previous requirement for orders to individuals to remedy the condition, except in the cases where summary destruction or removal is preceded by tagging or sealing the obnoxious articles or things. The federal provisions for deportation also require immediate taking into custody. The Aliens Act of 1798 was more moderate in this respect, providing for orders to leave in the first instance.

A general requirement of a warrant issued by an official exercising magistratual powers would serve the purpose of ensuring caution in the application of summary action, and would relieve the acting subordinate from liability.

As the law now stands, the summary character of the action is offset by the peril of personal liability, which may act as a deterrent and thus paralyze public action, or may give the individual a barren remedy against an insolvent subordinate. The individual may find a more effective relief by enjoining summary action through a court of equity. This is forbidden by the federal statutes in connection with the revenue; and the power of distraint is thereby made a powerful weapon in the hands of the internal revenue authorities to force submission on the part of the taxpayer. Even where the remedy of injunction is theoretically available, the official action may be too summary for its practical application.

§108. *Substitutional execution.*—As regards the power of substitutional execution, it is of course applicable in the main only to nuisance conditions remediable by structural arrangements. It is interesting to note that the Prussian law of 1883 places it first in order in enumerating the methods of enforcing police orders. It plays a considerable part in the English public health and town improvement acts. In American legislation the power is quite inconspicuous. To make it operative, either there must be funds appropriated to enable the public authority to have the work done, the public bearing the expense in the first instance, or there must be power to employ mechanics or contractors giving them a lien for their outlay. Obviously, this would be a power lending itself to abusive exercise. These difficulties account sufficiently for the scarcity of provisions of this character.

§109. *Concluding observations.*—The foregoing account of statutory provisions makes the status of the summary power in our law appear as more uncertain than that of the other categories of administrative power. It has assumed considerable importance in the de-



portation of aliens; but in that connection is a recent power, not based upon established Anglo-American tradition. That tradition supports the summary enforcement of a tax liability; but in some states, e.g., Illinois, a judgment is required, and the distress warrant against delinquent collectors has fallen into disfavor. Emergency powers for the protection of health and safety in the face of immediate danger ought to be conceded, but they have no clear basis in our common law. Summary abatement or condemnation, in the absence of emergency, has a narrower range than seems generally to be assumed; but the range is probably wider than it needs to be. The details of the power are inadequately worked out, both from the point of view of the individual and from that of the responsible official.

Generally speaking, a correct estimate of the value and operation of summary powers would require a more intensive study than is possible on the basis of either statutory provisions or judicial decisions.

## CHAPTER XI

### A NOTE ON REGULATIVE OR RULE-MAKING POWERS

§110. *Relation to survey.*—The reasons for not including regulative powers among the administrative powers treated by this survey have been set forth before.<sup>1</sup> Inevitably, however, the comprehensive examination of statutes called for by the survey has left an impression in the mind of the writer as to the place occupied by administrative regulations in the legislative control of persons and property; and since there is both considerable interest in the subject, and much doubt and difficulty concerning it, some general observations, though they must be mainly in the nature of suggestions, may not be inappropriate.

The consideration of the subject of administrative regulations by legal writers and judicial decisions is largely devoted to its constitutional aspects.<sup>2</sup> There is the recognition of the general principle that the legislature may not delegate its legislative powers to the point of abdication; on the other hand there is the fact of an extensive practice of delegation. We leave aside the delegation to local governing authorities on principles of local self-government which are firmly established as a matter of history, and confine ourselves to administrative rule-making powers (although, of course, the line between the two is sometimes not easy to draw). The limitations of the municipal ordinance power can be considered profitably only as part of a study of the general subject of legislation.

Different from an administrative regulative power is also the delegation by the legislature of the authority to determine whether a law is to take effect or not. Of this latter type was the power sustained by the Supreme Court in *Field v. Clark*, 143 U.S. 649, generally regarded as a leading case on the subject of the delegation of legislative powers. Congress had left it to the President to determine the operativeness of certain "fighting" clauses of the Tariff Act of 1890. Congress had itself not only fixed the provisions that were to be placed into force,

<sup>1</sup> See §9, *supra*.

<sup>2</sup> James Hart, *The Ordinance-making Powers of the President* (1925); John B. Cheadle, "The Delegation of Legislative Functions," 27 *Yale Law Journal* 892; John A. Farlie, "Administrative Legislation," 18 *Michigan Law Review* 181. For England, see C. J. Carr, *Delegated Legislation* (1921).

but had also indicated generally the conditions under which they were to become operative, delegating merely the ascertainment of the existence of these conditions; and this delegation, moreover, was made to the chief executive, i.e., to a political and not merely an administrative authority. A similar type of delegation is found in the Tariff Act of 1922, and has apparently become a permanent feature of tariff legislation. The convenience and even necessity of such a delegation is clear. It is a very different matter to leave it to the executive authority to determine when or whether a law is to take effect, by his own unguided discretion. This delegation would be of a type similar to the referendum. A referendum by way of local option is merely a special form of local legislation and presents no peculiar problem; the state-wide referendum is, on the other hand, a clear case of abdication of political responsibility which the legislature should bear itself;<sup>3</sup> and the general American practice is to support the state-wide referendum by express constitutional authorization. In English legislation we find occasionally a provision whereby the taking effect or operation of a statute is left to the determination of the chief executive, usually by Order in Council; the Aliens Act of 1919 is an instance in point. On the Continent of Europe the operation of a statute generally depends upon its publication, and publication is an executive function. There are no legal sanctions for the performance of this duty, and, while ordinarily publication or promulgation takes place as a matter of course, it appears that in Prussia in a number of cases it has been deferred for an appreciable period, apparently, however, without any intent of nullifying the legislative will; in any event the point has not become a political issue. American legislative practice does not operate with this form of uninstructed delegation of power as to time or occasion of putting a statute into effect. An instance of it is found, however, in the one-day-of-rest-in-seven provision of the Labor Law of New York to the effect that the law shall not apply to designated classes of employers "if the industrial board in its discretion approves" (§161, 2 c.). The Court of Appeals, while sustaining the law in general, expressed strong doubts as to the constitutionality of this provision (*People v. Klinck etc. Company*, 214 N.Y. 121); and the general opinion in America would probably be against its validity.

The restricted scope of this survey presents a correspondingly restricted aspect of the problem of delegated regulative powers. The

<sup>3</sup> *Brauner v. Supervisors*, 141 Md. 586.

survey is confined to governmental functions of control, and excludes functions of service. In dealing with the latter, the legislature has a much freer hand than in dealing with the former; and this applies to the delegation of rule-making powers. A liberality of delegation of power which is appropriate in regulating the use of the government's own resources may be inappropriate in regulating private rights. This rather obvious fact should invite caution in using such a case as that of *United States v. Grimaud* (220 U.S. 506), a case relating to the public lands, as an authority of general validity. The relevancy of this distinction does not seem always to have been borne in mind.

§111. *Delegation in very general form.*—This may be illustrated by the power of local boards of health under the Public Health Law of New York. They have power to make and publish from time to time all such orders and regulations, not inconsistent with the provisions of the Sanitary Code, as they may deem necessary and proper for the preservation of life and health and the execution and enforcement of the Public Health Law in the municipality. A similarly wide reference to the preservation and improvement of the public health is found in the delegation of powers of regulation to the State Board of Health of Illinois. In the descriptive part of this survey some comment has been made upon the vague order-issuing powers of the New York boards of health and the relatively slight significance which they probably have in practice. There is also an illuminating decision of the Supreme Court of Illinois (*Potts v. Breen*, 167 Ill. 67), holding that while the Board might, under this power, require the vaccination of school children in time of threatening or existing smallpox epidemic, it could not do so as a general or permanent measure. That makes the administrative regulation something less than legislative. It indicates that the proper method of dealing with this wide form of delegation is by conservative construction, thus avoiding the question of constitutional validity. In any event, a delegation so undefined is too uncommon to call for much comment.

§112. *The unquestioned province of rule-making powers.*—In a restricted sense all administrative action involves the possibility of rule-making. Even if administration constitutes control, that control has its service side in the organization of official action; and even a moderate degree of complexity of machinery and mechanism calls for a routine dependent on rules. These rules may be of such a character as not to trench on freedom of private action, as in the matter of offi-

cial books and records, or even of office hours, which necessarily require conformity on the part of the public. Private action begins to be controlled where rules prescribe the forms to be observed by individuals in their relation to the public authority. Uniformity may serve administrative convenience without touching important private interests; and if so, an administrative rule is undoubtedly beneficial and justifiable. There is a constant legislative practice of delegation in that respect; and where a statute prescribes the contents of reports, applications, or other statements, but leaves their form to be determined by regulation, an appreciation of the difference between substance and form is clearly indicated.

An important species of this kind of delegation relates to procedural forms. A statute is regarded as sufficiently specific if it requires administrative action affecting an individual to be supported by notice and hearing, using these or other general terms of like effect. A latitude as to details is contemplated, but not necessarily, at least not in every respect, a latitude variable from case to case. So far as uniformity is desirable, it is properly secured by administrative regulation, and an express statutory reference to hearings under rules and regulations to be established by the authority will insure the observance of rules to an extent which is left to the discretion of the authority, but which will naturally be in accordance with normal usage. Here, then, the rule-making power will serve to check administrative power rather than add to it.

There may be a similar relation between rules and administrative discretion in general. If the justification of administrative discretion is to be found in the supposition that controlling considerations are liable to vary from case to case in an unpredictable manner, a standardization of these considerations by general rule may be regarded as inconsistent with the basic principle of discretion; if, on the other hand, discretion represents the trial-and-error method of evolving standards, this inconsistency in a measure disappears. In the latter case a rule should for the time being be flexible, until approved by experience. It may indeed be sometimes preferable not to promulgate a rule formally, and caution should be exercised in making such promulgation matter of statutory duty. Circumstances may, however, make it desirable that the standard of discretion be known as a guide to parties interested, as where a medical board states what will constitute "reputability" of an institution, whose graduates are to be ad-

mitted to examination. Conditions must determine whether discretion should be thus standardized or not.<sup>4</sup>

Another type of rule-making is likewise inherent in the administrative application of the law, namely that relating to interpretation and resulting in what are distinctively known as "rulings." A ruling does not, like other regulations, deal with matter left open for variable disposition, but defines the meaning of statutory terms and provisions. Where the statute is in the first instance administratively applied, such definition is inevitable, whether intended for the guidance of official subordinates or for the guidance of the public. In revenue legislation, in particular, such rulings or regulations are of very great importance. They are inconclusive, if questioned in court; but even a court may give weight to a long established administrative construction. They may also have a qualified legal status, where the statute makes them binding on subordinates or successors in office, until reversed or modified in due course (Tariff Act, 1922, §502*b, c*; also Revenue Act, 1926, §1108).

All these types of unquestionably valid rule-making may be supposed to be covered by the ordinary delegation of power to make rules and regulations to carry a statute into effect; and the power probably exists without express delegation, a possible difference being that the express delegation makes the rule binding upon the administrative authority while it stands whereas a rule voluntarily made may perhaps be looked upon in the same manner as "administrative rules" are looked upon in courts of equity, namely as rules of guidance by which the authority is not rigorously bound.

It is probably also true that a delegation phrased in that conservative form ought not to carry powers beyond those indicated, but it is difficult to speak on this with certainty.<sup>5</sup>

Perhaps most of the common delegations of power concerning minor or subordinate matters can be brought under the categories

<sup>4</sup> See the observations of the Supreme Court of Illinois on the rule-making powers incidental to the assessment of property, in *Porter v. R. R. Co.*, 76 Ill. 561, 585, 586.

<sup>5</sup> The rules made under such a delegation contained in the Federal Food and Drug Act of 1906 (§3) confine themselves in the main to explanations, warnings, and directions to administrative officials regarding the exercise of their duties and the conduct of official proceedings. An exception is however found in Rule 17, requiring all information, which under the law must appear on the label, to be in English; and in a few cases the regulation undertakes to specify what constitutes misbranding.

just indicated. Ordinarily the practice of legislation is sufficiently conservative to make it unnecessary to speculate concerning the major or minor character of some other matters. Thus, particularly, the matter of fees payable for official services is perhaps more often taken care of by the statute itself than delegated. Otherwise schedules of minor fees and dues may be legitimately regarded as subordinate matter. In revenue legislation, the problem of preventing evasion may call for minute details of regulation which it is possibly inconvenient to place in a statute. The special taxes in connection with distilleries under the federal internal revenue system furnish a conspicuous example. German jurists have observed that the governmental practice is to treat, as regards publication, regulations of this character as if they were founded on inherent, and not on delegated, executive authority; and they explain this by saying that one engaging in a business which is subject to a complicated fiscal régime, in a sense voluntarily acquiesces in an extraordinary government power of supervision and direction (Mayer, *Verwaltungsrecht*, Vol. I, pp. 436-44). This principle of delegation would also apply to customs regulations of navigation, bonded warehouses, or transit in sealed cars. It does not as easily apply to revenue regulations of such general incidence as those regarding the income tax; and while the Revenue Act of 1926 contains a very general power of regulation concerning records to be kept, the actual exercise of the power does not appear to go beyond customary requirements or practices.

§113. *Rule-making powers for supplementing or modifying statutory provisions.*—The characteristic of this group is that the statute itself regulates to the extent believed to be necessary or considered as practicable on the basis of available data, and that the legislature is satisfied that it has expressed its policy sufficiently to guide the administration in framing further provisions, although these cannot be said to be of a subordinate or minor character. The following may be mentioned as illustrations:

The power, after the legislature has given a number of specific instances of a generic description, to add other specific instances, as, for example, additional diseases to be notified or to be made subject to quarantine—a power not uncommonly given in German statutes; the power to specify a generically defined matter or category, such as offensive trades, noxious ingredients, adulterants, poisons—likewise a common form of delegation in German legislation; the power to establish classes, grades, or units for the application of statutory

regulations, as, for example, standards of purity or of power in connection with certain public utility services; the power to specify districts or territorial classifications in which stated statutory provisions are to operate; the power, after the statute has regulated certain categories of conditions, to determine whether the same regulations shall be applied to other similar conditions, either specified or in a general manner indicated by the statute; the power to determine under what conditions the benefit of favoring or exceptional provisions may be enjoyed (see *Tariff Act, 1922, §1, par. 1506, 1507, 1514, 1647, 1695, 1706, 1708; §§303, 308, 309, 310, 311, 312*); the power, under conditions indicated in the statute, to vary the provisions of the act within limits likewise indicated. The last-mentioned power is often a dispensing power exercised by way of general rule, i.e., a relatively conservative form of such power and a legislative policy of reciprocity or retaliation in the fighting clauses of a tariff act may be rendered more effective, if the legislature, instead of fixing itself the exceptional rates, leaves them to executive determination (compare *Act, 1922, §1, par. 1684, with §317d, e*).

Powers of this description most typically represent the principle of delegation, namely that the legislature reserves to itself the control of policy and that the delegated function is more or less in the nature of technical elaboration.

§114. *Delegation for regulation of major matters without the guidance of analogous direct provisions in the statute.*—This and the foregoing category insensibly shade into each other, the difference being one of degree; but the less conservative character of the delegation makes it more questionable as a matter of principle, and perhaps, in America, as a matter of constitutionality. The practice of delegation seems to be more liberal in Germany than in England; more liberal in England than in America. In Germany, a very brief *Weights and Measures Act (May 30, 1908)* leaves it to an imperial commission to see to the uniformity of standards and to determine the conditions of certification, and the commission thereupon issued a code of one hundred and fifty-one sections; a *Pure Food Act (of 1879)* authorizes regulations prohibiting methods to be designated of preparation, preservation, or packing, or prohibiting the sale of food of quality to be specified, or under misleading designations, or prohibiting the sale of animals for slaughter or of food from animals where the animals suffer from diseases specified in the regulations, or the use of material or of dyes specified in the regulations for the manufacture of articles of use



or consumption, or the sale of oil of grades to be specified—the act itself containing in the main only administrative provisions, while substantive rules are practically altogether left to administrative regulation. No American food legislation delegates to that extent. In Germany, also, the entire matter of the qualification requirements for being recognized as a member of a learned profession is left to administrative regulation; while in New York, and for the medical profession also in England, these requirements are laid down in the statute. In America, however, there are likewise considerable variations of practice, as may be illustrated by comparing the detailed provisions of the Illinois Health, Safety, and Comfort Act of 1909 with the general power of the Wisconsin Industrial Commission to order such reasonable standards, rules, and regulations for the construction, repair, and maintenance of places of employment as shall render them safe.

While it is extremely difficult to formulate a generally valid principle of legitimacy of delegation, the observation may be hazarded, that with regard to major matters the appropriate sphere of delegated authority is where there are no controverted issues of policy or of opinion. Hence a liberal delegation may be expected, and is actually found, in safety legislation, in which arrangements of a purely technical character necessarily play a conspicuous part. Even here, however, direct statutory regulation may be preferred, if the subject matter touches class interests or otherwise has a strong public appeal; very little, therefore, is left to administrative regulation in the Seamen's Act of 1915 (although supplementary administrative powers are liberally referred to) or in the English coal mines acts in which particularly the meticulous provisions of the act of 1908 for computing time are to be noted.

Practically equivalent to the absence of controverted issues is their obscurity or non-recognition or non-formulation in the public mind or in the minds of the parties affected. This applies particularly to economic regulation. It would be almost inconceivable that the fixing of hours of adult female labor should be left to administrative regulation, in view of the sharp conflict of interest and of opinion. On the other hand, the factors of rate regulation are so obscure that delegation suggests itself as an acceptable solution, even where regulation assumes a distinctly legislative character, as it does in the American Transportation Act of 1920 and in the English Railways Act of 1921. It can be understood that even so basic a matter as the principle of val-

uation should be referred to a commission, although the difficulty of the matter is reflected in the inconclusiveness of the delegation;<sup>6</sup> however, it cannot be regarded as other than an anomaly that Congress should have left it to the Interstate Commerce Commission to determine for the future the percentage rate of a fair return, tempered though the delegation was by the initial fixing of the rate by Congress itself, thus setting a standard for the guidance of the Commission. A point of such vital importance ought to be matter of direct statutory regulation. It is also doubtful whether the above suggested principle of delegation can be verified in the matter of railroad accounting. In America, both in the Interstate Commerce Act and in New York, there is out and out delegation to the commission, while in England there is an elaborate procedure for the settlement of systems, on the basis of consultation with representative bodies. The relation of some phases of accounting (allocation to principal or income) can hardly be regarded as purely technical or non-controversial, nor is it too obscure for clear formulation; and in the absence of freedom of private choice, direct statutory regulation might seem appropriate. It may be, however, that after the practice of delegation has once become as firmly established as in the regulation of public utilities, its continued and even expanded application will come to appear politically preferable to the perils of sectionally influenced legislative intervention; thus the railroad companies themselves oppose the substitution of statutory for administrative handling of the long-and-short-haul problem (defeat of the Gooding Bill in 1926). The long-continued practice of delegation also tends to remove the objection on constitutional grounds. The courts have never had any criterion of validity except that of reasonableness, the common refuge of thought and expression in the face of undeveloped or unascertainable standards. Scientifically unsatisfactory, the principle of reasonableness serves as a potential check on undue delegation, though it is hardly more effective than the natural jealousy with which a legislature guards its own prerogatives. Normally, it would seem that the progressive recognition of distinct issues involved in some phase of regulation would produce a pressure to have the solution of the issue incorporated in statutory provisions. Revenue legislation is perhaps more typical in this respect than public utility legislation. Certainly in the matter of customs appraisals there has been a most striking advance in the direction of statutory specification of rules and principles. And income tax legislation shows similar tendencies.

<sup>6</sup> See §177, *infra*.

§115. *Considerations bearing on delegation.*—In all countries the struggle for free government has had for its main object popular participation through representative bodies in fiscal control and in the enactment of legislation. But the whole government having been placed on a democratic basis, and all bureaucratic power having become subject to legislative supremacy, it may seem as if the political object had been fully secured. This view, however, fails to take into account the inherent tendencies of different forms of governmental organization. That delegation has been the voluntary act of the legislature does not necessarily mean either that the legislature has foreseen all the effects of delegation, or that it can practically at pleasure check or annul these effects. The question of the superiority of one organ of regulation over another is therefore not disposed of by pointing to the popular source of all authority. The issue is not the same that it was at the beginning of the constitutional struggle, but an issue still remains between political and bureaucratic rule-making.

The conspicuous difference between legislative and administrative rule-making lies in the process of enactment. Assume that, as is common in Europe and not uncommon in our federal government, bills are prepared by government departments. When the draft has been completed, in many cases practically all the work has been done that goes into the making of an administrative regulation; but for the purpose of obtaining a statute, the real difficulties of the task begin. It is sufficient merely to mention the procedural checks: committee consideration, hearings, and report, possible debate and partisan criticism, and a public vote—all this duplicated by the bicameral system, and subject to executive approval. To become a law, the measure often must have, irrespective of intrinsic merit, a certain public appeal. The process of legislation gives play to all political forces and frankly admits the preponderating effect of political considerations. There is a good deal in the process that is not favorable to technical perfection, although there is, on the other hand, the possibility that a numerous body of legislators may bring forth information and judgment that the bureaucratic staff failed to obtain.

On the other hand, the process of administrative regulation is in America practically unregulated. A constant practice of federal legislation vests the making of these regulations in the head of the department, or makes them subject to his approval if the rules are made by the chief of a bureau. The check of approval is lacking where the rules are made by commissions not subject to any department. In any

event, the approval must be a formal matter since the head of the department has no distinct organization for revising regulations. Whatever substantial safeguards there are, must be matter of voluntary observance. In Germany there are likewise no general statutory rules for the framing of regulations, but in connection with some matters (insurance, stock exchanges, water regulation, etc.) there is provision for the organization of consultative bodies of a representative character. These are also conspicuous features in some English statutes; so in connection with the standardization of railway rates under the act of 1921. A number of English statutes, however, prescribe an elaborate procedure for the making of rules (publication of drafts, opportunity for objections, and public hearings), which tends to become standardized; thus the provisions of the Factory Act of 1901 have been incorporated by reference into the National Insurance Act of 1911. We also find in England the practice of requiring, for certain classes of rules or orders, that they must be laid before Parliament, with a power of disapproval vested in either House; but in the nature of things a check of this kind must in the great majority of cases be of little practical consequence.

It may be assumed that even without a mandatory requirement by statute, a government department charged with framing regulations will consult parties in interest and representative bodies; what it cannot produce is the "political" atmosphere of parliamentary procedure with its attendant checks.

These differences in the process of enactment seem to reinforce the suggestions before made as to the appropriate sphere of delegated rule-making: it ought to be confined to non-controversial matter of a technical character. It presupposes that regulation is conceded to be desirable, that there is agreement upon having the best rule prevail, and that the best rule is matter of technical ascertainment. Where these conditions do not prevail, i.e., where there is strong opposition to any regulation, or where there must be a considerable element of discretionary preference, as between different modes of regulation bearing differently on different interests, a recourse to political decision seems to be conformable to the exercise of authoritative control over persons and property.

From the point of view of the protection of legal rights it may be contended that a legislature is a safer repository of regulative power than a bureaucratic department; but such a contention must be a matter of speculation rather than of proof. In favor of the delegated

power one considerable advantage in this respect should be pointed out: it permits a separation of matter of principle from matter of conventional disposition which cannot be made in a statute. A statute is (in America) subject to constitutional limitations of a vague and controversial character; apart from that, a statute may formulate a guiding policy or principle in various ways, and such formulation may be valuable as an aid to judicial construction; but any discordant clear provision in matters of detail will pro tanto supersede the principle under the logical rule of construction that the particular prevails over the general; there is no way in which the legislature can insure the observance of a principle by way of self-denying ordinance binding on itself. But in delegating regulative power it may lay down binding principles, the observance of which by the delegated authority will be judicially enforced; and even without explicit formulation, not only will the purpose and policy of the statute limit and control the subordinate power of regulation, but the courts will exercise a stronger control over regulations with a view to insuring justice, respect for private rights, and the proportionateness of means to ends than they can exercise with regard to a statute. And such a judicial control over regulations is also possible in England or in Germany where our "due-process" limitations on legislation are not recognized. This advantage from the point of view of judicial protection serves to offset any possible disadvantage by reason of an assumed bureaucratic inferiority as regards solicitude for private rights.

It is sometimes claimed as an advantage of the administrative regulation that it is superior to a statute in point of flexibility. If flexible is equivalent to readily changeable, it may be questionable whether this is an advantage, and, if it is, whether as a matter of fact many regulations are not as permanent as statutes, entrenched in the inertia of bureaucratic tradition. In another sense, however, it may be an advantage to have rules less rigid than statutes, and administrative regulations might fill that desideratum. A statute merely as such has a moral sanction which no other political or administrative act can claim; it becomes the law of the land and sets standards of conduct, conformity to which becomes a civic duty. But this very quality makes it doubtful whether the statute is the proper vehicle for every conceivable kind of a rule; indeed, some purposes of a statute may be defeated by an excess of minute detail which cannot always be carried into effect, and the disregard of which may detract from the general authority of the law. From this point of view the transfer of minutiae

of regulation from the statute to an administrative rule will be of particular value, if it means a relaxation of the rigidity of requirements. An administrative toleration of minor violations will then leave the authority of the statute unimpaired. Logically, then, the administrative rule should have merely the sanction of a moderate penalty, being in other respects directory rather than mandatory; this advantage, however (conceding it to be an advantage), is lost if the statute provides that every rule and regulation made under it shall have the same force as the statute itself.

The recent decision of the Court of Appeals of New York in the case of *Schumer v. Caplin* (1925, 241 N.Y. 346, 150 N. E. 139) is of interest in this respect. A personal injury was occasioned by the disregard of a rule of the Industrial Commission, the statute providing that the rules and regulations of the Commission shall have the force and effect of law and shall be enforced in the same manner as the provisions of the statute. The court below ruled that the disregard of a rule by the defendant constituted as a matter of law negligence on his part. The Court of Appeals held that a legislative declaration that a rule has the force and effect of law does not make it so, since the constitution of the state commits to the legislature alone the power to enact a statute, and that therefore the violation of a commission rule did not constitute negligence as a matter of law. The result reached seems a desirable one, though it is of course always regrettable to raise questions of constitutional power. If violation of an administrative rule creates a civil liability, it would also be true that a contract made in disregard of such a rule is null and void. In either case the administrative rule affects civil relations, the control of which the legislature ought to keep in its own hands. It is true that municipal ordinances are permitted in this indirect way to determine civil rights; it is also true that some kinds of administrative determinations (e.g., rate orders) must necessarily operate civilly. It does not, however, follow that subordinate regulations should indiscriminately be given civil effect by current phrases of general import. The state of the statute law can be readily ascertained, and notice of it must be imputed to everyone; administrative regulations, on the other hand, are frequently confused, obscure, and difficult of ascertainment. To make them a source of peril in civil transactions (a form of enforcement withdrawn from administrative control) may therefore constitute grave injustice.

### **THIRD: REMEDIAL PROVISIONS**

might be unsettled by special provisions. In any event there are many statutes without provisions or relief.<sup>1</sup> The result is that remedial provisions are fragmentary, and an exhaustive statutory survey would fail to reveal the actual operation of administrative powers, affected as they are by the possibility of judicial control. It is therefore necessary to give an outline of the common law system sufficient to yield a true perspective of administrative powers, though it is of course out of the question to make an exhaustive statement of the operation of common law remedies.

§117. *Continental Law.*—On the Continent of Europe the remedial side of administrative law bears a different aspect. This is not due to any absence of unwritten law—for neither in France nor in Germany has the public law ever been codified with the same completeness as the private law—but to a different view of the place which the judicial power holds in the constitutional system. We assume as a matter of course that because administration should be subject to law it should be subject to the courts, which is equivalent to an assumption that the law is a monopoly of the courts. In contrast to this stands the Continental theory of the separation of powers, which assigns to the administration a position of equality with the judiciary. But this theory has been carried out no more consistently than ours. It has been found necessary to create safeguards against administrative error and abuse; and a system of “administrative justice” has sprung up which differs greatly from ours in form, while it resembles it greatly in practical results.

Even if an American writer could claim to understand fully the German or French system of relief against administrative acts, he would find it difficult to convey a clear understanding of it to an American reader; in any system of law there is inevitably much that will escape the foreign student—matters of complicated history, of ambiguous legislative texts, and of conflicting doctrines of courts and jurists. The writings of Dicey in England, of Goodnow, Lowell, and Garner in America, have done what can be done in the way of giving an account of French administrative law. For Germany the difficulty is greater, because the German public law has not, like the private law, been unified or codified; and while much of the Prussian administrative law has been laid down in comprehensive statutes (particularly two acts of July 30 and August 1, 1883), yet they apparently

<sup>1</sup> The New York Public Service Commission Act and the Medical Practice Act are conspicuous instances in point.



do not cover the entire field, and it is difficult to find one's way through their complicated provisions.<sup>2</sup> A full account of the entire system would be tedious and unprofitable; it will serve the purpose of the present survey to present a few salient points.

§118. *Continental doctrine of liability.*—We are familiar with the judicial examination of official acts incidental to a suit for damages against an officer. In Germany it is recognized that an officer may be held responsible in damages for an illegal act; but the theory of illegality and the relation of the court to the official's act is different from what it is in our law. According to Mayer, the author of a standard treatise, the officer is excused to a certain extent by error and by the command of the superior. If it was his official duty to examine and determine, an erroneous determination is not illegality—a theory which we apply to an inferior judge, but not always to a ministerial officer; and if it was his official duty to obey a superior, he is protected by the command though it is illegal—a theory which we recognize only in a qualified way where the inferior acts in execution of a warrant fair on its face. A Prussian statute, moreover, forbids the judicial questioning of a police order before the order has been set aside by the superior administrative authority. (Mayer, *Verwaltungsrecht*, Vol. I, §17). It is clear that so long as these principles are recognized, an action for damages against an officer cannot be made the means of obtaining relief against administrative error.<sup>3</sup>

On the other hand the German (like the French) law is more liberal than the common law in recognizing a liability of the corporate community (municipality or state) for damages. The principle appears to be that where an official act done in pursuance of the public welfare has resulted in special injury to an individual, under circumstances which would render a private corporation liable, the individual is entitled to compensation; and it is not necessarily controlling whether the act was illegal or not. A statute is not presumed to justify or authorize the sacrifice of private property to a public interest except on the condition of compensation (Mayer, §54).<sup>4</sup> This principle

<sup>2</sup>The same is true of the imperial law. See Lassar, *Reichseigene Verwaltung* (Tuebingen, 1926), p. 38.

<sup>3</sup>The provision of the German Civil Code regarding liability of officers (§839) applies only to intentional or negligent violation of official duty.

<sup>4</sup>The most recent general discussion of the subject that has come to my notice is Fleiner, *Institutionen des Deutschen Verwaltungsrechts* (1922), §17. The doctrines are too complicated for summary statement.

would cover the cases in which our courts have held officials liable for slaughtering animals supposedly infected but actually sound.

§119. *A separate system of administrative courts.*—This originated in France, and was due to a doctrine of the separation of powers which after the Revolution assumed a form very different from that which has been incorporated in our constitutions. The French courts had opposed the great reforms which preceded or accompanied the Revolution, and it was thought necessary to forbid judicial interference with the course of administration. When subsequently it was felt to be desirable to create guaranties of a judicial character against administrative error or abuse, tribunals less independent in status than the ordinary courts were created, culminating in the Council of State. This system served as a model to a number of Continental states. In Prussia the lower administrative courts are composed in part of legally qualified permanent officials and partly of members selected on a self-governmental representative basis, and they act both in a judicial and in an administrative capacity, while the Supreme Administrative Court (*Oberverwaltungsgericht*) is composed of permanent officials, one-half qualified for high judicial office, one-half qualified for high administrative office. They have judicial tenure and independence. This court passes only upon questions of law.

The administrative tribunals have exclusive jurisdiction in controversies concerning the validity of administrative orders or acts; however, if administrative acts result in criminal prosecutions, the regular courts are competent, and incidentally pass on the validity of administrative acts involved, particularly on the validity of police ordinances.<sup>5</sup> The vesting of jurisdiction affecting matters of public law in separate courts is placed theoretically upon the ground that they involve considerations and an attitude of mind somewhat different from other civil or criminal matters and that therefore special qualification and a separate "atmosphere" are desirable. There appears to have been no strong movement in the direction of abandoning the system.

The student to whom this system is foreign is hardly qualified to pass upon its merits. As the system works out in Prussia, it may produce conflicting doctrines with regard to the same subject matter: a police ordinance may be finally reviewed either by the Supreme Ad-

<sup>5</sup> The ordinary courts have also jurisdiction where public rights are opposed by private privileges or exemptions resting upon special title—a matter too difficult to be considered here.

ministrative Court or by the highest criminal court of Prussia (*Kammergericht*), and the two courts may not take the same view of the law. English and American lawyers will doubt whether a special point of view in dealing with questions of public law is necessary or desirable, if it leads to a serious impairment of the guaranties of private right, or whether, where such point of view is legitimate, the regular courts will not furnish it just as well. It would be difficult to discover in the decisions of the Prussian Administrative Court a spirit favorable to public and unfavorable to private right; a comparison of those decisions with the decisions of the *Kammergericht* shows no difference between the two in general attitude. In Belgium, the jurisprudence of which is generally modeled upon that of France, the system of separate administrative courts has not been adopted. This difference between German and French administrative law on the one hand and English and American administrative law on the other may therefore be registered without comment or criticism. While we have courts of claims and a court of customs appeals, we are not conscious of any particular political or juristic significance of these special tribunals. It is an entirely different question whether it is proper to have a central administrative tribunal liable to be overruled by local courts of less technical qualification. The contrast between the concentration of jurisdiction in customs cases in the Court of Customs Appeals, and the decentralization of the revisory jurisdiction in internal revenue controversies has been pointed out in the descriptive part of this survey.<sup>6</sup> In like manner, it is somewhat of an anomaly that the only court empowered to issue a mandamus against federal officials is the local court of the District of Columbia; it would seem more appropriate to have some tribunal of national status vested with that prerogative jurisdiction; but whether such a tribunal would be called an administrative court or not would make little difference.<sup>7</sup>

While the common law and equity methods of relief against administrative jurisdiction operate against officers and official acts without reference to any particular statute under which powers may be exercised, subject to exceptions expressly established, specific relief through Prussian administrative courts is entirely statutory, and the principal act of August 1, 1883 has refrained from granting jurisdic-

<sup>6</sup> The Revenue Act of 1926 has largely done away with this difference.

<sup>7</sup> The functioning of the Court of Appeals of the District of Columbia as an administrative tribunal in the sense of controlling administrative action without concluding private rights is a different matter. See *Frasch v. Moore*, 211 U.S. 1.

tion generically; it enumerates the various matters with regard to which a contest is permitted, and the enumeration is scattered through the entire act of one hundred and sixty-four sections. This is in contrast also to the French law, which by section 9 of the Act of May 24, 1872, grants to the Council of State jurisdiction "in all suits for annulment by reason of excess of power that may be brought against the acts of various administrative authorities."<sup>8</sup> However, the Prussian law covers such wide categories as police orders, and the refusal of a license is regarded as equivalent to an order; and altogether it may be compared to the system of enumeration observed in the grant of ordinance-making powers to American municipalities: the enumeration is sufficiently comprehensive to afford relief in most of the typical cases of administrative error in which the English or American law gives a judicial remedy.

§120. *The absence of habeas corpus and of contempt power.*—In Continental, as in our law, the guaranties of personal liberty are generally adequate: imprisonment requires a judicial sentence, and arrest must be followed by an immediate judicial hearing. There are, however, provinces of administrative action that stand outside of these guaranties, particularly military and martial law and the expulsion of aliens. In England and America the cause of detention can in all cases be inquired into by means of the writ of habeas corpus; and this will inevitably lead to a judicial examination of at least the jurisdictional foundations of the exercise of administrative power, though there may be no inquiry into the merits of the decision. In Germany the alien taken into custody for purposes of deportation has no remedy which would give him access to the courts, and it does not even appear how a claim of non-alienage could be brought before a court.

In English and American law the judicial power to grant specific relief against administrative error or default is supported by the power to punish disobedience as contempt of court. Such a power is unknown to Continental jurisprudence. An administrative court pronounces only upon the legality or illegality of administrative action—a sort of declaratory judgment, or an analogy to an annulling order issued upon a writ of certiorari. This may appear inadequate in the case of the wrongful refusal to exercise an enabling power; for though the refusal will be held void, the court will not issue an order to the administrative authority to act (40 Decisions Supreme Administrative Court, 372). While this may be looked upon as a theoretical defect, it is hardly felt as

<sup>8</sup> See Leon Duguit, "French Administrative Courts," 29 *Political Science Quarterly* 385.

such in practice. There is usually no inducement to an administrative authority to place itself in opposition to its clear legal duty, and if there were, the hierarchical subordination to a responsible central head of government would have its effect. Disobedience would become a political issue; and it is obvious that, if a political issue were made of a judicial order, at least in the federal administration, the contempt process would become worthless; for it is difficult to see how the Supreme Court of the District of Columbia could enforce the commitment of the head of an executive department. There might be a question of personal liability in damages (see *Kendall v. Stokes*, 3 How. 87), but that possibility would also exist under the Prussian law. On the whole, the question of enforcement is rather academic.

The differences between the Anglo-American and the Continental systems of relief are formal and technical. It is surprising how much alike the principles of relief are in substance. These are concerned with the differences between questions of law and fact and discretion, abuse of discretion, and excess of jurisdiction, which are inherent in the administrative process, and which are common to all systems dealing with similar problems.

Perhaps the outstanding advantage of the Anglo-American over the German system is the existence of such a remedy as the writ of habeas corpus, making it possible to gain access to a court whenever an administrative act results in the invasion of personal liberty; for, given the possibility of assuming jurisdiction, a court will be keen to discover some ground upon which the exercise of administrative power can be controlled. In Germany this possibility of access to the courts does not exist as against political acts of the government; while in France the refusal of the Council of State to inquire into *actes de gouvernement* (Hauriou, *Droit Public*, p. 434) is more in the nature of a self-denying ordinance, just as in America a writ of habeas corpus may be dismissed where it is sought to interfere with the operation of martial law (*Re Boyle*, 6 Idaho 609). The advantage of the Continental over the Anglo-American system lies in a more liberal theory of state responsibility to make compensation for injury inflicted in the course of public administration.

## CHAPTER XIII

### THE COMMON LAW SYSTEM OF REMEDIES

#### A. GENERAL OUTLINE

In brief outline the methods of relief, in the absence of statutory provision, may be classified as follows:

§121. *Defense to enforcement proceedings.*—The individual aggrieved by administrative action remains passive and lets the administrative authority proceed against him judicially, whereupon he sets up the defense that the administrative act was unwarranted. This presupposes that the administrative act is “executory” (i.e., must wait upon further compulsion to become effective), and that this compulsion can be applied only through the courts. It is therefore not available where the administration has summary powers at its disposal (distrain in case of taxation), unless it prefers to proceed through the courts, as it did, for example, in the *Yonkers Board of Health* case (140 N.Y. 1).

Cases can be imagined in which a mere right to set up a successful defense is not a satisfactory remedy: Suppose a license-holder claims that his license has been illegally revoked, and that for some reason mandamus or certiorari will not lie; he may wait until he is prosecuted for selling without a license and then show the illegality of the revocation; but the record of the criminal case will only show a charge of selling without a license, a plea of not guilty, and an acquittal, which may as well be on the ground of failure to prove a sale. In other words, where the defense is to a criminal prosecution, it will be an adequate remedy only if the record can be made to show the ground of the acquittal, i.e., if the case is carried up on appeal to a higher court.

Two questions appear to be unsettled in connection with a defense to an enforcement proceeding:

(a) Can a defense be set up where the defendant has failed to avail himself of a possible earlier remedy?

Apparently it can, if the administrative proceeding suffered from a jurisdictional defect, as where there was an attempt to impose a personal tax upon a non-resident (*McLean v. Jephson*, 123 N.Y. 142). It has been held that it cannot, if the assessors had jurisdiction; the possibility of a statutory proceeding for abatement then renders the de-

fense to an action by the collector a collateral attack which will not be admitted (*Harrington v. Glidden*, 179 Mass. 486). However, where a statute gave an appeal to a court from an order to put up a fire escape, and the owner on taking the appeal complained that it deprived him of his constitutional right to a jury trial, the court said that if he had not sought the appeal he would have had his jury trial as to the existence of fundamental facts upon a criminal prosecution against him for failure to comply (*Stevens v. Casey*, 228 Mass. 368). So far as this decision seems to imply that there is a right to a jury trial as to the facts underlying an administrative order, it raises a point that has not been much discussed, but which was disposed of adversely in one of the cases arising under the Metropolitan Board of Health Act in New York (*Reynolds v. Schultz* [1867], 27 N.Y. Super. Ct. 282).

(b) The second question is closely connected with the point last mentioned: In an action to enforce an order, must the authority prove not only the due making of the order and non-compliance with it, but also the conditions of fact underlying the order?

In the case of *Fire Department of New York v. Gilmour*, 149 N.Y. 453, the trial court had ruled out testimony on the part of the owner that the order was not justified by the conditions of the premises, and the Court of Appeals reversed on that ground; but in that case there had been no hearing before the order had been issued. There appears to be no decision on this point in New York in a case where the statute had provided for an administrative hearing below. In an early English case, where a person was indicted for disobeying an order of justices, the court upon the trial refused to enter into the merits of the original case, saying that it would be absurd that a party should, by a contempt, procure a revision of the judgment of a competent tribunal—it being implied that jurisdictional facts can always be inquired into (*Rex v. Mitton*, 3 Esp. 200, note). While the question is of considerable theoretical interest, it is receiving a practical answer in the most important classes of administrative orders issued upon notice and hearing, by statutory provisions requiring findings of fact supported by the evidence to be accepted in enforcement proceedings. This, of course, assumes that the constitutional right to a jury trial does not extend to cases resulting merely in an administrative order.

§122. *Action for damages or to recover property*.—The action for damages may be an action for tort (trespass, trover, case) or an action for money had and received (assumpsit). It may be an action against an officer or against a municipal corporation, so far as the principles of

municipal liability lend themselves to the purpose. There is no common law action against the state (Crown, United States), since the sovereign is not suable without his consent; the liability of the state is purely statutory. The action for damages leaves the administrative process itself untouched, acting upon it only indirectly through the apprehension of pecuniary responsibility, which may affect the conduct of the official.

The liability of officers will have to be considered separately; that of municipal corporations may be disposed of with a few observations. The number of reported cases of actions against municipalities is far greater than the number of actions against officers, but they are mostly actions for negligence in the management of municipal property, including streets and highways, or actions based on contractual relations; that is to say, they concern service or managerial functions, which are beyond the scope of this survey. Where the municipality or its agent acts in a magisterial capacity (i.e., in the exercise of powers over person or property), it is as a rule not liable for official misfeasance or non-feasance. This non-liability covers such matters as refusal or revocation of license, arrest, quarantine, condemnation, or confiscation of property—in fact, everything that relates to the local exercise of the police power. There is consequently no possibility of using such an action for the correction of administrative error. The Charter of the city of New York relieves health officers from liability for acts done or omitted in good faith and with ordinary discretion, and provides that any person whose property may have been unjustly or illegally destroyed or injured pursuant to any order or action of the department of health or its officers, for which no personal liability may exist, may recover compensation or damages from the city (§1196). This affords an adequate remedy against administrative error; but the provision is quite exceptional in American legislation, whereas the English Public Health Act provides that where any person sustains any damage by reason of the exercise of any of the powers of the act, in relation to any matter as to which he is not himself in default, full compensation shall be made by the local authority exercising such powers (§308)—a provision ever more comprehensive than that of the New York Charter.

Errors or illegalities committed in the exercise of local taxing powers may be corrected, if money has been paid to the local corporation under duress, by an action for money had and received (*Newman v. Supervisors*, 45 N.Y. 676); and the fact that the tax consti-



tutes a lien makes its payment involuntary (*Aetna Insurance Company v. Mayor*, 153 N.Y. 331). But this remedy, involving preliminary payment of the contested tax, is not as beneficial as the proceeding by certiorari.

The action to recover property (ejectment, replevin) is likewise a proceeding at common law, and may serve the purpose of obtaining relief, where property has been taken by summary administrative process (*Den v. Hoboken Land and Improvement Company*, 18 How. 272; *United States v. Lee*, 106 U.S. 196). This remedy interferes with the administrative process, attempting to nullify it *ex post facto*. It is of minor practical importance. Ejectment may be used to question the validity of tax sales. Replevin against revenue officers has been forbidden in the United States by statute since 1833 (R. S., §934); it was formerly also forbidden in New York (old Code, §207), but by amendment made in 1881 the prohibition appears to have been practically nullified (Code Civil Procedure, §1695, now Civil Practice Act, §1090).

§123. *Injunction*.—According to the nature of its operation, an injunction is a convenient method of opposing administrative action of an affirmative character, while it lends itself less readily, if at all, to overcoming administrative inaction, where the affirmative exercise of a power is desired. There are, however, doctrinal difficulties in the way of the availability of the remedy. The principle that equity will not interfere where there is an adequate remedy at law still operates strongly, though with somewhat diminishing force, in administrative law. A hundred years ago an application to a court of equity to restrain official action was regarded as an anomaly. In a case arising in 1822, where a bounty was contested as illegal and an injunction was sought against the town collector and supervisor pending an application for mandamus and certiorari, Chancellor Kent denied the application, saying: "This is not the case of a private trust, but the official act of a political body; and in the whole history of English Chancery there is no instance of the assertion of such a jurisdiction as is now contended for" (*Movers v. Smedley*, 6 Johns. Ch. 28)—a statement not altogether warranted in view of the early case of *Box v. Allen* (1727), 1 Dickens 49, in which a demurrer to a bill to be relieved against an order of the commissioners of sewers was overruled.

There still persists a very generally recognized rule that equity will not deal with appointment to or removal from office. The United States Supreme Court has accepted this rule in *Re Sawyer* (1888),

124 U.S. 200, and the Court of Appeals of New York in *People v. Howe* (1904), 177 N.Y. 499, 505. This, however, touches a branch of administrative law with which we are not concerned.

As regards taxation, it is commonly stated that there must be some recognized special ground of equity jurisdiction to warrant a restraining order, and the Supreme Court of the United States has repeatedly insisted upon this rule in dealing with state or local taxation (*Bailey v. George*, 259 U.S. 16). This, however, does not mean that there are not many cases in which an injunction will be granted (see, for example, *Union Pacific Railroad Company v. Cheyenne*, 113 U.S. 516; *People's Bank v. Marye*, 191 U.S. 272; *Fargo v. Hart*, 193 U.S. 490). In matters of federal revenue there is the express prohibition of injunctions by section 3224 of the Revised Statutes (act of 1867), which, however, does not apply where the tax is in the nature of a penalty (*Lipke v. Lederer*, 259 U.S. 557), and which did not prevent the income tax law of 1894 from being declared unconstitutional in a suit brought by a shareholder to restrain a corporation from making required returns (*Pollock v. Farmers' Loan and Trust Company*, 159 U.S. 429, 608). In New York the Court of Appeals has likewise refused to grant an injunction in tax cases (*U. L. T. v. Grant* [1893], 137 N.Y. 7), although section 83 of the Tax Law refers to a stay, lawfully granted by a court of record by injunction or other order or proceeding, of the collection of any tax.

There is the further doctrine that equity will not restrain the enforcement of criminal laws, applied in New York in the case of *Delaney v. Flood*, 183 N.Y. 323, by refusing to restrain police authorities from stationing officers near a place alleged to be kept for an illegal purpose. Most administrative orders depend for their enforcement upon penalties, and if they were held to be within the rule barring equity jurisdiction on that ground, the right to relief against illegal administrative action might be seriously curtailed; however, a case for equity arises where the order affects many persons or many cases (*Third Avenue Railway Company v. Mayor*, 54 N.Y. 159), and the United States Supreme Court will grant an injunction if property rights by the exercise of the power would be destroyed or rendered worthless (*Dobbins v. Los Angeles*, 195 U.S. 223). An injunction may be granted where the authority threatens summary action (*Babcock v. Buffalo*, 56 N.Y. 268).

Judicial statements insisting abstractly upon the limitations of equity jurisdiction, or even judicial decisions denying injunctions,

where an issue is made of the question of jurisdiction, should be contrasted with the many cases where no question is made of the propriety of equitable relief. In some states (e.g., Illinois) the injunction is the most common method of contesting a tax alleged to be illegal; and Judge Cooley has pointed out the advantages that injunction has over the writ of certiorari (*Whitbeck v. Hudson*, 50 Mich. 86; also *Treatise on Taxation*, pp. 760-68). In the federal administration, as will be shown later on, relief would in many cases fail entirely if it were not for the remedy by injunction, and outside of the field of taxation that remedy is freely resorted to. And while the federal courts are forbidden by statute to interfere by injunction with the assessment and collection of federal taxes, they are not bound by similar prohibitive state statutes, where a case is made for federal jurisdiction in a proceeding to contest the validity of a state tax (*Taylor v. L. and N. R. Co.*, 88 Fed. 350).

Altogether, it must be concluded that the injunction is one of the important methods of judicial control over the administration.

This is true of America; it is more difficult to speak as to England. The only reference made in Halsbury's *Laws of England* to the use of the injunction against the administration is a brief paragraph: "In a proper case an injunction will be granted to restrain a Department of the British Government from doing a mere ministerial act, if it does not involve an interference with the public duty of the Department." The only case cited (*Ellis v. Earl Grey*, [1833], 6 Sim. 214) concerned the payment of money to a party not entitled. The *Encyclopædia of Local Government* refers to no cases of injunctions against public authorities; Stone's *Justice of the Peace* has only a brief paragraph to the effect that criminal proceedings will not be restrained (ed. 1914, p. 1034). The case of *Dyson v. Attorney-General* [1911], 1 K. B. 410, also shows a complete absence of authority for the use of injunction, as it is used in this country, to restrain the exercise of public administrative functions. But in the case last cited ([1912] 1 Ch. 158) a declaratory judgment was given that a public officer had no right to act under a statute, where it was merely a question of interpreting his powers; and a declaratory judgment may easily be made to perform the same function as equitable relief (see [1911] 1 K. B. 417, 423).

§124. *Extraordinary legal remedies or prerogative writs.*—These terms, though not as appropriate now as they were formerly, are used to cover mandamus, certiorari, quo warranto, prohibition, and

habeas corpus. Of these, quo warranto and prohibition may be dismissed, because, at least in New York and in the federal courts, they are not used as remedies available to individuals to obtain relief against administrative error or illegality. Quo warranto is available to one claiming public office to try his title against a rival claimant, or to the state to correct the usurpation or abuse of public or corporate powers; the application of the remedy to such matters as the exclusion of children from public schools is confined to certain states (*People v. Board of Education of Quincy*, 101 Ill. 303). Prohibition is chiefly used to hold courts within their jurisdiction, rarely against administrative authorities; and its place in the system of administrative law remedies is quite inconspicuous.

The writs of mandamus and of certiorari are the typical administrative law remedies. Mandamus may also be used to enforce obligations of private corporations, certiorari to review convictions of inferior criminal courts, or for certain appellate purposes; but the most characteristic application of the two writs or their modern substitutes is in connection with the exercise or non-exercise of administrative powers. In New York, probably by far the greater part of the judicial development of administrative law centers around these two remedies. In England the remedies have much the same function as in America; but the impression received from Halsbury's *Laws of England* is that they are rarely used to control administrative action (see title, *Crown Practice*), and this is confirmed by reference to the *Encyclopaedias of the Laws of England* (see the two titles) and of *Local Government* (Vol. 1, pp. 218, 500). The more sparing use of administrative powers in legislative practice, and, under some statutes, an adequate provision of statutory remedies, may in part account for this.

Mandamus and certiorari will have to be given separate consideration.

§125. *Habeas corpus*.—The function of habeas corpus is to inquire into the cause of the detention of a person. The power to commit is normally a judicial power, and the jurisdiction of a court is appropriately tested by a habeas corpus proceeding. Commitment by administrative authorities is exceptional; as a means of enforcing the collection of taxes it seems to have fallen into disuse; the instances which most readily occur to the mind are quarantine, the detention in public custodial institutions, martial-law sentences, extradition, and the detention and deportation of aliens. Of these the last mentioned is practically the most important. The acts of Congress purport to vest

final authority in the head of an administrative department, the Secretary of Labor; but questions of jurisdiction, legality of action, and the fairness of a hearing are examined by the courts on habeas corpus, and no attempt has been made by Congress to withdraw that jurisdiction.

It would have been possible for courts to hold, or for Congress to provide (subject to the extent of the constitutional guaranty as interpreted by the courts), that upon a return showing a decision by the Secretary of Labor the writ must be dismissed. This would have been in analogy to the ordinary doctrine that the writ of habeas corpus must not usurp the function of a writ of error; for that is substantially the function that it now performs with reference to deportation orders, conceding that administrative evidence and procedure need not conform precisely to judicial standards (*Bilokumsky v. Tod*, 263 U.S. 149, 157). The use of the writ for the determination of constitutional questions in connection with immigration legislation is almost coeval with that legislation (*Chew Heong v. U.S.* [1884], 112 U.S. 536); it was first used to inquire into the correctness of administrative findings where there was a claim of citizenship (Chinese exclusion cases, 208 U.S. 8; 223 U.S. 673; 253 U.S. 454; 259 U.S. 276). The first intimation that it might be used on behalf of conceded aliens to secure them a "fair though summary hearing" was a dictum in 1912 (*Zakonaite v. Wolf*, 226 U.S. 272); it was held that it might be used to enforce proof of alienage in 1923 (*Bilokumsky v. Tod*, 263 U.S. 149), and now there are direct decisions securing by way of habeas corpus to aliens a right to a fair hearing and to compliance with formal requirements (*Mahler v. Eby*, 264 U.S. 32; *Tisi v. Tod*, 264 U.S. 131). In England the question whether the case is within the statute may be examined upon habeas corpus, but in view of the wide executive discretion ("if he deems it to be conducive to the public good") there is no occasion to inquire into anything else (*King v. Inspector* [1920] 3 K.B. 72; *Rex v. Brixton Prison* [1916] 2 K.B. 742; *King v. Home Secretary*, 88 Just. Peace Rep. 89). A writ of certiorari may serve the same purpose (*Rex v. Home Secretary* [1917] 1 K.B. 922). As was said in the case last cited:

In the event of it being disputed that the subject of a deportation order is an alien, the matter must be determined by the Court, and unless it be proved that the person is an alien the order must be quashed as made without jurisdiction; but I am not aware of any other ground upon which such an order can be quashed.

The habeas corpus differs from mandamus and certiorari in being more readily obtainable; under the Civil Practice Act of New York, it may be granted by a justice of the supreme court as well as by the court itself, and by any person authorized to perform the duties of a justice at chambers (§1232); moreover it must, under penalty, be granted unless it appears from the petition that the petitioner is prohibited from prosecuting the writ (§1235). Mandamus and certiorari, on the other hand, can be granted only by the supreme court (§§1287, 1317); with regard to certiorari, it is further provided that the granting or refusal is discretionary with the court (§1290); and while there is no similar provision as to mandamus, the rule appears to be the same, in accordance with the common law (*People v. Allegany County Supervisors* [1836], 15 Wend. 198; *People v. Interurban Company*, 177 N.Y. 296; as to appealability, see *Barrett v. Third Avenue Railway Company*, 45 N.Y. 628; *People v. Common Council*, 78 N.Y. 56). Habeas corpus is also grantable by the federal district courts, while mandamus and certiorari are not.

#### B. THE COMMON LAW SYSTEM IN THE FEDERAL ADMINISTRATION

§126. *Action for damages.*—During the greater portion of the nineteenth century the principal function of the federal government, which brought it into administrative contact with private rights of property, was the collection of the customs revenue. It was therefore in connection with this that some remedial system was first called for. It is often said that the United States as a federal power has no common law, and it is certain that none of the courts exercising the federal (as distinguished from local) judicial power of the United States was vested by statute with full common law jurisdiction. How, under the circumstances, were errors arising in the administration of the customs, involving the interpretation of tariff schedules, to be dealt with? The early tariff laws provided no system of judicial review. Suppose the Collector of Customs of the Port of New York, by misconstruction of the law, exacted an excessive rate of duty; was there any remedy apart from statute? There was, by the application of common law principles, if the collector, stepping beyond his legal powers, rendered himself personally liable. Technically, such liability arose under the law of New York. The Federal Judiciary Act did not give the courts of the United States jurisdiction of all cases arising under any act of Congress, but made it possible for a defendant sued in a state court, who set up a defense of federal authority, to remove

the case into the federal court (act of March 3, 1817, 3 St. at Large 396). If then the Collector, upon tender of the lawful rate, refused to surrender imported merchandise, he made himself guilty of conversion; or if the importer, in order to obtain possession of his goods, paid the amount unlawfully exacted under protest, warning the collector not to remit to the Treasury, the collector was liable to repay as for money had and received. Thus the action of trover, or preferably the action of assumpsit, became the recognized remedy to test the legality of the government's construction of the tariff laws (*Tracy v. Swartwout*, 10 Pet. 80; *Elliott v. Swartwout*, 10 Pet. 137 [1836]). Until 1890, these actions were started in state courts and from there removed into the United States Circuit Court.

In *Tracy v. Swartwout* the Supreme Court observed: "Some personal inconvenience may be experienced by an officer, who shall be held responsible in damages for illegal acts done under instructions of a superior; but as the government in such cases is bound to indemnify the officer, there can be no eventual hardship." Since the liability of the collector in assumpsit was founded upon his supposed duty, after warning, not to pay over the money to his superior, the practice grew up for the collector to hold personally the amounts in litigation. Collector Swartwout used this money for private speculation and, owing to the panic of 1837, defaulted in his accounts. Congress thereupon, in 1839, passed an act requiring collectors to place all moneys paid under protest to the credit of the Treasurer of the United States without awaiting the result of litigation. The Supreme Court, in the case of *Cary v. Curtis* (1845), 3 How. 236, held that this act destroyed the foundation of the assumpsit against the collector; but Congress, in session when this decision was rendered, at once reinstated the action, thus giving statutory recognition to the remedy against the collector (R. S., §3011). In 1863 Congress provided that in proper cases where judgment has been recovered against the collector, no execution shall issue against him, but the amount recovered shall be paid out of the proper appropriation from the Treasury (R. S., §989). Thus the suit against the collector was made a mere pro forma proceeding to recover from the government. Finally the Customs Administration Act of 1890 substituted for the common law action against the collector a purely statutory method of review. The exceptional cases in which the action against the collector was still admitted may be ignored (*De Lima v. Bidwell*, 182 U. S. 1).

The method originally adopted for customs litigation is, how-

ever, still continued where internal revenue taxes are in dispute. Since section 989 of the Revised Statutes applies to all revenue officers, the action against the internal revenue collector is likewise in substance a proceeding against the government. The form of the proceeding, however, still controls to this extent that where the collector to whom overpayment has been made goes out of office, the action cannot be brought against his successor in office (*Smietanka v. Illinois Steel Company*, 257 U.S. 1). However, a suit against the United States is also available; and the concurrent jurisdiction of the district courts, ordinarily limited to amounts under \$10,000, has been relieved from that limitation where under the *Smietanka* decision the collector cannot be sued (Revenue Act of 1924, §1025, amending Judicial Code, §24, No. 20).<sup>1</sup>

What has been said of the liability of collectors of the revenue also applies to postmasters exacting illegal postage, and the theory of liability has been most fully discussed in a suit arising under the postal laws (*Teal v. Felton*, 1 N. Y. 537; 12 How. 284). However, the litigation over postage has naturally been insignificant; and the question of personal liability for carelessness in the transmission of the mails, which is a service function of the government, lies beyond the scope of the present inquiry (see *U. S. v. Griswold*, 8 Ariz. 543; *Idaho, etc., Co. v. Croghan*, 6 Idaho 470; *Keenan v. Southworth*, 110 Mass. 474).

The federal government not being organized into subordinate local corporations, the question of municipal liability does not arise in the federal system; the government itself is, according to common law principles, immune from suit and therefore immune from liability. The jurisdiction of the Court of Claims (supplemented by the partly concurrent jurisdiction of the district courts) is entirely statutory; but so far as it enters into the remedial system, it may be conveniently considered at this point. The acts of 1855 and 1887 expressly exclude from the jurisdiction of the court all cases sounding in tort; and although the government is suable on implied contract, it is held that an implied contract will not arise where the government

<sup>1</sup> The Revenue Act of 1926 restricts the action against the collector by making it inapplicable in all cases in which the Board of Tax Appeals is given jurisdiction (deficiency assessments); the decisions of the Board are reviewable only by the Circuit Court of Appeals or the Court of Appeals of the District of Columbia (§§1001-4). The part of section 1025 of the act of 1924 referred to in the text is re-enacted as section 1122.



claims to be acting by right (*Langford v. U.S.*, 101 U.S. 341). The theory upon which the legality of duties or taxes is litigated in actions against officers is therefore not available to support a suit against the government. The Tucker Act of 1887 gives, however, jurisdiction of claims founded upon any law of Congress. The Supreme Court in the case of *Dooley v. U.S.*, 182 U.S. 222, construed cases "arising under" the customs laws as equivalent to cases "founded upon" such laws, and has since adhered to that construction (*U.S. v. Emery, etc., Co.*, 237 U.S. 28, 32). On analogous principles government liability might be sought to be enforced for many other categories of administrative errors; but it remains to be seen how far the Supreme Court will go in giving effect to the possible implications of the decision in the Dooley case.<sup>2</sup>

§127. *The prerogative writs in the courts of the United States, and equitable relief.*—Attention has already been drawn to the use of habeas corpus in alien exclusion and deportation cases; sections 751 and 752 of the Revised Statutes give to the various courts and judges full power to grant the writ. The situation is different with regard to the other writs. The Judiciary Act of 1789 gave the Supreme Court original jurisdiction in cases of mandamus, a provision declared unconstitutional in *Marbury v. Madison*, 1 Cranch 137. Section 14 of the same act gave power to all the federal courts to issue "all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." This was held to mean that the power was given in cases where the jurisdiction already exists (e.g., mandamus to compel the legislative body of a municipality to levy a tax to satisfy a judgment previously recovered in the federal court), not where it is to be acquired by means of the writ proposed to be sued out (*McClung v. Silliman*, 6 Wheat. 601; *McIntire v. Wood*, 7 Cranch 504), i.e., the writ cannot be used to confer a jurisdiction which the court would not have without it, but is authorized only when ancillary to a jurisdiction already acquired. Nor is mandamus a suit of a civil nature at common law within section 11 of the same act (*Bath County v. Amy*, 13 Wall. 244). Under these rulings mandamus is not available in the regular federal courts to compel the

<sup>2</sup> In internal revenue cases it is not necessary to rely upon the theory of the Dooley case; for the Revenue Act expressly provides for the refund of taxes overpaid or erroneously or illegally assessed or collected (Act, 1926, §§284, 1111; *U.S. v. Savings Bank* [1881], 104 U.S. 728).

performance of official duties by federal officers in the particular judicial district. However, in *Kendall v. United States* (1838), 12 Pet. 524, the Supreme Court held that the power denied to or withheld from the other courts resided in the local court of the District of Columbia, supporting this ruling by arguments partly drawn from the law of Maryland in force in the District, partly from the wording of the act defining the jurisdiction of the court—arguments which appear entirely unconvincing, but which have never since been questioned. We have thus the anomaly that while inferior local officers of the United States, like postmasters, who reside in the various states, are not subject to mandamus, the heads of departments and chiefs of bureaus who reside in the District of Columbia are subject to the coercive process of a local court without any national status, and that the law regulating that process, while enacted by Congress, is only found in a compilation of local statutes (Act, March 3, 1901, c. 42).

The same section of the Judicial Code of the District of Columbia that gives to the local court power to issue the writ of mandamus, also gives power to issue the writ of certiorari. No attempt, however, was made to use certiorari to review an administrative determination until the case of *Degge v. Hitchcock* (1913), 229 U. S. 162, in which a fraud order of the Postmaster-General was complained of. The court held that the absence of precedents tended to show lack of power; that there was a principle that courts would not interfere with matters still pending in the departments, which principle would be overthrown by allowing certiorari, since that writ might be used to remove a record before decision—a view of the use of certiorari contrary to the practices of many states including New York, according to which the writ will be granted only to review final determinations (4 *Encyclopaedia of Pleading and Practice* 42; New York Civil Practice Act, §1286); and finally—a somewhat unintelligible argument—that the postmaster's hearing had an "administrative" quality, that his ruling was not such as to be final unless directly reversed, since the party was not concluded, but might have appropriate relief in a court of equity, citing *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94.

The last reason given is to be noted particularly; certiorari is unnecessary, since the remedy in equity is adequate. There is indeed little substantial difference, since injunction can be made to serve substantially the same purpose as certiorari, and vice versa, everything depending upon the scope of review which the court will permit under

either form of remedy, and injunction being preferable, since it is not hampered by the controversies which exist with reference to the common law province of the writ of certiorari.

The important point, then, is that the Supreme Court recognizes the appropriateness of equitable relief by injunction to correct administrative error which the court believes should be corrected judicially. A liberal view is taken of equitable jurisdiction (*Philadelphia Co. v. Stimson*, 223 U.S. 605, 622), and there is the additional advantage that the relief is not only, like mandamus, within the jurisdiction of the Supreme Court of the District of Columbia but, unlike mandamus, can be given by every district court, and, liberally applied, can be made to serve the purpose of mandamus, as where a local postmaster was enjoined from carrying out an order of the Postmaster-General directing the retention of letters (*American School v. McAnnulty*, 187 U.S. 94; also, *Wilson v. Bowers*, 14 Fed. 2d 976).

When the Rate Act of 1906 was before Congress, the question of the judicial review of the orders of the Interstate Commerce Commission was much discussed; and it was assumed that, so far as such review had to be allowed, it would be in the form of the injunction, and a somewhat casual recognition of that remedy ultimately found a place in the statute. The law was made explicit in 1913.

The inability to grant mandamus has led to a further extension of equitable relief. In a state court the proper way to obtain affirmative administrative action is by mandamus, and not to proceed as though illegal refusal to act were equivalent to favorable action (*Grace Church v. Zion City*, 300 Ill. 513); but a federal court may restrain official interference with private action irrespective of the non-possession of license or permit, on the ground that such license or permit is illegally withheld or delayed (*Chicago v. Fox Film Corporation*, 251 Fed. 883). Thus, in the same case in which the Illinois Supreme Court held an injunction to be improper, because the legal remedy was by mandamus (*Bell Telephone Company v. Commerce Commission* [1922], 306 Ill. 109), the United States Supreme Court eventually afforded relief by injunction, commenting upon unreasonable official delay as equivalent to confiscation (*Smith v. Illinois Bell Telephone Company* [1926], 270 U.S. 587).

So far then as relief in the federal administration is not expressly statutory, it assumes in the main the forms of either an action against the officer, mandamus, or injunction. Occasionally a defense to an enforcement proceeding may be available—so against the unwar-

ranted exercise of examining powers. The action against the officer has become in substance a proceeding against the government; mandamus is peculiar in being available only at the center of the government. The relief in equity has thus by force of circumstances become the normal form of relief where it is not (as in revenue cases) shut out by statute.

### C. ACTION AGAINST OFFICERS

§128. *Common law and civil law.*—Reference has been made to the part that the action against the collector has played in the history of federal revenue administration. As a remedy against illegal seizures in connection with the customs revenue, the action of trespass appears to be of great antiquity, there being instances of its use as early as the reign of Edward I (Hall, *Customs Revenue*, Vol. 2, p. 42). Suits against officers by reason of acts done under alleged statutory authority must have been common; for we find in the last section of the Poor Law of Elizabeth (43 Eliz., c. 2, §19 [1601]) a provision for the protection of officers against vexatious suits, which has all the appearance of a standard clause, and there have since been repeated English acts for the protection of officers, finally revised in the Public Authorities Protection Act of 1893 (56 & 57 Vict., c. 61). These acts did not purport to give immunity, but afforded at an earlier period certain facilities regarding pleading; later, when these became unnecessary, certain benefits in the matter of costs, statute of limitations, etc.

Mr. Dicey, in his *Law and Custom of the Constitution*, seems disposed to make the question of the liability of officers the pivotal point of difference between the English Rule of Law and the French Droit administratif. The matter is too difficult and technical for wide political generalization. Any comparison should take into account the absolute immunity from liability of superior judges at the common law, which, like the absolute immunity of the sovereign, is unknown to the Continental law, so that the latter in this respect makes a more favorable showing for the rule of law. The qualifications of the liability of administrative officials both in the French and in the German law, moreover, constitute a very complicated chapter of legal history; and if it is true that in both countries the practical result is official immunity for acts done in good faith, the question is whether the American law at least does not tend strongly in the same direction. Anyone who realizes the uncertainties and difficulties of our own law will be

cautious in making statements concerning this phase of the law in other countries.

§129. *Contrasting decisions.*—The state of the law is perhaps best set forth by presenting two series of decisions—the one affirming, the other denying official liability—and making these the subject of some comment.

In 1666 the writ of certiorari was sought to review orders of the commissioners of sewers, an early type of what may be called administrative tribunals (3 Blackstone 73). The Court of King's Bench refused the writ saying that if the commissioners proceed according to the statute their action is binding, and if they do not, then all is void and *coram non judice*, and the parties are at liberty to examine this in an action brought at common law. This plainly refers to an action of trespass against the commissioners or their subordinates (*Ball v. Partridge*, 1 Sid. 296).

In 1703, in *Ashby v. White*, 2 Ld. Raym. 938, the House of Lords, sustaining Lord Holt, allowed an action on the case against an election officer for refusing to receive the vote of an elector—a decision which has found a place in *Smith's Leading Cases* as illustrating the maxim that where there is a right there must be a remedy.

In 1774 the Court of King's Bench sustained a verdict of £3,000 against the governor of Minorca (then under British jurisdiction) for assault and false imprisonment. The governor had taken summary proceedings for the suppression of mutiny; but it appears that he did not succeed in making a case of justification, and finally insisted that the plea of justification was immaterial since his office protected him. This the court refused to concede. Precedents were cited of successful actions against the governors of New York, Jamaica, and Gibraltar (*Mostyn v. Fabrigas*, Cowper 161).

In 1795 official inspectors or searchers who were authorized and bound to seize leather insufficiently dried were held liable in trespass for a seizure, upon a finding by the jury that the leather was in proper condition. The statute authorized the seizure for subsequent trial; under the circumstances it was absurd to construe the statute literally as subjecting to preliminary seizure only the goods of the forbidden description. The court admitted the harshness, but saw no escape: "The act of Parliament only authorizes the searchers to seize goods of a certain denomination; the goods in question are not of that description; therefore the seizure is illegal, and consequently the defendants are trespassers" (*Warne v. Varley*, 6 Durn. and E. 443).

In 1814 a similar decision to that in *Ashby v. White* was rendered in Massachusetts, likewise insisting upon the necessity of some remedy, at the same time intimating that the court would probably determine that a sum, comparatively not large, would be excessive damages in a case where no fault, but ignorance or mistake, was imputable to the selectmen (*Lincoln v. Hapgood*, 11 Mass. 350). This decision was followed in Ohio in 1842 (*Jeffries v. Ankeny*, 11 Ohio 372).

In 1868, the Supreme Court of Iowa, by Judge Dillon, held a highway officer liable for an error of judgment committed in good faith in repairing a highway, whereby private property was damaged. It was a controlling consideration that a liability could not be placed elsewhere; but the court also said, "The discretion which protects such an officer as the road supervisor, stops at the boundary line where the absolute rights of property begin" (*McCord v. High*, 24 Iowa 336).

In 1891 the Supreme Court of Massachusetts held a sanitary officer liable in damages for killing an animal in good faith believed to be affected by disease, but which in the action for damages was found to be sound (*Müller v. Horton*, 152 Mass. 540). A similar decision was rendered in Wisconsin in 1904 (*Lowe v. Conroy*, 120 Wis. 151). In both cases the question was carefully considered, and liability was asserted as a necessary protection to private property, and earlier dicta or decisions to the contrary were expressly overruled (*Salem v. Eastern Railroad Company*, 98 Mass. 431; *Fath v. Koepfel*, 72 Wis. 289).

With these decisions the following others should be contrasted:

In 1700, the decision in *Ball v. Partridge*, declaring an action at common law (against the officer) to be the only remedy open to those aggrieved by orders of the commissioners of sewers, was virtually overruled in the so-called Cardiff Bridge case (*Rex v. Inhabitants of Glamorganshire*, 1 Ld. Raym. 580) which recognized the writ of certiorari as appropriate for specific relief in such cases—a landmark in remedial administrative law.

As regards the liability of election officers for erroneously refusing a vote, the ruling in *Ashby v. White* was qualified in 1787 in the case of *Drewry v. Coulton*, reported in 1 East 563, note, holding that there is no cause of action in the absence of malice. In the same year in which Massachusetts established the rule of liability, New York denied it (*Jenkins v. Waldron*, 11 Johns. 114), and in 1817 New Hampshire preferred to follow New York rather than Massachusetts

(*Wheeler v. Patterson*, 1 N.H. 88), and the rule of non-liability was subsequently accepted in a number of other states (Connecticut, Indiana, Michigan, North Carolina, and Tennessee). Election laws have since been so framed as to relieve officers from the peril of wrong decisions, either by making the voter's oath conclusive, so that refusal of the vote becomes properly actionable as a wilful act (*Gillespie v. Palmer*, 20 Wis. 544; *Elbin v. Wilson*, 33 Md. 135), or by making it possible to test the right to vote prior to the election (registration laws). In Massachusetts there may be set against the rule of liability of election officers the non-liability of school officials for refusal to admit a child (*Spear v. Cummings*, 23 Pick. 224, 1839); Chief Justice Shaw's denial of the analogy of the election case is not convincing.

In 1805 the Supreme Court of New York strongly disapproved the decision in *Warne v. Varley* (*supra*) and refused to apply it to the case of an inspector refusing in good faith to certify goods intended for export. The court speaks of "condemnation," but finally recognizes the act as one of omission or non-feasance, and finds in this element a sufficient difference from the English precedents (*Seaman v. Patten*, 2 Caines 312). The English cases indeed seem clear that error without malice on the part of licensing or registration officials, either in refusing or in revoking a license is not actionable (*Bassett v. Godshall* [1770], 3 Wilson 121; *Partridge v. General Council* [1890], 25 Q. B. D. 90). The American case of *Downer v. Lent* (6 Cal. 94 [1856]) is frequently cited as authority for the non-liability for revoking a license, although malice was alleged in that case.

Reversing the attitude of the English King's Bench in *Ball v. Partridge* (*supra*), the Supreme Court of New York held in 1833 that since legal errors in the exercise of the taxing power can be corrected by certiorari, the taxing officers are not liable in trespass for an unlawful levy (*Easton v. Calendar*, 11 Wend. 90). A distinction is now recognized in New York between jurisdictional error for which the assessing officer is liable (*Dorn v. Backer*, 61 N. Y. 261), and legal error for which he is not liable. In Massachusetts, an early decision held assessing officers liable for error of law though committed in pursuance of a vote of a town meeting (*Stetson v. Kempton* [1816], 13 Mass. 272); but the opposite rule was subsequently established by statute (Acts, 1823, c. 138, §5).

As regards liability of inferior officers for bona fide error resulting in the actual taking of property other than in cases of taxation, probably the leading American decision against liability is *Raymond v.*

*Fish* (1883), 51 Conn. 80. In New York there has been no case in the Court of Appeals quite similar to *Müller v. Horton* or *Lowe v. Conroy* (*supra*); but the decision in *Underwood v. Green*, 42 N.Y. 140, seems to favor a more lenient rule, and in a lower court the principle of non-liability appears to have been accepted (*Williams v. Rivenburg*, 145 App. D. 93). In *Crayton v. Larabee* (1917), 220 N. Y. 493, the Court of Appeals found that the officer had not exceeded his statutory power in quarantining a person who claimed not to have been actually exposed to disease. A statute was relied upon which did not make exposure a jurisdictional prerequisite. Two earlier cases, which the court cites as having recognized the doctrine of jurisdictional prerequisite (*People v. Board of Health*, 140 N.Y. 1; *Matter of Smith*, 146 N.Y. 68) were not cases of actions against officers. The court merely adds: "It may be that the decisions in these cases were based upon principles not applicable here—an hypothesis we do not consider."

§130. *High executive officers*.—The English decisions holding high executive officers liable for erroneous acts or orders resulting in an invasion of rights of person or property appear to have no parallel in America; and there is only one American parallel to the stringent English rule enforced against naval commanders (*Little v. Bareme* [1804], 2 Cranch. 170).<sup>3</sup> An action brought against an ex-president

<sup>3</sup> See Southey's *Life of Nelson* (American Book Company's edition, p. 85): "This sort of blockade Nelson could not carry on without great risk to himself. A captain of the navy is liable to prosecution for detention and damages. This danger was increased by a recent order by which, when a neutral ship was detained, a complete specification of her cargo was directed to be sent to the Secretary of the Admiralty, and no legal process instituted against her till the pleasure of the Board should be communicated. This was requiring an impossibility. The cargoes of ships, chiefly corn, would be spoiled long before the orders of the Admiralty could be known; and then if they should happen to release the vessel, the owners would look to the captain for damages. Even the only precaution which could be taken against this danger, involved danger: for if the captain should direct the cargo to be taken out, the freight paid for, and the vessel released, the agent employed might prove fraudulent and become bankrupt; and in that case the captain became responsible. Nelson therefore required, as the only means of carrying on that service, which was judged essential to the common cause without exposing the officers to ruin, that the British envoy should appoint agents to pay the freight, release the vessels, sell the cargo, and hold the amount until process was had upon it, government thus securing its officers. 'I am acting,' said Nelson, 'not only without the orders of my commander in chief, but in some measure contrary to him. However I have not only the support of his majesty's ministers, both at Turin and Genoa, but a consciousness that I am doing what is right and proper for the cause of our King and country. Political courage, in an officer abroad, is as highly necessary as military courage.'"



was dismissed upon a point of venue (*Livingston v. Jefferson* [1811], 1 Brock. 203, Fed. Cas. No. 8411). There have been three notable cases against governors or ex-governors of states, all of them unsuccessful (*Drucker v. Salomon*, 21 Wis. 628; *Moyer v. Peabody*, 212 U. S. 78; *Hatfield v. Graham*, 73 W. Va. 759). The decisions appear to go on the ground of the finality of the chief executive officer's discretion—a principle not generally admitted when his acts are collaterally in issue in a court of justice. While it is difficult to speak upon the subject with confidence, a strong impression is received to the effect that the chief executive is by custom and common consent accorded the same degree of immunity from liability that superior judges have always enjoyed at common law. That immunity covering as it does even acts of malice, goes perhaps farther than is justifiable (*Lange v. Benedict*, 73 N.Y. 12); but there appears to be no good reason why the chief executive should hold a legal position in respect of liability inferior to that of a judge.

§131. *Omission and commission.*—Leaving high executive officers aside, the English and American decisions reveal a different view with regard to acts of omission or mere declaratory acts and with regard to acts of commission including orders resulting in an actual invasion of rights. As regards the former, the tendency toward the rule of non-liability is so pronounced, when the officer acts in good faith, that the isolated cases to the contrary may be ignored. "Malice," including in that term wilfulness or unpardonable error, is essential to a cause of action. As regards acts of invasion or trespass, the tendencies are very much more confused, and it is impossible to ignore such decisions adhering to the rule of liability as those of the courts of Massachusetts and Wisconsin. The French law treats acts of omission and commission alike, requiring for liability in both cases the *fait personnel* of the officer, equivalent to our "malice" or negligence; and the same rule follows in Germany from general principles of tort liability; while in America it is still possible to maintain that in acts of invasion motive is not essential to liability.

If there is such a rule of unqualified liability, however, it has a precarious status. The courts accepting it state it with regret; if they justify it by the absence of other remedies, the establishment of another remedy may overturn the rule; other remedies have occasionally been established by judicial decision, and sometimes by the legislature; and we have seen that in the federal revenue administration the liability of the officer has either been superseded by statutory appeal

or has become a purely formal method of recovery against the government. In England, where under the Public Health Act the local authority compensates for losses in respect of which the individual is not in default, actions against health officers are practically unknown. In New York, the Charter of the city of New York has transferred the liability from the officers of the health department to the municipality. Actions for slaughtering animals lose their importance where compensation is provided for by statute.

It is obviously to the interest of the state to relieve the officers from personal liability, for the apprehension of such liability must act unfavorably upon the energy with which the officer will meet emergencies calling for drastic action. If there is legislation, it is generally compensation legislation, particularly in the matter of animal disease. Generally speaking, the legislature seems unwilling to deal directly with the subject of official liability.

In the nature of things the officers who are in a position to inflict actionable injury are likely to be inferior officers who may be unable to satisfy a judgment. In view of this, official liability would be much strengthened by bonding provisions. However, the general legislative practice is to require bonds only of officials handling funds, and officials exercising determinative powers are not usually in that category, and, as a matter of fact, are rarely bonded.

§132. *Wilful acts*.—In all the foregoing observations it has been assumed that the officer acts in good faith. The liability of an officer—other than a superior judge and probably the chief executive—acting maliciously and at the same time illegally, is clear. This would, for example, apply to an officer refusing to obey a mandamus (*Kendall v. Stokes*, 3 How. 87, 101; *Amy v. Supervisors*, 11 Wall. 136). The Civil Practice Act of New York goes farther and provides that if upon granting a peremptory mandamus it appears to the court that the officer without just excuse refused or neglected to perform his duty, the court besides awarding damages and costs may impose a fine not exceeding \$250; this fine is, however, to bar any other penalty incurred for non-performance of the duty (§1340). The same act also provides, following the English Habeas Corpus Act of 1678, that a judge refusing a writ of habeas corpus, unless it appears from the petition itself or the documents annexed thereto that the petitioner is prohibited from prosecuting the writ, forfeits to the prisoner the sum of \$1,000 (§1235). There is also a forfeiture for refusal to discharge the prisoner (§1267). This is more effective than a fine, over which

the injured person has no control. These provisions seem unique, although it would not be difficult to make them more generally applicable.

§133. *Conclusion.*—The law as set forth makes it appear that the action against the officer (except where it is a formal method of recovering from the government) is of no particular value for the purpose of reviewing administrative error, or even for the purpose of checking abuse of discretion. An examination of digests of cases bears out this impression. The sections dealing with official liability are very meager, and it may be inferred that actions against officers are correspondingly rare. And this seems particularly to be the case in England, in New York, and in the federal courts. The action against the officer serves its purpose when there is no other administrative law remedy. With the development of such remedies it tends inevitably to fall into disuse.

#### D. MANDAMUS AND CERTIORARI

§134. *Their general province.*—Administrative ruling or determinative powers have in this survey been divided into two main classes designated as enabling and directing powers. This division finds support in the common law development of the two principal administrative law remedies, mandamus and certiorari, which check and control the two classes of powers respectively, so far as their exercise is regarded as appropriately subject to judicial enforcement or correction. As has been shown before, in England the use of these remedies is now quite exceptional; in the federal administration mandamus has found a place, but not certiorari; but in New York, administrative law is to a great extent identified with mandamus and certiorari, which have in a manner been codified by the Code of Civil Procedure and Civil Practice Act; and, while the law of New York has shown a special adaptability in the development of these remedies, still or perhaps for that very reason, the state may be regarded as a representative American jurisdiction.

§135. *Mandamus.*—It is the function of mandamus to compel the performance of official duties. Originally a proceeding between the sovereign and the officer—and it is still customary to entitle the case “The People by the relation of [*ex rel.*] . . .”—it has long since been in substance an action by a private party, where the official duty is toward an individual; and this is the application of the remedy in which alone we are interested.

It is commonly said that by mandamus courts will enforce only

such official duties as are ministerial. In *Decatur v. Paulding* (1840), 14 Pet. 497, the Supreme Court contrasted ministerial and executive. The term "executive" has a specific meaning where official duty involves an extended course of conduct necessary to bring about a certain result, judging of appropriate and available means, and directing subordinates in accordance with some plan of action, such as the duty of a mayor to enforce the closing of saloons in a city, which was held to be uncontrollable by mandamus (*People v. Dunne* [1906], 219 Ill. 346; *People v. Busse* [1907], 238 Ill. 593); with this question of the judicial enforceability of executive law enforcement we are not here concerned; in another field this phase of the availability of mandamus has presented itself where courts have been asked to enforce the duty of public utility companies to render adequate service (*Northern Pacific Railroad Company v. Washington*, 142 U.S. 492), it being the difficulty of judicial control which was largely responsible for the establishment of administrative commissions.

In the *Decatur* case the duty in question merely concerned the application of pension laws to a particular case. The court held the function of interpretation vested in the Secretary of the Navy to be executive, uncontrollable by mandamus. It distinguished the decision in *Kendall v. United States* (12 Pet. 524 [1838]), in which the Postmaster-General was compelled by mandamus to allow a claim in accordance with a ruling of the Solicitor of the Treasury, to whose determination Congress had committed the matter. The difference between the two cases is plain, and may perhaps be most clearly put by comparing the duty of the Secretary of the Navy in the *Decatur* case to that of an auditor or comptroller, and that of the Postmaster-General in the *Kendall* case to that of a treasurer. Obviously, the function of the auditor is not as "ministerial" as that of the treasurer; the latter need not look beyond the audit and warrant, while the auditor must interpret the law (*Roberts v. United States*, 176 U. S. 221).

When it is sought to mandamus the auditor or comptroller to allow a claim against a state or government, the question presents itself at once whether this would not be a way of nullifying the rule that the sovereign cannot be sued without his consent. It is true that in Illinois this has been allowed to be done (*People v. Smith* [1867], 43 Ill. 219; *People v. Stevenson* [1916], 272 Ill. 215); but the opposite view is as plausible, if not more so, and it is of particular force, where the matter in dispute is not a contractual right, with reference

to which the non-suability of the sovereign is after all an anomaly, but a matter of bounty, with reference to which a government may legitimately insist upon conclusive administrative determinations. The latter position would apply not only to pensions but also to grants of public lands; and a court may be justified in assuming that Congress intended minor points of construction in the application of the land laws to be determined by the Secretary of the Interior and not to be controlled by the courts through mandamus (*U.S. v. Hitchcock*, 190 U.S. 316; *Ness v. Fisher*, 223 U.S. 683). This accounts in a very simple manner for a number of cases in which it has been held that mandamus does not reach the "executive" function of interpreting a statute. If this, however, were generalized into a rule that the construction of a statute is not a ministerial act, and therefore uncontrollable by mandamus (*American Casualty Company v. Fyler*, 71 Conn. 448), the value of the writ, as the Supreme Court has observed, would be very greatly impaired, since every official duty to some extent requires statutory construction, and the result would be a most unfortunate limitation of the powers of the court (*Roberts v. United States*, 176 U.S. 221, 231).<sup>4</sup> It would also run counter to the principle that, barring very exceptional cases, questions of law are always subject to judicial re-examination.

More frequently than in contrast to executive, the term "ministerial" in the law of mandamus is used as the opposite to "discretionary." At an early period it was held that there was no place for mandamus in connection with functions involving discretion, so that the writ would be denied though a license was refused for concededly illegitimate reasons (John Giles' case [1731], 2 Str. 881, and the reporter's note to the case); but as early as 1734 Lord Hardwicke said: "If the bishop acts judicially, a mandamus lies not to compel him to grant a license, but only to determine the one way or the other" (*King v. Bishop of Litchfield*, 7 Mod. 217), i.e., to compel, but not to control, the exercise of discretion. This means of course the exercise of discretion in a legal way, legal both as to the manner of procedure (*Ex parte Pardridge*, 19 Q. B. D. 467) and as to the considerations guiding the discretion (*Reg. v. Boteler*, 4 Best & Smith 959; *Reg. v. Bowman*, 1898, 1 Q. B. 663). "If the corporation are so candid as to state their reasons, and allege bad ones, this court will in such cases interfere," *Rex v. Mayor of London*, 3 Barn. & Ad. 255.

<sup>4</sup> See, however, the two cases of the *United States v. Interstate Commerce Commission*, 8 Fed. 2d 901, and 11 Fed. 2d 534.

In this case it was held that the grounds of action (refusing to admit an alderman) need not be set forth: "It is probably much better that the grounds should not be disclosed, because the circumstances which regulate the exercise of a discretion like this may be such that it would be extremely inconvenient for a traverse to be taken." There is no general rule of law, in the absence of a specific statutory requirement, requiring administrative authorities, in refusing a license or permit, to set forth the ground of refusal (*Gross' License*, 161 Pa. 344);<sup>5</sup> nor need the return to an alternative mandamus, where the petition alleges merely unlawful or unwarranted refusal, do more than state in equally general terms that the case was considered and the decision reached for statutory reasons or in the exercise of statutory discretion (*United States v. Douglass*, 19 D. C. 99); nor does a mere allegation in the petition of fitness, reputability, etc., call for more than a mere denial, and a demurrer in such a case does not admit what is merely a conclusion on the part of the pleader (*Devlin v. Belt*, 70 Md. 352; *People v. Illinois State Board*, 110 Ill. 180). The practice of mandamus requires, however, that each relevant allegation in the petition or alternative writ be admitted or denied: "greater certainty is required than in an ordinary plea in bar" (*People v. Supervisors*, 51 Ill. 191, citing *Tapping on Mandamus*, §§352, 370). It may therefore be possible to marshal all the facts that enter into the exercise of discretion so as to compel admission or denial. If they are all admitted, it will be a further question whether they exhaust the possible considerations underlying the exercise of discretion. Perhaps in most cases there will be a residuum of discretion that cannot be tied to specific facts, and to that extent discretion will be superior to judicial control by mandamus. In some cases it may be possible to analyze the situation exhaustively into constituent elements of matters of fact; but that would be equivalent to reducing discretion to non-discretion (*State v. Chittenden*, 112 Wis. 569).

Where under a discretionary enabling power a permit or license is refused, and mandamus is sought as a remedy against the alleged illegal exercise of discretion, some interesting questions present themselves which have received no, or only inadequate, judicial discussion. It must be assumed that it is proper to state in the petition for mandamus all relevant facts entering into the reaching of the administrative decision. If these facts do not exhaust the considera-

<sup>5</sup> The rule in Michigan may be more favorable to the individual; see *Amperse v. Kalamazoo*, 59 Mich. 78.

tions that may guide the discretion, the petition will be demurrable; and upon argument the administrative authority will have to convince the court that, conceding all the facts alleged, a residuum of discretion remained that may support the refusal. The demurrer may thus be successful in defeating the petition; if unsuccessful, the authority will be permitted to plead over. If, then, the allegations of the petition are relevant, and are well pleaded, they must be met by appropriate admissions or denials; and if denied, an issue is presented for trial. Thereby questions of fact, which the legislature, by using terms of discretion, meant to be administratively determined, are transferred to the court for trial *de novo*. Such transfer may be justified on the ground that the administrative refusal was not preceded by anything in the nature of a legal hearing, incorporated in an appropriate record. Judicial control is, however, then not based upon the irregularity of the administrative hearing but upon the inconsistency of the decision reached with established facts; and mandamus thus preserves its function, in accordance with the New York doctrine, as a remedy, not against technical error, but against substantial injustice.

Assume, on the other hand, that the administrative refusal was by the statute to be preceded by a hearing, and that this is construed as involving an appropriate record. The presumable legislative intent in such a case would be that facts should not be retried *de novo* by a court, but that merely the administrative record should be examinable with a view to determining whether or not the decision was supported by evidence or by *the* evidence. The appropriate remedy to achieve this result would be certiorari; this may serve to explain the provision for certiorari in the Insurance Law of New York in connection with the grant and refusal of agents' licenses. The matter becomes simpler where there is substituted for both mandamus and certiorari a remedy in equity expressly made available for both refusal and revocation of a permit, as in the National Prohibition Act.

Naturally it is the ministerial or non-discretionary consent, approval, or permit requirement, in connection with which the remedy of mandamus will be most valuable. It is the purpose of substituting ministerial for discretionary functions to give the individual a legal and judicially enforceable right; if it were the intent to give the officer power to make conclusive findings of fact, his function would no longer be ministerial. The further legislative tendency, so far as it exists, to condition the right upon statutory statements of facts rather than upon facts to be proved, has the effect of presenting in a mandamus

proceeding only questions of law (peremptory mandamus, New York Civil Practice Act, §1319). In so far as the right depends upon controverted facts, the mandamus proceeding presents an issue of fact triable by a jury (*ibid.*, §1333; Code District of Columbia, §1278). In its turn the statutory provision for trying facts in mandamus proceedings shows that normally the official's determination of the existence or non-existence of the facts entitling to the license or permit is not only inconclusive but that the judicial review is a trial de novo and not merely an appeal. This is justified, because the refusal of a license is hardly ever required to be preceded by anything in the nature of a formal trial, or even such notice and hearing as is commonly required to support an administrative order.

Obedience to the writ of mandamus is enforceable by contempt process, and the recalcitrant official becomes liable in damages to the aggrieved individual (*Amy v. Supervisors*, 11 Wall. 136). This liability may be particularly valuable where commitment for contempt encounters practical difficulties. New York further provides for damages and a fine where it appears to the court that there was no just excuse for refusing or neglecting to perform the duty in the first instance (Civil Practice Act, §1340). The possible need and value of such a provision has been pointed out in connection with the discussion of enabling powers.\*

§136. *Certiorari*.—The writ of certiorari is used for a variety of purposes; the function in which we are interested is that of bringing up for review erroneous determinations of authorities not required to proceed according to the course of the common law, including, as these do, administrative bodies acting quasi-judicially. The writ commands the certifying (*certiorari facias*) of the record into the superior court, in order that it may be examined and, if found defective, quashed. As pointed out before, the so-called Cardiff Bridge case in 1700 established the availability of the writ to review illegal orders of such authorities as the commissioners of sewers. The frequency with which the writ was used to remove summary convictions into the Court of

\* While an executive officer is not likely to disobey a mandamus, he may refuse to accept the decision, especially if that of an inferior court, as a precedent in similar cases, thus requiring in each case the individual to seek judicial redress, justifying this course by the inconveniences that would result from compliance with the law. This apparently was the course temporarily pursued, but soon abandoned, by the Secretary of Commerce in connection with radio licenses. See *Congressional Record*, June 30, 1926, p. 12370. A personal liability in damages would make him reluctant to pursue such a course.



King's Bench led Parliament to insert into many statutes clauses forbidding such removal; but it was held that the statutory prohibition did not apply where the proceeding was vitiated by some defect of jurisdiction (*Queen v. Wood*, 5 El. & Bl. 49). From this arose in America a very widespread misapprehension that the writ would not lie to correct other than jurisdictional errors. The incorrectness of this doctrine was clearly exposed in a scholarly opinion written by Judge Campbell of the Supreme Court of Michigan (*Jackson v. People*, [1860], 9 Mich. 111); but before that time it had been accepted in New York, qualified to this extent, that facts upon which jurisdiction depends may be inquired into (*People v. Goodwin* [1851], 5 N.Y. 568). New York, however, abandoned this limitation of the writ in 1868. In the Brooklyn Gas case (*People v. Board of Assessors* [1868], 39 N. Y. 81) the Court of Appeals held that the office of the writ unquestionably also extended to review all questions of regularity in the proceedings (i.e., all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the express terms of the statute law or by well-settled principles of the common law), and this was construed to apply to an erroneous principle of assessment adopted by tax assessors. And in the same year the same court held that a decision reached without supporting testimony constitutes error of law, and that for the purpose of reaching such error the court may look into the evidence (*People v. Board of Police*, 39 N.Y. 506). Judge Woodruff said:

My own conviction of the importance of the question, in view of the great number of proceedings of a summary character in which powers are exercised which affect valuable rights both of person and property, has led me to collect and compare the more prominent cases on this subject; and I cannot resist the belief that a disposition has been manifested to limit the office of this most useful writ within too narrow limits. Let it be once established that, where an officer or board of officers have jurisdiction of the subject or of the persons to be affected, and proceed in its exercise according to the prescribed modes or forms, their determination is final and beyond the reach of any review, whatever errors in law they may commit, and however clear it may be upon undisputed facts, that their judgment, decision, or order is not warranted, and there is danger that much of injustice and wrong may happen without possibility of redress.

Fourteen years later Judge Arnoux, who had been counsel for the relator in this case, referred to it as follows:

(Until the decision . . . .) the tendency of the courts in certiorari cases was to refuse to examine into the evidence or to determine any question beyond that of jurisdiction. This permitted inferior tribunals and magistrates to exercise their powers in an arbitrary, high-handed, and unjustifiable manner, and made them more absolute than any court of original jurisdiction. The case above cited brought to the attention of the court an illustration of the despotic action that such boards may take when beyond the reach of review. . . . There able counsel contended that the court was bound by the record. This question was examined with exhaustive research by that distinguished ornament of the bench, the late Judge Woodruff, and the able opinion that he wrote, unanimously concurred in by the other judges of the court, marks a new departure in the law relating to certiorari in this state.<sup>7</sup>

The Code of Civil Procedure accepted this liberal scope of the writ and added the power, if there was any competent proof of the facts, to determine

whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the Supreme Court, triable by jury, would be set aside by the court, as against the weight of evidence.<sup>8</sup>

Section 1303 of the Civil Practice Act provides for taking proof of facts essential to the jurisdiction of the body or the officer making the determination to be reviewed.<sup>9</sup>

<sup>7</sup> *Matter of Lauterjung* (1882), 48 N.Y. Super. Ct. 308.

<sup>8</sup> §2140, par. 5, now Civil Practice Act, §1304.

<sup>9</sup> A development of the writ of certiorari, not unlike that in New York just described, has recently been taking place in Illinois. As late as 1899, that state adhered to the doctrine that only jurisdictional error can be reviewed by the writ (*People v. Lindblom*, 182 Ill. 241); and, different from New York, it had been said in an early case that it is not the practice to ascertain from extrinsic evidence whether the inferior court had jurisdiction, but to determine that question by the record (*Chicago & Rock Island Railroad Company v. Whipple*, 22 Ill. 105). But this rule was abandoned when certiorari became the regular method of reviewing decisions of the Industrial Commission under the Workmen's Compensation Act (*Courter v. Simpson Construction Company*, 264 Ill. 488). The questions whether the employment is hazardous, whether the accident has happened in the course of employment, and whether the person injured is a minor and therefore unlawfully employed are jurisdictional questions, and since the record contains the evidence by the positive provision of the statute (§19c of the act), the court will review the evidence to determine the jurisdictional question (*Hahnemann Hospital v. Industrial Commission*, 282 Ill. 316). The review of questions of law and fact other than jurisdictional questions is due to the express provisions of

The liberality of the New York law of certiorari regarding the scope of review, when the remedy is admitted, stands in contrast to the policy of restricting the remedy with reference to the type of administrative action sought to be reviewed. The matter has been very fully discussed by Mr. Goodnow in his article on the writ of certiorari in 6 *Political Science Quarterly* (1891) 493 (subdivision "IV: Authorities Subject to the Writ"), to which reference may be made. Since that time other decisions have thrown new light on the attitude of the Court of Appeals. In 1893, in the *Yonkers Board of Health* case (140 N.Y. 1) the court declared certiorari to be inappropriate to review a nuisance removal order, on the ground that the Board had power to act upon its own knowledge; and this being so, the record would not present the entire case upon which a reviewing court could determine whether the decision was right or wrong. The position of the court appears to be this: An administrative order either does or does not require notice and hearing. If it does, the authority must act judicially, and may therefore not use informally obtained official information. Since this restriction in administrative matters may be undesirable, the court has repeatedly refused to read into a statute a notice requirement not explicitly established by the legislature (*People v. Department of Health*, 189 N.Y. 187; *People v. Morton*, 148 N.Y. 156). Where the statute does require notice and hearing, substantial procedural safeguards must be observed, and certiorari performs the func-

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amendments of the Workmen's Compensation Act. (A dictum as to the constitutional right to such review in *Otis Elevator Company v. Industrial Commission*, 302 Ill. 90, was explained in *Nega v. Chicago Railways Company*, 317 Ill. 482.) A further step was taken in 1922 in *Funkhouser v. Coffin*, 301 Ill. 257, when the doctrine of the Hahnemann Hospital case was enlarged by applying it to a case where the statute did not require facts to be stated in the record, and by treating all the facts as jurisdictional facts. It was held that the return to the common law writ must show by affirmative evidence the jurisdiction of the tribunal and must show by facts recited that the tribunal had jurisdiction *and authority* to make the decision. The record only stated that evidence had been heard and the officer removed found guilty as charged; and the court observed that even though it be conceded that the specifications filed constituted legal cause for removal, there was nothing in the return to show that there was an attempt to prove facts or what was the particular state of facts. From this it is of course only a short and logical step to holding that where the evidence makes no case, the determination will be quashed, which was the decision in the New York Board of Police case. It is interesting that both in New York and in Illinois the new departure in the scope of certiorari took place in civil service removal cases—a type of case in which the question of judicial control has always been a bone of contention.

tion of a writ of error. The consequent injection of technicalities into administrative proceedings serves as an additional reason against the implication of a notice-and-hearing requirement. Administrative action not required to observe the technical restrictions of judicial procedure is not rendered invalid by mere irregularity; but if it is substantially unjust, the court will give relief in other ways: by recognizing a defense to enforcement proceedings, by injunction against enforcement, or, in case of an unwarranted revocation of license or removal from office, by a mandamus to reinstate. Again it was a civil service case which gave the court occasion to state its policy. After the action of the civil service commissioners in classifying or not classifying places had been held to be administrative and not judicial, and hence not reviewable by certiorari (*People v. Burt*, 72 N.Y. S. 567; affirmed, 170 N.Y. 620 [1901]), the action in rating a position as competitive or non-competitive was held to be judicial and not controllable by mandamus (*People v. Collier* [1903], 175 N.Y. 196). This illustrates the refinement of distinction between administrative and judicial. It subsequently gave way to a more substantial differentiation, which appears from the following quotation from the case of *Simons v. McGuire* (1912), 204 N.Y. 253:

The trend of the earlier cases reached its logical culmination in *People ex rel. Sims v. Collier* (175 N.Y. 196), where it was held that the duty of classification under the Civil Service Law was quasi judicial in its nature and was, therefore, not reviewable by mandamus but by certiorari as in other cases involving judicial functions. This was in 1903. Three years of experience under that decision demonstrated that this court had in effect assumed the functions of the civil service commissioners, for every challenged decision of these officers was brought to this court as a question of law. The case of *People ex rel. Schau v. McWilliams* (185 N.Y. 92), which came to us in 1906, very pointedly presented the unfortunate tendencies of our decision in the *Sims* case, and after mature deliberation we decided to retract our earlier views and held that the determination of a civil service commission in classifying positions in the public service, although involving the exercise of judgment and discretion, is more of a legislative or executive character than judicial or quasi judicial. The result of this conclusion in the *Schau* case is that the action of the civil service commissioners, in making classifications, is subject to a judicial control that is limited to such questions as may properly be reviewed in proceedings instituted by writ of mandamus. The illustrations given by Chief Judge Cullen in that case clearly indicate the restricted range of review under the present rules: "If the position is clearly one properly subject to competitive examination, the com-

missioners may be compelled to so classify it. On the other hand, if the position be by statute or from its nature exempt from examination and the action of the commission be palpably illegal, the commission may be compelled to strike the position from the competitive or examination class, though in such cases redress by mandamus would often be unnecessary, as a valid appointment could be made notwithstanding the classification. But where the position is one, as to the proper mode of filling which there is a fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action of the commission should stand, even though the courts may differ from the commission as to the wisdom of the classification."

It appears from this that where it is considered desirable to concede to the administrative authority considerable latitude either as regards procedure (which may be the case in sanitary or safety orders) or as regards substantive principles of determination (which may be proper in civil service cases where ordinary rights of person or property are not involved), certiorari is not appropriate since it scrutinizes the record as to its strict conformity to law; but that any abuse of discretion, including clear violations of substantial rights, will be corrected, and that for that purpose an alternative mandamus will be available, which, while respecting discretion and while not concerned with formal irregularities of action, will reach any abuse of power. If, as stated before, certiorari performs the function of a writ of error, it may perhaps be said that in the light of the decisions mandamus in New York performs the function of a writ of denial of justice, if that term may be used. In any event the restricted scope of certiorari appears to be due not merely to technical distinctions but to substantial considerations.

It may still be asked why certiorari should be altogether denied merely because the order sought to be reviewed was based in part on personal information instead of upon strictly judicial evidence; it would be possible in such a case to use the writ to quash an order illegal for lack of jurisdiction or non-conformity to substantive rules of law, without going into questions of procedure or evidence.<sup>10</sup> Perhaps the reason is that such restriction of the scope of review would be in-

<sup>10</sup> In addition, where a board acts on its own knowledge, control by certiorari is practicable by requiring that the return disclose the information under which the board acted; and certiorari is held to perform that function where it is given as a statutory remedy to review the action of the Board of Appeals under the zoning law applicable to the city of New York. See *People v. Walsh*, 244 N.Y. 280; 155 N. E. 575 (1927).

admissible in view of the positive provisions of the Code or Civil Practice Act. For the correction of errors of law or jurisdiction recourse must in such cases lie to an injunction or to defense to enforcement proceedings.

Since orders of public service commissions can be issued only after notice and hearing, certiorari is of course available against them; and the Public Service Commission Act being silent as to judicial remedies, certiorari is the recognized method of reviewing this conspicuous class of orders. The subjection of the public utility business to an incisive administrative jurisdiction has thus invested the writ of certiorari in New York with additional importance.

§137. *Mandamus and certiorari in relation to discretion.*—There is an established rule that mandamus will not lie to control discretion, while apparently there has been no occasion to formulate a similar rule with regard to certiorari. An example may illustrate the different operation of the two remedies in this respect. Assume that under a system of film-censorship approval may be withheld because the film is immoral. A court may refuse to interfere by mandamus with a refusal to approve, relying upon the discretionary nature of the function. Suppose the law provides only for the suppression of immoral films, granting notice and hearing: certiorari will bring the evidence, upon which the order of suppression is based, before the court, and the court must at least be satisfied that there is evidence to support the order. It is, of course, true that if the refusal to approve is arbitrary, mandamus may give relief, and that, on the other hand, upon certiorari an order based upon closely balanced evidence may be left undisturbed. But certiorari gives the aggrieved party a better chance than mandamus. This simply expresses in terms of remedies that official discretion is wider where the affirmative is upon the private party than where the affirmative is upon the authority; a positive direction requires a stronger support than a mere negative conclusion. In discussing the choice between directing and enabling powers, instances have been pointed out where the legislature has deliberately substituted veto for approval as a policy favoring private right.<sup>11</sup> In discussing the operation of enabling powers attention has been called to the innovation introduced by the Transportation Act of 1920 in requiring a hearing prior to the issue of a certificate of convenience and necessity.<sup>12</sup> By interposing the same procedural safeguards between the application for a permit and its

<sup>11</sup> *Supra*, §33.

<sup>12</sup> *Supra*, §55.

grant (and still more its refusal) as between a charge and the issue of an order, the status of the enabling power may be assimilated to that of the directing power, and remedially this will express itself in making a refusal based on a hearing subject to review by certiorari. Probably there will always remain a slight difference of judicial disposition with regard to either form of power: a refusal to approve is less incisive than a condemnation, and judicial control may be expected to be more freely exercised over the latter than over the former, provided the refusal involves discretion; on the other hand, a ministerial enabling power is subject to a stronger judicial control than a directing power for the reason that (as has been explained before) a directing power can hardly be conceived without some element of discretion.

§138. *Certiorari and the question of fact.*—Why is it that the certiorari proceeding, unlike mandamus, makes no provision for the trial of facts? The reason is that, since the duty enforced by mandamus is ministerial, the authority is not invested with power to pass even with prima facie effect on controverted issues of fact. The very purpose of administrative orders on the other hand is to leave to administrative determination conditions not exhaustively defined by statute.<sup>13</sup> The order-issuing tribunal therefore necessarily passes on facts that may be controversial. If then the legislature provides for notice and hearing, it thereby declares its purpose to recognize the administrative authority as an appropriate fact-trying tribunal, providing for a judicial check only to see that this function is properly performed. Upon a finding of error, the law might provide for a disposition of the issue of fact by the court; but it is at this point that the restricted function of the certiorari as a writ of error asserts itself: the court does not try facts any more than an appellate tribunal does. It might, however, be expected that upon quashing the order the court should have power to refer the matter back for rehearing; that practice exists in some states (4 Encycl. Pl. & Pr., 316-20), and in New York under particular statutes (e.g., Tax Law, §293); but the Civil Practice Act does not authorize a remand for further proceeding. A successful certiorari proceeding merely results in a setting aside of the order as unwarranted by the law or by the facts appearing on the record. Of course if these facts are of a continuing nature, there is nothing to prevent the administrative authority from proceeding anew upon the basis of a situation existing subsequent to the annulment of the first order.

<sup>13</sup> See §74, *supra*.

The foregoing explains why facts are not retried on certiorari where the contested order has been issued after notice and hearing. Where the statute fails to provide for notice and hearing below, it has been shown that New York considers a certiorari inappropriate. It has already been pointed out that there appears to be no convincing reason for absolutely denying the writ in such cases even for the correction of errors of law or jurisdiction. It might also be urged that under a more liberal view certiorari in such cases might be used for trying facts. The authority whose order is in question is a party to the certiorari proceeding, and the procedure would be capable of being so altered as to permit the authority to defend upon the facts as well as upon the law. It cannot be answered that the court would thereby undertake to try facts that are better left to expert administrative determination, for it is conceded in New York that the administrative finding, not being based on notice and hearing, is inconclusive; and that the party is constitutionally entitled to his day in court upon the facts as well as upon the law. It would seem that one remedy might be made to serve for the review of administrative orders, as one remedy serves to review administrative refusal to act. The New York position cannot even be adequately explained by the desire of the courts to sustain informally issued orders unless injustice can be affirmatively shown by the individual, for that burden might be thrown upon him on certiorari as well as in a suit for injunction; whereas if the individual chooses to wait for an enforcement proceeding, the administrative authority must prove the entire case in court.

It illustrates the somewhat technical aspect of the form of relief, that the judicial control, which in New York is exercised over commission orders by certiorari, is obtained in the federal courts by injunction, and that the substantive principles of review appear to be practically the same in both systems.

The scope of injunction is in so far wider than that of certiorari, as there is no occasion of making the New York distinction between orders based on notice and hearing and orders based in whole or in part on the officer's own information. In the latter cases injunction will perform the function which in New York is reserved to mandamus.

This goes to show that there is no intrinsic reason why the forms of remedy could not be less differentiated than they are at present in New York.

Notice should also be taken of a statutory certiorari in New York wider than the certiorari regulated by the Code or Civil Prac-



tice Act. Such a certiorari is provided by the Tax Law, §§292, 293.<sup>14</sup> An assessment may be contested by reason of overvaluation and inequality as well as of illegality, and testimony may be taken by the reviewing court (*People v. Barker*, 152 N.Y. 447; *People v. Feitner*, 168 N.Y. 441). This is equivalent to a statutory appeal. The Motion Picture Law of 1921 (§10) permits a review by certiorari of the refusal of a license; and in the Insurance Law we find the grant as well as the refusal of licenses subject to such review (§§91, 142), and the same law in several places (§141, No. 5; §141a, No. 7) speaks of a review by certiorari "on the merits." These provisions likewise indicate a purpose of making the certiorari perform the function of an appeal.

<sup>14</sup>Davies, "Certiorari against Tax Assessments," 1 *Columbia Law Review* 419.

## CHAPTER XIV

### STATUTORY REMEDIES

§139. *In general.*—Legislation may deal with remedial relief by recognizing the existing common law system and utilizing or modifying it for its purposes. In discussing common law and equitable remedies, some reference has been made to statutory provisions bearing upon the same, and something will have to be said about the operation of these remedies under recent federal commission legislation. If the term "statutory remedies" is used with reference to an independent system of relief, it covers provisions for an appeal which may be either to superior administrative authorities or to courts of justice. These two forms of appeal require separate consideration.

#### A. ADMINISTRATIVE APPEAL<sup>1</sup>

§140. *Question whether inherent.*—Where an administrative system is hierarchically organized, as it is in Prussia and in the American federal government, every ruling authority under the chief executive has an official superior who may possibly be vested with overruling power. However, such a power, even if it should be theoretically conceded, is not customarily exercised through all stages. In Prussia an appeal against police orders does not go beyond the chief provincial authority, and in the United States the Attorney-General has given opinions to the effect that while the President may determine whether an executive officer has authority over a particular subject, an appeal does not otherwise lie to him from the head of a department (15 O. A. G. 94, 100), nor would an appellate jurisdiction to pass upon the authority of a "subordinate officer" extend to the "independent" establishments, such as the Interstate Commerce Commission.

§141. *United States.*—In the United States an administrative appeal is therefore in the nature of things excluded where the determining authority is either a head of a department or an independent commission—so in the case of the orders of the Interstate Commerce Commission, the deportation of aliens, or the various licensing or or-

<sup>1</sup> In the descriptive part of this survey, in connection with German legislation, the term "administrative appeal" denotes an appeal carried to the administrative courts.

der-issuing powers of the Secretary of Agriculture. There is, on the other hand, room for an appeal where the head of a bureau is the determining authority (internal revenue, patents, public lands). The statutes vest these powers in the commissioner "under the direction of" the secretary (R. S., §§321, 453, 481), without providing for appeals in express terms. In connection with the issue of patents it has been held that the provision for an appeal to the courts by implication excludes an appeal to the secretary (*Butterworth v. United States*, 112 U.S. 50); however, the Secretary of the Interior does entertain appeals from the Commissioner of the Land Office, and since 1914 the annual appropriations have recognized this by providing for a Board of Appeals in his office (38 St. L. 488).<sup>2</sup> The Secretary of the Treasury does not regularly hear appeals from the Commissioner of the Internal Revenue, but he has been known to hear a remonstrance against the Commissioner's exercising an authority the legality of which was (unsuccessfully) questioned. It will, however, be observed that if the general power of "direction" confers an appellate authority, this, in the absence of a positive statutory provision, probably does not mean that the aggrieved individual has a right to the exercise of that authority, although there may be a constant practice equivalent to such a right. It is also probable, although not certain, that the Secretary would be slower to interfere with a discretionary power than with an erroneous decision. The whole matter is obviously in the main one of departmental practice.<sup>3</sup>

Provision for administrative appeal is found in the federal statutes where the decision is in the first instance vested in local officials. From an early time, customs appraisals were made reviewable, this being one of the few instances in American legislation where use was made for appellate purposes of lay assessors (merchant appraisers). In 1864 an appeal was given to the Secretary of the Treasury—a questionable arrangement since in many cases he was committed by his own previous instructions; and in 1890 the appellate function was transferred to general appraisers and a Board of General Appraisers, which to all

<sup>2</sup> See E. C. Finney, "The Board of Appeals," 10 *American Political Science Review* 290; also C. R. Pierce, "The Land Department as an Administrative Tribunal," 10 *op. cit.*, 271.

<sup>3</sup> As to the relation of the Department of State to consuls exercising authority under the Immigration Act of 1924 in granting or refusing visas, see *Hearings before the Committee on Immigration, 69th Congress, First Session, March 25, 26, April 13, 1926, p. 143.*

intents and purposes was made a court, and is now officially designated as a court. The steamboat inspection service was from the beginning locally organized, with provision for appeals: from the local boards to the district supervising inspector, and from the latter to the Supervising Inspector-General, whose decision, when approved by the Secretary of Commerce, is final (Act, June 10, 1918). It does not appear what purpose is served by this approval requirement. Locomotive boilers are inspected by district inspectors, whose orders are appealable to the chief inspector, who makes a re-examination through some other inspectors; an appeal from the chief inspector lies to the Interstate Commerce Commission, but beyond a provision for a hearing the law does not regulate the method or principle of handling the appeal (Act, February 17, 1911). Decisions excluding immigrant aliens are made by local boards of inquiry; they are final in cases of specified disease or mental or physical disability, and in other cases are appealable to the Secretary of Labor, the alien being informed of his right of appeal and being entitled to counsel. The Secretary handles these appeals through a board of review which he has voluntarily organized in his office (*Report*, 1922, p. 86); this board being without legal status, its function is purely advisory; it illustrates, what has been pointed out before, that action by the head of the department does not involve actual personal cognizance of the merits of each case.\* The appeal is not a trial de novo, but the decision is rendered solely upon the evidence adduced before the board of special inquiry (Act, 1917, §17). An appeal from the fixing of grain standards by local inspectors goes to the Secretary of Agriculture whose findings (signed by him or such agents of the Department as he may designate) are made prima facie evidence in judicial proceedings (Act, August 11, 1916, §6). In 1924 Congress created a Board of Tax Appeals for the review of certain determinations of the Commissioner of Internal Revenue, mainly deficiency assessments of income and estate taxes (Revenue Act, §900). The Board of Tax Appeals resembles the Board of General Appraisers, although not given quite the same status; the appeal is fully regulated by statute, and the board acts very much like a court. Indeed, for all practical purposes, the appeals to the Board of General Appraisers and to the Board of Tax Appeals are different from other administrative appeals in that they are not bureaucratically, but judicially, handled, and there is consequently no delegation by the nominal appellate authority.

\* See §18, *supra*.

§142. *New York*.—The administrative organization in New York lacks the subordination of ruling authorities to heads of principal departments which we find in several branches of the federal administration. The important administrative officials (superintendents of banking and of insurance, commissioner of farms and markets, commissioner of labor, commissioner of health) have no official superior other than the Governor; the Board of Regents appears to be independent. There are, moreover, local boards and officials not subject to the control of the state executive. There is consequently not the same opportunity for administrative appeal that there is in the federal system; and the executive authority of the Governor is not used for purposes of appellate jurisdiction.

In the city of New York important powers are exercised both under the City Charter and under the Code of Ordinances. The only relief that an ordinance can give is an administrative appeal within the city organization; but in the very few cases in which such relief is expressly provided for, it appears that recourse has been had to state legislation—so in the matter of appeals from the fire commissioner (Laws, 1913, c. 695, utilizing arbitrators), and particularly in the creation of the board of standards and appeals in connection with building regulations (Law, 1916, c. 503). The remedial side of administrative powers in the city of New York has received very little legislative attention.

The Public Health Law gives the Commissioner of Health power to modify or reverse an order, regulation, by-law, or ordinance of a local board of health concerning a matter which in his judgment affects the public health beyond its local district (§4); this may occasionally serve the purpose of an appellate authority over individual orders; otherwise the Public Health Law makes no provision for appeals; under the State Sanitary Code (administratively enacted under statutory authority), however, the refusal of a permit for a labor camp by the local health officer is subject to an appeal to the State Commissioner of Health.

The Labor Law provides for a review by the Industrial Board of any rule or order made under its provisions, and for a further action in court (§§110, 111). The rules are made by the Board itself, and while orders may be issued by the Commissioner, his powers in that respect are few. With regard to tenement manufacture he has important licensing powers, but his refusal does not take the form of an order but merely of a filing of a statement of reasons (§356), and is

therefore apparently not covered by the appeal provision. This provision therefore seems mainly intended for a review of board rules. The same is true of the variation procedure provided by sections 30 and 161, No. 5, of the Labor Law, which in many cases, however, will operate in favor of aggrieved individuals. This power of variation was first given in the Charter of the city of New York in connection with building regulations (§§410, 461) and has become most conspicuous as a method of tempering possible hardships incident to zoning (Laws, 1914, c. 471; 1916, c. 503), where, however, it rather performs the function of a dispensing power.

The Tax Law provides for complaints against assessments to be heard by the assessors (§37); but since the original assessment is made upon mere information obtained by diligent inquiry, the complaint is an appeal only in a qualified sense. In hearing such complaints, the assessors of a given district act as a body and perform the function assigned in some jurisdictions to a district board of review. The county boards of supervisors equalize, but do not entertain appeals. Nor is any appellate authority given to the Tax Commission with regard to the general property tax, while with regard to many other taxes it acts as the original assessing authority. As regards the transfer tax, an appeal lies from an appraisal or assessment to the surrogate; but this is in the nature of a rehearing, since the value of the estate is formally determined by him in the first instance (§§231, 232).

§143. *Rehearings*.—Provisions for rehearing have become important by reason of their introduction into public utility legislation. The provision was placed in the Interstate Commerce Act in 1906 (§16a) and in the Public Service Commission Law of New York in 1907 (§22). The rehearing is not matter of absolute right, but sufficient reason must be made to appear, and in the Act of Congress special reference is made to the discretion of the Commission; nor has the grant of a rehearing a suspensive effect except by special order.<sup>5</sup> In New York the review of the general property assessment and of the transfer tax assessment is made by the original assessing authority and is therefore in the nature of a rehearing. The provision for review by the Industrial Board of the rules and orders under the Labor Law, which has already been referred to, is particularly full: the petition must state in what respects the order is claimed to be invalid or unreasonable, and any objections not raised are deemed waived; the petition operates as

<sup>5</sup> See as to this *United States v. Abilene etc. Co.*, 265 U.S. 274.

a stay; the Board may confirm without a hearing, if the issues have been considered in a prior proceeding; the board may either revoke or amend the order; the action of the Board is subject to a further review by the court. Under the Moving-Picture Law of 1921 the refusal to pass a film is likewise in the first instance reviewed by the full commission.

The statutory rehearing may be well considered as a natural development from originally voluntary practices. In any bureaucratic department the vesting of determinative powers in the head means a delegation to subordinates with formal approval by the nominal head. In a large organization the staff will be organized to take care of matters of varying complexity; and if the interests passed upon are of any importance, an elaborate review machinery may be instituted. This happened in the Internal Revenue Bureau in connection with the income and other taxes. The Federal Trade Commission has developed careful sifting processes even irrespective of appeals. In the case of a commission, moreover, there is likely to be a preliminary examination by one commissioner, and there may be statutory authority for action by divisions (Interstate Commerce Act, amendment of 1917); in that event a review by the full commission is likewise a natural thing. Practically such a rehearing may have the same value as an administrative appeal.

§144. *England.*—In England the system of administrative organization stands, as regards centralization, midway between that of Prussia and that of New York; there is, on the one hand, greater subordination of local to central government than in New York; on the other hand the decentralization of governmental functions has not been carried out as consistently as in Prussia. The vesting of the administration of the licensing (liquor) laws in the justices of the peace has naturally resulted in judicial appeals; and the judicial organization of the Railway and Canal Commission has had the like effect. The Factory Law is almost altogether centrally administered; in the isolated case where a licensing power is given to a local authority (§101), the law gives in case of a refusal a right to apply by complaint to a court of summary jurisdiction; and the act operates without administrative appeals. The Public Health Act vests important determining powers in courts of summary jurisdiction with consequent appeal to the Quarter Sessions; the Housing Act gave originally an appeal from a demolition order to the Quarter Sessions; and it was a notable departure when in 1909 this appeal was transferred to the Local Govern-

ment Board. The important statutes enacted in the interest of safety (mines, merchant-shipping, explosives) do contain some provisions for appeal from local officials (inspectors, pilotage authorities) to the Secretary of State or Board of Trade. The Medical Act gives an appeal from the Registrar to the General Council. Tax appeals are in part administratively organized (income tax), but under the Town Improvement Clauses Act of 1847 the appeal from local ratings goes to special or quarter sessions (§§185-91). The English law presents an anomaly in the matter of patent appeals; in America and Germany they are determined by a court or judicially constituted authority; in England by a law officer of the crown, who, while in a sense belonging to the legal establishment, is yet an administrative officer;<sup>6</sup> the grant of compulsory licenses is, however, appealable to a court. Where an administrative appeal is given, the procedure is left unregulated; the Housing Act of 1909 leaves it to be determined by the rules of the Local Government Board (§39). The opinions in the *Arlidge* case (*Local Government Board v. Arlidge*, 1915 A. C. 120) show how little precedent material there is to control the principles upon which such an appeal is to be conducted.

It is characteristic of all administrative appeals that they extend to every phase of the original decision, unless especially restricted; they therefore may not only consider new evidence but may cover matter of discretion. It may be that where they are to be conducted under rules, the rules may impose restrictions in these respects; however, practices in that respect cannot be ascertained from the statute books.<sup>7</sup>

#### B. APPEAL TO COURT

§145. *Statutory provisions.*—While it is easy to differentiate administrative appeals from common law remedies, the line between these and statutory appeals from administrative decisions to courts is

<sup>6</sup> In the matter of trademarks the Board of Trade exercises appellate functions, in 1919 in part superseded by judicial appeal (Act, 1905, §14; 1919, §8).

<sup>7</sup> It is impossible to form a judgment upon the subject of administrative appeals without further information as to actual practices. See, for example, note in Lumley's *Public Health* to section 268 of the Public Health Act of 1875 relating to appeals from decisions regarding improvement expenses to the Local Government Board: "It is not the practice of the Local Government Board to furnish either to local authorities or appellants any reasons for their decisions or details on which their decisions are based" (p. 607). As to these appeals, see also Baty, "Supersession of the Law Courts by Bureaucracy," 38 *Law Magazine and Review* 139.



not always equally clear. If there is a right to a license upon the basis of definite fact, a mandamus is available to review a refusal, and a statutory appeal to a court will not alter the law as regards the substance of relief. However, it may make the relief more expeditious if the law dispenses with the formalities of a mandamus proceeding or permits an appeal to a court more accessible than the highest court of original jurisdiction. On the other hand, if the licensing power is discretionary, an unqualified appeal from a refusal to a court enlarges the common law relief, though it may still be controversial to what extent.

In England we find a number of instances in which an appeal is given to the quarter sessions. This is natural where the original jurisdiction is in the justices of the peace, as under the licensing acts, and a long tradition seems to support the use of the quarter sessions as an appellate tribunal (from ratings under the Town Improvement Act of 1847; from refusal of a peddling license, 1871; of a firearms license under the act of 1890; of an underground bakehouse license under the Factory Act of 1901; from orders under the Milk and Dairies Act of 1915). Under the pilotage law the appeal goes to a judge of the county court sitting with assessors. Under the Friendly Societies Acts the appeal from a refusal to register goes to the High Court, while the Companies Act has no similar provision, giving an appeal only against a removal from the register (§242); so there is an appeal against the removal from the register to the High Court in the case of dentists, veterinarians, and midwives, but not in the case of physicians and surgeons. These variations reveal the lack of established legislative policy.

In America likewise there is not much system in the matter of appeals to courts, except perhaps in the few cases in which an administrative order results in a claim to compensation (so under Interstate Commerce Act, §3, No. 3; in England such claims are frequently referred to arbitration). Congress has made the Court of Appeals of the District of Columbia the tribunal to hear appeals from administrative decisions in the case of patents and trade-marks (R. S., §§4911, 4914, 4915, act of 1893 and 1905),<sup>3</sup> and in the case of the refusal of

<sup>3</sup> Since the decision on appeal merely governs further proceedings before the commissioner, and does not preclude a new contest in an action between the parties in interest, the Supreme Court treats the decision as administrative in character and not as a judicial judgment (*Frasch v. Moore*, 211 U.S. 1, *Postum Cereal Company v. California Fig Nut Company* (1927), 47 Supr. Ct. Rep., 284.

second-class mail matter privileges (Act, July 28, 1916); and the National Prohibition Act makes refusals and revocations of permits reviewable "by appropriate proceedings in a court of equity" (§§ 5, 6). But these cases are exceptional. The history of railway legislation in New York was marked by the extraordinarily broad judicial review provision over rate regulation of the acts of 1890 and 1892, but this was a passing phase; at present important appellate powers are given with regard to certificates of convenience and necessity (Railroad Law, § 9) and grade-crossing orders (Railroad Law, § 91). An entirely inconclusive review provision is found in the Insurance Law (§ 107). Apparently the only instance of court review being a systematic part of the structure of an act is furnished by the Labor Law (§ 111): the validity or reasonableness of any order may be contested after it has been reviewed by the Industrial Board; the record of the hearing of the board is filed with the court; and the court may refer any issue to the board or to a jury. The judgment of the court is appealable as in other cases.

§ 146. *Scope of judicial appellate review.*—An act of free discretion is hardly appropriate for judicial review, and in America such review might be questioned on constitutional grounds; however, the two conspicuous instances in New York, the appeal from a refusal of a certificate of convenience and necessity and the appeal from a refusal to permit the laying of railroad tracks in streets, have passed unchallenged.<sup>9</sup> Administrative acts of free discretion with regard to individual rights are rare, and it would almost be a contradiction in terms to make them unqualifiedly reviewable by a court. The cases in which the question of scope of review arises are either cases of discretion so qualified as to come near being a question of fact, or cases where a question of fact is administratively determined.

Appellate review may mean either a hearing *de novo* or it may mean the correction of non-permissible error. Since human judgment is not perfect, a power of determination which is not purely ministerial implies a margin of permissible error; it is only when that margin is exceeded that error vitiates a decision. It is open to the legislature either to confine review to vitiating error, or to permit the first decision to be superseded by one presumably better informed, wiser, or more impartial. The clearest criterion to differentiate the two theories of review is the admission or exclusion of fresh evidence on appeal; the appeal is still merely corrective, although there is entire independence in

<sup>9</sup> In Connecticut the latter has been held unconstitutional (*Norwalk Street Railway Company's Appeal*, 69 Conn. 96).

appreciating the evidence below (English Supreme Court Act of 1925, §25 (2): "may draw any inference of fact which might have been drawn in the court [below]"); on the other hand there is a hearing de novo although the decision below is made prima facie evidence of the facts. The legislature, in giving an appeal from an administrative decision to a court, may or may not indicate what scope of review it intends. If the legislative intent cannot be gathered from the terms of the act, which theory should be accepted? The arguments in favor of either theory are rather closely balanced.

In favor of the merely corrective scope it may be said that it is conformable to the operation of the certiorari in New York, and that unless the appeal is so confined, the individual may refuse to state his case to the administrative authority, thus defeating the first statutory tribunal (*Thompson v. Koch*, 98 Ky. 400); this, however, is also true where on appeal from a justice of the peace a case is tried de novo. On the other hand it may be argued, in favor of the wider scope of review, that it permits greater informality below, serving expedition and economy, particularly by permitting a proceeding without the employment of counsel, and yet accomplishing justice in the great majority of cases. Conversely, where the hearing below is informal, the appeal ought to be a trial de novo; and where the appeal is not a trial de novo, the hearing below ought to be formal. Perhaps the recent decision of the Supreme Court in *Ma-King Products Company v. Blair* (1926), 271 U.S. 479, arising under the National Prohibition Law, will be given considerable weight:

It is clear that Congress in providing that an adverse decision of the Commissioner might be reviewed in a court of equity, did not vest in the court the administrative function of determining whether or not the permit should be granted; but that this provision is to be construed, in the light of the well established rule in analogous cases, as merely giving the court authority to determine whether, upon the facts and the law, the action of the Commission is based upon an error of law, or is wholly unsupported by the evidence, or clearly arbitrary or capricious.

If the cases which the court has in mind are not analogous, there is no "well established rule"; and there is a very strong difference between the Prohibition Law, which gives a review by an appropriate proceeding in a court of equity, in which the court may affirm, modify, or reverse, as the facts and law of the case may warrant—terms which point to a full appellate authority—and other federal statutes, in which the appellate review is either expressly limited as stated in the Blair case

(Federal Trade Commission Act) or is left entirely to inference (Interstate Commerce Act; deportation cases). Nevertheless, the decision in the Blair case indicates a trend in the direction of the narrower scope of review.

If the theory of restricted review is accepted as the normal one, it is pretty certain to be applied where there is a hearing requirement below; yet it is generally believed that in an administrative hearing the strict rules of evidence need not be observed. It has been said, on the other hand, that if administrative findings are made prima facie evidence, none but legal evidence may be admitted.<sup>10</sup> Yet the logical effect of a prima facie evidence rule is that the presumption may be overcome by new evidence. The prima facie evidence provision, instead of strengthening, will therefore weaken the effect of the administrative finding—a result which is presumably not in accordance with the legislative intent.

§147. *Judicial review provisions in federal trade and commerce legislation.*—Until the enactment of the Interstate Commerce Law in 1887, the chief subject of Congressional legislation calling for remedial relief was revenue. In this field the correction of administrative error was left to common law methods, which gradually won legislative recognition; it was not until 1890 that the method of review became entirely statutory with regard to customs revenue; and a similar development away from common law remedies was started for the internal revenue only as late as 1924. There were a few other fields of legislation, mostly relating to service functions, in which there might have been a demand for the correction of administrative error: steamboat inspection, postal service, public land, pensions, immigration; but in connection with these matters Congress was either silent as to judicial relief or excluded it. There was thus in 1887 no established legislative policy regarding judicial review.

The Interstate Commerce Act as originally enacted provided in section 16 that whenever a common carrier violates an order, the Commission shall apply in a summary way by petition to the circuit court, which shall proceed to hear and determine the matter speedily as a court of equity in such manner as to do justice in the premises, the report of the Commission on such hearing to be prima facie evidence of the matters therein stated. Congress thus used the enforcement proceeding for review purposes, and the provision as to prima facie

<sup>10</sup> See observations of Charles D. Hamel, first chairman of Board of Tax Appeals, in *Proceedings, National Tax Association, 1924*, p. 282.

evidence made it clear that the findings of the Commission might be rebutted by new evidence; and this was the holding of the Supreme Court in the Alabama Midland case (168 U.S. 144).

When the bill for amending the Commerce Act, which resulted in the Rate Act of 1906, was before Congress, there was a movement to restrict the scope of judicial review, and there was much debate as to the extent to which the judicial power of review could be legitimately restricted under the Constitution; but the act as finally passed avoided any direct issue, and reflected the controversy merely in a curiously obscure and ambiguous compromise. The provisions of the amended act relating to court review are as follows:

If any carrier fails or neglects to obey any order of the commission . . . . the commission may apply to the circuit court . . . . for an enforcement of such order . . . .; the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition. If upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other process mandatory or otherwise. . . . .

The wording is strangely inconsequential; "order regularly made and duly served" seems to mean an order correct in its formal aspects; but if an order must be enforced so long as it is formally correct, why should the court be given power to prosecute inquiries and investigations?

Court reviews are apparently not had under this provision, either because the carriers appeal to a court of equity, before the Commission proceeds to enforce, or because the Commission does not care to proceed under a section so ambiguously worded; in any event, there seems to be no construction of this provision by the Supreme Court.<sup>11</sup>

There is no other grant of judicial review in direct terms; but the same section 16 of the act of 1906, almost casually, recognizes the right to equitable relief twice, once by providing that the venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, or suspend any order or require-

<sup>11</sup> Occasionally, the carrier has sought the protection of a judicial enforcement order, where the Interstate Commerce Commission order appeared to conflict with obligations imposed by state law or state commission order. *Annual Report*, 1917, pp. 82, 86; 1918, pp. 71, 85; 1919, p. 73.

ment of the Commission shall be in a district designated by the act, and again by a proviso that no injunction, interlocutory order, or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. Similar recognition has since been given by other acts of Congress to the right to proceed against the Commission in equity, and this has become the established mode of review.

The acts of Congress leave the scope of this review entirely undefined, and it must therefore be gathered from the judicial decisions. The first significant declaration was made by Chief Justice White to the effect that in determining whether an order shall be suspended or set aside, the court must consider (a) all relevant questions of constitutional power and right; (b) whether the administrative order is within the scope of delegated authority; and (c) whether, even although in form within the delegated power, the execution of the authority has been manifested in such an unreasonable manner as to bring it within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power (*Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U.S. 452, 469). In simpler form it is said in *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U.S. 541, 547, that the orders of the Commission are final unless (a) beyond the power which it could constitutionally exercise, or (b) beyond its statutory power, or (c) based upon a mistake of law. And it is further declared in *Interstate Commerce Commission v. Louisville and Nashville R. Co.*, 227 U.S. 88, 92, that the legal effect of evidence is a question of law, and a finding without evidence beyond the power of the Commission, though conclusions of fact will not be reviewed by passing upon the credibility of witnesses or conflicts in the testimony.

The court review of Federal Trade Commission orders is linked with the provision for their enforcement, and in much more explicit manner than in the Rate Act of 1906. When an order is disobeyed, the Commission applies to the circuit court of appeals for enforcement, filing with its report and order a transcript of the entire record including the testimony. The court causes notice to be served upon the person, and thereupon has jurisdiction of the proceeding and the question determined therein, and may, upon the record of the Commission, make a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to facts, if supported by testimony, are conclusive; but, in a proper case, the

court may order additional evidence to be taken before the Commission, upon the basis of which the Commission may modify its findings or make new findings.

There is also an explicit provision for a similar review upon petition of the party to set aside the order of the Commission. The jurisdiction of the circuit court of appeals is exclusive, subject to review by the Supreme Court upon certiorari (§5).

The practically contemporaneous Clayton Anti-Trust Act has the same provision for review (§11). The Shipping Act of 1916, which generally in a perfunctory way follows the model of the Interstate Commerce Act, also has the provisions of the latter bearing on court review, except that it speaks of an order "duly issued" instead of an order "duly served" (§§29, 31). The Packers' Act of 1921 in the part relating to stock yards likewise follows the Interstate Commerce Act (§§315, 316), while in the part relating to packers it generally follows the model of the Trade Commission Act. However, the court review is by petition to set aside the order. The transcript of the record is filed with the court, and the court may order the administrative hearing to be reopened for the taking of additional evidence. The court may affirm, modify, or set aside the order of the Secretary, but the phraseology as to its relation to findings of fact differs from that used in the Trade Commission Act, the provision being that the evidence so taken (at the administrative hearing) shall be considered by the court as the evidence of the case. This appears equivalent to saying that the administrative findings must be supported, not by evidence, but by *the* evidence, implying a wider power of review (§204). The anti-dumping provision of the Tariff Act of 1922 (§316) again follows the Federal Trade Commission Act but, having occasion to speak twice of the relation of findings to evidence, in one place, apparently by inadvertence, makes the findings conclusive, if supported by *the* evidence; while in an earlier part of the same section the phrase is: "findings, if supported by evidence."

There is thus a narrower and a wider scope of review under these statutes. They are alike in that the reviewing court does not itself hear new evidence, although it may have power to refer back for additional evidence. The main difference is that under one type of provision the court is bound by the administrative finding, if the administrative record has any supporting evidence, while under the other type the court itself must be satisfied that the evidence of the record supports the finding. The narrower type is the equivalent of No. 4 of the certiorari

section of the New York Civil Practice Act (§1304): “. . . . whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination . . . .”; the wider type is the equivalent of No. 5 of the same section:

. . . . if there was such proof, whether, upon all the evidence, there was such a preponderance of proof against the existence of any of these facts, that the verdict of a jury, affirming the existence thereof, rendered in an action of the Supreme Court, triable by a jury, would be set aside by the court as against the weight of evidence.

But in the case of the *Curtis Publishing Company v. Federal Trade Commission* (260 U.S. 568) the Supreme Court under the narrower power reviewed substantially as though the wider power had been granted; and, on the other hand, we read in a decision of the Court of Appeals of New York (219 N.Y. 90), that the section of the code just cited does not extend the power of the court beyond the rules laid down by the Supreme Court with reference to the decisions of the Interstate Commerce decisions. And it is probable that the difference tends to disappear in favor of the wider power.<sup>12</sup>

<sup>12</sup> See also §154, *infra*.



## CHAPTER XV

### POLICIES REGARDING ADMINISTRATIVE FINALITY

§148. *Different aspects.*—There are three aspects under which the question of the finality of an administrative determination presents itself: (1) may a favorable determination be impeached by a party adversely interested? (2) may a determination, so far as it is favorable to the party affected, be reopened by the administrative authority? (question of the operation of an administrative determination as *res judicata*); and (3) may an adverse determination be placed beyond the reach of the judicial power? (question of adverse conclusiveness).

§149. *Finality of favorable action as against adverse interests.*—The first question has been dealt with in discussing the operation of directing powers. The doctrine of the Procter-Gamble case, 225 U.S. 282, that there is no remedy against the refusal of the Interstate Commerce Commission to make an order, was laid down as one not simply arising from the restricted provisions of the Commerce Court Act but as conformable to the general policy of the Interstate Commerce Law. In many cases it is also conformable to the nature and purpose of administrative corrective intervention in general. But in other cases it may well be that the refusal to proceed adversely against A will be in effect the sanctioning of an injury or prejudice to B, and it will then largely depend upon procedural arrangements whether B will or will not be entitled to relief (*Chicago Junction case*, 264 U.S. 258; *United States v. New River Co.*, 265 U.S. 533). If an adverse determination is made and is then contested, an opposing private party may intervene (U.S. Judicial Code, §212; New York Civil Practice Act, §1302); and there is no inherent reason why under proper circumstances a private party should not be given a justiciable right to demand administrative relief to be given by an order issued against another private party. Indeed, a further legislative development in that direction may be expected.

§150. *Administrative determination as res judicata*<sup>1</sup>.—The rule that every system of remedial relief should normally operate sub-

<sup>1</sup> Closely related is the question whether administrative rulings should operate as precedents in like cases in favor of other parties; see, for example, 58 Cong. 3d Session, House Doc. No. 17, pp. 505, 506. This question will not be discussed.

ject to time limitations applies with particular force to remedies by way of appeal against authoritative decisions contested by reason of alleged error. However, since there must be something to start the time running, it may be claimed that there can be no limitation where a pretended decision is an absolute nullity. The vice of nullity may be much more easily predicated of an administrative than of a judicial decision, since ordinary judicial action is subject to only few jurisdictional prerequisites, and those of a general character. To illustrate, a tax assessment against a non-resident, though served with process, is a nullity, while a tax judgment might be merely erroneous; the latter would start the time for a remedy running, but not the former. Such a theory of nullity will usually work in favor of an individual subject to an administrative power, but in the case of an enabling power it may be turned against him. The question has been discussed in connection with grants of public lands, and the Supreme Court has held that the government cannot treat its grant as a nullity and revoke it, where the statutory condition may be considered as only "quasi-judicial" (*Noble v. Union River Logging Company*, 147 U.S. 665); in other words there seems to be an inclination to hold that the government cannot administratively rescind decisions that it has made in favor of an individual, though it may rescind decisions made against him (*Beley v. Naphaly*, 169 U.S. 353), and although it may, on established principles of equity, rescind through appropriate judicial proceedings (*United States v. Minor*, 114 U.S. 233). In the case of corporate organization effected by certificate, it is doubtful how the corporate status is affected by non-existence of one of the statutory requirements; a provision is therefore of considerable value which, like that of the English Companies Act of 1908 (§17), makes registration conclusive in respect of compliance with all requirements. Such a provision would of course be inappropriate in case of a marriage license, and it should in any event be considered whether certain requirements should not be excepted or certain remedies be saved. The occasional practical necessity of such a provision, on the other hand, is illustrated by the New York Tenement House Law when it makes a certificate of compliance conclusive in favor of a purchaser (law of 1916, §§120, 121).

Considerations of equity appear to support the finality or conclusiveness of an administrative decision in favor of the individual, even though it be conceded that he may at his option treat it as inconclusive so far as it is unfavorable to him. This is borne out by the relative paucity of decisions discussing the principle of administrative

"res judicata" in this sense. The point has assumed importance under the federal revenue acts. In the case of the general property tax the tax liability has its inception in the levy based upon an assessment, and the power to assess is exhausted by its initial exercise, subject to specific statutory provisions for review, equalization, or back assessment. In the case of customs duties, an appraisal and a collector's decision is, subject to appeal, made conclusive (Act, 1922, §§501, 514). The question arises whether finality also attaches to passage of goods free of duty or to mere liquidation of duties without specific appraisal. This matter was first dealt with in 1874, when the importer was protected from further adverse action at the expiration of one year from entry or sixty days from liquidation, whichever may be the later period, with an exception for cases of fraud; and the act of 1922 introduced a further two years' limitation in case of probable cause of suspicion of fraud (§521; *U.S. v. Calhoun*, 184 Fed. 499; *Hawley v. U.S.*, 3 Customs Appeals 456; *U.S. v. Vitelli*, 5 *ibid.*, 151). Negatively stated, this means that until the expiration of the period the government may revise its own action so as to further charge the importer; but the action thus subject to revision has been perfunctory without formal decision.

The federal income tax differs from the general property tax in raising a tax liability from the annual operation of the law itself and not from any administrative act of assessment. The assessing power of the Commissioner of Internal Revenue is a corrective power (deficiency assessments). The act establishes for the power to assess or to sue without assessment, a normal period of limitation of three years from the time of the return; and while judicial proceedings may be brought within six years after an assessment, apparently only the tax as assessed can be collected through such proceedings (§§277, 278). There is then the question whether an assessment made by the Commissioner is conclusive at the option of the taxpayer, conceding that it is not conclusive against him. General principles of administrative law would seem to favor such conclusiveness. There is, however, the provision of the law that except in the case of fraud or mathematical mistake a finding or decision of the Commissioner on the merits of a claim shall be conclusive on any other administrative or accounting officer (i.e., other than the Commissioner himself [1924, §1007; 1926, §1107]), and the further provision that if after determination and assessments, and payment (or acceptance of refund) in accordance therewith, an agreement in writing is made between the taxpayer and the

Commissioner with the approval of the Secretary, that the same shall be final and conclusive, then (except upon showing of fraud, etc.) the case shall not be reopened by any officer, and no suit to set the same aside shall be entertained (1924, §1006; 1926, §1106). The effect of these two positive provisions for finality may be to negative any inherent finality principle which, if conceded, would make them superfluous; on the other hand, it may be contended that a beneficial principle of administrative law (if otherwise recognized) should not be denied upon the basis of mere implication.

It seems sufficiently clear that there is no pronounced legislative policy in the direction of giving an individual the conclusive benefit of an administrative determination, but there is some tendency to make the right to reopen decisions subject to time limitations.

There is a further problem deserving consideration, namely, to what extent the administrative power as a continuing power is affected by a decision in favor of an individual. A mere administrative determination not to make an order upon the basis of existing conditions will clearly not preclude a new proceeding upon the basis of new or aggravated conditions. But what will be the effect of a judicial decision setting aside an administrative decision adverse to an individual? Theoretically it ought to operate only *rebus sic stantibus*. And this is probably the law. If the order has been set aside by certiorari, the judgment is merely one vacating this particular order, and a new proceeding is not affected. An injunction operates in this respect more incisively, since it forbids the administrative authority to act; and it is probable that unless the injunction is limited in time or to a specified state of facts, the court must be applied to by the administrative authority for the purpose of proceeding anew against the individual.

§151. *Adverse conclusiveness*.—Under the American constitutional system, a legislative provision expressly debarring an individual from obtaining judicial relief against an adverse administrative determination raises a question of validity. However, in most cases the question: conclusive or not? is one primarily of construction, and the constitutional issue remains in the background. Legislation granting administrative powers is in the main content to abide in the matter of relief by the common law; and in so far as there is legislative modification, it is in the direction of enlargement rather than restriction of relief. In the most notable Supreme Court decisions, the assertion or denial of administrative conclusiveness was not called for by explicit statutory provisions.

It is convenient to speak in the matter of conclusiveness of questions of jurisdiction, of law, of fact, and of discretion; but it is not always easy to differentiate these categories: courts speak of mixed questions of law and fact; it may be doubtful whether a fact is jurisdictional or not; and questions of value, of abuse of discretion, and of constitutional right may call for special consideration. The comments offered do not claim to be exhaustive, but are merely intended to supplement the outline of remedial provisions.

§152. *Questions of law.*—Apart from legislative provision, it is generally possible to carry questions of law to a court. Doctrines that apparently stand in the way (as for example, that certiorari reviews only questions of jurisdiction, or that in mandamus proceedings the interpretation of a statute presents a question of discretion) are of very doubtful soundness and validity.<sup>2</sup> In New York certiorari expressly extends to all questions of law, and the Supreme Court has held decisions of the Interstate Commerce Commission to be reviewable for error of law. In the matter of revenue legislation, Congress, from the time when it promptly annulled the decision of *Cary v. Curtis* (3 How. 236) by reinstating the right of action against the collector, has always saved a day in court for the correction of errors of law; and in the final development of customs administration, while questions of fact and of value have been made administratively determinable, a special court has been created to deal with questions of law. It is true that the act of July 3, 1884, constituting the bureau of navigation, provides that on all questions of interpretation growing out of the execution of the laws relating to the collection of tonnage taxes, the decision of the Commission of Navigation shall be final, and that one of the circuit courts has held that this provision excludes judicial review (*North German Lloyd v. Hedden* [1890], 43 Fed. 17); but another circuit court has reached the opposite conclusion, holding that "final" has reference only to the departmental organization, excluding review by the Secretary of the Treasury (*Laidlaw v. Abraham* [1890], 43 Fed. 297); and the latter holding is in accordance with the construction placed by the Supreme Court upon an analogous provision of the public land laws (*Johnson v. Towsley*, 13 Wall. 72). In any event, the questions passed upon by the Commissioner of Navigation do not in-

<sup>2</sup> See, however, as to section 204 of the Transportation Act, *United States v. Interstate Commerce Commission*, 11 Fed. 2d 554 and §180 *infra*.

volve ordinary questions of private right, but are of an international character.<sup>3</sup>

In several cases the Supreme Court has refused to re-examine the interpretation placed by the Department of the Interior upon terms of public land grants, believing that Congress intended that the questions involved should be finally adjudicated by the public land administration (*U.S. v. Hitchcock*, 190 U.S. 316; *Ness v. Fisher*, 223 U.S. 683). Congress had not excluded judicial review in explicit terms, but it might have done so, the matter being one of governmental bounty; and it was legitimate for the Supreme Court to place upon the statutes the construction it did.

In like manner, the Supreme Court has refused to re-examine the ruling of the Post-Office Department that certain publications were not periodicals so as to be entitled to be admitted as second-class mail matter (*Bates & Guild Company v. Payne* [1904], 194 U.S. 106). In this case the Court formulated its position as follows:

. . . . that where the decisions of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right, of so doing.

As relating to questions of law, the soundness of the statement must be questioned: the generalization is entirely unwarranted either by the course of decisions or by the history of legislation; and it emphasizes a phase of judicial review which has been constantly receding in importance, namely, that relief is a matter of judicial discretion and not of individual right. An unregulated judicial discretion may under circumstances be inevitable; but where it can be avoided, it is no more desirable than unregulated administrative discretion. In the particular case, the Post-Office Department, under strong executive pressure, had reversed a ruling of long standing as to what constituted periodical literature, upon the faith of which certain publishing practices had been established;<sup>4</sup> and this might well have been considered an emi-

<sup>3</sup> The North German Lloyd decision gave rise to diplomatic correspondence, which has been reprinted by the Carnegie Endowment (*Treaties between U.S. and Prussia*, 1918), but nothing appears as to the final disposition of the controversy. The Laidlaw decision is cited with apparent approval in 20 Op. Att.-Gen. p. 367; but this opinion refers the controversy to the decision of Congress.

<sup>4</sup> There had been abuses of the privilege; see 58 Cong. 3d Sess., *House Document No. 17*, pp. 500-512.

nently proper case for independent judicial review. If the case is to be accepted as a controlling decision, it should be observed that the carriage of second-class matter is not, like the ordinary postal service with its monopoly feature, a matter of right, but a privilege accorded by the government at a considerable loss, and that it is analogous in this respect to public land grants. It is also significant that in this matter of carriage of second-class matter Congress has since expressly given an appeal from certain administrative rulings to the Court of Appeals of the District of Columbia (Act, July 28, 1916, 39 St. L. 424, 425).

§153. *Questions of jurisdiction.*—Where jurisdiction depends upon a question of law, the rule that matter of law is always judicially re-examinable applies with particular force. Had, in the tonnage-tax cases, the question been whether a particular imposition fell under the act of 1884 or not, the judicial reviewability would not have been questioned. Under a tariff law, the proper classification of imported goods under the free or dutiable list, or under particular schedules of the latter, presents a question of law ultimately determined by the Court of Customs Appeals, but in its preliminary stages committed to administrative tribunals; but if the question is whether goods coming from the Philippines are imported goods, the question of law involves jurisdiction or vice versa, and the consignee may ignore the statutory scheme of relief, appealing at once to the court against the action of the customs authorities (*De Lima v. Bidwell*, 182 U.S. 1; *Dooley v. United States*, 182 U.S. 222). The same is true where the question is whether the immigration laws apply to a person coming from Porto Rico (*Gonzales v. Williams*, 192 U.S. 1).

How is it if jurisdiction depends upon matter of fact? It is not necessary to consider the difficult and doubtful doctrine of personal liability for acting without jurisdiction, where the defect of jurisdiction rests upon error of fact (*Calder v. Halket*, 3 Moore P. C. 28; *Dorn v. Backer*, 61 N.Y. 261; *Müller v. Horton*, 152 Mass. 540). If we ask whether courts will give relief other than by an action of trespass, where administrative authorities err in deciding a jurisdictional question of fact adversely to individual right, an affirmative answer is furnished by the doctrines of certiorari, mandamus, habeas corpus, or equitable relief by injunction.

The most conspicuous instance in which an administrative finding of a jurisdictional fact was held conclusive is furnished by the well-known Chinese exclusion case of *United States v. Ju Toy*, 198 U.S.

153). In the previous case of *United States v. Sing Tuck*, 194 U.S. 161, the court had held that a person of Chinese race seeking to enter the country could not simply recuse the jurisdiction of immigration officials by a bare allegation that he was born in the United States and therefore a citizen. That decision means that initial administrative jurisdiction may well be supported by a prima facie case, although lack of jurisdictional facts may be ultimately established. Conceding legislative power, this rests upon presumable legislative intent in accordance with common sense and convenience. But in the *Ju Toy* case, the individual submitted himself to the administrative proceeding, and only upon its resulting adversely appealed to the court. The court, upon new evidence, found in his favor. The Supreme Court reversed, holding that the administrative finding, upon a fair hearing adverse to the claim of citizenship, could not be impeached by habeas corpus, the only available method of judicial review; that in other words, the administrative determination of the jurisdictional fact is conclusive. True, the court will secure a fair hearing, but it will do that on behalf of one concededly an alien, so that the alleged citizen occupies no better position. The opinion in the *Sing Tuck* case had foreshadowed a different ruling; and the reasoning in the *Ju Toy* case is unsatisfactory, if not obscure, and it may be doubted whether it is generally accepted as sound law. It seems to illustrate the saying that hard cases make bad law. There was a notorious and difficult situation. Chinese persons landing in San Francisco could produce apparently convincing testimony that they were born in California; yet if all the persons adducing such proof were born in California, every Chinese woman living there must have had an impossible number of children.<sup>6</sup> Apparently the courts in cases like the *Ju Toy* case felt bound by the unimpeached testimony, while the administrative authorities did not. The superiority of the administrative process in effectuating the purpose of the law induced the Supreme Court to accept it as final. But it cannot be conceded that a court is impotent in the face of manufactured testimony or, on the other hand, that a total disregard of rules of evidence can be a satisfactory foundation of justice. There ought to be the freest appreciation of evidence, adapted to all conditions, even in a court of

<sup>6</sup> *Report of Commissioner-General of Immigration, 1907*, p. 106; see also the preceding annual reports; for the *Sing Tuck* case, see 1904, p. 139; the *Ju Toy* case, 1905, p. 86. The decision in the *Ju Toy* case applies only to one claiming admission to the country, not to a resident of the country claiming citizenship, *Ng Fung Ho v. White*, 259 U.S. 276, 284.



justice; and one claiming in good faith to be a native-born citizen should have a right to a judicial and not merely administrative examination of his claim. Citizenship is not merely a jurisdictional fact in immigration cases, but the right of a citizen to enter the country after absence is a constitutional right. The Supreme Court has since held that where rate regulation touches constitutional rights by alleged confiscatory effect, the owner is entitled to the independent judgment of a court of justice as a matter of due process (*Ben Avon Borough v. Ohio Valley Water Company*, 253 U.S. 287); and it is difficult to see why the right of property should enjoy a higher protection than the right of a citizen to be in his own country.

§154. *Questions of fact.*—Questions of fact in administrative determinations differ from like questions in judicial proceedings in two respects: in the latter, where the cause is one of general common law or equity jurisdiction, the question of fact is practically never a jurisdictional fact, but one submitted for decision, while administrative jurisdiction frequently presupposes the existence of the fact as a jurisdictional prerequisite; and notice and hearing is the normal judicial process, while administrative authorities may be authorized to proceed *ex parte*, or their action may be ministerial in the sense of being inconclusive if they proceed upon an erroneous assumption of fact. If the fact is a jurisdictional fact, if the proceeding is *ex parte*, or if the officer acts ministerially, the question of fact is open to judicial examination. Normally, the question of fact falls under one of these three categories, at least in the absence of administrative appeal provisions, and inconclusiveness of an administrative determination of fact made in the first instance is therefore the rule; this is conspicuously illustrated by the judicial reviewability of deficiency assessments made by the Commissioner of Internal Revenue, particularly prior to the creation of the Board of Tax Appeals.

The question of conclusiveness will therefore arise mainly where facts are clearly not jurisdictional, and where the administrative authority is one acting judicially after notice and hearing. As has been shown before, the legislative policy is now reasonably well settled to the effect that there may be some judicial review but that it will be a restricted review. Legislation varies as to the degree of restriction. If the administrative finding is made *prima facie* evidence, the court may receive new evidence in rebuttal. But the most recent tendency is to restrict the reviewing court to the administrative evidence, permitting it merely to require the taking of additional evidence for report to the

court. There is then a remaining difference as to the scope of review according to whether there may be a reversal only if there is no evidence to support the finding, or also if the evidence upon the entire record does not in the opinion of the court justify the inference drawn, the finding below being accepted, if there is room for legitimate difference of opinion. This is the difference between subdivisions 4 and 5 of section 1304 of the Civil Practice Act of New York, defining the scope of review in certiorari. All this has been discussed before,<sup>6</sup> but a general observation may be ventured as to the significance of these differences. Administrative proceedings ordinarily deal with questions of fact of a different kind from those that arise in civil or criminal litigation. In the latter the issue is apt to be whether something happened or not, and whether witnesses tell the truth, although occasionally the issue is also as to the interpretation of conceded facts (negligence, motive, etc.). Sometimes administrative proceedings likewise have to inquire into facts of a fugitive character (as, for example, whether an animal which is to be slaughtered, and the carcass of which will be disposed of, is sound or infected;<sup>7</sup> but normally the questions of fact to be administratively determined are questions of the expert interpretation of data which are intrinsically uncontroverted. It is the difference between matter of perception and memory, and matter of appreciation and inference. As to the latter, there is obviously much greater chance for forming an independent judgment upon the basis of a record; and a reviewing court can hardly fail to be affected by its attitude toward the final result when it determines whether a burden of proof has been met or not, or whether the evidence is merely on the whole inadequate, or whether it is so utterly inadequate as to be legally no evidence. In view of this, the differences in statutory phrasing are apt, in their practical application, to become so refined as to become illusory. This furnishes an explanation of the decision of *Federal Trade Commission v. Curtis Publishing Company*, 260 U.S. 568, in which the Supreme Court (Justices Taft and Brandeis "doubting") interpreted the narrower review of the Federal Trade Commission act as if it were the wider review;<sup>8</sup> and of the statement in *People v. McCall*, 219 N.Y. 84, 90, that there is no difference between the certiorari review of the orders of the

<sup>6</sup> See §§146, 147, *supra*.

<sup>7</sup> Note also the special character of alien exclusion cases where the question of citizenship by birth is raised.

<sup>8</sup> As to this case, see article by G. Hankin in 23 *Michigan Law Review* 233, 262-67.

New York Public Service Commission and the supposedly much narrower review of the orders of the Interstate Commerce Commission.

Courts clearly incline both to assert and to restrict their appellate authority in considerable independence of statutory provisions. Section 15 of the Tariff Act of 1890 allowed an appeal from the decision of the Board of General Appraisers to the circuit court for a review of the questions of law and fact involved in such decision. However, findings of the appraisers upon conflicting evidence were set aside only if clearly against the evidence (*Re Kursheedt Manufacturing Company*, 49 Fed. 633; *Re White*, 53 Fed. 787). Such a finding may possibly be regarded as an error of law even now when the Court of Customs Appeals is confined by statute to questions of law. And with a statutory provision making an administrative decision final, the judicial enforcement of a fair hearing will afford protection against findings in disregard of evidence, although a mere falling short of judicial proof may not warrant judicial interference.

On the whole, it is clearly possible to speak of a tendency to give to administrative findings of fact, where the authority acts semi-judicially, at least the effect of the findings of a jury.

§155. *Questions of discretion.*—It is often stated as an almost axiomatic proposition that courts will not review the exercise of administrative discretion, and this rule is incorporated into the law of mandamus. The statement, however, can be true only of an unqualified discretion, for the very meaning of "qualified discretion" is that in some respects it is controllable; and in examining the subject of administrative discretion it has been shown that qualification is the rule and not the exception. Finality therefore applies only to that residuum of discretion which remains after due effect has been given to all qualifying factors. As regards the latter, it is only necessary to recapitulate what has been said before, in the chapter on Discretion, and particularly also in discussing the relation of mandamus and certiorari to discretion.\* The following points should be noted:

A licensing power lends itself better to the grant of a wide discretion than an order-issuing power. The unimpeachability of a discretionary refusal of a license is aided by the absence of any rule requiring the refusal to be accompanied by a statement of reasons; it is, on the other hand, weakened by such a requirement of notice and hearing, as the Transportation Act of 1920 has introduced, and which, if further developed, may revolutionize the law of enabling powers. In

\* See §137, *supra*.

the absence of such a requirement the rules of pleading in mandamus may serve to force a show of hands: the refusing authority may be compelled to admit or deny specific allegations which, if true, will eliminate specific grounds of refusal; but ordinarily a residuum of discretion will remain which cannot be pinned down to definite facts, i.e., in most cases it will be impossible to reduce, by a process of elimination, discretion to non-discretion.

In the exercise of directing powers, matter of discretion tends to approximate questions of fact, and as a rule there will be no substantial difference between finality of discretion and finality in finding of facts. The law of certiorari covers both alike.

Whether the power is one to license or one to order, discretion should always be guided by considerations appropriate to the subject matter; and other considerations being illegitimate, the exercise of a discretion based upon them constitutes an error of law. Even more inadmissible, of course, is any personal, corrupt or malicious consideration which produces an abuse of discretion. The French call this an excess of power (*excès de pouvoir*), and it may be properly treated as a transgression of jurisdiction. It is clear that such a perversion of discretion is not final; the difficulty will be to prove illegality.

What is true of the type of questions of fact with which administrative authorities are apt to deal is still more true of all discretionary powers: that in many cases it will be impossible to make an absolutely convincing proof of error, and unless the court is ready to be convinced, the administrative action will be final.

§156. *Questions of value.*—The question of value dominates two of the most important branches of administration, revenue and public utilities; as regards the latter, value determines not merely the reasonableness of a rate but also probably, in the ultimate analysis, adequacy of service and principles of financing.

Assessment for the purposes of taxation may combine determination of facts and of values; in the general property tax, taxable personality offers in many cases no problem of valuation, so far as trust securities are concerned. The assessment of real estate, on the other hand, involves valuation which is in the main matter of estimate, and which closely resembles discretion. Efforts have been made to standardize real estate valuations, but they have mainly aimed to find criteria of relative values. For the purposes of the general property tax, relative equality generally answers the purpose of justice, since uniform over- or under-valuation is reflected in the tax rate. In any event a scientific standard of absolute value seems unattainable. The

uncertainty of value justifies administrative finality, and this is the generally accepted rule. The statutory certiorari in New York which permits judicial review on the ground of overvaluation or inequality (Tax Law, §290), and which has been noted before, is an exception. Where incorrect principles of valuation are adopted, there is error of law which can be reached by a common law certiorari (*People v. Board of Assessors*, 39 N.Y. 81); and gross overvaluation has been treated as legal fraud (*Chicago v. Burtice*, 24 Ill. 489), while systematic inequality may justify federal relief under the Fourteenth Amendment (*Taylor v. Louisville & Nashville R. Co.*, 88 Fed. 350). The finality of administrative valuation also extends to the taxation of railroads (*State Railroad Tax Cases*, 92 U.S. 575), although it is almost impossible to conceive of a fair estimate without some guiding principle; in such cases courts will treat the adoption of a reasonable rule as an exercise of discretion (*People v. State Board of Tax Commissioners*, 196 N.Y. 39, applied to special franchise valuation).

Legislative definitions of value are generally perfunctory, but even when they attempt to be explicit, cannot eliminate matter of opinion. A notable example of statutory definition is found in the federal customs legislation. Section 2906 of the Revised Statutes referred to actual market value; this was somewhat further defined by section 19 of the act of 1890, slightly modified in the act of 1909, and finally superseded by the elaborate definition of section 402 of the Tariff Act of 1922. Section 3011 of the Revised Statutes, incorporating the provision of an act of 1845, gave an importer, paying under protest, an action against the collector to recover back any excess of duties paid, and made the action triable by jury. Notwithstanding this, and notwithstanding the fact that section 2931, to which section 3011 referred, spoke of "rate and amount of duties," the Supreme Court held in *Hilton v. Merritt* (1884), 110 U.S. 97, that "rate and amount" referred only to classification, and that in the absence of fraud the court in the action against the collector would not review the appraisal made by the customs officers. This decision shows a strong judicial policy in favor of the finality of appraisal. Congress indorsed this view when by the act of 1890 (§15) it confined judicial review to the construction of the law and the facts respecting the classification of the merchandise and the rate of duty imposed thereon under such classification. As stated before, in 1922 the law went one step farther and confined the review by the Court of Customs Appeals to questions of law only.

The process of valuation involved in rate regulation is very different from that which devolves upon tax authorities. The puzzling

search for an absolute standard of value presents a problem of law. Apart from that, there is much more of interpretation of record data than there is in the appraisal of real estate for the purpose of the general property tax, and matters of estimate are to some extent standardized by established accounting practices. It is difficult and perhaps needless to determine whether a controversial interpretation of uncontested data should be described as a question of fact or a matter of discretion. The data are elicited by a quasi-judicial proceeding and constitute the record on which the decision must be based. Both in New York and under congressional legislation it is the commission alone which takes evidence, although the law may give a court the power to require the taking of additional evidence. If the record is plainly defective, the decision may be impeached. As has been shown before, the basis of the impeachment may be either that the whole record fails to sustain the finding, or that there is no evidence to sustain the finding. It has also been shown that where the evidence is not ordinary testimonial matter, but matter for expert opinion or judgment, the difference between the two bases tends to diminish in importance, and that it is consequently not as substantial in administrative proceedings as in ordinary litigation. The difference has been practically ignored both by the Supreme Court (260 U.S. 568) and by the Court of Appeals of New York (219 N.Y. 90).

Yet in the case of *Ben Avon Borough v. Ohio Valley Water Company*, 253 U.S. 287, the Supreme Court made this difference controlling as a matter of constitutional law. When it is contended that rate regulation trenches upon the constitutional right of property, a state court must exercise its own judgment upon the record evidence; and to confine it to a rejection of the findings of the commission merely if there is no evidence to sustain the finding (abuse of discretion) is to deny due process of law. The doctrine has some peculiar aspects. Apparently the wider scope of review is constitutionally essential only where the question of constitutional power is involved, that is to say, where the rate is alleged to be confiscatory. But if it is difficult to find the line between a reasonable and an unreasonable rate, it will pass the wit of commissions and courts to differentiate "unreasonably low but not confiscatory" from "so unreasonably low as to be confiscatory," considering that the minimum rate of return conformable to due process has never been fixed. If it be assumed that "unreasonably low" always means confiscatory and that the sustaining of a contested rate regularly involves the constitutional issue, the decision means that

every state statute must afford against commission valuations that wider scope of judicial review which will examine the entire record to determine whether the evidence sustains the finding, and to reverse it if it does not. This is what the Superior Court of Pennsylvania did, and what the Supreme Court of Pennsylvania said it had no power to do (260 Pa. 289), while the Supreme Court of the United States said that under the Constitution it must have that power. The statute of Pennsylvania had been so worded ("if the court shall, upon the record, find that the order appealed from is unreasonable, . . . it may reverse the order of the commission") as to satisfy the Federal Constitution, and it was clearly competent to make the appellate power of the supreme court of the state as wide as the reversing power of the superior court. Had the decision of the Supreme Court of the state been made upon the ground, not that the Superior Court exceeded its power, but that it erred in its interpretation of the evidence, the decision of the Supreme Court of the United States must have fallen the other way. If the Supreme Court is of the opinion that the wider scope of review is indispensable where constitutional rights are at issue, the decisions of the Interstate Commerce Commission ought to be subject to the same review. It is apparently dangerous, in a rate regulation statute, to use the phrase of the Federal Trade Commission law that the commission order must be enforced "if supported by evidence"; "if supported by *the* evidence" appears to be the only safe wording. Apart from satisfying the Constitution, either phrase will equally enable a court to abide by a commission-finding or to set it aside, according to its view of what justice demands in the particular case.<sup>10</sup>

The doctrine of the Ben Avon case moreover assumes that value is sufficiently a question of fact to be susceptible of being checked by evidence. In so far as valuation is simply matter of estimate incapable of either proof or disproof, the examination of the record will furnish no basis for dissent from the conclusion of the commission, and the ordinary rule of finality will have its operation.

<sup>10</sup> There is a dictum of the Supreme Court of Illinois accepting the Ben Avon decision as requiring the more comprehensive judicial control over all commission decisions: "Due process of law requires submission to a judicial tribunal for determination upon its own independent judgment as to both law and facts according to the settled rules governing judicial action and decision" (*Otis Elevator Company v. Industrial Commission*, 302 Ill. 90). Applied to the Commerce (Public Utility) Commission in *Commerce Commission v. C. C. C. & St. L. R. Co.*, 309 Ill. 165. But see the subsequent explanation in *Nega v. Chicago Railways Company*, 317 Ill. 482.

**PART II**

**(DESCRIPTIVE PART)**

**STATUTORY PROVISIONS OPERATING WITH THE AID OF  
ADMINISTRATIVE POWERS**



## PRELIMINARY NOTE

§157. The use of administrative powers over persons and property in legislative practice can be made to appear only from a detailed account of statutory provisions. To this inevitably tedious task the descriptive part of this survey is devoted, in which the different subjects of legislation are taken up successively. The order of arrangement cannot claim logical perfection; some of the heads (safety, health, morals) represent abstract objects of policy; others (public utilities, navigation, banking, labor, etc.) represent recognized categories of economic or social action or interest affecting the public welfare. The classification adopted, like any other, involves some overlapping and arbitrary assignment. The effort has been to make the divisions serve the purposes of the survey by grouping as far as possible in accordance with generally accepted divisions of administrative organization.

Accordingly, provisions are grouped under the following heads: public utilities; merchant shipping; banking; insurance; trade; labor; professions; religion, education, and political action; safety; health; morals; personal status (civil status, incorporation, naturalization, passports, admission and expulsion of aliens); use of land; and revenue.

The following subjects of legislation and administrative action have been excluded, as involving service powers or powers over dependent or functional status, or judicial powers, but not involving determinative administrative powers over normal rights of person or property: diplomacy; armed defense; justice, civil and criminal, substantive and remedial; elections; civil service; public funds; public property; public contracts; public records; highways and public improvements, including the law of eminent domain; the postal service; education; poor relief; and charitable and correctional institutions.

The field of legislation lying outside of the scope of this survey is thus larger than that included in it.

## CHAPTER XVI

### ADMINISTRATIVE POWERS IN CONNECTION WITH PUBLIC UTILITIES

§158. *General status of legislation and administrative organization.*—The term “public utilities” is here used as covering those classes of business which are subject to intensive public control by reason of the fact that they claim special public privileges (right of eminent domain, special use of public highways), or that by inherent economic conditions they tend to assume the character of monopolies, or by reason of these two factors combined. The most important of these businesses are transportation, mainly but not exclusively by rail, and the transmission of intelligence and the supply of water, light, heat, and power by fixed conduits.

In former times the idea of public utility was closely associated with incorporation, that is, corporate character and privileges were sought and granted on the ground of special benefit accruing to the community; and in France an administrative declaration of “public utility” still serves the end of investing an enterprise with a privileged character. But mere incorporation has ceased to denote a special degree of public utility; and as will be shown farther on,<sup>1</sup> the acquisition of corporate character has practically, if not legally, become almost a matter of common right, with a clear tendency to reduce administrative co-operation to a ministerial function of registration.

In contrast to this, there has been no relaxation of public control over public utility services in the narrower sense of the term, and in some respects they present the most characteristic field of modern administrative law. Again, while legislation for the mere grant of corporate capacity has shown the same tendencies in America, England, and Germany, there are radical differences in public utility legislation in the several jurisdictions.

§159. *Prussia.*—In Germany, the principal railroads, as well as the telegraph and telephone systems are state or nationally owned and operated, and local utilities are owned and operated either municipally or under contract with municipalities, and there is consequently little

<sup>1</sup> See §§243-46, *infra*.

room for public control exercised over private rights on the basis of authority; what control there exists is exercised mainly by virtue of charter reservations or contract stipulations. There is no general legislation regarding public utilities. Railroads in Prussia during the period of the former Empire continued to be governed by the original act of November 30, 1838. Section 1 of this act provides that every company intending to build a railroad shall apply to the Minister of Commerce and state precisely the main points of the line and the amount of intended capital. If there is no general objection to the enterprise, the plan according to instructions heretofore and hereafter issued shall be examined carefully. If in consequence of the examination the franchise (concession) is granted, the Minister of Commerce, stating the necessary conditions and measures, if any, shall fix a time for showing that the capital has been subscribed, etc. As regards rates, basic principles (return of ten per cent, etc.) were fixed by the act of 1838; and section 35 provided that in case of controversies regarding the application of rates between the company and private parties, the decision should lie with the local representative of the central government, subject to appeal to the Minister of Commerce. The Administrative Competence Act of 1883 (§159) however transferred this jurisdiction to the regular courts of justice. An act of June 1, 1882, provides that maximum rates on state railways can be raised only by law. An act of 1902 places the alienation of separate parts of an entire system under administrative control.

This meagerness of legislation justifies the entire elimination of Germany from the following survey of public utility control.<sup>2</sup>

§160. *England*.<sup>3</sup>—The traditional and still prevailing English method of controlling public utilities is through what is called "private bill legislation"; i.e., a special act of Parliament has to be obtained for each undertaking. This act of Parliament performs the function of franchise or license coupled with regulations applicable to the particular enterprise, that is to say, the double function of a normative statute and of special direction and permit. It controls

<sup>2</sup> See the account of supervision of street railroads in Prussia by Robert R. Whitten in the *Annual Report of the Public Service Commission of New York (First District)*, 1908.

<sup>3</sup> It should be noted that the telegraph and telephone system is government owned and operated. Many local utilities are municipally owned and operated; the system of private bill legislation applies to local utilities, whether privately or municipally owned.

such matters as organization, methods of financing ("capital powers"), requirements regarding construction, equipment, and service, provisions concerning relations to allied undertakings (interchange of traffic, leasing powers, etc.), restrictions as to charges and rates, etc.

While the special act thus constitutes an effective control, it is altogether an initial control; and Parliament, though it has the power, is unlikely to interfere with the particular concern by a new special act except where an amending act is sought by the concern itself. However, from an early period (about 1845) the private acts have regularly contained a clause making them subject to future general legislation.

A considerable number of such general acts have been placed upon the statute book, important laws having been recently enacted with regard to electricity (1919, 1926), gas (1920), and railways (1921). While, in view of the special acts, necessarily fragmentary, these laws taken together have not only standardized a good deal of the law relating to public utilities by direct statutory requirements and prohibitions, but have also created administrative powers of determination with reference to them. The growth of these administrative powers evinces an increasing legislative disposition to delegate the control over public utilities, and the most recent acts manifest that tendency in the most striking way; but the system of reserving to Parliament a veto with respect to each undertaking of any consequence has not been abandoned.

The regular organ of administrative control over public utilities under English legislation has in the past been the Board of Trade. A Ministry of Transport was created in 1919, and a number of functions with regard to railways have been transferred to this; the precise extent of this transfer depends upon Orders in Council (Ministry of Transport Act, §2), and to the foreign student this is a matter of indifference. Whether vested in the Board of Trade or in the Ministry of Transport, the control is bureaucratically organized and exercised.

Separated from this departmental control is a commission control, which is judicially organized. Railway Commissioners were permanently created by the Regulation of Railways Act, 1873; these Commissioners were removable for cause by the Lord Chancellor; the Railway and Canal Traffic Act of 1888 substituted a Railway and Canal Commission which had the status of a court of record, and which consisted of two appointed Commissioners (removable by the

Lord Chancellor for inability or misbehavior) and of three ex-officio Commissioners who were judges.

The powers of the Railway and Canal Commission were altered by the Railways Act of 1921, which vested in them functions with regard to services and facilities, while the functions regarding rates (charges), changed from "judicial" to "quasi-legislative" character, were transferred to a new Rates Tribunal, consisting of three permanent members (term of seven years) and a varying number of non-permanent assessors chosen from two panels. The Railways Act of 1921 also created a special temporary Amalgamation Tribunal. The Electricity Act of 1919 creates Electricity Commissioners; and the Electricity Supply Act of 1926, a Central Electricity Board.

This recourse to new organs of control is likewise indicative of the new tendency toward delegation of control over public utilities by Parliament.

§161. *New York*.—Like England, New York originally dealt with railroads through special charters, the enabling provisions of which were more important than those establishing regulation or control. This system of special charters lasted only until 1848, when a general railroad act was passed, permitting the organization of railroad companies by compliance with general conditions and without administrative check of any kind other than the obligation of an annual report. A provision requiring each company to obtain a legislative declaration of public utility for its proposed road was dropped when the act was revised in 1850, so that from then on the building of a new road was exclusively a matter of private discretion. In 1855 a Board of Railroad Commissioners was created, consisting of the State Engineer and Surveyor, one member appointed by the Governor, and one representing the railroad companies; this board had examining and prosecuting powers, and its permit dependent on safe condition was required for the opening of any road; but it possessed no directing powers. The Board was short-lived; it was abolished in 1857 upon the recommendation of the State Engineer.

There followed a period of twenty-three years in which what railroad legislation there was—safety requirements, obligations to furnish facilities for connecting traffic with other roads, limitations on the power to consolidate—operated entirely without administrative control or intervention. In 1880 the consent of the State Engineer was required for increases of capital stock. Then, in 1882, another Board of Railroad Commissioners was created, which like many of the other

early state boards was given no determinative powers;<sup>4</sup> the law provided only for notices, recommendations, and reports, which were to leave the legal rights (as well as the obligations and liabilities) of the railroad company unimpaired. An amendment of 1890 first created the duty of railroad companies to comply with decisions of the Board. Other amendments from time to time enlarged the powers of the Board, which were subsequently transferred to Public Service Commissions with continually expanding powers and jurisdiction. The most recent revision of 1921 creates a Public Service Commission for the state outside of the cities of 1,000,000 inhabitants and a Transit Commission for the city of New York.<sup>5</sup>

The law concerning public utilities is at present found partly in the Railroad Law, which consolidates the specific requirements and prohibitions of the earlier railroad legislation, adding numerous provisions giving powers to the Public Service Commission; partly in the Transportation Law; and partly in the Public Service Commission Law, which, besides duplicating the Railroad Law in some respects, declares the obligation of the common carrier in general terms, which may be given content through comprehensive powers vested in the Commission; there is hardly any power known to American public utilities legislation that is withheld from the Commission.

The provisions of the Public Service Commission Law apply in whole or in part to railroads, street railroads, common carriers except by water independent of railroads, transportation companies (classified by Laws, 1926, c. 762), state coach, turnpike, or bridge companies, steam-heating corporations, gas and electric companies, and telegraph and telephone companies. The common-carrier provisions in part also cover stock yards.

The Public Service Commission consists of five members, appointed by the Governor and Senate for terms of ten years, and receiving salaries of \$15,000 a year.

§162. *United States*.—The general legislative status of public utility control is relatively simple. The important statute is the Interstate Commerce Act of 1887, as revised in 1920. The earliest of the

<sup>4</sup>The act of 1880 had, however, provided that when a board of railroad commissioners should be created, the board instead of the State Engineer should approve the increase of capital stock.

<sup>5</sup>A locally appointed Board of Transportation for the city of New York, created in 1924, exercises certain powers under the Rapid Transit Act of 1891 and its amendments.

general railroad acts now on the statute book (Revised Statute, §5258, enacted in 1866) merely gives to every steam railroad the right to carry passengers and property from state to state and receive compensation therefor, and to connect with roads from other states so as to form continuous lines. Vague and general in its language, it was purely an enabling act and called for no administrative provisions. It made very little impression on the law (See 19 Wall. 584, and 37 Fed. 567). The Interstate Commerce Act therefore, unlike the New York Commission Act, encountered no previous legislation covering its ground; and its enactment was hastened by the decision of the Supreme Court in *Wabash etc. R. Co. v. Illinois* (1886), 118 U. S. 557, that state laws could not affect interstate commerce transactions. The Interstate Commerce Act emphasized the matter of rates which had received very perfunctory treatment in the New York act of 1882. In addition to provisions perhaps sufficiently definite for enforcement (forbidding preference or discrimination, prohibiting pooling, the long- and short-haul clause), it contained others practically unenforceable without further definition, particularly the requirement of just and reasonable rates. The apparent power of the Interstate Commerce Commission to make orders concerning reasonableness was rendered ineffective by the inconclusiveness of its determinations owing to two decisions of the Supreme Court, the one holding that an order requiring a railroad company to cease and desist from charging an unreasonable rate could not be accompanied by a declaration of a reasonable maximum rate (*Queen & Crescent case*, 167 U.S. 479), the other holding that the provision for judicial enforcement of commission orders, while recognizing the commission order as prima facie evidence, left all the questions to be tried de novo by the court (*Alabama Midland case*, 168 U.S. 144). These defects were corrected by the act of 1906. In the meantime Congress had also legislated with reference to safety appliances, and in connection therewith had vested powers in the Commission; the Elkins Law of 1903 (dealing mainly with rebates and discriminative practices) operated in the main through drastic penal provisions. As in New York, new powers were given to the Commission by amending acts and new statutes from time to time, so that at the present time there is hardly any form of administrative power that it does not exercise.

As in the original act, the law speaks partly in terms sufficiently definite for enforcement (the prohibition of free transportation except as specified, the commodities clause, prohibition of rebates, hours of

service, safety requirements) and partly in terms which require to be supplemented by administrative determinations ("just," "reasonable," "proper," "safe," "adequate," "undue"). This survey ignores provisions not calling for administrative determinations.

The Interstate Commerce Act applies to common carriers engaged in transportation by railroad, or partly by railroad and partly by water, by pipe lines (except of water and gas), and to the transmission of intelligence by wire or wireless. The terms "common carrier" and "transportation" are defined in the act. The act applies to interstate and foreign commerce.

The powers are vested in the Interstate Commerce Commission, consisting at present of eleven members, appointed by the President and the Senate on a non-partisan basis (i.e., not more than six from the same political party) for terms of seven years and receiving salaries of \$12,000. The Commissioners are removable by the President for inefficiency, neglect of duty, or malfeasance in office. It will be noted that Congress did not attempt, as it did later on in the case of the Board of General Appraisers, to give them practically judicial tenure. In 1917 the Commission was authorized to form of its members divisions of not less than three, each division to exercise in the first instance the powers vested in the Commission.

The various phases of public utility undertakings subject to administrative control will be considered under the following headings: initial approval; abandonment; consolidation and related arrangements; finance; service facilities and services; safety; charges and return; incidental and subsidiary powers; procedural and remedial provisions.

§163. *Initial approval—England.*—In England, Parliament in principle reserves to itself the approval of every public utility in almost every detail that can be laid down in advance in the special act authorizing the particular undertaking, thereby dispensing with "certificates of convenience and necessity," and similar administrative powers. This system applies to railroads, electrical, gas, and water works, and harbors.

The initial approval in the case of railroads covers details of location and construction which in America are uncontrolled by law. An act of 1845 speaks of changes in gradient or radius beyond the statutory limit, which may be authorized by Board of Trade certificate; and the same act and the act of 1873 require official approval or certification for other corrections of plans or deviations therefrom.



Of similar character, though perhaps of greater importance, is the power given in 1903 to the Board of Trade to authorize railway companies to exercise certain stated powers relating to electrification, upon a procedure prescribed in the act. The order of the Board is subject to variation or rescission, but only on application of a party to the order.

An exception from the rule of parliamentary approval in each case was established in 1864 for railroads, the building of which does not call for the exercise of compulsory powers—so where all land-owners consent. The Board of Trade may in its discretion, and subject to any provisions it may deem necessary, authorize the construction of such a road (and a subsequent alteration of plans) and give the undertakers corporate powers. The authorization is subject to annulment by Parliament within six months; and an act of 1870 provides that where the authorization is objected to by a railroad or canal company, it requires confirmation by Parliament. A railroad so authorized differs from a private road built without authorization in that the latter is not relieved from liability for the nuisance, if any, inevitably caused by its operation.<sup>6</sup>

A more conspicuous instance of the delegation of initial control is to be found in the Light Railways Act of 1896, which is instructive to the foreign student of the English method of dealing with public utilities because it presents a sort of compendium of the usual provisions of private acts.<sup>7</sup>

The cautious policy with respect to delegation appears in a direction to the authorities charged with the execution of the act to consider whether the question of authorization should not be submitted to Parliament, and in the injunction not to give the final authority if by reason of the magnitude of the undertaking or its effect on existing railways the matter ought to be submitted to Parliament; such submission is also required if it is proposed to vary the Land Clauses Act in any respect.

The authorities are the Board of Trade and a commission of three appointed by the President of the Board of Trade. The mechanism of authorization is as follows:

The proposers of the undertaking make application to the Commissioners and submit a draft order. The Commissioners gather all

<sup>6</sup> See *Encyclopaedia Britannica*, *Railways*, p. 826.

<sup>7</sup> A number of changes were made by the Railways Act of 1921, which transferred the power of the Commissioners and the Board of Trade to the Minister of Transport; but the general scheme remains.

material information (in part specified by statute) bearing on the expediency of the undertaking, holding local inquiries after public notice and individual notice to owners who are to be expropriated, and considering both formal and informal objections.<sup>8</sup> After the draft order has been settled by the Commissioners, it is submitted to the Board of Trade, showing all objections and how they have been disposed of; and the Board gives notice that it will hear objections to confirmation. If the draft order is rejected by the Commissioners, municipal authorities may appeal to the Board of Trade, which may refer the matter back to the Commissioners.

The Board of Trade is required by the act to consider specified matters before confirmation (see *supra* as to submission to Parliament), and may confirm with or without modification. Its confirming order is conclusive of compliance with all prerequisites and has the effect of an act of Parliament.

Section 11 of the act which specifies what the authorizing order may contain, is of interest as showing what ideas Parliament had as to the function of initial authorization as a means of permanent control: the provisions may cover, among other things, the incorporation of the company, powers necessary for construction and working, including powers to make agreements for the purpose, statutory safety requirements, audit of accounts, maximum rates, municipal subsidy or sharing in profits or acquisition, and in addition any other matters whether similar or not to those enumerated, auxiliary to the objects of the undertaking.

The purpose of continuing control may be served by a provision for amending or additional orders (§24), which may be made on the application of any authority or person, the only limitation being that no power is to be conferred by amendment to acquire the railway without the consent of the owners.

The delegation of tramway authorization is less complete, for, while the preparation of provisional orders authorizing their establishment, subject to full statutory directions, is committed to the Board of Trade, each such order requires confirmation by Parliament. Important powers are, however, vested otherwise in the Board of Trade: its consent is required for the sale of a tramway; in case of insolvency it may terminate the powers of promoters; and upon representation that the public is deprived of the full benefit of a tramway, it may

<sup>8</sup>Section 22 provides for hearing objections as to injury to buildings or to natural scenery.

grant licenses for its use to others than its promoters. These powers, granted as early as 1870, have no parallel in the control of regular railways.

In 1919 Parliament also relaxed the initial approval of works for supplying electricity, substituting, for Provisional Orders in Council, special orders of Commissioners of Electricity confirmed by the Board of Trade, but still requiring the approval of each special order by both Houses of Parliament. In accordance with earlier provisions for provisional orders, the special order may be subject to regulations and conditions concerning supply, prices, safety, inquiries, enforcement, and other matters; and where the order reserves a power to consent or approve, the power is discretionary and may be exercised subject to conditions, and in the case of plans, patterns and specifications, subject to revocation or modification (act of 1899, §73). The power seems ample enough to be made available for continuing control. A private generating station merely requires the consent of the Commissioners, which may not be either refused or burdened with conditions without a local inquiry.

With regard to gas works, the régime of special authorizing acts of Parliament still prevails. The Gas Act of 1920 merely authorizes the Board of Trade to modify special acts, particularly with regard to prices and charge units, but requires each modifying order to be laid before Parliament. The apparent purpose is to relieve gas companies of requirements which changing conditions have made unduly burdensome.

Not even this extent of delegation has so far found its way into legislation for water works or harbors.

The system of special acts has not been applied to either wireless telegraphy or aerial navigation, but both have been placed under administrative control: any wireless station or apparatus requires a license from the Postmaster-General (act of 1904), and Orders in Council may regulate aerodromes and the use of aircraft (act of 1920).

§164. *Initial approval—New York.*—From 1850 on, for a period of over forty years, New York dispensed with any control over the establishment of railroads. The creation of a railroad commission in 1882 did not at first alter the law in this respect, but the commissioners secured in 1892 an amendment of the law introducing the certificate of convenience and necessity, which continues to be required both by the Railroad Law (§9) and by the Public Service Com-

mission Law (§53).<sup>9</sup> The former law (not the latter) gives an appeal from the refusal of the certificate to the Appellate Division of the Supreme Court, which may exercise its own discretion. The law, while prescribing due hearing and notice by publication, or notice as the Commission may prescribe, does not indicate on what grounds the certificate is to be granted or refused, merely requiring that it shall certify that public convenience and necessity require the construction of the railroad as proposed in the certificate of incorporation. The certificate of incorporation must state the kind of road to be built or operated, the length of the railroad and its termini, and the name of each county in which any part of it is located. Thus the details of location are beyond administrative control, and section 16 of the Railroad Law, which deals with location through petition to court and appointment of commissioners, does not refer to the Public Service Commission. So also as regards the manner of construction, the powers of the Commissioners are confined to safety requirements, and consent to a change of gauge or of motive power; a number of other matters (weight of rail, tunnels, gauge, and facilities for intersection or connection with other roads) are covered by direct provisions of the Railroad Law; but construction generally lies outside of the sphere of commission control. It is also to be noted that no power is given to grant a certificate subject to conditions or qualifications,<sup>10</sup> so that it is not possible to enlarge the scope of control in this way. The initial control is therefore not nearly as extensive or intensive as it is in England; the only purpose of the certificate appears to have been to prevent needless duplication of service or to veto irresponsible undertakings. The section of the Public Service Commission Law providing for the authorization of railroad undertakings is practically repeated in subsequent parts of the act for the other public utilities covered by it; they all require commission authority for the beginning of construction, or the exercise of franchises or privileges not theretofore exercised.

§165. *Initial approval—United States.*—As regards interstate commerce, Congress did not deal with the organization or establishment of railroads for over thirty years after the first enactment of the

<sup>9</sup> Section 25 of the Transportation Law also requires it for specified classes of stage route or "bus" lines; see *Commission Report (2d Division) 1913*, pp. 14, 15; 1916, p. 10.

<sup>10</sup> Except under an amendment of 1917 where a business corporation owning two-thirds of the stock of a railroad corporation desires to change itself into a railroad corporation (Railroad Law, §156).

Interstate Commerce Act, leaving this to the states, and merely securing, as before noted, to each road the right to carry on interstate commerce. The certificate of convenience and necessity was first introduced in 1920. It applies to new construction, extension, acquisition or operation. Proceedings with regard to hearings and other matters are to be regulated by the Interstate Commerce Commission. Different in this respect from the law of New York, the certificate may be granted subject to terms and conditions, and thus may be made the vehicle of control in unspecified matters. The future will show how this control will be exercised. The issuance of the certificate authorizes the carrier to proceed without securing approval other than such certificate. So far as the Interstate Commerce Act operates, therefore, state approval is dispensed with.<sup>11</sup>

§166. *Administrative control over abandonment.*—What legislative provision there is, is generally to the effect that abandonment must be officially sanctioned; abandonment is compulsory only in the case of railroad-controlled water carriers. In England under an act of 1863, the Railway and Canal Commission may at seven-year intervals institute inquiries as to whether or not public interests are prejudicially affected by the power of a railway company to operate steamboats; and if they report to Parliament adversely to the power, the power ceases twelve months thereafter unless Parliament otherwise provides. Under the Panama Canal Act of 1912 (now Interstate Commerce Act, §5 [9]), the control of competing water carriers after a given date is made unlawful by the direct provision of the law without calling for administrative intervention, except that the fact of competition is conclusively determined by the Commission;<sup>12</sup> but the Commission has the power to grant an extension, the period of extension not being limited, if operation is in the public interest and of advantage to the convenience and commerce of the people, and competition is not reduced thereby (§5 [10, 11]).<sup>13</sup>

As regards permissive abandonment, English legislation vests general powers in the Board of Trade to authorize the abandonment of a canal where it has become unnecessary, or where it has become dere-

<sup>11</sup> It should, however, be noted that in order to give full effect to this authority, Congress should have invested the carrier with appropriate powers of eminent domain; these now, as before, depend upon state law.

<sup>12</sup> A similar provision exists in the New York Public Service Commission Law, §49.

<sup>13</sup> As to this dispensing power, see §70, *supra*.

lict (in the latter case it may be made a condition that the canal be transferred to some other body and be subjected to a scheme of management [act of 1888]); to revoke special electricity orders on the representation of the undertaker that the undertaking can not be carried on with profit (act of 1899); and to relieve gas undertakers on terms and conditions where by reason of competition of electricity the undertaking has become unremunerative (Electric Lighting Act, 1889, §29).

There is no similar general power with regard to railroads: the one general act which deals with the matter, that of 1850 as amended in 1867, applies only to railroads authorized before 1867. This act requires sufficient ground and public notice, and permits the imposition of terms and conditions, particularly in the interest of shareholders; and capital and borrowing powers may be reduced in case of partial abandonment. The act of 1867 expressly makes the power of the Board of Trade to refuse authorization discretionary. Questions of compensation due to abandonment are determined by arbitration. For the abandonment of railways organized from 1867 on, special parliamentary authority is required (12 *Encyclopaedia of Laws of England*, 269).

In New York the change of a railroad route requires the consent of local authorities (Railroad Law, §24), and the abandonment of a parallel line acquired by merger or consolidation is dependent upon the consent of the Public Service Commission (§140); otherwise there are no explicit statutory provisions either for railroads or public utilities. There are general statutory duties to render public service, and commission powers to make corresponding orders; but if the Commission believes that no public interest would be subserved thereby, it need not make an order (*Agor v. N.Y. C. R. Co.* [1900], 8 State Dept. Rep. 305); and the courts do not necessarily afford a remedy against abandonment (*People v. R. O. & W. R. Co.* [1886], 103 N.Y. 95).

Under the Interstate Commerce Act, as amended by the Transportation Act of 1920, the certificate of convenience and necessity is required for abandonment as well as for new construction, and the same provisions apply to both. There is consequently the strongest administrative control, and rights of abandonment under state laws count for nothing where the road in any way serves interstate commerce.<sup>14</sup> It should also be noted that while as against the state abandonment generally means the repudiation of a charter duty, there is no charter ob-

<sup>14</sup> On the other hand, federal authority to abandon is conclusive without state concurrence (*Colorado v. United States*, 271 U.S. 153).

ligation toward the United States, so that the power exercised by the Interstate Commerce Commission is not in the nature of a dispensing power.

§167. *Administrative control over consolidation and related arrangements (lease, stock control, traffic agreements, pooling).*—Until very recently, in so far as there was general legislation, it was friendly to arrangements welding connecting lines into one system and hostile to arrangements in restraint of competition.

In England the matter of consolidation or lease is entirely controlled by the special act provisions; but an act of 1864 empowered the Board of Trade to grant certificates (to be operative as acts of Parliament) for working agreements between railways. A six months' delay in the taking effect of each certificate enabled either house of Parliament to interpose its veto. The certificate is by the act required to be preceded by hearings, the grant in the discretion of the Board, and subject to provisions that may be inserted in it for better effectuating its purpose. The Board of Trade under the same act may also authorize the execution of joint works by railway companies.

In New York, before the advent of commission control, the general railroad law (statutes of 1867 and 1869) provided for leases and consolidations; and the act of 1869 prohibited the consolidation of parallel or competing lines. Under the present legislation the approval of the Public Service Commission is required for all these arrangements: for consolidation of railroads "so far as permitted by law" (Railroad Law, §§140, 150), and for a lease, surrender of capital stock, and issue of new stock by the lessee (§§148, 149; the leasing of competing lines is now also prohibited); for the acquisition by any stock corporation of railroad stock as collateral, and for the increase of the holding of railroad stock under specified circumstances (§§54, 70, 83, 99 [2]); for the consolidation or merger of gas and electric light corporations (Transportation Corporation Law, §61) and for the holding by any stock corporation (not already owning the majority of stock) of more than 10 per cent of the stock of any telegraph or telephone company (§100).

This whole matter is of course affected by the control over capital issues and, so far as interstate carriers are concerned, by the Interstate Commerce Act.

The Interstate Commerce Act originally left these matters untouched except for an absolute prohibition of pooling (§5), and stock control was dealt with by section 7 of the Clayton Anti-Trust Act of

1914. In 1920, however, the matter of pooling was placed under the control of the Interstate Commerce Commission, if in its opinion it had no tendency to unduly restrain competition (upon hearing, if in interest of better service or economy, assent by all involved, on terms and conditions). At the same time the Commission was empowered, after hearing, to approve and authorize the acquisition by one carrier of the control of another by lease, acquisition of stock, or in any other manner not involving consolidation into a single system (likewise on terms and conditions thought reasonable [§5 (2)]).<sup>15</sup>

Under the same amending act, commission approval is required for the employment of a person as officer or director in more than one carrier company, and the approval is to be on due showing that public or private interests will not be adversely affected (§20a [12]).

A policy favorable to railroad consolidation was inaugurated in the United States by the Transportation Act of 1920 and in England by the Railways Act of 1921.

The English act is mandatory: it specifies the amalgamations to be effected, and creates for the purpose an Amalgamation Tribunal consisting of three Commissioners named in the act. It calls for co-operation of the companies, requiring schemes to be submitted to the tribunal which confirms a scheme if it is in accordance with the statute; or, upon failure to submit such a scheme, settles one in accordance with the act, which specifies the controlling considerations and the procedure to be followed, and permits appeals up to the House of Lords. It is stated that by the end of 1922 most of the amalgamations had been carried into effect voluntarily (33 *Economic Journal* 19, 22).

The Minister of Transport may, moreover, authorize the purchase, lease, or working by one company of any part of the system of another; and he may consent to a combination, pooling, or allocation of traffic, and the joint working of subsidiaries (§§18, 19; section 19 is somewhat obscure, apparently providing that it is unlawful without the consent of the Minister to enter into pooling agreements or combinations contravening the purposes of the act).

The American provision is not mandatory. The Interstate Commerce Commission is to prepare consolidation plans, the act laying down general considerations and making the power continuing. Consolidations in accordance with the plan are relieved from other statutory prohibitions; but each consolidation requires the approval of the

<sup>15</sup> See §62, *supra*, note referring to 71 I. C. C. 128.



Commission which is to be given only on notice and hearing, and may be given subject to terms and conditions [§5 (4, 5, 6)].<sup>16</sup>

§168. *Administrative control over finance—England.*—The matter of financing public utilities may be affected indirectly by accounting requirements or directly by provisions concerning what in English legislation are called "capital powers."

Since in England capital powers are entirely controlled by law, accounting provisions are for this purpose of minor importance.

An act of 1840 gave the Commissioners of Stamps power to direct or approve the form of railway accounts (§20).

An act of 1868 prescribed the forms of railroad accounts in a schedule, but authorized the Board of Trade to alter with the consent of a railway company the schedule forms in order to adapt them better to the affairs of the company.

An act of 1911 concerning railroad accounts contained a schedule fixing in considerable detail the form of accounts; this schedule was made alterable by the Board of Trade upon notice; and if railroad companies representing one-third of the aggregate railroad capital of the country were dissatisfied with the disposition of their objections, the order of the Board of Trade required parliamentary confirmation.

Finally the Railways Act of 1921 (§77) provides that the forms of accounts, returns, and statistics are determined by the Railway Clearing House with the approval of the Minister of Transport; and if the Minister does not approve, the matter is referred to a committee specified in the act. The requirements so fixed are upon the application of the Minister enforced by the Railway and Canal Commission.

With regard to electricity works, by section 6 of the act of 1899, accounts are audited by an auditor appointed by the Board of Trade; and by section 27 of the act of 1919 accounts and returns are to be submitted to the commissioners created by the act in the form and manner required by them.

Capital powers of public utilities are in England so completely determined by the authorizing special acts that additional laws are mainly in the nature of relaxing provisions. Two of these laws refer to railways (acts of 1864 and 1868); the latter operates without administrative powers; the former provides for raising additional capital un-

<sup>16</sup> The English Electricity Supply Act of 1926 gives to a newly established Central Electricity Board power to authorize the compulsory acquisition of any station unwilling to accept arrangements satisfactory to the Board, by any authorized undertaker, subject to the veto of either house of Parliament (§5).

der specified limitations by certificate of the Board of Trade which may contain provisions "for the better effectuation of its purposes," is amendable by the Board (but only on application of the company), and subject to annulment by either house of Parliament within six weeks after the certificate is laid before it.

Another act, of 1920, relates to other public utilities (gas, water power, electricity, tramways, light railways); it authorizes the Board of Trade or Minister of Transport to vary or relax the provisions of special acts concerning character and terms of stock and debentures.

It is clear that there is little uncontrolled corporate discretion in the matter of capital issues.

§169. *Control over finance—New York and the United States.*—In New York and under the Interstate Commerce Act the matter of accounts is subject to commission control. New York has slightly varying provisions for common carriers and for several other classes of public utilities (Public Service Commission Law, §§52, 66, 80, 95 [2]). The Commission may prescribe systems of accounts; may in several cases determine apportionment between distinct classes of business or service; and may, after hearing, prescribe for common carriers the accounts in which particular outlays and receipts shall be entered, charged, or credited. The *Public Service Commission Report, Second District, 1908* gives an entire volume to systems of accounts for the various classes of public utilities.

The Interstate Commerce Act originally authorized the Commission to prescribe a period within which common carriers should have a uniform system of accounts and the manner in which such accounts should be kept (§5 [1]); it now also provides (§5 [5]) that the Commission may prescribe the form of all accounts, the classes of property for which depreciation charges may properly be included under operating expenses, and the percentages of depreciation in such case. By providing that the Commission for this purpose may classify carriers, the act indicates that the power cannot be exercised otherwise than by general regulation. Under the authority to prescribe the form of accounts, the Commission has specified what shall be operating expenses and what capital expenditure, thereby to some extent controlling capitalization even prior to the direct grant of power over capital issues.<sup>17</sup>

At present, both in New York and under the federal act, capital issues are placed under direct commission control, federal authorization,

<sup>17</sup> William E. Hooper, *Railway Accounting*, c. 3, pp. 36, 57.

however, superseding the necessity of state approval (Transportation Act, §20a).

New York had required official approval for the increase of railroad stock since 1880, and for the mortgaging of railroad property since 1892 (Railroad Law, §8 [10]).

The Public Service Commission Law applies to all capital issues (stocks, bonds, other evidences of indebtedness), and specifies in some detail the purposes of such issues. The Commission must by order authorize the amount and the purpose of the issue, and certify that the money, etc., is reasonably required. The Commission may relieve from the requirement that the purposes are not reasonably chargeable to operating expenses. The Commission is itself placed under limitations on its power to authorize the capitalization of franchises (§§55, 69, 82, 101).

The United States exercised no direct control over capitalization until 1920, when it introduced the requirement of Commission approval for the issue of securities or assumption of liability under securities (§20). The considerations which are to guide the Commission are stated in the law only in very general terms ("lawful object," "reasonably necessary and appropriate"). The Commission is to investigate, but the holding of hearings is discretionary. The application may be granted with modifications and subject to terms and conditions,<sup>18</sup> and supplementary requirement may be made. As in New York, the requirement does not apply to limited amounts of short-term notes (two years, New York one year), which however must be notified to the Commission.

These provisions make it clear that future capitalization is placed under almost absolute administrative control.

§170. *Administrative powers in connection with service facilities and services—England.*—English legislation concerning facilities has in the past been conservative. It is probably impossible to generalize concerning facility provisions of special acts (compare [1894] 2 Q. B. 694, *infra*, with *King v. Severn R. Co.* 2 B. and Ald. 646); in any event until 1888 there was no readily available jurisdiction to enforce duties under special acts. The Traffic Act of 1854 established a general duty to furnish all reasonable traffic facilities on the company's own road, and for traffic from continuous or connecting lines, also all reasonable accommodation to the public, and prohibited unreasonable preferences or advantages in favor of particular persons or companies and undue or

<sup>18</sup> See §61, *supra*.

unreasonable prejudice. Jurisdiction to enforce this by restraining contravention and enjoining obedience (and by pecuniary penalty for violating the injunction) was vested by the act of 1854 in the Court of Common Pleas, by the act of 1873 in a Board of Railway Commissioners, and by the act of 1888 in the judicially constituted Railway and Canal Commission; and the latter act extended the jurisdiction to violation of special charter requirements. After an adverse decision an act of 1904 gave power to order private sidings (11 Ry. and Can. Traffic Cases 96). The courts construed the statutory obligation narrowly: facilities were required only so far as a railway or a station was in use (*Darlaston Local Board v. L. & N. W. R. C.* [1894], 2 Q. B. 694); and while it was no objection to an order that it could not be carried out without structural arrangements, the Commission had no power to transform the general into a specific duty "depending on any mere exercise of the Commission's own judgment," such a power being considered more suitable to a "practical or scientific," than to a legal tribunal (*South Eastern R. Co. v. Railway Commissioners*, 1881, 6 Q. B. D. 586, 591).

This conservative attitude is abandoned by the Railways Act of 1921, which creates comprehensive powers to order or authorize service facilities. The act distinguishes between authorizations and orders; the former are granted by the Minister of Transports, while orders are issued by the Railway and Canal Commission when they relate to services facilities and conveniences, and by the Minister when they relate to the gradual standardization of ways and equipment and to schemes for co-operative working or common user of rolling stock, shops, etc. Apparently it is contemplated that the latter class of orders are of a further-reaching, quasi-legislative character, and on the demand of any company they must be prepared by a representative committee; once made they are enforced by the Railway and Canal Commission. The orders made by the Commission in the first instance are merely required to be in the interest of the public, of the trade, or of any particular locality, and must be applied for by a body of persons representing such interest; and they may include minor extensions or improvements not in any one case involving an expenditure of more than £100,000. Neither class of orders is to be made if the necessary capital expenditure will prejudicially affect the then existing stockholders. For the purpose of making the orders effective, the Minister may authorize the acquisition of lands and easements.

The Railways Act also gives powers with regard to freight carriage

conditions: the companies are given a chance to submit proposals with regard to three classes of conditions specified in the act, and the Rates Tribunal finally settles them, whereupon they become reasonable standard terms, subject to alterations from time to time upon the application of either railroad companies or representative bodies of traders (§§42-45).

With regard to service facilities of public utilities other than railroads, England has for some time pursued a policy of liberal delegation of administrative powers.

Under the gas acts, administrative powers are divided between magistrates, local authorities, and central departments: a magistrate deals with complaints regarding illuminating power and issues specific orders to remedy them (act of 1860, §30),<sup>19</sup> while the Home Secretary investigates complaints of consumers and orders the removal of the cause of complaint (act of 1860, §54; 1870, §4). Gas meters are required to be officially stamped (act of 1859, §3); and the Gas Act of 1920 provides for gas referees and local gas examiners and a chief examiner to test gas.

The Electricity Act of 1899 (§10) requires the approval of the Board of Trade for any system of supply. The Board may require new connections in accordance with the special order controlling each undertaking. New connections are also required upon the promise of owners to take service; but if the charges therefor are to exceed the statutory limit the Board must approve; and an appeal to the Board of Trade lies from the requisition by owners.

Elaborate provisions involving powers to approve patterns, order repairs, establish tolerances, etc., are introduced by the act of 1899 (§§39-59) concerning the use and testing of measuring devices and meters.

Consent and approval requirements exist with regard to breaking of highways, laying of overhead wires, earth connections, insulation of mains, street works, erection of generating stations,<sup>20</sup> supply of haulage and traction, supply outside the area of the undertaking (not where the contrary was specially stipulated in favor of another undertaking), and the transfer of powers. The consent power in some cases

<sup>19</sup> The magistrate also determines the security which entitles a consumer to the supply of gas (act of 1860, §16).

<sup>20</sup> The act of 1919 makes the refusal or conditioning of consent to public generating stations dependent on prior local inquiries.

belongs to the local authorities; and consent may in case of all street works be given on terms and conditions, subject to an appeal to the Board of Trade (1899, §14).

It will be noted that with regard to neither gas nor electricity service are there such sweeping comprehensive directing powers as we find with regard to them in New York, or with regard to railroads in England under the law of 1921.<sup>21</sup>

§171. *Powers over service—New York.*—The present law vests large powers in the Public Service Commission. While certain specific requirements of the earlier railroad laws have been retained without substantial change (checking baggage, sale of tickets for connecting steamboats [Railroad Law, §§66, 69]), the more important of them have been made subject to commission regulation (sufficient and suitable cars [Public Service Commission Law, §37]) or to commission orders (switch connections if safe, practicable and sufficient business [*ibid.*, §27]; equal connecting facilities to other roads competing with each other [Railroad Law, §55<sup>22</sup>]). So certain relaxing provisions of the earlier law are now subject to commission approval (discontinuance of service in winter [Railroad Law, §§85, 86]).

Moreover the Commission is given important dispensing powers: it may permit the use of motive power other than that specified by law (Railroad Law, §180), the substitution of other in lieu of statutory safeguards (§15), the discontinuance of full stops at intersections when impracticable or upon the instalment of specified apparatus (§56); and it may make exceptions from the right of the shipper to determine the routing of shipments (Public Service Commission Law, §41).

Apart from this, the service duties of the several classes of public utilities are laid down in general terms: "safe," "adequate," "just," "reasonable," "without discrimination" (*ibid.*, §§26, 65, 79, 91),<sup>23</sup> and their specification is left to the Commission which is empowered to order improvements or additions or changes in the interest of security,

<sup>21</sup> Large powers of co-ordination and standardization are, however, vested in a Central Electricity Board by the Electricity Supply Act of 1926.

<sup>22</sup> The duty to haul cars of other common carriers does not refer to commission direction (Public Service Commission Law, §35).

<sup>23</sup> The Public Service Commission Law omits the prohibition of discrimination in the case of common carriers, but the Railroad Law (§54) has such a prohibition in somewhat ambiguous form and without reference to Commission direction.

convenience, or adequate service.<sup>24</sup> There is further provision for formal complaints to the Commission concerning violation of the law or orders, with power to the Commission to order satisfaction of the complaint to the extent specified by it (Public Service Commission Law, §§48, 71-73, 84-86).

§172. *Powers over service—United States.*—The service requirements of the Interstate Commerce Act, prior to 1920, were few: the act of 1887 prohibited, substantially in the same form as at present, undue or unreasonable preference or advantage to any person, locality, or description of traffic, or any undue or unreasonable preference or disadvantage, and established the duty to afford reasonable, proper, and equal facilities for interchange of traffic between carriers, without undue prejudice to any connecting line in the distribution of traffic. These provisions were modeled upon the English Act of 1854.

The act of 1906 added the duty to grant switch connections and furnish cars therefor, the prerequisites (practicability, safety, sufficient business to justify, reasonable terms) to be determined by the Commission (amendment to section 1).

Most of the present requirements are additions by the Transpor-

\* The provisions are that if the Commission, on hearing, on complaint, or on its own motion, finds that regulations, practices, equipment, appliances, or service are unjust, unreasonable, unsafe, improper, or inadequate, it may make an appropriate order and the carrier, etc., must do everything to secure absolute compliance (§49); that on hearing, etc., (as before) the Commission may order in the manner specified by it additional facilities, repairs, or changes that should reasonably be provided to promote security or convenience of the public or employees or to secure adequate service or facilities (§50); that it may require several companies to agree on joint facilities and divide the cost (not to include the erection of a union station, §50); that it may order increase of number of cars or trains or motive power or change time schedules (§51); that in the largest cities it may fix the maximum number of passengers in street cars (§51A); that it may order through routes and joint rates between connecting carriers and require, or on default declare, apportionment of rates, with elaborate specific powers as to connection between rail and water carriers, to be exercised only when reasonably practicable and where the amount of existing or prospective business justifies the outlay (§49); to require (except as between street railroads and other roads not reaching same points) the construction of interchange tracks (§49); to secure to several connecting roads equal accommodations (§55). The powers over gas and electric and telegraph and telephone companies are less specific, but equally comprehensive, specifically including reasonable extensions (§66, [1]). The meters of gas and electric companies must be inspected and sealed, and they must maintain facilities for testing them as required or approved by the Commission (§67).

tation Act of 1920; they cover the use of existing facilities, the addition to plant or equipment, and arrangements between different carriers.

The Commission, on complaint or on its own motion after hearing, may establish reasonable car service rules and practices, including compensation for use, and sanctions for non-observance. In case of emergency it may suspend rules and make car service directions in the interest of the public and of the commerce of the people<sup>23</sup> (with or without notice or hearing; but compensation fixed after hearing), and may also on terms (found just on hearing) require such common use of terminals as will best meet the emergency and serve the public interest (§1 [13-15]).

When a carrier is unable to transport traffic so as properly to serve the public, the Commission may give directions as to handling, routing, and movement of traffic. The conditions of the exercise of the power are the same as in case of car service (§1 [16]).

As between carriers, the Commission may order one carrier to permit another to use its terminal facilities and track approaches, if this is practicable without substantially impairing the ability of the first carrier to handle its own business. The compensation is to be fixed on principles controlling in compensation proceedings, and the carrier if not satisfied with the terms may sue in court (§3 [4]).

As between rail and water carriers, the Commission may direct physical connections from rail to dock, subject to a finding of public convenience and necessity. It may then establish terms of operation. It may also require any carrier having arrangements with foreign water carriers for through business from interior to foreign points to enter into similar arrangements with other foreign steamship lines between the same port and the same foreign country (§6 [13]).

Finally the Commission may, after hearing on complaint or on its own initiative, authorize or require a carrier to provide itself with safe and adequate facilities for performing as a common carrier its car service, and to extend its lines. The extension must be one reasonably required in the interest of public convenience and necessity; and the expense of neither extension nor facilities must impair the ability of the carrier to perform its service to the public (§1 [21]).

§173. *Comment.*—It appears that there has been in recent times a rapid expansion of administrative powers in the matter of service facilities of public utilities; the nature of these powers therefore de-

<sup>23</sup> See §50, *supra*.



serves attention: they are directing rather than enabling powers (i.e., orders rather than authorizations); there has been a change from prohibition to requirement, and the requirement must often in its nature be specific (i.e., adapted to particular circumstances, and therefore operative by way of particular order rather than by general rule); considering that these powers serve economic purposes, the result is a very decisive interference with the private right to manage an undertaking. The extreme in this direction is reached when power is given to require substantial extensions of service involving new construction not of a minor character.

It is worth noting that in England extension requirements are checked by expenditure limitations, while the New York Public Service Commission Act and Interstate Commerce Act limit only by the vaguest qualifications; the Interstate Commerce Act however fails to support the duty to extend a railroad by a corresponding power to acquire property by condemnation, which power continues to rest upon state law. The law concerning this particular exercise of administrative power has obviously not yet received its full development.<sup>26</sup>

§174. *Administrative powers in the interest of safety.*—The physical aspects of public utility instrumentalities involve public interests very different from those affected by the economic aspects of their services; and the course of legislation has therefore been, in part, separate and distinct.

English legislation was for a long time conservative in the grant of administrative powers. Under acts of 1842 and 1873 the Board of Trade had power, upon the report of an inspector, to postpone the opening of a railroad until a satisfactory report of compliance with the law was received from the railway company (1842, §6; 1873, §6). After a road was once opened, the Board of Trade might in case of an accident institute an inquiry, but this could result only in "observations," not in orders (1871, §§6, 7).

The act of 1842 also gave the Board of Trade power to determine disputes between railway companies regarding safety measures and to apportion the expense of the same. Other acts gave minor powers (1845, §63, relating to works necessary to deal with the frightening of animals; 1868, §24, removal of trees liable to fall on the tracks).

In the matter of grade crossings, there was an advance from enabling to directing powers: under the act of 1842 (§13) the Board of Trade might, on application, authorize the necessary works (subject to

<sup>26</sup> See also §46, *supra*.

compensation to those whose rights were interfered with); while an act of 1863 gave the Board the power to require such works (§7), and upon certificate of the Board to take the necessary lands (§28). The latter act made grade crossings and the manner of watching them subject to the approval of the Board.

The instalment of block systems, interlocking signals, and continuous brakes was authorized to be ordered by the Board of Trade, by the Railway Act of 1889, subject to exceptions and modifications, with due regard to the nature and extent of the traffic and after hearing; the enforcement of such order being intrusted to the Railway and Canal Commission.

For the protection of railway employees a comprehensive rule-making power applicable to specified risks is vested in the Board of Trade by an act of 1900, the rule-making procedure being carefully specified in the law. The law provides that where, in the opinion of the Board, the requirements of the case would be better met by a specific order or direction than by a general rule, the Board may make such order in the manner and subject to the provisions applicable to the general rule. The Railway and Canal Commission is given jurisdiction to consider and sustain objections to the rule, or order, before it becomes effective, and also to enforce compliance with it after it is made. The Board of Trade also determines how much of the necessary expense is chargeable, and may be met, as a capital expense.

Prior to 1921 there was no similar directing power with regard to railway safety in general, but the sweeping power of section 16 of the Railways Act of 1921, before referred to in connection with service facilities, may also be exercised with a view to security and promoting the public safety.

With regard to electric lines or works, the Board of Trade may under specified conditions issue orders in the interest of public safety, to be followed in case of non-compliance by orders of removal which are enforced by a court of summary jurisdiction (Electric Lighting Act, 1888).

The Railroad Law of New York contains a number of directly operative provisions, most of them antedating the creation of the Public Service Commission (fencing and cattleguards; signboards and flagmen; duty to inspect boilers; engines, coal jimmies, airbrakes, and couplers). The present railroad law makes many of these requirements subject to Commission approval or Commission direction, so with regard to flagmen, gates and signboards (§53); safety devices,

and intersection of steam and street railroads (§56); manner of street crossings, the statute regulating the expense of abolition of grade crossings, while the Commission institutes proceedings, apportions expense among railroads, and supervises accounts as between roads and municipalities (§§89, 90, 94, 95<sup>27</sup>); means of lighting and ventilating tunnels (§§102-5); requiring the removal of incompetent boiler inspectors (§72). Dispensing powers are found in Railroad Law (§§56, 75, 89). In addition the Public Service Commission Law makes the general order-issuing power of the Commission applicable in the case of unsafe as well as inadequate services (§49 [2]).

Congress has dealt with safety on railroads by a number of acts outside of the Interstate Commerce Act and by amendments of the Interstate Commerce Act. Most of the provisions of the former acts operate directly without depending on Commission action, but giving in several instances to the Commission either dispensing powers or powers to act only on default of the carriers or their representative organization (American Railway Association). The Boiler Inspection Act of 1911 and 1915, which in general follows this system, makes the carrier's rules and regulations dependent upon the approval of the Commission, and gives power to order the discontinuance of the use of defective boilers, to inspectors appointed under the act, subject to appeal first to a chief inspector and then to the Interstate Commerce Commission.

The Interstate Commerce Act deals with safety in two amendments added by the Transportation Act of 1920.

The one, now section 26 of the act, empowers the Commission to order, after investigation, any carrier (giving at least two years for compliance) to instal train stop or train control or other safety devices, complying with specifications and requirements prescribed by the Commission. It seems that the other devices are to serve the general purposes of train control and that the selection of a particular type is to be left to the carrier.<sup>28</sup>

The other, now section 1 (21) of the act, in giving the Commission the general directing power above referred to in connection with service facilities, speaks of safe and adequate facilities for performing car service, the only limitations being a hearing and that the expense

<sup>27</sup> The matter of grade crossings was regulated by law in 1897; the earlier reports of the Railroad Commissioners (1886, 1887) had suggested the vesting of important powers in connection therewith in the courts.

<sup>28</sup> Mac Veagh, *Transportation Act of 1920*, §§311, 512.

will not impair the ability of the carrier to perform its duty to the public.

A review of the safety powers thus outlined shows a great liberality of delegation under the more recent legislation, and this is apparently due to the combining of safety and adequacy of service in the same grant of power. In New York the earlier policy had been specific and direct statutory requirement, and the present undefined delegation is accompanied by grants of power with reference to specific subjects which in part are qualified (e.g., in the matter of abolition of grade crossings), and which on general principles of construction perhaps serve to modify the more general delegation. In England the earlier policy was to rely upon the carrier's own interest and initiative, in the United States at least until the carrier had been placed in default; while at present the more comprehensive provision of the Interstate Commerce Act (§1 [21]) places practically only a procedural check (requirement of hearing) upon administrative discretion, and the English Railways Act applies limitations only to capital expenditures and structural improvements. Perhaps it was felt that safety should at least stand on a par with economic considerations; in any event, the policy is too recent to permit of extended comment.

§175. *Administrative powers concerning charges and return—England.*—In England it is convenient to distinguish railroad charges from those for other public utility services. Water, gas, and electric charges were in general regulated by the respective special acts authorizing each undertaking, and one of the methods of regulation was the system of sliding scales which established statutory standards in inverse relation to dividends.<sup>29</sup> In addition the earlier legislation vested price-reducing powers in the courts (Quarter Sessions as to gas and water in 1847). As regards electricity, the act of 1899 required the approval of the Board of Trade for the method (basis) of charge, and authorized the Board to establish maximum prices, alterable on the application of either the undertaker or the consumers at intervals of five years (act of 1899 as amended in 1909). With regard to gas undertakings, relieving powers were given to the Board of Trade, to be exercised by reason of electricity competition (act of 1889) or by reason of changes of conditions since 1914 (act of 1920).

In the policy toward railway charges, three periods may be dis-

<sup>29</sup> R. H. Whitten, *Regulation of Public Service Companies in Great Britain* (New York, 1914); see for example the provision of the Gas Act of 1873 that in case of an increase of gas prices dividends may not exceed 5 per cent.

tinguished: that before 1888 (1894), that from 1888 (1894) to 1921, and the present. It should be borne in mind that every special authorizing act deals with charges in some way, but apparently in most cases without recourse to administrative power.

(i) *Prior to 1888.*—Powers are of a special or minor character: to order the submission of tables of rates (1840, §3), to approve traffic or rate agreements where authorized by special act (1863, §25; 1873, §16), to order (on application) the segregation of any particular traffic rate into its constituent parts (1873, §14), to determine disputes regarding terminal charges and decide what are reasonable sums (1873, §15), and to compel through rates (1873, §§11, 12). These powers were vested in the Board of Trade, or, under the act of 1873, in the Railway Commissioners.

More general, but apparently without much consequence, was the power given in 1844 to the Commissioners of the Treasury to reduce the rates of a railway company after twenty-one years of operation in order to reduce profits to a stated percentage, the power then not to be again exercised for twenty-one years.

The act of 1864 authorizing railways which could be constructed without powers of condemnation, fixed maximum charges and authorized the Board of Trade to vary them (§50); but that act had of course a most limited application.

A power to order workmen's trains and fix fares given in 1883 was supported only by the loss of the benefit of a lower tax.

Altogether there was no important administrative power over railroad charges.

The provision in the act of 1854 against undue preferences operated as a direct statutory prohibition.

(ii) *From 1888 (1894) to 1921.*—The Act of 1888 created the Railway and Canal Commission, which still exists. It has the status of a court of record: three of the Commissioners are judges assigned to act in that capacity, while two others are appointed by the Lord Chancellor and are removable by him for misbehavior; enforcing powers are like those of a superior court, but punishment for contempt requires the concurrence of a judge-commissioner. The powers under the act are exercised in part by the Board of Trade, in part by the Commission.

The Board of Trade acts by way of recommendation and mediation. The act provides for revised schedules and classifications: the railway companies are given the first opportunity to propose them; the

Board of Trade settles them by provisional order which becomes effective upon confirmation by Parliament (§24); and under section 31 anyone (including public authorities and trade associations) complaining of unfair or unreasonable rates or oppressive or unreasonable treatment may apply to the Board of Trade, which, if there appears to be reasonable ground, calls upon the company for an explanation and seeks to settle the dispute amicably, having power to appoint for the purpose a paid intermediary. The Board reports the complaints and the result of its action to Parliament, without determinative power of its own.

Where the act gives determinative powers, it vests them in the Commission. The powers relate in the main to through rates and preferential rates. On failure of companies to agree, the Commission may fix through routes and rates and apportion them; on objection the Commission must consider whether they are due and reasonable in the public interest; nor must the rate allowed to a Company be lower than what it may legally charge for the same mileage between the same points on another line of communication by a like mode of transit for like traffic (§25; this section is quite elaborate).

As regards undue preference, the prohibition of the act of 1854 is strengthened: differentiation between home and foreign merchandise is forbidden (§27); the burden of proof that a lower charge for similar services is not preferential is thrown upon the railway company; the Commission may direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway (§27); and the Commission may rescind or vary group rates as unduly preferential (§29).

On application certified to by the Board of Trade, the Commission may also readjust canal rates which a controlling railway company has fixed so as to divert traffic to the railway (§38).

The Commission is given jurisdiction to determine any dispute involving the legality of any charge for merchandise traffic, to enforce payment and award damages; but no damages may be awarded for preferential rates where they had been duly published, unless a prohibiting order with regard to them had been previously issued (§§10, 12). Orders may apply to two or more companies which must then submit schemes of arrangements (§14).

There is no provision in the act of 1888 making unreasonable

rates unlawful (as there is in American statutes) or giving the Commission jurisdiction by reason thereof.

However, by an act of 1894 the Commission is given jurisdiction with regard to any complaint that any increase of rates is unreasonable, but only after a complaint on that ground has first been considered by the Board of Trade. The burden of proof that an increase is reasonable lies on the railway company, and it is not sufficient to show that the charge is within a statutory limit. This provision is repealed by the Railways Act of 1921.

(iii) *Under the act of 1921.*—As before stated, a Rates Tribunal is created which is in part composed of representatives of interests chosen from "panels" formed for the purpose. This act distinguishes standard charges and exceptional rates. The standard charges are settled by the Rates Tribunal upon submission by the companies and hearings. They may be modified upon the application of any party in interest (§§27, 30, 31, 35).

The act prescribes, in addition to numerous miscellaneous provisions contained in the Fifth Schedule, that charges be fixed so as to yield a revenue determined by reference to a number of specified data (revenue of 1913, plus a stated percentage of specified capital expenditure since then, plus adequate remuneration for certain additional capital, with regard for insuring maximum development; with power to consider revenue derived by the company from subsidiary businesses). The charges are to be annually reviewed on the experience of the last three years; this review is mandatory upon request either of the company or of the Board of Trade; in the absence of such request, only if the Minister directs the review.

Revenue produced in excess of the standard revenue is to be reduced, unless unlikely to continue, by a stated percentage; if the standard revenue is not reached, rates are to be raised (Act, §§58, 59).

Exceptional rates are only of the classes specified in the act. As to those existing at the commencement of the act, after their discontinuance for two years they may be continued if the Rates Tribunal is satisfied of the existence of stated justifying circumstances: new exceptional rates must be reported, and those exceeding a stated variation must be approved; the Minister may refer the rates to the Rate Tribunal. Exceptional rates may also be ordered on application of a trader.

If the increase or the cancellation of an exceptional rate is objected to, it requires approval. If an exceptional rate in competition with water traffic is unremunerative, the Rates Tribunal on representation

may make such order as it may deem expedient. There are complex provisions as to determining the elements (disintegration) of an exceptional rate.

Exceptional passenger fares, if below the ordinary fares, must be reported to the Minister, who, if of opinion that they prejudice other users or jeopardize the standard revenue, may refer them to the Rates Tribunal, and the Rates Tribunal may cancel or modify the fares (§§36, 37, 38, 39, 40, 41).

There are also powers with regard to through rates (§§47, 48, 49, 75), and to competitive traffic charges where there is more than one route between two places (§52 on long-and-short haul), which need not be noted in detail; the tribunal may reduce rates for goods carried at the owner's risk (§46); and it determines any question as to the reasonableness of fares, where ships are used or provided by a railway company (§53).

It thus appears that the act of 1921 changes the rate control policy radically, both from what it was before 1894, when there was a power of interference only in case of illegality, and from the system of the act of 1894 (now repealed), which gave power over unreasonable rates in case of proposed increases, throwing the burden of proof on the company. The Rates Tribunal now exercises a standard-establishing, not only an abuse-correcting, power; but the power is subject to a statutory guidance more detailed than found in any American legislation. As stated by Sir W. M. Acworth, the eminent English railway authority, the act transfers the control of a subject essentially economic from the rigidity of statute law and the formalities of a law court with its precision of issues and its strict limitation of the parties to the issue, to a business tribunal with the function of surveying the question in all its bearings: of securing, on the one hand, from the traffic as a whole a reasonable return to the companies on the capital invested, and of seeing, on the other hand, that each separate class of traffic contributes, on what may be called "equality of sacrifice" principles, its fair share of the total sum required.<sup>30</sup>

§176. *Powers over rates—New York.*—The first Commission law of 1882 gave the Railroad Commissioners jurisdiction to take action where a corporation unjustly discriminates in its charges for services (§5) and, after a full hearing, where any change in the rates or fare for transporting freight or passengers is reasonable and expedient

<sup>30</sup> See 33 *Economic Journal* 19.



in order to promote the convenience and accommodation of the public (§6)—a phrasing strikingly different from the usual one permitting action only in the case of unreasonable charges. However, under the law as first enacted, the action under section 5 consisted only in a report to the Attorney-General for proceedings to be taken by him to protect the public interest, under section 6 in a like report for his consideration and action and a report to the legislature; and an express provision was added (§8) that the report should not impair any legal rights. This amounted to withholding from the Commissioners any determinative powers (see *People v. New York, L. E. & W. R. Co.*, 104 N.Y. 58).

An amendment of 1890 for the first time gave power to issue orders under section 6 with a duty of the railroad company to comply with such orders as should be just and reasonable. The Supreme Court, and on appeal, the Appellate Division and the Court of Appeals were given power to review and reverse on the facts as well as on the law; and a provision that the finding of the commissioners should be prima facie evidence was dropped in 1892 (Laws, 1890, c. 565, §§161, 162; 1892, c. 676).

By these provisions New York combined the widest administrative jurisdiction over rates with the most absolute subjection of the jurisdiction to judicial control. Probably the latter neutralized the former; the Commissioner's annual reports for a number of years<sup>21</sup> made a bare reference to rates, stating that there were few complaints, and after 1896 dropped the subject entirely.

The substitution of Public Service Commissions for the Railroad Commissioners in 1907 placed the law on its present footing, and generally speaking gave powers over rates similar to those of the federal law (i.e., exercisable on complaint only, unless in case of increase when there is a power to suspend [Public Service Commission Law, §29]); the power was made applicable to other public utilities as well as carriers. In view of the existence of statutory rates (which did not exist in federal legislation), these powers are made operative irrespective of a higher statutory maximum; and for gas, electric, and steam corporations sliding scale charges require the approval of the Commission (Public Service Commission Law, §§26, 27, 33, 36, 66, 71-73, 84-86, 97).

The annual Public Service Commission reports show that the subject of rates at once assumed a conspicuous place, much in contrast to

<sup>21</sup> See *Reports*, 1893-96.

the reports of the Railroad Commissioners. The principles of commission action are stated in the *Report of the Second Division, 1907*, pp. 36-54.

The method of the New York statute is to state the commission powers for each of the main classes of public utilities in general and only slightly varying terms, without laying down any specific considerations for the guidance of the Commission. In addition, the law has both direct statutory provisions and commission powers applicable to the typical problems covered by the federal law: through rates, long-and-short haul (subject, as in the federal law, to an administrative dispensing power), and rates affected by water competition (§§36, 37, 49). The commission procedure is prescribed in an introductory chapter, and judicial control is left to the general principles of the common law and the Civil Practice Act without explicit provision in the act.

The law also prescribes the filing of schedules, subject to an ample commission control, both generally or for particular cases (§28).

§177. *Powers over rates—United States.*—The powers of the Interstate Commerce Commission over rates may be summarized as follows:

The original act of 1887 prohibited unjust and unreasonable charges (§1), unjust discrimination in rendering like and contemporaneous service under substantially similar circumstances and conditions (§2), undue or unreasonable preference or advantage in favor of any person, locality, or description of traffic (§3), and the charging of more for the shorter than for the longer haul (§4).

The Commission was given a dispensing power with reference to the latter prohibition, and a general power to entertain complaints of violations of the act and to order the carrier to cease and desist from such violation (§15).

The Supreme Court, by holding that the orders to cease and desist could not be accompanied by a specification of a reasonable rate (*Interstate Commerce Commission v. Cincinnati, etc. R. Co.*, 167 U.S. 479), deprived the power over unreasonable rates of most of its effectiveness; and it was one of the main purposes of the Rate Act of 1906 to remedy this defect.

The Rate Act of 1906 made the power to prescribe reasonable rates, where there was a complaint of unreasonableness, explicit; and it added the power to establish, upon complaint, through routes and joint rates, and to prescribe the division of the latter upon failure of the carriers to agree.

In 1910 the power over unreasonable rates was enlarged by adding power over unreasonable or unjust classifications and practices concerning the receiving, handling, transporting, storing, and delivery of property; and by permitting the Commission to proceed upon its own initiative. The long-and-short-haul clause was made more definite by striking out the qualification of substantially similar circumstances and conditions, and by forbidding the charging of a greater compensation as a through rate than the aggregate of intermediate rates; but the greater definiteness of the prohibition necessarily enlarged the dispensing power of the Commission which was retained. A carrier reducing a rate to meet a competitive water rate was forbidden to raise the rate except upon a finding by the Commission, after a hearing, that the increase was due to conditions other than the elimination of water competition. Above all, the amendment of 1910 authorizes the Commission to suspend for a period specified in the act any new rate, classification, regulation, or practice, and after a hearing to make such order as would be proper after the rate had become effective, throwing the burden of proof as to the reasonableness of the proposed change upon the carrier; the Commission after hearing determines the maximum that may be allowed by a carrier to a shipper for services rendered by the shipper himself. The Panama Canal Act of 1912 applied to transportation by rail and water and gave power to the Commission to establish, after hearing, through rates, maximum joint rates, and proportional rates as defined in the act. The provision appears now in section 6 (13*b, c*) of the Interstate Commerce Act, omitting the "hearing" paragraph; but the same power subject to the requirement of hearing also appears in section 15 (3) of the act.<sup>82</sup>

As a check upon the rate-regulating power, Congress in 1913 provided for the physical valuation of all the property owned or used by every common carrier subject to the act. The valuation is intrusted to the Commission, which in its turn is required to state separately values determined by different principles (original cost, cost of reproduction, etc.) and to report an analysis of the methods of valuation employed.<sup>83</sup> The completed tentative valuation is subject to notice and hearing and may be changed by the Commission before becoming final. The final

<sup>82</sup> See Mac Veagh, *Transportation Act*, p. 309.

<sup>83</sup> See *Interstate Commerce Commission Reports*, Vol. 75, p. 508: "The act does not in terms provide that we shall report the value in a single sum; but inasmuch as the act, as we construe it, permits us to report it, and we have determined to do so, it follows we should state as best we may the methods. . . ."

valuation is made prima facie evidence in all judicial proceedings under the Interstate Commerce Act. This valuation provision appears as section 19a of the Interstate Commerce Act; but is supplemented by an apparently distinct power of valuation given in 1920 in section 15a of the act for the purpose of determining the basis of the fair return.

In 1915 provision was made for rates on valued goods. As since amended and made part of the present act, as section 20 (11), the Commission is empowered to authorize or require the carrier to establish rates dependent on declared or agreed value, thereby limiting liability in case of loss.

In 1917 Congress required for a limited period of time the approval of the Commission for any proposed increase of rates; this requirement expired by its own limitation on January 1, 1920, and while in force ceased to be of great practical consequence when a few months later the government assumed its war-time control of railroad administration.<sup>34</sup>

The provision is of interest as being the only American instance of rate regulation (other than in the case of dispensing powers) by way of approval requirement. Even in the case of proposed increase or change, the Commission exercises a directing and not an enabling power; it has power to suspend, but in the absence of its exercise the initial effectiveness of the rate (subject to subsequent corrective intervention) depends upon mere notice and filing. This method of dealing with rates is explained by the large number of tariffs filed, which annually run between 100,000 and 200,000;<sup>35</sup> it would be obviously impracticable to require an individual approval for each in view of the centralized administration of railroad supervision.

The Transportation Act of 1920 finally (in addition to a change of the long-and-short-haul clause declared by the Commission to be of little practical consequence in view of its previously established practice [see *Report, 1920*, p. 47]) enlarges the power of the Commission in two respects: it enables it to establish minimum as well as maximum rates; and, while preserving its reasonable latitude to modify or adjust unreasonable rates, also enables it, in the exercise of its power to prescribe just and reasonable rates, to initiate, modify, or establish such rates so as to produce a fair return. The fair-return provision is a first attempt to control the administrative rate-fixing power

<sup>34</sup> See *Commission Report, 1919*, p. 29.

<sup>35</sup> *New York Report (Second Division), 1909*, p. 54, shows 17,508 tariffs filed.

otherwise than by the mere requirement of reasonableness: the carriers as a whole or as rate groups are to be given the possibility of earning a net income equal to such return upon the aggregate value of the railway property used by them in the service of transportation, the percentage constituting the fair return (after an initial statutory rate now expired by limitation of time) to be fixed from time to time by the Commission itself.<sup>38</sup>

The aggregate value of the carrier's property is to be determined by the Commission from time to time. It may utilize the results of the valuation under the provision of 1913 and is directed in very general terms to consider all elements of value recognized by law for rate-making purposes. The valuation under the act of 1913 is to become binding only when finally ascertained; whether or not, until then, the Commission is given more binding power of valuation than it has under the act of 1913, is difficult to determine from the language of the act: but the reference to the "law of the land" was probably intended to leave the door open for the exercise of a judicial reviewing power.

Of the excess over the fair return resulting to any carrier from the uniformity of rates, one-half is to be paid into a general contingent railroad fund to be administered by the Commission; and the Commission may require security for, and prescribe terms and conditions of, payment. In its discretion the Commission may permit a carrier to retain excess earnings derived from new lines for a period not exceeding ten years, conditioned upon completion of construction within a time to be designated. These "fair return" and "recapture" provisions appear in section 15*a* of the act.

From the beginning the federal act required the keeping (and since 1889, the filing with the Commission) of schedules of charges, in the form prescribed and itemization required by the Commission, and the modification by the Commission of any proposed advance (now change) of rates; and in 1910 the Commission was authorized to reject and refuse to file any schedule not giving lawful notice of its effective date, the use of any such rejected schedule being made unlawful. These provisions are now incorporated in section 6 of the act.

Reviewing the history of the Interstate Commerce laws relating to rates, there appears a constant expansion of administrative power throughout, and in addition an important change of policy in 1920. Until then, the power of the Commission retained its original cor-

<sup>38</sup> It is understood that in 1922 the Commission fixed the fair return at 5.75 per cent.

rective character, proceeding upon some unreasonableness or injustice of the carrier's action, though in case of a proposed change the burden of proof of unreasonableness has since 1910 been thrown upon the carrier. There was a special statutory provision forbidding a carrier, who had reduced a rate for the purpose of meeting water competition, to raise the rate after the elimination of that competition, unless there were other valid grounds aside from that elimination. But since that rule was confined to water competition, there was nothing in the law to prevent a carrier to reduce a rate to drive out a competing land carrier and, after the successful accomplishment of that object, to raise the rate again to a figure not intrinsically unreasonable.

The act of 1920 apparently makes such a course impossible, since the power is now to prescribe minimum as well as maximum rates; and in section 15a (5) it refers to the establishment of uniform rates upon competitive traffic. There is the apparent anomaly that, as a matter of procedure under section 15 (1), the Commission, when proceeding against a particular rate, must find that it is unjust, unreasonable, discriminatory, preferential, or prejudicial, or otherwise in violation of any of the provisions of the act; but undoubtedly it will be held that the reduction of a rate to the detriment of competitive carrier is prejudicial or in violation of the provision for uniform rates upon competitive traffic.

The result is that the act of 1920, like the English Railway Act of 1921, though in less explicit terms, converts the rate-regulating power into a standardizing function. Apparently also the American act exercises less of statutory control over the administrative power than the English act. The latter fully defines the basic elements entering into the standard charges; the American act speaks only of a fair return upon the aggregate value of the railway property used in the service of transportation. The valuation is left to the Commission; if the more conservative provisions of section 19a (act of 1913) are to prevail rather than those of section 15a (act of 1920), its findings of fact are *prima facie* evidence, and if not accepted by the courts, can be corrected only by the Commission itself; the legal basis of the valuation is apparently left open for the courts to determine, since the Commission fixes different values based on different principles without anything in the act to indicate what principle is finally to prevail; if in this respect there is delegation of legislative power, the delegation is to the courts, not to the Commission. What is a fair return was initially determined by Congress but, since the statutory rate has expired by its

own limitation, is now left to the Commission, subject only to the judicial veto upon a confiscatory rate. If then the mere criterion of reasonableness will be controlled by the more definite criterion of a fixed fair return, this control will be supplied by the Commission itself, which will exercise a power truly legislative in character. There will then be an extent of delegation not ventured upon in England.<sup>37</sup>

§178. *Incidental and subsidiary powers in connection with public utilities.* (a) *Reparation power.*<sup>38</sup>—Both in the New York and in the federal law we find power given to the Commission to entertain complaints and require satisfaction or an answer to the complaint. Where, as under English Statutes, the answer as an alternative to satisfaction exhausts the power, the power is inconclusive and in the nature of mediation;<sup>39</sup> where the complaint is that there has been violation in respect of obligations phrased in terms so general as to become operative only by supplementary administrative definition, and the relief sought and given relates only to prospective conduct, the power of the Commission may still be regarded as administrative in character; but where the relief sought is satisfaction or reparation for injury suffered in the past, it is indistinguishable from similar relief theoretically given by a common-law cause of action for unreasonable charges, and the grant of administrative power encounters the difficulty of the constitutional guaranty of jury trial. As a consequence the American reparation provisions are hesitating and obscure: the commission's award of reparation is enforceable only by an action brought in court, and in that action the award is only *prima facie* evidence.<sup>40</sup> The Interstate Commerce Commission has expressed itself in favor of the abrogation of the power.<sup>41</sup>

A similar power to award damages was introduced in England by the act of 1888 (§§12, 13, 14); but the Commission in which it was vested was a court of record, and the power did not apply to merely

<sup>37</sup> See as to rate control, etc., §47, *supra*.

<sup>38</sup> See §8, *supra*.

<sup>39</sup> Under the English Railways Act of 1873 (§7) the Commissioners may afford the railway company an opportunity to explain; this is also substantially the extent of the power under the act of 1888, where the complaint is merely that charges are unreasonable.

<sup>40</sup> See sections 9, 13, and 16 of the Interstate Commerce Act and sections 48 and 96 of the New York Public Service Commission Act.

<sup>41</sup> The *Report of the New York Public Service Commission (Second District)*, 1909, p. 58, shows 137 reparation orders totaling \$3,680,235.

unreasonable rates, nor to preferential rates that had been duly published, until after failure to comply with requirements of the Commission.

(b) *Examining powers.*—The examining powers over English public utilities are not brought together in one provision as they are in American commission laws. The Railway and Canal Commission, being a court of record, has the ordinary incidental powers of a court to elicit evidence (Act, 1888, §18). The Board of Trade, not being a court, has no examining powers as such. An act of 1874 gives it power to hold inquiries and to delegate that power. When the Ministry of Transport was created in 1919, a similar power of inquiry was accompanied by power (supported by a penal provision) to require attendance of witnesses and the production of papers; the act of 1874 is silent as to such accompanying power.

In accordance with the general American practice, both the New York and federal commissions are given power, incidentally to determining on complaint, hearing, or investigation, to subpoena, swear, and examine witnesses, and call for the production of papers. As against recalcitrant persons, the power is made effective through calling in the aid of the regular courts (*Interstate Commerce Commission v. Brimson*, 154 U.S. 447).

Apart from the powers incidental to the reaching of correct determinations in particular cases, the commissions are empowered to require information to aid them in their general administrative functions.

In New York, where the law itself requires reports of railroad companies in great detail (the law of 1880 enumerated 183 items to be covered), the Public Service Commission may in addition prescribe the forms and contents of reports of the various public utilities; may require specific information and periodical reports, and has power to inspect, examine, and require the production of books, contracts, records, documents, and papers; and may require information or reports from the holders of the majority of the stock of a common carrier (Public Service Commission Law, §§5, 45, 46, 48, 66, 80, 95).

The Interstate Commerce Commission is given "authority to inquire into the management of the business of all common carriers, is required to keep itself informed as to the manner and method in which the same is conducted, and has the right to obtain from the carrier full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it is created" (§12; also §20 [1, 10]).



(c) *Enforcing provisions.*—The directing powers of the New York Public Service Commission are made effective by penalties attached to violation of, or non-compliance with, orders (§§56, 73, 102), and by provision for mandamus or injunction proceedings instituted by counsel of the Commission (§§57, 74, 103). Similar provisions are found in the Interstate Commerce Act (§16); and in England there is likewise provision for penalties and for enforcement through the Railway and Canal Commission, which has the power of a court to issue contempt process (Act, 1921, §16 [4], referring to Act, 1854, §3, and 1873, §6).

§179. *Procedural provisions.* (a) *English law.*—The English statute law does not furnish much material: there appears never to have been any general statutory direction as to Board of Trade procedure; but the act of 1919, creating the Ministry of Transport, provides that it may act with or through “assessors”; the procedure of the Railway and Canal Commission is that of a court. Nor are there remedial provisions applicable to the Board of Trade—judicial relief, in any case where it may be called for, being dependent upon general rules of common law and equity. These general remedies are made expressly inapplicable to the Railway and Canal Commission: its action is declared final on questions of fact and of locus standi; on other questions there is an appeal to a superior court of appeal (and under certain conditions further, to the House of Lords), and the court of appeal may draw inferences not inconsistent with facts expressly found by the Commission and necessary for the determination of questions of law (Act, 1888, §17).

(b) *American law.*—Under the legislation of New York and of the United States, the determinative powers are vested in commissions organized neither on a strictly bureaucratic nor on a strictly judicial basis.

Both the number of commissioners and the amount of business intrusted to them make some delegation natural; we thus find a provision in New York that one commissioner may hear and decide, but that an order to become effective must be approved and confirmed by the Commission (§11); under the federal act the delegation goes farther: by an amendment of 1917 the splitting up of the Commission into divisions (of not less than three members) is authorized, and each division exercises the power of the Commission (§17). Inquiries may be held by one commissioner, and papers may be examined by special agents and examiners (§20 [5]), and such special agents may general-

ly administer oaths, examine witnesses, and receive evidence (§20 [10]); the power to subpoena witnesses is, however, not delegated.

Both in New York and under the federal act the commission is to prescribe its own rules for its procedure; the Interstate Commerce Act requires forms and service of notices, etc., to be similar to those of the courts (§1); New York relieves the commission from "technical rules of evidence" (§20). The federal act has the important provision that on request the proceedings must be public (§17).

The acts indicate in connection with the various powers the jurisdictional requirements, if any, by using the terms "on complaint," "on its own motion," "on investigation," "upon hearing." The complaint requirement is relaxed by the provision that absence of direct damage does not prejudice (U.S., §13) and by specifically admitting organized interest representations as complainants.<sup>42</sup> The hearing requirement is of great importance since it compels the commission to support its action by the evidence appearing in the record.<sup>43</sup>

New York has the peculiar provision that, if required in the order, the person against whom it is issued must notify the Commission whether or not the terms of the order are accepted and will be obeyed (§23).

The non-legislative character of special orders was formerly indicated by a provision (§15 [2]) that they were to remain in effect for a period not exceeding two years; but this limitation has been dropped under both the New York and the federal law, and orders remain in effect for a specified time or until further order as the order may provide (N.Y., 23; U.S., 15 [2]).

A former provision of the New York law that all orders must be published in the annual Commission reports was dropped in 1921.

§180. *Remedial provisions.*—Under both the law of New York and the law of the United States the only generally applicable positive provision of a remedial character is that for a rehearing by the commission itself (N.Y., §22; U.S., §16). The rehearing is discretionary even where the first decision was by a division of the commission.

<sup>42</sup> In England the Railroad Act of 1873 provided for complaint by a person appointed by the Board of Trade (§2), and the act of 1888 made the decision of the Railway and Canal Commission on a question of "locus standi" non-appealable.

<sup>43</sup> "The use of the expression 'after a hearing' is conclusive that upon any such hearing the Commission must if it performs its duty take into consideration all the facts upon which its action should be based, and judge of those facts in the light of principle and of legal rights," *New York Public Service Commission (Second District) Report*, Vol. 1 (1907), p. 36.

There are no generally applicable provisions for judicial review.

Under the Railroad Law of New York there is an unrestricted appeal from a refusal of the commission to grant a certificate of convenience and necessity to the Appellate Division of the Supreme Court (§9), but no similar provision in the case of other public utilities.

There is also an appeal from commission orders in the matter of grade crossings, as from an order of the Supreme Court, to the Appellate Division and to the Court of Appeals (Railroad Law, §§89, 90, 91-97).

The Interstate Commerce Act gives a right to sue in court to determine compensation for the use of terminal facilities by another carrier (§3 [4]).

So far as the Clayton Anti-Trust Act is still applicable to railroad companies, the judicial control, both by way of enforcement and by way of review of cease-and-desist orders of the Commission, is regulated in substantially the same manner as in case of the Federal Trade Commission (§11 of act of October 15, 1914).

In the absence of special provisions judicial review rests on general principles.

Orders can be finally enforced only through the courts, since summary powers are withheld. Judicial enforcement normally means judicial review; but in the Interstate Commerce Act the courts are directed to enforce any order "regularly made and duly served" (§16 [12]).

In addition there are available for the contesting of orders before attempted enforcement the remedies of certiorari and injunction.

The New York provisions of the Code of Civil Procedure (now Civil Practice Act) on certiorari permit review on principles more liberal than the common law writ. As regards rate orders, however, the Public Service Commission Law requires that a judicial suspending order shall contain a specific finding, based on evidence and identified by reference thereto, that great and irreparable damage would otherwise result to the petitioner, and specifying the nature of the damage.

In the federal courts certiorari is not used, and the available remedy is injunction. This was recognized by the Rate Act of 1906 which referred to the remedy without expressly granting it (§16), and the remedy is now explicitly recognized and regulated by the District Court Jurisdiction Act of October 22, 1913.

It should be observed that when the Rate Act of 1906 recognized by implication the remedy by injunction, the commission powers believed to be in possible need of judicial control were in the main direct-

ing powers, to which injunctive relief is peculiarly appropriate. The same act, however, also gave greater importance to the dispensing power under section 4 (long-and-short-haul clause), and in the Inter-Mountain Rate Cases it was distinctly said that the exercise of that power was likewise capable of judicial correction (234 U.S. 476, 488, 490). Since then the Transportation Act of 1920 has added enabling powers of the greatest consequence, in the requirement of the certificate of convenience and necessity, and in the capital issues provision. It may be that these powers are controllable by injunction; but the natural remedy is mandamus to compel the commission to confine itself to lawful considerations in entertaining applications, leaving its determination within these considerations free.<sup>44</sup> Whatever its form, some remedy to control the important enabling powers added by the Transportation Act of 1920 is imperatively needed.

<sup>44</sup> For a case of mandamus in the Supreme Court of the District of Columbia, see *Kansas City Southern R. Co. v. Interstate Commerce Commission*, 252 U.S. 178; but the action of the Commission in that case was held to be ministerial. In two recent cases the Court of Appeals of the District of Columbia has denied mandamus to review decisions of the Interstate Commerce Commission (*U.S. v. Interstate Commerce Commission*, 8 Fed. 2d 901; *U.S. v. Interstate Commerce Commission*, 11 Fed. 2d 554).

## CHAPTER XVII

### ADMINISTRATIVE POWERS IN CONNECTION WITH MERCHANT SHIPPING

§181. *General status of legislation and administration.*—Under this head fall both maritime and inland navigation. It will, however, be convenient to ignore canal transportation: in England this is regulated chiefly by special acts or in connection with railway legislation; in the United States there is no interstate canal legislation except so far as it is covered by water transportation in general; and in Germany and in the state of New York the principal canals are state-owned.

New York has in addition to the canal legislation some legislation relating to navigation and to wrecks which is of relatively minor importance, and the administrative powers under which are noted below.<sup>1</sup>

Shipping legislation has been systematized to a considerable degree in the United States and in Great Britain. While some provisions are found in the customs laws, the bulk of the laws has been consoli-

<sup>1</sup> Administrative powers with regard to steam vessels under the New York Navigation Law :

A very comprehensive power is vested in inspectors: they may make rules applying to all, one, or more vessels; they may require all necessary provisions against fire and may require additional lifeboats (§§5, 9, 14); they give certificates of approval after inspection, or state in writing their reason for refusal (§7); they grant on examination one-year licenses to masters, pilots, and engineers, the boat or class of boats being specified in the license; the law itself prescribes qualification of citizenship and age (§17); they fix the number of passengers that may be transported by a passenger ship (§5); they approve the covering of cans containing inflammable materials (§22); they subject boilers to tests specified by them (§29); pending inspection, they may issue temporary permits, if satisfied, etc., (§32); their consent is required for the changing of the name of a ship (§19); they investigate violations of law, having power to subpoena witnesses.

Wreckmasters are appointed for the counties bordering upon the sea (Suffolk, Queens, Kings, Westchester) (§93); the law speaks of sheriffs, coroners, or wreckmasters (§81), the officers first named apparently performing the functions of wreckmasters in counties (on Great Lakes) where no provision is made for the appointment of the latter.

Wreckmasters take all measures for saving and securing property when no owner appears, and take possession in the name of the people (§81). The sale of

dated in comprehensive acts. For the history of the American legislation, see the account in the *U.S. Report on Transportation by Water*, Vol. I (1909), pp. 117-21; the legislation has since been enlarged by the Seamen's Act of 1915, the Shipping and Merchant Marine acts of 1916 and 1920, and the Panama Canal Act of 1912, some of the provisions of the latter being incorporated in the Interstate Commerce Act.

In England a great step toward consolidation was taken in 1826, when four hundred and fifty-five acts and parts of acts were superseded by eleven acts (6 Geo. IV, c. 105, c. 106-16; see Abbott on *Shipping* [ed. of 1827]). These were further consolidated into the Merchant Shipping Act of 1854, revised in 1894, and amended in 1906.

In Germany there are separate laws concerning nationality of ships, registry of ships, and seamen (October 25, 1867, June 28, 1873; Seamen's law, 1872 and 1902).<sup>2</sup>

The administrative authorities charged with the execution of the shipping laws are, in the United States: the Secretary of the Treasury, and since the organization of that department, the Secretary of Commerce; a Commissioner of Navigation; the collectors of customs and

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perishable property is under the direction of the county court; the county court also adjusts salvage if there is no agreement (§§82, 89). The sale of the property at public auction, if the owner does not appear within a year, or if salvage is not paid, does not appear to require a previous order of the county court (§90).

Unlike the English and German law, the New York wreck law contains no provision for the commandeering of services.

<sup>2</sup> Note on German law of internal navigation:

The law regarding the navigation of important German inland waters is laid down in international treaties and conventions between states and, so far as these waters are common to several member states, is declared a matter of federal jurisdiction.

The acts generally declare freedom of navigation (no monopolies or other privileges; the admission of non-nationals depends upon special international treaties). They require, however, official certificates of qualification and fitness for ships and navigators (see, for example, act concerning the Elbe, June 23, 1821, art. 4).

The freedom of navigation does not apply to ferries (Elbe act, art. 2). These are matter of special grant. The use of a river for logging purposes requires a public license (*Prussian Landrecht*, Vol. 2, p. 15, §49), while the general freedom of navigation applies to rafts as well as to boats.

The building of a canal for navigation requires a license which also gives the right of expropriation.

German inland waters are now also considerably affected by provisions of the Treaty of Versailles.

an inspection force; and also, as regards economic aspects, the Interstate Commerce Commission and the Shipping Board. In England the authorities are: the Board of Trade, customs officers, and subordinate local organizations, partly in board form (courts of survey, marine board, pilotage authorities), partly individual (superintendents, surveyors, registrars, emigration officers). In Germany, the state authorities charged with general local administration execute the federal laws.

In the three jurisdictions, consuls form part of the administrative machinery so far as functions have to be performed abroad.

The main purposes of merchant shipping legislation are the establishment of the status of ships, safety in navigation (in connection with steerage passengers also health and comfort), and protection of seamen. The checking of the movement of ships is a by-product of revenue legislation. The status of a ship is connected with nationalistic protective policies of an economic character; but otherwise the economic aspects of marine transportation (i.e., rates and service facilities) have become the subject of legislation only in the United States, and there the legislation is quite recent. It is obvious that national regulation of foreign sea-borne trade encounters the difficulty of international competition; and coastwise trade has shared in the immunity enjoyed by foreign trade. The Interstate Commerce Act applies to water transportation when rail and water are used under common control for continuous carriage.

A review of the entire field of merchant shipping legislation from the point of view of administrative powers reveals the following main characteristics: first, the very extensive employment of administrative checks; second, the tendency of these checks to assume a non-discretionary character; third, the liberality of remedial provisions and the employment of special organs for the purpose; and fourth, the availability and use of summary enforcing powers, owing to the fact that the movement of a vessel is absolutely dependent upon official certification. Barring the fourth, which is peculiar to maritime law, the significance of the other three characteristics lies in the fact that experience with administrative control extending over a long period of time has apparently evolved a relatively conservative type of regulation.

§182. *Economic aspects of water transportation.*—As compared with the great amount of legislation dealing with the economic aspects of land transportation, water transportation has been hardly subjected to any control in this respect. Some provisions of the Inter-

state Commerce Act relating to combined rail and water carriage and to railroad control of water transportation have been noted before (§5 [9, 10, 11]; §6 [13] of the act); the Transportation Act of 1920 also established publicity requirements (filing of schedules, etc.), for water carriers (Interstate Commerce Act, §25). Moreover, Congress has legislated with reference to the business of shipping, in 1916 and 1920. The two acts (Shipping and Merchant Marine Acts) vest important powers in a Shipping Board, which, like the Interstate Commerce Commission, is an independent administrative agency, not subordinate to one of the executive departments, but which, unlike the Interstate Commerce Commission, is more of a managing than a controlling body, having charge of government-owned ships. The most important administrative powers of the Shipping Act, like its substantive prohibitions and requirements, are modeled upon those of the Interstate Commerce Act: no undue preference, prejudice, or discrimination; just and reasonable rates and practices, etc.; and corresponding powers of the Board to make orders and to require satisfaction of complaints, with provision for judicial enforcement as in the Interstate Commerce Act (1916, §§22, 23, 25, 29, 30, 31).

It is, however, characteristic of shipping legislation in general that in addition to judicial enforcement there are summary powers: clearance may be refused by the Secretary of the Treasury to a ship refusing to receive freight when able to do so (§36); and if there is a complaint that a non-citizen violates the act, the Board may, after investigation, certify the violation to the Secretary of Commerce, who may refuse entry to any ship owned by the violator until the Board certifies that the violation has ceased (1920, §14a). Perhaps the latter power should be read in connection with treaty provisions.

Section 19 of the act of 1916 contains a provision analogous to that of the Interstate Commerce Act as to the increase of rates previously reduced to injure competitive water carriers, and section 19 of the act of 1920 gives the Board power to make regulations to meet unfavorable competitive conditions as to shipping in foreign trade, the regulations to prevail over those of other departments except in the matter of health and safety, disputes in that respect to be decided by the President.

Agreements between water carriers are subject to the approval (and modification) of the Board, except that agreements existing in 1916 are lawful until disapproved (1916, §15); and the approval of the Board is required for the transfer of vessels purchased from the



Board to non-citizens or to foreign registry (1916, §9) and for the assignment of rights under a mortgage of a vessel of the United States to a non-citizen (Ship Mortgage Act, 1920).

Section 28 of the act of 1920 prohibits a common carrier subject to the Interstate Commerce Act from charging under any joint or proportional rate less by reason of part of the route being by way of foreign water commerce than he charges for similar transportation for the same distance over the same route in the same direction in connection with wholly domestic commerce, unless the foreign-water commerce is by a vessel of the United States. But the Shipping Board is given power to certify lack of adequate shipping facilities by United States vessels to the Interstate Commerce Commission, which may then suspend the operation of the provision with power of terminating the suspension upon corresponding certification by the Shipping Board.<sup>9</sup>

All this legislation appears to be of a tentative character.

The Federal Anti-trust Act applies to commerce by water as well as by land; its modification with reference to foreign trade by the so-called Webb-Pomerene Act, which will be noted in connection with trade legislation, has no particular reference to merchant shipping.

§183. *Status of ships*.—It is the policy of all countries having merchant marines to give to ships a national character, which may carry with it valuable rights (so in the United States the privilege of the coasting trade, which means trade between American ports) and which may be conditioned on statutory prerequisites (in the United States: built in the United States, unless captured or forfeited, and owned and officered by American citizens; for exceptions in favor of foreign-built vessels under conditions fully specified by statute see R. S., §4136, and act of May 10, 1892).

The substantive statutory conditions being fulfilled, the national character of a vessel of the United States depends for vessels engaged in foreign commerce upon registry, and for vessels engaged in domestic commerce and fishing vessels upon enrolment. The latter also require an annual license specifying whether the vessel is engaged in coasting trade or in fishing, and in what class of fishery. Vessels under five tons are exempt from enrolment.

Registry, enrolment, and license are granted by the collector of customs of the appropriate port. The conditions of the grant, of the

<sup>9</sup> The suspension has taken place; and a certification of adequacy, which would have terminated the suspension, was withdrawn on May 8, 1924; so that by the end of 1924 the suspension of section 28 was still operative.

renewal of the annual license, and of the surrender of the certificate are so fully specified as to leave no room for discretion.

Before registry, the ship must be measured by a surveyor or some person appointed by him. There is a penalty for non-registration.<sup>4</sup>

The registry laws date from 1792.

A new register is required where a ship is sold or altered (§4170), and a change of master must be indorsed by the collector of customs upon the certificate of registry; but there is no general provision for administrative consent to, or advance certification of, a sale. Under recent legislation the consent of the Shipping Board is required for the transfer of a vessel purchased from it to non-citizen or foreign registry (1916, §9), and for the assignment of rights under a mortgage of a vessel of the United States to a non-citizen [1920, §O(d)].<sup>5</sup>

Under the English law, a ship must be registered in order to be recognized as a British ship;<sup>6</sup> and while there is no penalty for non-registration, a ship may be detained until the certificate of registry is produced. Before registry the ship must have been surveyed and a certificate of survey delivered to the registrar (1894, §6).

The conditions of registration are fully determined by the statute, administrative powers being merely subsidiary or relating to minor matters: requiring satisfactory evidence that the ship is entitled as a British ship (1906, §51); marking to the satisfaction of the Board of Trade (1894, §7); refusal to register identical or similar names (1906, §50).

An abandoned ship may not be registered without a surveyor's certificate of seaworthiness (1894, §54).

Pilot boats must be licensed by the pilotage authority which also appoints and removes masters (1894, §611).

Unauthorized colors and pennants may be seized and taken away (1894, §73).

The sale or mortgage of ships at a place out of the country in

<sup>4</sup> See R. S., §§4131, 4136, 4141, 4142, 4146, 4147, 4148, 4311-14, 4316, 4317, 4319-21, 4327, 4331, 4337.

<sup>5</sup> Under an act of 1797 a ship once sold to a foreigner could not again receive American registry, unless it came back to the hands of the original owner or his representatives (6, Op. Att'y Gen'l, 383); but this was changed in 1897 (U.S. R. S., §4165).

<sup>6</sup> Registry was introduced in 1660. See historical note in Abbott on *Shipping* (5th ed., 1827), p. 24.

which the port of its registry is situated requires certification by the registrar, which must be granted if certain statements required by law are made (1894, §§39-46, 60).

The German provision is that a ship (of 50 cubic meter gross content or more) must be registered and have a certificate of registration in order to be entitled to fly the German flag. The entry in the register is made when all necessary facts are satisfactorily proved; and, under penalty, changes in these facts must be notified for registry (acts of October 25, 1867, and June 28, 1873).

Vessels engaged in internal navigation above a specified tonnage (15 or 20 tons) are required to register with the court of the ship's domicile and to receive ship's letters accordingly. The obligation is enforced by administrative penalty (Internal Navigation Law, 1895, §§120-30).

The measurement of German ships is regulated by a Federal Council regulation of June 20, 1888. This regulation does not rest on statutory authority; the majority of German jurists therefore consider it invalid so far as it imposes duties on private owners and not merely on administrative authorities (*Meyer, Verwaltungsrecht*, §172).

The result of the survey is embodied in a survey certificate and is also entered in the registry certificate.

In the United States the change of the name of a vessel requires the consent of the Commissioner of Navigation, who gives it when in his judgment there is sufficient cause, and who has power to make rules and to procure information as to the condition of the ship, its pecuniary liabilities, etc., so that no prejudice may result from the change of the name (act of February 19, 1920).

In England, a change of name requires the permission of the Board of Trade, which is to be granted if the application is reasonable and if specific notice requirements have been complied with (1894, §51).

The German provision is that the name of a ship may be changed only for specially urgent reasons, and with the consent of the Chancellor (Act, 1873, §2).

It is clear that the administrative check upon change of name, usually a matter of perfunctory statutory provision, is in the case of vessels intended to be a matter of substantial discretion.

§184. *Movement of vessels.*—Administrative checks upon the movement of vessels apply particularly to foreign commerce, and as

regards incoming vessels are part of the customs administration laws (U.S. R. S. §§2770 ff., re-enacting act of 1799).<sup>7</sup>

Vessels of the United States going to a foreign country are required, under penalty, before departing from the United States to be furnished by the collector with a passport, the form of which is prescribed by the Secretary of State (§4306 [7]). On arrival at a foreign port, the register must be deposited with the consular officer at such port, if any (§4309). A vessel bound to a foreign port or to a port in non-contiguous territory is required under penalty to deliver to the collector of customs of the port of departure a manifest of its cargo and receive a clearance (form of manifest and oath and of clearance are prescribed by the law); this provision applies to foreign as well as American vessels (§§4197-4200, 4211).

Fishing vessels require permission of the collector to touch at a foreign port, and if they do, are, on returning, treated like vessels coming from a foreign port (§§4364, 4365).

An act of 1912 authorizes the Secretary to exempt pleasure yachts from entering and clearing requirements; an earlier act of 1870 permitted him to commission yachts belonging to yacht clubs, stating in the commission their privileges and exemptions.

Clearance and entry requirements under the English law are found in the Customs Consolidation Act (1876, §§101, 128) and the Customs Revenue Act (1883, §5); under the German law in the Customs Union Act of June 21, 1869, §§74-90.

§185. *Safety and analogous requirements for ships—United States.*—The legal provisions relate to steamboat inspection, licensing of officers, and equipment of merchant vessels with men and life-saving apparatus.

The chief administrative authority is the Secretary of Commerce (formerly Secretary of the Treasury); the immediate administration of most provisions is in the hands of an inspection service so organized (local inspectors, supervising inspectors, and supervising inspector-general) as to admit of the exercise of appellate power. Rights of appeal are granted particularly in connection with licensing provisions.

The method of administrative control is that of systematically organized inspection and certification, supplemented by directing powers

<sup>7</sup> As regards domestic vessels, the Revised Statutes, §§4355-56, require under specified conditions manifests of cargoes of arriving vessels to be delivered to the proper port officer before unloading.

and license requirements, representing perhaps as thorough a system of administrative control as is found anywhere in American legislation.

The inspection service dates from 1852; an earlier act of 1838 required masters, under penalty, to apply to a judge of the United States district court for an inspection to be made by a competent person; the act of 1852 substituted official inspectors.

The inspection and certification requirements apply to steamships, boilers, and boiler plates (§4421, 4429, 4430). It is not quite clear whether or not the inspection of hulls is compulsory.<sup>8</sup> Without the certificate a ship cannot be registered, enrolled, or licensed (§4498). There are special permits for carrying gunpowder (§4422, safety provisions specified by law) and for using petroleum as motive power (§4474).

Subject to approval and certification are also: the number of passengers that can be safely carried (§4464; controlled by supervising inspectors); special permits for excursion boats (acts of 1886 and 1917); the number of officers and crew and of licensed deck officers requisite for safe navigation (act of March 3, 1917, amending R. S., §4463; appeal up to supervising inspector-general); the muster roll assigning men to specified duties in connection with life-saving; and the marking of lifeboats (act of 1915).

Inspectors may order all necessary provisions against fire (§4470); and there is provision for dealing with a ship which the inspector finds cannot be safely operated (§4453 as amended in 1905; §4454: notice to repair, to cease navigation, revocation of certificate, libel for summary seizure; application by master to supervising inspector for re-examination, appeal to Secretary of Commerce). Inspectors may also increase the statutory number of deck officers if necessary for safety (act of 1912).

Under the act of 1915 the collector of customs may, and on complaint shall, inquire into the compliance with the requirements of section 13 regarding the manning of merchant vessels, and shall refuse clearance to any vessel failing to comply.

An act of August 2, 1882, contains full provisions for the accommodation of emigrant passengers on steamships and other vessels, so specific as to require no administrative discretion or check. The absence of administrative approval requirements is probably due to the fact that nearly all the immigrant-carrying vessels at the time were

<sup>8</sup> §4417; see L. M. Short, *Steamboat Inspection Service*, pp. 31-35.

foreign. The law applies to foreign vessels, and gives the Collector of Customs power to cause the inspection of these and to withhold clearance until compliance with the law is shown (§10, 12).

There are older provisions, applying to all merchant vessels, for the benefit of seamen. The first and second officer or a majority of the crew may complain to the master of the unfitness of the vessel, and the master is thereupon required under penalty to apply to a judge or justice of the peace for the appointment of surveyors to make an examination. Upon their report the judge makes the appropriate orders to which the master and crew shall conform; there is no provision for penalty for non-conformance. If the complaint appears to be unfounded, the master deducts the cost of the survey and damages from the wages of the complaining seamen; and if they refuse to proceed on the voyage, they forfeit wages that are due (before 1898 they were liable to imprisonment). In foreign ports the order for examination is made by a consular officer instead of a judge. These provisions were enacted in 1790 and 1840. It will be noted that the order for the examination and the decision thereupon is made by a judge, not by an administrative officer (except a consular officer abroad); the examination itself is made by unofficial persons (R. S., §§4556-59).

There are a number of dispensing powers permitting exemption from specified requirements, generally vested in the Secretary of Commerce (pleasure yachts; gear for lowering lifeboats, if strict application is not practicable or reasonable; citizenship of watch officers, when the needs of foreign commerce require dispensation; also as to plates used in boiler construction [§4429]).

The very detailed safety requirements of the act of 1915 refer repeatedly to supplementary rule-making powers of the Secretary of Commerce. It is, however, apparent that nothing that could be thought of by the framers of the act is delegated; the act furnishing a conspicuous instance of not leaving even technical requirements to be settled by administrative action where safety rules at the same time pursue the economic object of raising the status of the class which has been instrumental in procuring the legislation. It is in this respect analogous to the full-crew acts for railroads and to the British legislation for coal mines.

Licenses or certificates are required for captains, mates, engineers, and pilots.<sup>9</sup> They run for varying periods and are renewable under

<sup>9</sup> As regards pilots, the Revised Statutes, §4444, provide that no state government shall require pilots of steam vessels to procure a license in addition to

rules. They are subject to suspension or revocation (also assignment to lower class in case of engineers) for specified reasons. Refusal as well as revocation are, in the case of officers, subject to appeal up to the inspector general (Act, 1914, *Fisher v. Alwen*, 290 Fed. 8).<sup>10</sup>

§186. *Safety—England.*—The statutory provisions relate to the condition of the ship, the qualifications of the personnel, and pilotage.

A passenger steamer carrying more than twelve passengers must have a certificate of survey from the Board of Trade, which is good for one year, unless it is canceled earlier for fraud, error, or other insufficiency, or subsequent injury to the ship (1894, §§271, 274, 279). A ship surveyor may point out deficiencies in lights or signals, life-saving apparatus, or water provision, whereupon the ship is detained until a certificate is obtained (1894, §§420, 421; 1906, §26).

If in any of the above cases the certificate is refused, an appeal lies (unless in the first instance an appointee of the owner has joined in the investigation and finding) to a court of survey, and the judge reports to the Board of Trade, which may then, if satisfied, grant the certificate (1894, §§273, 275, 420). It is further provided that passenger and emigrant ships must be provided with signaling devices "to the satisfaction of the Board of Trade" (1894, §435).

If a ship is believed by the Board of Trade to be unsafe as defined in the act (an act of 1897 includes unsafety by reason of undermanning), the Board may order the provisional detention of the ship. There is then a survey, in which a person appointed by the master out of the list of assessors may join, and upon the basis of the report the Board may make (and vary) absolute or conditional orders (§459).

Under an act of 1899, the order may also relate to the condition

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that issued by the United States, but also saves any state laws requiring vessels entering a port in a state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state. It therefore seems that state licensing requirements apply to vessels in the foreign trade. New York provided for licenses to be issued by commissioners for the port of New York, by an act of 1853; and an act of 1884 appears to penalize a vessel not employing a licensed pilot (Laws, 1884, c. 90).

<sup>10</sup> The act of 1915 requires that each ship covered by the act must have a proportion of able seamen; there is provision for certifying able seamen, but it is not quite clear whether the certification is optional or compulsory, nor whether the prescribed physical examination (which is under rules prescribed by the Department) must be official or may be private (§13). The act gives to the certificate merely the effect of prima facie evidence of rating. Lifeboat men must under the act of 1915 be certificated.

of anchors and cables, and the act provides that testing establishments may be licensed and their charges fixed by the Board.

Finally in pursuance of an international convention, provision was made in 1914 for a safety certificate for every ship (Merchant Shipping [Convention] Act, 1914).

Where a ship is ordered detained, clearance must be refused (§692).

Emigrant ships in particular must, before sailing, be surveyed and reported seaworthy and fit; against an adverse report the owner may demand a reference to three other surveyors, who may overrule the first report (1894, §289). A considerable number of approving powers are vested in an emigration officer.<sup>11</sup>

The Merchant Shipping Act also contains qualification requirements for masters, mates, and engineers. The statute merely speaks of sobriety, experience, ability, and conduct (§98); details of qualification are fixed by rules of the Board of Trade, which through its appointees conducts examinations and issues certificates to anyone entitled (§§94, 98, 99). In the absence of such proof of qualification, the customs officers may detain the ship (§103).

The matter of cancellation (and suspension) of certificates is fully regulated: the grounds are conviction of an offense, and unfitness, which includes incompetency, misconduct, and failure to give assistance; there is an inquiry which is conducted by an appointee of the Board of Trade, a local marine board, or a summary court acting with a legal assistant. The inquiry results in a report to the Board of Trade,

<sup>11</sup> The emigration officer must be satisfied with the manning of the ship (appeal to Board of Trade, which refers to two other officers or persons, who decide finally [§305]). He must approve of fire engines, anchors, and signaling devices (§290); specified portions of the ship must be built to his satisfaction (§291); cargo may be carried on deck only if stowed to his satisfaction, and if he does not consider that it unduly impedes light and ventilation (§294); he must be satisfied that provisions and water answer requirements of law, and must approve containers of water (§§295, 296); restriction of water supply to needs to next intermediate port must be approved by him (§297); he judges of sufficiency of medical and surgical instruments and stores (§§300, 303); he may forbid the carrying of articles dangerous to passengers (§301); he may object to the medical practitioner carried on the ship (§303); he must approve of steward, cooks, cooking place and apparatus; he may forbid taking or require relanding of unfit persons, or may require relanding for purification (§307). In case of shipwreck, he may direct removal of steerage passengers at expense of master (§331). Finally schedules 10, 11, and 13 of the act of 1894 refer to his approval for many parts of the ship's equipment.



which may order a rehearing by a court or may order cancellation; an appeal lies from the cancellation to the High Court. A canceled certificate may be restored by the Board of Trade (§§409, 471, 474, 475).

There is also provision for certification of fishing-boat skippers, and in certain cases for cooks (§§413, 415; act of 1906, §27).

*Pilotage.*—The English law concerning pilotage (act of 1913) leaves much room for local variation and delegates extensive rule-making powers to the Board of Trade and to the pilotage authorities.

The Board of Trade is charged with the reorganization of pilotage systems, through "revision" orders which require confirmation by Parliament; after the first revision, orders are made only on application, and they require confirmation only if objected to.

The pilotage orders of the Board of Trade organize ("incorporate") the pilotage authorities and may provide for compulsory pilotage. Both pilots and harbor authorities are to have representation in the organization.

The by-laws of the pilotage authority, which are subject to confirmation and modification by the Board of Trade, regulate the matter of pilots' licenses, examinations, and pilotage and deep-sea certificates; determine qualifications; may limit numbers and port dues; and establish systems of supply and employment. Parties in interest may object to, or ask for additional, by-laws, the Board of Trade exercising the requisite supervisory authority (§§7, 17, 18).

Apart from these regulative powers, the law itself provides that for specified classes of ships, annually renewable pilotage certificates may be granted to masters and mates, but only to British subjects (§23); there is also provision for granting certificates to non-British subjects, but the Admiralty may exclude any district from the operation of this provision (§24).

The act does not directly establish a system of compulsory pilotage, leaving existing local systems in force (§10); however the law apparently makes it unlawful for a master to employ an unlicensed pilot where he can obtain a licensed one, and there is a provision for superseding an unqualified by a qualified pilot, with power to the pilotage authority to divide the fees in case of dispute (§30). It is obvious that the matter is affected a good deal by local custom.

There are full remedial provisions in connection with pilotage certificates: The power to suspend or revoke certificates is conditioned on specified causes, including "misconduct affecting capability," and

is vested in the pilotage authority or a committee on which pilots are represented (§20). Appeal lies from the pilotage authority to the Board of Trade (which may issue appropriate orders or act instead of the authority), not only for suspension revocation or non-renewal, but also for refusal to examine or grant certificates, for unfair examination, for unreasonable license conditions, or any failure of duty (§27). From non-renewal, suspension, or revocation, an appeal also lies to a judge of the county court sitting with an assessor, and the judge may give special leave to appeal to the High Court (§18).

*Wrecks.*—The subject of wrecks is dealt with as one calling for emergency powers, and is handled administratively through receivers of wrecks appointed by the Board of Trade. The receiver takes command and gives directions; has power to examine on oath, require assistance, determine title, detain till payment of salvage; may sell in specified cases, and apportion salvage up to a specified amount. The salvage payment is determined by the Board of Trade (§525).

Harbor authorities may remove or destroy sunken vessels.

§187. *Safety—Germany.*—Certification of qualification for service: Under section 31 of the Trade Code, seamen, sea machinists, and pilots must show their knowledge by a certificate of competency issued by the competent authority. The proof of competence is regulated by the Federal Council (regulation of January 16, 1904). The certificates are valid for the entire Empire, but in the case of pilots, only for the waters specified therein. There is a saving for treaty provisions.

Under an act of June 15, 1895, relating to internal navigation, including rafting, the Federal Council makes rules regarding the proof or qualification of navigators, machinists, etc. (§140).

The Federal Council under the authority of the Seamen's Act of 1902 also determines to what extent the physical fitness of navigators must be certified (regulation of July 1, 1905).

An emigration law of June 9, 1897, provides (§36) that the Federal Council shall issue regulations concerning condition and equipment of emigrant ships, concerning their supervision, medical examination of passengers and crew, exclusion of sick persons, and sanitary and moral protection of emigrants. A full regulation was accordingly issued on March 14, 1898. As regards seaworthiness, however, reference is made chiefly to the requirements of the Germanic Lloyd, an insurance organization, which also takes care of the inspection abroad. Inspection in Germany is made by state officials.

Under an act concerning wrecks, of May 17, 1874, wrecking mas-

ters have power to commandeer services, boats, and necessary apparatus.

§188. *Employment and service of seamen—United States.*—The system of legislation is that found in other countries, subjecting the contract of service at sea to specified administrative checks. The La Follette Act of 1915, while enlarging the substantive provisions for the protection of seamen, has not altered the administrative control provisions.

The law requires the co-operation (acknowledgment, certification, presence) of a shipping commissioner in the signing of shipping articles and in the settling of wages and discharge of seamen (R. S., §§4511, 4539, 4549; act of 1872; act of March 3, 1897).

The list of the crew of a foreign-bound vessel must, before its clearance, be approved and certified by the collector of customs, and on the return of the vessel the list must be accounted for (R. S., §§4573-76; acts of 1803 and 1813).

The engagement as well as the discharge of a seaman abroad requires the sanction of a consular officer (§4517 [1872], §4580 [1856, 1873, 1884]).

Indentures and apprenticeship must be produced to a shipping commissioner, and the assignment of any such indenture must be approved by a commissioner (§4510 [1872]).

Allotments of wages require the approval of a commissioner (acts of 1884 to 1915).

Regulations for the conduct and discipline of sailors must be approved by the Secretary of Commerce (§4511; apparently by general rule).

On submission, a shipping commissioner decides disputes between master and crew, and for that purpose is vested with examining powers (§§4554, 4555).

Consular officers are vested with power to make certain determinations or issue certain orders relating to seamen discharged or left destitute abroad, or concerning the effects of such as die abroad during a voyage (R. S., §§4538, 4539; acts of June 26, 1884, and December 21, 1898).

Treatment while in service.—The unsatisfactory provisions concerning unseaworthiness (noted before in connection with safety) apply also to provisions and stores, with the addition that if the complaint relates to these, one of the examiners must be a physician of the Marine Hospital (R. S. §4557).

An act of 1872 (R. S., §4565) provides for complaint by three or more of the crew to specified administrative officers (customs officers, shipping commissioners, navy and consular officers) concerning the supply of provisions or water on foreign-going ships. The results of the examination which follows are certified to the master who must comply under penalty, and are entered in the log book. A report is sent to the district judge and is evidence in legal proceedings. This act is much more favorable than that found in sections 4556-59; but it, too, lacks the full administrative power of enforcement found in section 12 of the act of 1882 for the protection of immigrants.

There are also some requirements for the accommodation of the crew (act of 1897, amended in 1915) which are complete without administrative action, except that the sleeping accommodations on Mississippi steamers require the direction and approval (apparently by general rule) of the Supervising Inspector-General (act of 1897, §2; 1915, §6).

§189. *Seamen—England.*—As under the laws of other countries, the hiring and discharge of seamen is required to be made a matter of record;<sup>12</sup> there are checks placed on deductions from wages by way of fine, upon the discharge or leaving behind of seamen abroad, and a statutory obligation to carry distressed seamen found abroad to home ports. While these provisions are elaborate, the administrative powers, placed in superintendents and other "proper authorities" (including consular officers), subject to the Board of Trade, are few. In part they are purely ministerial (delivery of certificates that crew lists and agreements have been executed or, in case of discharge of crew, delivered, without which the ship cannot obtain clearance [§§118, 119, 170, 453]), or relate only to matter of proof (fines, 1894: proof of entry in log book, 1906: proof of offense).

Official approval is required for the discharging or leaving behind of a seaman abroad; but the approval must not be unreasonably withheld (act of 1906, §§30, 36); also for specified parts of apprenticeship contracts (1894, §395). The withholding of a discharge certificate from a seaman wilfully failing to join a ship may be directed only by the Board of Trade (1906, §65).

The Superintendent is given adjudicating powers in case of wage

<sup>12</sup> As to history, see Abbott's *Law of Merchant Shipping* (14th ed., 1901), p. 220. The administrative check appears to have been introduced for foreign-going ships in 1850 (13 and 14 Vict., c. 93, §47; compare with 7 and 8 Vict., c. 112 [1844], §2).

disputes, but without consent of both parties only up to £5 (§§137, 138); also in case of fishing boats without the limitation as to amount (§387).

The adequate provision of medicines is secured by medical inspection, resulting in deficiency notices, which must be removed by proper certificates (1894, §202).

The adequate supply of provisions or water is secured in a much less satisfactory manner, for official action is taken only on complaint of the crew, who are liable to forfeiture of wages if the complaint is found to be without reasonable cause, while the master is liable only to a fine if he fails to comply with a notice to remedy deficiencies (§198; compare U.S. R. S., §4565). However, in case of ships bound for the Orient, the provisions and water for the crew must be certified (fifth schedule of act).

As regards seamen's qualifications, there is only a system of optional certification ("A. B."). Satisfactory proof must be made to the proper authorities (1894, §126; 1906, §58).

Like the German law and the former American law, the English law provides for compulsory conveyance to the ship of a seaman deserting or absent without leave. Local police officers are required to give assistance; the seaman may demand to be taken before a court to be dealt with according to law (§§222, 223).

The business of engaging or supplying seamen requires a license from the Board of Trade, which fixes the period of the license, its terms, and the conditions under which it may be revoked (1894, §110).

There may be local by-laws (and they may be made compulsory for any district by Order in Council) for licensing seamen's lodging-houses (§214).

§190. *Seamen—Germany.*—Powers with reference to the contract of service and service conditions (Seamen's Act, June 2, 1902):

The most conspicuous administrative power is that of compelling performance of service after enrolment, vested in the marine office or, where there is none, in the police (§33)—a power peculiar to seamen, abolished in the United States by the act of 1898.

The most important licensing requirement is that for employment agencies, the provisions of which are analogous to those of the general employment agencies' law of 1910. The marine office is vested with considerable powers of determining controversies and questions: It decides appeals in case of reduction in rank for incompetence (in any event the reduction may be entered in the shipping book only by the

marine office (§43)); it decides complaints as to unseaworthiness and inadequacy of supplies (§58); it determines whether a sailor, by refusing or frustrating treatment, has forfeited his right to free medical service (§59); it also determines whether a sailor has contracted sickness by his own fault (§62); it determines whether on the expiration of a term a substitute can be found (if not, the sailor must continue to serve on terms specified by law [§67]); it determines provisionally the amount due to a sailor where a casualty terminates his contract (§69); so, in case of his discharge for other than specified reasons (§71); where a sailor (for reason specified, §74) demands his discharge abroad, on objection of the captain, it makes a preliminary determination (§77); it decides provisionally as to the manner of sending back a sailor from a foreign port (§78).<sup>13</sup>

More important than the administrative powers are the publicity requirements of the act: each sailor is required to have a shipping book (§7); hiring and discharge and payment of seamen must take place at a marine office (§§13, 14, 18, 46); there must be a muster roll, the contents of which are fixed in part by the law, in part by Federal Council regulations (§14); all disciplinary measures (the permissible kinds are specified by law) must be entered in the ship's journal (§92).

The law operates to a great extent by directly prescribing the rights and obligations of the parties to the hiring contract.

<sup>13</sup> There are a few other powers of a very minor character: special permits for Sunday labor in ports (authority designated by state government, §37); certification by marine office that it is impracticable to enter the termination of a former employment in the shipping book (§10); consent (on condition, if necessary) that captain leave sailor abroad (§83); decisions of minor questions regarding the manner and cost of transporting a sailor from a foreign to a German port.

## CHAPTER XVIII

### ADMINISTRATIVE POWERS UNDER BANKING LEGISLATION

§191. *New York*.—The first general banking law of New York was enacted in 1838; after frequent amendments it was revised in 1882, in 1892, and in the consolidations of 1909 and 1914.

The first law contained administrative powers only in connection with the security for circulating notes; the substantive and formal requirements for organizing a bank were few and simple and involved no positive official action. At first the only power of examination was exercised through the Chancellor; but administrative powers of inspection were given by acts of 1840 and 1843. Examiners are mentioned in the statutes after the Banking Department was organized (1851); provision for periodical examination, however, appears first in 1892. The requirement of certificate of confidence and public convenience as a prerequisite to organization was created for banks in general as late as 1908 (Laws, 1908, c. 125; see *Banking Report*, 1907, p. xxviii).

While only a close examination of the session laws can show the growth of administrative functions in detail, it seems that some of the most incisive and particularly discretionary powers are of recent date.

Private bankers were placed under the Banking Law in 1914.<sup>1</sup> Before that time a distinction was made between an individual banker organizing under the banking law and authorized to use the word "bank" (Banking Act, §141) and a private banker who stood outside of the law (see *People v. Doty* [1880], 80 N.Y. 225).

*Direct statutory provisions*.—The Banking Law itself contains numerous requirements and prohibitions, both substantive and formal, relative to the following: requirements of incorporation, general powers, shareholders' liability, restrictions on business, deposit and reserve requirements, investments, loans, rate of interest, calculation of profits, merger, causes of dissolution.

Some of these (general powers, restrictions on loans, reserve re-

<sup>1</sup>In 1910 an amendment of the General Business Law required private bankers to obtain licenses from the Comptroller. The act appears to have been chiefly aimed at loose practices in receiving money for deposit or transmission abroad, and provided for the exemption of the more responsible banking firms.

quirements) contain no reference whatever to administrative power or action, and all of them constitute checks on administrative discretion.

All private banks must keep their capital unimpaired and distinct from personal investments (§§154, 155). They are subject to a number of other requirements (deposit of securities to secure depositors, §161; reports, §§169, 170; prohibition against loaning to private partners, §162; prohibition against investing capital in real estate, §§163, 164; requirement of reserves against deposits, §166; regulations as to transmission of money, §§167, 168, from which, however, private banks satisfying specified statutory conditions as to size of capital and average deposits are exempt upon submitting annual affidavits to the superintendent. This exemption is qualified by the somewhat extraordinary provision that if the Superintendent refuses to accept and file the affidavits, the banker must cease to do business (§160). All private bankers are, however, subject to the sweeping directing powers of section 56.

*Administrative powers in general.*—All administrative powers are now vested in a Superintendent of Banking; deputies and examiners are, however, recognized by provisions requiring them to take the oath of office and permitting examinations to be made through them (§39).

Examining powers are very general and extend both to matters specified in the law and prescribed by the superintendent. They are accompanied by the usual subsidiary powers (§39).

The law requires reports and specifies, in part, matters to be reported; but in addition the Superintendent may prescribe form and contents of reports and may require special reports (§§42, 43, 147, 273). The reports are not to be published unless he believes the ends of justice and public advantage will be subserved (§41).

He posts weekly bulletins of all matters with regard to which he exercises powers of importance (§82).

As regards approval requirements, there is a general provision (which is not usual in this general form) that the Superintendent has a sound discretion to grant or refuse; also that approvals shall be in writing; but there is no analogous requirement that refusals shall be in writing or filed, still less that they shall be accompanied by reasons (§48).

*Establishment of a bank.*—The Superintendent, before a bank can transact business, must file the organization certificate; he must refuse to file it if the certificate or accompanying documents are not in conformity with laws. He examines as to character, responsibility,



and general fitness of organizers; also as to public convenience and advantage (it should be observed that notice is given to other banks in the same place); and if he finds it expedient and desirable, endorses the certificate within a time specified "approved" or "refused." When satisfied that the legal conditions (minimum number of incorporators and directors, minimum capital, specified statements) have been complied with and that the full capital is paid, he issues an authorization certificate stating that business can be safely intrusted to the bank (§§21-24, 101-4, 309, 315, 316, 375-77, 340, 341, 362).

The approval requirement is enforced by the prohibition against the use of the designation "bank" unless authorized (§141). In the case of a foreign banking corporation, the Superintendent satisfies himself whether the applicant may safely be permitted to do business in the state (§27)—a form of power narrower than that with regard to foreign insurance companies. If satisfied, the Superintendent issues a license running for one year and renewable in his discretion, and subject to revocation as noted below (§29).

A personal loan company also requires an annual approval of a bond; on failure, the authorization certificate may be revoked (§342).

With regard to savings banks, the Superintendent shall also inquire if the proposed bank will afford greater convenience of access to a considerable number of depositors and if the density of the population affords a reasonable promise of adequate support (§233). He may also require an undertaking that further contributions will be made to the initial guaranty and expense fund required by law (§§234, 235).

The establishment of branch offices is subject to permission of the Superintendent. He grants it if satisfied that it is expedient and desirable. Otherwise, or if the bank has not the requisite amount of capital paid in, he shall refuse (§§57, 349).

The conditions for opening branch offices are further specified in section 110.

A change of location is likewise subject to the approval of the Superintendent. The approval is to be given, in the absence of reasonable objection, if the change is to another place in the same locality; if to a place in another locality, the application is to be refused if the change is undesirable or inexpedient (§50). In case of a private bank, the application must state the reason for the proposed change (§159). A personal loan company may not have its place of business in the same connecting room with another business unless the Superintendent consents (§348).

A change from a state bank to a trust company requires the approval of the Superintendent, referring to the wide discretion of section 23 (§138).

If the Superintendent is satisfied of the sufficiency of the capital, the needs of the community, and the presence of legal requirements, he may authorize banks to act in the same capacity as a trust company (§105).

A merger between banks requires the approval of the Superintendent (§488).

*Conduct of banking business.*—The only approval requirement seems to be that the Superintendent, on the bank's nomination, designates in his discretion (subject to statutory capital requirements) the depository bank in which reserves are required to be kept (§38).

The directing powers of the Banking Department are few but important:

1. If books and accounts are not kept so that the condition of the bank can be readily ascertained, the Superintendent may require them to be kept as he determines (§56 [4]).

2. He may order the making good of capital deficiencies and reserves (§56 [2]).

3. Above all, he may order the discontinuance of unauthorized or unsafe practices and may require explanations in defense of practices he questions (§56 [1]).<sup>2</sup>

<sup>2</sup> This power was granted in 1908 pursuant to the following recommendation in the *Department Report of 1907* (p. xxvii):

"Regulations covering all details of financial management are unnecessary and would be unwise. The need of a certain amount of authority in the Superintendent, however, must be recognized, and the power granted by proper statutory enactment.

"Many matters of internal administration, safety, and expediency must be left to the determination of the institutions themselves, and should concern the Superintendent of Banks only when the policies adopted seem to promise dangerous results. In such cases he should act under a general authority to require observance of his directions.

"I therefore recommend:

"That the Superintendent of Banks be given authority to direct the discontinuance of objectionable practices on the part of institutions under his supervision, with an opportunity to the institutions subjected to criticism to show cause why the practice complained of should not be discontinued, and, in case of a failure to show cause to the satisfaction of the Superintendent, that he should either make public the facts in the premises, or assume charge of the institution on the ground of its being in an unsafe and unsound condition, if such be the case."

These directing powers are made effective by the further power of the Superintendent to take possession of the business and property of the bank in case of noncompliance (§57).

The only administrative power concerning the terms on which banking services are rendered relates to personal loan companies and brokers, the Superintendent being given power to order a reduction of rates if the net earnings exceed 12 per cent (§§350, 56 [5]).

*Summary powers.*—These consist in taking possession of the bank and liquidating it, and in the revocation of licenses. The dissolution of a banking corporation is effected through a judicial proceeding (§486).

The power to take possession seems to serve mainly the purpose of dealing with a precarious financial condition: suspension of payment, impairment of capital, and generally if the bank conducts business in an unsafe manner, or is in an unsound or unsafe condition, or cannot with safety or expediency continue business. These are very general terms. Moreover, the Superintendent may also take possession in case of violation of law or if his orders are disobeyed. The bank, however, may make application to a court against the continuance of the possession. The Superintendent may permit the resumption of business; or he may report delinquencies to the Attorney-General. The liquidation is administrative; but objections to claims are judicially determined, and sale of assets and payment of dividends proceed under the direction of a court (see sections 57-81).

Where a bank fails to maintain reserves, the Superintendent levies assessments at statutory rates; if these are not paid after due notice, securities deposited or interest thereon may be applied to the payment (§34); or the Superintendent may report to the Attorney-General for proceedings (§36).

The power to revoke licenses is confined to private bankers, personal loan companies, personal loan brokers, and foreign corporations: if the Superintendent is satisfied that the corporation or person to whom he has issued an authorization certificate or license violates the provision of the Banking Law, or is in unsound or unsafe condition, or cannot with safety and expediency continue business, he may notify the holder that the license is revoked. The revocation may be published in the discretion of the Superintendent (§29).

NOTE.—Minor or special powers not accounted for in the foregoing analysis:

1. Powers of extension of time (§§49, 133, 218, 189, 387).
2. Vacancies in board of directors may be left unfilled with consent of Superintendent (§126).

3. Change in number of directors not effective till approved by Superintendent (§127).
4. Change from state to national bank requires notification to the Superintendent (§137).
5. Superintendent has discretion whether the application by a private banking partnership is to be verified by one or more members (§150).
6. Superintendent designates papers in which unclaimed deposits of private bankers are published (§157).
7. Carrying the place of business at a greater than its actual cost, or including the increase in book value in gross earnings, requires the approval of the Superintendent (§§109, 194). In case of saving banks (§246) and savings and loan associations (§§361-63), the prohibition is absolute.
8. Power of directors to sell stock of shareholder failing to pay an assessment; sale may not be for less than valuation fixed by the Superintendent (§§121, 207, 323).
9. Return of deposited securities on ceasing to transact business; Superintendent must be satisfied that bank is solvent and interests of creditors are fully protected (§37).
10. Trust company *may be permitted* (note the phrase) to collect interest on deposited securities and to exchange them (§184).
11. Superintendent authorizes philanthropic or educational institutions to designate funds as saving accounts (§279).
12. He approves the increase of number of savings bank trustees, upon satisfactory reasons (§266), and the removal by trustees of one of their number on charges (§268).
13. He approves the by-laws of land banks (§§421-23), and the alteration of by-laws of saving and loan associations (§410) and of credit unions (§473; refusal in the last case being subject to appeal to a justice of the supreme court). The by-laws of a credit union and of a savings bank in the first instance require only to be submitted (§§450-52, 262).
14. He approves an exchange of real estate of savings and loan associations which requires payment of money by the association (§387).
15. He fixes (subject to specified exceptions) the valuation at which overdue debts may be carried as assets by savings banks and savings and loan associations (§§253, 393).
16. He furnishes lists of municipal bond investments which protect trustees of savings banks from liability for investment losses (§239).
17. He may require the sale of securities that have ceased to be authorized savings-banks investments (§55).
18. He approves the petition of a savings bank for a court order reducing the liability to depositors by reason of impairment of assets (§280). In case of credit unions, such reduction requires only his approval, not also a court order (§462).
19. Foreign transportation ticket agents (other than railroad companies or agents, or agents of steamship companies) require a license from the Comptroller, which is annually renewable, and revocable by the Comptroller for specified cause (General Business Laws, §§150, 152).

The foregoing list is given to show the very extensive recourse of the law to

administrative control; some of the requirements are trivial, and as to some, the approval is apt to be perfunctory; a small official staff (apart from the examiners) is apparently sufficient to handle the business of the Department.

§192. *United States—National banks.*—Legal control is exercised in the main through prescribed prerequisites of organization and limitation of powers, and through systematic examination and reports.

Determinative powers are more sparingly delegated than in New York. They are vested in the Comptroller of the Currency, or, in connection with the Clayton Act, in the Federal Reserve Board. They are as follows:

a) *Approval requirements:*

1. In connection with the establishment of the bank, the Comptroller issues a certificate of authority, if satisfied that it is entitled to commence business. He may withhold it when he has reason to suppose that it is formed for other than objects contemplated by the law (§5169).

2. The Comptroller's consent or approval is required for consolidation of banks (Act, November 7, 1918; also Act, February 25, 1927, §1); there is also a consent requirement for one officer serving in more banks than one, subject to statutory restriction (acts May 15, 1916, and May 26, 1920).

3. Also for the conversion of a state into a national, and of a gold into a currency, bank (§5154, and Act, February 14, 1880).

4. Also for the establishment of branches; the number of permissible branches in municipalities of over 100,000 inhabitants is committed to the discretion of the Comptroller (Act, February 25, 1927, §7).

5. Also for a change of name or location (Act, May 1, 1886).

6. Also for extending the corporate life of the bank, if an examination shows the bank to be in a satisfactory condition; in this connection the Comptroller has also power to appraise the shares of dissenting shareholders (act of July 12, 1882, and April 12, 1902).

7. For increase or reduction of capital (§§5142, 5143).

8. For organizing banks, in smaller places, with less than the normal minimum capital (§5138, and Act, March 14, 1900).

9. For withdrawal of circulating notes (act of 1882; until then regulated by law without reference to administrative power).

10. For the selection of banks in designated cities at which circulating notes will be redeemed; if none is selected the Comptroller may appoint a receiver (§5195).

*b) Directing powers:* The Comptroller may require:

1. The deposit of additional bonds to secure circulating notes in case of depreciation (§5167).
2. The making good of reserves which have fallen below the required amount; upon failure he appoints, after thirty days, a receiver (§5191).
3. The payment of a capital stock deficiency within three months after notice; otherwise he appoints a receiver (§5205).
4. Special reports (§5211), and he may order special examinations (§5227).

*c) Summary powers:*

1. The Comptroller may appoint a receiver in the cases before noted (§§5191 [with approval of Secretary of Treasury], 5195, and 5205); and also if circulating notes are not redeemed (§5234). Section 5234 regulates the appointment of the receiver; the sale of assets takes place under orders of a court; section 5237 authorizes the bank to enjoin proceedings leading to receivership by application to a court.
2. The Comptroller may cancel deposited bonds which are forfeited for failure to pay circulating notes, or he may sell them at public auction or private sale (§§5229, 5230, 5231).

*International Finance Corporations (Edge Act, December 24, 1919).*—Administrative powers are vested in the Federal Reserve Board.

It approves the name of the organization; it approves the articles of association and gives a permit to begin business; it approves the places where branches and agencies may be established; it approves the conversion of a state corporation into a federal corporation if not contrary to state law; it may make rules and regulations for the conduct of the corporation's business; it prescribes conditions and limitations for the issue of debentures, bonds, and notes; it prescribes, subject to a statutory minimum, what reserves shall be carried; if more than the specified percentage of the corporation's capital is to be invested in any one other corporation, the Board's approval is required; its consent is required for the purchase of stock in other corporations organized under the Edge Act or under foreign laws; it approves of an officer, employee, etc., of a bank that is a member of the Federal Reserve System also serving as officer, employee, etc., of the corporation organized under this act, and of an officer, employee, etc., also serving as officer, employee, etc., of a corporation in whose stock it has invested; it determines what powers may be exercised in other countries as

being usually exercised in connection with banking in those countries; it may require the corporation to act as the fiscal agent of the United States; it may direct an examination of the corporation's affairs by examiners appointed by it; and it may appoint a receiver of an insolvent corporation who has the same powers as the receiver appointed for a national bank.

§193. *England*.—The subject of administrative powers under English banking legislation may be disposed of very briefly.

Special administrative powers exist by statute in connection with banks of issue, which, for reasons before stated, are omitted from this survey. There is some legislation regarding savings banks, with a few administrative powers vested in the National Debt Commissioners: they must consent to amalgamations, to specified investments, and to the purchase of land and the erection of buildings for bank purposes (Savings Bank Act, 1904, §§4, 5, 6).

There is otherwise no English legislation relating to the business of banking, except that banking associations of more than ten persons are required to be registered under the Companies Act, 1908 (§1), and except that the law of bills of exchange has been codified (act of 1882). This being a branch of the private law, it operates without the intervention of administrative powers.

An act of 1900 provides for the registration of money-lenders; the only administrative power under the act is the authority of the Board of Trade to exempt from the registration requirement any body corporate, with the effect that it is not considered a money-lender within the terms of the act. Another law was enacted in 1927.

§194. *Germany*.—Except for the privilege of issuing notes to circulate as money, the business of banking in Germany until 1899 was free from legislative, and therefore also from administrative, control.

The general joint stock company law (part of the Commercial Code) gave ample facilities for the organization of banking as well as other business corporations, without restraint as to combination of activities in the same concern.\*

The first, and within the period covered by this survey the only, systematic regulation of the banking business is the Mortgage Bank Law of 1899.

While the legislation is federal, the administration, as in the case

\* A commentator states that one of the principal German banks was organized for the carrying on of banking, commercial, and industrial businesses of all kinds (Staub, *Commentary to Commercial Code* [§182]).

of many other federal laws, is committed largely to the member states; and when the law refers to a supervisory authority, that authority is determined by state law (§3).

The conduct of the business, except in case of pre-existing mortgage banks (§45), requires a license, according to the scope of the business either from the Federal Council or the Central State authority; and the license may be given only to joint stock companies (§1).

Authorization is also required for any change of by-laws (§1).

The licensing power is not in any way qualified.

The consent or approval of the supervisory authority is required: (1) for raising the loan limit on farm lands from 60 to 66 per cent (§11), (2) for valuation instructions (§13), (3) for general loan conditions (§15), and (4) for conditions of loans on light railways (§42).

If valuation instructions are used in another than the home state, the authority of the other state may object to them; and the objection is determined by the Federal Council (§13). Since the bank may here encounter conflicting policies of two jurisdictions adversely interested in the method of valuation, the one from the point of view of the lender, the other from that of the borrower, the power to settle the conflict is committed to the federal authority.

The supervising authority has directing powers in a few minor specified matters, as follows:

It may demand lists of loans, the form and contents of such lists being prescribed by the Federal Council (§15).

It may require the calling of meetings and the placing of subjects designated by it on the agenda, and in default, may itself do these things (§24).

It may prohibit the carrying into effect of any illegal resolutions (§4).

In addition, however, it has the power to take all measures necessary to secure conformity of bank operations to the law, and for this purpose has particularly full powers of inspection and of calling for information (§4).

*Comparison.*—The administrative powers under the German Mortgage Bank Law should be compared with those of the New York Banking Law:

The initial licensing power under the German law is entirely unqualified: neither in Germany nor in New York (except in New York as to specified branches of banking) is there an administrative power to revoke licenses.



There is in Germany no provision regarding location or branches, and consequently no approval requirements in these respects.

The directing power in New York is very much wider, extending to unsafe practices; in Germany it applies only to violations of law.

There is in Germany, in accordance with the general practice, no power to examine on oath.

There is no power under any circumstances to take possession of the bank, as there is in New York.

The contents of reports, as well as all other matters prescribed or regulated, are fixed in detail by the law itself, leaving no room for any rule-making power.

On the other hand there is a method of supervision unknown to the law of New York: the supervising authority appoints for each bank a trustee who sees to the adequacy of real security and is custodian of valuable papers (§29).

It may, also, for supervising purposes appoint a delegate, fixing his fee, which is to be paid by the bank (§4).

§195. *Administrative powers under laws for the control of dealings in securities.*—Such control may be effected by legislation of two different kinds: laws of the type of the American so-called “blue-sky laws,” and laws for the regulation of stock exchanges.

“Blue-sky” laws are found in none of the four jurisdictions covered by this survey;<sup>4</sup> an account will, however, be given of the securities law of Illinois of 1919. A law for the regulation of stock exchanges is found in Germany. It covers other exchanges as well, and therefore controls dealings of a certain type in produce as well as in securities.

In Germany, moreover, the issue of obligations payable to the bearer requires state-government authorization; unauthorized bearer obligations are void, but the issuer is liable to the bearer for his damages (Civil Code, §795).

<sup>4</sup>Section 421 of the Penal Law of New York as amended in 1921 (§520) relates only to fraudulent securities and is a simple penal statute without administrative arrangements or powers. Another statute of New York (Laws, 1921, c. 649; amended 1923, c. 649, and 1925, c. 230) was at first likewise confined to fraudulent practices in connection with securities, and vested special powers for effectually meeting them in the Attorney-General and the Supreme Court, in analogy to the powers given in aid of the anti-trust laws; the amendment of 1925 adds publicity requirements by notices printed in an official paper from which specified classes of securities are exempt. While this act may be designated as a “blue-sky law,” it differs from the usual American type by likewise dispensing with administrative powers, other than examining powers.

*The Illinois Securities Law of 1919.*—The law divides securities by careful definition and classification, leaving practically no room for administrative discretion, into four classes. The first two classes are not placed under administrative control; securities of the third and fourth class (“C” and “D”) may be sold only after filing prescribed statements with the Secretary of State. The Secretary of State does not issue an affirmative license or certificate, but the filing *on his part* of the statements filed with him (the term “filing” indicates both the act of the party and the act of the officer, being used in two different senses) operates as authority to sell (§17).

The law further prohibits any reference in any advertisement to compliance with the law, and requires for securities of the fourth class a statement of their classification under the law, with the addition: “These are speculative securities” (§21).

The Secretary refuses to file the statements if they are inadequate, evasive, or not in accordance with law, or if the sale would in his opinion tend to work a fraud upon the purchaser (§17).

The refusal to file may be contested by an application to a court, the burden of proof resting upon the contestant (§18).

After filing, the administrative control ceases, except that the Secretary of State may institute proceedings in court to restrain the sale of securities where statements turn out to be false or conditions change (§24).

The conspicuous administrative features of the Illinois Securities Law are: the deliberate avoidance of affirmative certification; the restriction of the right to refuse filing to cases of non-compliance with law and of fraud, the latter implying some degree of discretion; and the provision for judicial review of an administrative refusal.

*German legislation concerning exchanges.*—A federal law of May 27, 1908, superseded an earlier one of 1896 which failed of its purpose by reason of the too drastic character of its provisions.

The law applies to produce as well as to stock exchanges and has elaborate special provisions concerning “futures” in grains (§§67-87).

The object of the law is sought to be accomplished in the main through a self-governmental organization of exchanges, coupled with limitations imposed by law.

The self-governmental organization includes disciplinary courts and commissions which pass on the admission of securities (§§9-27, 36-38).

The law prescribes what classes of persons are excluded from the

exchanges (§7), and what classes can legally bind themselves by dealings in "futures" (§53); it also contains rules for the admissibility of securities (§44), and for the fixing of quotations (§§29-35).

The Federal Council has rule-making powers, partly to supplement and partly to vary the provisions of the law; it may prohibit the use of exchange facilities to designated classes of business or make such use dependent on conditions (§4). The Federal Council acts with the advice of a committee of experts appointed by it, one half on the nomination of the exchanges.

The administration of the law, as of many other federal laws, is in the main intrusted to the member states.

The state government licenses or closes exchanges, apparently as a matter of absolutely free discretion (§1). It also approves the rules of each exchange and may require specified rules to be adopted, particularly concerning the representation of agricultural interests (§4).

A state commissioner is appointed to supervise each exchange, and he has the right to attend the meetings of the governing board (§1).

The state government may relieve in particular cases from the statutory disqualification to be on the exchange (§7).

The admissibility of securities or produce to be dealt with by way of "futures" is passed upon by a committee of experts, whose opinion must be communicated to the Chancellor. Before they are admitted, the Chancellor must declare that there is no occasion for further inquiry. The directors of the exchange may at any time withdraw the admission (§50). In part the conditions of admissibility are prescribed by the law itself.

The free discretion in licensing and closing, contrary to the German legislative practice observed in dealing with private rights, marks the character of the exchange as a quasi-public institution.

## CHAPTER XIX

### ADMINISTRATIVE POWERS UNDER INSURANCE LEGISLATION<sup>1</sup>

§196. *England*.—Until 1909 England had legislation only with regard to life insurance. The law (acts of 1870, 1871, 1872) required the deposit of a stated amount with the Accountant-General of the Court of Chancery (to be returned upon accumulation of an insurance fund of a stated amount), the filing of an annual statement with the Board of Trade, and a quinquennial actuarial investigation. The few supervisory powers (consent to amalgamation or transfer) and also the powers in connection with winding up a company were vested in the Court of Chancery. In 1907 the provisions of these acts were extended to employers' liability insurance companies.

a) *The Act of 1909*.—In 1909 an Assurance Companies Act was passed, covering life, fire, accident, employers'-liability, and bond-investment insurance. The business of marine insurance was left unregulated, but the law of marine insurance contract had been codified in 1906. The latter belongs to the domain of private law and does not create administrative powers.<sup>2</sup>

The act of 1909 makes the previous requirements for life insurance companies applicable to all the companies which it covers: deposit of £20,000 for each company, annual balance sheets, and quinquennial actuarial reports and abstracts which must be deposited with the Board of Trade. It also requires the deposit with the Board of Trade of statements made in connection with amalgamations and transfers of business, and the separation of accounts for separate classes of insurance or of other business. The act prescribes rules for valuing policies and liabilities under policies in case of winding-up.

Apart from the last requirement, the direct provisions of the act

<sup>1</sup> See E. W. Patterson, *The Insurance Commissioner in the United States* (1927), for a very adequate treatment of the American law. In the absence of American federal legislation, only the three other jurisdictions will have to be considered.

<sup>2</sup> Hoffman, *Insurance Science and Economics*, p. 231: "The distinction between the administrative, or public, law of insurance, and the private, or contract law is vital, and there is practically never any confusion upon these two branches of legal science in the legislation of European countries."

do not apparently control either plan of organization, or methods or principles of doing business.

The act does not apply to Lloyd's or underwriters' associations, which are subject to modified deposit and report requirements or in the alternative must comply with trust deeds approved by the Board of Trade (Schedule 8).

The act likewise does not apply to registered trade-unions.

In view of the slight control exercised by the act, administrative powers are correspondingly limited. In the main they are powers to vary particular provisions of the act or to grant exemptions.

Thus the Board approves underwriters' associations that desire to avail themselves of the exemption granted to Lloyd's (§28); it passes on the claim that the business is carried on mainly on the mutual plan in the case of building and employers'-liability insurance, which secures exemption from deposit requirements (§§31, 33); it may extend the exemption of registered trade-unions to old established unregistered unions and, if it appears expedient, to unregistered friendly societies (§35); it approves the trust deed which may be substituted for the requirements applicable to underwriters' associations, and of the associations themselves (§28 and Schedule 8).

The Board of Trade may also alter the forms prescribed by the schedules of the act, to make them applicable to the circumstances of any particular company (§22).

The Board of Trade prescribes, apparently by general regulation, the manner of auditing accounts (§9), and the qualifications of the actuary who makes the quinquennial examinations (§§5, 29).

There are no approval requirements except as before noted, nor any directing powers; if accounts, abstracts, etc., deposited with the Board of Trade appear to the Board to be inaccurate or incomplete, the power given is merely to "communicate with the company with a view to the correction of any such inaccuracies and the supply of deficiencies" (§7).

Not only are winding-up proceedings entirely judicial (§15), but amalgamation of companies or transfer of business is effected by application to a court and under judicial sanction (§§13, 14).

The act applies equally to domestic and to foreign companies (§1), so that the latter likewise enjoy almost complete immunity from administrative control.

*b) The Act of 1923.*—An act of 1923 regulates the business of industrial assurance, i.e., life insurance where premiums are received at

short intervals by means of collectors, the business being conducted either by assurance companies ("industrial assurance companies") or by friendly societies ("collecting societies"). The act is notable for the powers which it vests in the Chief Registrar of Friendly Societies, who is *ex-officio* commissioner for administering the law. He has important dispensing powers: he may grant to existing societies postponements (five years at a time) of compliance with the deposit requirement of the act (§7); he may, where the collecting society is a branch of a friendly society, accept the guaranty of the latter in such manner as he directs, in lieu of the deposit (§7); he may grant revocable exemptions to juvenile societies established as branches of friendly societies, and to collecting societies which confine collections to a ten-mile radius (§§10, 11); he may grant relaxations in connection with specified valuation requirements, and may sanction condensed statements in policies in place of the full recital of statutory provisions (§§18, 21).

The refusal of the postponement of a deposit requirement is subject to appeal to a court; so is the refusal of the exercise of a power to relieve from unreasonable conditions in so-called "war-bond policies" (§30). The Commissioner may refuse to issue a warrant for a deposit to a company desiring to do industrial insurance business if he considers the carrying on of such business inexpedient; but his judgment in that respect is also subject to appeal to a court (§12); he may, after hearing representations, reject any account or return and give directions for variation (§16), and may, subject to appeal, reject any valuation (§18); he has full power of inspection, and, subject to appeal, may impose the expense thereof upon the society or company (§17); in connection with valuations, he may call for information specified in the act (§18); any dispute between insurer and assured or beneficiary may be referred to the Commissioner by either party, if the amount does not exceed £50 and neither the legality of the policy is questioned nor fraud or misrepresentation charged, and may be so referred by consent in any case (§32); the Commissioner must be heard in case of amalgamation or conversion (§36); finally, he may award dissolution and winding-up of a collecting society, if the deposit requirement is not met or if a deficiency appears (§§7, 18), while in case of a company the dissolution is judicial (§18).

On the whole, the act of 1923 seems to represent a policy of granting administrative powers for the protection of the working classes, for which it is difficult to find in England a parallel outside of merchant shipping legislation.

§197. *New York.*<sup>3</sup>—The Insurance Law is found in the Consolidation of 1909 and numerous subsequent amendments.

Administrative functions are exercised by an Insurance Department under the headship of a Superintendent, created in 1859, prior to which date the Comptroller had been the supervising officer.

*Direct statutory provisions.*—The scientific character of insurance makes it possible to standardize the financial foundations and methods of the business to an exceptional degree. State control is therefore exercised primarily through direct requirements and prohibitions, accompanied by publicity and strict supervision; and determinative powers are ministerial rather than discretionary. These powers, however, are numerous and important.

The statutory provisions operating, at least in part, directly and without dependence upon administrative action relate to the following points: conditions of incorporation (§§70, 110); objects and permissible combinations of objects (§70); minimum capital (§12); deposit requirements (§§13, 27, 28, 71, 131); investments and rules for valuing securities (§§16, 18); restrictions on holding real property (§20); rules for reinsurance (§22); limitations of any one risk (§24); requirement of annual reports (§44); insurance without consent of insured (§55); requirement that the policy contain the entire contract (§58); for life and in part also for health and casualty insurance in particular: prohibition against treating the person soliciting insurance as the agent of the insured (§59); requirement of annual investigation by an approved actuary (§19); annual distribution of surplus; very full provisions regarding bases of valuing policies (§84), allowable assets (§86), contingency reserves (§87), surrender value of lapsed and forfeited policies (§88), and investments (§100); standard provisions (§101); annual reports (§103); prohibition of discrimination (§89); limitation of new business (subject to a dispensing power) (§96); limitation of expenses (§97); election of directors (§94) (some of the most drastic provisions were introduced in 1906 as the result of the investigation of the Armstrong Committee); standard provisions for health and accident insurance (§107) and for liability insurance (§109); for fire insurance in particular: provisions regarding the financing of mutuals (§§111-16); standard

<sup>3</sup> As to American methods of state supervision in general, see H. P. Dunham, *The Business of Insurance* (1912), Vol. 4, c. 67.

fire policy (§121);<sup>4</sup> change from mutual to stock corporation (§125); merger (§129); guaranty and reserve funds (§130); also a number of provisions particularly applicable to co-operative and fraternal companies, though much less full than those applying to regular companies.

The direct statutory regulation has the effect of either eliminating determinative administrative action (i.e., action other than by way of examination or prosecution) altogether, or of eliminating or reducing administrative discretion.<sup>5</sup>

*Examining powers.*—The examining powers vested in the Superintendent and exercisable through examiners appointed by him are comprehensive, extending not only to companies and their agents, but to all persons having information or papers relevant to the examination. Before filing a report resulting from an examination, the Superintendent is required to grant a hearing to the corporation; the publication of the report is in his discretion (§39).

The examination is required to be made if a stockholder, policyholder, or judgment creditor presents under oath facts within his

<sup>4</sup> Note the difference between standard *provisions* with regard to life, health, and accident insurance, and standard *policy* with regard to fire insurance; as to the difference between the two in health and accident insurance, see *Hopkins v. Connecticut General Life Insurance Company*, 225 N.Y. 76, and *State v. Smith* 184 Wis. 455.

<sup>5</sup> The following German comment is of interest (Broecker, "The New Insurance Law of the State of New York," 12 *Zeitschrift fuer Versicherungswissenschaft* 64 [1907]): "While the German statute in almost all its parts, at least so far as the regulation of predominantly technical questions is concerned, expresses the idea that the widest possible scope must be given to the development of the legitimate peculiarities of each particular enterprise, the American legislation everywhere manifests a strong effort to confine the entire management, particularly as regards technical arrangements, as far as possible to rigid forms.

"Thus the American statutes determine precisely by which actuarial principles the obligations of life insurance companies toward the insured shall be ascertained by the supervising authority, and what measures are to be taken if the authority arrives at conclusions unfavorable to the company. The German law takes the opposite position. The supervising authority is free to concede to each company the adoption of those actuarial principles which appear to be best suited to the particular company.

"The advantage of the American system is that the companies always know precisely, what the powers of the supervising authority are. It must be to them a source of confidence that they are legally protected against unauthorized measures of the superintending official. This much is certain, that the German system is preferable where it is possible to count upon reasonableness and expert knowledge in the supervising authority."



knowledge which in the judgment of the Superintendent make an examination advisable (§40).

The verified report of the examination is, as to facts appearing from documents or elicited from sworn testimony, made presumptive evidence in actions brought by the people against the insurer (§39).

*Establishment of business and changes.*—Both the setting up of the insurer's business and important changes in it (including increase of capital and change of name) are dependent upon official action.

Until 1910 the Superintendent, in case of domestic corporations, merely certified that the law had been complied with, and the Attorney-General approved the charter and accompanying declaration—the latter on old established provision, and both of ministerial character (§§9, 11, 163, 200). In 1910, however, the powers of the Superintendent to refuse his certificate, if in his judgment the refusal would best promote the interests of the people, was extended from foreign to domestic companies.

If the concern is unincorporated, the superintendent may likewise refuse the certificate if the refusal will best promote the interests of the people, and he must certify that the business can be safely intrusted to it (§54); a substantially similar power is given with regard to co-operative fire insurance (§§260, 263), Lloyd's insurance (§§301-4), associations without capital stock (§111a), and promotion schemes (§66). In other cases he merely judges of solvency and facts bearing upon it (mutual fire, §111-14), or of the genuineness of member lists (certain mutual companies, §§164, 186), or of the qualification to act as surety (title and credit guaranty, §182).

The superintendent's consent or approval is required for change of name (§§127, 301, 302), increase of capital (§127), merger, consolidations, conversion, or similar important changes (§§129, 179, 195, 236; 16, 125, 217). As usual in such cases, the power is not in terms qualified; and where it is qualified by addition of terms calling for the superintendent's judgment, the presumable legislative intent is enlargement and not reduction of administrative discretion (§§93, 114, 159, 217).

*Security.*—As regards security (deposits, investments, reserve, re-insurance, amount of business), the statutory provisions are so full that powers are, on the whole, of secondary importance; there is, however, some discretion, in addition to statutory rules, with reference to valuation, and in a few cases also as to the determination of the amounts of reserves (§§13, 18, 20, 22, 27, 28, 72, 84, 87).

The drastic limitations placed upon life companies in 1906 are subject to dispensing powers: the Superintendent may permit a specified excess over the statutory restriction of new business and may suspend the limitations for one year (§§96, 96a).

*Policies.*—In the matter of terms of policies, the powers of the Superintendent until 1922 were, on the whole, limited to the approval of forms, the law itself standardizing the policy in varying degrees (§§101, 101a-d, 121, 220); in the case of health and accident policies the power is one of disapproval subject to judicial review (§107); a standardizing power with regard to riders is made binding only on those using substantially similar conditions (§121).

*Rates.*—In 1922 the law introduced the policy of a qualified control of fire insurance rates through controlling voluntary rate-making associations of which insurers are members;<sup>6</sup> the Superintendent is given full examining power over the rating organization; he may, after hearing, order discriminations in rates removed (subject to review by certiorari), and he approves the methods of hearing by or before the organization. His approval is required for the charging by members of higher or lower rates than those fixed by the organization. Moreover, he may order an adjustment of rates, if those charged show for a two-year period an excessive or inadequate profit, subject to review by certiorari (§141a, b).

This novel method of rate control merits attention.

*Danger of insolvency.*—Administrative powers expand when it becomes a question of dealing with a danger of insolvency. The Superintendent determines deficiencies of capital and requires directors to call on shareholders (§§41, 86). For specified classes of companies he may require additional reserves (§87) or the ceasing of business (§207). It is to be noted, however, that in order to take possession of a concern he must proceed through the courts (§§41, 63, 164); whereas in the case of a bank this judicial intervention is not required, and it is the bank that has to go into court to get relief against the administrative action. The leniency of the law in dealing with fraternal benefit societies is particularly to be noticed (§242).

*Revocation.*—The power to revoke the certificate of authority is bestowed conservatively, and only for delinquency in some form; it applies to all companies in the discretion of the Superintendent if misleading statements are made (§60); for the violation of the standard-pro-

<sup>6</sup> See Riegel, "Rate-making Organizations," 70 *Annals of American Academy* (1917) 172.

visions requirement he may revoke the certificate of a health or accident company (§107); for failure to maintain surplus and reserves, that of a liability-compensation company (§164); that of Lloyd's, for failure to comply with requirements or upon any event which would prohibit the doing of business (§§301, 302). For refusal to permit examination, he is directed to revoke the authority of a co-operative casualty and life company (§213).

*Foreign companies.*—The powers stated so far apply to domestic insurers; those exercisable with regard to foreign companies are much wider.

In all cases the certificate may be refused if the interest of the people seems to require it, (a power introduced in 1892, and in 1910 extended to domestic insurers) (§9); on the same ground it may be revoked (yet the revocation is made subject to certiorari) (§32); certificates run for one year only (§§32, 204). The grant of the certificate is in the discretion of the Superintendent in the case of mutual-liability and compensation companies (§194) and in the case of Lloyd's (§305); Lloyd's certificates shall be revoked if further business will be hazardous, as well as for specified grounds involving delinquency (§305). In certain other cases revocation is made mandatory (non-payment of taxes [§34], impairment of capital [§41], if expenses exceed a prescribed limit [§207], removal of suit to federal court [§30], the last provision inoperative under 241 U.S. 329).

A certificate may also be revoked or its renewal refused by way of retaliation (§§33, 204).

Any foreign company shall be refused admission unless its assets are of the same character as those required of a domestic company and unless it agrees not to transact business forbidden to a domestic company. On violation of the agreement, and subject to the assent of the Attorney-General, the certificate shall be revoked (§56).

The lenient policy of the law toward fraternal benefit societies extends to foreign societies of that character (§§237, 242, 244).

*Agents and brokers.*—It remains to notice the subjection of "intermediary" insurance business to the requirement of certificates of authority.

Agents of foreign fire and life companies were placed under license requirement at a relatively early period (Laws, 1851, c. 95, §3; 1853, c. 466, §23); in 1884 the Superintendent was authorized to license agents (not to exceed two hundred) to procure fire policies from insurers not authorized to do business in the state (Law, 1884, c. 346, §4).

After the outbreak of the war this was extended to specified war and riot risks (1917, c. 510). A certificate of authority was required of all life insurance agents in 1889 (c. 282).

At present the law covers life, fire, and health and accident insurance agents, and brokers and adjusters (Insurance Law, §§91, 91a, 138a, 142, 142a). The certificates must be renewed annually. The provisions are exceedingly elaborate and to some extent extraordinary. Thus the first part of section 91 gives the Superintendent discretion to refuse to issue or renew the certificate; yet in a subsequent part of the same section (and the same provision is found in connection with fire insurance agents) not only the refusal of the certificate (a sufficiently unusual provision), but also the grant itself is made subject to review by the writ of certiorari. Both refusal and revocation require notice and hearing. In favor of fire- and life-insurance agents and brokers we find the further provision that the certiorari proceedings not merely suspend the revocation, but apparently also effect an automatic renewal (§§91, 143, No. 13). It may be surmised that the requirements met with opposition and that the somewhat anomalous safeguards represent a compromise.

NOTE.—It is outside of the scope of this survey to consider non-statutory activities. Dunham's chapter on state supervision of insurance, above cited, mentions as duties imposed upon the insurance commissioner by custom: the hearing of complaints of policy-holders and of agents; the answering of lawyers' questions for information about insurance laws; the advising with companies which are in difficulties; and advising persons, upon their request, as to kinds and cost of policies. He also refers to the efforts of the National Convention of Insurance Commissioners to unify laws. See also, Patterson, *op. cit.*, section 20.

§198. *Germany*.—The German Insurance Law was enacted May 12, 1901. There is also a German act of May 30, 1908, codifying the law of the insurance contract, but it does not concern itself with the public control of the business.

Before 1901 the only provision of the federal law (insurance being, under the constitution, a subject of federal jurisdiction) was that insurance was excepted from the general principle of freedom of the pursuit of gainful occupations (Trade Code, §6). The business thus was left to the control of member states, whose laws restricted it to licensed institutions. Licenses were granted in Prussia by the government if it was satisfied of the integrity and reliability of the undertaker. Foreign companies required a permit from the government (Prussian act of May 17, 1853).

The act of 1901 is comprehensive, applying to all classes of insurance except a few specified branches (losses on security quotations, goods in transit, and companies doing exclusively reinsurance business), to whom however the Federal Council may make such provisions of the law as it may specify applicable (§116).

The act is very much more sparing in its direct requirements than that of New York.

It specifies what classes of provisions must be contained in any life insurance policy (§9) and in the plan of any life insurance company, thus requiring, without prescribing, methods that insure standardization.

There are limitations on the power to hold real estate, and an obligation to keep books.

For mutual companies there are organization and publicity requirements, the more elaborate ones not being applicable to small companies (§§15-53); the duty to make provision for an organization fund (§22) and for a reserve (§37) is subject to dispensation.

Life insurance companies must have a reserve fund, which must be separately administered and kept intact; the manner of investing it and rules for real security are prescribed; otherwise the matter is left to be determined by the plan of the company (§§56-62).

The brevity of these provisions contrasts markedly with the fullness of those of the New York law.

The provisions giving administrative powers are likewise simpler in form, and they are carefully guarded (except as to foreign companies, which may be rejected or forbidden further business in the free discretion of the government [§§86, 91]), but they are more incisive in some respects than those of New York.<sup>7</sup>

Thus the discretion exercised in granting or refusing the initial license required for every company, while so circumscribed as to exclude considerations of mere expediency, involves passing upon the safety of the general plan. The provision is that the license may be refused only if the plan contravenes legal requirements, if it does not sufficiently

<sup>7</sup> A full account of government control of insurance in Germany is given by Frederick L. Hoffman, *Insurance Science and Economics* (1911), c. 5. He says (p. 229): "These Codes (Swiss, Austrian, and German) confer great powers of discretion upon the supervising authorities, while providing for the necessary technical and political qualifications in the supervising officials. The codes contain few regulations in matters of administrative detail, which is probably the chief reason why in practice they have been so generally satisfactory and effective."

guard the interests of the assured or does not sufficiently demonstrate the continuing capacity to satisfy obligations, or if there are facts justifying the apprehension that the business will not be conducted in accordance with law or proper standards (§§4, 7).

As a condition of licensing, the deposit of security may be required, with appropriate stipulations concerning its use and return. Consent is also required for every change of plan (§13).

As pointed out before, the greater detail of the New York regulation of the business reduces the initial administrative discretion; while the greater discretion in Germany permits greater liberty and variety in plans and methods of insurance.

Certain other consent requirements call for bare notice: for acquisition of real property (§54); for the transfer of the business or a branch thereof (§14); for the place of depositing reserves (§57) and the selection of deposit banks (§54); for the dissolution of mutuals (§43).

Of considerable interest and importance are the directing powers: the insurance authority may require the calling of meetings and direct the placing of subjects on the agenda (§65); it may require the adoption of instructions to govern valuations for loans (§60); in case of threatening insolvency it may require charges, order reduction of payments, and prohibit specified payments (§69).

Above all it may issue orders, not only to secure compliance with the law, but also to remove abuses or reprehensible practices (§64); and in case of continued violation of duties or grave abuses the authority may order the discontinuance of the concern or take other measures for security (§67).

To enforce its orders, it may impose penalties which are collectible like local taxes (§64)—an administrative power almost entirely unknown to American insurance legislation and probably contrary to recognized constitutional principles.<sup>8</sup>

It thus appears that the directing powers are more incisive than those under the law of New York, though hardly more so than those which may be exercised in New York by the Superintendent of Banks.

As in New York, the authority may require information and take testimony (§65).

There are full provisions concerning the organization of the insurance authority. The chief authority is a board, not an individual; and board procedure is required for the exercise of all important determin-

<sup>8</sup> See Patterson, *op. cit.*, p. 431, for a few instances.

ing powers. All adverse determinations not resting on free discretion (which exists only with regard to foreign companies) are subject to appeal. The appeal is administrative; and the authority itself is organized for the purpose, appeals being heard by members of the board reinforced by expert assessors and superior judges (§§70-77).

To the subject of insurance also belongs a German imperial act of 1876 relating to registered relief funds. These require a permit from the superior administrative authority: the application must be decided within six weeks and may be denied only for non-compliance with definite legal requirements, to be stated in writing; i.e., the power is non-discretionary.

If revenues are insufficient and the fund does not remedy the situation voluntarily, it may be ordered to alter either its dues or its relief rates.

The act specifies seven reasons for which the fund may be closed. The general provisions of the Trade Code concerning relief against administrative action are made applicable.

## CHAPTER XX

### ADMINISTRATIVE POWERS UNDER TRADE LEGISLATION

§199. *General and historical.*—The term “trade” as a subject of legislation requires definition. It may be used to cover all commerce and industry. The German equivalent, *Gewerbe*, as used in the Trade Code (*Gewerbeordnung*) means every gainful occupation except agriculture. As a category of legislation in this survey, the meaning is much narrower. Public utilities, shipping, and finance have already been considered separately. Much of trade legislation concerns safety, health, morals, or labor, and is more conveniently treated under these heads; so also, the professions claim a place by themselves. There practically remains only the regulation from an economic point of view of dealings in commodities and middlemen’s or other independent services.

Trade regulation in this narrower sense, in contrast to other fields of legislation, has shown during the last 100 or 150 years a tendency to contract rather than to expand. In the Middle Ages, trades were everywhere subject to guild control, the right to engage in a trade, as well as the quality of products, being carefully guarded and supervised. In England, after the decline of the guilds, the control of commodities was in part taken over by national legislation, a large amount of which was enacted in the Tudor period for the “true making” of particular species of manufacture (worsted, dyed wool, cloth, linen, featherbeds, leather, wax, tiles, malt, oil; the work of silk-throwsters, upholsterers, plasters, painters), but all these statutes were abrogated by acts passed in the reigns of George III and Queen Victoria.

In New York, the old legislation (like that of other states [see the note in *Turner v. Maryland*, 107 U.S. 38]) provided for the inspection (and consequent official marking) of a considerable number of commodities, particularly where intended for export (flour and meal, beef and pork, pot and pearl ashes, fish, fish and liver oil, lumber, staves, flaxseed, sole leather, hoops, distilled spirits, and leaf tobacco). This legislation fell into disfavor, and in 1846 the constitution abolished and forbade the future creation of all offices for the weighing, gauging, measuring, culling, or inspecting of any merchandise, produce, manufacture, or commodity, saving offices for the protection of the public



health, for the supplying of correct standards of weights and measures, and for the protection of the state in its revenues and purchases. The provision is continued in the present constitution. Probably safety requirements are also outside of the prohibition; in any event, the Charter of the city of New York provides for the official stamping of petroleum barrels (§765). A few provisions of the Farms and Markets Law for official certificates of inspection (shipment of fruit-bearing trees, §§161-72; transportation of bees, §174) are not easy to reconcile with the constitutional prohibition, whereas the official marking of bottles used in the Babcock test for milk (§56) may be considered as a health measure.

An examination of the present statutes of New York shows how legislation has adjusted itself to the prohibition of the constitution. Until recently the General Business Law (articles 13, 14, 15) regulated dealings in certain products (flour and meal, beef and pork, hops and hay), prohibiting mixtures and requiring standard weights and packages as well as certain brands and marks, but the latter were not official; these articles were repealed in 1922. The Farms and Markets Law gives powers of inspection but withholds powers of certification with regard to a number of commodities (seeds, insecticides, turpentine and linseed oil, apples and peaches, coal and bread); the same is true of the oleomargarine and dairy laws. The Farms and Markets Law requires manufacturers and sellers of concentrated feeding stuffs, and of commercial fertilizers, to file annual statements and, if requested, samples for each brand; and they must obtain annual certificates of compliance with this requirement, which are subject to cancellation for specified reasons (§§132, 133, 145); but here again the law omits any requirement of certification applying to the commodities themselves. The Department of Farms and Markets has general power with regard to all foodstuffs or farm products to make rules regarding grading, packing, handling, storage, and sale, and it may prescribe the use of grades and the marketing of products (Business Law, §20a; Farms and Markets Law, §24); but there is nothing in this delegation that gives power to require any of these products to be officially marked or certified. New York does not even require the use of officially sealed weights and measures (*Fausnaugh v. Rogers*, 62 App. Div. 535), which the constitution distinctly permits. From this it may be inferred that the absence of requirements that has been noted is not entirely due to constitutional prohibition, but perhaps as much to the feeling that a policy of official certification must often be of doubtful

value or even liable to defeat its purpose by creating the appearance without the reality of official guaranty of quality.

In Germany, the Trade Code of 1869, revised in 1900, deals with gainful occupations in a comprehensive manner. It excepts a number of industries and vocations from its provisions (railroads, insurance, law and notarial practice, instruction and education, pharmacies, emigrant agents, fisheries, labor on ships), and applies to a number of others only in so far as there are express provisions relating to them (mining, stock-raising, medicine, lotteries). The code proclaims the freedom to pursue trades except so far as it otherwise provides, thereby abrogating all older license requirements that it does not expressly save. The code in part establishes license requirements directly, in part permits state or localities to establish or continue them; most of these fall under heads that are separately considered in this survey (health and safety, morals, professions, labor). It does not touch requirements of taxing, custom, or postal laws. While dispensing with licenses, it imposes upon anyone engaging in some independent trade or vocation the duty to notify the public authorities (§§14, 15).

In connection with specified license requirements, the administrative authority also determines from case to case whether or not, and to what extent, the particular trade or business can be exercised through assistants or employees (Trade Code, §4).

To some extent, license requirements are replaced by prohibiting powers, continuance in business being subject to administrative prohibition if facts appear which demonstrate the unreliability of the person with reference to the particular business. While some of the businesses placed under this power are of such a character that their control may be justified as protection against crime or the safeguarding of morals, health, or safety (dealing in explosives, drugs, lottery tickets, second-hand goods and waste products, keeping bathing establishments, instruction in dancing, gymnastics, or swimming), in others the object seems to be the meeting of a danger of fraud or exploitation or other irregularities (auctioneers, those classes of peddlers which are exempt from license requirements, credit information bureaus, brokers for legal and official business, real estate brokers, loan brokers, marriage brokers, dealers in farm property, and in livestock or living birds, wine-dealers under the act of 1909 in case of repeated conviction). Brokers and auctioneers (and also secondhand dealers, and dealers in explosives) moreover, may be placed under local police control in accordance with regulations of the state government. There is also a

general power to prohibit the further use of any trade establishment or plant by reason of preponderant prejudice or danger to the public welfare (Trade Code, §51); but this is of a different character, being exercisable only upon granting full compensation.

A notable feature of the German system thus outlined, and one sharply differing from our federal system, is that every restraint on trade, proceeding from a member-state, must find its warrant in the Federal Trade Code, and that the Federal Trade Code confines itself in a number of cases to leaving the power to enact restraining legislation to the member-states, regarding it as the special province of the federal or imperial law to establish safeguards to private rights and checks upon state power, both legislative and administrative. Even where the license requirement is established by the code directly, it is administered by the state governments.

It appears from what has been said that in New York there has been an explicit constitutional policy against official certification requirements for commodities; in Germany there has been an equally explicit, but statutory, policy against license requirements for gainful occupations, but subject to quite a number of exceptions; in England, there has been no similar distinct pronouncement of legislative policy, but earlier laws became obsolete and the principal repealing acts merely registered their disuse (§§19 & 20 Vict., c. 64 [1856]; Statute Law Revision Act, 1863). In the three jurisdictions alike, there is now relatively little legislation, and that is of an unsystematic character, creating administrative powers with regard to the economic aspects of ordinary business; but there are signs of a revival of regulation.

§200. *Licensing requirements.*—It is of interest to compare the three jurisdictions as to the present status of their trade legislation regarding certification and licensing requirements:

Peddlers require licenses in the three jurisdictions. The peddling license is nowhere a matter of free discretion; in New York it seems to be a ministerial act (Secretary of State, on application showing specified particulars, shall license); in Germany, grant and refusal are regulated with great particularity (Trade Code, §§55-63); in England, the granting authority must be satisfied of good character and good faith, and from a refusal an appeal may be taken to a court. Nowhere is there explicit power to attach conditions to the license, and the German law specifies restrictions in an exhaustive manner. Everywhere the license is annual, and England and Germany provide for revocation, which in England is judicial, and in Germany, administrative.

Pawnbrokers, likewise, must be licensed in the three jurisdictions. New York requires evidence of good character and an approved bond; England and Germany specify grounds of refusal (England, failure to provide satisfactory evidence of character; Germany, facts showing unreliability with regard to the business, and also, according to local law and ordinance, absence of local need). In England the license may be taken away on conviction if the court thinks fit. In Germany the license may be administratively revoked for the same lack of personal qualification for which it might have been refused (§53). England has for dealers in old metals the peculiar provision that, upon conviction, the place may be required to be registered with the police, and then becomes, for three years, subject to regulations made under the authority of the act (act of 1861). Additional powers of entry and inspection are given by the Public Health Act of 1907.

Auctioneers are free in England; in Germany, they are generally subject to prohibiting orders and must be licensed for sales of real estate; in New York, they require a bond and certificate of appointment from the Comptroller and are, besides, subject to local licenses; in the city of New York, the City Clerk licenses, and the President of the Board of Aldermen may revoke the license on complaint of fraud or misconduct (Charter, §34). For food auctions in public markets, the Department of Farms and Markets "shall grant to persons of good character" licenses which are revocable for misconduct on complaint and hearing (Farms and Markets Law, §§273-75).

In New York, the Farms and Markets Law also requires the annual licensing on the basis of character, responsibility, and good faith, and with provision for revocation, of farm-produce commission merchants (§§245, 248, 249). The same law requires for purposes of milk control, licenses for milk-testers, (§56), for persons in charge of milk-gathering stations (§57), and for buying milk from producers for shipment into a city (§§252, 255, 257). The licenses are revocable for specified causes; the revocation is judicially reviewable (§§248, 249, 254, 255). No similar requirements are found in England or Germany.

In England the Customs and Inland Revenue Act of 1879 (§8) authorizes the placing of certain exports under license. An act of 1920 (c. 70) includes among these gold and silver coin and bullion, and authorizes license requirements for melting or breaking up gold or silver coin current in any country. There is no similar American or German (pre-war) legislation.

The New York Business Law establishes license requirements for

junk-dealers (§60), private detectives (§70), foreign-transportation ticket agents (§§150, 152), employment agents (§§170-91), and for dog-drawn vehicles §36); the Real Property Law, for real estate brokers and salesmen (Art. 12a, act of 1922); the Charter of the city of New York authorizes the licensing of driving of cars, carts, trucks, hacks, and cabs, boatmen, expressmen, bootblacks, dealers in second-hand articles, scalpers in coal freights, intelligence offices, massage parlors, menageries, circuses, common shows, bowling alleys, and billiard tables, and for bone-boiling and fat-rendering (§§51, 316). They are all covered by licensing requirements of the New York City Code of Ordinances.<sup>1</sup>

It is also sufficient merely to mention the English license requirements for hacks and stages, and for porters, messengers, etc. These are local and long established, but recognized in modern statutes (Town Police Clauses Act, 1874; Chimney Sweeps Act, 1875; Public Health Amendment Act, 1907, §84). Similar local licensing powers are recognized by the German Trade Code (§37).

The dispensing with licenses or certificates of qualification based on character or skill in the case of ordinary trades or vocations should be contrasted with the exaction of such tests for professions. The practice of professions generally presupposes a course of what may be called "scientific training" (i.e., not merely training of a practical character), and they are supposed to bear some special relation to public interests (health), or to partake of the nature of public services (law).

<sup>1</sup> The New York City Code of Ordinances, §§178-80 (added December 30, 1919), requires a license of a lessee of a tenement, having three or more dwelling apartments, subletting any portion thereof to three or more persons. The license is annual, and is issued by the Commissioner of Licenses, in his discretion, to lessees complying with rules and regulations laid down by the Board of Aldermen. The Commissioner, after hearing, has power to suspend or revoke such licenses. The revocation renders the person ineligible for another license for three years.

This licensing requirement appears to be without any parallel in other jurisdictions. The subletting of property for dwelling purposes is not ordinarily regarded as a trade, although local conditions may give it that character. When, however, it is considered that this form of profitable investment of money has always been regarded simply as a legitimate use of property and that under a general provision of the New York Code of Ordinances only citizens (or declarants) may receive licenses, it must be questioned whether such requirement, assuming its constitutionality, can be imposed without explicit statutory authority. The ordinances can hardly be regarded as a sanitary measure, since sanitary requirements are fully taken care of by the Sanitary Code and the Tenement House Law.

The line between a profession and a trade is not always easy to draw, and in America there is a clear tendency to extend qualification tests. They are based on the plea of public health and safety in the case of architects, plumbers, and even barbers; they have also been introduced for undertakers, embalmers, and horseshoers<sup>2</sup> where the argument of public health will scarcely avail; and there is in many states (since 1922 also in New York) legislation requiring the licensing of real estate agents, which has been sustained by the Supreme Court (*Bratton v. Chandler* [1922], 260 U.S. 110).

The Court of Appeals of New York has held some license requirements unconstitutional, but in such a way as to support a very wide exercise of the legislative power (*People v. Ringe*, 197 N.Y. 143; *People v. Wilber*, 198 N.Y. 1).

In view of the general trend of decisions, the question presents itself rather as one of legislative policy than of constitutional law; and in this country it has never become a publicly controverted issue as it has been in Germany, where the movement toward licensing requirements has so far been resisted, or in Austria, where it led in 1883 to the introduction of qualification tests for forty-seven specified trades. England, like Germany, has so far been conservative; New York has not gone as far as some other states; but there have been notable additions to the list of licensed occupations in recent years.

§201. *Certification requirements applicable to commodities.*—As before stated, this form of administrative power has greatly declined. The legislation of New York has been sufficiently noted, particularly the omission to provide for officially certified weights and measures. In England and in Germany all measures, weights, and scales used in trade must be officially sealed or stamped; in England, patterns for manufacturing the same are certified to by the Board of Trade, which also makes rules for examining and certifying inspectors, and finally decides disputes between inspectors and other persons as to the meaning of regulations regarding the mode of testing. (English Act, 1878, §§38, 44, 29; 1904, §6; German Act, May 30, 1908).

In England a recent seed law (1920) provides for the licensing by the Department of Agriculture of testing stations, and for powers of inspection and taking samples. Testing certificates are conclusive, unless there is demand for further tests; and in case of differences, the

<sup>2</sup>The German Trade Code likewise permits the states to require certificates of examination for horseshoers (§300).

average certified to by the Minister is conclusive. Certification is thus neither compulsory, nor is it official, except on appeal.

There are other sporadic certification requirements under English statutes, both old and recent, but they are of minor importance: weighing of hay and incidental determination of disputes (1796, 1856); proving of gun barrels (1868), of anchors and chain cables (1899); hall-marking of foreign plate (1904); assaying of foreign watch cases (1907).

The hall-mark requirements for gold and silver under the German Law (Act, July 16, 1884) provide for private marking; only the form of the mark is established by administrative regulation.

The German wine law of 1909 is an elaborate law to secure quality and prevent fraud, not in any sense a sanitary measure. It leaves a good deal to administrative regulations of the Federal Council (adding of ingredients, designations, import prohibitions) but otherwise operates with a minimum of administrative power (other than inspection and taking samples) and contains no provision for official certification.

NOTE.—The following throws an interesting sidelight on British legislative attitude toward certification requirements:

“The reaction against State interference with trade, which marked the middle years of the nineteenth century, threatened for a time to terminate the Government branding of barrels of cured herrings and the correlative system of inspection. The brand was not used on the West Coast, which supplied the home and Irish markets with lightly cured fish, but the export trade from the East Coast to the Continent had developed under this system, and would, indeed, have been jeopardised by its abandonment. It must not be thought that the question of the continuance of the brand was not one of importance to the Highlands and Islands, for, though the industry in western seas did not employ the brand, yet the seasonal migration of workers from the west to the east had already assumed large proportions. An important and interesting feature of the brand system was that it gave to these western fishermen just that chance of becoming boatowners and attaining independence which lack of capital denied them at home. The German merchants, who were large capitalist wholesale dealers, were accustomed to advance, before the fish were caught, considerable sums of money to the Scotch curers on the sole condition that the fish eventually despatched should have the Government brand. The curers, certain of their market, were anxious to engage boats and were quite ready to advance money to fishermen for the purchase and equipment of fishing vessels. It is curious to find that, in spite of the many obvious advantages of the brand system, in spite of the astonishing progress which the export trade had been making while under that system, and in spite of the fact that even the opponents of the Government brand admitted that its continuance was advocated by a majority of the curers, the foreign buyers, and nearly all the merchants and fishery officers, yet the Treasury, in 1855, came to the conclusion that the artificial system created by the brand

should be abolished, and therefore proposed, in accordance with the opinion strongly expressed in the House of Commons, to abolish not only the brand but also the Commissioners. Protests immediately poured in, and were supported by the Commissioners themselves. The Treasury yielded so far as to appoint a Commission of three of whom a majority reported in favour of the continuance of the brand on a self-supporting basis. As a result, a payment of fourpence per barrel was imposed as a brand fee, and first levied in 1859. It yielded in the first year £2664 12s., and in the second £3865 4s. 6d.; amounts which fully covered the cost of the service. Notwithstanding, the Treasury were not satisfied, and it shows the extraordinary influence of the Free Trade theory at that time that a further Commission (the Huxley Commission) appointed in 1866 should report that they considered the continuance of the white herring brand and inspection to be unjustifiable and the Acts of Parliament constituting the Commissioners superfluous and tending to operate injuriously. 'It is admitted on all sides,' they say, 'that in principle the branding system is utterly indefensible. . . . We conceive that the very existence of the brand and its concomitant system of regulation and inspection involves a violation of a great principle of public policy. It is a direct violation of the greatest of all economical principles and of that which is now adopted as the commercial policy of this country—the principle of Free Trade and the policy of removing every description of restriction and protection from commerce.' However, the recommendations of the Huxley Commission were not adopted, and the herring brand has continued to the present day. . . . The use of the brand appears to be declining; in 1911 of 2,046,747 barrels cured, worth £2,390,982, only 267,370 barrels, worth £400,923, were branded, i.e., less than 12 per cent., while during the last few years the brand fees have not yielded a surplus." S. P. Day, *Public Administration in the Highlands and Islands of Scotland*, pp. 258-60.

§202. *Directing powers in trade legislation.*—Powers of this class form the conspicuous feature of federal trade regulation, to be presently discussed. In the other three jurisdictions there have been no grants of power of administrative intervention of this kind for economic purposes, so far as ordinary trades are concerned.

The Farms and Markets Law of New York (Laws, 1922, c. 48), however, gives to the Commissioner rather novel powers of a quasi-judicial character. He may hear charges of violations of law or rules or orders, and issue orders compelling compliance (with the provision borrowed from the Public Service Commission Law, requiring the party to notify the Commissioner whether he will comply with the order); the order is subject to judicial review; violation of the order is subject to penalty (§§32, 37, 40).

The Commissioner may also inquire into complaints regarding the purchase of milk for shipment to cities (§253) and regarding the conduct of any farm produce commission business (§247), and either dis-



miss the complaint or specify the facts established, apparently without giving his findings further effect.

The purpose of the law seems to be to constitute the Commissioner a sort of administrative grievance tribunal without the formality of judicial proceedings; but in so far as grievances relate to practices not clearly illegal, the law leaves his action inconclusive, and the power to award reparation is withheld.

§203. *Federal trade legislation.*—The power given by the Federal Constitution to Congress over interstate and foreign commerce remained practically dormant with regard to ordinary commercial transactions for a century. Its main effect during that period was to prevent by judicial nullification or the expectation of it, restrictive legislation on the part of the states. In 1890, the Sherman Anti-trust Act prohibited all monopolies and combinations in restraint of interstate and foreign commerce. The prohibition applied, without exception, to every species of commercial or industrial enterprise and activity, being as broad as the federal power. It operated, however, entirely without administrative aid other than the regular prosecuting powers of the Department of Justice, subsequently reinforced by important powers of investigation vested in the Bureau of Corporations, a division of the newly established Department of Commerce. The criminal enforcement of the Sherman Act was impeded by the generality and vagueness of its terms; this was sought to be corrected to some extent by the so-called "Clayton Anti-trust Act" of October 15, 1914. At the same time, it was felt that in order to deal more effectively with difficult economic problems, administrative, in addition to judicial, methods might be helpful; and thus resulted the Trade Commission Act of September 26, 1914. Another new departure was made in 1921 when functions similar to those exercised by the Federal Trade Commission were, with regard to packers and stock yards, vested in an executive official, the Secretary of Agriculture. The Secretary of Agriculture had previously, in 1916, been given important powers with reference to the grain trade and agricultural warehousing.<sup>3</sup> The Warehouse Act of August 11, 1916, is an optional certification measure; warehouses are not required to be licensed, but may be licensed and bonded and then

<sup>3</sup> In 1912, he and the Secretary of the Treasury were given power jointly and severally to make rules to prevent the import of adulterated grain seeds, and he was given power to bind the consignee by bond to reclean in accordance with the rules (Act, August 24, 1912). Minor powers for information regarding grades and staple length of cotton are given to the Secretary of Agriculture by act of March 3, 1927.

placed under regulations and supervision of the Department, and products stored in them must be inspected and graded by licensed inspectors in accordance with standards established by the Department; receipts must conform to the requirements of the act and rules made under the act. Licenses are subject to suspension and revocation for specified causes. The Grain Standards Act of the same date is compulsory for grain sold in interstate commerce, provided the sale is by grade. It provides for official establishment of grades and for inspection and certification by licensed inspectors. The grading is subject to appeal to the Secretary whose finding is *prima facie* evidence in the courts of the United States. The Cotton Standards Act of 1923 requires the use of official standards (except where a transaction is by actual sample or on the basis of private types), but certification is optional. The Grain Futures Act of 1922 provides for the certification of "contract markets" for dealing in futures.

It is proper now to consider the administrative powers under the Trade Commission Act and its successors.

The substantive provision of the act of 1914 is remarkably simple. Section 5 declares that unfair methods of competition in commerce are unlawful. The Commission is then empowered and directed to prevent the use of such methods.

For this purpose, the Federal Trade Commission may issue a complaint charging a violation of the act, and proceed to a hearing. As a result of the hearing, it may order the person to cease and desist from using such method of competition. In case of non-compliance, the Commission applies to a United States Circuit Court of Appeals for an enforcement of the order. In this proceeding, the findings of the Commission as to facts, if supported by testimony, are conclusive, but the court may require additional evidence to be taken before the Commission. The party against whom the order is made may also apply to the court to set the order aside.

The Commission is given by the act large powers of investigation and the usual examining powers. Its officers are not permitted to make public any information except by authority of the Commission or by direction of a court, and the Commission itself is forbidden to publish trade secrets or names of customers.

The prohibition of unfair methods of competition is not supported by any direct penalty provisions. There is no reparation provision. The act confers upon the Commission no licensing powers or powers of exemption.

In 1918, the Federal Trade Commission was given some powers by the so-called "Webb-Pomerene Act" (April 10, 1918). This act exempts from the prohibitions of the Anti-trust Act of 1890 associations formed for the sole purpose of engaging in export trade, provided they do not restrain trade within the United States, or the export trade of domestic competitors. The association must register with the Trade Commission and give it any information it may require with regard to matters specified in the law. The registration gives the association the benefit of the act. If the Commission has reason to believe that the association restrains trade within the United States or the export trade of a domestic competitor (whether by acts done within or without the United States), it conducts an inquiry, as the result of which it may make recommendations to the association for the readjustment of its business. If these are not complied with, it refers its findings or recommendations to the Attorney-General for such action thereon as he may deem proper. It will be noted that no power is given to enforce the recommendations of the Commission; for the Attorney-General can enforce only the Anti-trust Law.

However, the act of 1914 is extended to unfair methods of competition against other American exporters used by export trade associations outside of the territorial jurisdiction of the United States. The submission to such extraterritorial power appears to be one of the conditions upon which exemption from the Anti-Trust Act is granted.

The Packers and Stock Yards Act, 1921, in its first Title, places certain prohibitions upon packers. These are more elaborate than the brief prohibition of the Trade Commission Act. Summarized, they make it unlawful for packers to use unfair, unjustly discriminatory, or deceptive practices, to give undue or unreasonable preferences or advantages, to sell or buy articles so as to apportion supply with a tendency to restraint of trade or monopoly, or so as to manipulate or control prices or create a monopoly, or to combine to apportion territory or purchases or manipulate or control prices (§202).

The Secretary of Agriculture may by complaint charge a violation of any of these prohibitions, conduct an inquiry, and issue an order to cease and desist. The packer is given all procedural rights. The order is conclusive unless within thirty days the packer appeals to a Circuit Court of Appeals. The court considers the evidence taken before the Secretary as the evidence of the case, but may order the hearing reopened for taking additional evidence. It may affirm, modify, or set aside the order. The affirming or modifying decree of the court oper-

ates as an injunction; the violation of the order of the Secretary, where it has become conclusive without appeal, is subject to penalty.

The second Title of the act makes it the duty of every stock-yard owner and market agency to furnish without discrimination reasonable stock-yard services; requires rates to be just, reasonable, and non-discriminatory; and makes unlawful any unfair, unjustly discriminatory, or deceptive practice in connection with the marketing of livestock. Schedules of rates must be filed, and may not be changed except after ten days' notice to the Secretary of Agriculture (except by his permission). Under this part of the act, the Secretary may proceed on his own initiative or upon complaint (which may be preferred without direct damage) or upon the petition of a stock-yard owner or market agency. He may inquire whether proposed new rates or practices are lawful, whether any existing rate or practice is unjust, unreasonable, or discriminatory, or any practice or device unfair or deceptive; and may issue, after hearing, orders to cease and desist, or orders prescribing just and reasonable rates, practices, or regulations. The violation of an order is subject to penalty. The Secretary may also apply to a District Court for the enforcement of the order, and the court shall enforce obedience if the court after hearing determines that the order was lawfully (not as in the Interstate Commerce Act: "regularly") made and duly served. For the purpose of setting aside orders of the Secretary by judicial proceedings, the provisions of the Interstate Commerce Act are by analogy made applicable.

There is provision for reparation orders if damage has been suffered by reason of the violation of requirements of the act or of orders. In a suit brought to enforce reparation, the order of the Secretary is *prima facie* evidence (§309c, f).

The first part of the act applying to packers deals with the competitive business of buying, manufacturing, and selling, and is clearly modeled upon the Federal Trade Commission Act. The second part, applying to stock yards, deals with the furnishing of marketing facilities under circumstances in which the service tends to assume the character of a monopoly (small stock yards are excluded by definition), and is modeled upon the Interstate Commerce Act.

In either case, the model is departed from by substituting for a commission the head of one of the executive departments of the government.

Neither the Federal Trade Commission Act nor its successors contain licensing provisions. In the Export Trade Association Act and the

Packers and Stock Yards acts this omission is striking, for it would have been possible to require the official approval of the articles or by-laws of all export associations (instead of the mere filing) and, in the case of packers at least, the approval of mergers and consolidations involving a specified capitalization. The absence of such provisions must be due to a legislative policy of leaving to the government a free hand without advance commitment by certification upon the basis of *ex parte* statements.

The absence of licensing provisions in the Federal Trade Commission Act is readily explainable by the sweeping scope of the act. As it stands, it applies to every concern engaged in interstate or foreign commerce except banks, common carriers, packers, and stockyards, and to every transaction of any such concern relating to such commerce. Any licensing requirement would have necessitated the singling out of concerns or transactions, with consequent considerations of expediency, which would have greatly complicated the act.

The administration of the act proceeds entirely through the system of occasional inquiry and correction, and the danger of having the Commission swamped by innumerable complaints is avoided by the provision that complaints shall be issued only if it appears to the Commission that a proceeding by it will be in the public interest, private parties appearing as interveners for good cause shown. This discretion, which is not to be found in the Packers Act, is intended to give some assurance that the attention of the Commission will be confined to practices of general interest.

The Federal Trade Commission Act is important both as an attempt to evolve standards of trading not as yet legislatively definable, and as creating a novel piece of administrative machinery. From the former point of view, the indefiniteness of the statutory standard is the justification of the administrative power; from the latter point of view, this indefiniteness is its chief problem and difficulty. The terms of the Packers and Stock Yards Act, being practically those of the Anti-trust and Interstate Commerce acts, are perhaps less speculative than the concept of unfair competition; but they likewise lack common legal certainty.

The repression of private action upon the basis of vaguely defined economic principles makes a considerable demand upon administrative impartiality. The Federal Trade Commission Act divides the determination of questions between regular courts and a commission of five members, the court passing upon the law, the Commission upon the

facts. Since the Commission is virtually a prosecuting body, it seems anomalous to make it the judge of the facts; and that anomaly is not removed by the commission status with its semi-judicial implications.<sup>4</sup> The Packers' Act frankly drops this device and places the administration of its flexible standards in the hands of a policy-pursuing executive department. Since in doing so it adheres to the principle of the Commission Act that the court must base its decision upon the administrative findings, without power to take evidence independently, the anomaly seems to be even stronger. In both cases the anomaly is less than it appears upon the face of the act, if the court construes its reviewing power liberally, particularly if it treats the sufficiency of the data to support a given economic conclusion as a matter of law; and this the Supreme Court has done. (*Federal Trade Commission v. Curtis Publishing Co.*, 260 U.S. 568). It is perhaps too early to judge whether Congress has dealt successfully with a difficult legislative problem.

The Trade Commission Act has no parallel either in New York or in England<sup>5</sup> nor in the pre-war legislation of Germany.<sup>6</sup>

<sup>4</sup> Another difficulty arises from the Federal Trade Commission acting as a purely investigating body under section 6 of the act. In pursuance of a resolution of one of the Houses of Congress the Commission thus investigated alleged violations of the anti-trust laws by the Chicago packers, and rendered an adverse report. The Government of New Zealand in part relied upon this report as a justification for refusing an export license to one of the packing firms, and in remonstrating against this action, the Department of State of the United States felt compelled to point out, that the report was not a judicial decision and expressed the conclusions of the Federal Trade Commission only. See *Chicago Journal of Commerce*, October 14, 1921. Such a disavowal by the Government of one of its own agencies creates of course an embarrassing situation.

<sup>5</sup> In England, a Royal Commission on Food Prices has recommended the establishment of a Food Council with power, upon discovering that some person or firm behaves in a manner contrary to the public interest, to instruct the person or firm to desist from such behavior, and then if necessary to issue consequential direction and in case of non-compliance to report to the President of the Board of Trade who is to lay the report before Parliament. While apparently inspired by the American Federal Trade Commission Act, this leaves the powers purely "hortatory" (1925, Cmd. 2390, p. 139). See Comments of an Editorial in the *London Weekly Times*, May 14, 1925.

<sup>6</sup> Under an authorizing act of October 13, 1923, the German Government has enacted an ordinance concerning trusts (Kartelle), published November 3, 1923. This ordinance does not prohibit, but regulates. Determining powers are vested in a court created for the purpose (Kartellgericht). Certain measures of a trust require the previous consent of the presiding judge of the court. Any reso-

§204. *Foreign trade. United States.*—The so-called “flexible” clauses of the Tariff Act of 1922 and the Anti-Dumping Act of 1921 (Title 3 of the Emergency Tariff Act, 1921, left unrepealed by the act of 1922) seek to meet injurious foreign competition or hostile foreign action by measures more effectual than the normal tariff.<sup>7</sup> The conditions to be dealt with are either industrial conditions which make the existing protective duties inadequate (Act, 1922, §315), or unfair methods of competition or unfair acts in the importation of goods (Act, 1921; 1922, §316), or foreign discrimination (Act, 1922, §317). The counter measures are additional duties or exclusion of articles from importation. Since the adoption of these measures depends upon contingencies to be determined from time to time, the determination is delegated by Congress, by the act of 1921 to the Secretary of the Treasury, by the act of 1922 to the President acting after investigation by the Tariff Commission created in 1916, one of the “independent” agencies of the government. The delegation in the case of additional duties under the Anti-Dumping Act and under sections 315 and 316 of the act of 1922 is somewhat disguised by apparently leaving it to the executive officer only to determine the existence of the contingency and the rate of addition necessary to deal with it, whereupon the act itself purports to impose the additional duty; however, as the two determinations entirely control the imposition, there is real delegation, and in the case of exclusion, which is the measure to be adopted “in extreme cases” against persons violating the act, and in the case of retaliation (§317) the delegation is undisguised. Since section 316 of the act of 1922 is to be operative only in case of unfair practices declared to be unlawful, the section provides for an investigation upon notice and hearing by the Tariff Commission, whose findings, if supported by evidence (the section says in one place “if supported by *the* evidence”), are made conclusive, subject to appeal on questions of law to the Court of Customs Appeals—a procedure based upon that of the Federal Trade Commission Law. It is only upon the finding of the Commission that

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lution of the trust may be annulled by the court on the application of the Minister having charge of economic affairs, if prejudicial to the public welfare. The Minister himself may authorize members of the trust to terminate their membership or participation in any measure.

<sup>7</sup> See, also, section 73 of the Tariff Act of 1914 and sections 800 and 801 of the Revenue Act of 1916 (left unrepealed), penalizing certain practices in connection with imports. Also Viner, *Dumping*, pp. 240-46.

the President acts; but the President's decision as between additional duty and exclusion, and as to rate of additional duty, is conclusive.

*Retaliatory power.*—Another very drastic weapon against foreign discrimination is given to the President by section 5 of the act of August 30, 1890 (26 St. L. 414). When the President is satisfied that a foreign state unjustly discriminates against the importation or sale of American products, he may exclude from importation into the United States any products of such foreign state that he may deem proper. The exclusion may be modified or terminated at any time in the President's discretion.

*England.*—The Safeguarding of Industries Act of 1921 bestows administrative powers somewhat more conservatively. Dumping practices, as defined in the act, are to be met by the imposition of customs duties equal to one-third of the value of the goods concerned. The imposition is preceded by an inquiry ordered by the Board of Trade and entrusted to a committee of five selected from a permanent panel consisting mainly of persons of commercial or industrial experience. The persons are chosen by the President of the Board of Trade. The order putting the statutory provision into effect is made on the basis of the report, by the Board of Trade, but is either ineffective or not effective beyond a short period without an approving resolution of the House of Commons. The Commissioners of Customs may require proof as to the origin of goods. The value of goods, subject to statutory definition, is fixed by the Commissioners, and disputes as to value are conclusively settled by the arbitration of a referee appointed by the Lord Chancellor.

§205. *Patent and copyright legislation. The creation of the right.*—Formerly copyright as well as patent right depended upon official action, which in the case of copyright was a mere act of registration without any preliminary examination of the right of the applicant (so expressed in section 40 of the German Copyright Act), while in the case of patent right the act was one of a determinative character; but recent copyright legislation enacted pursuant to international convention has made the existence of copyright independent of registration.

The creation of a patent requires, as the name implies, an official act. This act, moreover, in the United States, England, and Germany (in France and some other countries the law is different) is based upon an examination which extends to the merits as well as the form of the application, and for this purpose examiners are attached to the patent offices. The status of the patent office in Germany is practically that of a court: it has a president and other permanent members appointed



by the federal chief executive, and is not subordinate to any other government department. An appeal lies from its decisions to the Supreme Imperial Court.

In the United States and in England the patent office is a bureau in an executive department (Department of Commerce, Board of Trade, respectively), and the head (Comissioner, Comptroller-General, respectively) is subject to the direction of the head of the department, although this direction does not include appellate review (*Butterworth v. Hoe*, 112 U.S. 50).

In the United States an appeal lies from the rejection of an application by the Commissioner to a court (R. S., §4911, and act of February 9, 1893),<sup>8</sup> while in England the appeal goes only to a law officer of the Crown (Attorney-General or Solicitor-General [§§ 3, 6, 7]). In England, moreover, the Comptroller may refuse to grant a patent (or design) the use of which in his opinion would be contrary to law or morality (§75), and no appeal is given from this action.

Administrative power is thus carried to quite exceptional lengths in England in the matter of patents; in the matter of trade-marks likewise the appeal is normally administrative (from the Registrar to the Board of Trade [act of 1905, §54]); it is however to be noted that, in connection with trade-marks, appellate functions of the Board of Trade have in some respects been superseded by exclusive judicial jurisdiction (compare section 14 of the act of 1905 with section 8 of the act of 1919).

In America the administrative features of trade-mark legislation are similar to those of patent legislation.

*The exploitation of the right—patents.*—In England the exploitation of a patent may be directed by administrative order. The power is given by section 27 of the Patents and Designs Act (1907) as amended in 1919, the qualifications being very elaborate and minute. The ground of interference is the abuse of the patent monopoly, such abuse being found in the non-working of the patent on a commercial scale in the United Kingdom without satisfactory reason, or by reason of imports controlled by the patentee, or in the failure to meet the domestic demand, or in refusals to license which result in prejudice to trade or industry. The power is exercised by making licenses a matter of right, the terms of the license to be settled officially, if necessary, with the right of exclusiveness, but subject to a power of revocation if the li-

<sup>8</sup>Under the act of March 2, 1927, there is an administrative appeal to a board of appeals of patent office officials, and a judicial appeal in the alternative either to the Court of Appeals of the District of Columbia or by bill in equity.

cense is not duly taken advantage of. As a last resort, if the object of the law cannot be obtained through licenses, the patent itself may be revoked.

The power is vested in the Comptroller-General of Patents, who is vested with power to examine the parties. Any application must be accompanied by statutory declarations verifying the applicants' interest and the facts set out in the application.

Orders are subject to appeal to the High Court.

Where a registered design is applied to manufactures abroad, but not to a reasonable extent in the United Kingdom, the Comptroller may cancel the registration or grant compulsory licenses. This action is likewise subject to appeal to the court (section 58 as amended in 1919).

Compulsory licenses also exist in connection with the manufacture of matches. Under the act prohibiting the use of white phosphorus, patentees of other processes may be required by the Board of Trade to grant licenses upon terms which the Board considers just (Act, 1908, §4). In America this particular evil was dealt with by a prohibitory federal tax; and under this theory of legislation a resort to compulsory licenses would have been inappropriate—apart from the novelty of the exercise of that power in connection with patents under the American law.

A policy similar to that of the English law, but in very much simpler form, is expressed in the German law. An act of June 6, 1911, amending the Patent Act of 1891, permits in the public interest the grant of compulsory licenses, where the owner refuses a license upon adequate compensation or security, and permits the revocation of a patent where the invention is exploited exclusively, or mainly, abroad. These measures cannot be taken until the expiration of three years from the grant of the patent. The original act provided for revocation, but not for compulsory licenses.

As before indicated, the American law does not require the exploitation of a patent.

*Copyright.*—In England, the Judicial Committee of the Privy Council may, after the death of the author, order the owner of the copyright of a published book to grant a license for publication on terms and conditions thought fit (Act, 1911, §4). It is to be noted that the power, while administrative in character, is vested in a body which ordinarily functions as a court. No similar power exists in the United States, or under the German Act of 1901.

## CHAPTER XXI

### ADMINISTRATIVE POWERS IN CONNECTION WITH LABOR LEGISLATION<sup>1</sup>

Administrative powers will be treated under the following heads: (1) rule-making powers, (2) dispensing powers, (3) inspection, (4) directing powers, (5) licensing requirements, (6) powers under child labor legislation, (7) powers under mining legislation, (8) powers under wage legislation, and (9) powers over labor agencies.

§206. *Rule-making powers.*—A legislative policy to secure health, safety, and comfort in work places involves a variety of mechanical requirements. If these are phrased in very general terms, they are difficult to enforce; if they are specified in detail, they may prove to be undesirably complex and rigid. It is also true that while requirements that are controverted seek expression in the political form of legislation, the framing of rules by more technically organized bodies may appear preferable where it is only a question of reaching an agreed end by the most suitable means. Rule-making powers are therefore an important part of factory legislation.

In New York the rule-making powers are vested in an Industrial Board consisting of the Commissioner and associated officials, the board-form of organization being retained for this purpose after the adoption of the single-headed system of a labor commissioner.

<sup>1</sup>In the jurisdictions covered by this survey the principal phases of labor legislation (employment of women and children, work places and working equipment, hours of labor, payment of wages) are contained in comprehensive statutes that represent the accretion of years of gradual progress in protective measures: in New York the Labor Law, last revised in 1921; in Germany, the Trade Code, completely revised in 1900; in England, the Factory and Workshops Act as revised in 1901, the Coal Mines Act as revised in 1911, and the Trade Board acts of 1909 and 1918. References, unless otherwise specified, are to these acts.

As a matter of convenience, factory and mining laws are treated under the head of labor rather than under the head of health and safety, this classification being in accord with actual administrative arrangements.

The survey excludes industrial boards administering accident compensation or insurance, for the reason that the functions performed by them are so much judicial in their nature as to set them entirely apart from other administrative powers; they rather deserve a place in a study of forms and methods of administering remedial relief.

The powers are liberally worded; the usual form, powers to make rules for carrying into effect the provisions of the law, being strengthened by adding: "applying the provisions to specific conditions and prescribing methods to effectuate such provisions" (§27).

The Board is furthermore given power to make rules concerning the construction, equipment, and maintenance of work places and machinery, to secure sanitation and to guard against fire hazards, personal injuries, and diseases; also to make special requirements as to temperature, humidity, and removal of dust or gases, by requiring licenses where the Board finds conditions of special danger in any class of industry (§28).

These sections would probably be sufficient to cover the following subjects with regard to which rule-making powers are specially given: stairway inclosures in factories (§271); fire-alarm signals and fire drills suitable to each situation (§279) (in New York City this power is exercised by the Fire Commissioner); approval of automatic sprinkler systems (§280, in New York City as under §279); plumbing and toilet rooms in factories (§295); standards of ventilation, temperature, and humidity, prescribing means of removing impurities and the requisite machinery (§299); protection from dust (§310); toilet rooms and methods of ventilation in mercantile establishments (§§381, 382); use of high explosives in mines (§402).

The general powers of sections 27 and 28 may be of importance where the law does not specifically delegate powers (see for example, the entire seventh article of the Labor Law).

Under the English Factories and Workshops Act the rule-making powers are vested in a secretary of state or a minister. When he is satisfied that any manufacture, machinery, plant, process, or description of manual labor is dangerous or injurious to health, or dangerous to life or limb, either generally or in the case of women, children, or any other class of persons, he may certify the danger and make regulations appearing to him to be reasonably practicable to meet the necessities of the case (§79). In addition to this general power, the secretary may by special order (the term is used in the act for rules applicable to a class, and not for orders applicable to particular concerns) prescribe standards of ventilation (§7) and sufficient and suitable accommodation in the way of sanitary conveniences (§9). In a number of cases he also determines whether or not, under what conditions, and to what classes of industry or employment statutory provision shall become

applicable (home work and domestic workshops [§§107, 111, 112]; extension of piece-work rules to non-textile factories [§116]).

Under section 79 above cited and under the corresponding section 8 of the earlier act of 1891, the secretary of state has issued many orders which supplement the requirements and prohibitions of the Factory Act. The *Encyclopaedia of the Laws of England* published in 1907, refers to twenty-two of such orders issued from 1892 to 1905, applying to specified manufacturing processes (Vol. 5, p. 686). The author of the article on labor legislation in the *Supplement to the Encyclopaedia Britannica* concludes that, taking into consideration quantity and disregarding importance, probably the larger part of existing enactments regarding labor have not been directly passed by Parliament, and that Parliament has of late years become more and more content to settle principles and to leave detailed decisions and the working-out of extensions to other bodies, reserving to itself a varying amount of ultimate control (Vol. 31, p. 691).

The German Trade Code leaves physical arrangements in work places almost entirely to regulations to be issued by the Federal Council or, in its default, by the state authorities, for different classes of establishments, the law containing merely general directions (§120a-e). The Federal Council may also prohibit the employment of women or minors in specially hazardous industries, or prescribe conditions for such employment; and may prohibit the employment of women at night time in specified kinds of manufacture (§139a). Under this authority comprehensive codes have been issued from time to time by the Federal Council.

The laws both of New York and of England contain procedural requirements for the making of such rules, those prescribed by the English Factories and Workshops Act having become a model for subsequent English legislation granting rule-making powers concerning other subjects. There are no similar procedural rules imposed upon the German Federal Council, but the law requires representatives of vocational associations to be heard before state or local regulations are issued (§120e).

§207. *Dispensing powers.*—Specific requirements relating to hours or analogous conditions of employment are apt to create inconvenience or hardship if applied to business, or even to industry, generally and without discrimination. Minute differentiation or classification, on the other hand, presents difficulties from the legislative or parliamentary point of view, quite apart from constitutional problems

arising in the United States. The situation is often most easily handled by granting administrative powers of exemption, extension, or variation, on behalf of special classes of industries. There is, on the other hand, rarely any need of differentiating in this respect (as distinguished from mechanical requirements) between individual concerns except in emergencies. These dispensing powers therefore fall under the head of rule-making powers.

The one-day-of-rest-in-seven law of New York (Labor Law, §161, subd. 5) furnishes a striking illustration:

If there shall be practical difficulties or unnecessary hardships in carrying out the provision of this section or the rules of the Board, the Board may make a variation therefrom if the spirit of the act be observed and substantial justice done. Such variation shall be by resolution adopted by a majority vote, shall describe the conditions under which it shall be permitted and shall apply to substantially similar conditions. The variations shall be published in the same manner as the rules of the department, and a properly indexed record of variations shall be kept by the department.

Apart from this very general authority to vary the one-day-of-rest-in-seven law, the dispensing powers under the New York Labor Law which operate by general rule for classes of establishments (indicated by the fact that they are exercised by the Industrial Board and not by the Commissioner) are not nearly as elaborate as they are in the English Factory Act. A few express provisions relate to minor matters (toilet facilities inside of factories, and school sinks [§§295, 381]; smoking in factories [§§283, 285]; a power to extend ventilation requirements to wood-working machinery [§299]). Only with regard to specified physical requirements (buildings and exits, fixtures, apparatus, and machinery) is there a sweeping dispensing power to meet cases of difficulty or hardship by variations from any labor law provision or rule, observing the spirit of the rule and insuring public safety. The prescribed procedure is adapted to individual cases (petition, hearing, resolution of the Board by at least two votes), but the law directs that the variation shall apply to all buildings, installations, and conditions, where the facts are substantially the same, and that the resolution shall be published and an index record be kept of it open to public inspection. This means that the variation, so far as applicable, is to operate as a general rule (Labor Law, §30).

The English Factories and Workshops Act operates to quite an extent with dispensing powers in favor of classes of industries. The statute specifies variations or exceptions which may be authorized by

the secretary on proof of conditions existing in a class of industry, or it permits such variations in whole or part to be specified by the secretary, or permits exceptions or variations to be extended to classes other than those specified in the act, or it applies certain provisions to such classes only as may be determined by the secretary to be in need of them; the secretary may also be authorized to attach to the exercise of his power conditions to be observed by those to whom an exception or variation is granted (§§36, 39, 40, 41, 42, 43, 45, 46, 49, 50, 51, 52, 53, 58, 59, 107, 111, 112, 116). A dispensing power thus particularized constitutes much less of a delegation of power than one granted in general terms, but gives a stronger claim to those desiring its exercise.

Dispensing powers exercisable in individual cases seem to be entirely lacking in the English Factory Law; New York has a number of them;<sup>2</sup> but it is noteworthy that the one-day-of-rest-in-seven law contemplates variations operative by class and not for particular cases (§161, No. 5; see above). The general feeling in America in connection with labor legislation is that emergency powers of exemption should be avoided as tending to break down the law.

The German Sunday law, incorporated in the Trade Code, does provide for emergency exceptions (105e, f). The law requires them to be in writing and a record to be kept, and leaves it to the Federal Council to make rules regarding the exercise of the power. The rules appear to be sufficiently stringent to prevent a perfunctory granting of

<sup>2</sup> Powers of exemption exercisable in individual cases:—The Commissioner of Labor may authorize payment by check upon satisfactory assurances in lieu of the cash payment of wages prescribed for particular industries (§195).

He may permit excess of statutory number of occupants of a factory if safety is not endangered (increase limited in proportion to width of stairway; power to apportion occupants to floors [§278]).

He may relax the minimum-air-space requirement for night work in factories (§300).

He may permit a sprinkler system with one instead of two sources of supply if he determines that the spirit of the law is observed (§279).

He may permit the employment of persons under sixteen years of age and of females in basements of mercantile establishments if sufficiently lighted, etc. (§383).

He may, subject to revocation, shorten the legal time for meals for certain classes of female and minor employees (§184); may, subject to revocation, permit a lunchroom in an otherwise forbidden location under proper conditions (§380).

He may dispense with notices stating daily hours of labor of females (§174).

The qualifying safeguards attached to a number of those powers are apparently rather perfunctory.

exemptions. Similar emergency exceptions carefully circumscribed are provided for in connection with hours of labor for women (§138a).

It is otherwise difficult to judge of the practice of individual dispensations under the German Trade Code. The powers given to the Federal Council to make general regulations under sections 120d and 139a are wide enough to admit of provisions for such dispensing powers; and to some extent they appear to be given—not, however, freely or indiscriminately. An accurate survey has not been attempted.

§208. *Inspection.*—While mere inspecting powers, not being determinative in their nature, fall outside the scope of this survey, an account of the administrative aspects of labor legislation that should not at least take cognizance of them would be manifestly inadequate or even misleading. Even where it is a mere aid to enforcement, systematic inspection, whether or not coupled with legislative standardization, is apt to be practically more important than either a licensing or a directing power; this is notably true of banking and insurance legislation. In labor legislation, however, inspection is more than mere aid to enforcement; its function is, as well, to advise and recommend; it is as much a service as a control agency.

The creation of an inspection force appointed by the central government and independent of local influences, by the English act of 1833, was the foundation of all subsequent factory legislation. Both in England and in Germany the superior inspectors have come to hold a high professional status; and while civil service conditions in America have perhaps prevented an equal professionalizing of the service, factory inspectors' experiences and observations have likewise been a factor in the improvement of standards.<sup>3</sup>

§209. *Directing powers.*—Neither licensing nor directing powers play as important a part in factory laws as in other branches

<sup>3</sup>NOTE.—The following is taken from a book review (*London Times Literary Supplement*, July 12, 1923):

"When Althorp passed his factory act in 1833 he thought, as his colleagues and critics thought, that he was doing very little in the way of reform. Neither he nor his opponents realized that in appointing inspectors to enforce the operation of that act, they were introducing a principle that was going to prove the most important innovation of the century in English government. For that example was followed; and the reports of inspectors appointed under one act or another, supplied the chief motive force for reform in the pretorian age. But this was not the only purpose these officials fulfilled. In a society that was splitting up into employers and employed, these men, partly investigators, partly judges, partly police and partly intermediaries, rendered invaluable services. For



of legislation. In England, when factory legislation began to take its present shape (1833), both these classes of powers were usually vested in justices of the peace. The purpose of the factory laws was to break, by the creation of the office of inspectors, the controlling influence of justices who were socially affiliated with the employers.

The original thought apparently was to give inspectors the powers of justices, and thus we find provisions in the act of 1833 authorizing them to impose penalties (§§31, 34, 41). This power was found to be inadvisable and was taken away in 1844. The act of 1833 also spoke of orders issued by inspectors; but if these were intended to be issuable for particular factories, the power was not clearly expressed. The later paucity of express order-issuing powers is sufficiently explained by the general unfamiliarity of English law with this form of administrative authority. Even under the revision of 1901, powers of this class remained few in number, and in a majority of cases were vested in local authorities (§2: limewashing and cleansing; §14: fire escapes; §§108, 110: prohibiting work to be given out to unhealthy places or infected houses). An order of a court is required to prohibit the use of dangerous machinery or of an unhealthy or dangerous factory (§§17, 18). An inspector may in a few cases issue warning notices (§§17, 93; where the warning relates to cleaning machinery in motion, it creates a presumption against the owner [§13]); apparently only in one case may he issue an order (fan to prevent injurious inhalations from certain machinery [§74]). The only thing that a secretary of state may order under the act of 1901 is a formal investigation in case of an accident (§22).

A radical change in this respect was made by an amendment of the Factories and Workshops Act of 1916. This gives the secretary of state power to make orders for a particular factory or workshop (other than a domestic factory) relating to meals, drinking water, protective

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the English magistrates were quite incapable of defending the employed class; they belonged in most cases to the employers' class and they lived in that world. So long as the responsibility for seeing that the factory acts were obeyed was left to them, these acts were a dead letter. If it had been left to them to expose the scandals that horrified Parliament in the later revelations of the state of the mines, the potteries, the silk and lace mills, and the other industries that were investigated in the 50's and 60's, nothing would have been done. As it was, the wrongs of the weakest classes were brought before Parliament in a series of reports from men who had indeed the general outlook of property, but combined with it the standards of decent conduct and fairness that educated minds bring to such questions."

clothing, first-aid arrangements, seats, washing facilities, accommodation for clothing, and supervision of workers, and to provide for workers being associated in the management of these matters. If the owner disputes the reasonableness of the orders, the decision is left to a referee selected in accordance with rules.

Evidently the provision, which is contained in an act containing a number of miscellaneous measures, is not of first-rate importance. It is a provision for comfort rather than for safety, and appears to have been occasioned by the desire to make working conditions in munition and other factories as conducive as possible to the welfare of workers and thereby to increase production (80 Justice of Peace 446).

The Labor Law of New York is more liberal in its directing powers. The most important of these relate to tenement manufacture: the commissioner may order the remedying of any unsanitary condition and the cleaning of any filthy apartment, and may placard the door (§359); also may order the cleaning of any article (§361); may label "tenement made" an article unlawfully manufactured in a tenement, or if he finds evidence of infectious disease (§§360, 362); on his report, the board of health issues orders required by the public health (§362); there is also a directing power with regard to mines (requiring two outlets as specified [§411]; the subject of mines is of minor importance in New York). The power to label "unclean" extends to other articles (§297); and under a provision first introduced in 1892 (c. 673, §8), the Commissioner may generally prohibit the use of machinery until made safe in accordance with his directions (§256); the same power is given to him as to scaffolding (§240).

In Germany the practice of exercising the police power by particular administrative orders is common, and a provision permitting them for factories was incorporated in the Trade Code almost as a matter of course (§120d). The power is vested in the regular local representatives of the central government and is qualified by consideration for established conditions. It is subject to a double appeal of a purely administrative character.

There are also carefully regulated directing powers in the homework act of 1911 (§§5-9).<sup>4</sup>

§210. *Licensing and certifying requirements.*—Subject to a few important exceptions, these likewise are not a conspicuous feature of labor legislation, it being evidently regarded as impracticable to place official advance checks upon the establishment of factories, instalment

<sup>4</sup> See also Resolution of International Labor Conference, 1923, §73, *supra*.

of machinery, or the employment of adult labor. There is a striking difference in this respect from the laws relating to shipping and seamen.

The Labor Law of New York, in addition to two minor matters (approval of fire-proof receptacles [§281] and qualification certificates for workers in compressed air [§428]), uses licensing requirements for the control of tenement manufacture. A permit or license must be secured from the Commissioner of Labor by the contractor or employer as well as by the owner of the tenement house (§353). The issue of the owner's license is conditioned upon the house complying with prescribed requirements and upon an examination with satisfactory result of the local health records (§§355-56). Permits and licenses are revocable by the Commissioner for unsanitary condition, violation of law, or non-compliance with orders, a statement of the causes being filed in his office (§363). The Public Health Law provides for tenement manufacture permits by the local board of health (§33).

Besides these specific requirements, a very general provision of the Labor Law (§28) authorizes the Industrial Board to require licenses for carrying on any industry, trade, occupation, or process that by reason of danger to the employees may appear to it to require special regulation. This blanket licensing power was created in 1913 (c. 199) and the extent of its use is not apparent. The grant of the power is entirely without qualification.

The English Factory Act is very sparing in its licensing requirements: existing underground bakeries (no new ones are allowed) must have their suitability certified by the district council, which must be satisfied as to construction, light, and ventilation, a refusal being appealable to a court (§101); and a newly erected factory must be certified by the district council to have reasonable means of fire escape, the certificate specifying the means in detail.

The home-work provisions of the factory law do not require licenses, but permit the local council to order that work shall be no longer given out to be done in unhealthy places or in houses where there is an infectious disease (§§108, 110).

In order that an employer may make the joining of a shop club a condition of employment, the club must be registered, and the Registrar must certify that the club is beneficial and permanent (Shop Clubs Act, 1902).

German labor legislation avoids licensing requirements. Thus the Trade Code requires for each factory a set of regulations to be framed by the employer. This is a matter which obviously should be adminis-

tratively checked. However, in accordance with the system generally favored by the Trade Code, there is merely a duty to notify the authorities, who may object if the regulations are not in the form or do not observe the principles prescribed by the act, subject to an administrative appeal (§134a-g).

In like manner the home-work law of December 20, 1911, operates through direct statutory requirements and order-issuing powers, omitting licensing requirements.

However, the certification requirements for weights and measures extend to those used in connection with calculating the wages of employees.

§211. *Child labor legislation.*—The system of prohibiting the industrial employment of children under a given age can hardly be made effective without a supplementary system of advance certification for those who are not sufficiently beyond that age to preclude doubts. Such certification is required for persons under sixteen years of age by the Labor Law of New York and by the English Factory Act of 1901 and the Education Act of 1921.

*New York.*—In New York the employment certificate is regulated by the Education Law. It is issued on the basis of a school-record certificate given by a public school official, and on the basis of an age-and-health certificate given by a health officer. The officer issuing the employment certificate tests and certifies the ability to read and write English. The act prescribes in detail the required evidence of age. Newsboys' permit badges are issued to boys over twelve upon the certificate of the school principal.

*England.*—Under the Factory Act the certificate of fitness for employment is given by a certifying surgeon appointed by an inspector. The surgeon satisfies himself of the age from the birth certificate or otherwise: the inspector may annul the certificate if he has reasonable cause to believe that the age is less. On request, the reason for refusing a certificate must be given in writing. The certificate may be qualified by conditions as to work. An inspector may require the discontinuance of employment if he believes the young person incapacitated for the required work; he may then not be re-employed without a new surgeon's certificate (§§63-67, 122).

The Education Act, 1921, authorizes a local education authority to license children over twelve years of age to take part in entertainments under conditions specified by law or prescribed by rules of the Board of Education. The license may be rescinded if the conditions

are not observed. An appeal lies from any decision of the local board to the Board of Education (§101). Similar licenses may be granted by a petty sessional court for the training of children between twelve and sixteen years old as acrobats, notice of the application for the license to be given to the local chief of police (§102).

An act of 1913 provides for licenses for young persons to be employed for performances, etc., abroad. The license is granted by a police magistrate who may attach conditions; he must be satisfied of certain statutory prerequisites, and the Secretary of State must be furnished with prescribed statements for transmission to consuls. The magistrate may require security. The license is for three months, is renewable, and may be revoked if the magistrate is satisfied that the conditions are not complied with.

*Germany.*—The German Trade Code provides an administrative control over all employees of less than full age by requiring an employment book. This is issued by the local police authorities on proof of completion of the elementary school course, and must be handed to the employer and returned by him on the termination of the employment (§§107-12).

There are full provisions regulating hours of labor of young persons. In connection with these the law provides both for emergency exceptions and for variations. The emergency power is vested in authorities of varying grades, according to the duration of the exception (§139).

There is a separate child labor law of March 30, 1903, for children between twelve (the minimum age) and thirteen or the later completion of the elementary school course. According to this, an employment card must be handed to the employer for every such child. The card is issued by the local police authorities on the application of the guardian; the issue is apparently matter of course (§11). The police authorities may, on the application of or after hearing the school supervisors, restrict or prohibit the employment of any particular child and cancel the card if the employment has been contrary to law or has resulted in material prejudice (§20).

Specified employments are forbidden, among them employment in public performances or exhibitions; but for the latter the law recognizes an administrative dispensing power if the employment serves an artistic or scientific interest (§6). Another dispensing power relates to employment of children under twelve in liquor-serving establishments

in small localities, where the child is a member of the employer's family.

Particular liquor establishments may, if evil conditions have appeared, be placed under special restraints or total prohibition with regard to the employment of children (§20).

Persons deprived of civil privileges may not employ minors. If they do, dismissal may be compelled by the police (Trade Code, §106).

§212. *Mining legislation. England.*—In England there are separate statutes for metalliferous mines (1872) and for coal mines (1911, superseding an earlier consolidation of 1887).

A conspicuous feature of the laws for the protection of miners, still retained for metalliferous mines, is the provision for regulations to be made by the mine-owner for his mine, which, if approved by the government, supersede in specified classes of cases general rules. The Coal Mines Act of 1911 makes these special regulations subsidiary to official regulations.

Another conspicuous feature is the requirement of certificated managers for coal mines. The provisions for certification are similar to those for other professions.

The administrative authorities, under the Secretary of State, are mining inspectors.

As in the case of factory laws, the statutes themselves fix many requirements without recourse to administrative discretion or determination; however, in contrast to the factory laws, the inspectors are vested with important determinative powers. Among these is a general but qualified directing power for particular cases: the inspector may give notice requiring dangerous conditions to be remedied or men to be withdrawn; in case of objection the matter is referred to a panel of referees (§§99, 116). To enjoin the working of a dangerous mine requires the order of the High Court (§107); to prohibit the use of dangerous machinery, the action of the court of summary jurisdiction (§108).

If in factory legislation there appeared to be an administrative principle that determinative powers should be separated from the function of inspection, that principle has been departed from in mining legislation.

A detailed account of administrative powers is given in a note.

There are separate English acts for the regulation of hours of labor in coal mines (1908) and for the establishment of a minimum wage (1912).

The Hours-of-labor Act determines directly all particulars, leaving only two minor details to administrative determination.

The Minimum-wage Act operates through boards representing operators and miners recognized by the Board of Trade. These boards are intended to be autonomous and, if fairly constituted, the Board of Trade must recognize them; it may merely require the observance of rules insuring fairness, and in default of agreement, may appoint the independent chairman. In other words, the machinery for fixing wages is not official, but representative of the parties concerned.

*Germany.*—Under the German constitution of 1871, mining legislation belongs to the states and not to the Empire. Prussia enacted a comprehensive mining law in 1865, amended in 1872, 1892, 1894, 1905, and 1909.

The leading administrative features are similar to those of the English acts: certificated managers; a labor code of regulations for each mine framed by the owner; particular directing powers to protect safety or morals and to deal with mining disasters.

In accordance with the German practice, the regulations for particular mines are not subject to approval, but subject to objections, if not framed in accordance with law or if the rules proposed are contrary to law.

The amending law of 1909 regulates in detail the institution of security men representing the miners, and reserves to the government supervisory powers over them (power to see to regularity of elections, to remove, or to suspend, etc.). The remedial provisions of the General Administrative Code are applicable.

There are rule-making powers concerning working hours for sanitary reasons, with dispensing powers for special reasons on behalf of particular mines; also concerning safety, decency, and generally prejudicial effects of mining operations (§197).

There is no mining legislation of importance in New York, nor any federal legislation with reference to the protection of miners. Typical coal-mining acts are found in Pennsylvania and Illinois.

An examination of legislation for the protection of miners, which, as distinguished from factory legislation, is mainly legislation for adult men and men well organized, leaves the impression that there is an effort to settle as much as possible by statute directly and to intrust details, whether of regulation or of supervision, not exclusively to government officials. This does not necessarily mean absence of administrative ruling powers, but it means that their importance is reduced

both by statutory standardization, and by control functions organized upon a non-official basis: autonomous regulations, certificated managers, and bodies representing the industry.

## §213. CONSPECTUS OF ADMINISTRATIVE POWERS UNDER ENGLISH AND GERMAN MINING STATUTES<sup>a</sup>

### I. ENGLAND

#### A. Coal Mines Act, 1911

##### 1. Rule-making powers:

The act gives to the secretary of state rule-making powers regarding use of explosives (§60), and for the control and guidance of persons in mines, with power to exempt classes (§86).

##### 2. Particular powers vested in secretary of state:

His approval is required for a newly introduced internal-combustion engine in an underground mine (§58).

His approval is required for special regulations for particular mines, supplementing or modifying general regulations, and submitted by an inspector or the owner or the majority of workmen (§87).

He may limit the number of mines for which one manager may act in case of insufficiency of personal supervision (§4). He may object to a division of a mine into separate mines (to make "small" mines) as evasive of the act with provision for settlement of disputes (§25). His decision as to character of mine (coal or metalliferous) is final, except in legal proceedings (§113). He approves types of safety lamps (§33); authorizes possession of matches (§35).

Dispensing powers: From quantitative requirements as to air, in case specified by statute, subject to conditions (§29); from prohibition regarding safety lamps, by reason of special circumstances (§32); from provisions regarding shafts and winding, on specified grounds, with power to impose conditions (§38); provision of section 43 not to apply where secretary is satisfied that mine will be worked out in three years.

##### 3. Particular powers vested in a mine inspector:

He may require accurate plans, and the production of the plan, marked with the state of the workings (§19).

He may order an increase of a road to an adequate height (§45).

He may forbid the use of electricity as being dangerous (§60).

He may require the appointment of managers for small mines (which are otherwise exempt) (see section 2).

His approval is required for placing under one manager several mines exceeding a specified aggregate size; and his sanction, which must not be unreasonably withheld, is required for the use of other than safety lamps under stated conditions (§32).

He also has the general power to require dangerous conditions to be remedied, referred to before (§99).

<sup>a</sup> A few very minor powers are ignored (see sections 21 and 31).



## 4. Certification of managers:

Secretary of state appoints board of examiners which makes rules with his consent. The qualifications of managers are in part prescribed by statute; diplomas and institutions for training must be approved; the approval may be subject to conditions and it is revocable. Foreign certificates may be recognized if the secretary of state deems them equivalent. Certificates may be canceled for incompetency, etc., upon inquiry by a judge or other person appointed by a secretary of state, and the secretary of state may, if he thinks fit, restore the certificate (§§5, 8, 9, 10, 11, 12).

## 5. General provisions:

- a) Provision for delegation: The orders of the secretary of state may be signed by an under-secretary or assistant under-secretary (§114).
- b) Exemptions granted by inspectors must be in writing and signed; they may be subject to conditions and restrictions and may be revoked at any time (§119).
- c) Provision for settling disputes by reference to one of a panel of referees appointed under act and selected under rules; their decision is final. Objections, in order to be entitled to consideration, must be notified. The Reference Committee (Chief Justice of England and an eminent mining authority selected by him) appoints a number of persons as panel and makes rules as to mode of selection, procedure and cost of proceedings (§116).

## B. Metalliferous Mines Act, 1872

Special orders may be made as under section 99 of the Coal Mines Act, 1911 (§18), disputes being settled by arbitration regulated by section 21; the inspector may require plans to be made (§19) and abandoned mines to be fenced (§13); the inspector is vested with certain powers of exemption in particular cases, general exemptions being made by the secretary of state (§23).

## C. Coal Mines, Hours of Labor Act, 1908

1. The secretary of state finally determines whether or not a person is a workman, or a workman of a particular class.
2. The time for lowering or raising shifts is approved by an inspector; if the owner feels aggrieved, the matter is referred to a person appointed by a county judge.

## 2. PRUSSIAN MINING LAW OF 1865, AS AMENDED IN 1905 AND 1909

## A. Rule-making power (§197). This extends to:

1. Sanitary, safety, and decency requirements (rules for decency are made after hearing of the trade union).
2. Working hours, subject to dispensing power for particular mines for special reasons.
3. Prevention of effects of mining operations prejudicial to the public.

B. Mine supervisors must be examined and certified to be qualified (§74); an administrative appeal was provided in 1909.

C. An unqualified person may be removed (§75).

- D. The code of labor regulations framed for every mine by its owner must be presented to the mine authority, which may require alterations where the code does not adequately establish order or where its provisions are contrary to law (§§80f, g).
- E. The duty to establish a working code may be dispensed with by the mine authority if the operations are small or temporary.
- F. Particular measures may be ordered for any mine, after hearing the owner, either in case of disaster or in case of danger or prejudice to morals, or in case of generally prejudicial effects of mining operations (§§196, 198, 205).
- G. General supervisory powers created by the act of 1909 over the "security men" elected by the miners: power over elections, power to remove, suspend, etc.; the general remedial provisions of the Prussian Administrative Code are applicable (§§80 f-a to 80 f-s).

§214. *Wage Legislation* (the English Trade Boards acts of 1909 and 1918).—This legislation operates entirely through administrative procedure without the fixing of any statutory standard. The machinery of administration is largely non-official.

The non-obligatory rate provisions of the act of 1909 were repealed by the act of 1918. The act applies to trades in which there is no adequate machinery for effective regulation of wages throughout the trade. The trades falling under this description are specified by special orders made by the Minister of Labor. The order making the act applicable to a trade is subject to annulment on an address by either house or Parliament. (The act says, "His Majesty, in Council, may annul," etc.; it is clear that the address by either house of Parliament is intended to be mandatory and that the choice of the term "may" is simply a matter of courtesy.)

The chief authority is the Board of Trade (now Minister of Labor), which provides for the constitution of trade boards, less than one-half of the trade-board members to be appointed, the other members representing equally the employers and employees of the trade; a quorum to contain at least one appointed member. The Board of Trade also constitutes district trade committees representing equally employers and employees, plus, at least, one appointed member, with powers of recommendation.

The act prescribes the procedure for proposing, considering, and fixing a wage, which may be a minimum piece rate; the rate may apply for a period to be specified, or to an area, a process, or a class; if to a class, the trade board may require the certification of its members; infirm workers may be given exemptions; in case of learners, a trade board may prescribe conditions to secure effective instruction; the rate becomes effective on confirmation by the Minister.

Minimum-wage legislation has been extended to agricultural laborers by an act of 1924 (14 and 15 Geo. V, c. 37).

There is no similar legislation in New York; nor was there in Germany, prior to the war.

In a number of American states there are statutes for fixing minimum wages for women workers, in some states (e.g., Massachusetts) of a non-compulsory character. Compulsory minimum-wage acts have been declared unconstitutional for ordinary occupations by a decision of the Supreme Court (*Adkins v. Children's Hospital*, 261 U.S. 525).

The legislation of Congress for boards of arbitration, mediation, and conciliation to deal with wage disputes between common carriers and their employees applies compulsion only in case of voluntary submission.

§215. *Powers over labor agencies. (a) Employment agencies.*—The business of finding jobs for workers, and workers for employers, is regarded as one liable to special abuses, so that it has been suggested that it should be entirely taken over by public authorities.<sup>6</sup>

The business is placed under control in New York and Germany, in England only with regard to agricultural gangs.

The statutes operate through publicity requirements, the establishment of incompatibilities with other businesses, and above all through the requirement of licenses and powers to revoke the same. The latter provisions are noted below. In Germany fees are fixed by administrative regulation; in New York, by statute.

i) *New York.*—The employment agency law of New York (General Business Law, §170-92) is one of the most carefully elaborated license laws on the New York statute books. The law applies to employment agencies with specified exceptions (teachers, technical positions, nurses, medical institutions and hospitals, bureaus charging no fees) and has separate provisions for theatrical employment.

The law itself regulates the fees that may be charged, and forbids the business to be conducted in premises of specified description.

The carrying on of the business requires a license to be obtained from the local authorities (mayor or commissioner of licenses).<sup>7</sup> The particulars of the application for the license are fixed by law, and the form is prescribed by the licensing authority. The application is pub-

<sup>6</sup> In Washington an act was passed to that effect by initiative vote in 1915, but it was declared unconstitutional (*Adams v. Tanner* [1917], 244 U.S. 590).

<sup>7</sup> Incidentally this act requires for cities of the first class (three hundred thousand or more inhabitants) the establishment of an office of commissioner of licenses.

lished by posting in the licensing office, and written protests may be filed. The licensing authority investigates the character of the applicant and the proposed premises, and holds a hearing to consider protests. If the result of the hearing or investigation is unfavorable, or if the applicant has not complied with the provisions of the law, the application is denied. Each application "should be granted or refused" within thirty days from the date of filing. The license runs for one year; it is to be noted that there is no relaxation of requirements for renewing the license.

The consent of the licensing authority is required for the transfer of the license to another person or to other premises; in the former, but not in the latter case, the formalities are the same as in case of a new application.

The person conducting the agency is placed under bond, which may be sued on for the benefit of a person damaged by the act of the licensee; he is also required to keep registers and to furnish employment cards. All registers are subject to inspection.

The license is revocable "for any good cause shown within the meaning or purpose of this article," or when it is shown that the licensee is guilty of immoral, fraudulent, or illegal conduct. The procedure for revocation is carefully regulated.

Both refusal to issue a license and its revocation may be reviewed by certiorari.

ii) *Germany*.—The German employment agency law (act of June 2, 1910) requires a license for conducting an agency, which must specify the classes of employment for which positions will be procured. The license is to be refused where there are facts showing the unreliability of the applicant or where there is no local need, particularly where local needs are satisfied by public employment agencies.

The license may be revoked where the conduct of the agency shows the lack of reliability for which the license might have been refused. Unreliability is to be assumed where there have been repeated convictions for taking excessive fees. The refusal or revocation of the license is subject to administrative appeal.

Where a woman is to be sent abroad to accept a position, the authorities must be notified.

The licensing authorities have power to make rules regarding fees to be charged. The law itself establishes an incompatibility of carrying on specified businesses in conjunction with employment agencies.

In accordance with the usual German practice the license is not granted for a definite term.

iii) *England*.—Under the English Agricultural Gangs Act of 1867, gang masters are licensed by a justice of the peace; they must be of good character, fit to manage their men, and not engaged in the liquor-selling business. The license runs for six months and is renewable. The justice, in granting the license, may impose conditions limiting the amount of traveling by foot to be done by children. From a refusal of a license, an appeal lies to the General or Quarter Sessions.

Upon a second conviction, a license may be withheld for six months; upon a third conviction, for two years; a fourth conviction disqualifies the licensee.

(b) *Immigrants and emigrants*.—The New York Labor Law provides for the licensing of immigrant lodging houses. The license is issued on proof of character, is transferable only with consent, and is revocable on notice and for cause shown (§§230-33). The Charter of the city of New York (§347) authorizes the police board to grant licenses upon bond (and revocable for cause) to emigrant boarding houses.

These provisions call for no special comment.

Under the English Merchant Shipping Act passage brokers and emigrant runners are required to be licensed by the local authorities; the license is granted only after notice to the Board of Trade, is annual, and may be revoked only by a court. The passage broker must give a bond approved by the emigration officer, and the appointment of a broker's agent must be countersigned by him (act of 1894, §§342, 343, 348).

Of considerable interest is a German act of June 9, 1897, regulating the emigrant business: Licenses are required for forwarders and carriers as well as for agents; the former are granted by the Chancellor, the latter by superior state administrative authorities. Licensees must be citizens, except that aliens may be admitted as forwarders and carriers on condition of keeping a representative in Germany approved by the Chancellor, and of submitting themselves to German courts. An agent is not to be licensed if there are facts showing his unreliability or if there are already a sufficient number of agents. Licenses are revocable; the license of an agent must be revoked for causes specified in the statute. Agents are entitled to an administrative remonstrance against refusal or revocation of license. The Federal Council has regu-

lative powers regarding accounts, security to be given, physical accommodation, and moral protection. The law provides for inspection of vessels, crews, and emigrants. The law itself regulates in important respects the contract with the emigrant. Subsidization by foreign governments or societies is forbidden; but the Chancellor may make exceptions. The law creates an advisory council, which is heard in connection with the grant, restriction, or revocation of forwarders' licenses, and the approval of colonization schemes.

The act proceeds upon the theory that emigration is legitimately subject to political or sovereign control.<sup>8</sup> It is therefore constructed on lines very different from those observed with regard to ordinary businesses. Restrictive and discretionary powers are conspicuous, and judicial control is altogether excluded. The administering authorities are correspondingly high in rank. However, the Chancellor is checked by a council which in a sense is independent of him, for its members are appointed by the Federal Council, and its president by the chief executive.

<sup>8</sup> Before the enactment of the law, the matter was controlled by the state governments without express legislative warrant; thus from 1859 to 1896 Prussia allowed no emigrant agencies for Brazil.

## CHAPTER XXII

### ADMINISTRATIVE POWERS IN CONNECTION WITH THE CONTROL OF PROFESSIONS

§216. *In general.*—The line between professions and ordinary trades cannot be drawn accurately. Historically it is true that when legal competence tests were largely abandoned for skilled handicrafts they were not only retained but strengthened for the learned professions, but there is a tendency to revert to those tests for some skilled trades and to extend them to certain specialized business services, the training for which is gaining an academic status.

The legislative system may be that of compulsory licensing or that of optional certification. The latter means that certification permits the assumption of certain designations, the use of which without certification is made unlawful. If the designations thus made dependent on certification are the customary professional designations, the optional feature is of course considerably reduced; it is still, but to a less extent, reduced where certification confers certain privileges, as, for example, that of being employed for official or quasi-official purposes. Even thus reduced, however, the optional system has the advantage that the law may impose higher standards with less opposition and may dispense with a definition of what constitutes professional practice.

The characteristic administrative feature of the legislation is the testing of qualification prerequisites. In this respect there is little difference between compulsory licensing and optional certification, particularly where the latter carries privileges or exclusively entitles to certain rights. The testing may involve examination or the passing upon the value of educational certificates. In former times this phase of control was in large measure left to agencies that were wholly or partly extra-official, and particularly to corporate organizations of the professions; there is now a tendency to supersede these by purely official control; but the former method still plays a conspicuous part in England. In New York important changes in this respect were made in 1910.

Another noteworthy feature of the control of professions is the existence of administrative powers to revoke licenses or certificates.

Apart from these powers of revocation the laws operate without any powers to issue orders in particular cases; nor do we find with regard to professions the inspecting or examining powers which otherwise so commonly accompany administrative control. There is a considerable amount of rule-making power, but with a tendency to confine powers of regulation to technical or minor matters, and to settle essentials directly by statute.

Legislation will first be considered concerning the practice of medicine, which is the most typical. The law regarding other professions is of interest as showing the scope of legislative control and as indicating possible variations in methods of control. The omission of the legal profession is explained by its close affiliation with the administration of justice which is outside the scope of this survey. Somewhat related to the control of professions, but much less developed, is the legislation concerning institutions caring for persons.

§217. *Medical-practice legislation (a) New York.*—The system of control has for over a hundred years been that of compulsory licensing; consequently the law has to define what constitutes practicing medicine, and it does so by specifying methods of treatment not covered by the act. The law itself prescribes the conditions of admission to examination,<sup>1</sup> the conditions under which institutions may grant degrees, the length of practice which may be accepted in lieu of education, the conditions of recognizing eminent physicians from other states, and the causes and procedure of revocation. These provisions operate to reduce administrative discretion.

The administrative powers are vested in the Regents of the University. They decide whether practice may be accepted in lieu of training; they pass upon the standards of schools (which must be satisfactory to them); they control examinations which are conducted by an appointed Board of Examiners; they determine whether other states maintain equal standards; they issue licenses and have a power circumscribed by law (the causes including fraud, and any crime or misdemeanor) to revoke them.

The discretion thus reposed in them is considerable, and it is clear that most decisions must be made on the advice of others; but apart from the Board of Examiners, the law does not provide for advisory bodies or for a delegation of powers.

There is no explicit provision for judicial review.

<sup>1</sup> There are special conditions for the practice of osteopathy.



*b) England.*—The general system is to leave anyone free to give medical treatment, but to confine to registered persons the right to designate themselves as such, to hold official positions, to grant legally required certificates, and to sue for fees—a system of optional but privilege-carrying certification.

Registration is controlled by a General Council of Medical Education and Registration, the members of which are in part selected by corporations and universities, and in part appointed by the king. Some functions may be delegated to branch councils. The Council makes rules concerning the register, which is administered by a Registrar.

Registration depends on qualifications set forth in the schedule of the act of 1858, and was under that act evidenced by the production of specified documents (diplomas); the act of 1886 substitutes qualifying examinations and specifies the bodies entitled to conduct these. Under the act of 1858 the Council had power to require information as to courses, and its members had the right to attend examinations; under the act of 1886 the Council appoints examination inspectors.

Upon representation of the Council, the Privy Council may order that examinations conducted by some named body shall not confer the right to be registered. The order may be based upon ascertained defects or upon the fact that candidates for examination are restricted to particular schools of medicine.

If the Registrar declines registration because not satisfied that the applicant is entitled to it, an appeal may be taken to the Council.

The Council may strike off the register anyone convicted or found by the Council guilty of infamous conduct in any professional respect. It may also erase fraudulent or incorrect entries.

*c) Germany.*—The Trade Code provides that official approval (“*approbation*”) is required for those who designate themselves as physicians, surgeons, obstetricians, etc., or who are recognized as such by central or local authorities and intrusted with official functions.

The approval is given upon the basis of a certificate of competence, and the Federal Council designates for the various parts of the Empire the authorities which may grant approvals, which are then valid for the entire Empire. It also issues regulations as to proof of competency on qualification tests—a matter settled in New York and England by the statute itself. The law provides, however, that a certificate of competence may not be made dependent upon the previous

obtaining of an academic doctor's diploma. The names of approved persons are published in the official papers designated by the Federal Council.

Persons who have obtained the approval may practice anywhere within the Empire.

The law provides that approbations may be rescinded if it appears that the prerequisites prescribed by the law did not exist; and if there is a criminal conviction attended by loss of civil privileges (an aggravation of a sentence recognized by the German law), the approbation may be withdrawn for the period of such loss.

§218. *Other professions.*—The German Code has one provision for all those who designate themselves as physicians or by equivalent titles (which includes dentists and veterinarians) and for apothecaries; for the latter, moreover, local provisions are (or, until recently were) in force which limit the number of pharmacies and thus give to each a monopoly status. Midwives require a certificate of examination issued by the competent state authorities.

New York and England have separate provisions for professions allied to medicine, and New York also for some other professional vocations.

New York has systems of compulsory licenses for the practice of dentistry, midwifery, veterinary medicine, pharmacy, chiropody, optometry, engineering and land-surveying, embalming and undertaking, and in first-class cities for plumbing; and systems of optional certification for nurses, accountants, shorthand reporters, and architects.

England applies license or registration provisions to dentists, pharmacists, veterinary surgeons, midwives, and nurses. It regulates upon a professional basis the certification of mine-managers (Coal Mines Act, 1911); otherwise it has neither the compulsory nor the optional system for any other profession not allied to medicine.

In New York all professional licenses and certificates, compulsory and optional, are placed under the control of the Regents of the University, who appoint the examiners; except that in the case of embalmers and plumbers the examiners are placed under the jurisdiction of the State Board of Health, and except that midwives, upon a somewhat less professional basis, are licensed by the State Commissioner of Health. The examiners of candidates for veterinary medicine and for nursing are appointed on the nomination of the respective professional organizations. In the case of pharmacy examinations, the law

speaks of their being conducted by the Board of Examiners and the Regents. There is provision for temporary permits, apprentices, employees, etc., in the case of dentists and pharmacists. Annual local registration is required of dentists, optometrists, and plumbers. In the case of engineers and surveyors, the Regents act upon the recommendation of a licensing board appointed by them.

There is a difference between compulsory licenses and optional certificates in the matter of qualification prerequisites; for the former they are in all the statutes fixed by the law directly, for the latter only in the case of architects; while for accountants, nurses, and reporters, qualifications and rules for examination are fixed by the Regents or Examiners.

The law of New York is not quite uniform as to revocation of license or certificate for the various professions: the causes are specified for dentists, embalmers, engineers, and surveyors and architects; the phrase "and other cause" is added for pharmacists; the phrase "sufficient cause" is used in case of nurses and accountants; "violation of rules" in case of plumbers; for optometry and chiropody the law is the same as for the practice of medicine; conviction of felony automatically disqualifies in the case of veterinarians; the county clerk annuls, in case of any conviction of felony, the dentist's annual certificate of registration.

In all cases the revocation is administrative and without express provision for judicial review.

In England the compulsory-license system exists for pharmacists (Acts, 1852, 1868, 1874, 1908), midwives (since 1910), and dentists (since 1921); the optional certification or registration system for nurses (assuming title of registered nurses, act of 1919) and veterinarians (1881: registration as members of the Royal College; 1920: designation as veterinary surgeon). The Pharmacy Law also provides for registered assistants.

For each profession the law establishes or recognizes some controlling official board or corporate organization: the Dental Board, the Royal College of Veterinary Surgeons, the Central Midwives' Board, and the General Nursing Council. These bodies respectively fix the qualifications for admission to practice or registration, subject to approval by the Privy Council or a secretary of state or a minister, in the case of nurses also subject to the veto of either house of Parliament, except that in the case of dentists they are established by the provisions of the statute itself. In every case the statute makes

provision for examination, and the rules of the Nursing Council must also require a prescribed training at an approved institution.

Under all the English statutes there is administrative power of revocation (removal from register): in the case of nurses the power is determined by the rules of the Council; the Midwives Act makes disobedience to rules and regulations a cause; the Pharmacy<sup>2</sup> and the Veterinary Surgery acts follow the Medical act, except that the latter speaks of "conduct disgraceful" (instead of "infamous") in a professional respect, and contains full procedural requirements (1881, §§6, 7, 8: three-fourths vote, quorum of two-thirds). The Dentists Act speaks of "infamous or disgraceful conduct in a professional respect," but provides against erasure from the register by reason of the adoption or non-adoption of any particular theory of practice, or by reason of conviction of an offense which under the circumstances of the case does not disqualify. Express provision for canceling illegal or fraudulent registration is found in the Pharmacy, Veterinary, Dentists, and Midwives acts.

There is provision for an appeal to a court against removal from the registrar in the case of veterinary surgeons, dentists, midwives, and nurses, and in the case of dentists also from a refusal to register (Act, 1921, §9).

The Nurses Act gives an administrative appeal to the Minister of Health from a refusal to approve an institution as fit for training.

There is thus considerable variation in the statutory provisions.

§219. *Institutional care and treatment.*—This subject, though related to that of professions, has received less legislative attention and is unstandardized.

New York has provisions concerning insane asylums, hospitals, dispensaries, and child-caring institutions; England, concerning insane asylums, homes for drunkards, and infants' homes; Germany, for hospitals and insane asylums.

a) *New York.*—The provisions of the law of New York are fullest for insane asylums. The keeping of such an institution for compensation or hire requires a license from the State Commissioner of Lunacy. The license is to be accompanied by a plan with such other information and in such form as the Commission may require. The Commission may at any time inquire into the conduct of the institu-

<sup>2</sup> The Pharmacy Act of 1868 was more conservative: erasure from the register had to be directed by the Privy Council on the basis of a conviction of an offense against the act rendering the person unfit for practice.

tion and may after hearing for just and reasonable cause (including the interest of the inmates) amend or revoke the license.

As regards hospitals, the laws of New York are intended to secure other objects than professional qualification. The Public Health Law (§319) requires administrative approval for the establishment of a tuberculosis hospital or camp in a town, but the guiding consideration is that of location. A hospital corporation requires for its organization under the membership corporation law the approval of the State Board of Charities in addition to that of a Justice; obviously, this too fails to cover hospitals conducted for profit or by individuals. A general license requirement for hospitals is found in the Code of Ordinances of the city of New York, and is perhaps provided for by other local laws; but the general state laws seem to have no such provision.

Dispensaries are required to be licensed by the State Board of Charities (State Charities Law, §291).

The New York City Code of Ordinances also provides for licenses for boarding children under twelve years of age, for day nurseries, and for schools for children under sixteen; and the New York State Sanitary Code provides for licenses "revocable at any time" for boarding children under twelve. This Sanitary Code is enacted by the State Board of Health; and there is no direct general state legislation concerning child-caring institutions.

*b) England.*—The first general legislation for the control of hospitals appears to be the Nursing Homes (Registration) Act of December 22, 1927.

There is a statute of 1845 for the licensing of houses for the reception of lunatics by commissioners in lunacy or justices, the license being annual and revocable by the Lord Chancellor, who may also prohibit its renewal. An act of 1890 prohibits the granting of new licenses but preserves existing houses, which are subject to regulation by the commissioners, subject to the approval of a secretary of state.

Infants' homes are provided for in England by acts of 1872 and 1908. They require notice to local authorities and registration, which may be refused unless the authority is satisfied that the house is suitable and the applicant of good character and competent; the local authority may strike the keeper off the register for negligence or incapacity, or for unfitness of the house (1872, §7). The house is subject to local visitations, from which, however, exemption may be granted (1908, §2[4]). Poor children's institutions in general may be subjected to inspection by a secretary of state; and for the emigration of a child committed to the care of an institution his consent is

required (1908, §§21, 25). Specified categories of persons require the written sanction of local authorities for keeping infants for reward; an inspector may apply to these authorities or to a justice for an order removing the child from the custody of any unfit person thus keeping an infant for reward (1908, §§3, 5).

Maternity homes are required to be registered by an act of 1926 (16 & 17 Geo. V, c. 31); the act specifies the reasons for which the local supervisory authority may refuse registration, and the refusal is subject to appeal to a court of summary jurisdiction, and further to the Quarter Sessions.

The treatment of habitual drunkards is regulated by an act of 1879. A local authority may license, subject to any conditions, a person (not the keeper of a house for lunatics) to keep a retreat for habitual drunkards. The license runs for thirteen months, and is revocable and renewable, and may in the discretion of the authority be transferred (§§6, 8). Either the local authority or an inspector appointed by a secretary of state may order the discharge of a patient where the place is unfit. An application for admission must be attested by two justices; before the end of the term the applicant can obtain his discharge only by an order of a justice. A justice may also give a license to a drunkard to live for a term of two months with a person named. The license may be revoked by the justice or, on the recommendation of an inspector, by a secretary of state (§§19, 20).

*c) Germany.*—The German Trade Code requires a license for the keeping of private hospitals (including lying-in hospitals) or insane asylums (§30). The law provides that the license may be refused only on four specified grounds. These are, first, the existence of facts which demonstrate the unreliability of the manager with reference to the management of the institution; second, the non-compliance with sanitary requirements of the structural and technical equipment of the institution, according to the plans and specifications submitted; third, the fact that the institution is to occupy only a part of a building occupied by others who will be materially prejudiced or imperiled by the institution; fourth, the fact that the institution is intended for the reception of persons affected with contagious disease, or insane persons, or that the local situation will cause considerable prejudice or danger to the owners or occupants of neighboring properties. In the third and fourth cases, the local authorities must be heard before the license is granted.

## CHAPTER XXIII

### ADMINISTRATIVE POWERS IN CONNECTION WITH RELIGION, EDUCATION, AND POLITICAL ACTION

§220. *The church.*—This field can be disposed of with a few words. Both in England and in New York there is some legislation of an enabling, but not of a compulsory, character: in England mainly for the registration of places of worship (important for the solemnization of marriages), in New York for the incorporation of religious societies. There are no licensing or even registration requirements, and no powers of administrative supervision. The régime is one of complete abstention; in New York with reference to all religious activities whatever, in England with reference to those outside of the Established Church.

The only point at which federal legislation in the United States touches the church is in connection with prohibition legislation and the use of wine for sacramental purposes. This will be noted in its proper place.

In the German Empire religion belonged to the reserved province of the member-states. The only Prussian legislation conferring administrative powers was the outgrowth of the conflict with the Catholic Church shortly after the establishment of the Empire. An act of May 11, 1873, concerning the appointment of Christian ecclesiastics, gave the government the right to object to appointments on grounds carefully specified in the law; an act of April 29, 1887, confined this right of objection to permanent appointments.

Article 137 of the new Constitution of August 11, 1919, provides that every religious society confers its offices without co-operation of the state or of any civil community. This apparently does away with the foregoing legislation.

§221. *Education.*—There is no English legislation affecting the freedom of private primary or secondary education, and consequently there are no administrative powers exercisable *in invitum*. But there is an elaborate system of grants in aid, by which the great mass of denominational schools is practically brought under legislative and administrative control.

The establishment of an institution for higher education has al-

ways been sanctioned by a charter. The College Charter Act (1871) provides that any application for a charter for the foundation of any college or university, which is referred to a committee of the Privy Council, shall be laid before both houses of Parliament for not less than thirty days before a report is made by the Committee to the Crown in Council.

But there is no explicit prohibition against the private foundation of a college or university, and sections 19 and 20 of the Companies Act of 1908 seem to lend themselves to that purpose.<sup>1</sup>

In Germany the Federal Trade Code provides that the principle of vocational freedom is not applicable to education and the instruction of children. Educational matters belong to the reserved powers of the member-states.

The Constitution of Prussia of 1851 provides that every person is free to give instruction and establish and conduct schools, who proves to the authorities his moral, scientific, and technical qualifications (Art. 22), and it places private as well as public educational institutions under state supervision (Art. 23). Proof of qualification and submission and approval of plans for private schools are also required by the code of 1794 (II, 12, §§3, 5).

Universities are established by special charter granted by the executive power, and the charter determines their rights and obligations (Code, 1794, II, 12, §68).

New York<sup>2</sup> subjects institutions of higher learning to a far-reaching administrative control, vested in the main in the Regents of the University (the educational organization of the state copied from the French model), who are elected by the legislature.

It is made unlawful to confer diplomas or degrees or assume the name of "university" or "college" or conduct a correspondence school without authority from the Regents or by special law (§§66, 80). Apart from the assumption of these privileges, an institution requires administrative authorization only if it desires to have the status of a corporation (§59); but these privileges are, of course, practically in most cases almost indispensable prerequisites to effective operation.<sup>3</sup>

<sup>1</sup> St. Hilda's Incorporated College (1901), 1 Ch. 556.

<sup>2</sup> References are to the Education Law.

<sup>3</sup> That it is not absolutely indispensable is shown by the case of the Rand School of Social Science which came before the Appellate Division under the act of 1921, to be presently referred to. This school, without a corporate organization of its own, was operated by the American Socialist party which in its turn



The power of the Regents to incorporate extends to universities, colleges, academies, libraries, museums, or other institutions or associations for the promotion of science, literature, art, history, or other departments of knowledge or education (§59).

A further qualification of "other approved purposes in whole or in part of educational or cultural value deemed worthy of recognition or encouragement by the University," which phrasing vests a wide discretion in the Regents, appears to refer only to other associations than those specifically enumerated.

The law itself requires of degree-conferring institutions minimum resources amounting to \$500,000 (§61), and specifies a number of organization provisions and powers for every incorporated institution (§68); otherwise powers, privileges and duties, provision and equipment are left to be determined, authorized, or approved by the act of incorporation (§§59, 61). The Regents also have the important dispensing power of enlarging the capacity of the institution to take gifts beyond the amount fixed by charter or law, subsequent to the taking effect of the gift (§68[5])—a provision remedying a situation such as was presented in the McGraw case [*Matter of McGraw*, 111 N.Y. 66]).

For reasons specified in the law (misconduct, incapacity, neglect of duty, failure to carry educational purposes into effect) the Regents may, after hearing, remove a trustee of any institution other than a denominational one and fill the vacancy (§68[4]); and for "sufficient cause" and after hearing, they may suspend or revoke a charter (§62); but after such revocation, it requires judicial action on application of the trustees (of the Regents only if there are no trustees in the county where the institution is located) to dissolve the corporation and dispose of its property according to *cy-pres* principles (§63).<sup>4</sup>

Both the Regents and the Commissioner of Education have the usual examining powers, and for refusal to make any required report or for any violation of law the Regents may suspend the charter (§§45, 68).

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was incorporated under the Membership Corporation Law (see *People v. American Socialist Society*, 202 App. Div. 640). Since 1923, a stock corporation for purposes for which the Regents may grant a charter requires the consent of the Commissioner of Education (Stock Corporation Law, §6).

<sup>4</sup> Under the former law (Education Law, 1909, §1101) the Regents themselves dissolved the institution and disposed of its property.

The statute is silent as to any remedial action against the Regents, which consequently rest upon general principles.

The short-lived act of September 1, 1921 (one of the so-called "Lusk laws," repealed in 1923), applied to all instruction other than that given by institutions chartered by the Regents or by public or denominational schools, and other than ritual instruction by fraternal orders. It required for the conduct of instruction a license from the Regents, and prohibited the granting of licenses where it should appear that the proposed instruction included certain subversive political doctrines, or would be conducted in a fraudulent manner. The action of the Regents was subject to review by certiorari. The administrative powers under the act were thus much more restricted than those exercised over institutions of learning under the General Education Act, and the Appellate Division intimated that except for the statutory disqualifications there would be no discretion to refuse a license (*People v. American Socialist Society*, 202 App. Div. 640).

It should be added to this account of administrative powers over higher education in New York that they are not typical of American law in general. Probably in the great majority of states there is no requirement of administrative approval or license for the organization of institutions of higher learning, nor for ordinary private instruction; or at most there is such perfunctory approval of purposes as is required of all other membership or non-profit corporations.

In New York the system of control appears to have established itself without much discussion and without any political purpose, simply to secure proper standards and prevent fraud. The attempt to establish a control of a political nature in 1921 met with strong opposition which led to the speedy repeal of the measure.

§222. *Political action (press, association, and assembly).*<sup>5</sup>—In the legislative policies of the nineteenth century, freedom of speech, press, and assembly has gone hand in hand with freedom of religion; and the former has been associated chiefly with political agitation and propaganda. Both have found constitutional expression in America and in Germany (the latter couples association with assembly), and without constitutional guaranties England has been equally liberal. It is true that in England the common law of seditious libel survives

<sup>5</sup> A passing reference should here be made to the neutrality laws which vest powers in the president (R. S., §5287; act of 1818; Penal Laws, §14); also Joint Resolution relating to the export of war material, March 14, 1912; also the British Foreign Enlistment Act, 1870, §§21-24.

obscurely, and that a number of American states, including New York, have revived political legislation in the so-called "criminal anarchy" statutes; but these are penal laws which operate without administrative ruling powers.

In New York, while the right to associate for political purposes is unrestricted, a political association can acquire corporate capacity only under the membership corporation law; and under the law the certificate of incorporation must bear the written approval of a justice of the Supreme Court. The law does not indicate on what considerations that approval is to be given or withheld. The requirement was clearly non-political in its origin (it was first introduced in the Benevolent Corporations Law of 1848) and is not now regarded as a political check; in practice it appears to have presented no difficulty. Nevertheless, it is an anomaly.

The licensing of meetings and parades in public places, though capable of serving political ends, can do so only by the abuse of powers ostensibly exercised for other purposes.\*

Closely related to freedom of speech is the secrecy of private letters which Germany alone of the three jurisdictions guarantees explicitly. In England the right of a secretary of state to direct by warrant the opening of letters has been exercised from the first establishment of the Post-Office and has been confirmed by statute; the practice was made the subject of parliamentary attack and debate in 1844, but it was finally decided not to abrogate it, and the power still exists. In the United States secrecy of first-class mail is firmly established as a statutory policy. The Espionage Act of 1917 declares non-mailable every letter, print, or publication containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, as well as any matter in violation of the act, such matter not to be conveyed in the mails or delivered from any post-office; but it is expressly provided that this is not to authorize any person other than a post-office employee duly authorized thereto, to open any letter. The general postal laws have, however, been construed by the

\* In New York, parades marching on the street to the interruption of other citizens are forbidden unless written notice of not less than six hours is given to the police authorities. Police authorities may designate how much of the street in width the parade may occupy, with special reference to crowded thoroughfares. It is the duty of the police to furnish escort necessary to protect persons and property and maintain public peace and order. See New York General City Law, §5; also Greater New York Charter, §1457.

Supreme Court as vesting a discretion in the Postmaster-General in the matter of second-class mail privileges of newspapers, so that he may withhold or revoke the same if satisfied that the paper publishes non-mailable matter (*Milwaukee Publishing Company v. Burleson*, 255 U.S. 407). The political power thus recognized is all the more remarkable in that it is not explicitly given, but rests upon a controverted construction of the statute.

Whereas in England and the United States political freedom has resulted in the main in the abrogation or non-existence of regulative legislation and administrative powers, there is in Germany federal legislation relating to the press and the right of assembly and association which is of great interest as illustrating a carefully worked out system of reducing administrative powers to a minimum and subjecting them to effective checks.

The Press Law of 1874 abolishes the formerly existing licensing and censorship requirements and substitutes on the whole a system of responsibility under penal laws, leaving unaffected, however, special laws for times of war or state of siege (§30), and specially authorizing the Chancellor to forbid the publishing of information regarding movements of troops and measures of defense in time of actual or threatening war (§15). The only other provisions for administrative supervision and control are that a copy of each number of a periodical must at once be delivered to the police against immediate receipt (§9); that for reasons specified in the law (violation of formal requirements, contravention to specified prohibitions, obscene pictures or accounts, incitement to crime or violence with imminent danger that it will be effective), prints may be seized by administrative authority, subject to submission to a court within twenty-four hours, which court must decide within twenty-four hours (§23); and that specified classes of persons may be forbidden to peddle prints (§5). As regards foreign periodicals, the Chancellor may forbid circulation up to two years, if the periodical has within a year past been twice convicted under specified sections of the Penal Code (§14).

It thus appears that the law dispenses entirely with permit requirements and that discretion is carefully circumscribed by specific conditions.

As being closely connected with the freedom of the press in Germany, several legal provisions relating to the imperial postal and telegraph monopolies deserve notice:

The postal laws appear to exclude discretion, except that regulations issued by the Chancellor designate the matter or articles admissible for postal transmission; within these regulations and the law, acceptance and transmission may not be refused, and no political newspaper may be excluded nor may any discrimination in postage be made between different newspapers. The telegraph and telephone services, on the other hand, appear to be subject to a considerable degree of discretionary control; the law merely provides that priorities of use and exclusions must be based upon considerations of public interest; and the regulations provide that telegrams, the contents of which violate the law, or which are deemed inadmissible for reasons of public welfare or morality, shall be rejected. The question of admissibility is decided by the chief of the office, in the second instance by the superior post-office, and in the last resort by the central imperial post-office whose decision is not subject to further appeal.

Associations and assemblies were not regulated by imperial legislation until 1908 (act of April 19, 1908), being until then subject to state law. The principle of the law is expressed by recognizing in general terms the right of nationals to associate and to assemble, subject only to police restrictions for the safeguarding of life and health of persons assembled from immediate dangers (§1). However, state laws concerning religious societies remain in force (§24).

A political association must submit its constitution to the administrative authorities, but does not require a permit. An administrative dispensation may be granted from the general requirement of the use of the German language (§3). Any association, whether political or not, is subject to administrative dissolution if it pursues objects forbidden by the penal statutes; but the law secures a review of the dissolving order by way of administrative jurisdiction (§2). The substitution of administrative for ordinary courts is in accordance with the general division of jurisdictions in Germany.

As to assemblies, those in public places and those of a public political character are subjected to specified control: Assemblies and parades in public places require a police permit which may be denied only if danger to public security is apprehended. The refusal must be accompanied by reasons (§7). Public political meetings must (except in specified cases, particularly in election campaigns) be notified to the police who must acknowledge receipt immediately (§§5, 6)<sup>7</sup> and

<sup>7</sup> This substitution of notification for a permit is also found in the French law of June 10, 1881.

every such meeting must have a presiding officer (§10). Every public political meeting and every meeting in a public place may be attended by not more than two official delegates of the police, who may dissolve the meeting in cases specified by the law (specific violations of the act, and incitement to crime). On demand, the reason for dissolution must be stated in writing; and an appeal lies to the administrative court (§§13, 14).

In accordance with the general German practice, the association and assembly law, though federal, is administered by the state administrative authority.

CHAPTER XXIV  
ADMINISTRATIVE POWERS UNDER SAFETY  
LEGISLATION

§223. *In general.*—The principal subjects of legislation are inflammable and explosive materials, steam boilers, machinery, vehicles (ships, railroads, elevators, and automobiles), and buildings; of these subjects, shipping, machinery, and railroads have been considered in other connections.

The dangers to be guarded against are those of accident. Safety demands also protection against crime, but the amount of regulative legislation for the latter purpose is relatively small (weapons, and legislation to control certain businesses before noted in connection with trade legislation). The repression of crime as an administrative task calls into play the ordinary powers of the police and of prosecuting officers, which are not determinative in character.

Different from sanitary legislation, the entire field of control is practically undisputed; and safety legislation has very little of what might be dignified by the name of "history."

The important subject of building regulation is to a great extent local, either so that the legislature itself enacts local laws, particularly for a metropolis (Building Act for London, 1894), or so that legislative power is delegated to localities.

A more than local interest attaches to the terms of local safety ordinances, where discretionary powers with regard to structural arrangements of meeting places affect the practical enjoyment of the right of public assembly.

The extent to which the matter of public safety is committed to local bodies appears from the fact that there is no direct statutory provision in either of the three jurisdictions looking to the protection of the public from the dangers of electricity. The Code of Ordinances of the city of New York has a chapter on electrical control, which provides for both licensing and directing powers.

Of the 503 pages of the New York Code of Ordinances, 253 pages are devoted to safety ordinances (building, electricity, explosives, hazardous trades, firearms, fire prevention, traffic regulations).

Probably the most elaborate general statute dealing with safety is the English Explosives Act of 1875, covering manufacture, custody, transportation, and importation. Germany has a brief act on the same subject (1884), which indicates in a few sections that the matter is subject to licenses. The New York legislation for the state at large concerning explosives constitutes, somewhat incongruously, a chapter of the Labor Law. In the consolidation of 1913, it formed a chapter of the Insurance Law, added to it by legislation enacted in 1911 (c. 451). But in 1915 (c. 4), for some reason, this chapter was repealed, the office of Fire Marshal abolished, and his power regarding explosives transferred to the Labor Commissioner. There is additional legislation in the Greater New York Charter.

Automobile legislation is of the same general type in the three jurisdictions; on the other hand, weapons or firearms legislation is of a different character in Germany from what it is in England or New York. The German act (1891) looks to the safe quality of firearms, providing for their testing and marking, and since the whole matter is treated as purely technical, it is left to rules to be made by the Federal Council; the acts of New York (1921) and England (1920) are for the prevention of the misuse of weapons, and therefore operate through personal restraint, and very little is left to rule-making powers.

Germany appears to have less statutory safety legislation than either New York or England, the reason being that safety requirements are regarded as peculiarly a matter for administrative regulation. What there is of federal legislation consists largely in a delegation of powers to the Federal Council (steam boilers, December 27, 1908; automobiles, May 3, 1909). It is characteristic in this respect that municipal building regulations in many Prussian cities are made by the executive authority and not by the legislative council.

Safety legislation operates to a considerable extent through license requirements. These are based in some cases on considerations of personal fitness (possession of weapons, driving automobiles, operating boilers, employment in storing explosives, importing explosives), but generally upon objective physical conditions. If the personal qualification is technical skill, it may be tested by examination (automobile drivers) or by certification (boiler operators [New York]); in the case of weapon licenses, differences of policy are noticeable: so, in case of a citizen New York requires a reason to be shown for refusing a license, while England permits the granting only for good



reasons, which is the New York rule for non-citizens and for carrying weapons concealed.

Where the license depends on objective conditions, it may be made a purely ministerial act; this seems to be the case in New York with regard to the storing of explosives, which the law regulates with mathematical minuteness as to quantities and distances. This law, however, does not apply to New York City, where the matter is controlled by the discretion of the Fire Commissioner (§769). The English Act appears to leave something to administrative discretion.

The English Explosives Act operates in part through the requirement of rules to be made by the private owner, subject to government approval.

The Building Law for the city of New York appears to have first introduced<sup>1</sup> an administrative power, which has since become notable mainly in connection with zoning legislation: the Superintendent of Buildings, in passing on questions relating to construction, may, subject to the approval of the Borough President, authorize variations from the strict letter of the law, observing its spirit, securing public safety, and doing substantial justice. If he rejects an application for a variation where it is claimed that an equally good and more desirable form of construction can be employed, the owner may appeal to the board of appeals (1916, c. 503, §411). The legality of all orders of the board of appeals may be questioned by certiorari (1916, c. 503).

The New York charter also gives the Fire Commissioner important directing powers with regard to buildings: he may order the remedying of any conditions in violation of law or regulations, and may order the installation of fire-extinguishing apparatus and of means of exit (§775); a further power to order the vacation or removal of inadequately protected buildings is qualified by the provision that in case of non-compliance he may certify an emergency and "in addition to any other power" apply to a court for an order directing him (the Commissioner) to vacate the building (§778); he is also given power to direct a building that is on fire, or is likely to take and convey fire, to be pulled down, but this is accompanied by a provision for compensation (§754).

Under the Building Code of the city of New York a notice may be served requiring an unsafe building to be removed or made safe. Upon non-compliance by the owner, a survey is directed by a board

<sup>1</sup> The provision is first found in Laws, 1871, c. 625, §31.

of three, constituted like an arbitration board. If this board reports against the building, the matter is taken before a court, which may issue a precept to the Superintendent to abate or repair the building, the expense to be recovered from the owner (§§630-39).

The Code of Ordinances of the city of New York also gives power to the Commissioner of Electricity to order in writing the remedying of any defect in electric wiring or appliances, and to cause such wires and appliances to be disconnected and sealed (c. 9, §§2, 13).

Outside of the labor law, which contains adequate provision (§§240, 255), there does not appear to be granted either for the state at large or for the city of New York any general power to order the discontinuance of the use of dangerous structures, apparatus, machinery, or appliances. This power is generally recognized in Germany (Prussia). We recognize a general power to abate nuisances; but this does not serve the purpose, where direct action upon the dangerous thing itself is impracticable.

In England the phrasing occurs in a number of cases that structural arrangements or alterations must be made to the satisfaction of designated officials—a phrase which seems to involve at option either a licensing or a directing power (Public Health Amendment Act, 1907, §§30, 36, 37). The Explosives Act gives power to order the remedying of any defective or unnecessarily dangerous condition (§§24, 25, 26).

A power to require the remedying of dangerous conditions or to order the use of dangerous appliances to be discontinued would, under the German (Prussian) law, exist without specific provisions in a particular statute; for it is covered by a very general delegation of police authority contained in the Prussian Code of 1794.

The technical nature of the guiding considerations is indicated by the fact that in a few cases the Charter of the city of New York gives a determining voice to non-official bodies or persons: under section 770 to the New York Board of Underwriters; under section 343 to practical engineers detailed by the Police Department (certification of qualification of steam-boiler operators and report as to revocation of certificate); and under section 769 (until an amendment of 1902) to arbitrators consisting in part of representatives of the New York Board of Trade and Transportation and of the American Chemical Society.

Where there is an express provision for appellate review, the appeal is nearly always administrative. The grant of an appeal to a

court of summary jurisdiction under the English Firearms Law (1920) for the refusal as well as the revocation of a license is an exception (§§2, 8). New York in 1912 (c. 458) permitted an appeal from the Fire Commissioner's orders (confirmed by surveyors) to the Appellate Division of the Supreme Court, but repealed the provision in 1913 (c. 695). England in this field of legislation, as in others, has occasional recourse to arbitrators for appellate purposes; and one of the few similar American provisions is found in the Greater New York Charter (§§774, 777, as amended, 1913, c. 695) for the review of orders of the Fire Commissioner.

In view of the technical nature of safety requirements, the simplest plan of presenting the administrative powers under this legislation is to catalogue them in a note under appropriate heads.

#### §224. CONSPECTUS OF POWERS UNDER SAFETY LEGISLATION

##### A. Explosives and inflammables

###### 1. New York state-wide legislation :

Article 16 of the Labor Law relates to explosives but does not apply to New York City.

The law has a very precise "Quantity and Distance Table" for the location of magazines (§456). A certificate from the Commissioner of Labor is required for the storage of explosives, who determines the quantity permitted under section 456 and may modify or cancel the certificate in accordance with changed conditions (Labor Law, §458).

Moving-picture exhibitions with portable booths or miniature machines require a certificate of approval from appropriate authorities (General Business Law, XII, A).

As to illuminating oils, the State Board of Health prescribes tests and testing instruments and adopts rules for testing methods of enforcement—a rule-making power in aid of inspection.

###### 2. Legislation for New York City :

The Fire Commissioner (substituted by Laws, 1914, c. 495, for a municipal explosives commission) has authority to make regulations for keeping (etc.) explosives, in excess of quantities specified in the law. He issues licenses for keeping, etc., and certificates of fitness for employees (§§763, 769). He determines in his discretion the quantity that may be stored. He may revoke a license if in his judgment there is an infraction of an ordinance or regulation (§762).

He determines place, manner, and quantity of manufacture of fireworks in his discretion, and may revoke permits at any time (for specified fireworks, special permits between June 10 and July 10) (§764).

Petroleum: The Commissioner determines in his permits methods of separation, if stored within a specified distance from a building, designates testing instruments, issues special permits for keeping in fireproof struc-

tures, and issues general rules and special orders relative to handling transportation, etc. (§765).

Barrels and packages must bear an inspector's official stamp or mark (§765).

He regulates the kindling of fires in streets (§760). He licenses, subject to his rules and regulations, the retail selling of kerosene, and may revoke the license for cause (§766). He determines, in his discretion, the manner, place, and quantity of stored inflammable chemicals, and issues permits.

Pressed vegetable fiber may be stored in specified places or in buildings certified as approved by the Fire Commissioner or by the New York Board of Underwriters (§770).

Operators of steam boilers require annual certificates of qualification from practical engineers detailed as such by the Police Department, revocable by the Police Commissioner on report of two such practical engineers, stating the grounds (§343).

Additional provisions of the New York City Code of Ordinances:

a) Electrical control (c. 9):

The Commissioner may order in writing the remedying of any defect in wiring or appliances (§2).

The persons who instal or repair electrical wiring or appliances require an annual license from the Commissioner, who, for good cause, may modify, suspend, or revoke a license.

The fitness of the applicants is determined by a License Board appointed by the Commissioner. Except in the case of special permits, revocation, etc., of the license must be based on the recommendation of the Board (§§6, 8).

There is a provision for inspection and for certificates of inspection (§§10, 11).

The Commissioner may cause wires and appliances to be disconnected and sealed (§13).

The Code contains a great many specified requirements. Provisions for special permits, exemptions, or variations are found in connection with a considerable number of these requirements, but they are of too technical a nature to be stated in detail.

b) Explosives and hazardous trades (c. 10):

There is a general requirement of a permit to be issued upon such conditions as the Fire Commissioner deems necessary in the interest of public safety for conducting any hazardous trade, occupation, or business, requiring the storing, sale, or use of any explosive, inflammable, combustible, or other dangerous substance (§10).

Article 2 of the chapter gives the Fire Commissioner power to prescribe form and detail of the applications for certificates or permits (§20).

Section 21 prescribes qualifications for certificates of fitness.

Section 22 requires application for certificates of approval to be accompanied by complete plans.

Certificates of fitness are annual and shall be revocable licenses. Certificates of approval need not be granted for a fixed period and may be revoked at any time (§26).

The Code requires permits, certificates of fitness, etc., for a very considerable number of articles, things, and conditions, which are sufficiently indicated by reciting some of the heads and subtitles of articles: manufacture, storage, sale, transportation, and use of explosives; ammunition; fireworks; matches; mineral oils; inflammable mixtures; combustible mixtures; garages; motor-vehicle repair shops; dry-cleaning and dry-dyeing establishments; paints and varnishes; calcium carbide; gases under pressure; refrigerating plants; nitro-celluloid; inflammable motion-picture films; distilled liquors and alcohols; oils and fats; wholesale drug stores and drug and chemical supply houses; retail drug stores.

It further requires permits: for the transportation, sale, delivery, use, or possession of any explosive, such permit to be granted only to a citizen of the United States (§61); for a magazine for storing or keeping explosives and a certificate of fitness for the magazine keeper (§63); for vehicles in which explosives are transported through the streets, such vehicles to be in charge of two persons holding certificates of fitness (§64); for vessels carrying explosives, approaching nearer than 1,000 feet to any pier line, and for vessels transporting explosives on waters within the city (§65); for receiving delivery of explosives (§66).

c) Fire and fire prevention (c. 12).

The Fire Department is vested with the power to direct the operations of extinguishing fires and to take the necessary precautions to prevent communication thereof, including the power to remove all idle and suspicious persons or all persons not fit to be employed or not actually employed in aiding (§1).

The Code requires a permit: for kindling any fire in any street, vacant lot, etc. (§6); also for storing any combustible fiber or material in excess of 1 ton (§24); also for storing empty boxes, etc., occupying a space greater than 2,000 cubic feet (§25).

4. England (Explosives Act of 1875):

A license is required for a new factory or magazine; a continuing certificate for existing ones (§36, 14). The application requires action, first by a secretary of state, then by a local authority (§36, 7); it must show a plan with stated particulars and may be granted with modifications (§6).

The local action is subject to appeal to the secretary of state (§8).

The license is first provisional, subject to confirmation after the completion of the building (§8).

Non-observance of the terms of the license is ground for penalty and forfeiture of the explosive (apparently not of the license) (§9).

A continuing certificate is granted by the secretary of state: the application to state the particulars required by the secretary and the certificate to specify the maximum of gunpowder to be stored; for dynamite works or places the act permits the requirement of specified modifications,

the retention of existing time limits and revoking powers; for other explosives, the terms are in the discretion of the secretary (§§14, 51).

For filling small-arms cartridges, and for using explosives exclusively in the occupiers' mine or quarry, the secretary of state may grant, on conditions he deems fit, a certificate (§§46, 47).

For small firework factories (to be kept in accordance with Orders in Council) the local authority may grant a license (§49).

The local authority licenses gunpowder stores, if conditions are in accordance with orders of the local council (§15).

All premises for keeping gunpowder must be registered (§21).

The secretary of state may amend licenses for the purpose of altering their terms or altering the premises, being satisfied that there will be no material increase of danger (§12) (a power apparently in favor of the owner, not to his prejudice).

The reconstruction of a destroyed factory, etc., requires the permission of a secretary of state (§64).

Powers in connection with operation, transportation, etc.:

The secretary of state approves or disapproves or may alter safety rules to be made by the occupier; the aggrieved occupier may appeal for arbitration (§§11, 19).

The secretary of state may require lightning conductors; in specified buildings, they are required unless he deems it unnecessary (§10).

Railway and canal by-laws for carrying gunpowder require the sanction of the Board of Trade (§35).

Occupiers of wharves and docks, if required, must make by-laws, subject to the sanction of the secretary of state, for loading and unloading explosives (§36).

A harbor authority may, for breach of its by-laws, order a ship to be removed to place to be designated (§20).

An inspector must certify to the strength of packing-boxes, and consent to their containing more than a specified weight (§33).

Explosives may be imported only by persons holding a license from a secretary of state, granted with restrictions and for terms by him specified, and they may (subject to exceptions) be unloaded and delivered only to such persons (§40). The Commissioners of Customs have the same powers as in other cases where imports are restricted (§40).

The law gives inspecting powers to the Board of Trade and to inspectors appointed under the act (who make annual reports) (§§55, 57, 58). It also gives powers of inquiry in case of accident (§§68, 66), and powers of search (§73).

An inspector possesses directing powers as follows: he may (where the law does not specify quantity) require the reduction of explosives kept to a specified maximum, subject to appeal to the secretary of state, with eventual arbitration (§§24, 25); he may, if he finds anything unnecessarily dangerous or defective, require the condition to be remedied, subject to arbitration (§56).

Petroleum (acts of 1871, 1879, 1881, 1926):

The keeping of petroleum (except for specified purposes) requires a license from the local authority, which may be qualified by conditions.

There is an appeal to the secretary of state (on demand, a certificate must be given of the grounds of refusal or of conditioning; this certificate is presented with a memorial to the secretary of state, who delegates the matter for inquiry, and may grant the license) (1871, §§7, 8, 9, 10).

Petroleum may be stored only in licensed premises; otherwise it is subject to seizure and detention (1881, §§2, 4).

The act of 1879 provides for optional certification of testing apparatus by the Board of Trade; the act of 1926 requires its stamping.

5. Germany (act of June 9, 1884):

The act provides that manufacture, sale, and possession of explosives require police approval; that the member states determine the licensing authorities; that licenses are revocable; and that refusal and revocation are subject to administrative appeal.

B. Building

1. New York:

The legislation is found in part in the Tenement House Law, applicable to cities of the first class (New York and Buffalo), and partly it is charter legislation for various cities.

a) Tenement House Law:

The approval of the Tenement House Department is required: for iron fire escapes (§16), for ladder and scuttle equipment (to exempt from bulkhead requirement) (§17), for material of specified partition walls (§§18, 22a, 23), for keeping combustibles (subject to conditions of fire department [39]), and for retaining-walls in order that they may not be considered as reducing the minimum space of yards (§54a).

The Department has power to order additional means of egress (§16) and the concreting of shafts and areas (§91).

All these powers relate to matters of detail; the statute itself attempts to lay down directly all substantial requirements.

b) Legislation incorporated in the Greater New York Charter:

The Board of Aldermen has power to amend Building Code and Laws (§407), more particularly to restrict the height of buildings.

The Borough President has power to make rules for the administration of the Building Department.

The Superintendent of Buildings passes on questions relative to construction of buildings, and subject to the approval of the Borough President, authorizes variations from the strict letter of the law, observing its spirit, securing public safety, and doing substantial justice; if he rejects an application for a variation where it is claimed that an equally good and more desirable form of construction can be employed, the owner may appeal to a board of appeals (1916, c. 503, §411); he grants certificates of occupancy, on conformity to law, specifically certifying to the installation of any required fire-extinguishing apparatus; the certificate, until set aside by the board of appeals, is binding on all city departments except the Tenement House and Labor departments (§411a).

## SAFETY LEGISLATION

He has exclusive jurisdiction to require that the construction and alteration of all buildings shall conform to the provision of the labor and other laws, and has power to enforce the laws relating to the protection of persons employed in construction, etc., and to enforce ordinance provisions relating thereto.

He appoints chief inspectors and other inspectors as he may deem necessary: a chief inspector to have at least ten years', the others at least five years' practical experience, and not to be engaged in the building business while holding office in the Bureau, nor in the manufacture or sale of building safety devices. The Superintendent of Buildings may designate the chief inspector to possess his powers during his absence or inability (§406, as amended, Laws, 1918, c. 617).

**Powers of Fire Commissioner:**

He prescribes the protection of lights in theaters, stores, and hotels (§762); he directs fire alarms and fire-extinguishing apparatus where people congregate (§762); he approves time detectors for control of watchmen (§762); he may require fire drills where people congregate (§§775-76); he may cause obstructions in aisles to be removed (§762); he may order remedying of any condition in violation of law or regulations (§775); he may order installation of fire-extinguishing apparatus and of means of exit (§775); he may order inadequately protected buildings or buildings presenting a fire danger (declared by law to be nuisances) to be vacated or removed (§§775, 776); if his order is not complied with, he may certify emergency and may, in addition to any other power, apply for a court order directing him to vacate the building (§778); he may direct a building that is on fire or likely to take and convey fire to be pulled down (with provision for compensation) (§754).

**c) New York City Code of Ordinances, c. 5 (Building Code):**

Permits for different kind of structures are fully regulated by sections 3 and 4. Section 5 provides for certificate of occupancy. The issuance of permits and certificates are ministerial acts.

The Building Code contains very specific requirements which are generally operative without reference to administrative power or action, other than the general permit requirement.

There is, however, a reference to revocable permits for projections beyond the building line (§171).

Section 214 gives the Superintendent of Buildings power to determine disputes as to expense of partition fences and walls, and as to their sufficiency.

The Superintendent of Buildings has power, upon default of the owner, to do the necessary work for protecting excavations and to recover the expense from the owner (§230).

New structural material or material not otherwise provided for in the Building Code is subject to approval after certain tests (§§22, 358).

Buildings to be used for theatrical or operatic purposes or any other kind of public entertainment shall not be open to the public until approved by the Fire Commissioner, or Superintendent of Buildings.



Here too, the requirements of the code seem to be exhaustive (§§520-38).

Permits are required for passenger and freight elevators, and certificates of competency for the operators (§§562, 563, 567).

2. England:

Safety provisions in connection with buildings:

These are found in the Town Improvement Clauses Act, 1847, and in the Public Health Acts.

A building dangerous to passers-by or neighbors may be ordered by the local authority to be taken down or repaired; on disobedience, the order may be enforced by a justice (to the satisfaction of the surveyor); on default, the work may be done by the authority at the expense of the owner (1847, §15; 1907, §30).

The use of combustible material for roof covering requires the consent of local authorities (1847, §100).

The ingress and egress of places of public resort must be to the satisfaction of local authorities, and unobstructed to the extent required by them (1890, §36); and accommodations for large numbers of spectators must be constructed or secured to their satisfaction (§37).

A license is required for sky signs, which becomes void in enumerated cases, whereupon the sign may be removed (1907, §91).

Other powers for safety are found in Local Buildings Acts, such as the London Building Act of 1894; particularly also with regard to places of amusement (act of 1878 for London).

3. Germany:

The Prussian Code of 1794 generally requires official consent for new buildings ("fire places") in town or country (§§1, 8, 69). The details are a matter of local regulation.

C. Automobiles

1. New York, Highway Law, §289, as amended 1921, c. 580:

A license is required of automobile operators or chauffeurs, which expires annually.

A sworn application is made to the Tax Commission or its duly authorized agent, on blanks containing such proof of fitness as the commission shall, in its discretion, determine. Application is to be accompanied by photograph and fee.

The owner of a motor vehicle or a member of his immediate family shall be granted operator's license, subject to the provisions of the article.

There is such examination as the Tax Commission shall require. The licensee must be eighteen years of age. The license may contain special restrictions and limitations as to vehicle which the licensee may operate. The numbers and marks are to be of distinctive color each year. Chauffeurs are to wear badges. The licensee indorses his signature on the license, the license not to be valid until so indorsed. There is provision for the registration of licenses.

2. England, Motor Car Act, 1903:

The administrative powers relate to the licensing of drivers. The county council on payment of a stated fee, grants annual license to any

person not disqualified. On conviction, a court may, for any time it thinks fit, suspend the license or disqualify the driver.

3. Germany, act of May 3, 1909 :

The act gives rule-making powers to the Federal Council for execution of the act, for order and safety, for foreign chauffeurs.

Consent, approval, licensing requirements: (a) the automobile must be admitted to traffic; (b) a driver requires a license, to be given, if found competent, on examination; revocable; appeal from refusal or revocation in accordance with general principles laid down in Trade Code (§§20, 21).

D. Weapons and firearms

1. New York, 1921 :

A license is required for: (a) the possession of firearms of concealable size in urban communities; (b) the carrying of weapons concealed; (c) an alien having a dangerous weapon at any time or any place.

The license is granted by a police commissioner or judge: (a) to a householder for possession, unless there is good reason for refusal; (b) for carrying the weapon concealed, on proof of proper cause; (c) to a non-resident or non-citizen, only on statement of reasons.

The license is subject to a time limit and to cancellation.

2. England, Firearms Act of 1920 :

The manufacture and sale of firearms is subject to registration; if registration is refused or a removal from the register ordered, an appeal lies to a court of summary jurisdiction, under rules made by the Lord Chancellor (§§2, 8).

A register of transactions must be kept which is subject to inspection (§2).

The secretary of state may prohibit removal (except by certificate holders) from place to place or for export (§9).

The purchase and possession of firearms requires a certificate from the chief of police; certain weapons and specified persons are excluded from certification (§§1, 2, 4, 5, 6).

The certificate is granted only for good reason and if there is no danger to public safety or peace; it is not to be granted if the applicant is for any reason unfitted, especially if of unsound mind or intemperate, or if believed to be a prohibited person.

The certificate runs for three years and is renewable.

From a refusal, an appeal lies as under section 8. The certificate may be revoked for the same reasons for which it may be refused, and subject to the same appeal.

The act gives power of search and seizure, and to demand production of the certificate (§§9, 10).

Forfeiture is by judicial proceeding.

3. Germany, Act, May 21, 1899 :

Hand firearms must be tested (under Federal Council rules) and marked; the Federal Council determines the equivalence of foreign testing marks (Act, May 19, 1891).

The carrying of weapons is not covered by an express statute but is held in Prussia to be subject to police control under the very general delegation of police power contained in the code of 1794.

The dealing in weapons, however, not being covered by the exceptions specified in the Trade Code, is free.

## E. Poisons

### 1. England :

Administrative powers are found in the Apothecaries and Pharmacy acts, and the Poisons Act, 1908.

The Society of Apothecaries has power to search and test medicines and destroy such as are false (1815, §3).

The Pharmaceutical Council may, subject to the approval of the Privy Council, declare poisons (1868, §2).

The selling of poisons for exclusive use in destroying pests requires a local license in the granting of which the reasonable requirements of the neighborhood are considered.

An Order in Council laid before Parliament makes rules as to duration of licenses, fees, revocation, register (1908, §2).

### 2. Germany :

The Trade Code permits the state governments to place dealing in poisons under license requirements. It is understood that this power has been exercised by nearly all member-states.

### 3. New York :

The Public Health Law (§236) has only labeling requirements. They are repeated in the New York City Sanitary Code.

## CHAPTER XXV

### ADMINISTRATIVE POWERS UNDER HEALTH LEGISLATION

§225. *General comment.*—Health legislation covers a greater variety of subjects than safety legislation: contagious and infectious disease, both of men and animals (measures against plant disease and insect pests are similar in kind); sewage and protection of water supply; housing; foods and drugs; and noxious trades. The control of professions that have to do with health has been considered before.

While some of the legislation is of relatively old date (noxious trades, some food control, and quarantine), the greater part originated in the nineteenth century. Different from safety legislation, the dangers to be guarded against were old, but the scientific ascertainment of their sources and of the means of combating them was new, and enlarged facilities of locomotion increased the danger of transmission.

The protection of the public health affects so many private interests, and in such a vital manner, that the organization of the appropriate public powers is necessarily complex. It cannot be, like safety control, almost entirely localized; neither can it be, like banking, insurance, or labor legislation, entirely centralized; but it requires both central and local organs, and their relation presents special problems.

While technical knowledge is requisite, the responsibilities for decisions in the matter of property or business are likely to be such as to make a politically organized authority desirable: hence, generally speaking, powers are vested in executive authorities or governing boards, which, however, are either in part composed of, or advised by, medical officers.

Moreover, it is not always possible to concentrate all public health administration under one head or department. The argument, for example, that all sanitary inspection should be under one control encounters the other argument that factory or tenement inspection by different authorities for different purposes would be not only more expensive but also more vexatious. Actual arrangements show that the latter argument frequently prevails.

As in some other branches of regulative legislation, the most effective administrative power is that of inspection. This power is found

wherever it is an appropriate method of giving effect to a law, and often it is the only power that precedes enforcement in the courts; but in accordance with the general plan of the survey, there will be no attempt to state these powers in detail.

The plan of treatment will be to discuss the legislative systems of the four jurisdictions successively, noting the use of the several classes of administrative powers and the general administrative organization in each of them, and then to substantiate this general comment by a practically full catalogue of the administrative powers conferred by the statutes.

§226. *New York. Status of legislation and of administrative organization.*—The Public Health Law, which appears in the Consolidated Laws as chapter 46, contains all the provisions for the regulation of professions that can be said to have any connection with the protection of health. The principal other matters which it regulates are potable waters and quarantine. It also incorporates the provisions of law organizing the State Department of Health and local boards of health; and in connection therewith creates certain general powers concerning diseases and nuisances, which will be presently considered.

It is clear that this Public Health Law does not cover the entire field of health legislation. The three principal other statutes dealing with matters affecting the public health are the Tenement House Law; the Labor Law, which contains sanitary requirements in connection with labor conditions not only for the protection of employees but also for the general public (tenement labor, bakeries); and the Farms and Markets Law of 1922, which takes care of the important subjects of food products, cold storage, and animal and plant diseases.

Outside of these general statutes are local laws, the most important of which is the Charter of the city of New York, which recognizes the Sanitary Code of the city as established by local authority, with power of revision, alteration, and addition. This Sanitary Code is a very comprehensive measure dealing with many matters not touched upon by the general laws of the state; thus it requires a permit for the establishment of a hospital, a subject upon which the general statutes are silent.

It should also be observed that the State Commissioner of Health with the advice of a Public Health Council is authorized to establish a sanitary code, which in the territory prescribed therefor, supersedes all inconsistent local ordinances but does not apply to the city of New York (§2*b, c*). This State Sanitary Code is less comprehensive than

the New York City Sanitary Code, dealing chiefly with communicable diseases, the sale of milk, regulation of labor camps, procedure in dealing with nuisances, and—under an express authorization contained in the statute—with the practice of midwifery. The latter subject is now regulated by statute (Laws, 1922, c. 501).

The Public Health Law is administered by a State Commissioner of Health, and by local boards of health, the orders of which are subject to the revision of the Commissioner in so far as they affect the public health beyond the local district (§4). But the State Commissioner of Health does not administer the sanitary provisions of the Labor, Farms and Markets, and Tenement Laws. These laws provide their own administrative organizations, the two former entirely centralized, the latter entirely local. There is, however, provision for a certain amount of co-operation with local health authorities, particularly with reference to tenements.

The State Commissioner of Health must be a physician, and the majority of the members of the Public Health Council, which co-operates in the making of sanitary regulations, are likewise men of professional training. In the local boards of health one member must be a physician; in the smaller cities, the mayor is also a member of the board. The board has a medical health officer who is its executive subordinate.<sup>1</sup> In New York City two of the three members of the Board of Health are professional men, and one of the two, who is the president, is also the executive medical officer. There is therefore always a strong, if not a dominating, professional element in the exercise of determining powers. It deserves notice, however, that in the exercise of the broad power over nuisances under section 6 of the Public Health Law the Commissioner of Health merely inquires and recommends, while the decision rests with the Governor.

§227. *Directing and summary powers.*—Both in the article on the State Department of Health (art. 2) and the article on local boards of health (art. 3), the Public Health Law confers very general administrative powers.

In addition to a sweeping power of inspection ("the Commissioner of Health and any person authorized by him so to do, may enter, examine or survey all grounds, erections, vehicles, stores, apartments, buildings, places and premises"), the State Commissioner of Health is given power to make examination into nuisances and questions affecting the

<sup>1</sup> Chapter 249 of the laws of 1921 authorizes cities to substitute a departmental for a board organization.

security of life and health in any locality. The report of such examination, when approved by the Governor, shall be filed in the office of the Secretary of State, and the Governor may declare the matters adversely reported on public nuisances, to be changed, abated, or removed as he may direct. He may require all county officers to take all measures to execute such order and cause it to be obeyed, all acts reasonable or necessary to such abatement to be lawful or justifiable, the expense to be paid by the municipality and to be recoverable from the owner of the land (§6).

Every local board of health has power to make orders and regulations that it may deem necessary and proper for the preservation of life and health and the execution and enforcement of the Public Health Law in the municipality. It may make such orders and regulations for the suppression of nuisances and concerning all other matters in its judgment detrimental to public health in special and particular cases not of general application, serving copies upon the owner or occupant of the premises or posting the same thereon. It is given the powers of a justice of the peace to compel testimony, and may issue warrants to constables and policemen to apprehend and remove persons, who cannot otherwise be subjected to its orders, and a warrant to the sheriff to bring to its aid the power of the county whenever it is necessary to do so. In view of this latter provision, the power given earlier in the same section to employ persons necessary to carry orders into effect should perhaps not be construed as a power to take summary action. The board of health may impose penalties for non-compliance with its orders and may proceed judicially for specific enforcement; but the law does not, as is usual in such cases, declare each day's continuance in default a separate offense (§21).

No power of equally general scope is found in English public health legislation; no power of equally general scope is found in the legislation of New York outside of the Public Health Law. In Germany (Prussia) orders addressed to individuals to remove dangers to health or safety for which they are responsible are within the well established jurisdiction of administrative authorities, and have found a legislative recognition in the very brief and general definition of the police power contained in the Prussian Code of 1794; but there the limitations of the power are well understood, and its penal sanctions and remedial checks are specified by general statutes.

Such a practice of issuing individually addressed orders is, as a general administrative power, unknown to Anglo-American systems of

government; and when the power is conferred in sweeping terms by reference to a criterion of so diversified an incidence as the protection of the public health, the question arises whether its scope should not be held to be limited by more specific powers found either in the same act or in related statutes or in the subordinate codes, in accordance with the recognized principle of construing general in the light of particular provisions.

The specific matters, with reference to which there are additional express grants of directing powers, are: sewage and refuse disposal, communicable diseases, unsanitary bakeries, animal and plant diseases, and tenement houses; under the State Sanitary Code, also dairies; under the Sanitary Code of the city of New York, all nuisances.

It is of some interest to scrutinize the terms of these powers. Only the power over nuisances under the New York City Sanitary Code is very general in its wording: an owner may be ordered to make suitable or necessary repairs or improvements where a nuisance has been declared by the Board of Health (§185). The power in connection with communicable diseases is more specific (Public Health Law, §25): it extends to the requiring of purification and the prohibition of intercourse and communication with or use of infected premises, persons, and things, and the power is subject to the provisions of the Sanitary Code, which specifies very fully the customary precautionary measures; a power to order the vaccination of a particular person is apparently not given. In connection with tuberculosis, the power to require disinfection calls for no comment; but quite peculiar are the powers to serve notice upon a tubercular person to dispose of his sputum so as to remove the danger of infection, and to require an attending physician to take additional precautions in treating the patient, disobedience in either case to constitute a misdemeanor (§§326, 328-31). There is power to commit a disease-carrier to a hospital or an institution, but the power is vested in a magistrate, and not in the health authorities (§326a). These particular provisions must undoubtedly be taken to qualify more general powers, with which they make a striking contrast; evidently the problem of administrative authority assumes a much more sober aspect when formulated with reference to a specific matter than when stated as an abstract proposition in a general enumeration of powers.

Directing powers with reference to the other matters mentioned are, with perhaps one exception (directing treatment of diseased plants, Farms and Markets Law, §166), specifically defined (discon-



tinuing discharge of sewage, lighting of halls and painting of rooms in tenements, cleaning and disinfecting dairies, etc).

These directing powers are generally unqualified as to form or procedure, and unchecked by provisions for remedial relief; on the other hand they are not reinforced by adequate penalties for non-compliance, nor by presumptive evidence provisions. In so far as they depend upon judicial enforcement, they are in effect little more than warning notices, and this character of the notice is emphasized in section 47 of the Farms and Markets Law by the provision, that if the notice is complied with within ten days no prosecution shall be instituted.

They may also serve as warning notices, where there is power of direct action. This summary power to deal with dangers to health is granted with some degree of liberality both in the statutes and in the subordinate codes, even if the very sweeping powers under sections 6, 21, and 31, of the Public Health Law, above noted, are ignored. In connection with the suppression or prevention of the spread of communicable disease, the power is to prevent, as well as to prohibit, communication and intercourse. In a number of cases the law gives the power to placard or tag or seal unwholesome or unclean matter, thereby practically preventing its further use. The power of the Commissioner of Farms and Markets to close any unsanitary cold-storage warehouse and to seize and destroy cold-storage food unfit for consumption deserves notice, because the state law gives no similar power with regard to food in general; it is however given by the Sanitary Code of the city of New York both with regard to food and drugs (§§129, 137, 153), and probably by other local laws and regulations.

The power to "take measures" which seems to include both directing and summary authority, is generally reserved for emergencies. In New York it does not appear to be expressly granted for dealing with human communicable disease, but is given to the Commissioner of Farms and Markets for the purpose of preventing the introduction and spread of animal disease and suppressing an outbreak. The power is followed by more specific provisions, and it is not quite clear to what extent the latter qualify the former (Farms and Markets Law, §72).

The summary powers, like the directing powers, of the New York Health Law are unchecked by procedural or remedial provisions. Against error or abuse the owner or other private party may obtain relief by injunction or by action for damages, which is supposed to satisfy his constitutional rights (*People v. Board of Health*, 140 N.Y. 1; *North Am. Cold Storage Co. v. Chicago*, 211 U. S. 306). Provision

for compensation is, however, made in connection with the slaughter of animals; and the Charter of the city of New York transfers to the city the liability in damages which at common law falls upon the acting or directing health officers if the action turns out to be unjustified (§1178).

§228. *Permit and certification requirements.*—In the nature of things, such requirements cannot be as generally phrased as directing powers; the latter may be given with reference to the entire range of dangers to public health; whereas a requirement that a permit must be obtained where the public health is affected would be unmeaning. And there are so many acts, conditions, and occupations that have a possible relation to the public health that there must be considerable latitude of legislative discretion in singling out those that should be placed under administrative powers of advance determination. That discretion is usually exercised by the legislature itself; with reference to obviously local conditions, it is also frequently delegated to local legislative bodies; and in New York, the Public Health Law gives to the State Commissioner of Health, acting with the concurrence of an appointed Public Health Council, power to establish a sanitary code, which must have been expected to establish a number of license requirements, and, as a matter of fact, has done so. The Sanitary Code of the city of New York, originally framed by administrative authority, is now incorporated in the Code of Ordinances of the city, enacted by the Board of Aldermen. The sanitary codes of both the state and the city are given by statutes the force of law, and their violations are made misdemeanors.

The permit requirements of the State Sanitary Code are relatively few, the principal ones relating to the sale of milk, the establishment of labor camps, and the practice of midwifery (the latter under special statutory authority, and now superseded by direct statutory provision); the minor provisions relate to cases of communicable diseases and the use of living bacterial organisms for purposes of inoculation. On the other hand, the permit requirements of the Sanitary Code of the city of New York are extremely varied and numerous, applying to upward of fifty acts or occupations ranging all the way from the establishment of a cemetery and the burial of the dead to the keeping of live pigeons, and covering practically every business in which carelessness may cause disease, and every use of property which in congested urban districts may create a nuisance. The cases in which places are merely required to be kept subject to the regulations of the Board of Health

(for instance, barber shops) are less common than those in which a permit is required. In many cases (about one-fourth of the total number), the Code provides that those permits shall be subject to the terms prescribed by the Commissioner of Health.

This far-reaching administrative licensing power is almost entirely unchecked by formal or procedural safeguards (Code c. 14, art. 1), the whole matter being apparently left to the discretion or the regulative power of the Commissioner of Licenses. The provisions adopted for the city of Chicago in 1921 show that a municipal code can establish some procedural checks, whereas it can do very little in the way of granting remedial relief; it can give an appeal from one municipal authority to another (under the State Sanitary Code of New York the refusal of a permit for a labor camp by the local health officer is subject to an appeal to the State Commissioner of Health), but it cannot provide for review of local administrative action either by state authority or by any court of justice. For such review powers, we should have to look to a statute, but neither the Public Health Law nor the Charter of the city of New York attempt to check the exercise of local licensing powers by procedural requirements or by provisions for review. The whole matter is left to such checks and remedies as the common law may provide; and the courts of New York have been inclined to reduce procedural and remedial checks: they have recognized the power to attach to a permit the condition of its revocability, they recognize the right to revoke without notice or hearing, and they will review administrative action only if a case of abuse of power is affirmatively made out (*Metropolitan Milk Company v. City of New York*, 113 App. Div. 377; *People v. Department of Health*, 189 N.Y. 187). Under these circumstances the licensing powers exercised in the city of New York constitute a striking example of administrative authority raised upon the vaguest kind of legislative delegation.

The permit or certification requirements established by statute directly are much more restricted in number: the State Commissioner of Health issues permits in connection with the discharge of sewage and refuse into the waters of the state, and, under carefully framed safeguards, licenses tuberculosis hospitals and camps (§319); the Commissioner of Farms and Markets licenses cold-storage plants and gives a number of miscellaneous permits in connection with the moving of milk from the country to the city, and in connection with the movement of animals and the transportation of nursery stock; the Commissioner of Labor licenses bakeries and tenement manufacture, and

the Tenement House Law introduces for the city of New York the novel requirement of elaborate administrative checks both prior to the erection and prior to the occupancy of tenement houses.

The legislation concerning food supply contains no certification requirements applicable to individual food products, in striking contrast to the federal provision for meat inspection.

It is interesting to compare the provision in the Public Health Law, §33, for permits for tenement manufacture of various kinds "if deemed advisable," with the provision of the Labor Law subjecting the manufacture of clothing in tenements to permits and licenses, the grant of which, upon compliance with carefully prescribed prerequisites, is practically a matter of ministerial duty (see Labor Law, art. 13). In like manner the very generally phrased permit requirements of the New York Sanitary Code should be compared with the carefully elaborated provisions of the Tenement House Law, which call for a considerable number of dispensing powers. Generally speaking, the treatment of licensing requirements in the three statutes devoted to special phases of public health protection—Labor, Farms and Markets, and Tenements—shows much greater care and regard for private right than the general provisions of the Public Health Law and of the New York City Charter; but not even these three laws contain any provisions for judicial relief, and compare unfavorably in this respect with such statutes as the Insurance Law.

§229. *Federal health legislation. Extent of powers.*—For the first hundred years of the national government, sanitary protection, even against the dangers of sea-borne commerce, was left almost altogether to the states; all, for example, that the United States did in connection with quarantine was to accommodate the collection of customs duties to the exigencies of the situation (act of 1799, U. S. R. S., §§4793, 4796). The most important sanitary measure during that period was the act of 1848 against the importation of adulterated or inferior drugs and medicines, which permitted the customs authorities to reject them, and to destroy them if a bond was not given for their re-export. The act provided for an appeal to a qualified chemist (R. S., §§2933–38). Forty years later, the Tariff Act of 1890 permitted the President to prohibit the importation of any articles adulterated to an extent dangerous to the health and welfare of the people of the United States.

In consequence of the cholera panic of 1892 the United States took an active share in guarding against the importation of disease by

sea, and the present law dates from that time. Health certificates are now required of all entering vessels, both from the consul of the port of sailing and from the health officer of the port of entry, and the federal government co-operates with the states in the enforcement of quarantine (act of February 15, 1893). The act of 1893 also authorizes the President to suspend immigration from countries affected by disease, and under the immigration laws all immigrants are subjected to medical inspection.

The control of animal and meat products began in 1884 and gave rise to a series of acts: 1884, 1890, 1891, 1902, 1903, 1905, 1907, 1913, 1919. It now extends to various phases of interstate commerce, import, and export. It operates partly through statutory prohibitions subject to powers of exemption (importation of neat cattle; prohibition suspended on finding that there is no danger [Tariff Act, 1913]), partly through inspection and certification requirements, and partly through powers of seizure and destruction.

The President may suspend the importation of animals for a limited time (act of July 24, 1919).

Since 1909 the importation of wild animals requires a permit; this is a conservation measure.

Food products generally and drugs are covered by the act of 1906; an earlier act of 1897 places the import of tea with regard to its commercial quality under administrative control (this is not a purely sanitary measure). The administrative powers under the act of 1906 are likewise significant chiefly in connection with imports, which may be refused admission; but there is now a general power to disapprove trade-names, which applies to all food products moving in interstate or foreign commerce (acts of 1906 and 1919; 249 U.S. 495). Since 1909 protection has been extended to plants. The powers first related to imports;<sup>2</sup> but interstate shipments were covered by an act of 1915 giving postmasters power to act in co-operation with state inspectors; and an act of 1917 permits interstate quarantine against plant diseases and insect pests.

An act of 1927 establishes permit requirements, subject to dispensing powers, for the importation of milk and cream.

<sup>2</sup> Act of 1909 relating to permits for bringing in wild animals; 1910: power to reject insecticides, with a provision for an administrative hearing before prosecution for adulteration; 1912: permit for importing nursery stock, power to prohibit import of plant products from places to be specified, and power to make rules to prevent the importation of adulterated grain seeds.

The United States has also assumed control of establishments for preparing serums or virus for treating human diseases. The administration of the law, vested in 1902 in the Secretary of the Treasury, was in 1913 transferred to the Department of Agriculture.

The establishment requires a license, and the product must be prepared under rules and regulations in order to be admitted to commerce. If preparations are harmful or worthless, the license may be revoked; and a dealer who has made his purchase from the establishment prior to the revocation of the license may be prohibited from selling.

Permits are required for imports; worthless imports may be returned or destroyed, and permits revoked after hearing.

The export control of meat products requires some comment. It is much more highly systematized than import control. There is no licensing requirement for packing establishments, merely a power to reject the entire product of an insanitary plant. But there is the extraordinary requirement that the carcass of every individual animal slaughtered for export is inspected and passed or condemned. The Sanitary Code of the city of New York (art. 172) makes a similar requirement for imports into the city; but New York state legislation does not carry control to this point.

The explanation of the federal requirement must be found in the policy of foreign countries; their agrarian interests demanded the exclusion of foreign meat products, and put forward sanitary reasons. It became necessary to meet and disarm the antagonists of the American meat industry. The act of 1890 provided for certification on request, or if required by foreign law; the act of 1891 provided for marking under rules, but prohibited transportation only after a declaration of unsoundness; finally in 1907 the requirement of passing and marking was made absolute, and the foreign prohibitions had to be withdrawn (Clemen, *American Live Stock and Meat Industry*, pp. 323, 326).

*Summary powers.*—To a certain extent, federal sanitary legislation now extends to interstate as well as to foreign commerce, and in cases of emergency it operates through the summary powers of destruction which also occur in state legislation. But the main field of federal control is import and export, and in connection with these it has the advantage of readily available administrative enforcing powers, which (except in connection with shipments by mail) are absent from the control of domestic commerce. Imports are universally subject to administrative checks for the protection of the revenue; and long established legislation, due to international require-

ments, makes a clearance necessary for every vessel sailing for a foreign port. Every statutory provision relating to import and export can therefore be given effect by withholding entry or clearance, thereby throwing the initiative for going into court, if an appropriate form of remedy can be found, upon the aggrieved individual.

Of this facility, federal legislation concerning animals and plants and foods and drugs takes constant advantage. Thus the Meat Act of 1891 requires the condition of meat intended for export to be certified before a vessel carrying it can obtain clearance, and this provision was extended to dairy products in 1908. The act of 1891 also permitted a prohibition against a vessel from carrying cattle as a penalty for violation of regulations, enforced by refusal of clearance.

In case of imports, a simple provision for refusal of admission is sufficient for administrative enforcement, and only a power to destroy requires express statutory warrant. A statement in one of the Year Books of the Department of Agriculture that no prosecutions were found necessary to carry into effect the restrictions concerning imported drugs thus finds its ready explanation (1912, pp. 203, 204).

*Administrative organization.*—Federal health administration is divided between the Treasury Department and the Department of Agriculture. The former becomes active when sanitary powers involve the control of imports or of the movement of vessels. When the Department of Commerce was organized and many functions formerly exercised by the Treasury Department were transferred to it, the public health service was left with the Treasury. The United States recognizes the quarantine powers of the states (§4792).

All powers for the prevention or suppression of animal and plant disease, and slaughter house inspection, are committed to the Secretary of Agriculture.

Where sanitary protection involves the prohibition of imports or of immigration on a large scale, the appropriate power is vested in the President directly.

§230. *English health legislation. Extent of powers.*—In addition to the Public Health acts (1848, superseded by revision of 1875, supplemented by amending acts, the most important ones those of 1890 and 1907), there are acts relating to vaccination (1867–98), river pollution (1876), diseases of animals (1894), food and drugs (1875–99), and housing acts of 1909, 1919, and 1925. The Public Health Act is in part an act to deal with the outbreak of communicable disease, in part a “local improvement” act, creating local organs

and powers to deal with the sources of noxious exhalations which were formerly believed to be the main sources of epidemic diseases, warding off dangers either by public undertakings and services or by compelling private action.

As regards legislative recourse to administrative ruling powers, a difference appears between local improvement requirements and other phases of sanitary control.

Considering the latter first, administrative powers are sparingly bestowed in dealing with the suppression of contagious diseases, whether of men or animals; an order may be issued requiring disinfection of premises or articles, and, subject to compensation, the destruction of articles, with power of substitutional execution; infected persons, if it is impossible to isolate them effectually, may be removed to a hospital; but it requires an order of a justice to remove a well person or to force vaccination or the immediate burial of a dead body (1890, §8; 1925, §62).<sup>2</sup> There are no general emergency powers.

The administrative powers in dealing with animal disease are: the power to prohibit imports; the power to determine conclusively that an area or that an animal is infected, and—subject to compensation—the slaughter of animals by order of the Minister of Agriculture. Perhaps there are other powers under the regulations which may be made by administrative authority regarding the movement of animals after a declaration of infection has been made.

In dealing with foods and drugs, there are strong administrative powers over the import of tea (prescribing terms of delivery if found mixed, power to destroy if found unfit) and with regard to such drugs as opium and cocaine (import license; rules may require manufacturing licenses).

On the other hand, the food acts (1875-99) depend on inspection and (in the case of margarine) registration; there are only a few minor dispensing and approving powers. The Milk and Dairies Act of 1915 gives the Local Government Board an extensive rule-making power, but does not mention licensing requirements or directing powers as possible subjects of rules; this act, however, does directly give a power to deal with milk supply by particular dairies by way of prohibition or conditional permits.

<sup>2</sup> The Public Health Act of 1925 deals also with verminous premises and persons; an administrative order may require the cleansing of the former; but a person may be dealt with against his wish only on the order of a petty sessional court (§46, 48).



The amending act of 1922 refers to local enactments providing for the registration of surveyors of milk, and contains remedial provisions applicable to such registration. The same amending act also requires licenses for the sale of special grades of milk.

Powers of inspection are accompanied by powers to seize and to procure samples for analysis; but condemnation or destruction requires the order of a justice (1875, §§116, 117).

In connection with local improvements or the lack of improvements, housing, water supply, nuisances, and noxious trades, administrative powers, beginning with the Town Improvement Clauses Act of 1847, have been liberally bestowed, both in the form of consent, approval, or certification requirements and in the form of powers to issue orders, the latter often accompanied by powers of substitutional execution. In many cases, however, the sanction of a magistrate is required. A summary power of abatement without notice or hearing appears only where the owner cannot be found.

The public health acts are careful and specific in their administrative provisions and protect private rights by reviewing powers, and in the absence of fault, by compensation provisions.

The Housing Act of 1909 substitutes the Local Government Board for the Court of Quarter Sessions as a reviewing authority in the matter of condemnation of houses unfit for habitation. It was the administrative or bureaucratic method of procedure adopted by the Local Government Board (treating the report of its inspector as confidential), which gave rise to the well-known case of *Local Government Board v. Arlidge* ([1915] A. C. 120); and the House of Lords took note of the legislative policy of changing from judicial to administrative action.

The Rivers Pollution Prevention Act of 1876 illustrates a very cautious policy in restraining private action. The statute does not operate through licensing or (like the New York law) through directing powers, but establishes direct prohibitions, subject to rather generally phrased qualifications. It checks, however, the enforcement of these prohibitions by requiring the consent of the Local Government Board to the institution of criminal proceedings, and directing the Board to consider industrial interests and the character of the locality. This form of administrative discretion occurs in other English statutes but is unknown to the American law.

*Administrative organization.*—The English health laws are locally administered by the elected governing bodies of urban or rural

districts, who have medical officers and inspectors of nuisances as their executive subordinates. The latter do not exercise determining powers, but their certificates furnish the basis for board or council action or for judicial orders. The council is generally authorized to act through a committee of its members, subject to the approval of the council (Local Government Act, 1894, §56).

The central authorities are likewise politically constituted. The first Public Health Act, of 1848, created a general Board of Health, two of whose three members were apparently intended to be medical men, though not so expressed in the act. This board met with strong opposition, and it was abolished in 1858, its functions being transferred partly to the Privy Council and partly to the Home Secretary. In 1871 the supervisory powers were vested in a newly constituted Local Government Board, which became one of the principal government departments. It is an interesting reversion that in 1919 this Local Government Board was again superseded by the Ministry of Health, with much more important status than that of the old Board of Health.\* Sanitary powers with regard to animals are vested in the Board of Agriculture. Some special powers are given to the Commissioners of Customs where imports are involved.

§231. *German health legislation.*—The federal jurisdiction over matters affecting health under the Constitution of 1867-71 rests generally on the power over trade and industry and upon a more specific power over measures of medicinal and veterinary police. This leaves the sanitary aspects of local improvements other than trade nuisances to state legislation.

The Empire enacted laws concerning vaccination (1874), communicable diseases (1900), cattle and meat inspection (1900), and animal diseases (1909). The food and drug laws do not in all cases serve sanitary purposes (margarine, 1897; saccharine, 1902). The legislation against the *Phylloxera* was probably constitutionally justified as a measure to carry into effect an international convention (1883, 1904; concurrent Prussian legislation of 1878). The Trade Code determines the principles on which trade nuisances are to be dealt with.

The only Prussian statute of importance appears to be one of 1905 for combating communicable diseases.

\*In the more detailed listing of powers, *infra*, the original statutory reference to the Local Government Board is retained, since some of its powers have been transferred to other government departments than the Ministry of Health.

It is clear that a good deal of sanitary protection and control must proceed from delegated power: the Prussian law on police administration (March 11, 1850) gives to the local and district authorities power to make regulations for the purpose of caring for life and health, and without consulting these a view of administrative powers must be as imperfect as would be a list of powers under the laws of New York that would not take account of the Sanitary Code of the city of New York.

Under the Prussian Code of 1794, moreover, every physical danger can be met by a police order applicable to the particular situation.

Several of the imperial statutes are merely outlines of powers to be exercised either by the Federal Council or by the states.

Thus the law concerning foodstuffs, etc., of May 14, 1879, gives a comprehensive rule-making power to the Federal Council, specifying a great many things that may be forbidden, referring to powers of supervision and authorizing the taking of samples, but not in terms either delegating, or providing for the delegation of licensing or directing powers.

The act concerning animal diseases lays down principles to be observed by the states. It names the diseases subject to notification; it imposes a local duty to isolate infected or exposed animals, but also a duty to take the advice of the official veterinarian (§11). It specifies permissible permanent requirements, including among these the power to require certification (§17), and permissible emergency measures, including the killing of animals (§§19-30). It makes full provision for compensation (§§66-73). It also establishes a right of administrative appeal (remonstrance) to be recognized by the states. The act is of a "charter" type unknown to English and American legislation.

The act concerning communicable diseases of 1900 is likewise an authorizing rather than a regulating act. The act itself merely specifies diseases (subject to addition by the Federal Council) and establishes a duty of notification. It creates a general emergency power to take necessary measures but imposes limitations as to what may be required in the matter of quarantine, restriction of residence, and restriction of trading rights (§§8, 12, 14, 15). On the other hand, it specially authorizes a number of measures: examination of dead bodies (§10), quarantine and supervision (§11), reporting new arrivals (§13), restricting or prohibiting use of public water supply (§17), vacation of premises and disinfection (§19), some of these measures not to be

taken except on the advice of a medical officer. This act likewise contains provisions for compensation (§§28-34).

The Federal Council may make regulations concerning imports, transit, and transportation; concerning the application of measures to travelers; and concerning scientific experiments with disease-producers (§§25, 27, 40).

The Prussian law of 1905 is of a similar character; it goes farther than the federal law in permitting the ordering of the dissection of bodies where there is a suspicion of certain diseases, and of the compulsory treatment of prostitutes in case of venereal disease. This would seem to show that the authorizations of the federal law are not construed as exclusive.

The act concerning cattle and meat inspection of 1900 differs from those before noted in being not merely an authorizing measure.

It requires in the case of specified animals (the list may be added to by the Federal Council) official examination before and after slaughter. The inspector after the first examination may give a two days' permit for slaughter, subject, if necessary, to precautions. After slaughter he issues in a proper case a declaration that the meat is suitable for food; or, if conditionally suitable, prescribes precautions or issues revocable licenses for sale or use. Revocable permits may be given for sale or use of horse meat. The use of condemned meat for other than food purposes requires a police permit which may be given subject to prescribed precautions.

The Federal Council is given power to make regulations concerning: ingredients and processes prohibited in the preparation of meat; the designation of foreign meat; the carrying out of the prohibition of imports; addition to the import restrictions contained in the law; extending the rules of the act regarding horse meat to other kinds of meat.

Part of the object of the law was undoubtedly to justify the insistence upon equal standards with regard to foreign imports.

The act is more detailed in its provisions than the federal meat inspection legislation of the United States.

The Phylloxera acts of 1883 and 1904 are not strictly health, but conservation measures. They authorize the taking and the direction of measures necessary to eliminate the pest from infected vineyards, subject to compensation.

The Saccharine Act of 1902 is an extraordinary measure, likewise not strictly sanitary in character. It applies to artificial sweetening

ingredients sweeter than sugar without corresponding nutritive value. According to Federal Council regulations, one or more concerns may be given manufacturing or import licenses. The license is revocable; the concern is under supervision. The authorities fix maximum prices and conditions of export. Sales may be made only to druggists or persons belonging to specified categories who hold revocable licenses. Druggists may sell to other than licensed persons only on conditions fixed by the Federal Council. The Council may also prescribe the form of packing and labels. The act typifies the extreme of administrative control.

The subject of trade nuisances is handled by the Federal Trade Code in a very general way: Section 16 provides that the consent of the authorities competent under the state laws is required for the erection of plants which, on account of local situation or on account of the condition of the site of operations, are calculated to induce special prejudice, danger or annoyance, either for the owners or occupants of neighboring estates or for the public in general. The section enumerates a large number of specified trades generally falling under the head of "trade nuisances," and provides that the list may through changing conditions be altered by the Federal Council with the approval of the next legislature. The Code then proceeds to establish procedural safeguards, which are typical of the law of license requirements based on local conditions, and which are referred to in other provisions of German statutes as applicable directly or by analogy. The application for the license must be accompanied by drawings and specifications. If these appear to be complete, public notice is given. If this results in no objection, an ex-officio inquiry is held into the question of public detriment and of compliance with police requirements. The license may be refused or granted conditionally; the conditions may be for the benefit of health and life of employees. Decision and conditions must be in writing; refusal and conditions must be accompanied by reasons. If there are objections, those resting on private title are left to ordinary litigation, but do not affect the administrative decision; others are fully discussed and decided. The applicant may, on giving security, and at his peril, be permitted to build at once. The administrative decision is subject to appeal to the next higher authority. Further details of procedure are left to the state laws, which must observe several principles: the decision either in the original or in the appeal stage must be made by a board having full examining powers. An appellate board decision must always be rendered in public session after

notice and hearing, an original board decision must be rendered in this way if there is no unqualified approval and the applicant demands an oral hearing. Licenses are not limited in duration, but changes require new licenses (Trade Code, §§16-25).

Under this method of regulation the federal statute does two things: it lays down the principle of license requirement for noxious trade establishments, defining them in a very general manner; and it insures the observance of fundamental principles of administrative law. Subject to these controlling principles, the details of administration, including organization of authorities and procedure, are left to the laws of the member-states.

The regular hierarchy of administrative officials, as determined by general laws of the several member-states, is charged by the federal laws with the execution of health legislation, physicians and other experts acting only in an advisory capacity.

### §232. CONSPECTUS OF POWERS

#### A. New York

##### 1. General (Public Health Law):

The State Public Health Council may establish a sanitary code (§26).

The State Commissioner is given general power of entry and examination (with provision for delegation) (§4).

On report of the Commissioner, the Governor may declare a nuisance, order change, abatement, or removal, and may order officials to execute the order (§6).

A local board may make orders in individual cases for suppression of matters in its judgment detrimental to public health, and may direct the apprehension and removal of persons (§§21, 21b); it may, with regard to nuisances, enter and inspect, and order their suppression and removal, and on default of the owner, may cause removal at his expense (§§26, 31).

##### 2. Protection of waters:

The Department of Health has regulative powers concerning potable waters and concerning specific matters in connection with bathing-establishments (§§70, 312).

The permit of the State Commissioner is required for discharging into the waters of the state, sewage (§76) or refuse (§78). As regards sewage, he may, with the approval of the Governor and Attorney-General, order the discontinuance of the discharge or direct methods of treatment or disposal (§76a); with regard to refuse he may impose conditions and may revoke the permit when necessary for the public health (§80).

He shall issue permits, if not detrimental to public health, for refuse discharge pipes (§79).

The Department of Health may abate summarily violations of its rules (§71).

## 3. Contagious diseases, quarantine, etc.:

Local boards of health and health officers may prohibit and prevent communication and require purification (§25); may quarantine persons recently exposed to smallpox who refuse to be vaccinated (§§119, 134); the health commissioner may prescribe the manner of vaccination and gives certificates of approval (for limited period) for vaccine virus (§311).

As to vessels: The local health officer may hold and treat as he deems necessary any vessel deemed by him to be in a condition dangerous to public health (§131); may order it removed to quarantine, and persons who have left to be returned to the ship (§136); he may make requirements specified by law before admitting a vessel to pratique (§132); he may require masters to present bills of health (§124). If the master does not comply with the health officer's directions, the latter may employ assistance to enforce his order.

Burial permits: Bodies are not to be interred or removed from the registration district or held beyond a specified period unless a permit is obtained from the registrar. The permit is not to be issued until the certificate of death has been filed (§375).

## 4. Tuberculosis:

Where premises are vacated by a tubercular patient, the local health officer shall direct disinfection; on default, cause the premises to be placarded (§§323, 324, 325); the health officer on complaint shall require a tubercular patient so to dispose of his sputum as to remove danger; failure is misdemeanor (§326); if a physician's precautions are insufficient, he shall require additional precautions; noncompliance is misdemeanor (§331); a disease carrier may be committed by a magistrate (§326a); the establishment of a tuberculosis hospital requires the approval of a State Commissioner of Health (§319; full regulation of licensing procedure).

## 5. Cold storage:

The subject is covered both by the Public Health Law and the Farms and Market Law, 1922. Though not in terms repealed, the former is probably superseded by the latter, and the citations refer to the latter.

Each cold-storage plant requires an annual license from the Commissioner, the issue of which is mandatory if the plant is sanitary and properly equipped (§232); if he deems the licensed warehouse conducted in an unsanitary manner, he shall close it till put in condition; he may suspend the license if the required changes are not made in the time specified (§232); temporary (up to 30 days) storage at a temperature below 20° requires a permit; also, under regulations, if a chill room is not structurally separate (§231); the Commissioner may seize and destroy cold-storage food unfit for consumption (§237); there are full powers of inspection (§243).

## 6. Bakeries (New York Labor Law):

Establishment or operation requires a sanitary certificate from the Commissioner of Labor. The law contains formal and procedural provisions (§337); the Commissioner may, if he finds unsanitary conditions, order discontinuance of operations until properly cleaned; on non-compliance, he may seal the oven and label the equipment "Unclean"; he must

file his reasons, but is not required to give notice (§336); upon non-compliance with the order, or if the health of the community or of the employees requires it, the Commissioner may make or rescind the certificate, filing his reasons, and he then seals the oven (§337); cellar bakeries not conforming to requirements of the law are forbidden without a certificate of exemption asked for on the ground of their being operated or in course of construction prior to act (§338).

7. Food stuffs; animal and plant diseases (Farms and Markets Law, 1922):

There is no general power to deal with unsound or adulterated food.

A permit is required for testing milk at other than receiving stations (§54); where milk receptacles are unclean, the Commissioner shall issue a notice to comply with the law (no prosecution, if complied with within 10 days) (§47); he may seize them for evidence if unclean (§48) and mark them as "Condemned" (§49).

A permit is required: for returning animals removed from the state where they have reacted to the tuberculin test (§74); for the immediate removal of imported animals upon a veterinarian's certificate (§74); for the sale and removal of tubercular animals other than for immediate slaughter (§81); for applying, for scientific purposes, an otherwise forbidden mode of treatment (§89).

The Commissioner may order the detaining for examination of animals coming into the state (§74); he may order an owner to put animals in quarantine (§76); on the outbreak of animal disease, he may take measures to suppress and prevent the spread of disease (§72); he may destroy animals only after a veterinarian's examination and certificate (§77); he may seize and destroy the carcass of an infected animal (§83); he may order animals suspected to be liable to contract or communicate disease to be slaughtered, if necessary to the speedy and economical suppression of disease (§85) (provision for appraisal, §§81, 84, 88); he may order the slaughter of a tubercular cow if a menace to health or undesirable for production of milk (§78); he may order the seizure or destruction of a calf less than 3 weeks old, or of veal from such a calf, or from an unhealthy calf (§91); he shall destroy foul broods of bees to prevent spread (§175); a permit is required for removal of diseased bees for treatment (§174).

A certificate of soundness based on a veterinarian's certificate is required for offering a stallion for service (§105).

A permit is required for unpacking of nursery stock brought into the state (§161); also for bringing specified insects into the state for scientific purposes (§189); the Commissioner may issue orders for carrying out treatment directed by him with regard to diseased plants (§166); infected plants are to be abated as a public nuisance (§165; provision for appraisal, §167).

Owners may be required to fumigate stock (§170) and to destroy specified insects (§171).

8. Tenement houses (Tenement House Law, 1916, type of a carefully drawn act):



There is the double check of a building-permit (with provision for changes in plans) and of a certificate of compliance. Both are ministerial; the certificate is conclusive in favor of purchasers (§§120, 121); the permit may be revoked for non-compliance or for false statements (§120).

Miscellaneous approval requirements and order issuing powers:

Approval is required (the requirement is generally qualified with some care): for the occupation of not duly ventilated rooms, in the cases specified where such occupation may be permitted, subject to alteration requirements (§73); for size of skylight determined by the Department to be practicable (§77); for maintaining water closets in cellars (unqualified except that writing required) (§93); for occupying living-rooms in basements, subject to statutory conditions; the reason for refusal must be stated in writing, in a book accessible to public (§95); (also special permit in connection with existing tenements in certain cases, by head of department on two separate inspectors' certificates, subject to requirement of alterations (§95); for janitors' apartments in cellars under specified conditions (§96); for stabling of (not more than two) horses (§109).

The Public Health Law requires a permit for the manufacture of clothing in tenements (§33).

The Department has power to order: the painting of rooms white when necessary to improve lighting (§73); the lighting of public halls and stairs where not sufficiently lighted (§90); the exposing of plumbing pipes (§94).

The law requires "to the satisfaction of the department": the cleansing of rooms (§104); the lighting and ventilating of basements and cellars (§90).

#### 9. Lodging houses (New York City Charter):

The Bureau of Buildings issues, under conditions specified by law, permits for converting buildings into lodging-houses (§1315); light and ventilation alterations or enlargements are subject to approval (§1315); the approval may be conditioned upon compliance with rules made by the Bureau.

#### 10. Permit requirements under the Sanitary Code of the city of New York (Code of Ordinances, c. 20):

§13, for admission to the city of a milch cow, certificate of freedom from tuberculosis; §18, for keeping for sale dogs, cats, birds, etc. (subject to terms of permit); §19, for keeping live fowl except on premises used for farming in unimproved sections; §20, for keeping live pigeons within the built-up portion; §21, horses to be tested and found free from glanders by a veterinarian; §§37-42, for removal, burial, or other disposition of dead bodies; §45, for establishing a crematory or burying ground or vault, or for placing any dead body therein, or for opening any grave, etc.; §46, for engaging in the business of undertaking; §58, for establishing a stable; §98, for moving through the city any person affected with, or any article exposed to, an infectious disease; §104, for using certain chemicals for fumigating; §105, for conducting diagnostic laboratories; §120, for use, sale, or distribution of inoculating preparations; §149, for conducting a restaurant (subject to the terms of the permit); §165, for manufacturing

or bottling mineral, carbonated, or table water; §168, for using water from wells in the borough of Manhattan in tenements, manufactories, or office buildings or restaurant; §170, for manufacturing or bringing to the city ice-cream (subject to terms of permit); §172, carcasses not to be brought into the city unless inspected and passed by some federal, state, or local authority; §174, for bringing to the city or manufacturing reconstituted milk (subject to terms); §190, clinical thermometers to be tested under Board of Health regulations; §196, for practicing midwifery (subject to terms); §197, for boarding any child under 12 years old other than a relative, etc.; §198, for conducting day nurseries; §217, for erecting or occupying any tent or camp; §220, for conducting a hospital (subject to terms); §222, for maintaining a school for children under 16 years old (subject to terms); §230, process of sterilizing animal hair used in manufacture of brushes or cloth to be prescribed by the Board of Health; §232, for opening ground filled with offensive material; §240, for engaging in the business of transporting garbage, etc.; §241, for gathering, etc., bones, refuse, or offensive material; §242, for depositing any dirt or garbage, etc., within 300 feet of any inhabited dwelling; §245, for vessels used for removal of any garbage, etc.; §252, for using street sweepings to fill up or raise the level of any grounds; §287, for having a school sink, otherwise than as specified in this section; §322, for carrying on any offensive noise in trade or business (subject to terms); §324, for carrying on certain specified businesses in boroughs other than Manhattan (for Manhattan they are absolutely prohibited); §325, for conducting business of slaughtering cattle, etc. (subject to terms); §327, for keeping or selling horse flesh; §328, for maintaining tanneries (subject to terms); §329, for carrying on the business of rendering or melting fat (subject to terms); §330, for carrying on the business of preparing sausages or preserving meat or fish; §331, for breaking out eggs, etc. (subject to terms); §332, for boiling varnish or oils, etc.; §333, for erecting or converting buildings to be used for the manufacture of gas; §334, for keeping a lodging-house with more than three beds or for more than six persons; §340, for maintaining a bathing establishment or hiring out bathing suits; §342, for maintaining a horseshoeing establishment; §352, for bringing a vessel liable to quarantine; §355, for removing from a vessel a person sick of or liable to develop infectious diseases; §359, for bringing to or unloading at any dock, skins, etc., from any infected foreign or southern place (subject to terms); §360, for mooring any house-boat (subject to terms).

## B. United States

### 1. Contagious diseases, quarantine:

Consent, approval, license, or certifying requirements: for the discharge of the cargo of a vessel in quarantine at some other than regular place, under conditions; Collector or Secretary (U.S. R. S., §4793, act of 1799); for extending the time of entry, or dispensing with or varying rules; Secretary; (§4793, act of 1799); consular bill of health for vessels clearing foreign port in order to enter U.S. port (February 15, 1893); certificate of quarantine health officer, if compliance with rules and regulations, for entry into U.S. port (act of February 15, 1893).

**Power to order:** the storing of goods in designated warehouses until they can be removed without contravening health laws (§4795, act of 1799); the suspension of immigration from any country in which contagious disease exists, if satisfied of serious danger of introduction of disease (act of February 15, 1893, power vested in President); the prohibition of import of articles adulterated to an extent dangerous to health or welfare of U.S. (President; act of August 30, 1890); the suspension of the importation of animals for a limited time (act of July 24, 1919, power vested in President); the removal of an infected vessel to quarantine for disinfection (Secretary of the Treasury); on certificate of disinfection, it may be admitted to any port named in certificate (act of February 15, 1893).

**Regulative power;** the President may cause the Secretary of Agriculture to promulgate rules and regulations to prevent spread of disease (March 27, 1890).

2. Imported drugs and medicines (Act, June 26, 1848; R. S., §§2933-38):

Power to mark on invoice as adulterated or below a given standard, whereupon it is barred; there is an appeal to a qualified chemist; re-export is permitted on bond to take them outside of U.S.; otherwise they are destroyed by the collector. This act is probably superseded by the Food and Drug Act, 1906.

3. Animals and meat:

Consent, approval, or certifying requirements:

The Secretary of Agriculture, under joint regulations of himself and Secretary of Treasury, may in his discretion admit tick-infested animals from Mexico to specified parts of Texas; he may inspect and on request, or, if required by foreign law, certify, salted pork and bacon (act of August 30, 1890); condition of meat intended for export is to be certified by inspectors of the Department of Agriculture, before vessel is granted clearance (act of March 3, 1893 extended to dairy products by act March 2, 1908).

For districts affected by disease an inspector may issue certificates of soundness, whereupon transportation may proceed without further inspection except as ordered (act of May 20, 1884).

Carcasses and products of animals found sound are to be marked under rules; the wrongful use of marks is punished; it is unlawful to transport carcasses or products declared unsound (act of March 3, 1891); carcasses of specified animals and meat products are inspected at slaughtering plants and marked passed or condemned; the products of a plant found to be unsanitary may be rejected (act of 1907); horse-meat products are to be marked as such. The Secretary approves trade-names under which meat food products are sold (act of 1919; see 249 U.S. 495); on certificate of the Department of Agriculture pure-bred animals are imported free of duty (act of October 3, 1913); permits are granted for reshipping in interstate commerce animals shipped for breeding or feeding purposes, if they have reacted to tuberculin test (July 14, 1919).

**Dispensing power:** Secretary of the Treasury may suspend the prohibition of the importation of meat or cattle hides on determination that there is no danger of contagion (Tariff Act, 1913).

Summary powers: renovated or process butter may be confiscated if unwholesome material is used (act of May 9, 1902); a vessel may be prohibited for a limited time from carrying cattle if regulations are violated; clearance may be refused (March 3, 1891); no clearance is to be given to vessels having meat on board without an inspector's certificate, subject to waiver by Secretary of Agriculture for particular countries (act of 1907).

Emergency powers: Secretary may adopt measures to prevent importation of disease; may seize and dispose of animal products from infected foreign countries when deemed advisable (act of September 11, 1919; acts of 1884, 1903, 1919); the Secretary may direct the slaughter of animals declared infected or exposed, subject to provision for compensation (arbitration; act of August 30, 1890); he may quarantine imported animals (*ibid.*) or deal with them according to regulations (*ibid.*); if, under regulations, an animal has been adjudged infected or dangerously exposed, the law prohibits export (August 30, 1890); the Secretary may quarantine any part of the United States on determining that its live stock is affected with contagious disease, and may establish rules for inspection, disinfection, certification, and manner of shipment from quarantined district (act of March 3, 1905).

4. Food and drugs (act, June 30, 1906):

If imported food or drugs are adulterated or misbranded, they are refused admission; if they are not reshipped within a stated time, Secretary of Treasury may destroy them under regulations; the examination is made by the Secretary of Agriculture.

Tea (March 2, 1897; May 31, 1920): import requires a permit upon an examiner's finding of conformity to standards, rejection is subject to appeal to board of tea appraisers; if not re-exported, the tea is destroyed; on bond, importation of inferior teas is allowed for specified purposes.

5. Plant protection:

A permit of the Secretary of Agriculture is required for importation of any wild animal (act of March 4, 1909).

If adulterated insecticides are imported, their admission may on hearing be refused; if not re-exported, they are destroyed. Specimens are examined; if found adulterated, the owner is notified and heard; if a violation of law appears, the U.S. attorney is notified (act of 1910); a permit for importing nursery stock is to be issued on compliance with regulations; there is a provision for acceptance of foreign certificates; regulations are to provide for scientific imports and for imports from countries without an inspection system.

The Secretary of Agriculture is given power, after public hearing, to restrict the import of plants, to be specified from countries to be specified; also power to forbid, after public hearing, imports from places where diseases or infestations exist (act of August 20, 1912); a postmaster may notify a sender that infested plants will be returned at his expense or turned over to the state authorities for destruction (act of 1915); an act of 1917 provides for interstate quarantine against plant diseases and insect pests with appropriate regulative powers, and for prohibition of imports

after a public hearing. See also act of February 15, 1927, regulating the importation of milk and cream.

Serums or virus for diseases of man: An act of July, 1902 permits the Secretary of the Treasury to make regulations for licenses of establishments preparing them, and also gives him power to revoke such licenses. An act of March 4, 1913, gives the Secretary of Agriculture power to license establishments; interstate (etc.) sale is prohibited unless the product prepared in such establishment is in compliance with rules and regulations; it also gives him power to revoke the license if the preparations are worthless or harmless; importation requires a permit; worthless or harmless preparations are denied entry and destroyed or returned; the permit may be revoked after hearing, if preparations are worthless or harmful; the Secretary has power to prohibit the sale of virus which had been delivered to the seller before license of maker had been suspended.

### C. England

1. Infectious and contagious diseases (Public Health Acts of 1875 and 1907; Infectious Diseases Prevention Act, 1890; Quarantine Act, 1904; Diseases of Animals Act, 1894, 1919):

#### a) Premises and articles:

The local authority,<sup>8</sup> on the certificate of a medical officer (or physician; act of 1875) may order by notice the disinfection of premises or articles (especially bedding and clothing) or the destruction of articles, to the satisfaction of the authority, with power of substitutional execution. For destruction of articles, compensation is paid, which in case of dispute is settled by arbitration. The power extends to filthy and dangerous articles, if there is a risk of injury to health, compensation being paid if the owner is without fault (1875, §§120, 121; 1890, §§5, 6, 55, 56, 66).

#### b) Persons:

The Local Government Board may make rules as to treatment of persons affected with epidemic or contagious disease and for the prevention of the spread of disease (1875, §130, a power of regulation unqualified in terms); on the certificate of a physician, infected persons may, if it is impossible to isolate them effectually, be removed to a suitable near hospital, with the consent of the hospital (1875, §124); on the certificate of a medical officer and on the order of two justices (subject to the conditions of the order) a well person may be removed from an infected house to a temporary shelter (1907, §61); a medical certificate is required before a child that had been exposed or infected can be sent to school (1907, §57); if a person has died of an infectious disease, the body may be retained for more than 48 hours only with the written consent of a medical officer or physician; in the absence of such consent, a justice may order burial, with power of substitutional execution by the relieving officer (1890, §8); if death has occurred in a

<sup>8</sup> The "local authority," which is generally the licensing or order-issuing authority, is the governing body (council) of the locality, but is authorized (Local Government Act, §56) to act through a committee of its members.

hospital, the medical officer or physician may certify that removal shall be only for burial, other removal then becomes unlawful (1890, §9).

The vaccination acts of 1867, 1871, and 1898 provide for notices by the registrar of births, requiring vaccination, to be followed, if disregarded, by an order from a justice.

The public vaccinator may give certificate of unfitness or unsusceptibility.

c) Persons on ships (regulative powers):

The Local Government Board may require that where there is reason to apprehend yellow fever, etc., no person shall leave a ship before the state of health of the persons on board the ship is ascertained (Customs Consolidation Act, 1876, §234).

Local regulations approved by the Local Government Board may require that persons brought by a vessel infected with a dangerous infectious disease may be removed to and kept at a hospital (1875, §125).

1. Diseases of animals and plants (principal act, 1894):

Administrative powers relate to: ascertainment of diseases; definition of area; movement of animals; destruction; and importation.

The Board of Agriculture with the local authority have authority to declare areas infected (plague, pleuropneumonia, foot-and-mouth disease), and prescribe the limits of the infected area; may also alter limits and declare freedom; §§5, 6, 8, 9, 12); the declaration is conclusive (§10); the certificate of a veterinary inspector that an animal is infected is also conclusive for the purposes of the act (§44); the Board may prohibit the holding of markets for the selling of animals in the infected area (§§8, 9); may prohibit or regulate the movement of animals therein (§12); for the movement of animals in or out of free parts of an infected area, a local license is required subject to conditions laid down by the Board (§10); if inspector certifies that orders are not complied with, vessels may be detained (§45).

Slaughter of animals may be ordered by the Board of Agriculture; it shall be ordered if animals are exposed to or suspected of plague or if they are infected with pleuropneumonia (§14), and may be ordered in case of other diseases (infected, suspected, or exposed) (§19); the slaughter is subject to compensation, and is made in accordance with Treasury regulations (§3); compensation may be withheld if rules are violated or if the animal was diseased at the time of landing (§30).

The Board of Agriculture may prohibit the landing of animals, carcasses, fodder, etc., from any specified country and shall prohibit the same when not satisfied as to the security afforded by the laws of the other country (§25); with regard to animals imported for exhibition and for other exceptional purposes, the Board may permit the same and specify measures of control in connection with the landing of the animals.

An Order in Council may prohibit the importation of anthrax-infected goods (1919).

An act of 1922 makes special concessions in favor of the landing of Canadian store cattle, the privilege being checked by full inspecting and

licensing powers vested either in the Ministry of Agriculture or in local authorities (Importation of Animals Act, 1922).

Powers in connection with vermin: The Board of Agriculture may prohibit the keeping or selling of specimens of destructive insects; may order the removal or destruction of crops on compensation (destructive insects acts of 1877 and 1907). The Board has also regulative powers. The forestry commissioners, on default of the owner, may authorize a competent person to enter and destroy vermin damaging trees, recovering the expense from the owner (Forestry Act, 1919, §4).

The local authority may order an owner to destroy rats or mice, with power of substitutional execution at his expense (Rats and Mice Act, 1919, §5).

Powers in connection with horse-breeding (act of 1918): A license is required for a traveling stallion. The license is granted by the Board of Agriculture, on compliance with requirements as to application and inspection; it may be refused or revoked if the animal is diseased, inadequately prolific, or calculated to injure the breed (§1). The license is annually renewable (§2). Refusal or revocation is subject to appeal to a panel of referees, on whose report the Board finally decides (§4).

### 3. Food and drugs:

The subjects dealt with by legislation are food and drugs in general (1875, 1899), bread (1836), butter and margarine (1887, 1907), horse flesh (1889), tea (1899), milk and dairies (1915), dangerous drugs (1920), and slaughter houses (1890).

The Milk and Dairies Act, 1915, gives to the Local Government Board a very extensive regulative power, authorizing regulations concerning registration, inspection, adulteration, labeling, etc., but not in terms referring to rules authorizing any powers to approve or to issue orders; the act, however, gives to local councils, on a report of a medical officer of occurrence of tuberculosis, and after an order to show cause, power to prohibit absolutely, or except on conditions prescribed, the supply of milk by any dairy (§3, Schedule 1). The order must state grounds and is subject to appeal to a court of summary jurisdiction. There is also provision for compensation. An inspector may require a cow to be milked in his presence.

With regard to tea: The consent of the Commissioners of Customs, if on inspection tea is found to be mixed, is required for its delivery, and they may prescribe terms and, if found unfit for food, may order it destroyed (act of 1899).

As regards dangerous drugs: The import and export of raw opium (there is an absolute prohibition regarding prepared opium) and of cocaine, morphine, etc., requires a license from the Secretary of State (power unqualified), and rules may require the licensing of premises for manufacture and of persons for manufacture, sale, or distribution (act of 1920).

Slaughter houses require licenses under the Public Health Act (1890, §§29-31). The license is revocable by a court upon conviction.

With regard to margarine, factories and consignments are required to be registered (not licensed); there are minor administrative powers: to

direct the non-application of requirements regarding the place of business retroactively, and to authorize the inspection of non-registered premises; to approve the marks placed on certain blends (not to be approved if word suggests butter).

Otherwise the administrative powers in connection with food are powers to inspect and to seize, the power to condemn or order destruction being reserved to a justice (Bread Act, 1836; act of 1875, §§116, 117; act of 1889, regarding horseflesh; power to order disposal as he thinks desirable).

The powers of inspection are accompanied by powers to procure samples for analysis (Margarine Act, 1887, §110, "without going through the form of purchase"), and certificates of analysis are made prima facie evidence (1875, §10; 1899, §1; certificate of principal chemist of Commissioners of Customs sufficient evidence unless his testimony called for co-operation with the Board of Agriculture).

#### 4. Land, improvements, housing, trade nuisances:

The principal acts are the Town Improvement Clauses Act, 1847; the Public Health Acts of 1875, 1890, and 1907, and the Housing Act of 1909.

The following list covers the principal subject matters and powers:

Drains: consent for building over sewers (1847, §31; 1875, §26), ordering covered drain according to the report of a surveyor (1875, §21), and every new house to have such a drain (1875, §25); ordering repairs (1847, §44; 1875, §41); ordering specified tests to be applied to drains (on order of court) and requiring owner to apply a remedy (1907, §45); ordering owner to provide sink or drain (1907, §§25-49).

Privies, etc.: Required to be constructed to satisfaction of authority (1847, §42; 1875, §36).

Cess pools, etc.: May be required to be filled up (1907, §49).

Stagnant water: If nuisance, removal from cellar may be required (1847, §99; 1875, §47).

Foundation levels: Required to be submitted to give opportunity for prohibition (1847, §§38-41).

Courts, entrances, means of access: Not to be closed or narrowed without consent (1907, §26).

Cellar dwellings: In courts to be prohibited; every court to be covered by prohibiting orders as soon as possible (1847, §113); cellar window to open in manner approved by surveyor (1875, §72).

Back-to-back houses: Permitted only on certificate of medical officer that effective ventilation is secured (1909, §43).

Refuse or noxious matter: Owner notified to remove; on default, becomes property of local authority and is sold, with provision for surplus or deficit (1847, §§100, 101; 1875, §49); with regard to stables, the order may direct periodical removal (1875, §50).

Smoke: Owner may be notified to remedy a furnace that does not consume smoke (1847, §108) (this provision is not in the act of 1875).

Ventilation: In buildings for public meetings the owner may be required to submit plans and after a stated time (to give opportunity for



approval or disapproval) to carry them out (1847, §110); provision for appeal.

**Whitewash:** Order to clean or whitewash on certificate of medical officer (1847, §102); if house endangers health, certificate may be by two practitioners (1875, §46).

**Water supply:** Notice to provide, on report of surveyor, if possible at reasonable expense (1875, §62), reasonableness determined by Local Government Board (1878, general order for a district); house not to be erected or rebuilt without certificate of availability of wholesome supply, appeal from refusal to summary court (1875, §6); also full provision for ordering water supply for rural dwelling houses, with opportunity for objections, such objections being decided by a court of summary jurisdiction or, if the contention is that the supply should be provided by the local authority, by the Local Government Board; provision for joint supply for several owners (1878, §3).

**Nuisances:** Local authority may require abatement; on default, order of court. Authority may abate if owner cannot be found (1875, §§91 ff.).

**Fitness for habitation:** If it is proposed to use building not described in its plan as a dwelling house, as such, the local authority may require structural alterations (1890, §33); if legal requirements are not complied with, local authority may require execution of works with power of substitutional execution; provision for appeal (1909, §15); dwelling houses, unfit for habitation may be required to be closed until fit; appeal to Local Government Board (1899, §17); three months after closing order, if not rendered fit, on notice and hearing and specified findings, power to order demolition of house, subject to appeal to Local Government Board (1909, §10); on owner's default to demolish within specified time, power of substitutional execution, subject to appeal (1890, §§34, 35).

**Temporary buildings (specified buildings exempted):** Consent of local authorities required; plans to be submitted for opportunity for disapproval or for imposition of conditions; power in case of contravention to remove at expense of owner (1907, §27).

**Lodging houses:** Requirement of registration (1847, §116); local power to require that notice of registration be affixed (1875, §79); power to require water supply, on default removal from register (1875, §81); to be limewashed to satisfaction of local authority (1875, §82); court as penalty on third conviction may require for five years local license subject to conditions (1875, §88); registration may be refused, if authority not satisfied of character and plans (1907, §69); deputy of keeper must be approved and approval may be canceled (1907, §7); notice to comply with sanitary requirements, with power of substitutional execution (1907, §74). Only a court can cancel registration (1907, §72).

**Slaughter houses:** Required to be registered; new ones to be licensed; suspension and revocation only on conviction by court (1847, §§125, 127, 129).

**Trade nuisances:** Proceeded against judicially (1875, §114); offensive trades in towns require consent (1875, §112).

**Alkali industries:** Various alkali acts, last 1906; requirement of registration; appliance must appear to chief inspector to meet legal requirements, subject to appeal to Local Government Board (1906, §9); condensation of gas to be secured to satisfaction of chief inspector (1906, §§1, 6). If nuisance, notice to abate, enforced judicially (1906, §5). Rules for workmen with sanction of Local Government Board (§85). Dispensing power of Local Government Board in favor of works antedating legislation. Extensive administrative regulative power.

**Canal boats, used as dwellings, acts of 1877, 1884:** Regulations of Local Government Board fix number of persons permitted to occupy; registration; certificate of registration to show number and other prescribed particulars; sanitary authority may in case of infectious disease take measures to prevent spread, remove persons, etc. Certificate made void by structural alterations changing original conditions.

**River pollution prevention, act of 1876,** places administrative checks on criminal proceedings: under the part of the act forbidding the discharge of polluting liquid from factories or mines, the sanitary authority cannot proceed without consent of Local Government Board, which considers industrial interests and the locality and which is to withhold its consent under circumstances specified by statute. Notwithstanding consent of Board, proceedings may be objected to before sanitary authority, which then decides on similar considerations. An inspector's certificate that best practicable means are used for rendering refuse harmless, is, subject to appeal to Local Government Board, conclusive.

#### D. Germany

##### 1. Dangerous diseases (act of June 30, 1900):

The law itself prescribes duty of notification specifying contagious diseases, to which the Federal Council may add (§§1, 5); there is a general emergency power of police to take required measures (§8), but subject to limitations as to quarantine (§14) and as to placing restrictions on residence (§12) and on trading rights (§15).

The following measures are specially authorized: ordering examination of dead bodies (§10); quarantine and supervision (§11); requiring reports on part of persons arriving at any place (§13); restricting and prohibiting the use of a public water supply (§17); vacation of premises (§18); disinfection (§19); some measures may be taken only on advice of a health officer.

The act contains compensation provisions (§§28-34).

The regulative power of the Federal Council relates to legally authorized precautions (§22); import, transit, and transportation (§25); applicability of measures to travelers (§40); and scientific experiments with disease producers (§27).

There is a general statutory requirement of vaccination (act of April 8, 1874); the administrative powers under this act are therefore of a very minor character, the most important being the determination of a medical officer that the state of health of a child for the time being prevents vaccination.

Prussian law for combating communicable diseases, August 28, 1905: The police has power to order the dissection of a body in case of suspicion of typhus (§6); specified measures may be ordered in case of specified diseases (§8); compulsory treatment of prostitutes may be ordered in case of venereal disease (§9); the council of ministers may extend quarantine supervision to other than specified diseases; to be laid before the legislature (§11).

The act contains compensation provisions (§§14-24).

Prussian law concerning cremation of September 14, 1911: crematories are to be licensed; licenses are granted only to public corporations having charge of cemeteries. The license is to be refused under specified circumstances and also unless the application of the corporation is by a two-thirds vote of its members. The rules of the crematory must be confirmed by the competent authority. No cremation may be had without a police license which is to be refused except on presentation (among other things) of a certificate of the local authority that there is no suspicion of crime.

### 2. Cattle and meat inspection (act of June 3, 1900):

The law requires official examination of specified animals before and after slaughter (the Federal Council may add to the list) (§1); if there is no objection, the inspector gives a permit, good for two days, for slaughter; precautions may be ordered if necessary (§2); after slaughter there is inspection and a declaration of suitability for food (§8); the carcass may be declared "conditionally suitable," subject to police precautions and to revocable license for sale, and, in case of restaurant keepers, for use (§§10, 11); there may be a police permit for use of condemned meat for other than food purposes with power to prescribe precautions (§9); also a revocable permit for use of horsemeat by dealers and restaurant-keepers (§18).

The Federal Council has power to make regulations concerning: ingredients and processes prohibited in preparing meat (§21); designation of foreign meat (§19); carrying out prohibition of imports (§22); it may add to import restrictions of (§§12, 13); it may extend horse-meat rules to other animals specified and to be specified (§18).

### 3. Animal diseases: Act June 26, 1909:

The Federal law leaves details of measures to states, and therefore is an authorizing and limiting law; it requires that state laws provide for an administrative appeal from decisions made under the law; it specifies the diseases subject to notification (§§9, 10); it imposes a local duty to isolate diseased animals; it imposes a local duty to take advice of the official veterinarian (§11); it specifies what may be required permanently (inspection, certification, regulations regarding many matters) (§17); it specifies what may be required in particular emergencies (emergency power including killing) (§§19-30); it provides for compensation (§§66-73).

The law has also provisions for nine specified diseases.

### 4. Food and drugs:

Under the Federal Trade Code, imperial administrative regulations may prescribe what drugs may be freely sold and the member-states are

permitted to fix prices; a regulation has introduced the Pharmacopoeia Germanica, November 21, 1890.

A food law of May 14, 1879, creates an extensive regulative power to be exercised by the Federal Council, providing that these rules may forbid a great many things specified in the law, the rules to be submitted to the Reichstag. The act refers to powers of supervision and authorizes the taking of samples, but neither the act itself nor the rule-making powers refer to the vesting of determinative (enabling and directing) powers in administrative authorities.

The margarine and butter-substitute law of June 15, 1897, likewise creates regulative, but not particular determining powers. The same is true of acts concerning white phosphorus (May 13, 1884), lead and zinc utensils (July 6, 1887), and injurious coloring matter (July 6, 1887).

The administrative powers contained in the Phylloxera and Saccharine acts have been sufficiently stated before.

## CHAPTER XXVI

### ADMINISTRATIVE POWERS UNDER MORALS LEGISLATION

§233. *In general.*—Under the head of morals legislation may be grouped laws dealing with vice and obscenity, gambling, drink, and public amusements.<sup>1</sup>

The legislative policy differs according as the thing is regarded as evil in itself, when it is dealt with by prohibition; or as liable to lead to evil through abuse, when it may be dealt with by regulation, particularly through licensing requirements. Legislation is particularly aimed at the commercial exploitation of evil tendencies, and thus becomes part of trade legislation.

Where the policy is prohibition, administrative powers are generally mere enforcing (detecting and prosecuting) powers, and outside the scope of this survey. This applies particularly to vice and gambling. There is no licensing of prostitution other than extra-legal. In Germany, the criminal code makes lotteries unlawful, unless licensed. The license is matter of state law, but in Prussia is not covered by statutory provisions; it is treated as matter of inherent executive prerogative, and the license is given only for public or charitable objects. The business of selling tickets of authorized lotteries is free, but one engaged in the business may be prohibited from carrying it on, if facts show his unreliability (Trade Code, §35).

In the United States, federal legislation touches obscenity, immorality, and gambling, both under the commerce power and under

<sup>1</sup> There are humanitarian laws concerning animals (care in transit; killing decrepit animals; vivisection) which may perhaps also be classified under this head, and which confer administrative powers: so the English "Knackers" acts of 1786, 1907, and 1911 which give summary powers, and the vivisection act of 1876 which imposes licensing requirements; in New York the officers and agents of societies incorporated for the prevention of cruelty to animals likewise have summary powers with regard to animals injured or diseased beyond the hope of recovery to usefulness. The Farms and Markets Law of New York contains a number of licensing and summary powers concerning dogs (§§107, 108, 114, 116); this legislation may be placed under the vague category of public order. The first act of Congress regulating interstate commerce was passed to enforce humane treatment of animals in course of transportation; but it operated without administrative functions other than prosecuting powers, which were vested in United States marshals. Act of 1873; R. S. §§4386-4389.

the power over the post-office. The nature of the postal service affords facilities for the grant of summary powers, since the provision that forbidden matter shall not be conveyed in the mails or delivered by a postmaster or letter-carrier but may be returned to the owner or sender, or otherwise disposed of as the postmaster may direct (R. S. §§3893-95), makes it necessary for any person feeling aggrieved by the decision to take the initiative in instituting judicial proceedings. No power is, however, given to the postmaster to open any letter or sealed matter of the first class.

In England and America Sunday legislation likewise operates by prohibition subject to direct statutory exceptions, the general exception of works of necessity and charity being so indefinitely phrased as to permit considerable discretion in the exercise of enforcing powers. The only noteworthy administrative power found in the English Sunday law of 1677 is that of a justice of the peace or local head officer to permit travel by boat on extraordinary occasions—a virtually unqualified dispensing power. Not even a power of this character is found in the New York law.

The following will give a statement of administrative powers, concerning, first, the traffic of intoxicating liquors and, second, public amusements, with some comment on significant phases of this legislation.

§234. *Intoxicating liquors—New York.*—The older licensing legislation was superseded by the prohibition amendment of the Federal Constitution. In pursuance of the powers given by that amendment, New York enacted a statute for its enforcement, which, however, was repealed in 1923, leaving the state without liquor legislation.

From the point of view of administrative powers, the old legislation was of great interest by reason of the policy, adopted by the so-called Raines Liquor Law of 1896, of substituting ministerial for discretionary powers in authorizing the sale of liquors. The change is indicated by using the term "liquor-tax certificate" in place of the customary term "license."

The relevant provisions of the law (now superseded) are as follows:

The law requires of the person proposing to engage in the business a signed and sworn statement upon an official blank. The statement gives the name, age, residence, citizenship of the applicant, and name and residence of every person who will have an interest in the traffic; the location of the premises; which of various specified classes of the

business it is proposed to conduct, and in connection with what other business, if any; that the applicant has not been convicted of felony, nor within three years of a violation of the liquor law, does not carry on any forbidden traffic, nor is within any of the prohibitions of the law; the proximity of dwelling houses, school houses, and churches; whether traffic in liquor has been carried on before on premises; whether occupied as a hotel; whether a liquor-tax certificate was previously revoked or forfeited; consent in writing of the owner of the property; consents of owners of nearby dwellings; if a hotel, that all requirements of the law regarding hotels have been complied with. He must also file a bond conditioned that there is no material false statement in the application statement, that there will be no gambling, that the premises will not become disorderly, that no provisions of the liquor law will be violated, and that all fines and judgments will be paid. There are full provisions as to sureties, and a reference to official approval only in case the surety is a surety corporation; and the approval may then be withheld only if the corporation is of questionable solvency or has defaulted in payment of a judgment upon a similar bond.

The method of the law is thus to prescribe specifically and exhaustively all matters which ordinarily form the subject of official consideration in exercising discretion, and to have the application show upon its face that all the conditions prescribed are complied with.

If the application is in form correct and the tax has been paid, the liquor-tax certificate was issued as a matter of ministerial duty.

Forfeiture of the certificate required judicial proceedings.

§235. *Intoxicating liquors—United States.*—The act of October 28, 1919, for the enforcement of the Eighteenth Amendment (National Prohibition Act) is not exclusively a prohibitory measure, since the Constitutional prohibition extends only to liquor intended for beverage purposes, leaving both alcoholic liquor used for non-beverage purposes and beverages of non-intoxicating character to legislative regulation by way of preventing evasions of the Constitutional prohibition.

The following are the administrative powers under the National Prohibition Act which so far as they are determining powers, are vested in the Secretary of the Treasury, with provision for delegation to a Commissioner of Prohibition.<sup>2</sup>

<sup>2</sup> Act of March 3, 1927. The powers were formerly vested in the Commissioner of Internal Revenue.

*Enabling powers.*—Permits are required as follows: for purchasing and possessing liquor for the purpose of manufacturing for specified permitted uses (Title 2, §4); for the purchase of wine for sacramental purposes, and, in the discretion of the Commissioner, in favor of an ecclesiastic designated by the head of his denominational jurisdiction, for the supervision of the manufacture of wine for sacramental purposes (Title 2, §6); for manufacturing, selling, purchasing, transporting, and prescribing liquor, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician (Title 2, §6).

Permits to sell at retail are issued only for sale through licensed pharmacists; permits to prescribe are given only to duly licensed and practicing physicians (Title 2, §6); permits to manufacture, prescribe, sell, or transport are annual; permits to buy for manufacturing purposes run for ninety days, and permits to buy for other purposes, for thirty days, and in either case they specify quantity, kind, and purpose. The particulars of the permit are specified in the law. The form is prescribed by the Commissioner (Title 2, §6).

Permits to manufacture or sell shall be revoked if the manufacturer fails to show that articles correspond to the limitations prescribed by law (Title 2, §5).

The refusal or revocation of a permit under sections 4, 5, and 6 (except the refusal in which the discretion of the Commissioner is expressly referred to) may be reviewed by an appropriate proceeding in a court of equity, the court having power to affirm, modify, or reverse the findings of the Commissioner as the facts or law of the case may warrant, and to restrain manufacture, etc., during the pendency of the proceedings (Title 2, §§5, 6, and 9).<sup>a</sup>

Permits are also required to develop liquids for conversion into beverages containing less than one-half of one per cent of alcohol (Title 2, §37), for the establishment or operation of industrial alcohol manufacturing plants, and for warehouses either in connection with such plants or elsewhere as the Commissioner may determine (Title 3, §§2, 3, 7). There is no express provision for the judicial review of a refusal of these permits.

*Directing power.*—If the Commissioner finds, upon hearing, after fifteen days' notice, that any person has sold any flavoring extract, etc., for beverage purposes, he shall notify such person or any known principal for whom the sale was made, to desist from the sale of such ar-

<sup>a</sup> See *Ma-King Products Company v. Blair* (1926), 271 U.S. 479.



ticle; it thereupon becomes unlawful for one year thereafter to sell such extracts, etc., without bond and permit, the Commissioner having the power to attach conditions to the permit and being directed by the law to require a record and report of sales (Title 2, §5).

*Rule-making powers.*—The act gives to the Commissioner regulative powers, both general and for regulating the following matters: transfer of plants, denaturing operations, withdrawal of liquor bonds, records and reports, forms of permits and applications, books to be kept for prescriptions and for manufacturers' records, and prescription blanks.

The law also requires the Commissioner to issue regulations to place the non-beverage alcohol industry and any other industry using such alcohol as a chemical raw material, and for other lawful purposes, upon the highest possible plane of scientific and commercial industry, consistent with the interests of the government. The act itself prescribes the registration of all industrial alcohol plants (Title 3, §13).

§236. *Intoxicating liquors—England.*—The prior acts relating to licensing the traffic in intoxicating liquors are superseded by the Licensing (Consolidation) Act of 1910.

The statute itself contains full regulations regarding the sale of liquor and the conduct of the premises (§§65–85); it specifies what persons and premises are disqualified (§§35, 36), and prescribes positive qualifications for premises (§37).

*Powers vested in justices of the peace.*—A license is required both for the person selling and the place of sale (§65).

The license is annual with facilities for renewal, or for seven years without these special facilities (§14).

Official consent is required for transfer to another person and removal to another place (§§23, 24); also for alterations of premises giving increased facilities for drinking (§71).

There is provision for provisional, occasional, and temporary licenses (§§33, 64, 88).

There are dispensing powers with regard to hours of closing, general (§55) and special (§57); also a power to dispense with the personal appearance of the applicant (§11).

There is a power, vested in two justices, to close for a time (to be specified) licensed premises in case of riot or tumult, or if either is expected (§63).

*Discretion.*—The license may be granted to such persons as the justices in the execution of their powers and in the exercise of their

discretion deem fit and proper (§9); a renewal of an "off" license may be refused only on grounds specified by law; of an "on" license for grounds other than those specified by law, only by the compensation authority and on compensation (§16); however, structural alterations may be required to secure the proper conduct of the business (§32).

The transfer of a license is refused or allowed in the discretion of the licensing authority subject to schedule requirements and to fitness.

The place of business is not to be removed to other premises except in the absence of specified objections, and then only in the discretion of the licensing authority. However, if the removal is desired for reasons beyond the control of the licensee, it is treated like a transfer (§§24, 26).

*Procedure.*—There are full provisions for the annual licensing meeting (§10); also for notices of application, of transfer and removal (§§15, 25, 26); and for objections (§15); the question of a refusal must be delegated to a committee (§6); the applicant must personally appear unless this is dispensed with (§11); the requirement of attendance is relaxed, and the facilities for objections reduced, where a renewal is applied for, and the grounds for refusing a renewal must be specified in writing (§16). The justices have power to make rules, requiring an interval between refusal of application and a new application, from which they may, for good cause, grant dispensation (§28).

No license may be objected to on the ground that the justices were not qualified (§17).

*Appeals.*—An appeal lies from the refusal to grant of renewal, transfer, or removal, to the Quarter Sessions, whose decision is conclusive (§32); no appeal appears to be granted from the refusal of an original application.

Every license is in the first instance granted by a licensing justice, subject to the action of a confirming authority. The confirmation may be opposed by one who objected before the licensing justice (§§12, 13). No confirmation is apparently required for the refusal of a new license.

Pending an appeal from a refusal of a renewal, commissioners of customs and excise may permit continuance of the business on terms deemed just (§89).

Licenses are subject only to forfeiture by judicial proceedings (§§70 ff).

The licensing act of 1921, in regulating the hours for selling intoxicating liquors, permits an additional hour for serving liquor with

meals, so long as the justices are satisfied that the licensed premises are structurally adapted and bona fide used for providing refreshments to which the supply of liquor is merely ancillary. The benefit of this provision is made to depend upon mere notification on the part of the license-holder, and without vesting in the justices any express determinative powers with reference thereto, either by way of license or by way of direction (§3 of act).

§237. *Intoxicating liquors—Germany.*—The traffic in intoxicating liquors is briefly regulated by the Federal Trade Code (§33).

The conduct of inns, taverns, and the retail sale of spirituous liquors, requires a license. The licensing authority is determined by the law of the member-states; in Prussia it is the county committee, a representative body about corresponding to our county board.

The law specifies the grounds upon which alone the license may be refused. These are:

1. The existence of facts that justify the assumption that the business will be used to permit debauchery, gambling, receiving stolen goods, or immorality.

2. The non-compliance of the condition and location of the intended place of business with police requirements.

It is left to state legislation to require in addition the proof of local need, first, for the dispensing or retailing of spirituous liquors, and second (in places of less than specified population) for the conduct of taverns and the dispensing of other intoxicating liquors. Before granting the licenses, the local authorities must be heard.

The law applies to co-operative associations and may by state law be applied to other associations supplying only members.

Refusal of the license is subject to administrative appeal. The general procedural provisions of the Trade Code regulating refusal of licenses apply.

A license may not be granted with a time limit.

The license is administratively revocable (subject to administrative appeal) if acts or omissions of the licensee clearly demonstrate the lack of personal qualifications which the law presupposes, or if the license was granted on the basis of untrue allegations.

While the retail sale of beer, other than in taverns, is not generally placed under a licensing requirement, the seller may be prohibited from continuing his trade if he has been repeatedly convicted of violations of the law.

§238. *Public amusements—New York.* (a) *State-wide legislation.*—The only legislation in the Consolidated Laws of 1909 that can be said to fall under this head is that relating to horse-racing, contained in sections 286 and 287 of the Membership Corporations Law. According to this, horse-racing associations proposing to conduct races must annually apply for licenses to the State Racing Commission. The license is to contain the condition that the races will be run subject to the rules of specified associations, which rules may be modified or abrogated by the Racing Commission. Upon complaint of either of two named associations, the license of a horse-racing association may be revoked by the Commission if it fails to comply with the law or with the conditions of the license, or if the continuance of the license is not conducive to the interests of legitimate racing.

A later act, of 1920 (c. 912), places boxing, sparring, and wrestling matches or exhibitions under the supervision of a License Committee appointed by the Governor and the State Athletic Commission. The Committee licenses corporations conducting matches or exhibitions and all participants therein, and the Commission issues annual permits to licensed corporations. The act itself contains detailed regulations regarding the conduct of matches. The license may be revoked or suspended for the stated reason that the licensee has in the judgment of the Committee been guilty of an act detrimental to the interests of boxing or wrestling.

In 1921, the subject of motion pictures received statutory regulation:

The statute provides for a State Motion Picture Commission to be appointed by the Governor and Senate. The Commission shall cause to be properly examined every film submitted, as required by the act; and unless the film or part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or of such character that its exhibition would tend to corrupt morals or incite to crime, it shall issue licenses. If the Commission refuses a license, it must furnish the applicant with a written report of its reasons. For used films, current-event films, and scientific or educational films, permits are given without examination. Application for either license or permit must be made as prescribed by the Commission. A refusal is subject to a right to review, in the first instance, by the full Commission, which must decide within five days, and to a further right to review by certiorari at the instance of the applicant. Permits (not licenses) may be revoked on five days' notice in

writing. It is made unlawful to exhibit or sell a film or reel without license or permit.<sup>4</sup>

*Charter of the city of New York.*—The Greater New York Charter (Laws, 1901, c. 466) gives in section 51 power to the Board of Aldermen to provide for the licensing and otherwise regulating of menageries, circuses, and common shows.

Section 1472 provides that no one shall exhibit to the public any interlude, tragedy, comedy, opera, ballet, play, farce, minstrelsy, or dancing, or any other entertainment of the stage, or any equestrian, circus, or dramatic performances, or any performances of juggling, rope performances, or dancing, until a license for the place has been obtained.

Ticket-selling licenses are required by ordinance of December 28, 1918, and the requirement was made statutory in 1922.

Section 1473, as amended by Laws, 1914, c. 475, transfers the granting of licenses from the police department to a Commissioner of Licenses. Section 1483 (as amended by the same act of 1914) makes it unlawful to sell liquors in any place of exhibition or performance mentioned in section 1472, except that the Commissioner may, in his discretion and subject to regulations, give permission, revocable at any time, to sell liquor while concerts are being given.

Section 1476 of the Charter provides for the revocation of any license by any judge of a court of record upon proof of violation of any provision of the law. This section 1476, with many others, was by the terms of the Charter alterable by action of the Board of Aldermen, and this power was apparently exercised; for the City Code of Ordinances, c. 14, art. 1, gives the Commissioner of Licenses general power to hear and determine complaints against licenses and to suspend and revoke any license or permit issued by him under any provision of the ordinances, and he is, in his discretion, authorized to take such testimony

<sup>4</sup> Before 1921, motion-picture exhibits were covered by article 2, chapter 13, of the New York City Code of Ordinances, which mainly related to safety and health but also provides that inspectors should investigate the character of exhibits and report any offense against morality, decency, and public welfare.

The report of the Department of Licenses of the city of New York for the year 1916, said: "When a production that is considered unfit to be exhibited in the motion picture theaters on the ground that it is indecent, immoral, or contrary to the public welfare is found, notice is sent to every motion picture theater that it must not be exhibited under pain of suspension or revocation of license. This plan has a distinct advantage in that no publicity is given an improper film; while under the old practice of police court action, much notoriety was secured."

as may be necessary for his official action or to delegate the taking of such testimony to a deputy commissioner.

An act of 1910 (c. 547, supplemented by act of 1921, c. 225) added new sections to the Greater New York charter (§§1488-94) dealing with the subject of dance halls—the subject being one which at the time received considerable attention throughout the country.

The act requires all public dance halls to be licensed if the place is safe and proper and complies with the laws (the license to be granted only after previous inspection). The license may be forfeited by habitual disorderly or immoral conduct, and shall be forfeited on conviction of specified offenses. The license shall be revoked when the premises are not safe and proper, the licensee being first served with a copy of the complaint. The reasons for revoking the license or for refusing to renew it must be in writing and a matter of public record; if twice revoked within six months, no new license shall be issued for at least one year. A permit is required for public dances or balls held by any person or associations in public dance halls. The permit is granted only upon condition that the dance be held in accordance with the regulations of the Commissioner, who may adopt regulations for preventing disorderly or immoral behavior or conduct calculated to disturb public peace and safety. The Commissioner may require information concerning the applicant. He may revoke the permit if it appears probable that the dance will not be conducted in accordance with regulations. The dance-hall license may be revoked if a dance is held there without a permit.

§239. *Public amusements—England.*—(1) Places for the public performance of stage plays, unless conducted under Letters Patent, require a license granted to a responsible (bonded) manager by the Lord Chamberlain or by justices. The power is in terms unqualified. The Lord Chamberlain or the justices may order the theater closed "on fit occasions" and may suspend the license for such time as they think fit, for riot or misbehavior.

The license becomes void if prohibited plays are acted.

2) Plays are subject to prohibition by the Lord Chamberlain. They may not be presented until seven days after they have been sent to him, and he may disallow them either before or after presentation "when fitting for the preservation of good manners, decorum, and public peace."

These powers are given by the Theatres Act, 1843.

3) Public billiard tables require an annual license, which is grant-

ed by justices to persons deemed fit and proper, and the transfer of which they may permit to persons in their discretion deemed fit. The fee is fixed by statute (act of 1845).

4) Race courses require annual licenses, granted or withheld by the Quarter Sessions at their discretion (act of 1879).

5) Places for public dancing, singing, or entertainment require an annual license granted by the county council to those deemed fit, subject to conditions and restrictions expressed in the license. The license may be transferred only to persons deemed fit. The license is revocable by order of the council on breach of its terms. There is provision for notice of the first application, with facility for provisional license pending the notice (act of 1894).<sup>5</sup>

6) Cinematographs may be exhibited only in places licensed by the county council. The grant is made annually to persons deemed fit; the license may prescribe terms under regulations made by the secretary of state. The license may be transferred as the council thinks fit. For contravention of the act or of regulations, the council may revoke the license. The council fixes the fee. It may delegate the grant of licenses to the petty sessions (act of 1909).

§240. *Public amusements—Germany.*—The Federal Trade Code has provisions regarding theaters (§32), other exhibitions or shows which do not serve the higher interests of art or science (compare the "common shows" of the New York Charter), itinerant shows, and public dances. This leaves concerts, lectures, and art exhibitions of the higher grade free.

Theatrical managers require a license which specifies the licensed undertaking. Another, or a materially changed undertaking, requires a new license. The law specifies the grounds on which the license is to be refused: that the applicant is unable to prove the possession of the necessary resources, or that, on the basis of facts, the authority is satisfied that he lacks the required reliability, particularly in moral, artistic, and financial respects. The license is administratively revocable (subject to administrative appeal) if acts or omissions clearly demonstrate the lack of personal qualifications which the law presupposes, or if the license was granted on the basis of untrue allegations.

There is no censorship of plays.

Exhibitions or shows not serving the higher interests of art or science are separately regulated. Anyone who desires as a matter of busi-

<sup>5</sup> A further act of 1926, the Home Counties Music and Dancing Licensing Act, is confined to the areas in the neighborhood of London.

ness to arrange for such exhibitions or shows on his premises, or to let his premises for such purposes, requires a license irrespective of a license already possessed for theatrical undertakings. The law enumerates the grounds upon which alone the license may be refused. They are: first, the existence of facts justifying the assumption that the show will be contrary to law or good morals; second, the inadequacy of the premises from the point of view of the police; and third, that a sufficient number of persons have already received a license. Upon the ground first named, a license may also be revoked or the conduct of the business prohibited to those engaged in it at the time of the enactment of the law.

There is apparently no license requirement for the manager of such shows, the entire responsibility being placed upon the person who controls the premises.

Itinerant musical or other shows or exhibitions, serving no higher interest of art or science, require previous local license.

Public dances are governed by state laws.

§241. *Comment.*—Both the traffic in intoxicating liquors and the purveying of public amusements are long established fields for the exercise of licensing powers; it is therefore interesting to compare the two, as well as to compare the different jurisdictions, and to note tendencies of development.

Most remarkable is undoubtedly the abandonment of all discretionary power in the New York liquor law of 1896. It was a radical departure from the previous liquor legislation of the state and not in harmony with tendencies of state legislation in other matters; nor was it the result of public discussion or controversy. While it may be surmised that the law was adopted to take liquor licenses out of politics, there are no contemporaneous official data that throw any light upon the change of policy.<sup>6</sup> Nor was the operation of the new law made the subject of legislative investigation or report. It is noteworthy that in a state in which radical changes of legislative policy are not uncommon, this system of non-discretionary control of the liquor traffic remained untouched and unquestioned until the advent of prohibition, a period of over twenty years. It thus proved itself a workable system, even if its permanence cannot be said to have been assured. The exercise of discretion was adhered to as soon as it became a question of having liquor served to the accompaniment of music.

In the federal prohibition law, permits play an important part;

<sup>6</sup> The report of the Lexow Committee in 1895 does not appear to have made any definite recommendation of the change.



the power to prohibit being by the Constitution limited to liquors used for beverage purposes, administrative checks upon the use of liquors for non-beverage purposes are admissible only as instrumentalities of the valid prohibition, and consequently a large discretion over the use of non-beverage liquor, over which there is no independent federal police power, would be inappropriate. It is true that the phrasing of the law is generally such that the issue of the permit appears as a matter of unqualified power; and while there are express provisions for judicial review in connection with nearly all the permits under Title 2, they are omitted under Title 3; but there appears to be no difference in the character of the permits under either title; and the legislative intent undoubtedly was, that permits should issue where legal conditions are satisfied. The danger of the abuse of the right to use liquor for medicinal purposes is met by careful restrictions upon the issue of prescription blanks, but without recourse to administrative discretion.

In contrast to New York, some of the striking developments of English licensing policy can be traced in judicial decisions and parliamentary history. More attention appears to have been paid to procedural provisions than to terms of power as a check upon abuse of discretion; and the leading case of *Sharp v. Wakefield* [1891], A.C. 173, sustained the exercise of a fair discretion in the matter of renewals, although the relaxation of procedural requirements evinced a legislative intent that normally renewals should be granted as a matter of course. Subsequent legislation made this point clear and granted a right to compensation for non-renewal. The consolidation of the law in 1910 treats the matter of discretion with great care: discretion is altogether eliminated for renewals, unless compensation is paid for non-renewal, the grounds for non-renewal being specified in the law; in the case of transfers or removals the discretion is qualified by reference to statutory requirements and to fitness; on the other hand, the discretion in refusing a new license seems to be absolute; a grant requires to be confirmed by a "confirming authority," but not a refusal. The refusal of a renewal, transfer, or removal is subject to an appeal. Forfeiture of a license requires a judicial proceeding.

If in a system in which nothing is left at loose ends, the refusal of a new license appears as a matter of free and unqualified administrative power, this must represent a deliberate policy against new licenses in addition to those already in existence. Such a policy will naturally resort to absolute discretion.

The German system stands midway between that of New York and England. The question of renewals is eliminated by the provision

forbidding time limits; the discretion in the matter of new licenses is a very qualified one; the question of local need, which gives large scope to administrative discretion, may be considered only in the traffic in spirituous liquors, or without that restriction in smaller places (under 15,000 inhabitants); otherwise refusal must be based on grounds specified in the law, and while these in a sense deal in part with matter of probability (that the business will be used to permit immorality), that probability must rest on facts. Refusal is moreover procedurally safeguarded and subject to review. Revocation is a matter of administrative jurisdiction, but adequately safeguarded.

The control of public amusements shows a very much less systematic state of the law than the control of intoxicating liquors.

In New York the small amount of legislation covering the entire state is striking; until very recently horse-racing was the only subject brought under administrative control. A state-wide censorship of motion pictures was not introduced until 1921. In both cases the control is more than perfunctory. A conspicuous feature in the horse-racing law is the function assigned to private associations: it is their rules which primarily govern the races, and it is upon their complaint that licenses are revoked.

For motion pictures, the law now prescribes a censorship which is carefully regulated. It is true that the grounds of rejection leave room for considerable discretion (immoral, tending to corrupt morals, etc.), but not only must reasons be given for refusal of a license but the refusal is subject to judicial review. The license here is given for each particular film and not for motion-picture theaters.

Both for the control of horse-racing and motion pictures, separate state commissions are created.

In contrast to this meager but well-constructed state legislation, the control of amusements in the city of New York evinces considerable looseness. Until 1914 all amusement licenses were granted by the police department. In that year the office of Commissioner of Licenses was created by an amendment of the Charter, and the report of the Department of Licenses for 1916 states that thereby, for the first time in the history of the city, a comprehensive plan for the regulation of public amusements was formulated and put into effect. The only subject that had previously received careful legislative attention was that of dance halls covered by a charter amendment of 1910—a subject which at that time was being placed under some kind of systematized regulation all over the country.

With regard to all other amusements, licensing powers are of the most general description and without any qualifying provisions. The Charter provided for revocation of licenses by judicial proceedings upon proof of violation of law; but under charter authority, this provision was altered by ordinance, and the power to revoke licenses transferred to the Commissioner, without adequate provision for judicial review. As appears from the above quoted report of the Department of Licenses of 1916, this power of revocation was, prior to the state law of 1921, relied upon to check the exhibition of objectionable motion pictures.

This subjection of public amusements to imperfectly defined powers, as it appears from an examination of the statute law of New York, is characteristic of American legislation in general. New York indeed compares favorably with Massachusetts, where, according to the letter of the law, amusement licenses are still revocable at pleasure.

In England, likewise, amusement licenses are handled less carefully than liquor licenses. The power to license theaters is in terms unqualified, and "misbehavior," as a ground of suspending the license, is a somewhat unsatisfactory term. In connection with the censorship of plays we find a power of prohibition instead of a licensing power. The grounds for prohibition ("for the preservation of good manners, decorum and public peace") are also so general as to furnish hardly any legal criterion, and it is well known that censorship of plays has proceeded on purely conventional and traditional principles (exclusion of biblical characters, etc.). It will be noted that neither in New York nor in Germany is there any censorship of theatrical plays.

With regard to the other regulated amusements (billiard tables, race courses, dance or music halls, cinematographs) English statutory provisions likewise express or imply discretionary licensing powers. All licenses are annual. The licensing power is vested either in the local governing body or in the justices of the peace; for theaters in London, in the Lord Chamberlain. Where a revoking power is expressed, it is exercised by the licensing authority. Neither refusal nor revocation of a license are made in terms subject to any reviewing power.

The control of public amusements in Germany distinguishes between those of a higher and lower grade, with an implied assumption that the difference is administratively workable. All of the lower-grade amusements are placed under license; of the higher-grade amusements, only theaters. In all cases the license, in accordance with the general German system, may be refused only for reasons specified in law, which

always require a basis of facts. The licensing power is vested in the general local administrative authorities. Powers of revocation and reviewing powers are governed by the principles generally applicable to licensing and, though not strictly judicial, provide for a regular system of procedure with adequate safeguards.

Thus, of the three jurisdictions, Germany is the only one that handles the control of amusements as carefully as the control of liquor traffic.

Comparing American and English legislation concerning the liquor traffic with the legislation concerning public amusements, the former shows a much stronger tendency toward the checking of administrative power and the safeguarding of private right. Why this difference? It is not sufficient to say that liquor has been a more controverted subject of legislation, and that prolonged controversy is likely to produce a higher type of statute. This factor might have been outweighed by the change of relative standing of the two subjects in public opinion: the liquor traffic has been losing in favor, while amusements have been gaining; the position of quasi-outlaw formerly assigned to the place of amusement has been transferred to the saloon. However, the very fact that the liquor business met with progressive legislative disfavor both permitted and called for progressive measures of restraint written directly into the law, so much so that in New York it was possible to take away all administrative discretion and yet leave the business subject to many rigorous restrictions. In the case of public amusements, on the other hand, which were gradually gaining favor, it would have been a very much more difficult matter to express relaxation in statutory terms. Moreover, in this field discretionary powers were believed to be a more effective method of enforcing standards than direct penal provisions. The moral standards applicable to all forms of art are not easily defined and admit of considerable deviation from the normal restraints on public conduct. Under the necessarily loose phrasing of criminal statutes forbidding immoral or unfit exhibitions, a jury is likely to refuse to convict in the same case in which the adverse exercise of administrative discretion by refusing or even revoking a permit stands a reasonable chance of being sustained on a judicial contest (*Bainbridge v. Minneapolis*, 131 Minn. 195, "Birth of a Nation" case). The administrative power is particularly effective where directed to a particular play or show; it is therefore important to note that the censorship of plays has been retained in England, and that the censorship of films has become the law of New York.

## CHAPTER XXVII

### ADMINISTRATIVE POWERS IN CONNECTION WITH PERSONAL STATUS

The following subjects will be discussed successively, the different jurisdictions being considered under each head:

(1) civil status, (2) incorporation, (3) naturalization, (4) issuance of passports, and (5) admission and expulsion of aliens.

§242. *Civil status*.—So far as status is matter of private law, administrative functions are few, and there is a tendency to vest them in courts and give them a judicial or quasi-judicial character.

*Name*.—The change of name is in England free and unregulated; in Germany (Prussia) it requires government consent, which is ordinarily given by the local representative of the chief executive authority; in New York it is effected by order of court, granted upon petition if there is no reasonable objection to the change (Civil Rights Law, §§60–64).

*Infancy*.—Official supervision or intervention may be desirable in the interest of infants' property rights. This is least developed in England, where the jurisdiction over guardians is exercised on the same principles as that over other trustees and where custody is judicially controlled only in litigated cases; in the United States there is, in addition to the same jurisdiction, legislation for the disposition of infants' real estate, which for that purpose resorts to the machinery of special judicial proceedings. In Germany, on the other hand, there is a well-developed institution of supervising guardianship by which all important acts of the guardian are made dependent upon official consent. This supervising guardianship is vested in the courts of first instance, which act in administrative form although with judicial independence. Administrative powers in connection with infant welfare and juvenile protection are beyond the scope of this survey.

*Legitimation*.—Of earlier cases of dependence of civil rights upon executive authority, the German Civil Code retains the institution of legitimation. An illegitimate child may be legitimated by the government upon petition of the father, but the legitimation operates only against him and the mother. The power can be exercised only on conditions fully prescribed by the law, while its non-exercise is discre-

tionary (Civil Code §§1723-40). There is no similar power either in England or in New York.

*Adoption.*—The institution of adoption is unknown to the English law; practical arrangements of that character do not create the legal relation of parent and child.<sup>1</sup> In Germany and in New York adoption is regulated by statute, and in both jurisdictions the function of giving the required official consent is judicial and not administrative, although adoption does not either in Germany or in New York assume (as it does in many other American jurisdictions) the form of a judicial proceeding. In New York the consent is given by the order of a county judge or surrogate (Domestic Relations Law, §§110-18); in Germany, by the court having jurisdiction in guardianship matters (Civil Code, §1754).

*Divorce.*—Under the older German civil law (in some parts of Germany until 1900) the granting of a divorce was a prerogative of the chief executive authority. In England and in America down to a relatively recent period the power to dissolve a marriage was exercised by the legislature as the sovereign organ of the state. In all three jurisdictions divorce is obtainable at present by judicial decree as the result of an adversary proceeding.

*Marriage.*—In the three jurisdictions administrative powers are exercised in connection with the marriage contract.

In Germany this requires solemnization by a civil officer. His function is purely formal, and he is not explicitly charged with the duty of ascertaining the non-existence of impediments. The marriage is preceded by publication of banns, except where mortal illness forbids delay; of this, of course, the civil officer judges.

The German law recognizes dispensing powers unknown in England or America. They apply to the publication of banns, non-age of the woman, the ten-months delay normally prescribed for the remarriage of a widow, and the impediment of adultery to the marriage of guilty parties (Civil Code, §§1303, 1312, 1313, 1316). The dispensation is granted by the member-state in accordance with its laws; in Prussia, by the Minister of Justice.

In England and in New York (as in other American states) there is no compulsory civil marriage, although designated public officials may officiate at the option of the parties. There is, however, an official

<sup>1</sup> Since the above was written, adoption has been introduced by an act passed in 1926; the necessary order is made by the High Court.

act which takes the place of the former ecclesiastical license, which in its turn dispensed with the publication of the banns.

This official act is in England the registrar's certificate, which, if delivered to the officiating minister, is equivalent to the publication of the banns (Act of 1836, §1); the registrar may also issue the certificate or license to one of the contracting parties (Act of 1898, §5). Where the marriage is objected to ("forbidden") by a "caveat," there can be no ecclesiastical license until the caveat is withdrawn or until the registrar certifies that the caveat should not obstruct; an appeal lies from the registrar to the Registrar-General (Act of 1836, §13). In case of a foreign marriage, a caveat may be referred to the Registrar-General, from whose action an appeal lies to the secretary of state (Act of 1892, §5). In case of a frivolous appeal the Registrar-General fixes the damages to be paid (Act of 1906, §1). The registrar also registers places at which marriages may be solemnized (Act of 1836, §18).

In New York the license requirement was introduced in 1907; but it is not essential to the validity of the marriage, the observance being enforced only by penal sanctions. The license authorizes either the solemnizing official to perform the ceremony, or the parties to enter into the written contract which satisfies the New York law. The licensing official is the town or city clerk, and he is required to issue the license in the absence of legal impediments; to ascertain the latter, he may administer oaths and require the production of witnesses whom he may likewise examine, and the application must contain specified information (Domestic Relations Law, §§13-15, 25).

§243. *Incorporation—In general.*—Neither the common nor the civil law recognizes the acquisition of distinct legal personality as the result or product of a mere private act, whether of agreement or endowment; but both systems demand some sovereign act of bestowal or grant (charter). In Germany (Prussia) this was the act of the monarch, in England the act of the Crown or of Parliament, in the United States the act of the legislature, and it used to be a special act for each particular case.

At the present time there exist general statutes fixing terms and conditions, compliance with which gives corporate capacity. In Germany the legislation is in the main federal; in the United States it is state legislation. The tendency is to make incorporation substantially almost a matter of common right, with a consequent reduction or elimination of administrative power.

The legislation is, however, divided into different statutes for dif-

ferent purposes, and legislation in which the purpose is to establish a special policy of control (public utility, banking, insurance corporations) will not be here considered. The general incorporation statutes are those in which the main legislative policy is of an enabling rather than of a regulative character.

§244. *Incorporation—New York.*—New York has, in addition to what is entitled a General Incorporation Law, others, likewise of a very general character, namely, a Stock Corporation Law and a Membership Corporation Law (a Business Corporation Law was repealed in 1923). The provisions of these general laws apply where there is no other more particular statutory regulation, or in addition to the latter.

The effect of the statutory provisions appears to be that it is the act of the incorporators which constitutes incorporation, while the administrative function is simply that of ministerial certification. The incorporators execute, acknowledge, and file with the Secretary of State a certificate of incorporation containing specified particulars, which evidences compliance with the very simple statutory substantive prerequisites: minimum number of incorporators, citizenship or residence of specified number or proportion of subscribers (not of subsequent members) or of directors; no specification of purposes, but merely a requirement that if a membership corporation pursues a number of purposes they must be kindred; no minimum capital requirement in case of stock corporation; and the Secretary of State records and indexes the certificate and issues a certified copy (§§4, 5). The extension of corporate existence likewise appears to be matter of right (§37).

However, by forbidding the filing of a certificate with a name so nearly resembling that of an existing corporation as to be calculated to deceive, the law by implication creates an administrative power and duty to reject a certificate in an appropriate case (§6, *People v. O'Brien*, 91 N.Y.S. 649).

The change of corporate name which formerly required an order of the Supreme Court is now subject to a similar administrative provision; in addition it must be approved by the appropriate superintending state department, if any.

Even the admission of a foreign corporation depends upon purely ministerial certification, it being only required that the business is such as may be carried on by a domestic corporation, and that all requirements of law are complied with (Stock Corporation Law, §110).

The reduction of capital stock in connection with the reorganization of a stock corporation as a non-par-value stock corporation re-



quired until 1923 an indorsement of approval by the State Comptroller, and his certification that the reduced amount is sufficient and in excess of all ascertained debts and liabilities; but an amendment of 1923 substitutes an affidavit to the same effect executed by corporate officers and directors (Stock Corporation Law, §37 [4]). The change appears to be in conformity with the general tendency to dispense with administrative determinative powers in this branch of the law.

The dissolution of a corporation prior to the expiration of its charter, which formerly was possible by mere ministerial certification of the Secretary of State, now requires a judicial proceeding (General Corporation Law, §§170, 177; Stock Corporation Law, §§220, 221, repealed 1923, c. 387).

While permit requirements are thus entirely dispensed with for business corporations, they are retained for those not organized for profit: the law requires for a large number of specified classes of such corporations, and for all membership corporations organized for lawful purposes not otherwise specified by law, that the certificate of incorporation bear the written approval of a justice of the Supreme Court—a requirement apparently introduced by the Benevolent Corporations Law of 1848 (Membership Corporation Law, §§41, 60, 100, 120, 130, 140, 144, 150, 160, 170, 180, 190, 240).

The power to approve, while committed to a justice, is clearly of an administrative character. It is not an order within the appeal provisions of the Civil Practice Act, §537; see *Matter of Board of Charities*, 76 Hun. 74).

There is no intimation on what ground the power is to be exercised; conservatively interpreted, it may mean only a power to certify to the lawfulness of the purpose; on the other hand, more liberally interpreted, it may mean a power to withhold approval on grounds of public policy. If the latter, it would be an extraordinary and anomalous power peculiar to New York. Practically, however, it should be noted that there is nothing to prevent repeated successive applications to different justices; and if the approval of none can be obtained, the adverse considerations of public policy are likely to be so strong as to amount to illegality. The scarcity of decided cases goes to show that the provision has presented no difficulty in actual practice.<sup>2</sup>

<sup>2</sup> In the matter of the *Wendover Athletic Association*, 70 Misc. 273, approval was withheld by reason of the insufficiency of the certificate—a matter, it would seem, within the jurisdiction of the Secretary of State. It was also stated in the opinion that there should be an averment that there was no previous application. See also *Catalonian National Club*, 112 Misc. 207.

Additional or substitutional approval certificates are required for specified classes of corporations: care of children or conduct of a hospital, by the State Board of Charities (§§120, 130); horse-racing, by the State Racing Commission; fire corporation, by local authorities.

All membership corporations are further subject to visitation by a justice of the Supreme Court (§16); and court proceedings or court orders are required for consolidation of corporations (§7), and for sale, mortgage, or extended leases of real property (§18).

§145. *Incorporation—Germany.*—The subject of incorporation is substantially covered by federal legislation.

It is true that the Civil Code provides that associations for economic purposes obtain corporate capacity (juristic personality) by member-state grant, in the absence of federal legislation (§22). The federal legislation is, however, so comprehensive that little room remains for state grant. Thus by the Trade Code certain branches of gainful activity are specified which may not be freely pursued, and as to these, state restrictions continue to apply, including the special charter requirements for corporate undertakings. This, for example, applies to institutions of higher learning, should any be organized for profit; and it applied to the business of insurance until 1901, when this came to be regulated by federal statute. The great mass of unspecified gainful activities, however, is free; and these are covered by the provision of the Commercial Code, permitting for any gainful object, without further enumeration, the formation of joint-stock companies, and requiring merely that the articles of association must state the object. The company is formed by the organizers fulfilling the requirement of registration with the district court, and it enjoys distinct legal personality (§40). The only administrative power is that of the Federal Council to permit shares of a lower-than-normal denomination (which is 1,000 marks), if the object is one of common utility (§180).

There is a separate statute (of May 1, 1889) for the formation of co-operative companies. These likewise acquire corporate capacity by mere registration. They are, however, subject to dissolution by proceedings brought in the administrative (not the ordinary civil) court, for illegality prejudicial to the public welfare, or for pursuing purposes other than those designated in its articles (§79). The proceeding for dissolution is in substance judicial and not administrative.

Societies formed for other than economic purposes also acquire corporate capacity by mere registration (Civil Code, §21); the filing is to be refused if the few legal requirements (minimum number of

members, articles of association providing for certain prescribed categories of matters) are not complied with (§§56, 57, 58, 61). Article 61 further provides that the filing authority must notify the competent administrative authority of the respective member-state (which may protest against the filing), if the society is forbidden or subject to prohibition according to public law, or if the purpose is political or religious. Until 1908 this meant the recognition of all state restraints upon the freedom of association; but the Federal Association Law of that year established the freedom of association for every purpose not contrary to criminal law, leaving in force only the territorial laws regarding religious associations; and these are assimilated to other associations by the new Constitution of 1919. While the duty to notify continues, the grounds of protest seem to have altogether disappeared. In any event the protest may be contested by proceedings brought in an administrative court (art. 62). If there is no protest, registration takes place six weeks after filing, or in case of protest, when the same is finally disposed of (§63).

Associations may be deprived of their legal capacity through proceedings brought in administrative courts, for reasons specified in the law (illegal acts prejudicial to the public welfare; pursuing political objects, if non-political; religious, if non-religious; economic, if non-economic; beyond the charter, if specially chartered) (§43).

The Civil Code provides that the district court may require the governing authority of the association to produce a list of the members; the Association Act of 1908 substitutes a power merely to require a statement of the number of members; this change thus makes for diminished administrative control.

Incorporated trusts (endowments [*Stiftungen*]) require the authorization of the state government, which apparently is discretionary (Civil Code, §80). If the carrying out of the object becomes impossible, the government may alter it conformably to the presumable intent of the founder or abrogate the trust (§87).

The Civil Code also authorizes member-states to impose government consent requirements for gifts to corporations exceeding 5,000 Marks, and a Prussian law of 1899 continues a pre-existing consent requirement of that kind with reference to the amount authorized by the Code. The consent is given by the chief executive authority.

§246. *Incorporation—England.*—The English legislation distinguishes between companies and societies, but the terms do not correspond to any one line of division of organizations according to their

purposes; the Companies Act provides also for non-business or non-economic associations. The term "societies" is applied to what we call "benevolent," "fraternal," or "co-operative" organizations. While the law regarding companies has been consolidated in an act of 1908, there are separate statutes for loan societies (1890), trade unions (1871), building societies (1874-94), industrial and provident societies (1893), and friendly societies (1896). These acts provide substantially for incorporation, though that term is used only in the Companies Act (§2) and the building society acts.

1) *Incorporation for profit*.—Under the Companies Act of 1908 incorporation "for any lawful purpose" (§2) is effected by registration upon compliance with the statutory prerequisites and forms. The registration is compulsory for associations for gain of more than twenty persons (for the business of banking more than ten) and optional for less than that number.

Administrative powers are sparingly conferred, either upon the registrar or upon the Board of Trade.

The registrar certifies that the company is entitled to commence business when the registration requirements have been complied with. This is a ministerial act, although conclusive evidence of compliance (§17).

He also certifies to the registration of companies existing at the commencement of the act (§259): if a joint stock company, he must be satisfied of its character as such (§255); and to the registration of specified mortgages required to be registered (§§93-95).

Where a company is defunct, the registrar may, on information and after public notice, order its removal from the register, subject to an appeal to the court (§242).

The consent of the Board of Trade is required for a change of name (unless the change is on account of similarity to another registered name, in which case the registrar consents); the only consent requirement in connection with the conduct of business is for payment of interest out of capital, which consent must within statutory limits prescribe a maximum period for such payments (§91).

The Board of Trade, upon application by members, may direct an investigation of a company, and examinations may thereupon be conducted on oath; evidence may be required that the applicants are not actuated by malice (§109). Upon similar application, it may, if the general meeting fails to do so, appoint an auditor to audit the books of the company (§112).

Winding-up proceedings are in the main judicial. However, if a special manager is appointed by a court, the Board of Trade determines his security and accounting (§161); it orders (subject to an appeal to the High Court) payments to be made to claimants out of undistributed assets (§224), and orders any surplus in the liquidation account to be paid over to the Treasury for investment (§230). Obviously these are very minor powers. But taking the law as a whole, there is thus a greater amount of administrative control than in New York.

Additional administrative powers were conferred by legislation of a national political character enacted during the war, namely the Registration of Business Names Act of 1916, made applicable to directors of companies in 1917, and the Companies (Foreign Interests) Act of 1917: the registrar may refuse or remove the name "British," if he thinks it misleading; the Board of Trade may require information to enable it to judge whether a business is subject to registration. Where articles of association restrict the control of a company by foreign interests, they are alterable only with the consent of the Board, and its decision that its consent is required is conclusive; and the winding-up of such a company must be authorized or ratified (with power to impose terms) by the Board, whose discretion is to be guided by the consideration whether the winding-up is in good faith or not.

ii) *Incorporation not for profit.*—This may be effected not only under the various "societies" acts for the purposes therein indicated but also under the companies acts; for the latter speaks of art, science, religion, charity, or any other like object (§19), and again of the promotion of commerce, art, science, religion, charity, or any other useful object (§20); and there seems to be no other general act specially intended to permit the incorporation of associations for social or ideal purposes.<sup>3</sup>

Under the Companies Act action of the Board of Trade is called for in two cases relating to such non-profit companies: its consent (with power to impose conditions) is required for the holding of land to the extent of more than two acres (§19); and the Board may permit

<sup>3</sup> Two relatively early acts deal with art unions (1846) and literary and scientific societies (1854). The former act apparently contemplates special charters and provides that it shall be expressed in the charter that if it shall appear to a Committee of the Privy Council that the purposes of the union are perverted, the charter may be revoked. The latter act provides that on the application of not less than two-fifths of the members, an alteration or amalgamation of the society, if injurious, may be forbidden by a Committee of the Privy Council.

registration with the omission of the word "limited." This permit may be subject to conditions and regulations and is revocable on notice and hearing (§20).

Societies of a benevolent or co-operative character are likewise incorporated by registration upon compliance with specified conditions concerning organization and accountability.

However, there is no express prohibition against associating without registration, such as there is in the case of associations for gain; and the former apprehension that unregistered societies might fall under certain old statutes or common law rules against illegal combinations was dispelled by the decision in *Luby v. Warwickshire Miners' Association* (1912) 2 Ch. 371, 380.

There are apparently some minor technical advantages following registration,<sup>4</sup> but the main inducement seems to be the recognized legal status with attendant guaranties of organization and supervision. Societies, whose well-established status enables them to dispense with these advantages, have apparently in some instances continued unregistered; and the Assurance Act of 1909 empowers the Board of Trade to extend to unregistered unions the privileges granted by the act to registered unions (§35). An act of 1912 also permits an unregistered trade-union to apply for a certificate that it is a trade-union, and from a refusal an appeal lies to the High Court (§2). Altogether the registration is a facility rather than a requirement.

The purposes for which societies may be registered are in a manner indicated by their names; the Friendly Societies Act, 1896 (§8), specifies a number of purposes and adds "for any purpose which the Treasury may authorize as a purpose to which the provisions of this act or such of them as are specified in the authority ought to be extended." A note in *Lely's Statutes* shows that up to March, 1902, seventeen purposes had been specially authorized.

The administrative powers vary slightly in the different acts but are of the same general type and exceed those exercised under the Companies Act; in some cases they have been enlarged by amending acts. Thus under the Trade-Union Act of 1871 as amended in 1912, the duty to register is not purely ministerial, but the registrar must be satisfied that the objects are statutory objects, and he may withdraw registry if they are not; but his action is subject to appeal to the High Court. The power to call special meetings on application or on charges,

<sup>4</sup>The article on "Friendly Societies" in the *Encyclopaedia Britannica* enumerates seventeen of these.

and to appoint an inspector with inquisitorial powers, is similar to that existing with regard to companies but is exercised by the registrar with the consent of a secretary of state or of the Treasury (Friendly Societies Act, §76; Building Societies Act, 1894, §5).

There are administrative powers of dissolution which are not found in the Companies Act. They are vested in the Chief Registrar but are subject to judicial appeal, and, under the Friendly Societies Act, 1896 (§76), are exercisable only with the consent of the Treasury. The reasons are fraud or mistake in obtaining registry, illegality of purpose, insolvency, and wilful violation of a provision of the law after notice (compare the phrase in the German law: "illegality prejudicial to the public welfare").

There are minor approval requirements (e.g., of change of name) and important regulative powers vested either in the registrar or in the Treasury or in a secretary of state; the rules made by the Treasury are required to be laid before Parliament.

In comparing the powers with those under the Companies Act, it should be remembered that if they are greater, they are also less incisive, inasmuch as withdrawal of registry leaves the society free to continue unregistered.

§247. *Naturalization.*—Naturalization or admission to citizenship status may be the automatic legal consequence of some other fact or relation without a special act of grant or certification, as in the case of minor children or (in the United States until 1922) the wife of an alien becoming naturalized. Apart from these cases, naturalization is either a direct sovereign act, or an official act under statutory delegation. The direct sovereign act may relate to a particular individual and be either the act of the executive head of the government, as under the older practice of the Continental states of Europe, or the act of the legislature, as in Great Britain until 1845; or the direct sovereign act may relate to entire classes of people, or the inhabitants of an entire territory, as when the Fourteenth Amendment gave citizenship to Negroes, or when the recent act of June 2, 1924, made Indians citizens.

Under modern systems of legislation the regular form of naturalization is an official act resting upon statutory delegation and conditioned upon the existence of specified prerequisites. It then becomes a question whether in the presence of these prerequisites naturalization is a matter of right or depends upon official discretion. Section 2166 of the U.S. Revised Statutes makes it clear that persons honorably discharged from military service are entitled to naturalization ("shall"

be admitted), and the German act of 1913 confers a similar right in a number of cases (where a German woman has lost her nationality by marriage and after her husband's death desires to regain it; where an infant has lost his German nationality; where an alien is appointed to an imperial office; where nationality has been forfeited without fault [§§10, 15, 26]; in these cases an appeal is provided for).

In other cases under the German law the grant or refusal of naturalization, notwithstanding the presence of the prerequisites, is apparently matter of discretion (§8: may be admitted; and absence of any remedy). The English law is explicit that the discretion of the Secretary of State is absolute, the statute (4 & 5 Geo. V, c. 17, §2 [3]) providing that "the grant of a certificate of naturalization shall be in the absolute discretion of the Secretary of State, and he may with or without assigning any reason, give or withhold the certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision."

In the United States the condition of the law from the administrative point of view is perhaps less clear and simple than it is either in Great Britain or Germany. From the beginning of the legislation—owing probably partly to the precedent of the act of 13 Geo. II, c. 7 (which allowed naturalization in the colonies after seven years of residence by mere registration with a judge and the taking of an oath)<sup>5</sup> and partly to the slight development of administrative organization in the early period of American government—the power to naturalize was vested in courts, both state and federal, and this system was retained when the act of 1906 created a Bureau of Naturalization. The law (Rev. St., §§2165–74, as amended by the act of June 29, 1906) fully specifies the prerequisites to naturalization: residence, good moral character, attachment to the Constitution, well disposed to good order and happiness of the country—which must be made to appear to the satisfaction of the court and must be proved by two witnesses other than the applicant, whereupon the applicant "may" be admitted. The nature of all the prerequisites except that of residence is such as to leave room for official discretion; once, however, they have been established to the satisfaction of the court, admission is a matter of course and probably matter of right.<sup>6</sup>

<sup>5</sup> See volume 18 of the *Publications of the London Huguenot Society*, p. xxx.

<sup>6</sup> Denial of a fair hearing was held judicially reviewable by a state appellate court in the *Matter of Fordiani* (1923), 98 Conn. 435. The Supreme Court of the United States has said that there is no direct review of the action of the court by



The Bureau of Naturalization created in 1906 is given no legal control over naturalization, but section 11 of the act of 1906 gives the United States the right to be heard in opposition to the granting of any petition in naturalization proceedings. For this purpose the Bureau maintains local examiners, who apparently exercise considerable influence in the interpretation and application of the law, so, for example, in the matter of aliens whose families have remained abroad (although under the quota law of 1921 the law itself may have excluded the wife), or who claimed exemption during the war. The situation illustrates the weight that bureaucratic "expert" opinion is apt to have with judges to whom naturalization is only an occasional function lying outside their ordinary judicial sphere.<sup>7</sup>

The revocation of naturalization is, under the American law, a purely judicial proceeding, the only ground of revocation being that the naturalization was illegally procured (act of 1906, §15). In Great Britain the act of 1914 likewise provided for revocation only if the naturalization was obtained by misrepresentation or fraud; an amendment of 1918 however extended the power to revoke to misconduct after the naturalization. Under the act of 1914 the proceeding was purely administrative; but under the act of 1918 an inquiry is provided for in cases in which justiciable questions arise, which is surrounded by substantially judicial guaranties, although the final decision remains in the hands of the Secretary of State.

§248. *Issuance of passports.*—Passport regulation has a double aspect, as it relates either to the requirement that aliens produce passports, or to the grant of passports to nationals. The former is an exer-

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writ of error or appeal, basing its view on the proceedings in Congress on the naturalization bill of 1906 (*U.S. v. Ness* [1917], 245 U.S. 319). Previously, appeals had been entertained from grants of naturalization at the instance of the government, both in state and federal courts (135 App. D. N.Y. 824; 32 App. D. C. 525; 162 Fed. 469; 164 Fed. 45; 171 Fed. 397). In the *Ozawa* case (260 U.S. 178, 1922), decided subsequent to the *Ness* case, the Circuit Court of Appeals had taken jurisdiction of an appeal from a refusal to naturalize, and in the Supreme Court this point passed *sub silentio*. The case of *Tutun v. U.S.*, 270 U.S. 568, decided April 12, 1926, holds that the refusal by the federal district court to naturalize is appealable, and the observation in the *Ness* case is explained by pointing out that it related to the action of a state court.

<sup>7</sup> See Abbott, *Select Cases on Immigration*, p. 332; also §19, *supra*.

An act of Congress approved June 8, 1926, enlarges the function of examiners, virtually permitting them to be used by the courts as referees. See a note in 21 *American Political Science Review* (May, 1927), 342.

cise of governmental control which will be considered in connection with the admission of aliens; the latter is at present generally an act of service, being part of the protection of nationals abroad. If it is true that at one time the law in England was that no subject might leave the realm without the license of the king (see Sibley, "Passport Systems," 7 *Journal of Society of Comparative Legislation* [N.S.], 27-33), no such common law rule ever existed in the United States, although a prohibition against departing from or entering the United States without a valid passport has been introduced by act of May 22, 1918, to be operative when the United States is at war.<sup>8</sup>

So long as foreign governments require passports of Americans entering their territory (and since the war the requirement has become the rule instead of the exception), the refusal of the passport operates of course as a veto upon foreign travel. Legally, however, the passport is not at present a requirement, so far as American law is concerned; and no penalty attaches to leaving without passport.

In the absence of any legislation, the issuance of a passport would be matter of inherent executive power. In the United States, however, the subject has been governed by statute since 1856. The law (Rev. St., §§4075 ff.) provides that the Secretary of State may grant and issue passports, or cause them to be granted by diplomatic or consular officers, to persons owing allegiance to the United States, under rules as the President may prescribe for or on behalf of the United States.

The words of the statute are capable of being construed as mandatory, and that construction would seem to be supported by the fact that when Congress intended the issue of passports to be discretionary it used explicit terms to that effect (act of 1907 providing for passports to declarants, repealed in 1920). The express provision for rules to be laid down by the President also indicates a legislative intent that the Secretary of State shall be governed by a general rule and not by an undefined discretion. The practice of the Department seems to be to refuse only on legal grounds or on grounds of international comity (Moore's *International Law Digest*, §512). However, the Attorney-General has expressed his opinion that the power is discretionary (23 *Opinions* 509) and such seems to be the general view (Hyde, *International Law*, §407). If so, it presents a striking instance of unregulated

<sup>8</sup> The continuation of this act by the act of March 2, 1921, relates only to aliens seeking to come to the United States; another act of November 10, 1919, authorizing the President to require passports, expired by limitation on March 4, 1921.

discretion. In any event, it is for practical purposes a discretion not subject to judicial control.\*

In England, in the absence of any legislation (other than the fixing of a fee), the issuance of a passport is a matter of executive power exclusively, subject to such political checks as the system of Parliamentary responsibility affords.

In Germany, an act of October 12, 1867, authorizes the head of the federal government temporarily, when public order appears to be menaced, to introduce passport requirements with or without limitations (§9); but it is obvious that this refers to passports to be used within the country and not abroad. The issue of passports for use abroad appears to stand on the same basis as in England. The requirement of a passport appears to rest at present upon an executive decree of June 21, 1916.

§249. *Admission and expulsion of aliens. German and British legislation.*—This matter is affected by a radical constitutional difference between Continental, English, and American law. Probably in all Continental states, in the absence of legislation, the presence of aliens

\* The refusal of passports in practice:—It appears that passports are not refused unless there are legal reasons for refusal. In the case in which the Attorney-General expressed himself in favor of discretion, and which concerned an American citizen of Chinese race, the passport was eventually issued (information from the Department of State); in a very striking case in which the consul in Chefoo sought instructions from the legation in China as to the grant of passports to two women apparently engaged in immoral pursuits, the legation advised against the grant in view of the special conditions in Oriental countries, but the State Department dissented inasmuch as this sort of conduct was not covered by the regulations (*Moore's Digest*, §512). Passports have been refused to Mormon emissaries, polygamy being a statutory crime (*Moore's Digest*, Vol. 3, p. 921), and to Socialists proposing to attend a conference in Stockholm in 1917, the Secretary of State holding that the conference was in a sense official and that participation would be contrary to U.S. R. S., §5335 (act of 1799), prohibiting dealing with foreign governments under specified circumstances (*Literary Digest*, Vol. 54, p. 1842; *ibid.*, Vol. 25, p. 19; *American Labor Year Book*, 1917-18, pp. 229-30). A passport will be refused if it is believed that it will be used to further an unlawful or improper purpose or to a person engaged in the violation of laws of the United States (*Moore's Digest*, Vol. 4, p. 920). This would apply to a violation of the neutrality laws.

The question of the appropriate name is necessarily involved in the issuance of a passport. Under a recent ruling (see *Chicago Tribune*, April 17, 1925) the Department of State permits a married woman to use her maiden name, provided the name of the husband is indicated; the previous practice was otherwise (see *New York Nation*, December 24, 1924).

within the territory is controlled by inherent sovereign executive authority; in England, in the absence of legislation, there is a question as to the extent of the Royal Prerogative, and while the point is controversial, the better opinion seems to be against the exercise of the Prerogative in this respect (W. F. Craies, "The Right of Aliens to Enter British Territory," 6 *Law Quarterly Review* 27); in America, since there is no such thing as an executive prerogative to coerce persons, the whole matter necessarily depends upon statute.

*Germany.*—In Germany, the Free Migration Act of 1867 expressly leaves unaffected the police power over foreigners, and by denying the power to expel federal citizens except in cases provided by statute, recognizes the executive power to expel non-citizens. The power may apparently be exercised by the member-states, and the Prussian General Administrative Act of 1883 (§130) expressly denies a right of action by reason of expulsion.

The requirement of passports to be presented by foreigners entering or traveling in Germany was abolished by another act of 1867 (October 12), subject to temporary exceptions in case of menace to public order, to be proclaimed by the head of the federal government. The same act however recognizes the continued validity of provisions for checking new arrivals or the sojourning of strangers, and particularly also the obligation of both citizens and aliens to give on official demand a sufficient account of themselves. These are matters of local police (Act of October 12, 1867, §§2, 3, 9, 10).

Legislation thus left untouched the inherent executive authority over resident aliens; and while it failed to provide a systematized or centralized check upon the entrance of aliens into German territory, the silence of legislation likewise implies continued executive authority over the subject.<sup>10</sup>

*England.*—In Great Britain, at the outbreak of the war, the admission and expulsion of aliens was governed by the Aliens Act, 1905; that act repealed an earlier act of 1836 which was a simple registration act without administrative powers.

The act of 1905 regulates the immigration of steerage passengers of immigrant ships, permitting, however, the Secretary of State to exempt ships, conditionally or otherwise, where he is satisfied that a

<sup>10</sup> In France, a law of December 3, 1849, expressly recognizes the right to expel foreigners and vests the power in the Minister of the Interior. As to the absolute character of the administrative discretion, see 40 *Revue de Droit Public* 381.

proper system is maintained to prevent the embarkation of undesirables or where security is given to his satisfaction.

Leave to land must be given by an immigration officer (who may be an officer of the customs service), after medical inspection.

Leave is to be withheld only if the immigrant is undesirable, which term is defined by the act. The definition includes criteria involving the exercise of judgment on the part of the officer: inability to show the possession of, or being in a position to obtain, the means of decently supporting himself and his dependents; or likelihood, owing to disease or infirmity, of becoming a charge upon the rates or otherwise a detriment to the public (with exceptions in favor of political or religious refugees); as well as more definite criteria (previous conviction of a non-political extraditable crime, or previous expulsion).

From the refusal of the leave the land, the immigrant or the ship-master may appeal to an immigration board of three persons having magisterial, business, or administrative experience, who are appointed, and proceed under rules made, by the Secretary of State.<sup>11</sup>

The Secretary of State determines, where the question arises on appeal, whether or not a person is an immigrant and whether a crime is a political or an extraditable crime.

The act of 1905 also regulates the expulsion of aliens. This always requires previous judicial action: either a conviction of specified offenses, coupled with a recommendation of expulsion by the court; or a certificate of a court, after proceedings taken within twelve months after entry of the alien, that the alien has received parochial relief, or has been found wandering without means of subsistence, or is living in unsanitary conditions due to overcrowding, or has been sentenced abroad for an extraditable non-political crime. Upon the basis of such recommendation or certificate the Secretary of State may make an order of expulsion if he sees fit; and for the purpose of carrying it into effect, or with a view to making it, may take the alien into custody. Under specified conditions he may require the ship-owner who brought him, to take the alien back free of charge (§§3, 4, 7).

The Aliens Restriction Act of 1919 repeals the act of 1905 as from a date or dates to be specified by Order in Council, which Order may with or without modification incorporate any provisions of the repealed act.

<sup>11</sup> A motion made in the House of Lords during the debate on the bill to substitute for the immigration board a court of summary jurisdiction had been rejected; see 151 *Hansard* 7.

The act of 1919 does not itself contain any permanent provisions either as to the admission or (except with regard to former enemy aliens then in the Kingdom) as to the expulsion of aliens; and while it does contain important permanent restrictions on the right of aliens, the only administrative powers exercisable with reference thereto are dispensing powers vested in the Board of Trade or a secretary of state (§§5, 7).

An act of 1914 also gives permanent power to deal with aliens by Order in Council in time of war or other great emergency.

The result seems to be that, except in cases of emergency, the power of the executive is confined to continuing, discontinuing, or modifying the provisions of the act of 1905, in the absence of which the authority to exclude or expel aliens remains as doubtful as it was before 1905. The extent of delegation under the act of 1919 is contrary to American constitutional practice, and perhaps to American constitutional law.

§250. *American immigration legislation.*—In the United States the admission and expulsion of aliens is exclusively a matter of federal concern and depends entirely upon legislation, the principal statute being that of 1917, supplemented by the act of 1924. The latter act is administratively important as introducing the check of consular visas. It definitely establishes the principle of numerical limitation, and in connection with it leaves vital determinations of a quasi-legislative character (the fixing of quota bases) to Presidential proclamation (§11). Most of the necessarily complex provisions regarding the application of the quota principle are contained in the law itself, and there was probably no intention to leave essential matters to administrative discretion. However, the act contains no directions as to the order in time of disposition of individual visa applications, and it appears that the Department of State, believing that it has no authority to meet demands for preferential treatment, follows the rule of granting visas in accordance with priority of application.<sup>12</sup>

Before the introduction of the numerical limitation of immigration, the policy of the law, which still continues concurrently, was partly wholesale exclusion (racial or regional) and partly exclusion by reason of individual disqualification. The practical difference is that in the former case the group classification is simple and particular statutory exceptions have to be affirmatively established, while in the latter

<sup>12</sup> *Hearings before Committee on Immigration (69th Congress, 1st Session, March 25, 26, April 13, 1926, p. 14).*

case it is the individual disability that has to be shown; from this point of view the exclusion of contract laborers belongs to the second class.

In the Chinese exclusion acts—the original application of wholesale exclusion—the administrative provisions were therefore relatively simple: the port authorities were in a position to prevent the landing of Chinese persons not provided with the statutory certificates (act of 1882, §§4, 9; act of 1888, §7), and cases of surreptitious entry were dealt with by expulsion, which under the Chinese exclusion acts until 1907 required judicial action.

The act of 1888 provided, in section 12, that the Collector of Customs was to decide in person all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and that his decision should be subject to review by the Secretary of the Treasury, and not otherwise.

Chinese exclusion has given rise to a peculiar doctrine which may be noted in this connection. The Chinese exclusion laws, like other immigration acts and the administrative powers thereunder, do not apply to American citizens. The attempt to exercise administrative power over citizens would normally be an act without jurisdiction, and on general principles would give a right to judicial relief. Under the decision in the case of *United States v. Ju Toy*, 198 U.S. 253, however, it seems that the courts may refuse to review an administrative decision adverse to a claim of citizenship on the part of a person refused admission as an ineligible alien. In the case of American citizens of Chinese race or their wives or children, their status as such is determined as a matter of regular administrative routine prior or at the time of entry (Smith and Herring, *Bureau of Immigration*, pp. 60, 61). The statutes are entirely silent as to such determination.

Exclusion by reason of individual disqualification calls for determinations from case to case. For this purpose there exist special immigration officers, who are placed under the Department of Labor. A very effective check of a preventive nature is furnished by the severe penalties (increased in 1924) put upon transportation companies bringing aliens affected with ascertainable defects, where these might have been detected by competent medical examination or reasonable precaution (1917, §9; 1924, §§16, 26). A further check of a more formal character is afforded by the papers required in order to obtain the consular visa (1924, §7), utilizing for this purpose the European *dossier*—the official record kept of a person, which is unknown to our institutions.

These checks are supplemented by personal inspection at the time of entry. The successful passing of that inspection admits the alien but is not evidenced by any formal permit.<sup>13</sup> The certificate of arrival provided for in section 1 of the Naturalization Act of 1906 is not a certificate of admissibility, and the mere endorsement of the immigration visa and its transmission to the Department of Labor applies apparently to both rejected and admitted aliens. In subsequent proceedings against him the alien is entitled to the production of the visa as evidence on his behalf; but he is deportable for defects existing at the time of entry, though passed upon and ascertainable at that time, and the burden of proof is upon him, both at the time of entry and in subsequent deportation proceedings (act of 1924, §23).

The grounds of exclusion or rejection of an alien are fully regulated by law (1917, §3), which does not in this respect purport to rely upon administrative discretion. However, some of the grounds specified present difficult questions of fact (constitutional psychopathic inferiority, certain proscribed political opinions) or even questions of probability (physical defect of a nature which may affect the ability to earn a living; persons likely to become a public charge); and the administrative power is correspondingly wide—wider than the power normally exercised by a criminal court. In view of this, the procedural provisions are relatively full; and further reference is made to administrative regulations by the Secretary of Labor and to medical regulations prepared by the Surgeon-General (1917, §§16, 17). In addition to the general examination by two inspectors, there is a physical and mental examination by two medical officers. Every case in which there is a doubt as to admissibility, or where one inspector challenges the favorable decision of another, goes before a board of special inquiry composed of three immigration officials; or if a mental defect is certified, the alien may appeal to a board of medical officers of the U.S. Health Service, having a right to one expert medical witness. Hearings before the board of inquiry are "separate and apart from the public," but the immigrant may have one friend or relative present under prescribed regulations. The decision of two members prevails. If based on the certificate of a medical officer on the ground of tuberculosis or dangerous contagious disease or mental or physical disability, the decision is final; in case of other grounds of exclusion, either the alien (who is informed of his right) or a dissenting member of the board may appeal

<sup>13</sup> Hence held to be of no probative value (*United States v. Lan Sun Ho* 85 Fed. 422).



to the Secretary of Labor, and on such appeal the alien has a right to counsel. Subject to such appeal, the decision is final, i. e., there is no right to judicial review (*Ekiu v. United States*, 142 U.S. 651).

Very full examining powers are vested in inspectors touching the right to enter, pass through, or reside in the United States (search, oath, requiring information, subpoenaing witnesses, and production of papers). Pending examination, the Commissioner-General may order persons to be detained on board of ships or at immigration stations (§11).

The deportation (return) as well as the detention of the alien denied admission is at the expense of the vessel that brought him (§18).

All obligations and prohibitions placed upon the owners of vessels (bringing aliens in violation of law, soliciting immigration, expense of deporting, furnishing lists and manifests, duties with regard to alien seamen [§§12, 14, 18, 32, 34, 36]) are made effective by an extraordinary power vested in the Secretary of Labor to determine the fact of violation and impose fines, which are enforced by denying clearance until payment, unless security is given by deposit (sustained by the Supreme Court in *Oceanic Steamship Company v. Stranahan*, 214 U.S. 320), or even to deny the transportation company the right to land any or all classes of aliens for a period sufficient to insure compliance with the law (§7).

The rigor of exclusion is somewhat tempered by a number of dispensing powers vested in the Secretary of Labor. Powers of this kind under the act of 1917 are: to admit children under sixteen years of age unaccompanied by and not coming to parents, if otherwise eligible and not likely to become a public charge (as to tests applied see Smith and Herring, *op. cit.*, p. 69) (§3); to admit, upon security and on conditions prescribed by him, aliens liable to become public charges or suffering from physical disability other than specified diseases (§21): to permit an excluded or deported alien to apply for readmission within less than a period of one year (§3); in the case of wife or minor children of a resident alien or naturalized citizen, coming to join him, but affected with a contagious disorder, to ascertain whether it is easily curable, and if so, to accord them hospital treatment at the expense of the husband or father, or to admit them if it can be done without danger to others (§22); in the case of any alien suffering from tuberculosis or other dangerous contagious disease, to admit him to hospital treatment (at the expense of the vessel), if to refuse treatment would be

inhumane or cause unusual hardship or suffering (§18); to admit, in his discretion, stowaways, if otherwise admissible; and to admit, also in his discretion (and apparently even though otherwise inadmissible), aliens who have had an unrelinquished uninterrupted domicil of seven years, after temporary absence from the country, upon conditions prescribed by him (§3).

The dispensation from the literacy test in the case of religious persecution is given by the statute itself, and the discretion of the Secretary relates only to the proof (§3).

Of a somewhat different character is the power of the Secretary to permit the importation of skilled labor under contract, when he has determined that skilled labor of that kind cannot be found unemployed in the country (§3); the administrative determination is here for the protection of the employer, who under the original act determined the statutory condition at his own peril.

Similar to the latter power, but to be exercised under general rules and regulations, is the temporary admission of otherwise inadmissible aliens, under prescribed conditions, including the exaction of bonds (§3). Under this power there was a regulation for the admission of Mexican contract laborers during the war, rescinded in 1921 (Smith and Herring, *op. cit.*, p. 32).

The only thing that corresponds to the very general power under the British Aliens Act 1905 to waive or modify statutory checks in reliance upon precautions taken by the immigrant carrier, is a very minor provision permitting the substitution of periodical lists of outgoing aliens for lists to be presented at each departure, in the case of vessels having regular sailings (§12).

The act of 1924 adds a dispensing power in favor of quota immigrants, whose inadmissibility under the quota provisions was unknown and unascertainable by them, but without thereby increasing the total of the quota.<sup>14</sup>

<sup>14</sup> Acts of May 22, 1918, and March 2, 1921: It is proper to note also a provision relating to admission of aliens which is of a purely political character. An act of 1918 authorizes the President, when the United States is at war, to make proclamation that the public safety requires additional prohibitions and restrictions upon the entry of persons into the United States; and upon such proclamation it is made unlawful, until otherwise ordered by the President or Congress, for any alien to enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe (40 St. L. 559, c. 81). An act of March 2, 1921, continues the provisions of the act of May 22, 1918, in force until otherwise provided by law.

§251. *American deportation legislation.*—The first American legislation was the Alien Act of 1798, which authorized the President to order (without any provision for hearing) the departure of aliens whom he should judge dangerous to the peace and safety of the United States or concerned in treasonable or secret machinations against the government, and in urgent cases to effect the removal by executive arrest and deportation. In ordinary cases non-compliance with the order was punished as a criminal offense. The President was also authorized to grant licenses to remain, under limitations of time and place prescribed by him. The act was passed for a term of two years and was allowed to expire by limitation (act of June 25, 1798, 1 St. L. 572). The provision for judicial enforcement, notwithstanding the purely political character of the act, is to be noted. No peace-time expulsion for equally wide political reasons has since been known to American law.

Deportation (in the sense of expulsion; the term is also used for the return of excluded immigrants) is now provided for by the immigration acts and supplemental acts of October 16, 1918, and May 16, 1920. The grounds of deportation are specified by law; they include acts of violation of law and moral delinquency subsequent to entry, the fact of having been at the time of entry a member of one or more of the classes excluded by law and—operating retroactively (although the entry was not unlawful and no subsequent unlawful overt act is charged)—the fact of belonging to certain proscribed political sects (act of October 16, 1918). In all cases, the deportation is mandatory; the act of May 16, 1920 (which relates to political and war-time offenses), requires a finding by the Secretary of Labor after hearing that the alien is an undesirable resident; the other acts are silent as to procedural safeguards; and the act of 1924 even places the burden of proof as to lawful entry upon the alien. The requirement of hearing rests upon the decision in the *Japanese Immigrant Case* (189 U.S. 86, 100), that any other course would be inconsistent with due process, and upon administrative regulation (Rule 22). The law simply provides that the alien shall, upon the warrant of the Secretary of Labor, be taken into

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“in so far as they relate to requiring passports and visas from aliens seeking to come to the United States.” There is no provision of the act of 1918 expressly relating to passports or visas of aliens, although the regulations under the act may do so. The power to impose conditions was exercised in the case of Count Karolyi in 1925 (see letter of Secretary Hughes to Senator Borah of February 24, 1925). The power, so long as it exists, appears to be subject only to the requirement of the reasonableness of the President's regulations and orders.

custody and deported, and that the decision of the Secretary shall be final. While the power is thus vested in the highest executive officer under the President, the proceeding is purely administrative, differing in this respect from the Chinese exclusion acts. Any judicial control over deportation must therefore rest upon general principles.<sup>15</sup>

Certain provisions of minor importance relate to the deportation of attendants of helpless aliens (§18); temporary release on bond with security approved by the Secretary, pending the final decision (§39); suspension of deportation to secure testimony for the prosecution of offenders (§18); and the deportation of inadmissible alien seamen (§34).<sup>16</sup>

<sup>15</sup> A considerable amount of case law has grown up as to the extent of such control, which cannot be considered in this connection.

<sup>16</sup> As to proposed deportation legislation pending in 1926, and left undisposed of by the 69th Congress, see 1 *Social Service Review* 46.

## CHAPTER XXVIII

### ADMINISTRATIVE POWERS UNDER LEGISLATION CONCERNING THE USE OF LAND

The principal subjects are the control of improvements (including town planning, zoning, and preservation of monuments), drainage, forests, mining, waters, and game and fish. In New York much of the legislation is incorporated in a Conservation law and placed under the jurisdiction of a Conservation Commission. In other jurisdictions legislation is scattering and administrative organization diversified. Town-planning and zoning legislation is locally restricted and generally locally administered.

§252. *Buildings and improvements. New York.*—An expanding policy of public control is met by doubts concerning the extent of the police power. The American law is reluctant to interfere with the right of the owner to use his land, except for the purpose of securing safety, health, and comfort; on the other hand, it is jealous of any encroachments of private property on public ways. As far as the latter are concerned, the Building Code of the city of New York recognizes specified customary projections as generally permissible (apparently without special permit for each particular case), but declares every such permission to be revocable at will by the Board of Aldermen or the Board of Estimate (§§170, 171).

As regards interference with the rights of owners, an amendment to the Greater New York Charter, of 1914 (c. 471), recognizes the principle of zoning, i.e., the requirement of the compliance of improvements with a general plan attempting to secure the conservation of property values. This is to be effected by regulations sufficiently comprehensive to be legislative rather than administrative in character. In order to do justice to individual cases of hardship, however, a Board of Standards and Appeals is under expressly authorized regulations given power to vary the application of the regulations in harmony with their general purpose and intent. A similar power had been previously introduced into the Charter of the city of New York in connection with other building regulations (§§410, 411); it is also found in the Labor Law (§§30, 161[5]); but it has come to be of the greatest practical importance in connection with zoning, and forms the most

conspicuous administrative feature of that legislation, having recently been copied in other states (Illinois, 1921, §3, as amended in 1923). The practical operation of the power of variation in New York was for a long time to prevent the question of the constitutionality of the zoning principle from being carried to the Court of Appeals.<sup>1</sup>

*England.*—In England the inconveniences of projecting and obstructive buildings were dealt with by the Town Improvement Clauses Act of 1847, leaving the matter to be handled by enabling and directing powers of the local authorities, subject to statutory duties of compensation in specified cases. Town-planning schemes were authorized by an act of 1909, superseded in that respect by an act of 1925. The law gives summary powers of removal in case of contravention to the scheme, as well as powers of substitutional execution; controversies as to conformity to the scheme and as to the injurious effect of the scheme on property are determined by the Ministry or by arbitrators appointed by it (Act, 1925, §§7, 10, 17).

*NOTE.*—More particularly stated, the powers under the English acts are as follows: The Town Improvement Clauses Act, 1847, authorizes local authorities to permit (on terms) buildings to be set forward to improve street lines, and to require (on compensation) projecting buildings to be set back as directed; other projections may be removed or altered, subject to compensation in the case of those that antedate the act; if erected subsequent to the act, they may be removed (§§66-70).

Outward-opening doors may be required to be altered, but may be allowed in case of public buildings (1847, §71). Waterspouts may be ordered (§74). The local authority has power to order the demolition of an obstructive building; the procedure is regulated by statute, and provides for appeal; compensation on principles stated by the act is settled by an arbitrator. Other buildings may be

<sup>1</sup> Edward M. Bassett in *Proceedings of the National City Planning Conference, 1925*, p. 118: "If the decision does not suit the applicant or an aggrieved party, then the court is called in to review the decision. The review, however, does not bring up the question of constitutionality, as is the case where there is no board of appeals and the applicant immediately resorts to mandamus. The court decides whether the board of appeals has acted within the scope of the power delegated to it, whether it used due discretion and whether it carried out the intention of the zoning enabling act and ordinance. For the purpose of this review all parties generally stand on the constitutionality of the law. If it is decided that in the first instance the board of appeals erred in the application of its adjustment, the applicant must again resort to the board of appeals so that such board can provide a more adequate variance. The result is that the safety valve function of the board of appeals prevents cases of mandamus, and thus far has been one of the most important elements in protecting the zoning ordinance of the city of New York against any adverse decision from the courts on the ground of unconstitutionality."

assessed for benefits; disputes are settled by two justices (1890, §38). The local authority may require the rounding-off of corners on compensation (1907, §22).

Ancient monuments are protected by preservation orders confirmed by Parliament. While such an order is in force, the monument is not to be altered without the written consent of the Commissioners of Public Works; if the monument is liable to fall into decay, the commissioners may constitute themselves guardians (act of 1913). It is to be noted that this protective control requires in each instance the sanction of Parliament.<sup>3</sup>

*Germany.*—In Germany the matter of building is controlled by state law, which is recognized by the federal law even where trades (otherwise subject to the federal power) are involved (Federal Trade Code, §23). In Prussia the principle has long been established that the erection or the destruction of a building within a city, as well as the erection of dwellings outside of cities or of built-up districts, requires administrative approval, which in the latter case is conditioned upon the establishment of proper communications and upon provision for added municipal burdens. These are principles unknown to our law. The protection of aesthetic values has been frankly made the basis of a power to refuse permits in an act of 1907.

More particularly, the powers under the Prussian laws are as follows:

1. The Code of 1794 establishes for new erections a requirement of notification, and for new residences a requirement of consent (I, 8, §§67, 69); a permit is also necessary for the destruction of a building abutting on a street (§36); consent requirements also exist for structures affecting street lines (eaves, signs, bay windows, cellar doors [§80]). In default of notification on the part of the owner, he may be required to alter a noxious or disfiguring building; and if he fails to comply, the building may be removed (§71).

2. New Settlements Act of 1904: Consent is required for building a residence outside of a connected settlement, and for parceling an estate in a city into residences. The consent may be conditioned on providing ways for communication, and on draining in case of marshland. The consent may be refused by reason of facts showing a specified impending prejudice to mining or agricultural interests (§15). If the new settlement creates new municipal burdens, a special contribution may be exacted to meet the expenses of necessary improvements (§§17, 17a).

<sup>3</sup> For analogous French legislation, applying to objects of personal property of special value, see Eygout, "La protection des objets mobiliers d'art et d'histoire," 39 *Revue de droit public* (1922), 460.

3. Prussian Act of July 15, 1907: Building permits are to be refused where the proposed building would grossly disfigure streets or squares of the locality or its general appearance (§1). Local ordinances may provide for refusal of permits where a proposed building or alteration would impair the peculiar character of places having special historic or artistic significance (§2). Local ordinances may require permits for advertising signs, the permit to be refused under the conditions specified in sections 1 and 2 (§3). Permits may not be refused except after hearing experts and the mayor. Local authorities may appeal from the grant of a building permit (§6).

The following sections of the Federal Trade Code bear upon this matter:

Section 23 refers to state laws for special provision as to water-power works, as to the prohibition of private slaughter houses where public slaughter houses exist, and as to zoning ordinances.

Section 27 relates to noisy trades not included in previous specifications. Notice of these must be given to the local authorities. If the proximity of the proposed establishment will greatly disturb a church or school or other public building or hospital, a superior authority will decide whether the consent to the carrying on of the noisy trade shall be refused, or granted only under specified conditions.

Section 28 relates to wind-driven power works. As to these, there may be administrative regulations securing a certain distance from other properties or public ways.

§253. *Drainage of land.*—Where the drainage of land involves the participation of other owners than those freely consenting to the scheme, there must be at some stage of the proceeding an act of compulsion which determines the necessity or legitimacy of the undertaking.

The scheme may be, primarily, one undertaken by an owner for the drainage of his own land which cannot be carried out without affecting others either detrimentally or beneficially; or it may be a joint scheme for the benefit of an aggregate tract of land, which for drainage purposes constitutes a unit.

In either case, drainage may be simply a means of increasing the value of land, or it may be a supposedly sanitary measure removing sources of disease that may affect some particular district.

*New York.*—The earlier legislation of New York frankly treated compulsory drainage as a measure for the improvement of the land of a petitioning owner, and (barring schemes sanctioned by special leg-



islation) it was not until 1869 that the improvement of the public health was put forward as a justification of compulsory measures. The Court of Appeals was willing to concede the validity of compulsory drainage for the latter purpose, but not as a mere measure of land improvement (*Re Ryers*, 72 N.Y. 1); and a constitutional recognition (in 1894) of the right to drain across the land of others was construed as not authorizing the forcing of other owners into participation in the scheme (*Re Tuthill*, 163 N.Y. 133). Another recent amendment of the constitution (1919), which declares drainage to be a public use, is supposed to dispose of these constitutional difficulties.

In view of the judicial decisions, a good deal of the earlier New York legislation must be regarded as unconstitutional; however, before it was so declared, it was practically used, and its administrative features are therefore of interest. The Revised Statutes provided for an application to a justice of the peace and a jury of inquisition (2 Rev. St. 548); the act of 1869 substituted an application to a county court or the Supreme Court, and an appointment of commissioners by the court. The commissioners make all necessary inquiries and determinations, subject to review by the court. The principle of the act of 1869 is similar to that which prevails in most of the states of the union: the forcing of unwilling parties into a drainage scheme assumes the form of a special judicial proceeding in which the determination rests on general statutory prerequisites of public benefit, the court delegating the finding of facts, subject to its review, to an *ad hoc* body of commissioners presumably qualified to judge of the scheme.

This old system has been superseded by the Conservation Law of 1911 and its subsequent amendments.

For the court and its commissioners, the law substitutes the Water-Power Commission of the Conservation Department, consisting of the Conservation Commissioner, Attorney-General, and State Engineer and Surveyor or their representatives or deputies, i.e., of two technicians and one lawyer. This body may determine upon the drainage of lands, where drainage is in the interest of public health, safety, or welfare, and is of sufficient importance to warrant state interference, either of its own motion or upon application, making the necessary inquiries and findings, and giving opportunity for making objections. On determining in favor of the plan, the Commission enters upon its minutes an order organizing the drainage improvement district. The Commission's determination requires the concurring vote of the State Engineer and Surveyor, and is reviewable by certiorari.

The Commission also assesses benefits for the purpose of paying for the improvement (subject to review in manner similar to the determination of a board of assessors in making an assessment) and issues bonds to finance the scheme (article 8 of the law).

A separate portion of the law (art. 8A) provides for proceedings authorizing an owner to drain his lands across the lands of others. The compensation payable to the other owner may be reduced by benefits derived, but there is no provision for assessing the other owners for benefits. The proceeding is likewise conducted by the Water-Power Commission. Either party may apply to the Supreme Court for an order confirming, vacating, or modifying the decision of the Commission as may seem just and legal to the court.

An act of 1922 (art. 8B) permits the Commission to repair or enlarge ditches established under earlier laws, provided that the expense (which is to be assessed according to benefits as under the original scheme) does not exceed the sum of \$2,000.

*England.*—The principal statutes are those of 1531, 1847, 1861, 1918, and 1926.

The Sewer Act of 1531 committed the supervision of drainage to local commissioners of sewers appointed by the Crown and constituting courts of record. The act states their powers in very wide terms but admits of a construction, which appears to be the accepted one, whereby they merely enforce such drainage as, through juries of inquisition, they find to rest upon some pre-existing obligation, thus functioning by maintenance, repair, and replacement, but not by the establishment of new drainage schemes.<sup>3</sup>

The Land Drainage Act of 1847 (10 & 11 Vict. c. 38) made it possible for a landowner to drain his lands across the lands of others, subject to payment of compensation;<sup>4</sup> the Land Drainage Act of 1861 (24 & 25 Vict. c. 123) made it possible to organize joint drainage schemes, forcing the participation of non-consenting owners, upon the petition of the proprietors of one-tenth of the land within the proposed boundaries, and subject to the veto of the proprietors of one-third of such land; where the scheme is carried into effect through commissioners of sewers, there is a further veto power on the part of the pro-

<sup>3</sup> New drainage schemes were authorized by special acts of Parliament, e.g., the Bedford Levels, 15 Car. II., c. 17, 1663.

<sup>4</sup> The act of 1861 (§§72-83) gave additional facilities by application to justices of the peace and, on demand of the other owner, subject to arbitration.

prietors of one-half of the lands prior to the actual execution of the work (§§5, 31).

The acts of 1847 and 1861 place the control of drainage proceedings in the hands of the Inclosure Commissioners, a permanent central government office. They examine and, upon the proper findings, approve the scheme. Under the act of 1861, it is carried into effect either by local commissioners of sewers appointed by the Crown under the old law, or by drainage boards elected by the proprietors.

Every scheme under the act of 1861 requires confirmation by an act of Parliament.

The Inclosure Commissioners were merged in the Board of Agriculture upon its creation in 1889.

By an act of 1918, the Board of Agriculture is given power to carry into effect small drainage works where the total expense will not exceed £5,000 nor £5 per acre; it must also be found, upon hearing, that the expense will not exceed the expected increase in value: under these conditions, the expense may be assessed upon the lands benefited according to a scheme of apportionment. The Board of Agriculture may delegate this power to local bodies, provided that the majority of members in each case are members of local governing bodies (county councils, etc.). The act of 1926 vests the power in the county councils and authorizes them to require the owner to put a drain in repair, subject to appeal to a court of summary jurisdiction (with further appeal to the Quarter Sessions) or to an arbitrator.

Other than small schemes may be initiated by the Board upon petition or on its own motion. The petition must come either from local authorities or from the owners of one-tenth of the contemplated district; the proprietors of one-third of the area have an absolute veto power. If opposed, the scheme requires confirmation by act of Parliament.

*Germany.*—The German (Prussian) law relating to water, including drainage, was revised by an elaborate codification in 1913 (act of April 7, 1913).

The law provides both for an administrative license to drain lands across the lands of other owners, subject to payment of compensation (§§50, 51, 52, 72 [8], 76 [2]), and for the formation of drainage districts. The latter formerly required a royal charter in each particular case; now the formation is effected by statutory proceedings (§§238, 248-74). These are conducted under the control of the chief district officer of the government. The consent of the majority of the owners is

required; it must appear that the formation of the district is the only practicable method of effecting drainage and that there is a prospect of benefit; owners not benefited may be relieved from charges and have a right to compensation. The details of the proceedings are in the hands of a commissioner, who sees to the preparation of plans and specifications, organizes the representation of adverse interests, and makes all necessary inquiries. An owner compelled to join may complain to the regular administrative court, with a further appeal to the Chief Water Authority. The constitution or charter of the district, which is the result of the proceedings, requires confirmation by the chief district officer.

The district, when organized, is placed under the supervision of the state for the purpose of insuring the due maintenance of the work, and the observance of the charter and general law. The supervisory authority may enforce its orders directly by administrative measures. Disputes between the district and its members are settled by administrative jurisdiction (§§217 ff.).

*Comment on drainage legislation.*—The characteristic development of drainage legislation both in New York and England has been the eventual commitment of the control of the matter to permanent administrative departments of the government. In New York this displaced a judicial control exercised through *ad hoc* commissioners; in England it continued to utilize, in part at least, the ancient commissioners of sewers.

The conditions that may justify the forcing of unwilling owners into a drainage scheme vary so much from case to case that the exercise of a power to determine their existence must be attended by a considerable amount of discretion based on just estimates of a technical character. It is difficult to see how such a discretion can be adequately and impartially exercised by commissioners selected from small rural districts from case to case, or how the necessary qualifications can be supplied by a judicial officer not expertly advised. A permanent government department will supply in a far higher degree the requisite guaranties of expert knowledge and impartiality, and judicial review of its action will tend to be confined to questions of legality or to the correction of plain bias or abuse of power. Against possible excess of zeal or optimism, there are available the statutory checks upon the formation of the district: the requirement of hearings, and of plans and specifications, the veto power of the majority or even of a substantial minority of owners, and the confirmation of the scheme by a superior

political authority. These checks are better developed in England and Germany than they are in New York, which substitutes for them a broad judicial power of review; but in New York the law is quite new, and up to the present time, its powers have been used only to a very slight extent.<sup>6</sup>

§254. *Forests. New York.*—The powers relate mainly to fire protection. The law recognizes "fire towns," i.e., towns having lands which are part of the forest preserve. In these, fires may not be set for clearing purposes without the consent of the Conservation Commission, and in case of drought the Governor may prohibit hunting, fishing, trapping, or camping in specified areas (§54).

A few powers relate to railroad operation in forest lands: approval requirement for fire-protective devices on locomotives (§55) and for spark-arresters on power generators (§54); ordering railroad locomotives not properly equipped from service in fire towns (§50); ordering railroad rights-of-way in fire towns to be cleared of inflammable material (§55); also a few powers to exempt from statutory duties or to grant extensions of time (§§50, 55).

The Commission is given typical full powers for the protection of white pine (determining danger districts, defining disease, quarantine, destruction of prohibited plants; power to cut down trees on payment of compensation) (§57a).

There are no absolute powers of control over private forest man-

<sup>6</sup> *New York Conservation Commission Report 1911*, Vol. 2, p. 43: "The State has had drainage laws since its formation and considerable work has been done under such laws, but the result has been almost universal failure. Almost every swamp of any magnitude has through it one or more abandoned 'Commissioners' ditches.' The aggregate of sums thus spent is very considerable, and the results wholly incommensurate therewith. If we look for the reason for this almost universal condition we shall find it in the methods prescribed by the law for carrying on the work. Heretofore, these laws provided that the work should be done by commissioners appointed by the judge of the county court where the work is located. These appointees were always local men unused to the conduct of engineering matters, unused to securing and using competent technical advice, and frequently incapable of taking the large view of the problems involved. Business failure under such circumstances is to be expected. The provisions for drainage contained in the Conservation Law are designed to overcome these defects of procedure. The organization of the Conservation Commission is believed to be well fitted to overcome previous defects and hence it is expected that there will eventually result from the present law the reclamation of a considerable part of the 270,000 acres of swamp land in the State and an addition of at least \$15,000,000 to farm land values of the State. There has been but little done to develop this feature of our work."

agement; but if the owner desires the benefit of special forest taxing laws, the Commission must certify that the conditions of suitability are fulfilled.

There is no attempt to qualify powers by procedural requirements or remedial provisions.

*Germany.*—The Prussian Forest Law of April 1, 1880, requires official consent for the erection of any building in which fire is used, within a stated distance from a forest of stated size (§47). The details show the care which is typical of Prussian legislation. The consent may be refused, or given subject to conditions, if there is cause for apprehension of danger to the forest; the consent may be conditioned but not refused if applied for by the owner of the forest or for a building in a built-up locality (§48). The forest-owner is given an opportunity to object to the consent (§49). The decision must be accompanied by reasons and is subject to appeal to the administrative courts (§50).

The established Prussian policy has been not to subject the management of private forests to public control.

*England.*—The very recent attempts at forest legislation in England operate without administrative powers over private rights.

§255. *Mineral resources. Prussia.*—Important legislation is found in Germany where the general principle, different from that of the Anglo-American law, is recognized that minerals (ores, salts, and coal) are not part of the ownership of the soil but are subject to exploitation by the first searcher, subject to indemnification of the owner of the surface for damage done to his property. This state of the law necessarily calls for the exercise of official powers.

The Prussian Mining Law of 1865 vests these powers in mining authorities which are locally organized, subject to central supervision (Bergamt, Oberbergamt).

There is generally liberty of searching; but the Bergamt may determine that in a particular case preponderating considerations of public interest militate against searching, whereupon it is not permitted (§4).

The law determines under what circumstances the successful searcher is entitled to exploit the mineral resources; while a public grant is required, this grant is a matter of right (§34).

The mine-owner may require that the surface-owner transfer to him so much of his property as is necessary for the working of the mine; the necessity is administratively determined subject to appeal to the Minister in Berlin (§§135-39, 142, 145).

For preponderating reasons of public interest the mine-owner may be required to operate his mine; if within six months from the order he fails to comply, proceedings for confiscation may be instituted which the owner may contest in the regular courts (§65). The exclusion of administrative in favor of regular jurisdiction marks the extraordinary character of the proceeding.

The mine-owner is required to submit to the mining authority a plan of operation. The plan is examined with reference to safety and decency of working conditions and to possible prejudice to public interests, and within fourteen days may be objected to on either of these grounds; the objections are then disposed of upon hearing (§§67, 68).

If operations are conducted in contravention to the plan, the authority has a right to shut down the mine (§70).

A consolidation of mines is subject to official consent or confirmation, which may be denied if the mines are non-contiguous, or for opposing considerations of public interest (§49).

It will be noted that while administrative powers purport to be circumscribed by law, the vague reference to considerations of public interest as the guide of discretion is more common than is otherwise the case in German legislation.

A separate act of 1908 confers powers for the protection of mineral springs: Either upon the application of the owner or upon a public utility declaration issued by specified ministries jointly, proceedings are instituted for the formation of a protective district involving preliminary plan and consents, notice and hearing, and decision upon remonstrances. The district is marked off by the local authorities (chief local executive and Bergamt [§§2, 3, 4]). Upon similar procedure districts may be reduced and abrogated (§12).

The rule is that within the district any works that may affect the springs require official consent; the order establishing the district specifies what works do not require such consent and what works require previous notification (§4). Any works, whether licensed or license-free, may, if they cause danger to the springs, be enjoined or required to be removed, or may be permitted to continue only on compliance with conditions (§18). Injured owners are entitled to compensation (§§19, 27).

*England.*—English legislation for the encouragement of the exploitation of mineral resources is quite recent.

The Petroleum Act of 1918 establishes a searching-and-boring monopoly on behalf of the Crown, and authorizes the Minister of Muni-

tions to grant licenses, on behalf of the King, to produce oil. However this license is not to confer any privilege to enter upon lands which the licensee would not have without the license. This is obviously a very conservative beginning of legislation, and indicates a radically different view of state power over minerals from that of the Prussian law.

A greater advance in public power is manifested by the Mines (Working Facilities and Support) Act, 1923. The act applies to cases where there is danger of minerals being left permanently unworked because the voluntary concurrence of those having the requisite rights of property cannot be obtained (§11). The conditions for the operation of the act are either of the following: that the holders of rights are numerous and have conflicting interests; that they or any of them cannot be ascertained or found, or have not the necessary powers of disposition; or that consents are unreasonably withheld or unreasonable terms demanded (§4). In either of these cases a grant of the right to work may be obtained under the act by application to the Board of Trade, which however merely establishes the *prima facie* case and refers the matter for determination to the Railway and Canal Commission, which is practically a court (§5).

The Commission grants the right if "expedient in the national interest" and fixes terms and conditions and the compensation to be paid. The Commission is directed to consider specified technical matters and existing or customary terms of mining leases (§6). It also decides between competing applications (§7). As regards procedure and appeals, the Railway and Canal Traffic Act of 1888 applies, and provision is made for assistance to be given to the Commission by the Board of Trade and other government departments.

This act appears to introduce a new principle into the English law of property. An amendment of 1926 permits the alteration of the conditions of existing leases. The Mine Industry Act of 1926 provides for voluntary amalgamation and compulsory absorption schemes with reference to coal mines. The schemes are submitted to the Board of Trade or framed with its aid; and if the Board finds a *prima facie* case, the scheme is referred to the Railway and Canal Commission for final action.

*New York.*—Since in New York the only mineral resources of importance, the salt springs, are dealt with by legislation only in so far as they are owned by the state, there are no administrative powers requiring comment.



*United States.*—The mining laws of the United States relate only to mines on the public lands, and are therefore likewise beyond the scope of this survey.

§256. *Note on legislation concerning waters.*—Works and structures affecting waters are in increasing degree placed under some administrative control. In New York the powers are found in the Conservation Law and are in part of very recent date. The United States has assumed jurisdiction over navigable waters, and, either in connection with its public lands or for the protection of navigability serving interstate or foreign commerce, has also legislated concerning the creation of water power, and has vested important powers in the Secretary of War or in a water-power commission consisting of the Secretaries of War, of the Interior, and of Agriculture (acts of 1872, 1890, 1899, 1920). In England the subject is dealt with by local acts; see *Encyclopaedia of Law of England*, title "Rivers Conservancy". In Prussia a comprehensive water law was enacted in 1913, superseding numerous and in part ancient local laws and customs.

In estimating administrative powers over private rights, however, the subject of waters presents the peculiar difficulty that public and private rights are so closely intertwined that it is frequently difficult to determine whether in acting under the law the authorities control private property or are engaged in the assertion of public proprietary rights or easements. Thus, in New York article 10A of the Conservation Law relating to water power appears to apply only where it is proposed to divert waters which are *publici juris* or where the water bed or other required real property is vested in the state.

In view of the slight and recent development of this field of legislation in America, its local character in England, and its great complexity and unfamiliar aspects in Germany, the equivocal status of the administrative powers delegated seems to justify the elimination of their consideration from this survey.

Similar considerations apply to the control of the air; and it is too early to judge of legislation which is entirely in its initial stages.

§257. *Fish and game. New York.*—The fish and game laws of New York, like those of other American states (federal legislation is limited to migratory birds, the control of pelagic seal fisheries in accordance with the Bering Sea Arbitration Act of April 6, 1894, and some recent legislation for Alaska), are marked by a liberal grant of administrative powers.

In addition to the ordinary hunting and fishing licenses (the latter

are required only of non-residents), which are issued by local officers (county, town, or city clerk), there are special licenses, generally issued by the Conservation Commission, for many particular privileges, such as using specified devices (§§254, 255<sup>b</sup>, 270, 271), taking, keeping, or importing animals for stated purposes (propagation, scientific study, or exhibition [§§159, 178, 190, 377]), or relating to animals in inclosed preserves (§372). Shellfish grounds are annually certified (§310).

The power to revoke licenses is given in particular cases, sometimes for cause, sometimes at pleasure (§§159, 310, 313, 372, 372[8], 377). The certification of shellfish grounds may be canceled on prescribed procedure, and for any particular lot may be revoked by the supervisor of marine fisheries (§§312, 313).

The Commission approves plans for dams (§290) and may prohibit fishing within 50 yards of any dam (§251); it may order the construction of fishways (§241) and the removal of weirs and other like obstructions preventing the passage of fish (§246), and may, in specified cases, order the removal of nets (§278). It may authorize bird or game refuges (§153). Fish or shellfish hindering the propagation of more valuable fish may be removed from both public and private waters (§155).<sup>a</sup>

In a number of cases the Commission by general order fixes places or seasons for specified hunting or fishing (§§252, 254, 255).

On petition and hearing, the Commission may regulate or prohibit during the open season the taking of any species of fish (§132); on the other hand, it may also for limited periods lift prohibitions against taking birds or quadrupeds in any locality where they become destructive (§158).

Characteristic of this branch of legislation is the grant of summary powers: the officers of the Conservation Department may seize animals possessed in violation of law (§169); may seize and destroy trapping, snaring, or netting devices (§221), and abate, destroy, or sell nets not authorized by law (§282); they may also abate privies, pens, etc., draining into hatcheries (§248). The highest courts have sustained a former summary power to abate nets merely on account of their unlawful use (*Lawton v. Steele*, 119 N.Y. 226, 152 U.S. 133),

<sup>a</sup> Rule 34 of the Commission states that nothing contained in any of these rules and regulations shall be construed as compelling the issuing of a license to any person or as preventing the revocation of such license at any time,—a liberal construction by the Commission of its own powers.

while the forfeiture of a vessel disturbing oyster beds by proceedings before a justice of the peace was held unconstitutional as violating the guaranty of jury trial (*Colon v. Lisk*, 153 N.Y. 188).

Quite unique appears also to be the provision for taking lands and waters for propagating fish, by mere administrative procedure, the owner being given the right to claim damages in the Court of Claims (§59).

*England.*—Administrative powers under the game laws are few: an act of 1831 authorizes justices in their discretion (if they deem fit) to grant to persons not being victualers or sellers of liquor, annual licenses to buy and sell game, which licenses become void on conviction. The act also refers to existing laws requiring annual game certificates.

An act of 1860 requires also licenses for killing any game. These likewise become void on conviction.

A wild-bird protection act of 1880 contains only regulative powers which are vested in a secretary of state.

More important are the powers in connection with fisheries, formerly scattered through a considerable number of statutes, now in the main consolidated and systematized in the Salmon and Fresh-water Fisheries Act of 1923. The substantive provisions of the act are those common to fish conservancy legislation and are sufficiently indicated by the title headings: prohibitions of certain modes of taking and destroying fish; obstructions to passage of fish; times of fishing and selling; and exportation. Wide dispensing powers are vested in the Minister of Agriculture and Fisheries, or the fishery boards (§§1, 5, 8, 18, 19, 21, 23), and characteristic consideration is given to the matter of "trade effluents" (§8). Owners or occupiers may be required to construct and maintain fish passes in dams erected since the obligation was first established (1873), and fishery boards may with the consent of the Minister construct such passes or place or maintain gratings to prevent the passage of fish, subject to compensation for injury (§§19, 20, 24); where the diversion of water is due to the act of the owner, the duty to place and maintain gratings is placed upon him, subject to a dispensing power of the Minister (§23).

Administratively, the most interesting feature of the act is the provision of fishery areas and fishery boards by order of the Minister. The making of such orders is surrounded by the customary safeguards of notices and hearings, and, upon objection, Parliamentary confirmation of the order is required (§40). A fishery board consists of appointed, elected, and ex-officio members (the latter owners of waters or fishing

rights); and the provisions concerning its constitution present an exceptionally elaborate example of legislative regulation of bodies of that type (§§45-58).

The fishery boards have extensive rule-making powers (§§59, 60, likewise observing customary procedural safeguards), and grant fishing licenses. The provision of the older laws that, subject to the provisions of the act, every person demanding a license and tendering the fee (duty) shall, unless disqualified, be entitled to receive the license "without any question or objection whatsoever" is retained (§61). The exercise of the license through agents or servants is carefully regulated (§61). Subject to confirmation by the Minister, licenses may be limited in number; but if there is to be a reduction in number, there must be a previous inquiry and the Minister must be satisfied that any licensee depending upon fishing for his livelihood will be able to obtain a license (§62).

Examining and summary powers, such as are common in fish and game laws, are vested in water bailiffs appointed by the fishery boards (§§33, 34, 66-72).

The establishment of an oyster fishery requires a license which may contain provisions deemed expedient. The procedure (publication of notice, objections, inquiry) is fully regulated, and confirmation by Parliament is required. If not satisfied that the cultivation is properly conducted, the Ministry may revoke the license, and it may upon prescribed procedure prohibit or temporarily restrict dredging (act of 1868; the powers were originally vested in the Board of Trade). In minor cases the license is granted by an Order in Council, subject to cancellation.

In connection with sea fisheries there are in the main only rule-making powers (through Orders in Council) for good order among boats and persons, and for carrying the law into execution; examining powers vested in sea-fishery officers; and licensing powers (by Order in Council) to carry into effect the North Sea Fisheries Convention of 1893.

*Prussia.*—The administrative powers in connection with game and fish under the German (Prussian) laws (Fisheries, 1874; Hunting, 1907) are in some respects of a distinctive type.

As in England, the exercise of fishing rights as to time (subject to legal restrictions), species of fish, utensils, and rules in the interest of traffic and navigation, may be regulated by executive ordinance; as

elsewhere, there are permits to take fish, where otherwise forbidden, for scientific and breeding purposes. The exercise of fishing rights by the owner requires notification and certification.

The special powers are: that arrangements may be ordered for the purpose of minimizing immissions into waters that may be dangerous to fish; that in leasing fishing rights the separation of contiguous parcels requires approval with a view of guarding against uneconomical parcellation; and that official consent is required for the formation of owners' associations having common supervision for their object; by chief executive order membership in such an association may be made compulsory.

With regard to hunting, the Prussian system is that a person may hunt on his own land only if it is permanently and completely inclosed or if it is a continuous forest of a specified size. Otherwise, joint hunting preserves are formed, normally coexistent with a commune, under the headship of the mayor; and the hunting rights are normally leased. Whether the preserve satisfies the legal requirements, is administratively determined. Official consent is required for joint preserves being formed otherwise than by one commune, for exercising rights through appointed hunters instead of through leasing, and for leasing to non-Germans.

A person desiring to hunt must have a police certificate; the reasons for which such a certificate must or may be refused are specified in the law; it may be revoked only if facts appear which would have justified refusal; and the remedies are the same as in the case of other police orders.

Special protective acts for game (1904) and birds (1908) contain regulative, licensing, and dispensing powers of familiar types, that do not call for special notice.

## CHAPTER XXIX

### ADMINISTRATIVE POWERS UNDER REVENUE LEGISLATION

§258. *The New York Tax Law. Status of legislation and organization.*—The laws in relation to taxation were consolidated in 1909, constituting chapter 60 of the Consolidated Laws. The taxes included in the consolidation at that time were the general property tax, the corporation tax, the transfer tax (originally inheritance tax [1885]), the special franchise tax (1899), the stock transfer tax (1905), and the mortgage tax (1906). Other sources of revenue stood outside the consolidation, notably the liquor tax of 1896, repealed in 1921, and the motor vehicle tax. Since 1909 the corporation tax has been placed on a new basis (acts of 1916, 1917, 1922, and 1926), and there has been added the income tax (1919), while the moneyed capital tax (1923) appears as a form of the general property tax.<sup>1</sup>

The principal organs for administering the tax laws are local assessors (and for the transfer tax, appraisers appointed by the Tax Commission), boards of equalization, and a state Tax Commission, created in 1915, to which were transferred in 1921 the functions of the Comptroller in administering the transfer and income taxes. The surrogates have jurisdiction to determine questions under the transfer tax.

The Conservation Commission determines, certifies, and supervises the conditions under which, for the encouragement of forestry, wooded tracts are to be entitled to the benefits of a reduced tax rate (§17).

There are separate local tax organizations under special local laws, particularly for the city of New York; but the jurisdiction of the Tax Commission extends over the entire state.<sup>2</sup>

The Tax Commission consists of three members appointed by Governor and Senate for terms of six years, and removable only for cause.

<sup>1</sup> For a tabular analysis of New York taxes on December 31, 1923, arranged, first, as to title of tax payment, whether annual or single, basis of tax, measure of tax, and rate of tax; and second, as to administration, assessment, levy, collection, disposition, and dates of taxable status, return, and payment due, see *Report of Tax Commission, 1923*, pp. 66-73.

<sup>2</sup> Even the jurisdiction of the Tax Commission may be indirectly affected by local provisions (*Tax Report, 1918*, p. 37).

They devote their entire time to the duties of the office. The subordinate members of the department belong to the classified service of the state.

The Commission has full examining powers with reference to any matter within the line of its special duty (§§171[11], 171b) and is given particularly full power to examine the books and records of corporations whose reports are delinquent or unsatisfactory, and to take proofs material to its information (§195). The Commission may also call on the corporation for reports on specified facts required for tax computation purposes (§211[7]).

Assessors are elective officers without professional qualification, and so are the supervisors who constitute the boards of equalization.

In the city of New York there is, for the revision of assessments, an appointed board of three assessors and a board consisting of ex-officio members (Greater New York Charter, §§943, 944).

§259. *Powers in connection with the several taxes—General property tax.*—The general tax on real and personal property is assessed by local assessors, and the law prescribes assessment at full value. Taxable property and taxable persons are to be ascertained by diligent inquiry (§20). No specific examining powers are given at this stage to ascertain either the property or its value. The form of the assessment roll is in part prescribed by the statute, in part left to be prescribed by the Tax Commission (§21).

The statute fixes the time by which the assessment roll is to be completed and the period during which it is to be open to inspection (§36). The assessors then meet to hear and determine complaints. These are made by statement under oath. For the purpose of deciding upon the complaint, the assessors may summon and examine the taxpayer or any other person, and may either increase or diminish the assessment. A contumacious taxpayer is not entitled to reduction. Minutes of the examination are taken and filed with the town clerk (§37). On default of the assessors, the reviewing power is exercised by the board of supervisors (§41).

The county board of supervisors may also as against the taxpayer correct mistakes or omissions reported to them by the assessors for the current or preceding year (§56). A refund by reason of manifest error requires an order of the county court (§56a). Property liable to taxation, but judicially declared to have been illegally assessed, may be reassessed by the supervisors (§57).

Except as indicated, the law provides for no administrative appeal,

but permits judicial review by certiorari by reason of illegality, over-valuation, or inequality. The return to the certiorari must be verified and must set forth facts to show the value of the property assessed and the grounds for the valuation. The court may take evidence or direct a reference for the purpose. If the decision is in favor of the taxpayer and the tax has been paid (the proceeding does not stay payment), the law provides for an appropriate refund and proceedings therefor (§§290 ff.).

The function of the certiorari is very much wider than that of the same remedy either at common law or under the New York Civil Practice Act; but it will be noted that it is the only method of review provided by law.<sup>3</sup>

If a tax remains unpaid, property may be sold for its satisfaction by mere administrative process, real property for the taxes thereon, and any personal property of the taxpayer for any tax unpaid by him (§§71, 120-22). The provisions on this subject are not clear and are in part local. The power to sell lands generally, is clearly given in the case of the non-payment of the corporation or of the income tax (§§201, 219c, 380).

*Transfer tax.*—For the purposes of the transfer tax the value of the taxable estate is ascertained by appraisers vested with examining powers for that purpose (in some counties the county treasurer acts as appraiser, in others there are salaried appraisers appointed by the Tax Commission), and upon their report and other proof before him the Surrogate determines the amount of the tax (§§229-31), and he determines all other questions with reference to the tax (§228). On the value of future or contingent estates the certificate of the Superintendent of Insurance is made conclusive as to the correctness of the method of computation (§231). The Commission is made a party to all proceedings for ancillary letters (§228).

An appeal at the instance of any party dissatisfied or of the Tax Commission lies (within sixty days) to the surrogate himself; in addition, the Tax Commission may within two years appeal to the Supreme Court for reappraisal on the ground of fraud, collusion, or error (§232). The taxpayer is apparently left to his ordinary legal remedies, the transfer tax law being silent.

<sup>3</sup> It is said in the *Report of the New York Tax Reform Association for 1919* (No. 584) that unless a reduction of at least \$10,000 in the assessment can be reasonably expected, it is, in the city of New York, cheaper to pay than to make a contest.



The Tax Commission is given power with the consent of the Attorney-General to compound with trustees as to the tax on future interests not at present payable or ascertainable (§233).

Payment of the tax is enforced in the Surrogate's Court by the district attorney, on notice to the Tax Commission (§235).

The enforcement of the transfer tax is relieved from any limitation of time whatever, except that the tax, six years after its accrual, ceases to be a lien on real estate in favor of bona fide purchasers (§945).

*Corporation taxes.*—Taxes other than the general property and the transfer tax, are assessed by the Tax Commission. Of these, the stock transfer tax and the mortgage tax, and bank and insurance taxes, offer no difficult problems of assessment. As regards the corporation taxes, the following provisions deserve notice:

Special franchises are based on full reports in accordance with the requirements of the Commission; a hearing is given to the corporation and the municipality affected after the valuation, and the final determination is subject to review by certiorari (§§44-47).

Taxes for the privilege of doing business in the state, and measured by the capital stock employed within the state, are imposed by sections 182 ff. of the Tax Law. For the purpose of this tax the corporation in the first instance appraises its own capital; and the Tax Commission, if not satisfied, may make its own valuation and settle an account thereupon, which is subject to revision and resettlement, on application of the taxpayer, by the Commission itself, and is finally reviewable by certiorari upon the law and the facts at the instance of the taxpayer or of the state (§§193, 198, 199).

Taxes termed "annual franchise taxes" but based on net income of the corporation are imposed by sections 208 ff. of the Tax Law. The law prescribes the matters to be reported by the corporation under oath, and methods of computation, and directs the tax to be computed by the Tax Commission, which audits and states an account against the corporation. This account is subject to revision and resettlement upon hearing by the Commission itself, upon application within one year by the corporation, without apparently any provision for revision on behalf of the state; and it is only the decision made on an application for revision that is subject to certiorari. The warrant for collection by administrative process, which is generally available for the enforcement of this tax, does not issue while an appeal is pending. In favor of the state the law makes statutes of limitation inapplicable to

the right to assess, and gives power to reassess and reaudit as a consequence of similar action by the Commissioner of Internal Revenue with respect to the federal income tax, such action being ordinarily limited to four years, but unlimited in time in case of fraud or wilful evasion.<sup>4</sup>

*Income tax.*—The administrative powers in connection with the income tax are on the whole modeled on those of the federal law; the judicial remedy on behalf of the taxpayer is, in accordance with the general practice in New York, certiorari and not an action against the collector.

As in the federal system, the taxpayer makes his return; the Tax Commission may make rules as to depreciation allowance, verification of contributions, returns by withholding agents, and allocation of sources of income within and outside of the state (§§359, 360, 366[2]). It may require accounts that are not kept so as to clearly reflect income, to be changed so as to achieve that purpose (§358), and it may require partners to return gross receipts and net profits (§364).

If no return is made the Commission estimates income from any information it can obtain. It has full examining power (§373) and power to require reports (§383).

Returns may be revised upon hearing, within three years, or, if they are wilfully false, without limit of time (§§373-74).

In addition to provisions for enforcement by administrative process (warrant to levy on any property of the taxpayer; the warrant upon being docketed becomes a lien [§380]), the tax is declared a debt (§351), and the Attorney-General may sue to recover it (§381).

*Comment.*—Taking a general view of the administrative aspects of the New York Tax Law, they are less complex than the system of taxes itself, but still markedly incongruous. The anomalous features are: the absence of any rules for assessing real property, result-

<sup>4</sup> Chapter 286 of the laws of 1926 imposes additional taxes as follows:

1. Upon financial corporations, based partly upon net income and partly upon capital stock. The taxpayer makes an annual return, which the Tax Commission may revise, or, in case of the taxpayer's default, supply by its own estimate, settling and stating an account. Except in case of fraud there is a three years' time limit for the exercise of the revising power. The Commission is given full examining power. Upon application within one year, the Commission shall grant a hearing, and in proper cases, resettle the account. Its determination is reviewable by certiorari. The tax may be collected by administrative process.

2. Upon national banking associations, likewise based upon net income, the administrative provisions relating to the tax on financial corporations being made applicable by reference (Tax Law, §§219 *bb, dd, ee, ff, jj, rr, and ss*).

ing, as the Tax Commission has pointed out, in capricious inequality (*Report, 1923, p. 25*); the retention of a tax on personal property at full value with an abandonment of any attempt at genuine assessment; two different systems of ascertaining income, one for corporations, another for individuals; decentralization and consequent local variations in the assessment of the inheritance tax; the lack of a system of administrative appeals; and a judicial review extraordinarily wide in scope (covering overvaluation and unequal valuations), while beyond the reach of the ordinary taxpayer by reason of technicality and expense.

Against these features should be set the tendency toward standardization through the establishment of a tax commission charged with devising general improvements in taxing methods. The reports of the Tax Commission show an effort to carry out this purpose of the law. Sooner or later the assessment of real property will be placed on a basis of definite rule, and the personal property tax will be reformed in some way. It is clear that assessment is not an appropriate function of local self-government, unless the purpose of the law is loose liberality. Perhaps the same is true of collection by administrative process: if this is summary, it is also technical, and the Tax Commission has discovered that in many cases measures of collection by levy and sale will not stand legal scrutiny (*Report, 1918, p. 33*). Administrative powers will undoubtedly in the future undergo further changes in the direction of subordination to central control.

§260. *United States customs revenue legislation.*<sup>5</sup> *Status of legislation and administrative organization.*—While the tariff in American history has been a main issue of party politics, the laws concerning the collection of customs have been little affected by partisan considerations. The first Congress passed a revenue act laying duties on goods (July 1, 1789) and an administrative act for the collection of duties (July 31, 1789); in fact the first bill introduced to deal with collection had proposed to leave this altogether to the states, but this idea was soon abandoned (1 *Annals of Congress* 367, 453). The act of 1799 which superseded the act of 1789 was likewise an administrative act; a temporary act of 1818, superseded by a permanent one of 1823 (3 *St. L.* 729), dealt with appraisal; but from 1828 on (act of May 19, 1828, §§8-10) the tariff acts generally also contained administrative provisions, while numerous other acts con-

<sup>5</sup> The flexible or fighting clauses of the act of 1922 are dealt with under "Trade Legislation."

are required only of non-residents), which are issued by local officers (county, town, or city clerk), there are special licenses, generally issued by the Conservation Commission, for many particular privileges, such as using specified devices (§§254, 255*b*, 270, 271), taking, keeping, or importing animals for stated purposes (propagation, scientific study, or exhibition [§§159, 178, 190, 377]), or relating to animals in inclosed preserves (§372). Shellfish grounds are annually certified (§310).

The power to revoke licenses is given in particular cases, sometimes for cause, sometimes at pleasure (§§159, 310, 313, 372, 372[8], 377). The certification of shellfish grounds may be canceled on prescribed procedure, and for any particular lot may be revoked by the supervisor of marine fisheries (§§312, 313).

The Commission approves plans for dams (§290) and may prohibit fishing within 50 yards of any dam (§251); it may order the construction of fishways (§241) and the removal of weirs and other like obstructions preventing the passage of fish (§246), and may, in specified cases, order the removal of nets (§278). It may authorize bird or game refuges (§153). Fish or shellfish hindering the propagation of more valuable fish may be removed from both public and private waters (§155).<sup>6</sup>

In a number of cases the Commission by general order fixes places or seasons for specified hunting or fishing (§§252, 254, 255).

On petition and hearing, the Commission may regulate or prohibit during the open season the taking of any species of fish (§132); on the other hand, it may also for limited periods lift prohibitions against taking birds or quadrupeds in any locality where they become destructive (§158).

Characteristic of this branch of legislation is the grant of summary powers: the officers of the Conservation Department may seize animals possessed in violation of law (§169); may seize and destroy trapping, snaring, or netting devices (§221), and abate, destroy, or sell nets not authorized by law (§282); they may also abate privies, pens, etc., draining into hatcheries (§248). The highest courts have sustained a former summary power to abate nets merely on account of their unlawful use (*Lawton v. Steele*, 119 N.Y. 226, 152 U.S. 133),

<sup>6</sup> Rule 34 of the Commission states that nothing contained in any of these rules and regulations shall be construed as compelling the issuing of a license to any person or as preventing the revocation of such license at any time,—a liberal construction by the Commission of its own powers.

while the forfeiture of a vessel disturbing oyster beds by proceedings before a justice of the peace was held unconstitutional as violating the guaranty of jury trial (*Colon v. Lisk*, 153 N.Y. 188).

Quite unique appears also to be the provision for taking lands and waters for propagating fish, by mere administrative procedure, the owner being given the right to claim damages in the Court of Claims (§59).

*England.*—Administrative powers under the game laws are few: an act of 1831 authorizes justices in their discretion (if they deem fit) to grant to persons not being victualers or sellers of liquor, annual licenses to buy and sell game, which licenses become void on conviction. The act also refers to existing laws requiring annual game certificates.

An act of 1860 requires also licenses for killing any game. These likewise become void on conviction.

A wild-bird protection act of 1880 contains only regulative powers which are vested in a secretary of state.

More important are the powers in connection with fisheries, formerly scattered through a considerable number of statutes, now in the main consolidated and systematized in the Salmon and Fresh-water Fisheries Act of 1923. The substantive provisions of the act are those common to fish conservancy legislation and are sufficiently indicated by the title headings: prohibitions of certain modes of taking and destroying fish; obstructions to passage of fish; times of fishing and selling; and exportation. Wide dispensing powers are vested in the Minister of Agriculture and Fisheries, or the fishery boards (§§1, 5, 8, 18, 19, 21, 23), and characteristic consideration is given to the matter of "trade effluents" (§8). Owners or occupiers may be required to construct and maintain fish passes in dams erected since the obligation was first established (1873), and fishery boards may with the consent of the Minister construct such passes or place or maintain gratings to prevent the passage of fish, subject to compensation for injury (§§19, 20, 24); where the diversion of water is due to the act of the owner, the duty to place and maintain gratings is placed upon him, subject to a dispensing power of the Minister (§23).

Administratively, the most interesting feature of the act is the provision of fishery areas and fishery boards by order of the Minister. The making of such orders is surrounded by the customary safeguards of notices and hearings, and, upon objection, Parliamentary confirmation of the order is required (§40). A fishery board consists of appointed, elected, and ex-officio members (the latter owners of waters or fishing

rights); and the provisions concerning its constitution present an exceptionally elaborate example of legislative regulation of bodies of that type (§§45-58).

The fishery boards have extensive rule-making powers (§§59, 60, likewise observing customary procedural safeguards), and grant fishing licenses. The provision of the older laws that, subject to the provisions of the act, every person demanding a license and tendering the fee (duty) shall, unless disqualified, be entitled to receive the license "without any question or objection whatsoever" is retained (§61). The exercise of the license through agents or servants is carefully regulated (§61). Subject to confirmation by the Minister, licenses may be limited in number; but if there is to be a reduction in number, there must be a previous inquiry and the Minister must be satisfied that any licensee depending upon fishing for his livelihood will be able to obtain a license (§62).

Examining and summary powers, such as are common in fish and game laws, are vested in water bailiffs appointed by the fishery boards (§§33, 34, 66-72).

The establishment of an oyster fishery requires a license which may contain provisions deemed expedient. The procedure (publication of notice, objections, inquiry) is fully regulated, and confirmation by Parliament is required. If not satisfied that the cultivation is properly conducted, the Ministry may revoke the license, and it may upon prescribed procedure prohibit or temporarily restrict dredging (act of 1868; the powers were originally vested in the Board of Trade). In minor cases the license is granted by an Order in Council, subject to cancellation.

In connection with sea fisheries there are in the main only rule-making powers (through Orders in Council) for good order among boats and persons, and for carrying the law into execution; examining powers vested in sea-fishery officers; and licensing powers (by Order in Council) to carry into effect the North Sea Fisheries Convention of 1893.

*Prussia.*—The administrative powers in connection with game and fish under the German (Prussian) laws (Fisheries, 1874; Hunting, 1907) are in some respects of a distinctive type.

As in England, the exercise of fishing rights as to time (subject to legal restrictions), species of fish, utensils, and rules in the interest of traffic and navigation, may be regulated by executive ordinance; as

elsewhere, there are permits to take fish, where otherwise forbidden, for scientific and breeding purposes. The exercise of fishing rights by the owner requires notification and certification.

The special powers are: that arrangements may be ordered for the purpose of minimizing immissions into waters that may be dangerous to fish; that in leasing fishing rights the separation of contiguous parcels requires approval with a view of guarding against uneconomical parcellation; and that official consent is required for the formation of owners' associations having common supervision for their object; by chief executive order membership in such an association may be made compulsory.

With regard to hunting, the Prussian system is that a person may hunt on his own land only if it is permanently and completely inclosed or if it is a continuous forest of a specified size. Otherwise, joint hunting preserves are formed, normally coextensive with a commune, under the headship of the mayor; and the hunting rights are normally leased. Whether the preserve satisfies the legal requirements, is administratively determined. Official consent is required for joint preserves being formed otherwise than by one commune, for exercising rights through appointed hunters instead of through leasing, and for leasing to non-Germans.

A person desiring to hunt must have a police certificate; the reasons for which such a certificate must or may be refused are specified in the law; it may be revoked only if facts appear which would have justified refusal; and the remedies are the same as in the case of other police orders.

Special protective acts for game (1904) and birds (1908) contain regulative, licensing, and dispensing powers of familiar types, that do not call for special notice.

and amount (classification), as to all exactions subject to the jurisdiction of the Secretary; and he liquidates duties. His determinations and his refusal to reliquidate for clerical error discovered within one year are subject to protest within sixty days.<sup>11</sup> He is then required to review his decision; and if upon review he affirms it, or if he modifies it and there is a protest against his modification, he must transmit the case to the Board of General Appraisers for its determination (§§514, 515).

Where an appeal is provided, the collector's personal liability is abrogated (§513).

The act of 1922 also introduces a provision permitting American manufacturers or wholesalers to complain to the Secretary of appraisals deemed too low. The appraiser must then report to the Secretary subsequent importations of the merchandise to which the complaint relates, and his appraisal with the reason therefor, and the Secretary may instruct the collector to file an appeal for reappraisal at which the manufacturer or wholesaler may be heard; in any event he is informed of subsequent appraisals. If the appraisal is raised, the importer may appeal; and the manufacturer or wholesaler is heard on the appeal. The manufacturer or wholesaler may also appeal for a reappraisal, if not satisfied with the action of the Secretary or of the appraiser. Analogous provisions apply if the manufacturer or wholesaler is dissatisfied with classification and rate of duty. This novel right to intervene is somewhat tempered by withholding from the manufacturer or wholesaler the right to inspect the importer's papers, if the appraisers deem disclosure improper (§516).

There is provision for penalizing frivolous appeals, subject to review by the Court of Customs Appeals (§517).

Collectors as well as appraisers are given full examining powers with regard to persons and papers, which extend to merchandise previously imported within one year (§508). There is, of course, in addition, the examination of the merchandise itself, which is committed to the appraiser under the direction of the collector, and the manner of which (proportion of packages opened) is in part prescribed by the statute itself (§499). It is somewhat remarkable that the examination of personal baggage is provided for in permissive rather than in mandatory terms (§496).

There is a somewhat extraordinary provision for the exercise of examining powers in other countries: unless foreign exporters submit

<sup>11</sup> A protest is not required in case of personal or household effects.



to inspection of their books and papers concerning market value or classification of goods, the Secretary of the Treasury is to prohibit the importation of their goods and may instruct the collector to withhold their delivery (§510).

*Finality of action.*—The former distinction between appraiser's decisions, which were conclusive upon all parties (i.e., including the government), and collector's decisions, which were conclusive upon all parties interested in the goods, disappears in the act of 1922, which, subject to appeal, makes conclusive upon all parties both the decisions of appraisers (§501) and the decisions of the collector as to the following: rate and amount of duties, exactions of whatever character within the jurisdiction of the Secretary of the Treasury, exclusion of merchandise, refusal to pay claims for drawback, and refusal to re-liquidate for clerical error discovered within one year from entry (§514). This leaves uncovered the passage of goods free of duty, and apparently also the ordinary liquidation of duties without decision by the collector, to which the provision of section 521 applies. Finality here attaches at the expiration of one year from entry or sixty days from liquidation (whichever is the later period), except in cases of fraud or protest (this limitation was first introduced in 1874); and in case of probable cause of suspicion of fraud, reliquidation is limited to two years from entry or liquidation, this latter limitation being first introduced by the act of 1922 (see *U.S. v. Calhoun* [1911], 184 Fed. 499; *Hawley v. U. S.* [1912], 3 Customs Appeals 456; *U.S. v. Vitelli* [1914], 5 *ibid.* 151).

The present "finality" provisions are more liberal than those in connection with the income tax; but this, in view of the fact that the amount of duty controls the importer's subsequent commercial calculations, is only natural.

Where overpayment is ascertained on final liquidation or reliquidation of an entry, the Secretary is directed to make refunds out of moneys permanently and indefinitely appropriated for the purpose (§520).

The Secretary of the Treasury has power to make regulations to secure uniform appraisals (§502), and to provide for cases where in his opinion the value of merchandise cannot be declared; also for declaration and entry of articles and effects which do not come in the regular course of commerce (§498).

His decisions on the construction of revenue laws are binding on customs officers (a provision introduced in 1847, which logically but

tardily led in 1890 to the abrogation of the appellate jurisdiction given to him in 1864); and a construction once made by him cannot be altered by him or a successor in office adversely to the United States, except in concurrence with an opinion of the Attorney-General or a decision of the Board of General Appraisers (§502).

The history of powers in connection with the assessment of duties furnishes an instructive chapter in the history of administrative law; while the rules to prevent undervaluation have become more and more stringent, this has been done more by specific statutory direction than by enlargement of administrative discretion; and the development of the remedial side of the law presents the most striking attempt in our law to surround administrative review with judicial safeguards, resulting finally in the establishment of a special court for the determination of questions of law belonging to this technical branch of administration. The longer history has given us a more systematic organization of appellate relief than we find as yet in connection with the income tax.

§263. *United States internal revenue legislation. Status of legislation and organization.*—Beginning with the Civil War, internal taxes became an important source of federal revenue, but secondary to customs duties. These taxes in their permanent post-war form were imposed principally upon special classes of business (alcoholic liquors, tobacco). The system involved in part very incisive powers of control of a technical character, which it would be unprofitable to describe in detail (see Rev. St. §§3255, 3259, 3260, 3263, 3264, 3265, 3267, 3270-74, 3285, 3293, 3294, 3297, 3310, 3311, 3320, 3330, 3350, 3357, 3383), but also included examining powers and powers of assessment, collection, and enforcement. These powers are available for taxes of less specialized character; and they continue, partly in amended form, applicable to the present revenue laws.

The internal revenue system gained additional importance through the introduction of estate (or gift) taxes, and particularly through the adoption of the income tax amendment to the federal Constitution and its fructification for the purpose of meeting the expenditures caused by the World War. The internal revenue now greatly exceeds that derived from duties on imports (from 1922 to 1923 approximately \$2,600,000,000 as against \$560,000,000).

The legislation under which this revenue is collected has been rewritten repeatedly in recent years, particularly in 1924 and 1926; and

the following statement of administrative powers is based upon the Revenue Act of 1926.

The administration of the law is committed to a Commissioner of Internal Revenue under the Secretary of the Treasury, a General Counsel for the Bureau (until 1926 Solicitor of Internal Revenue), and to collectors of internal revenue in districts established by the President. The statutes also provide for deputy commissioners, deputy collectors, heads of divisions, storekeepers, and gaugers. The act of 1924 created a Board of Tax Appeals of initially not to exceed twenty-eight and permanently seven members, a quasi-judicial authority designated by the statute as "an independent agency in the executive branch of the government."

The statutory provisions, of course, give no indication of the size of the force required for the administration of the tax laws. On June 30, 1922, the personnel included 7,275 persons employed in Washington, 7,110 in the collectors' offices, 3,251 as an internal revenue agents' force, 51 supervisors of accounts and collections, 52 special agents (special intelligence units), and 575 storekeepers; altogether 18,314 persons (*Report of Commissioner, 1922, p. 46*).

§264. *Income tax. Self-assessment.*—In view of the overshadowing place of the income tax in the system, the administrative powers in connection with the collection of that tax have received the greatest share of legislative attention.

The characteristic feature of the system is the primary self-assessment of the taxpayer; that is to say, the normal collection requires no previous administrative determination; but under statutory provisions, made as specific as the nature of the case permits, and on printed forms containing or accompanied by full instructions, the taxpayer makes a return in which he himself computes his tax liability and makes payment in accordance therewith.

In order to make this system workable, a great part of the law is given to definitions and directions for determining the various factors upon which the computation of the income depends, directions addressed to the taxpayer without duty of administrative determination in the first instance; even where the basis of determination is matter of estimate rather than of computation, or otherwise matter of judgment, the primary decision is not shifted to the administrative authority (repeated references to "fair market value"; §200d: "unless in order to clearly reflect income the deductions or credits should be taken as of a different period"); thus the reasonable "allowance" for wear

and wear and obsolescence of property used in business (§§214[8], 234[7]) and for depletion of natural resources and depreciation of improvements for their exploitation (§§214[9], 234[8]) is an allowance in the first instance determined by the taxpayer himself, and while the law refers to administrative rules and regulations to control such allowances for depletion and depreciation, the application of these rules to the peculiar conditions of each case is still left to the primary judgment of the taxpayer; it may also be presumed that where the law excludes from the taxable income of a non-resident alien amounts received from a domestic payer, if less than one-fifth of the income of such domestic payer is shown to the satisfaction of the Commissioner to be derived from domestic sources (§§217a, [1] and [2]), the taxpayer may at his peril take the benefit of the provision without any prior administrative determination (Regulations, art. 317; Montgomery, *Income Tax Procedure* [1924], p. 1333). Only in a few minor instances does the act expressly refer to the Commissioner's action without prior action or default on the part of the taxpayer; he approves of a change of an accounting period (§212c); he may allow a debt recoverable in part to be charged off in part, and may in his discretion permit a reasonable addition to reserve for bad debts in lieu of deducting them (§§214[7], 234[5]); his permission is required for abandonment by affiliated corporations of a basis of consolidated returns once adopted (§240a), and he is charged with ascertaining the original value of property acquired by gift, if the necessary facts are unknown to the donee (§204a[2]).

On the same principle, where under section 285 the Commissioner, by reason of apprehension that the collection of the tax may be prejudiced, declares the taxable period immediately terminated, the law requires him to make a demand for immediate payment of the tax, but neither requires nor authorizes him to specify the sum which is due. It is true that the same section in the case of an alien provides for a certificate of compliance with all obligations under the tax laws, without which the alien may not depart; but as the certificate is intended to operate merely as a permit for departure, it probably does not operate as a conclusive determination in favor of the taxpayer.

The production of a correct return must rest upon data of which the taxpayer has possession or information, and the accuracy of the return is in a measure secured by the oath or affirmation required of him and the severe penalties placed upon inaccuracy. It is obvious, however, that without systematic records kept by the taxpayer it is difficult to check the accuracy of the return. In view of this it should

be noted that this important matter is delegated entirely to the administration; the duty to keep records depends upon rules and regulations prescribed by the Commissioner with the approval of the Secretary, or upon a specific order of the Commissioner (§1102a, b); and by rule the duty has been imposed upon all persons carrying on the business of producing, manufacturing, purchasing, or selling commodities or merchandise except the business of growing and selling products of the soil. The difficulty of requiring records of individuals outside of a commercial business is obvious, and it was perhaps this consideration which moved Congress to leave the entire matter to administrative ruling; the law gives no indication as to the conditions under which particular individuals may be singled out for the requirement to keep records, or whether and to what extent other than customary practices may be imposed.

§265. *Administrative assessment of income tax.*—Administrative action is thus normally subsequent to the taxpayer's self-assessment expressed in his return. Section 271 provides that as soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax. The term "assessment" is not used in this section, and no provision is made for bringing a determination, which finds the return to be correct, to the notice of the taxpayer; if actually communicated to him, it still remains a question whether it is legally equivalent to an assessment; if uncommunicated, it is probably entirely inconclusive. The term "assessment" is likewise not used in section 285, which requires the Commissioner to terminate the taxable period of a taxpayer about to depart from the country or to remove his property and to demand immediate payment or security.<sup>12</sup> The term "assessment" appears to be used in the act only to designate the administrative fixing of the sum due as a consequence of a deficiency or failure to make a return (§§273, 274, 1103, incorporating section 3176 of the Revised Statutes).<sup>13</sup>

<sup>12</sup> In favor of citizens departing from the country the requirement is subject to waiver, and is actually waived.

<sup>13</sup> Section 1100 of the act of 1926 makes a part of the act all administrative provisions of law including the law relating to the assessment of taxes so far as applicable; but the Revised Statutes contain no general power to assess, merely giving the Commissioner under the direction of the Secretary, general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue. This hardly amounts by itself to an authority to assess not otherwise provided for.

There should also be noted the provision in section 277 requiring income

The question of the power to assess an income tax prior to or contemporaneously with a taxpayer's return and payment, or even subsequent thereto in the absence of a deficiency, is of importance in view of the provision of the law which permits an agreement between the taxpayer and the Commissioner, subject to the approval of the Secretary, making a determination and assessment of an income tax final and conclusive (§1106). Unless there is a power of primary assessment, such an agreement can be made only with reference to a deficiency or delinquency assessment.<sup>14</sup>

An express power of primary assessment, subject to proper safeguards, would seem to be desirable; on the other hand, it cannot be conceded that, as has been contended (Carl C. Plehn, "An Income Tax Assessment Roll," 27 *Journal of Political Economy* 375, 1919), a duty of primary assessment would be either desirable or practicable.

The absence of an explicit power to assess irrespective of default is particularly striking in view of the fact that in the absence of an assessment, judicial proceedings must be brought within four years from the return, while the making of an assessment permits judicial proceedings within six years thereafter (§278d).

The chief administrative power in connection with the income tax being that of questioning and correcting taxpayers' returns or defaults (in the year 1922-23 one-half of the cost connected with the collection of internal revenue [i.e., \$18,000,000 out of \$36,000,000] was expended in auditing the returns from 1917 to 1921), the act regulates the exercise of the power in full (§§273-79) and subjects it to certain remedial provisions.

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taxes to be assessed within three years after filing of the return. This is a limitation provision and normally would not be construed as affirmatively conferring a power which is not given elsewhere in the act. However, subdivision 4 of the same section provides, with respect to income received during the lifetime of a decedent, that the tax shall be assessed within one year after written request therefor by the executor or administrator. This does seem to give an affirmative right to an assessment upon request, since it is the only provision in the act to that effect; and since therefore, a limitation provision in the subdivision cited does imply an affirmative power, the same contention may be made on the basis of the limitation provisions of the other subdivisions. In this way a power of primary assessment might be read into the act.

<sup>14</sup> It may be said that in any event there can be no practical difficulty, since it is possible to arrange for a pro forma return of less than the amount believed to be due and a subsequent deficiency assessment as the basis of the agreement; this is true, provided the oath by which the return is required to be supported is also treated as a pro forma matter.

§266. *Enforcement, limitation, and remedial provisions.*—The determination of a deficiency or default is followed by a notification, which is preliminary to the assessment, except where the Commissioner believes that delay will jeopardize assessment or collections, in which case he is required to assess immediately.<sup>15</sup> In the ordinary case the taxpayer is given sixty days after notification in which to appeal to the Board of Tax Appeals; under the act of 1921 he had thirty days in which to appeal to the Commissioner himself, who provided an appropriate appeal organization in his office; the purpose of the change in 1924 was to provide a non-judicial appeal jurisdiction independent of the commissioner.<sup>16</sup> If the taxpayer does not appeal, or in so far as his appeal is unsuccessful, the deficiency is assessed and notice and demand is made for payment. If the assessment is immediate, without opportunity for appeal, the taxpayer may, upon giving security, file a claim in abatement, which stays the collection pending the final disposition of the claim. An adverse decision upon the claim is likewise subject to appeal to the Board of Tax Appeals.

Prior to the act of 1926 a successful appeal to the Board of Tax Appeals, in either case, did not preclude suit in court by the government to enforce the tax imposed by the law, nor did an unsuccessful appeal debar the taxpayer from his right of action. The act of 1926 makes the decision of the Board of Tax Appeals reviewable only by direct appeal (§§1001-4).

The Revenue Act (§1103) also amends and incorporates section 3176 of the Revised Statutes relating to failure to make returns and to false or fraudulent returns (whether wilful or otherwise). Either the collector (subject to amendment by the Commissioner) or the Commissioner may in such a case make a return "from his own knowledge and from such information as he can obtain through testimony or otherwise." This return is made *prima facie* good and sufficient for all legal purposes, and the Commissioner thereupon assesses the tax.

Both assessment and collection are subject to time limitations in

<sup>15</sup> It appears from the *Commissioner's Report of 1923*, p. 4, that of \$460,000,000 deficiency assessments, \$132,000,000 were "jeopardy" assessments, and of these \$5,600,000 were paid without protest.

<sup>16</sup> Notwithstanding the provision for appeal to the Board of Tax Appeals by the act of 1924, opportunity is still afforded by regulation for more informal reconsideration by protest, conference, and hearing before the Solicitor of Internal Revenue or General Counsel, and also for protest and conference in the collector's office in cases in which he audits the returns. See Holmes, *Federal Taxes* [6th ed.], §808.

accordance with the provisions of sections 274, 277, 278, and 279 of the act. Judicial proceedings cannot be brought after the time for making an assessment has expired without making an assessment; but there is no analogous provision for distraints.<sup>17</sup> After the making of an assessment, six years remain for either judicial proceedings or distraint. There is no other explicit limitation provision for distraint. Distraint must be made within ten days after notice and demand (Rev. St., 3187); but it does not appear that notice and demand are limited in time; if so, in the case of no assessment, which is the normal case, the right of distraint would be unlimited in time. The right to assess or enforce the tax is also unlimited if no return is made, or if the return is false or fraudulent with intent to evade the tax, or if it is a question of correcting a deduction tentatively allowed for depletion or depreciation.

The limitations on criminal prosecutions are specified in section 1110.

Apart from these limitation provisions, section 1106 provides that after determination and assessment, and payment or acceptance of refund, credit, or abatement based thereon, the taxpayer may make an agreement in writing with the Commissioner, with the approval of the Secretary, making such determination and assessment final and conclusive, barring, except in case of fraud or malfeasance, any reopening either administrative or judicial. The additional provision of section 1107 that except in the case of fraud or mathematical mistake a decision of the Commissioner on the merits of a claim shall be conclusive on any other administrative or accounting officer, seems to imply that the Commissioner himself may reopen his prior decisions.<sup>18</sup> The finality of administrative decisions in favor of the taxpayer is therefore very qualified. A somewhat unique check upon the abuse of administrative power is, however, found in section 1105; besides prohibiting unnecessary examinations and investigations, it provides that only one inspection in each year of the taxpayer's books of accounts shall be made unless after investigation the Commissioner notifies the taxpayer in writing of the necessity of additional inspection.

<sup>17</sup> The present Revenue Law speaks of proceedings in court; the Revenue Act of 1921 (§250d) spoke of "suit or proceeding," and this was held to make the limitation provision applicable to distraints (*Bowers v. N.Y. etc. Co.* [1927], 47 Supr. Ct. Rep. 389).

<sup>18</sup> A suit by the collector requires express authority from the Commissioner: Reg. 65, art. 1202; Reg. 62, art. 1006; Reg. 45, art. 1008, *Holmes, op. cit.*, p. 1388. The power to compromise is safeguarded by Rev. St. §3229.



If administrative action in connection with the collection of the income tax lacks conclusiveness in favor of the taxpayer, it is also inconclusive as against him. The act provides for refund (or credit as the case may be) of any amount overpaid, and "overpayment" must be taken to mean payment in excess of any amount due by law. The absence of power of primary determination and assessment would operate here in favor of the taxpayer; a deficiency assessment presupposes a deficiency but does not establish one that does not actually exist; if it is paid and if the payment is in excess of the amount due, it is recoverable. For the same reason the Commissioner's determination creates no legal presumption against the taxpayer, except by express statutory provision. By express provision, a presumption of correctness is created in favor of the returns made by the collector or amended or made by the Commissioner under section 3176 of the Revised Statutes (the keeping alive of which sections by the Revenue Act [§ 1103], in concurrence with the power of deficiency assessment under section 274, is therefore of additional importance). The presumption created by section 285 operates only in respect of the taxpayer's design or intention.

The law provides (§§ 1111-13, amending Rev. St., §§ 3220, 3226, 3228) that the refund must be sought in the first instance administratively within four years after payment, by filing a claim with the Commissioner, a judicial proceeding being permitted only after its rejection or in case of its non-disposition within six months. The judicial proceeding must be brought within two years after disallowance of the claim or five years after payment of the tax. The action for recovery is made independent of any protest.

The judicial proceeding is either a suit at common law or one authorized by statute.

At common law an action for money had and received lies for money not due according to law which has been paid to a collector under duress. In the federal administration this action was developed in connection with the collection of customs duties and was there finally superseded by administrative remedies. In connection with the internal revenue the action against the collector remained the common remedy, and the Revised Statutes recognize it in section 3220 (incorporated in the Revenue Act of 1926 by § 1111), under which the government assumes payment of judgments against the collector (also Rev. St., § 989). The right to sue is no longer dependent on duress. It is one of the peculiar consequences of the common law theory of the

action that it cannot be brought against the successor in office of the collector to whom the overpayment was made.<sup>19</sup>

The statutory proceeding is a suit against the United States, either in the Court of Claims or in the district court. The jurisdiction of the district court is normally limited to claims not exceeding \$10,000, but in consequence of the *Smietanka* decision, just referred to, was made unlimited where the collector to whom the payment was made is dead (Act, 1926, §1122, including §24, No. 20 of the Judicial Code).

This latter provision at the same time serves to give express recognition to the jurisdiction of the Court of Claims over claims by reason of revenue illegally exacted. This jurisdiction was first sustained with reference to customs duties in the case of *Dooley v. U.S.*, 182 U.S. 228, the logical soundness of which decision has been questioned, though sustained by subsequent decisions.

However, so far as internal revenue is concerned, the jurisdiction of the Court of Claims is clearly sustainable as falling within the category of "claims founded upon a law of Congress," since the Revenue Act explicitly declares a duty to refund overpayments (§§284a, 1111).

Since the judicial remedy on behalf of the taxpayer for recovery of internal revenue taxes alleged to have been unlawfully exacted rests upon general principles of law, the scope of the remedy is coextensive with the wrong, and may be sought both for error of law and for errors of fact. Any overpayment made in compliance with an official demand is thus recoverable. The distinction made in the customs administration, at the time when actions against the collector were still the normal remedy, between judicially reviewable questions of law and fact on the one hand and judicially unreviewable questions of appraisal on the other, does not apply to the income tax administration, in which the function of appraisal has no place.

It remains to note two provisions in the scheme of enforcement and relief: the one, regulated by the Revised Statutes, §§3187-3205, providing for distraint by the collector of the taxpayer's property, both personal and real, for unpaid taxes (the act of 1924 amends section 3187 by including bank accounts in the list of assets subject to distraint); the other forbidding any suit for the purpose of restraining the assessment or collection of any tax. Both these provisions are of older date and are merely retained for the purpose of income tax administration. They operate against the taxpayer. Again, however, the lack of a primary assessment seems relevant: for on general principles,

<sup>19</sup> *Smietanka v. Illinois Steel Company*, 257 U.S. 1.

in the absence of a Commissioner's assessment and warrant protecting the collector the latter would be liable in trespass for a distraint not justified by the facts, the decisions under the earlier law, when there was regularly an assessment protecting the collector, being inapplicable (*Erskine v. Hohnbach*, 14 Wall. 613; *Harding v. Woodcock*, 137 U.S. 43).

The provision for appeal to the Board of Tax Appeals by the act of 1924 reduced the power of distraint; for a deficiency disallowed by the Board was collectible only by suit brought by the government (§274*b*). Under the act of 1926 the decision of the Board of Tax Appeals can be reviewed only by direct appeal to the Circuit Court of Appeals or the Court of Appeals of the District of Columbia (§§1001-4).

As is usual in tax laws, deferred payment of the tax entails additions by way of penalty, and it is to be noted that all penalty provisions are mandatory.

§267. *Estate tax.*—The system of administrative powers provided by the income tax law is substantially adopted for the collection of the estate tax, i.e., there is primarily self-assessment with a provision for deficiency assessments by the Commissioner. It is true that the executor may request a determination of the amount due, which in that event must be notified to him within one year from the filing of the return (§313*b*); but this serves only to discharge the executor from personal liability, and does not relieve the estate from subsequently established deficiency assessments. The system of primary self-assessment is much more remarkable in the case of the estate tax than it is in the case of the income tax; for when principles are settled, the amount of income is, in the great majority of items, a matter of mathematical computation, whereas there can never be any final criterion as to the capital value of an estate; the primary self-assessment must necessarily be more or less conjectural. In practice the deficiency assessment will therefore tend to assume the function of a primary assessment.

§268. *Comment on internal revenue powers.*—Reviewing the entire system of administrative powers in connection with the income tax, the striking feature, as before observed, is the absence of primary official assessment, with a corresponding absence of finality, short of the statute of limitations, either on behalf of the government or on behalf of the taxpayer. What powers there are under the law, are vested in the Commissioner of Internal Revenue; but the law does not undertake to

vest in him either discretionary powers or absolute powers of determination, with the exception of rule-making and examining powers<sup>20</sup> and a few dispensing powers which on the whole are merely of the familiar type. In other words, there are no powers comparable to those of the Interstate Commerce Commission. The de facto powers of the Commissioner are inherent in the situation: where the computation of income depends upon difficult questions of law or fact, a power of deficiency assessment, though theoretically inconclusive, may place a considerable burden upon the taxpayer, particularly in view of the government's summary power of collection, and of the requirement of payment as a condition to bringing proceedings in court. The creation of the Board of Tax Appeals in 1924 is a recognition of the desirability of an independent review which is not clogged by the formalities and conditions of judicial relief. Whether the same type of review could be localized and made adaptable to small cases is another question difficult to determine.<sup>21</sup> It was also somewhat anomalous that, while the administrative review is centralized, the judicial review until 1926 was decentralized, so that any one of many district courts might reverse the Board of Tax Appeals or Commissioner, resulting possibly in diverse rulings to be ultimately harmonized by the Supreme Court. The logical development would seem to be the establishment of one appellate review tribunal superseding the district courts, in analogy to the Court of Customs Appeals; and so far as the decisions of the Board of Tax Appeals are concerned, this has at least in part been brought about by eliminating, in 1926, the reviewing power of the district courts.

§269. *The English Income Tax Law.*—The complexities of English revenue legislation forbid a detailed statement of administrative

<sup>20</sup>The Commissioner of Internal Revenue is authorized by any revenue agent or inspector to examine papers etc., bearing upon the matters required to be included in the return, may require the attendance of the person making the return or of any person having knowledge in the premises, and may take testimony with power to administer oaths (§1104); the collector or his deputy has merely power to administer oaths and take evidence, where such oaths and evidence are authorized by law or regulation (Rev. St., §3165, incorporated in §1115).

<sup>21</sup>At the meeting of the National Tax Association in 1924, Mr. Winston, Under-Secretary of the Treasury, stated that the Treasury had desired a Board of Tax Appeals of twenty-eight, so as to provide for minor boards, of three men each, to sit in the nine judicial circuits and act informally (*Proceedings*, p. 272). At the same meeting Mr. Hamel, the first chairman of the Board, pointed out the difficulties of this plan (*ibid.*, p. 281-84). However, there are local sittings of divisions of the Board.

powers, which in many respects would remain unintelligible to the foreign student. The writer of the article on the "Land Tax" in the *Encyclopaedia of the Laws of England* refers to the difficulty of comparing and reconciling numerous acts, and an extract given in a footnote from a recent treatise on finance shows how little can be learned from a mere recital of statutory provisions.<sup>22</sup>

Reliance on secondary sources of information is therefore inevitable, and for English income tax administration we fortunately possess an excellent study written by an American, which shows the actual

<sup>22</sup> E. Hilton Young, *The System of National Finance*, p. 107. "The local organization of the collectors of customs and excise is the chief instrument for the collection not only of duties of customs and excise but of taxes of all sorts, both for the commissioners at the Custom House, who are in direct control of the collectors, but for the Board of Inland Revenue also. Somerset House does collect some of its own revenue, and in particular the stamp duties which it collects at local offices for the sale of Inland Revenue Stamps such as those at Somerset House and at the Stock Exchange in the city of London; but it has no district collectors of its own for the country as a whole. It has its local surveyors, the surveyors of taxes, to be distinguished from the surveyors of customs and excise. Surveyors and inspectors of taxes number over six hundred with one thousand clerks to help them. Each surveyor of taxes has a district, with an assistant surveyor and from two to four clerks under him. The functions of the two sorts of surveyors are similar. As in the case of the surveyors of customs and excise, it is the duty of the surveyor of taxes to "raise a charge" against a collector. The collector against whom he raises it is the collector of customs and excise, acting in this connection as collector of the Inland Revenue as well. There is thus the same parallelism and division of functions in the collection of the direct taxes that we have already noticed in the collection of the indirect. The collectors collect the direct taxes charged against them by the surveyors of taxes, and remit them to the account of the commissioners of Inland Revenue at the Bank of England. They account for them to those commissioners and to their own official superiors, the commissioners of customs and excise. Periodically the Commissioners of Inland Revenue transfer the proceeds of their collections from their own account at the Bank of England to the Exchequer's Account. The chief head of revenue with which the Board of Inland Revenue is concerned, the Income Tax, is collected on a system of its own. It is a cumbrous old machine constructed when the taxpayer was less well broken to the bit than he is now. When the Income Tax was born, the taxpayer was fearful of oppression at the hands of the local tax collector. Excise and exciseman were still words capable of raising a riot as they had been in Walpole's time. Dislike of inquisition into a man's means was strong then, and is not yet extinct. There are traces of all these things in the anomalies of the income tax machine and of states of the social mind far more remote even than they. To protect the taxpayer from official inquisition, the collection of income tax is controlled by private persons not in the employment of the state. These are the District Commissioners of Inland Revenue, men of good standing in the district for which they act. If a taxpayer prefers to be dealt with by pro-

working of the law at the end of the nineteenth century.<sup>23</sup> Since that time the introduction of the supertax has necessitated administrative innovations, and the income tax law has been consolidated in 1918, but the account is still valuable as showing how misleading it would be in many instances to rely upon the letter of the statute.

A salient feature of the English income tax is the simplification of its administration by the system of collection at the source. Problems originally arose mainly under what is known as Schedule D, applying to cases where that system is inapplicable; i.e., chiefly income from business and professions. It is, of course, also inapplicable where assessment or its remission depends on total income from all sources, and with the introduction of abatements and of the supertax, the problems originally confined to Schedule D have come to permeate the entire system and have called for more stringent methods.

There is a double system of organization for income tax purpose, the one professional, the other non-professional. The former centers in the Commissioners of Inland Revenue, to whom are subordinated special commissioners, inspectors, and surveyors, the surveyors being local officers; but all are centrally appointed, form part of the permanent civil service, and are independent of local influence. The non-professional organization is of a type unknown to our laws. There are so-called "general commissioners," who are men of substance in the different local communities. They are either *ex-officio* commissioners functioning in connection with government departments, municipalities, or public companies; or, like the land tax commissioners, with whom they

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professionals rather than amateurs, he may put himself into the hands of the Special Commissioners, civil servants of high standing appointed by the Treasury, who work at Somerset House. With the Income Tax, as with the taxes with which we have already dealt, assessment and collection are in different hands. To do the work of assessment, assessors are appointed by the District Commissioners. They are persons of repute in the District (which is commonly the parish), not government servants, but in receipt of small fees. In theory they assess the taxpayer's income, and communicate the assessments to the surveyor of taxes for the district. In practice the assessment is made by the surveyor on returns of income made by the taxpayers and transmitted to him by the District Commissioners who have received them from their assessors. In fact the amateur organization of commissioners and assessors is of very little practical importance in comparison with the professional surveyors. The discontented assessee may complain to the commissioners and ultimately to the High Court of Justice."

<sup>23</sup> Joseph A. Hill, "The English Income Tax with Special Reference to Administration and Method of Assessment," *American Economic Association, Economic Studies*, Vol. 4, No. 4-5 (1899).

are practically identical, are named in acts of Parliament, and reappointed from time to time; they hold virtually for life, and nominate persons qualified to fill vacancies, i.e., they are self-perpetuating bodies. If they deem it advisable, they appoint "additional commissioners," who in fact function in connection with Schedule D. They also appoint assessors, who nominally hold for a year but who are reappointed from year to year. All these commissioners and assessors serve without compensation. They have no regular places of office where they attend (except that the general commissioners have a clerk) and seem to have something of the character of secret tribunals, rarely emerging into public light. These general commissioners are not subject to the control of the Board of Inland Revenue, but the latter has been given the power to determine the forms to be used for circulars and notices addressed to taxpayers.

The policy of the law appears to be to vest all legally determinative powers in the self-governmental or non-professional commissioners, confining the professional official on the spot, the surveyor, to the gathering of information, scrutiny of statements and returns, and advice, suggestion, and protest, relying upon it that the legally inconclusive but expert action of the surveyor will actually control the non-professional determination, or will insure the desired results without the necessity of such formal determination; and that is the way in which the arrangement is said to work out in practice. Occasionally the general commissioners actually hear and determine an appeal; usually revisions or remonstrances are settled by informal negotiation between taxpayer and surveyor.

The taxpayer has the right, if he so chooses, to have his tax under Schedule D assessed by the professional special commissioners at Somerset House in London, and functions in connection with the assessment of the supertax are committed to these entirely. Where therefore the problem is similar to that under the American law, the professional agency is resorted to in an increasing degree as the law has progressed. In Ireland the non-professional organization was never in use, owing to the non-development of its self-governmental basis.

Apart from this distribution of functions between professional and non-professional organs, the English Income Tax Law, like the American, relies in the first instance upon taxpayer's returns. These are liable to be questioned; and if so, assessments may be made upon such evidence as may be obtained, or, in the case of the supertax, according to best judgment. Examining powers, however, are not granted for this

purpose but only for the purpose of determining appeals, and in that connection are qualified by noteworthy concessions to the taxpayer.

Questions of assessment can be carried to the courts only upon points of law.

The assessment becomes final after the lapse of three years (§129 [5]), but this limitation has no application to cases of fraud (§132).

Penalties may be mitigated or remitted by the Commissioners of Inland Revenue or the Treasury (§222).

§270. *The Prussian Income Tax Law of 1906.*—An extended account of administrative powers under German revenue legislation is omitted in view of the changes introduced since the war; an analysis of relevant provisions of income tax legislation will serve the purposes of this survey. The Prussian, like the English, income tax administration uses self-governmental organs, but is constituted on a different plan: while in England professionals and non-professionals function separately, they are in Prussia combined in commissions representing both elements. There are three grades of such commissions: a pre-estimate commission, an assessment commission, and an appeal commission. Commissions are constituted in local districts, thus decentralizing the assessment of the tax. In each commission a professional official is chairman, the other members are in part (never a majority) selected by the government from local residents, in part elected by the local representative assemblies. In the pre-estimate commission the local chief executive (a regular official, but independent of the central government) is chairman; in the assessment commission, the chief county officer of the central government (*Landrat*, corresponding to the French prefect); in the appeal commission, a special government delegate taken from the permanent civil service. The non-professional commission members are unpaid.

The tax is a progressive one (it rises by lump sums from bracket to bracket), and the total income of the taxpayer must therefore be ascertained. Different from the United States, there is an official assessment in every case before the tax becomes payable (§§33, 37, 41).

Different also from the English and American practice, consideration may be given to special conditions impairing the taxpayer's capacity to pay (education of children, protracted illness, indebtedness, special calamities) by reducing his tax by not to exceed three grades. This dispensing power applies only to incomes up to a stated amount. It is exercised by the assessment commission.



The assessment is different for incomes up to 3,000 Marks and those above that figure.

In the former case the pre-estimate commission estimates on the basis of information obtained from persons likely to know about these smaller taxpayers (local authorities, landlords, employers); and while declarations may be administratively demanded, they are not required by law; in the absence of information the commission acts upon the chairman's estimate (§§22-24, 33). The estimate requires confirmation by the chairman of the assessment commission; if it is not accepted, the assessment commission itself acts.

Incomes over 3,000 Marks must be declared by the taxpayer, and companies required by law to have annual balance sheets must attach these to the declaration. Where income items depend upon appraisal, the taxpayer may state the facts and call for appraisal by the commission (§§25-31).

The declaration is scrutinized by the chairman of the assessment commission, who for that purpose may inspect public records (except savings accounts) and must give the taxpayer an opportunity to explain (i.e., may not at this stage *require* an explanation).

Only where the declaration appears questionable, may the chairman put definite questions and ask for proof (§39). The compulsory production of books or the examination under oath of witnesses or experts requires authorization by the commission (§40).

If there are no specific data, the income is freely estimated by the commission (§40), but data furnished may be disregarded only after notice and hearing or default (§41).

The remedies on behalf of the taxpayer vary according to the size of the income: for incomes up to 3,000 Marks, "objections" are disposed of by the assessment commission; for incomes over 3,000 Marks an appeal lies to the appeal commission. Errors of law and material errors of procedure may be carried to the Supreme Administrative Court (§§47-54).

Relief is therefore more decentralized than it is in the United States.

The assessment being official, there is no provision for deficiency assessment, except in cases of wilfully false statements; in such cases the tax may be subsequently collected, subject to a period of limitation of ten years (§§72-73).

*Recent changes.*—The post-war development of German revenue legislation appears to have modified some of the distinctive features of

the former system, and perhaps in the direction of assimilation to more stringent American practices. The entire law of tax administration is now codified in an imperial law of December 13, 1919, which supercedes the earlier Prussian provisions.

As in the United States, the tax liability now arises out of the operation of the law upon the facts and does not depend upon an administrative act of assessment; this of course means that the law is sufficiently specific to make the amount of the tax ascertainable without recourse to administrative discretion (§81). This naturally leaves room for deficiency assessments, and the law provides for them (§§212-15).

The scheme of remedies seems to be the same as before (§§218, 219, 244-88).

There has been also a notable strengthening of the inquisitorial features of tax legislation. In some respects the law is now more stringent than our own. There is a statutory duty to keep at least memoranda of taxable receipts (§164), and safe boxes are made subject to inspection (§209). While under the Prussian law compulsory examining powers were granted only in the contest stages of proceedings, they may now be exercised at any time (§207).

The following observations of a German jurist upon this increased stringency are of interest:

These measures in connection with the provisions of the Imperial Tax Law concerning assessment and their severe penalties give to the tax authorities powers enabling them to secure proper assessments, and indicate a change in the spirit of legislation of the utmost significance to public and particularly to fiscal law. This change means to some extent a reversion to the conception of the relation between state and taxpayer which had characterized the absolute state of the seventeenth and eighteenth centuries.

In the second half of the nineteenth century, in part perhaps earlier, that conception was altered. The doctrine of the constitutional state and its offspring, liberalism, manifesting itself in the economic field in Manchester and free trade theories, turned from absolutism to the protection of the individual, and in the matter of taxation this operated against state power and its instruments. The individual was gradually hedged in by a wire fence of remedies, and state government limitations became shackles. Penalties were reduced, the procedure modified in favor of the taxpayer, not only as regards penalties and remedies, but also as regards assessments. The co-operation of taxpayers was more and more relied upon, and there was an anxious endeavor to shield personal affairs from official inquisition. In the mat-

ter of assessments, appeals, and penalties, the burden of proof was shifted from the taxpayer to the state.

Tax legislation at the end of the nineteenth and beginning of the twentieth century marked the climax of this policy. Now, beginning with the war tax laws, another reaction has set in, first under the stress of necessity, but partly also consciously: in the Reichstag's committee discussions of the "law against the flight from taxes" (*Gesetz gegen die Steuerflucht*) it was said that this law meant a new political idea, the transformation of the relation between private economy and the government. The Imperial Tax Law has given this new relation a clear and deliberate elaboration and made it the foundation of the new taxation.<sup>24</sup>

<sup>24</sup> Pistorius, "The New Imperial Finance Law," *Jahrbuch für öffentliches Recht*, 1911, p. 25.

## CHAPTER XXX

### CONCLUDING OBSERVATIONS

§271. *An estimate of the place of administrative powers in regulative legislation.*—It is proposed, in conclusion, to bring together and summarize some of the more general observations expressed in the foregoing analysis. It is, of course, realized that an estimate of administrative powers cannot be otherwise than speculative in character.

Administrative law as a system of powers of the character described in this Survey is subject to the challenge that it should justify itself as entitled to a permanent place in the economy of our law. It is subject to this challenge because history shows that administrative power is not indispensable, in the sense that judicial power is, to the operation of legal control. The two legal systems that have impressed themselves most deeply upon the world, that of Rome and that of England, have for considerable periods managed to do without administrative intervention with private rights other than in judicial forms. A thousand years of legal development had not given Rome a system of registry of deeds or titles in connection with real estate, and in the larger part of England such a system has not been adopted to the present day. In the administration of the personal estate of decedents the English law accepted the system of officialism developed by the law of the church; but the doctrine of executorship *de son tort* shows how willing the common law courts were to acquiesce in unofficial administration wherever it was possible to avoid producing a will in court; in the transmission of real estate, whether by intestacy or by will, official intervention was entirely dispensed with; it was not until the latter part of the nineteenth century that England accepted without reserve the principle of devolution of property *mortis causa* through official channels. In America, the aversion to officialism has not been nearly so strong; and there are many signs that English law is undergoing changes in the Continental direction; but we certainly find in the common law of the classical period an example of conscious or unconscious individualism which makes a striking parallel to the classical Roman law.

The same aversion to officialism was for a long time characteristic of the English system of internal police, in contrast to its bu-

reaucratic organization on the Continent of Europe. Until well into the nineteenth century there were no central government departments supervising social or industrial activities; there was no prefectorial system of local government, its place being taken by a judicially organized county magistracy which issued orders in the form of convictions, and was charged with a system of promoting the public welfare through penal statutes, being in its turn checked by the supervisory jurisdiction of the King's Courts. Where some new function of governmental control was called for, for which the existing organization appeared inadequate, it was by preference intrusted to commissions having the independent status of courts of record. But such new functions were sparingly created. The so-called "industrial revolution" was allowed to proceed without let or hindrance from law or legislation; and when new inventions and improvements called into life great quasi-public undertakings which demanded special privileges and therefore could not be allowed to establish themselves without public authority or control, Parliament preferred to keep that control in its own hands, devising for the purpose an elaborate system of private bill legislation which has only within quite recent times shown signs of giving way to administrative control. Ever since the days of Parliamentary reform, however, the English dislike of the bureaucratic type of government has had gradually to give way, under the insistent pressure of urgent social problems, to modern methods of administration. First the reform of the poor law, then the systematic legislation for public sanitation, and finally the factory laws and other laws for the benefit of the working classes provided for direct supervision and co-operation by central departments; and the Home Office, the Board of Trade, and the Local Government Board (now Ministry of Health) established the bureaucratic type of administration as part of the government of England.

In America the growth of administrative power did not encounter the same temperamental opposition that it did in England, but it was checked by the distribution of powers under a federal system. The highly concentrated form of the federal administrative organization was for a long time not used for the exercise of governmental power over individuals (other than the collection of revenue); it was not until toward the end of the nineteenth century that Congress began to use its interstate commerce powers for regulative purposes, and it then had recourse in part to administration by commission. In the states the bulk of legislation was at first locally administered with-

out central supervision; and it was only by slow degrees that a central state administrative organization with controlling powers over private individuals was built up. The result is that, while we have probably been less conservative than England in the enactment of regulative legislation, we still have on the whole an administrative control less bureaucratic, because less centralized.

But, generally speaking, the Survey shows in the four jurisdictions alike, that is to say, in those lacking the bureaucratic tradition as well as in the country that has it to so strong an extent as Germany, a growing tendency to have recourse to administrative powers. Remaining differences of policy seem to relate rather to the question: regulation or no regulation, than to the question: regulation with or without administrative power. When we find the appearance of such an important new policy as that of anti-trust legislation (not yet, in the period under review, undertaken in England or Germany), we consider it rather as an anomaly than otherwise that it should still operate largely without the aid of administrative power; and we are inclined to explain it by saying that the policy is one of suppression; were it one of regulation, we should expect administrative powers almost as a matter of course.

We must assume that modern social or economic phenomena that require legislative attention by reason of possibly injurious tendencies have become too subtle and complex to be dealt with by simple prohibition, whether the prohibition be directed to an entire subject matter or field of activity that lends itself to abuse, or to abuses so defined that the prohibition of the statute can serve as an adequate guidance to private action, calling in either case only for criminal enforcement. If such prohibition is impossible, and the extreme alternative of legislative non-intervention or neutrality seems likewise politically inadmissible, there remains as the readiest expedient the policy of supervisory control, unless indeed a remedy is to be found in communalization by municipality, state, or nation, substituting administrative service for control. Much less of administrative activity is of course involved in control than in service.

If under modern conditions a policy of regulation almost inevitably implies administrative power, the question is whether the survey conveys any intimation as to which type of power is the most effective, and which type is likely to be permanent. It has been shown that the two conspicuous types are the enabling power (the adminis-

trative permit or license) and the directing power (the administrative order), respectively; the former representing what may be called a system of advance checks, the latter a system of corrective intervention. It has further been shown that the chief political problem concerning administrative power relates to the delegation and the use of discretion. To repeat what has been said before, the permit or license admits of a wider discretion than the order, but on the other hand may also be entirely non-discretionary; the power to order almost inevitably involves some discretion, but it is a discretion likely to be quasi-judicially exercised and susceptible to control by the courts.

In these simple distinctions lies a good deal of the philosophy of administrative powers. If it is possible to establish that licenses tend to become ministerial acts, the main question will be whether the alternative system of corrective intervention with its qualified discretion may be assumed to have taken a permanent place in our system, and what it signifies.

In ascertaining tendencies it is not easy to divest the mind of bias or prejudice. Evidence of a development that seems desirable easily appears persuasive or convincing. I believe that on the whole there is a trend toward the reduction of discretion in the grant of licensing powers. This is not based on so unique an instance as the New York Raines Liquor Tax Law of 1896 with its absolute elimination of all discretion, nor does it on the other hand overlook the emphasizing of discretion in the New York Banking Law, or the remarkable change in the Insurance Law of New York by the amendment of 1910, to an almost absolute discretion in the grant of the initial certificate. It may appear that these do not effect as formidable a change in practice as in theory; we know that in New York these changes were suggested by the administrative departments, and that it is official as well as human nature to covet the possession of power more than the responsibility of its exercise. The impression of a tendency toward non-discretion rests upon the unmistakable progress toward statutory standardization of matters that in the initial stages of legislation are left unregulated and hence discretionary: witness tariff and internal revenue laws, liquor legislation, and acts regulating admission to professions. Above all, in that field of legislation in which administrative checks have had the longest history and the widest application, the navigation laws, they have become almost entirely ministerial; and long experience in an administrative régime is perhaps the safest criterion as to what is adequate and effective in the way of

control.<sup>1</sup> Divested of discretion, a system of advance checks is consistent with placing private right entirely upon the basis of direct statutory requirement; and while there is still the possible objection on the score of official formalism, delay, or expense, this is believed to be offset by the greater effectiveness of regulation thus aided; and the individual may find that his own interests are in many respects served by official certification of compliance with the law. Such a system of advance checks will therefore be likely to remain a permanent feature of regulative legislation.

The introduction of the system of licensing powers into public utility regulation by the Transportation Act of 1920 is indeed a fact which must be given weight. This licensing power, as has been shown, involves the widest type of discretion, which is still further enlarged by the possibility of attaching conditions to a permit. Apart from this latter feature, the power is checked by the innovation of a hearing requirement which must inevitably tend to check and reduce discretion and assimilate it in a considerable degree to the quasi-judicial administrative order. The right to attach conditions, on the other hand, is in effect a power of special legislation; and if this is to remain a permanent feature of administrative control over public utilities, it means the legislative possession and the legislative delegation of authority which cannot be measured by any rule of law. Judgment on this form of licensing power should be withheld until its limits are better established than they are now.

It may of course be suggested that a wide discretion in the control of public utilities represents the voice of the state speaking, as it were, as a partner in every business "affected with a public interest," not to be measured by principles governing the control of normal private rights. Apart from the difficulty of drawing the line between more or less public or private fields of economic enterprise, the question will be how such a discretion will be exercised. If quasi-judicially exercised, it will inevitably tend to be bound by legal standards; and administrative power tends to assume quasi-judicial forms. A discretion not bound by legal principle is the exercise of political power. Political power has its place in any form of government, but its proper

<sup>1</sup> It has been claimed that the vesting of powers more or less arbitrary is necessary for the protection of the public in large centres of population (*Metropolitan Milk Co. v. New York*, 113 App. Div. 377), and the liberality of delegation in the city of New York seems to bear out this theory; however, the proposition remains to be established.



organs are the legislature and possibly the chief executive. American practice reprobates its delegation to inferior organs with an instinctive perception that it is essentially a negation of the rule of law in administration.

The system of corrective intervention, which expresses itself in administrative orders, is the most recent and the most characteristic development of administrative powers. It is associated with the history of public utility regulation. This means that it serves economic regulation, and this again means that the discretion which it involves is of a peculiarly difficult and delicate type. It has been shown that this discretion represents a trial-and-error method of evolving standards, assuming that standards can ultimately be evolved.<sup>2</sup> If this assumption is untrue, the quasi-judicial administrative process involves a fallacy; and theoretically it may be said that it would be more straightforward to have regulation take the more arbitrary form of a legislative fiat, or of determinations by boards frankly constituted on the basis of interest representation. This appears to be recognized in English legislative practice. But it may be that there is no objective standard, and yet that the demonstration of this may be too protracted to count practically, i.e., the trial-and-error method may be continued indefinitely, all the parties deluding themselves that they are engaged, if not in a scientific process, at least in its formative stages. If discretion is appropriate to half-developed and imperfectly understood conditions, it is also true that such conditions will confront legislation perpetually.

Moreover, the system of corrective intervention may also commend itself so long as it incidentally serves other interests. There are such other interests which are not expressed in statutory texts and not avowed by those exercising the power, perhaps not even conscious to their minds. The legislative policy of regulation finds justification in some public interest that cannot be left to private vindication. The primary incidence of the violation of the public interest is, however, some private injury; a private complaint will initiate the administrative intervention, and if the proceeding is successful, it will inure to the pecuniary profit of the party aggrieved. As an incident to economic regulation, the individual may thus obtain redress without, or with only moderate, trouble or expense to himself, quite in contrast to the protection given in the administration of civil justice. The differ-

<sup>2</sup> See §52, *supra*.

ence from intervention in cases of crime, or of danger to health or safety, is obvious. The administrative commission or department may thus perform the unavowed function of a small man's court, to which a democratic community may not be adverse.

Those subject to the power might be expected to be eager to expose and combat a system which in some respects has the semblance without the reality of justice, and which was certainly not organized in the first instance to further their interests. The president of one of our great railroad companies once urged that there should be created in the federal government a department of transportation; the Interstate Commerce Commission, he thought, was the advocate of the shipper, and the carrier had no "friend at court." But the railroad companies would not at present be willing to see commission-control abrogated. In an increasing degree they have recourse to commission powers in their competitive struggles with each other. Apart from that, in all cases, where the policy of regulation has obviously "come to stay," interests are not willing to forego the possible advantage that administrative may have over direct legislative control. So far as administrative power is less diffused in point of numbers than legislative power vested in large bodies, it is exercised under a greater sense of responsibility; and a power thus concentrated tends to create a bond of sympathy between its holders and vested interests. Reference has been made to the complexity of the basic problem of injury caused by social and economic phenomena supposed to call for legislative intervention. Not only is it often futile to treat alleged abuses simply as forms of crime, but in many cases the imperative voice of authority is not the most effective method of approach. Something more subtle, more in the nature of mediation and influence, with authority merely in the background, may be needed in the constitution of the modern state. A somewhat ambiguous form of official action—part service and part control, part executive and part judicial, part suasion and part command, part formal and part informal—may perhaps best perform that function; and particularly in view of an effective organization of judicial review, objections based upon the commingling of functions, supposed to be theoretically incompatible, may practically count for relatively little.<sup>8</sup> Altogether, administrative power appears as one of the established political facts in present-day government.

<sup>8</sup> See also §84, *supra*: Intermediate position of the directing power.

All these observations, it should finally be emphasized, apply to administrative powers exercised over persons managing their own affairs and of normal capacity to manage them, not to powers exercised by the government with reference to those standing in a special relation to it, voluntarily assumed or of a functional character, or over persons lacking normal status. Powers belonging to these categories constitute a separate phase of administrative law, governed in part by very different principles from those here discussed.

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