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ADMINISTRATIVE COMMISSIONS AND THE JUDICIAL POWER

By Ray A. Brown*

The American doctrine that our constitutions, whether of nation or of state, constitute a basic fundamental law to which ordinary acts of legislation must bend has led many of our people, both lay and professional, into certain superficial and dangerous habits of thought. A resulting apotheosis of the constitution seems to regard the barren written document as a self-sufficient, exclusive, and final protector of the fundamental rights and principles upon which ordered and righteous political society is based. Too often we concentrate our attention on the simple question whether a proposed act is or is not constitutional. When once the courts have held that the law in question does not transcend constitutional provisions, our interest is apt to cease: the barriers are down, the propriety of the law is proved, and future development proceeds in a planless manner, undisturbed by doubts and questions. We need to go back of the words of the constitution to ascertain the ultimate and fundamental reasons of policy which have caused these mandates and prohibitions to be transcribed in the written document. With this point of view it is the purpose of this paper to consider those constitutional doctrines which require that the function of adjudication shall be conferred only upon the courts and to ascertain the way in which these provisions have been handled when legislation is attacked as contrary to their mandates; to weigh the efficacy, if any, still possessed by them; and finally to consider whether we should not plan our future course with somewhat more regard for the fundamentals which underlie them than has formerly been the case.

In the earlier days of the republic the machinery of government was fairly standardized and simple. The legislature, meeting

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at periodical intervals, made the laws; the executive enforced them, and the courts of the land, in the process of litigious controversy, construed and applied them. This tripartite division of the powers of government was considered such an essential feature of our governmental policy that it was enshrined as one of the constitutional holy of holies in familiarly known doctrines which required the separation and forbade the delegation of governmental powers. But with the increase of state activity made necessary by our developing urban and industrial civilization, these traditional institutions became inadequate.\footnote{See: Berle, The Expansion of American Administrative Law, (1917) 30 Harv. L. Rev. 430; Frankfurter, The Task of Administrative Law, (1927) 75 U. of Pa. L. Rev. 614; Guthrie, Presidential Address New York State Bar Association, (1923) 46 Rep. N. Y. St. Bar Ass'n 169; Haines, Effects of the Growth of Administrative Law, (1932) 26 Am. Pol. Sc. Rev. 875; Hughes, The Republic after the War, (1919) 53 Am. L. Rev. 651; Pound, The Crisis in American Law, (1926) 10 J. Am. Jud. Soc. 5; Pound, Organization of Courts, (1927) 11 J. Am. Jud. Soc. 69, being the republication of an address delivered in 1913; Rosenberry, Administrative Law and the Constitution, (1929) 23 Am. Pol. Sc. Rev. 32.} The legislatures sitting only at intervals and composed mainly of lay representatives of the lay body of the state were lacking in ability and time to handle the huge task of providing the detailed regulations which our complex society demanded. Accordingly the phenomenon arose by which the legislative assembly indicated the broad general policy of the law and left to the executive the duty of giving content to that policy and of supplying the detailed rules through which it was made effective.\footnote{The subject of the delegation of legislative power has received much consideration from courts and legal writers and need not be gone into here. The sad plight of the supposed constitutional prohibition can be gathered from the statement of the Hon. Elihu Root that "the old doctrine forbidding the delegation of legislative power has virtually retired from the field and given up the fight." (1916) 41 Rep. Am. Bar Ass'n 355, 368. Professor Cheadle is perhaps right in saying that the only question confronting the courts is "what is reasonably necessary in view of what the times demand and of the end to be accomplished." Cheadle, The Delegation of the Legislative Function, (1918) 27 Yale L. J. 892, 920. See also the thorough and realistic opinion in State ex rel. Wisconsin Inspection Bureau v. Whitman, (1928) 196 Wis. 472, 220 N. W. 929.} The development also affected the customary courts of the land. In many instances the subject matter of the regulation required for its administration a specialized knowledge much more in the competence of the particularly trained and experienced experts in the field than in that of the judges of our customary courts, whose knowledge was necessarily much more diffuse.\footnote{The courts have often favorably commented on the expert qualifications of administrative tribunals: "The findings of the commission (i. e., the}
procedure was too delayed, expensive, and cumbersome to satisfy the present-day demand for a speedy and economical justice. The result has been that today hosts of executive tribunals perform functions so nearly akin to those of the courts that the only term by which we can designate them seems to be "quasi-judicial."  

We are undoubtedly at a critical time in the growth of administrative law. The great advances now being made in governmental control of private industry and business undoubtedly call for a greater reliance on administrative agencies as instruments of control, and even in the traditional field of legislative and judicial action there is an increasing demand for conferring upon administrative tribunals the functions formerly performed by legislatures and courts. Up to the present time, unfortunately, this system of administrative law making and adjudication has largely, like

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Interstate Commerce Commission) are made by law prima facie true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." McKenna, J., in Ill. Central Ry. v. Interstate Commerce Commission, (1907) 206 U. S. 441, 27 Sup. Ct. 700, 51 L. Ed. 1128. The case of McCarthy v. Sawyer Goodman Co., (1927) 194 Wis. 198, 215 N. W. 824 concerned the judicial review of a finding by the Wisconsin Industrial Commission in a workmen's compensation case involving an alleged traumatic inguinal hernia. The court said:

"The frequency of these cases has enabled the members of the Industrial Commission to become thoroughly familiar with the nature, development and progress of the ailment, and they bring to the consideration of such cases a knowledge and experience which enables them to pass most discriminatingly upon the evidence produced. It is scarcely too much to say that they are experts upon the subject. . . . Why constitute experienced and expert men as fact finders if their findings of fact upon expert matters are to be overturned by courts the personnel of which have neither the knowledge nor experience of such matters enjoyed by the members of the Industrial Commission?"

"The recent swing of the pendulum toward administrative courts is in part a protest against the present cumbersomeness of judicial proceedings, of which protest the bench and bar have been too slow in taking notice." Smith, Administrative Justice, (1923) 18 Ill. L. Rev. 211. See also Haines, Effects of the Growth of Administrative Law, (1932) 26 Am. Pol. Sc. Rev. 875, 880; Pillsbury, Administrative Tribunals, (1923) 36 Harv. L. Rev. 405, 407.


The recommendation is made in a notable study that automobile accident litigation be removed from the courts, and committed to commissions to administer on a compensation basis. See (1932) Report of the Committee to Study Compensation for Automobile Accidents, to Columbia University Council for Research in the Social Sciences. In the field of criminal law the demand is made that executive boards of experts determine the sentence which should be imposed upon a person found guilty by the court. See Report National Commission on Law Observance and Enforcement, No. 9, Penal Institutions, Probation, and Parole, (1931) pp. 141, 172, 238.
Topsy, "just growed." As new needs have developed, new executive tribunals have been created to meet them. There is a brief skirmish to determine their right to a place in our governmental system. The issue once decided in favor of the constitutional existence of the new tribunal, the system of administrative government presses on to new fields of conquest, with the result that the present development is a singularly haphazard and unplanned thing, with far too little attention being paid to the principles and details of organization and procedure, which aim to secure that proper balance between public demands and private right, without which no governmental agency deserves to exist.\(^7\)

I.

The first task at hand is to consider the types of rationalistic weapons and devices which have been employed in resisting the assault upon the right of administrative bodies to perform the function of adjudication, commonly assumed to be the particular prerogative of the regularly constituted courts of law. The attack has commonly been along three lines: the guaranty of the right to trial by jury; the requirement that no person shall be deprived of life, liberty or property but by due process of law; and the doctrine of the separation of powers, which presumably requires that each of the three great departments of government, the legislative, the executive and the judicial, shall exercise the respective powers conferred upon them by the constitution, and no others. The first two of these constitutional provisions have turned out to be but of small moment in the controversy. The federal constitution does not require the states to preserve in their system of government the institution of jury trial.\(^8\) And as far as the state constitutions are concerned, the restriction of the clause is largely negatived by the holding that the requirement of jury trial relates only to proceedings to vindicate traditional rights recognized by the common law and not to proceedings concerning special rights and defenses created by statute. Thus, in answer to the contention that the right to jury trial was denied by commission administra-


tion of the workmen's compensation law, the Illinois supreme court said:\(^9\)

"Our constitution provides that the right of trial by jury as heretofore enjoyed shall remain inviolate, but it guarantees that right only to those causes of action recognized by law. The act here in question takes away the cause of action on the one hand and the ground of defense on the other and merges both in a statutory indemnity fixed and certain. If the power to do away with a cause of action in any case exists at all in the exercise of the police power of the State, then the right of trial by jury is therefore no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the latter is to leave the former nothing upon which to operate."\(^10\)

And as far as the due process of law clause is concerned, few propositions are better settled than the one that this cryptic clause does not require a judicial proceeding. If the fundamentals of a fair hearing are preserved, the states are free to adopt whatever tribunals and procedures they deem advisable.\(^11\)

The serious question is with the doctrine of the separation of powers. Concerning this, one thing is apparent: the answer to the question of whether or no there is an unconstitutional imposition of judicial power upon an administrative body cannot be determined through the medium of definition or through any analytical differentiation of the judicial function from that of the executive or administrative.

\(^9\)Grand Trunk Western Ry. Co. v. Industrial Commission, (1920) 291 Ill. 167, 176, 125 N. E. 748.

\(^10\)See also: Branch v. Indemnity Insurance Co., (1920) 156 Md. 482, 144 Atl. 696; Cunningham v. N. W. Improvement Co., (1911) 44 Mont. 180, 119 Pac. 554; Fassig v. State ex rel. Turner, (1917) 95 Ohio St. 232, 116 N. E. 104; State ex rel. Davis-Smith Co. v. Clausen, (1911) 65 Wash. 156, 117 Pac. 1101.

\(^11\)"There is no provision in the federal constitution which directly or impliedly prohibits a state under its own laws from conferring on non-judicial bodies certain functions that may be called judicial." Peckham, J., in Consolidated Rendering Co. v. Vermont, (1908) 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327. See also: Reetz v. Michigan, (1903) 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563; Gregory v. Hecke, (1925) 73 Cal. App. 268, 238 Pac. 767; Klafter v. State Board, (1913) 259 Ill. 15, 102 N. E. 193; Kennedy v. State Board, (1906) 145 Mich. 241, 108 N. W. 730. This is not to say that administrative procedure may not be so lacking in the fundamentals of a fair hearing as to be contrary to the requirement of due process of law. Southern Ry. v. Virginia, (1933) 290 U. S. 190, 54 Sup. Ct. 148, 78 L. Ed. 260. Concerning certain types of questions it has also been held that though an administrative hearing may be had in the first instance, due process of law requires that one of the customary courts give an independent review of the matter. Ohio Valley Water Co. v. Ben Avon Borough, (1920) 253 U. S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908. Cf. Crowell v. Benson, (1932) 285 U. S. 22, 52 Sup. Ct. 285, 76 L. Ed. 598.
"What is a judicial power cannot be brought within the ringfence of a definition. It is undoubtedly power to hear and determine; but this is not peculiar to the judicial office. Many of the acts of administrative and executive officers involve the exercise of the same power. Boards for the equalization of taxes, of public works, of county commissioners, township trustees, judges of election, viewers of roads, all, in one form or another, hear and determine questions in the exercise of their functions, more or less directly affecting private, as well as public rights. It may be safely conceded that power to hear and determine rights of property and of person between private parties is judicial, and can only be conferred on the courts... But such a definition does not necessarily include this case."

The opinions of the courts teem with language of a similar nature. Judges, when confronted with the contention that an administrative body, because it determines controverted facts, construes the law and makes decisions affecting the rights and duties of the parties, is necessarily performing judicial functions, counter with the declaration that, though such functions may be quasi-judicial, they are not judicial in a constitutional sense; and then proceed to justify themselves by reference to the similar functions performed without challenge by other administrative agencies.13

12State ex rel. Attorney-General v. Hawkins, (1886) 44 Ohio St. 98, 5 N. E. 228. In the instant case the court held that the removal of a public officer by the governor was not an unconstitutional exercise of judicial power.

13"While a board of county commissioners is not by the laws of this state clothed with any judicial powers, such as are conferred upon courts, still they are in certain instances invested with discretionary powers, which they exercise in a quasi-judicial manner; that is, they are authorized to investigate facts and exercise discretion or judgment in relation to the facts revealed by such investigation in a manner similar and with similar effect as courts... The term 'quasi judicial' is used to describe acts, not of judicial tribunals usually, but acts of public boards and municipal officials, presumed to be the product or result of investigation, consideration, and human judgment, based upon evidentiary facts of some sort, in a matter within the discretionary power of such board or officer." Hoyt v. Hughes County, (1913) 32 S. D. 117, 142 N. W. 471, 472-3.

"In determining whether any particular place is a nuisance, the commissioner, no doubt, exercises some discretion, which, in a strict sense, is in its nature judicial; but the executing of a police regulation quite often calls into action that kind of discretion. And yet the acts of a commissioner involved in this case are no more judicial than the acts of officers under many other laws and ordinances which have been held valid." Los Angeles County v. Spencer, (1899) 126 Cal. 670, 59 Pac. 202. See also Alabama's Freight Co. v. Hunt, (1926) 29 Ariz. 419, 242 Pac. 658; Suckow v. Board of Medical Examiners, (1920) 182 Cal. 247, 187 Pac. 965; Lanterman v. Anderson, (1918) 36 Cal. App. 472, 172 Pac. 625; State ex rel. Hubbard v. Holmes, (1907) 53 Fla. 226, 44 So. 179; Nash v. City of Glen Elder, (1910) 81 Kan. 446, 106 Pac. 292; Solvaca v. Ryan & Reilly Co., (1917) 131 Md. 263, 101 Atl. 710; Ex parte Lewis, (1931) 328 Mo. 843, 42 S. W. (2d) 21; Enterprise Irr. District v. Tri-State Land Co., (1912) 92 Neb. 121,
This is singularly unhelpful to one who is interested in determining what functions may or may not be conferred on an administrative body. To such a searcher the vital point necessarily is not the similarities but the differences between the functions of the separate departments of government.

According to the nature of a particular mental act which the official performs in making his decision, a few courts have indeed attempted to differentiate the judicial from the administrative function. Thus it is sometimes held that an act is administrative or ministerial rather than judicial because it lacks in discretionary quality and calls merely for the ascertainment of facts and the almost automatic application of the law thereto. In *Ex parte Lewis* the court held that the act of a health commissioner committing certain diseased persons to an isolation hospital was not judicial in character, since it did not involve "an exercise of primary or independent discretion, but only determines within defined limits and subject to review some facts upon which the law by its own terms operates." On the other hand, the Wisconsin court held unconstitutional a statute giving to a securities commission, in cases where securities had been sold contrary to the terms of the law, power to declare the sale voidable and to make such other award as should be "just and equitable" in the premises.

"The fact that it attempts to delegate to the commission the power to make an award which shall be just and equitable without erecting any standard but leaving it wholly within the discretion of the commission makes it a clear delegation of judicial power..."

This is certainly unsatisfactory. The character of an act claimed to be judicial certainly cannot be determined by the case

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14(1931) 328 Mo. 843, 42 S. W. (2d) 21.

15See also Cunningham v. Southwestern Improvement Co., (1911) 44 Mont. 180, 119 Pac. 554; Williams v. Wedding, (1915) 165 Ky. 361, 176 S. W. 1176. The courts frequently declare that the mere finding of fact and the application of the law thereto is an administrative, rather than a judicial, function. Russell v. City of Fargo, (1914) 28 N. D. 300, 148 N. W. 610; State ex rel. Abbott v. Ross, (1911) 62 Wash. 82, 113 Pac. 273.

16Klein v. Barry, (1923) 182 Wis. 255, 273, 196 N. W. 457. In State v. Bulot, (1932) 175 La. 21, 142 So. 787 the court held that a statute of Louisiana which gave to police officers the power to disperse "unlawful" though peaceful assemblies was an unconstitutional delegation of judicial power since the determination of what was "unlawful" was a peculiar prerogative of the courts.
or difficulty of the case to be decided; and while the lack of a proper standard for administrative action may cause the statute to be doubted on other grounds, it is a little difficult to see why the greater discretion of the equity courts is any more sacrosanct than the more closely confined powers of the common law tribunals. Concerning this attempt to differentiate the judicial function by an analysis of the nature of the mental act performed in arriving at a decision, it has well been remarked:

"The idea of counsel for appellant seems to be that, because the commissioners in the performance of their duties must necessarily act judicially, they must be considered, to all intents and purposes, a court, hence an unconstitutional body because not one contemplated by sec. 2, art. VII, of the constitution. That is manifestly wrong. The constitution by no means provides that all authority to act judicially is or shall be vested in some one of the courts therein indicated. The language of the constitution is: 'The judicial power of this state, both as to matters of law and equity, shall be vested in' the courts mentioned. The term 'matters of law and equity' refers to the administration of the law in actions and proceedings in courts of law and equity,—the exercise of such power in such matters as was exercised by such courts at the time of the adoption of the constitution. . . . To act judicially, and to act judicially in a matter at law or in equity,—or, in other words, in actions at law or suits in equity,—are not necessarily the same."

Even more unsatisfactory as a basis for distinguishing between the judicial and administrative function is the test of the mechanics of procedure used by the tribunal in reaching its decision. A few courts have, however, apparently held that a given tribunal is or is not exercising judicial powers by considering the extent to which its proceedings approximate those of the courts of law. In Western Metal Supply Co. v. Pillsbury, it appeared that the constitution of California gave to the legislature the power to provide a commission to adjudicate claims brought under the workmen's compensation law of the state. Concerning this constitutional delegation the court said:

"The power granted to the commission by the act, to determine
that a right to compensation exists and to fix by an award the amount of such compensation is judicial in its nature. The correctness of this view is emphasized, indeed demonstrated, by a brief summary of the provisions of the act defining the duties and powers of the board with respect to claims for compensation. The commission is vested with 'full power, authority and jurisdiction to try and finally determine' all proceedings for the recovery of compensation subject only to the limited review provided in section 84 of the act. The commission has power to administer oaths, to issue subpoenas, to take testimony, to punish for contempt 'in like manner and to the same extent as courts of record.' Where compensation is sought, the proceedings are in substance those of a court in an action at law. 'Application in writing' (i.e., a complaint) is filed with the commission by a party in interest. The time and place for the hearing are fixed by the commission, and a copy of the application, together with notice of the time and place of hearing, is then served on the adverse party. This is, in effect, the issuance and service of summons. The adverse party must within five days file his answer. Here we have the usual framing of issues by the pleadings of the parties. After hearing by the commission, it makes and files its findings of facts and its 'award which shall state its determination as to the rights of the parties.' The findings thus made are 'conclusive and final,' and the award itself is not reviewable except by a writ of certiorari under which the review is restricted in scope. Any party in interest may file a certified copy of the findings and award with the clerk of the superior court and judgment must be entered by the clerk in conformity therewith. The commission, in exercising these powers, is performing precisely the same functions that are performed by any court in passing upon questions brought before it.  

On the other hand, it is frequently held that the functions of certain administrative bodies are not judicial, because their proceedings are lacking in some of the more common features of the customary court proceedings. Such differentiation is unfortunate. It might cause the peculiar result that the legislature might delegate to an administrative body power to affect vitally the rights and duties of the individual if it proceeded without testimony or

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hearing, but could not do so if the administrative tribunal were required to vouchsafe to those interested the safeguards which in judicial proceedings are considered fundamental for the protection of private right.

Concerning one salient feature of the judicial process, namely the effect of the judgment of the court as a final and conclusive determination of the rights of the parties, more extended comment is necessary. The opinion by Chief Justice Taney in *Gordon v. United States*,22 posthumously published many years after the decision of the case, to the effect that a decision of a court could not be accepted as within its proper jurisdiction to make unless it carried with it the right of enforcement through judicial process, is probably not the law today,23 and concerning the converse situation, in which our interest now lies, it should be noticed that administrative officers, in certain situations, are validly invested with power to enforce by executive process their own decrees. Thus in the leading case of *Den d. Murray v. Hoboken Land and Improvement Co.*,24 it was held that the Treasury Department could not only determine the amount due from a delinquent revenue agent of the government but could also enforce its determination by a distress warrant issued by the department. It has long been a standing practice to enforce by executive process the duty of the individual to pay taxes to the state.26 Aliens illegally within the country are deported entirely by administrative determination and process,26 and the Supreme Court has upheld the imposition and enforcement by administrative process of penalties upon ship companies illegally bringing aliens into the country.27 Still another common instance of administrative execution is the

22(1865) 2 Wall. (U.S.) 561, 17 L. Ed. 921. "The award of an execution is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no judgment in the legal sense of the term without it."
24(1855) 18 How. (U.S.) 272, 15 L. Ed. 372.
summary abatement of nuisances and the seizure of property illegally held. Assuming, if we may, that an administrative enforcement is permissible in the above cases only because of some peculiar governmental power or public exigency and that administrative enforcement of decisions involving purely private rights, for example in a workmen’s compensation case, would not be permissible, this possible prohibition is easily avoided by the expedient of having the administrative order filed in a court of law, where, unless attacked, it automatically becomes a judgment of the court enforceable as such by the regular judicial process.

The consideration that an administrative decision is subject to subsequent attack and review in a court of law has, however, frequently been held decisive of the fact that judicial functions have not been conferred. There are many possible degrees of the extent of such review. Where the administrative determination is merely advisory and without effect until approved by a regular judicial tribunal, which has full liberty to approve or reject the same, there is no difficulty in holding that judicial functions have not been conferred. In such instances, the administrative body acts merely as a referee or a master in chancery to report its findings to the court. In Lawton v. Steele, the court went further and held that a party whose property had been destroyed by an executive official as constituting a nuisance had no valid complaint, since he still had available the judicial remedy to replevy his property or to sue the officer in damages. Such inconclusive administrative determinations are, however, unsatisfactory. The sum-


30It should be noticed, moreover, that many administrative decisions, such as denial of claims against the state or the refusal or cancellation of licenses, are self-executing, needing no further process to give them effect.


mary and less technical administrative process does not relieve of the necessity of resorting to the courts. It is merely an added load to the already heavy burden of litigation. Accordingly, it is customary to afford to the administrative finding a greater or less determinative effect. Such finding may be made final unless subsequently attacked by judicial proceedings, and even then the administrative determination may be final unless found to be in excess of jurisdiction, in error of law, or arbitrarily and illegally arrived at. Such limited power of review in the courts is frequently held sufficient to prevent the administrative determination from being held invalid as an unconstitutional exercise of judicial power. Thus in the leading case of *Borgnis v. Falk*, the workmen's compensation law of Wisconsin made the findings of fact by an industrial commission final except where procured by fraud, made in excess of the commission's power, or made in error of law. This was held to give to the reviewing court power to review the commission's finding where determinative of the latter's jurisdiction. The resulting inconclusiveness of the commission's determinations was held sufficient to save the statute against the contention that judicial power had been illegally granted. In thus upholding the grant to administrative bodies of fact-finding powers which, by statute, are given a limited determinative quality, these courts are merely recognizing the right of the legislature to place upon them the same restrictions as the courts themselves have voluntarily adopted when administrative decisions are attacked by proceedings in mandamus, certiorari, or by injunction. The grant to executive boards of the power to make administrative determinations has, however, at times been held to constitute an unconstitutional grant of judicial power, even though such determinations were subject to full court review. In *State v. Guilbert*, involving the provision of a land registration

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33(1911) 147 Wis. 327, 133 N. W. 209.
36(1897) 56 Ohio St. 575, 47 N. E. 551.
statute under the so-called Torrens system, the court examined the functions of the recorder under the act and found them judicial in nature. This being so, the constitutional invalidity of such grant of judicial power was not obviated by provisions for an appeal to the courts.

"The recorder, as a ministerial officer, is incompetent to receive a grant of judicial power from the legislature. His acts in the attempted exercise of such powers are necessarily nullities. They cannot be effective to impose any obligation or burden upon a citizen, or to deprive him of any right. The act plainly contemplates that the person against whom the recorder decides in the exercise of any of the powers sought to be conferred must either submit to the adverse decision, or take upon himself the burden of an appeal. In view of the constitutional provision on the subject, he cannot be forced to this alternative. If these are judicial powers, it is admitted that they cannot be vested in the recorder. If they are not judicial, the provisions for an appeal are void, since, as was said by this court in Ex parte Logan Branch, ... 'we have no idea of an appeal, except from one court to another.'"

In another Torrens case,37 a similar result was reached by the Illinois court.

"If the party or officer is clothed with the power of adjudicating upon and protecting the rights or interests of contesting parties, and that adjudication involves the construction and application of the law, and affects any of the rights or interests of the parties, though not finally determining the rights, it is still a judicial proceeding or the exercise of judicial functions."

It has also been held that the disbarment of attorneys is such an integral part of the judicial power that the function cannot be imposed upon boards of commissioners or bar examiners, even though the affected parties might appeal from their decision to that of the supreme court.38 Again, in Board of Water Engineers v. McKnight,39 a statute of Texas gave to a board of water engineers, after investigation and hearing, the power of determining the rights of adverse claimants to use the public waters of the state for irrigation and power purposes. The finding of the board was determinative of the rights of the parties unless within

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38 In re Edwards, (1928) 45 Idaho 676, 266 Pac. 655; In re Gibson, (1931) 35 N. M. 550, 4 Pac. (2d) 643; In re Bruen, (1918) 102 Wash. 472, 172 Pac. 1132. Where, however, the board does not itself disbar but reports its findings to the court, which, with full power of review, enters the order of disbarment, no constitutional objection is found. In re Shattuck, (1928) 208 Cal. 6, 279 Pac. 998; In re Scott, (1930) 53 Nev. 24, 292 Pac. 291; State Bar v. McGhee, (1931) 148 Okla. 219, 298 Pac. 580.
39 (1921) 111 Tex. 82, 229 S. W. 301.
sixty days thereafter an appeal was taken to the district court wherein a trial de novo could be had. It was held, however, that this was an unconstitutional grant to the board of judicial power, the vice of which was not cured by the provision for repeal. The court said:

"It is earnestly argued that the statutes are saved from constitutional infirmity because the action of the Board is final only as to those who desire it to be final, for it is said any dissatisfied claimant is entitled to a court trial de novo. The Constitution, in its prohibition against conferring on persons in one governmental department power belonging to another, contains no exception of instances wherein the latter department may review the acts of the former. The constitution making no such exception, the courts should not make it."40

Admitting for purposes of argument that it would be unconstitutional in most instances to confer upon an administrative body the power of final and conclusive determination enforceable by that body's own executionary writ, this concession does not save the judicial function of the courts from serious infringement. The essence of the judicial duty is to decide. If as a practical matter that ultimate decision rests with an administrative tribunal, to that extent has the judicial power of the court been affected. If all the courts do is to furnish the enforcement process for the administrative determination, the essence of the judicatory function is with the latter and not with the former body. So also judicial review of only a limited portion of the commission's determination leaves the commission as the sole and final arbiter of that part of the controversy to which the judicial review does not extend. Any one familiar with workmen's compensation litigation, for example, knows full well that in ninety per cent. of the cases it is the commission's determination of the facts which is the conclusive and decisive factor. Even where full judicial review is afforded, the administrative decision may, for practical reasons, be the final word. In the case of the poor fisherman

40The case is contrary to the decisions of the Nebraska and Wyoming courts under similar statutes. Crawford v. Hathaway, (1903) 67 Neb. 325, 93 N. W. 781; Farm Investment Co. v. Carpenter, (1900) 9 Wyo. 110, 61 Pac. 258. The subsequent Texas case of Motl v. Boyd, (1928) 116 Tex. 82, 286 S. W. 458, reversing Boyd v. Motl, (1922) 236 S. W. 487, sustained the power of the board to grant permits to use unappropriated waters even though contests might arise concerning such permits, on the ground that the grant or refusal of a license was a mere ministerial act not involving vested property rights. "There is nothing in the statute which makes the conclusion of the board that the permit applied for would or would not impair existing water rights conclusive or binding on any one."
whose nets have been summarily destroyed by a game warden, it is little more than contemptuous irony to tell him that in theory of law the executive determination has not affected his rights, since he still possesses the liberty of spending time and money far beyond his ability to command in a possibly vain pursuit against the officer for damages. What is here said is offered not in argument against judicial powers of administrative tribunals but rather in emphasis of the belief that the current provisions for judicial execution and review do not, from the realistic viewpoint, prevent large measures of the judicial functions from being conferred on executive bodies.

II

To differentiate the judicial from the administrative by an analysis of the operations performed in carrying out the two functions is as a general proposition a futile task. The question whether judicial powers have or have not been validly conferred is determined not by the manner in which the issues are decided but by the character of the issues which are referred to the administrative body for decision. In Louisville & Nashville R. v. Garrett,41 upholding the administrative determination of railroad rates, the court said:

"Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial powers. The legislature, had it seen fit, might have conducted similar inquiries through committees of its members, or specially constituted bodies, upon whose report as to the reasonableness of existing rates it would decide whether or not they were extortionate and whether other rates should be established, and it might have used methods like those of judicial tribunals in the endeavor to elicit the facts. It is 'the nature of the final act' that determines 'the nature of the previous inquiry.'"42

41(1913) 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229.
It is just as impossible, however, to include within one definition those issues that are inherently administrative, as it is to include within the "ringfence of a definition" those types of proceedings that are judicial in character. The determination of certain issues by administrative rather than by judicial tribunals depends upon a complexity of considerations, some logical, some historical, and some purely expedient. The only thing to do, therefore, is to examine the existing situation and to see what functions in fact have been held administrative in character and what judicial. If we cannot define, we may at least describe. 48

To make a rough classification of the types of problems which have been committed to administrative determination is not difficult. 1. First are those matters of primary public concern in which the individual citizen has an interest only to the extent that he happens to be a member of the body corporate. 2. In the second class may be placed those proceedings in which the state has a direct interest, but where the individual is also directly affected as the other party to the jural relation; of this the assessment and collection of taxes is perhaps the most outstanding example. 3. The third classification is a subhead of the second, but is distinguished by the fact that in certain situations the state has granted to the individual a privilege which is ordinarily held by the courts to be within the absolute prerogative of the state either to confer or to withhold. The determination of the validity of claims by the individual against the state for alleged wrongs committed by the latter come within this category. 4. In the exercise of its police power the state acts as a conservator of social interests, and in so doing, through the medium of the powers to license, quarantine, and abate nuisances, directly affects the interests of the individual citizen. 5. In some situations the state, through administrative machinery, attempts to exercise the quasi-criminal function of imposing penalties and forfeitures. 6. Lastly, by administrative means, the state may settle controversies between individuals in which the state is interested only to the extent that it is always concerned in the orderly and effective administration of justice. The workmen's compensation laws give rise to the most outstanding example of this type of administrative adjudication.

48Cf. Pillsbury, Administrative Tribunals, (1923) 36 Harv. L. Rev. 405, 419 et seq.
1. Matters Primarily of Public Concern.

The best illustration of controversies of a purely public character is in the creation and division of political subdivisions: counties, cities, villages, school districts, and the like. In *Early County v. Baker County*, a statute of Georgia provided that, when the grand jury of a county should inform the governor that the territorial boundary was in dispute, he should appoint a surveyor to determine the controverted line. The survey made was reported to the secretary of state, who, after a hearing, had power to determine conclusively the disputed boundary. In answer to the contention that this constituted an illegal grant of judicial power to the secretary, the court said:

"Counties have no territorial rights as against the state, and the statutory plan was not to settle a private dispute between the counties, but to afford means to the state in the delineation of the boundaries between its political subdivisions. If the decision of the secretary of state is to have the ordinary force and effect of a judgment rendered in a judicial proceeding, then territorial rights would become vested, and the legislature could not make a change, so as to disturb or alter the divisional line as adjudged by the secretary of state. Whereas all the authorities concur that, unless the constitution of a state otherwise prescribes, the Legislature has the power to diminish or enlarge the area of a county, or change its boundary lines, whenever the public convenience or necessity requires."

A similar reliance on the paramount legislative power over the controversies has also been made when administrative bodies have been given final authority in the case of the division of governmental units to apportion between the two new districts the property and debts of the old divided districts. This positive declaration that the creation, delimitation, and division of governmental corporations is a matter of public, rather than of private, right and so cognizable by non-judicial tribunals is undoubtedly due somewhat to the fact that the issues involved are not of the type which a court may properly determine. They depend upon practical, political, and governmental expediencies not to be solved by the determination of exact facts or by the application thereto of

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44*(1911) 137 Ga. 126, 72 S. E. 905.
2. Controversies Between the State and the Individual.

Such controversies as those mentioned in subdivision A are comparatively few in number, and the constitutional issue is not a serious one. Much more frequent and important are the issues which arise when the public interest directly involves the interests of the individual. Such questions, moreover, in their solution call into play not only broad questions of political expediency but also the determination of ordinary fact questions and the application thereto of customary rules of law.

(1) The assessment and collection of the state revenues commonly gives rise to issues of this latter type, and yet it is perfectly well established that the matter is primarily one for administrative and not for judicial cognizance.

"Very summary remedies have been allowed, in every age and country, for the collection by the government of its revenues. They have been considered a matter of state necessity. . . . If the state might be deprived of the resources for continuing its existence and performing its regular functions until a revenue could be collected by the processes provided for the enforcement of debts owing to individuals, it would be continually at the mercy of factions and discontented parties. Obviously this could not be tolerated."47

"The proceedings by which taxes for governmental purposes have been assessed, levied and collected from the citizen have always been regarded as administrative, and not judicial in their character, and to constitute due process of law within the meaning of the constitution. Such proceedings have from necessity been exercised by governments during all times, by summary methods of procedure, and to require the deliberation and delay incidental to judicial proceedings in the exercise and enforcement of the taxing power by government would seriously cripple its efficiency, if not destroy its existence."48

40Conover v. Gatten, (1911) 251 Ill. 587, 96 N. E. 522; Van Hess v. Board of Commissioners, (1921) 190 Ind. 347, 129 N. E. 305.
These statements meet with a general response in the cases, and as long as the assessing tribunal affords a hearing and acts fairly and within its jurisdiction, a court review of its action is not a constitutional requisite.

(2) Closely akin to taxation is the exercise of the power of eminent domain, and whether the question be the expediency of the projected improvement or the award to be made for the property taken in the exercise of the power, it is well settled that in the absence of express constitutional provision to the contrary a trial in a court of justice is not required for the settlement of this issue.

"The proceeding for the ascertainment of the value of the property and consequent compensation to be made is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts with or without the intervention of the jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner with opportunity to owners of the property to present evidence as to its value and to be heard thereon."

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"Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the constitution some other provision which restrains congress from authorizing such proceedings. . . . Probably there are few governments which do not permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to."

In Phillips v. Commissioner of Internal Revenue, (1931) 283 U. S. 589, 51 Sup. Ct. 609, 75 L. Ed. 1289, the court sustained on the same ground of public necessity the administrative assessment and collection of a tax from a fraudulent transferee of a defaulting tax payer.


51People v. Smith, (1860) 21 N. Y. 595.

Whether a certain improvement is desirable as a matter of public policy is certainly not proper matter for judicial determination, but the determination of the compensation to be awarded for the property taken cannot so be disposed of. The reason given for the non-judicial determination of such issues is usually the historical one that at the time our constitutions were established the administrative rather than the judicial character of eminent domain proceedings was well settled.\(^3\)

(3) Another class of controversies in which public and individual interests are closely intermingled arises in connection with elections. The great weight of authority is that such matters are political and not judicial in character. In *Dickey v. Reed*,\(^4\) involving an election to determine whether the City of Chicago should adopt a new charter, the court declined to enjoin the new government on the alleged ground of fraud in election, saying:

"Elections belong to the political branch of the government, and are beyond the control of the judicial power. It was not designed, when the fundamental law of the State was framed, that either department of government should interfere with or control the other, and it is for the political power of the State, within the limits of the constitution, to provide the manner in which elections shall be held, and the manner in which officers thus elected shall be qualified, and their elections contested."\(^5\)

The legislative power to provide the determination by non-judicial tribunals, not only of the results of election, but also of

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\(^3\) Edwards v. Cheyenne, (1911) 19 Wyo. 110, 114 Pac. 677; 2 Lewis, Law of Eminent Domain, 2d ed., 773. Some state constitutions require that the compensation for the property taken must be assessed by a jury. Constitution of Ohio, art. XIII, sec. 5. Constitution of Washington, art. I, sec. 16. The administrative proceedings must be before an impartial tribunal with opportunity for a hearing on a controverted issue in order to accord with due process of law. Langford v. County of Ramsey, (1870) 16 Minn. 375. In White v. Maverick County Water etc. District, (1931) 35 S. W. (2d) 107 it was held an unconstitutional grant of judicial power to invest an irrigation district with the power to condemn. See also Marin Water, etc., Co. v. California R. Comm., (1916) 171 Cal. 706, 154 Pac. 864.

\(^4\) (1875) 78 Ill. 261.

\(^5\) See also Toncray v. Budge, (1908) 14 Idaho 621, 95 Pac. 26; Allen v. Burrow, (1904) 69 Kan. 812, 77 Pac. 555; In re Freeholders of Hudson County, (1928) 105 N. J. L. 57, 143 Atl. 536; Williamson v. Lane, (1879) 52 Tex. 335; State v. Superior Court, (1914) 81 Wash. 623, 143 Pac. 461.

"The manner of contesting elections is regulated entirely by the statute. The jurisdiction, mode of control, and the entire contest are purely statutory and are beyond the judicial power. A contest is neither an action at law nor in equity and cannot be brought before any court unless the statute so provides." Bowen v. Russell, (1916) 272 Ill. 313, 111 N. E. 978.
the qualifications of individuals to register as voters has been based on the belief that the doctrine of the separation of powers leaves to the legislative branch full control of the processes through which the popular will may be expressed. ⁵⁶

(4) In regard to removal from public office, while it is generally recognized that the legislature in creating such offices may provide for the determination of the term thereof by the arbitrary will of some superior officer, where the statute provides for removal only on specific charges of misfeasance, there is some conflict. The matter is thoroughly discussed in the leading case of State ex rel. Attorney General v. Hawkins. ⁵⁷

"The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him as a public trust to be exercised for the benefit of the public. . . . A public office and its creation is a matter of public, and not of private, law. The legislature had the power to provide for the creation of a board of police commissioners for cities of the grade and class of Cincinnati. This power carried with it, as an incident of its exercise, the power to provide a mode of removal, unless restrained by some provision of the constitution, to the mere act of providing for the appointment of members of the board, which is not the case. . . . There is no requirement that the power of removal, that may be prescribed by law, shall be conferred on the courts, for the legislature is to provide the manner, as well as the cause of removal. . . .

"A different view has been taken by the courts of some of the states. . . . But these decisions have, as a rule, proceeded upon the ground that an incumbent has a property in his office, and that he can not be deprived of his right without the judgment of a court. This view finds support in the doctrines of the common law, which regarded an office as a hereditament, but has no foundation whatever in a representative government like our own. . . . It is claimed that a distinction should be taken in the cases where the power of appointing and removing are reposed in one and the same person, and where it is reposed in different persons. We are aware that this distinction exists in the facts of some of the cases, but we are not aware that any distinction in principle has been based upon it. Whether the person removed was or was not appointed to his office by the official that is vested with the power to remove, can not, as we see it, change the essential character of the power of removal. It is also claimed that a distinction should be taken between the case where an appoint-

⁵⁷(1886) 44 Ohio St. 98, 5 N. E. 228.
ment to an office is made to be held by the appointee at the pleasure of the appointing power, and, where it is with a provision for removal for misconduct. But there is none in principle, so far as the right to remove is concerned. The office, in either case, is held subject to the terms upon which it was created, and the mode of removal prescribed. As it may be so created as that the incumbent shall hold at the pleasure of the appointing power, then for a stronger reason, the appointment may be made to depend upon removal for cause, irrespective of where the power to remove may be lodged. . . . It is a strange sort of logic which reaches the result, that the office may be accepted in the manner prescribed by the legislature, and the mode of removal rejected."

Expressions to the effect that the power to remove, since it calls for the investigation of evidence and the application and construction of law, is an exclusive judicial function have occurred in cases where the removing officer acted without granting a hearing to the accused official. This is a horse of another color. It is doubtful today, when the grant of quasi-judicial functions to administrative bodies has become exceedingly common and where the public exigency often calls for prompt removal of unfaithful officials without waiting for the slow judicial process, whether many courts would follow the dicta of these earlier cases.


In a large class of cases the non-judicial determination of controversies is sustained on the ground that the subject matter thereof is a matter only of privilege and not of right. There is no right to sue the state, and the payment by the state of claims made against it is purely a matter of grace. Therefore, it is held that the state may provide such machinery as it wishes for the determination of those claims which it allows to be presented. Also public lands are the property of the state to be retained or disposed of as it may desire. If the latter course is selected, the

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58In accord, see Donahue v. County of Will, (1881) 100 Ill. 94; State ex rel. Clapp v. Peterson, (1892) 50 Minn. 239, 52 N. W. 655; State ex rel. Caldwell v. Wilson, (1897) 121 N. C. 425, 28 S. E. 554; State ex rel. Shaw v. Frazier, (1918) 39 N. D. 430, 167 N. W. 510.


60See also Christy v. City of Kingfisher, (1904) 13 Okla. 585, 76 Pac. 135, which is of this same type. Orkle v. Board of Commissioners, (1895) 41 W. Va. 471, 23 S. E. 804 is, however, directly opposed to State v. Hawkins, (1886) 44 Ohio St. 98, 5 N. E. 228.

state may provide a non-judicial means for the determination of all questions arising concerning the claim of individuals to take of its bounty even to the extent of settling the claims of contesting private parties to the land in question. So again when state funds are created to provide remuneration for those particularly in need of state assistance, the same conclusion is reached. Concerning the determination of the right of a bank depositor to participate in a state bank deposit guarantee fund, the North Dakota court said:

"The privilege of enjoying the benefits of the fund was conferred as a matter of grace. It cannot be demanded as a matter of right. It was optional with the legislature whether any means should be provided whereby claims against the fund might be established, and so the legislature might prescribe such rules and regulations in that behalf as it deemed just and proper." In the above cases the government may perhaps be visualized as a benevolent St. Nicholas for whose gratuitous disposition of public property and funds prospective donees have no right to sue the donor in the courts of law. The theory of individual privilege as distinct from individual right has, however, been extended to certain other interests in which the government is considered to have the paramount right either to withhold or to grant. In Nishimura Ekiu v. United States, the court said:

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64Decatur v. Paulding, (1840) 14 Pet. (U.S.) 497, 10 L. Ed. 559; Silberschein v. United States, (1924) 266 U. S. 221, 45 Sup. Ct. 69, 69 L. Ed. 256.
66(1892) 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146.
"It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its domains, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. . . . An alien immigrant prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful. . . . But, on the other hand, the final determination of those facts may be intrusted by congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted."

This power of congress to submit claims to administrative determination also extends to controversies arising from the deportation of aliens unlawfully within the country and to the importation into the country by citizens of foreign-made goods. The role played in these cases by the theory that the matter in controversy is one within the plenary power of government is shown by those cases which hold that a trial in one of the regular courts of the land is necessary when a bona fide claim of citizenship is made by a deportee or when a government seeks not only to eject but also to punish an alien unlawfully within the country.

The quasi-judicial function of administrative bodies in a widely separated field from those just considered may also be

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70Ng Fung Ho v. White, (1922) 259 U. S. 276, 42 Sup. Ct. 492, 66 L. Ed. 938; Wong Wing v. United States, (1896) 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140. In Oceanic Steam Navigation Co. v. Stranahan, (1909) 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013 the theory of absolute government prerogative received its fullest recognition in the holding that the United States could, because of its control over the subject matter of the admission of aliens, by administrative determination, without a hearing impose a fine on the steamship company for illegally bringing aliens into the country and collect such fine by the administrative means of refusing clearance papers to the vessel involved until the fine was paid.
sustained on the theory that the subject matter involved is within the plenary power of the state. The grant and forfeiture of corporate charters and privileges may be, and often is, committed to administrative bodies. This is exceedingly common in the regulation of insurance corporations.\(^7\) In the early case of *Hartford Fire Insurance Co. v. Raymond*\(^2\) the state law provided for the revocation by the secretary of state of the license of a foreign insurance company if it appeared to him that the financial condition of the company was such as not to justify its continuance of the business in the state. The supreme court of Michigan upheld this exercise of authority by the secretary, saying:

"It is contended by the relator that the authority granted to foreign insurance corporations to do business in this state is a valuable right, in the nature of and equivalent to a corporate franchise, and within the protection of constitutional safeguards; and that the act is unconstitutional and void because it deprives the relator of these valuable rights and privileges without due process of law. Corporations organized under the laws of other states to engage in and carry on business not open to citizens generally cannot carry on business in this state, except permission, either express or implied, is given them to do so. . . . It has been repeatedly held, and there seems to be no conflict of authority, that corporations of one state have no right to exercise their franchises in another state except upon the assent of such other state, and upon such terms as may be imposed by the state where their business is to be done. The conditions imposed may be reasonable or unreasonable; they are absolutely within the discretion of the legislature."\(^7\)

To designate as a means of escape from constitutional requirements certain interests as mere privileges subject to the arbitrary will of the state is unfortunate. Since the time of Bentham the better juristic philosophy was recognized that in the

\(^7\)See Patterson, The Insurance Commissioner in the United States, secs. 10-13.

\(^2\)(1888) 70 Mich. 485, 38 N. W. 474.

\(^7\)See also Domingues Land Corp. v. Daugherty, (1925) 196 Cal. 468, 238 Pac. 703; Four-S Razor Co. v. Guyman, (1922) 110 Kan. 745, 205 Pac. 635; Brooklyn Steam Transit Co. v. Brooklyn, (1879) 78 N. Y. 24; Des Chutes v. Lara, (1928) 127 Or. 57, 270 Pac. 913. In the case of State v. Blaisdell, (1911) 22 N. D. 86, 132 N. W. 769, the court, however, held it unconstitutional to confer upon the secretary of state the power after a hearing to revoke the license of a foreign corporation to do business in the state if he found that the corporation was violating the anti-monopoly laws of the state. The court considered that the revocation of a charter was in the nature of a punishment and that the secretary in deciding whether or not the company had violated the terms of the statute was acting in a manner comparable to that of a court and was therefore exercising judicial functions contrary to the constitution.
legal sense all of our so-called rights are dependent on the will of the state, which recognizes, restricts or destroys them, in accordance with what it believes the best interests of the common society demand.\footnote{74} The “privilege” of a person injured by an act of government to sue the state, of a business man engaged in foreign trade to import goods from abroad, of an alien to remain in the land where he has taken up his abode, or of a citizen to enjoy the facilities of the postal service is just as valuable, perhaps more valuable, to him than the commoner rights of liberty and property, concerning which it is admitted full constitutional protection is afforded. This is not to say that administrative action in the instances discussed in this and the preceding section should always be prohibited. There may be strong reasons of policy and expediency, which require in certain cases the swift and inexpensive action of the executive. But if there still remains any virtue in the doctrine which requires that judicial functions should be bestowed only on the courts, it is the establishment of a practical balance between the demands of administrative efficiency and the protection of private interests which should determine whether a given power should be exercised by commissions or by courts. As will be later pointed out, behind the doctrine of the separation of powers lie certain fundamental political principles, which it is to the peril of the state and to individual liberty to ignore. The system of administrative adjudication cannot develop in an orderly, intelligent, and safe manner if certain interests are arbitrarily deemed to be beyond the scope of their control.

4. Exercise of the Police Power.

(1) No more expansive concept exists in constitutional law than that of the police power: “The power of promoting the public welfare by restraining and regulating the use of liberty and property.”\footnote{75} And one of the most effective instruments for the promotion of that welfare is that of requiring, through the medium of a license, minimum standards of ability, knowledge, and integrity, in those trades, occupations, and professions which intimately affect the public welfare. Here we have an exercise of governmental power that affects the most precious of individual

\footnote{74}Bentham, Theory of Legislation (Translation from the French by R. Hildreth) p. 82. See Pound, Theories of Law, (1912) 22 Yale L. J. 114, 140-146; Pound, Interests of Personality, (1915) 28 Harv. L. Rev. 343. 343-346.

\footnote{75}Freund, The Police Power, p. III.
interests—the practice of a trade or profession, often made extremely valuable by years of training and experience, usually constituting the sole means of livelihood of the party affected. The issues presented to the tribunal for decision particularly in case of revocation moreover often present questions of fact and lie well within the ordinary competence of a court to decide. Yet it is perfectly well established, with a single exception to be noted below, that there is no exercise of the judicial function in the grant and revocation of governmental licenses by administrative agencies. It is sometimes emphasized that the revocation of a license is in no sense a punishment but merely the means adopted to protect the public against the incompetent, careless, and unscrupulous. Other courts are content with the declaration that the grant and revocation of licenses, while involving elements of judgment and discretion, is nevertheless only quasi-judicial and therefore administrative in nature like the duties of many other executive agencies. The most satisfactory explanation is perhaps that the police power, through its own inherent strength, not only may impose on private individuals the substantive requirements of minimum standards of proficiency and honesty but also may provide an administrative process for determining whether those standards have been maintained. This is well set forth in Meffert v. State Board of Medical Registration and Examination where an administrative board had revoked for alleged gross immorality a physician's license to practice:

“One of the rights reserved to the state is to determine the qualification for office and the conditions upon which citizens may exercise the various callings and pursuits within its limits. . . . It is subversive of the morals of the people and degrading to the medical profession for the state to clothe a grossly immoral man with authority to enter the homes of her citizens in the capacity of a physician. It was the intention of the legislature to adopt a summary proceeding by which the morals of the people and the dignity of the profession might be protected against such a possibility without being embarrassed by the technical rules of proceedings at law. . . . It is further contended that the right of a

76 People v. Apfelbaum, (1911) 251 Ill. 18, 95 N. E. 995; Klafter v. State Board, (1913) 259 Ill. 15, 102 N. E. 193.
78 (1903) 66 Kan. 710, 72 Pac. 247.
physician to practice his profession is a property right, of which he cannot be deprived without due process of law, which plaintiff in error construes to mean the judgment of a constitutionally created court. We have seen that it is within the police power of a state to prescribe the qualifications of one desiring to practice medicine, and also to provide for the creation of a board or tribunal to make the examination and determine whether the applicant for a license to follow this profession possesses the required qualification, and if so to issue to him such license. It must follow that the state may confer upon the same board or tribunal the power to revoke such license, if it should thereafter be made to appear that the license should not have been issued, or if for any reason the holder thereof since its issuance becomes disqualified."\(^7\)

When confronted, however, with proposed commission disbarment of attorneys the courts have revolted. Whether this is because, as the courts have declared, the admission and disbarment of attorneys is a traditional and peculiar prerogative of the courts or whether it is because the judges, as members of the legal profession, have a greater understanding and sympathy for the rights of an attorney charged with unprofessional practices may perhaps be left to conjecture.\(^8\)

(2) Another well recognized exercise of the police power by administrative agencies is the abatement of public nuisances. The


There seems to be no sustained contention that building commissioners and boards of appeal under building and zoning ordinances are exercising judicial powers. Nevertheless their functions have frequently been referred to as quasi-judicial in nature: Murphy v. Curley, (1914) 220 Mass. 73, 107 N. E. 378; Hendey v. Ackerman, (1927) 103 N. J. L. 305, 136 Atl. 733; People ex rel. Swedish Hospital v. Leo, (1923) 120 Misc. Rep. 355, 198 N. Y. S. 397; Harden v. City of Raleigh, (1926) 192 N. C. 395, 135 S. E. 151. In Gulf Refining Co. v. City of Dallas, (Tex. Civ. App. 1928) 10 S. W. (2d) 151 it was held that the power of a building commissioner to refuse or to revoke building permits, when found contrary to the restrictions in deeds, was an illegal grant of judicial power. It has also been held that where no sufficiently definite standard is afforded for the power of a board of appeal to suspend in particular cases the general operation of a zoning ordinance, the statute constituted an illegal delegation of legislative power. Welton v. Hamilton, (1931) 344 Ill. 82, 176 N. E. 333. Cf. Sundeen v. Rogers, (1928) 83 N. H. 253, 141 Atl. 142; Spencer-Sturla Co. v. City of Memphis, (1927) 155 Tenn. 70, 290 S. W. 608; and see Cover, Legal Status of Boards of Zoning Appeals, (1933) 8 J. Land & Pub. Utility Econ. 352.

\(^8\)In re Shattuck, (1929) 208 Cal. 6, 279 Pac. 998; In re Edwards, (1928) 45 Idaho 676, 266 Pac. 665; In re Scott, (1930) 53 Nev. 24, 292 Pac. 291; In re Gibson, (1931) 35 N. M. 550, 4 Pac. (2d) 643; In re Bruen, (1918) 102 Wash. 472, 172 Pac. 1152.
attacks on this exercise of power have been customarily based on the ground that the procedure deprives the owner concerned of his property without due process of law. In overruling such contention the courts have customarily relied on a variety of reasons. In *Manhattan Manufacturing and Fertilizing Co. v. VanKeuren* a municipal officer investigated and found that the fertilizer factory of the plaintiff constituted a nuisance, and entered and sufficiently dismantled it to prevent its operation, when the owner thereof failed to remedy the conditions complained of. In sustaining his action the court said:

"At common law it was always the right of a citizen, without official authority to abate a public nuisance, and without waiting to have it adjudged such by a legal tribunal. His right to do so depended upon the fact of its being a nuisance. If he assumed to act upon his own adjudication that it was, and such adjudication was afterwards shown to be wrong, he was liable as wrongdoer for his error, and appropriate damages could be recovered against him. This common law right still exists in full force. Any citizen, acting either as an individual or as a public official under orders of local or municipal authorities, whether such order be or be not in pursuance of special legislation or chartered provisions, may abate what the common law deemed a public nuisance. In abating it property may be destroyed, and the owner deprived of it without trial, without notice, and without compensation. Such destruction for the public safety or health is not a taking of private property for public use without compensation or due process of law in the sense of the constitution. It is simply the prevention of its noxious and unlawful use, and depends upon the principles that every man must so use his property as not to injure his neighbor, and that the safety of the public is the paramount law. These principles are legal maxims or axioms essential to the existence of regulated society. Written constitutions presuppose them, and cannot set them aside. They underlie and justify what is termed the police power of the state."

Again in *Lowe v. Conroy* a health officer destroyed certain hides alleged to be infected with anthrax. In a suit against him for damages the court sustained such procedure on the ground of immediate public necessity, remarking:

"The statutes were unquestionably framed upon the fact that such boards must act immediately and summarily in cases of the appearance of contagious and malignant diseases, which are liable to spread and become epidemic causing destruction of human life. Under such circumstances it has been held that the legislature

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81 (1872) 23 N. J. Eq. 251.
82 (1904) 120 Wis. 151, 97 N. W. 942.
under its police power can rightfully grant to boards of health authority to employ all necessary means to protect the public health, and if necessary to go to the extent of destroying private property when the emergency demands.\[83\]

The courts have sustained administrative abatement not only of property offensive to the senses or imminently dangerous to the public health\[84\] but also of property infected with dangerous animal and plant diseases\[85\] and of artesian wells allowed by the owner to run to waste to the detriment of other water users.\[86\] On the analogy of nuisance the administrative abatement of buildings erected or improved contrary to law within the fire limits of a city is sustained, the courts frequently stressing the necessity for immediate and summary action to prevent the always present danger of fire;\[87\] and it has been held that administrative officials may impound and sell for the charges animals unlawfully allowed to stray on the public highways.\[88\] The quarantine of those infected with contagious diseases is properly committed to medical

\[83\] In the trial of this case the jury found that the hides were not in fact infected with the result that the officer was held liable for the value thereof. The award of damages was affirmed on appeal. In Miller v. Horton, (1891) 152 Mass. 540, 26 N. E. 100 the court intimated strongly that it was beyond the power of the state to make the administrative determination final. See also Freund, The Police Power, sec. 521.

\[84\] City of Orlando v. Pragg, (1893) 31 Fla. 111, 12 So. 368; Mayor, etc., of Savannah v. Mulligan, (1895) 95 Ga. 323, 22 S. E. 621; City of New Orleans v. Charaouleau, (1908) 121 La. 890, 46 So. 911.

\[85\] Los Angeles County v. Spencer, (1899) 126 Cal. 670, 59 Pac. 202; Rowland v. Morris, (1922) 152 Ga. 842, 111 S. E. 389. In Stockwell v. State, (1920) 110 Tex. 550, 221 S. W. 932, the Texas supreme court held unconstitutional a statute giving to the commissioner of agriculture authority to order the abatement of trees and shrubs infested with contagious diseases of citrus fruits, which statute made the decision of the commissioner final. The court held that while the state may declare a definite thing a nuisance and order its destruction, if the statute defines the nuisance only in general terms, the determination of whether a specific thing comes within those terms involves the judicial function. "Under the contest made by his pleading, before the property of the defendant could be summarily destroyed, he was entitled to a judicial hearing and decision as to whether it ought to be destroyed. As applied to such a case, nothing less would amount to due process of law, without which the bill of rights declares no citizen shall be deprived of his property."


\[88\] Wilcox v. Heming, (1883) 58 Wis. 144, 15 N. W. 435; contra, Varden v. Mount, (1879) 78 Ky. 86.
The administrative abatement of certain classes of property, however, such as gambling devices, obscene pictures, and intoxicating liquors, rests on the distinct principle that the state may deprive such articles of their character as property, and in them therefore the possessors can claim no legal rights enforceable in the courts of law.89

Granting that property of a certain kind is a nuisance the right of administrative abatement seems clear, but the legislature has no arbitrary power to declare property to be a nuisance and so subject to summary destruction by executive officers.90 But whether the right to declare property a nuisance is limited to those cases where summary and immediate abatement is essential to the preservation of public welfare or where the property has been validly stripped of all legal status is perhaps uncertain.91

(3) Certain callings, such as railroads and the other public service companies and commercial banks, are subject to an unusual degree of public control, which in recent years has been invariably committed to administrative commissions. Perhaps the most important function exercised by such commissions is the regulation of the rates of the railroads and of the other public utilities. Concerning this function it is held that the fixing of a rate for the future, though it involves the finding of facts and the application and construction of law, is an act inherently legislative in character and so not subject to the objection that judicial power is unlawfully conferred on an administrative body.92

89 Haverty v. Bass, (1876) 66 Me. 71; Ex parte Lewis, (1931) 328 Mo. 843, 42 S. W. (2d) 21. In State v. Troutman, (1931) 50 Idaho 673, 299 Pac. 658 and In re Main, (1933) 162 Okla. 65, 19 Pac. (2d) 153, the court sustained orders by administrative agencies for the sterilization of mental defectives, where full judicial review was afforded.


control includes, besides rate regulation, many other details of the utility's relations with the public, such as the extent and character of the service furnished, the construction and abandonment of lines of railroad, the location of stations, the crossings and connections between the lines of different railroad companies, and the proper protection of highway crossings. It seems settled that such functions are administrative, and not judicial, in character. In People ex rel. Hubbard v. Colorado Title & Trust Co., the court sustained the grant to the public utilities commission of power to authorize the abandonment of a line of railroad, saying:

"The Public Utilities Commission is not a court, but is an administrative commission, having certain delegated powers, and charged with the performance of certain executive and administrative duties, and its powers are subject to the action of the courts in matters of which the courts have jurisdiction. . . . The power to ascertain from the facts whether a railroad company should discontinue service upon and dismantle the road is delegated by the Legislature to a commission. . . . This is not the exercise of judicial power by a commission in the sense that courts administer judicial remedies, but is incidental to the exercise of delegated administrative powers. The exercise of judgment and discretion as an incident to such power is not the exercise of judicial power within the meaning of the Constitution."

Banking is another activity closely affecting the public and subject to unusual supervision by administrative authorities. Concerning the activities of such executive agents it has been held that the closing of banks, the operations of which are dangerous to the public welfare, and the levying of assessments against the stockholders of insolvent institutions are not so far judicial in character that they may not be performed by administrative officers.

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94(1918) 65 Colo. 472, 178 Pac. 6.
96Cosmopolitan Trust Co. v. Mitchell, (1922) 242 Mass. 95, 136 N. E.
The infliction of punishment for the violation of law, particularly when it involves incarceration of the offender, is undoubtedly considered to be the peculiar prerogative of the courts. In *Wong Wing v. United States* a federal statute gave to a United States judge or court commissioner power, by summary proceedings, not only to deport aliens unlawfully within the country but also to order their confinement at hard labor for one year prior to the deportation. The court, while admitting that the exclusion and deportation of aliens might lawfully be committed to administrative agencies, held unconstitutional the attempt to provide such proceedings in relation to punishment.

"To declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents."

Other statutes have also been held unconstitutional when the court has seen in them attempts to impose on administrative agencies the power to punish for crime. Thus the Illinois court held that a so-called tax of $10 imposed on all land owners who failed to clear certain streams on their lands of obstruction was in reality a penalty which could not be imposed by the tax administrators, and in North Dakota a statute which directed the secretary of state to revoke the charter of any corporation which, in his opinion, was intentionally, for the purpose of destroying competition, selling its merchandise at lower rates in one section of the state than in others, was an unconstitutional attempt to inflict punishment through administrative process.

403; *Felton v. Bennett*, (1927) 163 Ga. 849, 137 S. E. 264; *Allen v. Prudential Trust Co.*, (1922) 242 Mass. 78, 136 N. E. 410; *Hanson v. Soderberg*, (1919) 105 Wash. 255, 177 Pac. 827. In *Shaw v. Lone Star Bldg. & Loan Association*, (1931) 40 S. W. (2d) 968 the uniformly conservative Texas court held that the state banking commissioner could not be invested with power to annul the certificate of authority of a building and loan association determined by him to be conducting its business in violation of law. "The determination of these questions 'upon examination and other evidence' and the imposition of the penalty, annulment of the permit to do business, involve all elements of a judicial proceeding, and power, the exercise of which the constitution has vested in the judiciary."

97(1896) 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140.

98*Cleveland, etc., R. v. People*, (1904) 212 Ill. 638, 72 N. E. 725.

99*State v. Blaisdell*, (1911) 22 N. D. 85, 132 N. W. 769. The court
Nevertheless, in certain situations, in which the public interest is particularly paramount, administrative imposition of penalties for breaches of the law has been accepted with scarcely any protest. For a long time the tariff laws have provided that where the appraised value of imported merchandise shall exceed by a given percentage the declared value, additional duties by way of penalty shall be assessed by the collector of customs. Concerning this statute the Supreme Court of the United States in *Passavant v. United States* said:

"As stated by Mr. Justice Campbell, speaking for the court, in *Bartlett v. Kane*, . . . such additional duties 'are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud.' They are designed to discourage undervaluation upon imported merchandise, and to prevent efforts to escape the legal rates of duty. It is wholly immaterial whether they are called 'additional duties' or 'penalties.' Congress had the power to impose them under either designation or character. When the dutiable value of the merchandise is finally ascertained to be in excess of the value declared in the entry by more than 10 per centum, this extra duty or penalty attaches, and the collector is directed and required to levy and collect the same in addition to the ad valorem duty provided by law. The importers in this case cannot be heard to complain of this additional duty or penalty, which was a legal incident to the finding of a dutiable value in excess of the entry value to the extent provided by the statute."

The power of the commissioner of internal revenue to levy additional assessments on account of negligent or fraudulent income tax returns seems not to have been challenged on constitutional grounds. The most extreme example of administrative imposition of penalties occurs in the case of *Oceanic Steam Navigation Company v. Stranahan*, where the collector of customs was empowered to impose a fine of $100 for each diseased alien brought into the United States by a steamship company when medical examination under the auspices of such officer disclosed that the said company should have ascertained the fact of such

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disease at the time of embarkation. This administrative exercise of the power to punish was sustained by a reliance on the plenary power of Congress over foreign commerce. Concerning this formalistic approach to the subject sufficient has been said already.


The settlement of disputes between individual contestants is the very raison d'etre and primary occupation of the courts of justice, and in the grant to administrative bodies of such functions the greatest strain of all is placed upon the doctrine of the separation of powers. Professor Ernst Freund in his treatise, Administrative Powers over Persons and Property, thought indeed such exercise of quasi-judicial powers by administrative bodies so much of an anomaly that he refused to include them in his treatment of the subject. Nevertheless, several very important instances of the grant of such powers to administrative tribunals exist. The Interstate Commerce Act gives to the commission power to entertain complaints against carriers for damages suffered on account of violations of the act. The order of the commission for reparation is, however, enforceable only by action at law in the courts, where the findings and order of the commission are prima facie evidence of the facts. Similar provisions occur in many of the state utility laws. Back of these grants of power lies undoubtedly the conviction that the control over the railroads and other public utilities calls for the detailed knowledge and training of expert administrative officials and that this control should not be hampered by theoretical divisions of the powers of government. In the leading case of Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co., the Supreme Court took the position that one of the cardinal objects of the Interstate Commerce Act was to secure uniformity of rates and transportation

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103 There is some conflict whether an administrative agency has the power to punish for contempt witnesses who refuse to testify before it. See Interstate Commerce Commission v. Brimson, (1894) 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047 dictum; Langenberg v. Decker, (1892) 131 Ind. 471, 31 N. E. 190; In re Sanford, (1911) 236 Mo. 665, 139 S. W. 376; In re Hayes, (1931) 200 N. C. 133, 156 S. E. 791.

104 See supra II, 3.


practices between carriers and shippers. It held, therefore, that a shipper claiming to be injured by the illegal charges of a carrier could not sue therefor in the courts until the validity or invalidity of the charges had been established before the Interstate Commerce Commission.

While there have been numerous cases considering whether or not administrative judgment and discretion is so involved in a given case as to require resort to the commission before suit is brought before the courts, the determination of the class of claims that can be entertained by the commission under its statutory power to award damages has not been so often considered. Probably the best suggestion is that of an unusually well-informed commentator, that the commission's power extends only to those cases where the knowledge and judgment of experienced technicians is required and not to those cases where the decision depends only upon ordinary fact determinations and the application thereto of the rules of the common law. In this respect the case of Great Northern Ry. Co. v. Merchants Elevator Co. is instructive. In that case a shipper sued in a state suit to recover freight charges exacted in alleged violation of the company's tariffs. The decision turned on a proper construction of these tariffs, and it was contended that in order to secure uniformity under the principle of the Abilene Case prior resort should be had to the commission. The court, however, denied the argument saying that resort to the commission is required in those cases where the determination of the controversy demands "acquaintance with the many intricate facts of transportation . . . commonly to be found only in a body of experts." In the instant case, if the interpretation of the tariff had involved the question whether particular terms therein employed had been used in a general or in a special trade sense, it would have been necessary to have secured first the expert decision of the commission; but since the only question was the ordinary one of law, viz., the proper construction to be placed on a written document, the courts had the primary

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110Fletcher, Power of the Interstate Commerce Commission to Award Damages, (1916) 25 Yale L. J. 489.

jurisdiction. It is this difference between those controversies which involve detailed knowledge of utility law and practices and those which require only ordinary fact determinations and the application of the ordinary rules of law that seems to decide, not only in Interstate Commerce Commission cases,\footnote{Blume & Co. v. Wells-Fargo, (1909) 15 I. C. C. Rep. 53; Gustafson v. Mich. Cent. R. Co., (1921) 296 Ill. 41, 129 N. E. 516; Louisville & N. R. Co. v. Scott, (1909) 133 Ky. 724, 118 S. W. 990.} but also in cases arising under the state utility laws, whether the commissions or the courts should have jurisdiction.\footnote{In Waukesha G. & E. Co. v. Waukesha Motor Co., (1921) 175 Wis. 420, 184 N. W. 702, the plaintiff utility sued for gas and electricity furnished the defendant. The defendant counterclaimed for breach of the plaintiff's contract to furnish certain specified amounts of gas and electricity each month. The Wisconsin supreme court held that the matter of this counter claim was for the courts and not for the commission, since the only question involved was the simple question of breach of contract, wherein the technical knowledge of the commission could be of no assistance. In Chicago, M. & St. P. Ry. Co. v. R. R. Commission, (1927) 194 Wis. 24, 215 N. W. 442, the Monad Construction Co. had become indebted to the plaintiff railroad for demurrage charges. The plaintiff had in its filed tariffs a certain average demurrage plan in which credit was given to the shipper for prompt return of cars. The railroad company refused to enter into such average demurrage agreement with the Monad Co., on account of the past unpaid demurrage, and made demand on the shipper for demurrage on the straight basis. It was held that this was a matter within the proper jurisdiction of the Commission. The Waukesha G. & E. Case involved mere breach of contract, whereas in this case the violation of statutory rules was involved. See also Jones v. Cooper, (1922) 154 Ark. 308, 242 S. W. 550.} The commission's power of reparation being thus limited, the courts have found but little constitutional difficulty with the statutes, since they do not pretend to give the commission any enforcement power but require court action to collect the award in which the proceedings before the commission constitute prima facie evidence only of the right to the award.\footnote{Meeker v. Lehigh Valley Ry. Co., (1915) 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed. 644; Sullivan v. Union Stockyards Co., (C.C.A. 8th Cir. 1928) 26 F. (2d) 60; State v. Public Service Comm., (1932) 135 Kan. 491, 11 Pac. (2d) 999; Louisville & N. R. Co. v. Greenbrier Distillery Co., (1916) 170 Ky. 775, 187 S. W. 296; Turner Creamery Co. v. Chicago, M. & St. P. Ry., (1915) 36 S. D. 310, 154 N. W. 819; Chicago & N. W. Ry. v. Railroad Comm., (1914) 156 Wis. 47, 145 N. W. 216. In State ex rel. Chicago, M. & St. P. Ry. v. Pub. Serv. Comm., (1917) 94 Wash. 274, 162 Pac. 523, where the commission attempted to make a final award of damages, it was held an unconstitutional delegation of judicial power existed. In State ex rel. Mo. Pac. R. R. Co. v. Pub. Serv. Comm., (1924) 303 Mo. 212, 259 S. W. 445, the Missouri supreme court held that the power of the Public Service Commission to decide claims of shippers against railroads was an unconstitutional grant of judicial power. "To determine whether one person is entitled to recover money from another by way of damages cannot be anything but a judicial question and as such must be determined by the courts. The Public Service Commission is not, and under our constitution cannot be, a court. . . . A statute authorizing such
Two major attempts have been made to subject to administrative determination controversies over land titles. To inaugurate the so-called Torrens system of land registration, the Illinois legislature provided that application for a certificate of title should be made to the recorder of deeds, who, after notice to possible adverse claimants, should proceed to have the title to the land examined, and upon satisfying himself of the right of the petitioner, should issue to him a certificate of title. This certificate should constitute conclusive evidence of the holder's rights, except that those claiming an adverse interest in the land should have five years from the date of the certificate to bring action in the regular courts of law to assert their adverse claims. In spite of this right of judicial review, the statute was held an illegal delegation of judicial power.\textsuperscript{5} State v. Guilbert\textsuperscript{1} involved that portion of the Ohio Torrens law which gave the recorder of deeds, upon petition of the mortgagor, authority to discharge, after notice to the mortgagee, liens upon the land for which no satisfaction had been filed, although an appeal might be made to the courts from the decision of the recorder. The court again held that this determination by an administrative officer of the rights of the parties was an unconstitutional exercise of judicial power.

A more determined effort to provide administrative means for the settlement of land controversies has been made in connection with conflicting water rights in the arid states of the west, where the doctrine of prior appropriation prevails. Concerning the relative efficiency of judicial and administrative adjudication of these claims the Wyoming court has remarked:

"In the development of the irrigation problem under the rule of prior appropriation, perplexing questions are continually arising, of a technical and practical character. As between an investigation in the courts and by the board, it would seem that an administrative board, with experience and peculiar knowledge along this particular line, can, in the first instance, solve the questions involved, with due regard to private and public interests, conduct the requisite investigation, and make the ascertainment of individual rights, with greater facility, at less expense to interested parties, and with a larger degree of satisfaction to all concerned."\textsuperscript{117}

\textsuperscript{5}People ex rel. Kern v. Chase, (1896) 165 Ill. 527, 46 N. E. 454. See supra, p. 273, for quotations from this case.

\textsuperscript{117}Farm Investment Co. v. Carpenter, (1900) 9 Wyo. 110, 61 Pac. 258.
The Wyoming law, which forms the basis for the statutes of Nebraska, Texas, and Nevada, provides for a board of water control which, on its own motion, is to proceed to determine after investigation and hearing the respective priorities of the claimants to the public waters of the state. Appeal is permitted to the courts, but, in absence of such, the order of the board, recordable in the county court as a certificate of title, is conclusively determinative of the rights of the respective users. Concerning the contention that judicial power is unlawfully delegated to the board, the Wyoming court said:

"The statute nowhere attempts to devest the courts of any jurisdiction granted to them by the constitution to redress grievances and afford relief at law or in equity under the ordinary and well-known rules of procedure. A purely statutory proceeding is created, to be set in motion by no act or complaint of any injured party, but which in each instance is to be inaugurated by order of the board,—a proceeding which is to result, not in a judgment for damages to a party for injuries sustained, nor the issuance of any writ or process known to the law for the purpose of preventing the unlawful invasion of a party's rights or privileges; but the finality of the proceeding is a settlement or adjustment of the priorities of appropriation of the public waters of the state, and is followed by the issuance of a certificate to each appropriator, showing his relative standing among other claimants, and the amount of water to which he is found to be entitled."

A similar result was reached in the neighboring state of Nebraska, but in Texas and Nevada the law in question was held invalid. In Board of Water Engineers v. McKnight, the Texas court said:

"In order to make the determinations required of the Board of Water Engineers in Texas, they must decide the most intricate questions of law and of fact—questions with respect to the validity and superiority of land titles, questions of contract, questions of boundary, questions of limitations, and questions of prescription. An inquiry involving such questions and resulting in the binding adjudication of property rights is strictly judicial, and we would not uphold the Constitution as it is plainly written were we to sanction the delegation of the power to conduct and to finally

See also Cox, The Texas Board of Water Engineers, (1928) 7 Tex. L. Rev. 86, 245.


(1921) 111 Tex. 82, 229 S. W. 301. See supra p. 273 for further discussion of this case.
determine such an inquiry to any other tribunal than the courts. . . ."120

The Oregon and Arizona statutes differ slightly from those just mentioned in that the order of the board is not of itself determinative of the rights of the parties but must first be filed in the circuit court, which court, if no objection is made to the board’s findings, enters judgment in accordance therewith, but if objection is made, proceeds to determine the rights of the parties in a manner which "shall be as nearly as may be like that in a suit of equity." These statutes have been upheld, the Oregon court saying:

"In proceedings under the statute the board is not authorized to make determinations which are final in character. Their findings and orders are prima facie final and binding until changed in some proper proceeding. The findings of the board are advisory rather than authoritative. It is only when the courts of the state have obtained jurisdiction of the subject-matter and of the persons interested and rendered a decree in the matter determining such rights that, strictly speaking, an adjudication or final determination is made."121

(3) In conferring upon industrial commissions and similar boards the power to determine the claims of employees for injuries arising under the provisions of the workmen’s compensation laws we find by far the most important instance of the delegation to administrative agencies of quasi-judicial power. Although the compensation laws extend the liability of the employer far beyond the original limits of the common law, nevertheless both under the commission administration of the statutory rules and the court administration of the common law rule the essential question to be answered is the same: Is the employer liable to his employee under the particular rules applicable to the case for an injury to the latter occurring in the course of his employment? It should be noticed also that the controversy at issue is essentially a private one between individual persons, the public right being

120See Cox, supra n. 117, for a complete discussion of the situation in Texas, and Ormsby County v. Kearney, (1914) 37 Nev. 314, 142 Pac. 803, in which the Nevada court by a two to one decision held their act unconstitutional. As far as the statutes provided for the licensing or the appropriation of the unused public waters of the state, the statute was upheld, even though the determination of the board that unappropriated waters existed would seem to involve the vested rights of prior appropriators. See Motl v. Boyd, (1926) 116 Tex. 82, 286 S. W. 458; Speer v. Stephenson, (1909) 16 Idaho 707, 102 Pac. 365.

121In re Willow Creek, (1914) 74 Or. 592, 144 Pac. 505. See accord Stuart v. Norviel, (1924) 26 Ariz. 493, 226 Pac. 908.
involved only to the extent that the state is perhaps unusually interested in the welfare of its laboring classes. Nevertheless, in spite of this strong resemblance to the ordinary judicial function, the delegation to commissions of the power to decide claims under the workmen's compensation statutes has been uniformly sustained, but for a variety of reasons.

The elective acts can be easily disposed of on the ground that the parties have voluntarily chosen to accept commission adjudication of their respective claims. "The act being elective it is operative only as to those who choose to come within its terms, and in administering the act the commission becomes a board of arbitration by agreement." When this escape from the constitutional question is either not available or not resorted to, the reasons given for upholding the delegation of this quasi-judicial power to the commissions do not possess the above logical decisiveness. At times the court depends upon its own ipse dixit that the power of the board is only administrative and not judicial, or upon the non-conclusive assertion that the determination of fact questions and the exercise of discretion are not exclusive attributes of the courts but inhere also in the duties of many executive officers and boards. The assertion of one court

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122 In some states a state fund is created to which injured employees are relegated to claims for injuries arising in the course of their employment. Since resort to this fund is in lieu of the right existing at common law to sue the employer for damages, it could hardly be contended that the state has the same arbitrary right to control expenditures from this fund as it does in respect to claims against the state which are granted purely as a matter of grace. See supra, II. C.


124 The act "vests no judicial power in the industrial accident board which it creates. That board is but an administrative agency provided for the proper execution of the act." Middleton v. Tex. P. & L. Co., (1916) 108 Tex. 96, 185 S. W. 556. See also Fassig v. State ex rel. Turner, (1917) 95 Ohio St. 232, 116 N. E. 104.


"We do not consider the industrial commission a court; nor do we construe the act as vesting in the Commission judicial powers within the meaning of the constitution. It is an administrative body or arm of the government which in the course of its administration of a law is empowered to ascertain some questions of fact and apply the existing law thereto, and in so doing acts quasi-judicially, but it is not thereby vested with judicial
that the acts of the compensation boards are administrative and not judicial because "the act is almost automatic in practical working, amounts to be paid are easy of computation, and the person or persons to whom they shall be paid are fixed and certain." This certainly will not be agreed to by any one who is cognizant of the difficulties arising in the administration of the compensation laws. A more common ground for denying the contention that judicial powers are conferred on the compensation commissions is the instance that such boards possess no powers of enforcing their own decrees, or else that they are not wholly binding on the parties due to a more or less limited power of review by the regularly constituted courts. Thus in the leading case of Borgnis v. Falk the court held that the retention by the courts of the power to decide whether a particular case came within the commission's jurisdiction as constituting a claim for compensation against an employer by an employee who had elected to come under the act, for accidental injury, growing out of or incidental to the employment, and not due to wilful conduct, saved the statute from being an unconstitutional delegation of judicial power. Reference has already been made to the fact that this limited right of judicial review leaves to the administrative body the final decision on many of the most important issues between power in the constitutional sense. There are many such administrative bodies or commissions, and with the increasing complexity of modern government they seem likely to increase rather than diminish. Examples may be easily thought of,—town boards, boards of health, boards of review, boards of equalization, railroad rate commissions, and public utility commissions all come within this class. They perform very important duties in our scheme of government, but they are not legislatures or courts. The legislative branch of the government by statute determines the rights, duties, and liabilities of persons and corporations under certain conditions of fact, and varying as the facts and conditions change. . . . The law is made by the legislature; the facts upon which its operation is dependent are ascertained by the administrative board." For the weakness of this line of reasoning see supra, p. 266.

126Grand Trunk Western R. R. Co. v. Industrial Commission, (1920) 291 Ill. 167, 125 N. E. 748. See also Cunningham v. Northwest Improvement Co., (1911) 44 Mont. 180, 119 Pac. 554.

127Mackin v. Detroit-Timkin Axle Co., (1915) 187 Mich. 8, 153 N. W. 49. The industrial accident board is "but an administrative body vested, it is true, with various and important duties and powers, some of them quasi-judicial in their nature, but without that final authority to decide and render enforceable judgment which constitutes the judicial power. Its determinations and awards are not enforceable by execution or other process until a binding judgment is entered thereon in a regularly constituted court."

128(1911) 147 Wis. 327, 133 N. W. 209.

129See also Alabam's Freight Co. v. Hunt, (1926) 29 Ariz. 419, 242 Pac. 658; State ex rel. Yaple v. Creamer, (1912) 85 Ohio St. 349, 97 N. E. 602.
the parties and places but little restriction on the practical substitution of administrative for court adjudication.\(^\text{130}\)

The most realistic solution to the workmen's compensation cases is based on the police power of the state which has sufficient vigor not only to sustain in matters of industrial accidents the substitution of a rule of absolute liability for the old doctrine based on fault, but also administrative determination of liability for that of the slower and more cumbersome methods of the courts. In *State v. Mountain Timber Co.*,\(^\text{131}\) the court said:

"When we say that we sustain a law by reference to the police power that might otherwise be in conflict with some provision of the constitution, it would seem that every incident to that law, as well as all methods necessary to make it effective, are likewise exempted from the proscriptions and limitations of the constitution. The legislature has adopted the idea of industrial insurance, and seen fit to make that idea a workable one by putting its execution, as well as its administrative features, in the hands of a commission. It has abolished rights of actions and defenses and in certain cases denied the right of trial by jury. The legislature has said to the man whose business is a dangerous one and the operation of which may bring injury to an employee, that he cannot do business without waiving certain rights and privileges heretofore enjoyed, and it has said to the employee that, inasmuch as he may become dependent upon the state, he must give up his personal right of contract when about to engage in a hazardous occupation and contract with reference to the law. These demands are the fundamentals of our industrial insurance law. If the law is not administered as therein provided, it is not likely that a compulsory law such as it is could ever be adequately administered; for, aside from its humane purpose, it was adopted in order that the delay and frequent injustice incident to civil trials might be avoided. . . . To uphold the law in the sense of sustaining the idea of industrial insurance, and to deny the right of executing it without the intervention of the courts, would throw us back on the original ground and we should then, if consistent, hold the idea of industrial insurance to be beyond the limit of the police power."\(^\text{132}\)

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\(^{130}\)See supra, p. 274.

\(^{131}\) (1913) 75 Wash. 581, 135 Pac. 645.

\(^{132}\)See also Solvuca v. Ryan & Reilly Co., (1917) 131 Md. 265, 101 N. E. 710.

In *Western Metal Supply Co. v. Pillsbury*, (1916) 172 Cal. 407, 156 Pac. 491, the California supreme court, by reason of a constitutional amendment authorizing the legislature to provide administrative settlement of compensation claims, was not required to resort to subtleties to sustain the compensation act and was quite emphatic in its declaration that "this action by such board would be an exercise of judicial power. For that purpose it is in legal effect a court."
From the foregoing somewhat lengthy discussion of the cases it appears that a reasonable and persistent public demand for tribunals and machinery better equipped than are the customary courts to handle in a speedy, economical, and efficient manner certain phases of legal controversy has met, and probably will meet, with but little effective constitutional resistance. On one ground or another the overwhelming majority of opinions sustain the delegation in the particular case that happens to be before the court. There is no line of sufficient clarity effectively to differentiate the judicial and the administrative functions and so to place them in their proper respective departments. Administrative bodies have been given powers to decide controversies between the state and individuals and even between private disputants, which are nevertheless held to be non-judicial in character as long as the power of enforcement is left with the courts and a modicum of judicial review is still available. As has been seen, the power to grant and revoke licenses has been held a proper administrative function. It seems likely that through this medium of the administrative license government will assume an increasingly greater control over what we formerly considered the private prerogatives of business and industry. The result in the western water and in the workmen's compensation cases indicates that, even in the case of essentially private controversies, administrative tribunals and methods may be provided if such recourse seems necessary to secure prompt and efficient justice. The declaration that the police power is capable not only of imposing new substantive standards but also of providing machinery to make the enforcement of those standards effective has possibilities of future developments by no means exhausted. It is not now necessary to ascertain with exactness the extent to which the system of administrative justice may constitutionally proceed. For present purposes it is sufficient to say that the system has established its right to a place in our governmental structure and that the end is not yet in sight.

The present predominance of the question of the constitutional rights of administrative agencies to exist has led in many ways

133 See supra, p. 286.
135 See supra, p. 298.
136 See supra, p. 265 and p. 303.
to gross anachronisms and injustices. Professor Patterson has shown that the administrative control over the insurance business is singularly lacking in the fundamentals of the judicial process, and the administration of the laws concerning the admission and expulsion of aliens approaches a national scandal. The degree of judicial review of administrative action now available leaves on the one hand a large amount of judicial power in the hands of the executive and on the other is frequently criticized as an officious interference with the administrative process. It is a reproach to Anglo-American justice that a competent American observer can declare of France and of French administrative law that "there is no other country where the rights of private individuals are so well protected against the arbitrariness, the abuses, and the illegal conduct of the administrative authorities."

Administrative law has indeed been sharply and severely criticised as an alien and dangerous innovation. It is, however, strongly urged that those who are genuinely concerned would render a much greater service if they would abandon their vain attempts to sweep back the tides of administrative law and would concentrate their attention to preserving in that system the really fundamental ideals and principles of justice that the centuries have enshrined in the jurisprudence and procedure of our customary courts. In spite of the virtual overthrow of the doctrine that would forbid the delegation of judicial duties to other bodies than the regularly constituted courts, it is believed that the courts

137 Patterson, The Insurance Commissioner in the United States, chap. 5.
139 See supra, p. 274.
142 See Sutherland, Private Rights and Governmental Control, (1918) 85 Cent. L. J. 168; Allen, Bureaucracy Triumphant; The Rt. Hon. Lord Hewart of Bury, The New Despotism; Kidd, Encroachment of Administrative Bodies on the Judicial Sphere, (1929) 45 Scot. L. Rev. 325. A somewhat extensive survey by the author of the views of the Wisconsin Bar reveals a widespread hostility among the lawyers of the state to commissions and commission methods.
of law as we know them in the Anglo-American system have in their organization, procedure, and tradition, along with much that is unnecessary and outmoded, the elements which secure the fair and impartial justice which is a necessary attribute of every enlightened government.

In a thoughtful and thorough treatise148 Mr. W. A. Robson of the English Bar discusses those elements of organization, procedure, and judicial thought technique by which the English attempt to preserve the quality of justice dispensed by their courts. This is not the place to consider how many of these elements should be incorporated into a system of administrative justice. Unfortunately, some of the features that are most important in securing for the courts their vaunted impartiality cause their proceedings to be cumbersome, over-technical, and expensive. In creating administrative tribunals we are too often prone to rush to the other extreme and pay little or no attention to the fundamentals of organization and procedure by which the purity of the judicial process is preserved. This neglect of the details of administrative organization and process should not continue. We must pay more attention to the legislation by which administrative tribunals are created and their procedures regulated, and to the judicial rules promulgated for their guidance.149 We must continue with the objective studies of different administrative tribunals for the conduct of which Professor Frankfurter with the aid of the Commonwealth Fund has been so valiant a proponent and patron146 and be ready to apply the lessons revealed by such studies. Perhaps such specialized tribunals as the Court of Claims, the Court of Customs and Patent Appeals,146 and the Board of

148Robson, Justice and Administrative Law.

149It is unfortunate that the monumental case book on Administrative Law by Professors Frankfurter and Davison concentrates to such an extent on the separation of powers and the right to judicial review and almost completely ignores the considerable body of law relating to the administrative process itself.

146See Frankfurter, The Task of Administrative Law, (1927) 75 U. of Pa. L. Rev. 614; Henderson, The Federal Trade Commission; Patterson, The Insurance Commissioner in the United States; Van Vleck, Administrative Control of Aliens. In the collection of cases by Professor Frankfurter and Professor Davison on Administrative Law, there is contained in the appendix a long list of such studies made in connection with Professor Frankfurter's seminar on Administrative Law at the Harvard Law School. At the present time an extensive study of the administration of workmen's compensation laws of the United States under Professor Walter F. Dodd is just approaching completion.

Tax Appeals,\textsuperscript{147} lying on the border line between the judicial and the administrative, are worthy of more widespread emulation. It may be that a thorough comparative study of the French system of administrative courts would reveal much that could with profit be applied to ourselves.\textsuperscript{148} All this is, however, far beyond the scope of the present article, and is merely indicative of the course which it is believed the study of administrative law should in the future follow.

\textsuperscript{147}See Latham, Jurisdiction of the U. S. Board of Tax Appeals, (1927) 15 Cal. L. Rev. 199.