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Public Law

by

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Original Preface

The growing importance of public law in the United States has brought the subject to the attention of both lawyers and laymen. Yet the term "public law" has acquired no definite content and is not found among the standardized headings employed in law books. The definition adopted for the purposes of this volume is neither original nor universally agreed to, but it provides a simple basis for selecting the subjects to be treated. It fits, moreover, into the generic pattern of Anglo-American law which has developed around relationships rather than entities. The term "public law" is used here in contrast with the term "private law" and is meant to comprise the law governing relationships to which states and their agencies become parties. This definition, it is true, excludes certain material occasionally referred to as public law; but it includes, nevertheless, many more topics than can be dealt with in the available space. The subjects treated in the following pages, therefore, do not exhaust the list, but they appear to the author to be among the most important. Another might well have varied from this choice.

Criminal Law, which should otherwise have been included, is treated in a separate volume of this series.

Howard L. Bevis, 1939

"AntiShyster" defined:

Black's Law Dictionary defines "shyster" as "one who carries on any business, especially a legal business, in a dishonest way. An unscrupulous practitioner who disgraces his profession by doing mean work, and resorts to sharp practice to do it." Webster's Ninth New Collegiate Dictionary defines "shyster" as "one who is professionally unscrupulous esp. in the practice of law or politics." For the purposes of this publication, a "shyster" is a dishonest attorney or politician, i.e., one who lies. An "AntiShyster", therefore, is a person, an institution, or in this case, a news magazine that stands in sharp opposition to lies and to professional liars, especially in the arenas of law and politics.

Legal Advice

The ONLY legal advice this publication offers is this: Any attempt to cope with our modern judicial system must be tempered with the sure and certain knowledge that "law" is always a crapshoot. That is, nothing (not even brown paper bags filled with hundred dollar bills and handed to the judge) will absolutely guarantee your victory in a judicial trial or administrative hearing. The most you can hope for is to improve the probability that you may win. Therefore, DO NOT DEPEND ON THE ARTICLES OR ADVERTISEMENTS IN THIS PUBLICATION to illustrate anything more than the opinions or experiences of others trying to escape, survive, attack or even make sense of "the best judicial system in the world". But don't be discouraged; there's not another foolproof publication on law in the entire USA – except the Bible.

". . . it does not require a majority to prevail, but rather an irate, tireless minority keen to set brush fires in people's minds."
– Samuel Adams

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Part I, Chapter I

Nature and Scope of Public Law

Public law can be most succinctly defined as all law which is not private law. But this statement merely defines, it does not describe. What, then, is law? What is private law? And what, finally, is public law?

1. What Is Law?

Law, to begin with, consists of rules, principles and standards. It regulates the conduct, the relations, the interests of people. In organized society it is coextensive with human intercourse. It has its origin and its authority in the state.

2. What Is the State?

A state we shall define simply as a society organized for political purposes. A society has been described as an aggregate of individuals held together by a mutuality of interests and a "consciousness of kind." In political philosophy, such a group is generally deemed capable of having a common or corporate will, distinguishable from the wills of its several members. If the members of such an organized group recognize an obligation to obey that will, and recognize the authority of the group through appropriate agencies to coerce their obedience, the society takes on the character of a body-politic. A body-politic which derives its existence and authority from no other body or person, which exists in its own inherent right, whose corporate will is supreme within its jurisdiction and which stands upon the plane of equality with any other body-politic, becomes a state. Whether, to be a state, it must have dominion over a definite territory is disputed in political science. For practical purposes in the modern world the approximation of this condition seems requisite. Nomadic states may, perhaps, be said to control the territory over which they wander unobstructed.

3. States and Governments.

States act though governments which are established to effectuate their wills. The functional aspects of states most frequently occupy attention and the concepts of "government" and of "state" are popularly confused. It should be kept in mind, however, that a government is but the agency of a state and that the same state may continue an uninterrupted existence through a succession of governments.

Law is made articulate by government. Whether government can make law is a question of jurisprudence with which we need not here concern ourselves. Nor need we debate the priority in cause or time of government and law.

To ordain and establish government is a function of constitutional law with which everyone is familiar; governments not set up by written constitutions nevertheless exist by virtue of fundamental law. On the other hand, the organs of government—legislative and judicial—are continually declaring law. But the law so declared is the law of the state, not of the government, and, once declared, may survive the government which gave it utterance. Law, let is say, is the expression of the state's will—even of its will to come into existence—made articulate through government.

Law is made articulate, chiefly, by two agencies: legisla-

tive bodies and courts. Legislative bodies—conventions, legislative assemblies, rulers—promulgate what we know as the "written law," constitutions, statutes, ordinances, etc. Courts, and possibly other tribunals, formulate the "unwritten law" as occasion requires, from the practices, customs, philosophy, religion and culture of the people. Whether the function of courts is indispensable to the creation of a rule of law, as Gray believed, whether a legislature can really do more than record in statutory form the unwritten law of custom, as Carter held, whether the law must "grow" or whether it can be "made," these and many other questions of related purport must be left to the writers on jurisprudence. We shall not be concerned with the tenets of analytical, historical, philosophical, sociological or any other particular school of jurists further than may be incidentally necessary to the development of the subject in hand.

4. The Nature of Law.

It follows from what we have said that the term "law," as we shall use it, does not mean divine law, nor moral law; neither does it mean the sequence of events often spoken of as the law of science or of nature, although any of these may inspire or shape the formulation of the law with which we are concerned. It need hardly be remarked that it does not include the numerous codes or other bodies of church law, lodge law, company regulations, etc., nor the written or unwritten social codes which so powerfully affect conduct in social groups. For us the indispensable requisite is sponsorship by a state.

It is commonly said that law consists of rules. As already indicated, it also consists of principles and standards. A rule establishes a pattern of conduct to which conformity is required of all who come within its scope, as, for example, in the United States, that one shall drive on the right hand side of the road. But there are many contingencies for which the state formulates no precise general rule, leaving, rather, the rule for the particular occasion to be formulated by an officer in accordance with certain general principles or standards. Such principles and standards, when authoritatively declared become part of the recognized law of the state.

To illustrate, first, a standard: If the driver of an automobile collide with another he may be compelled at common law to compensate the other for the damage done if, but only if, he was not exercising due care. It is practically impossible to formulate "rules" of conduct for drivers in

every situation into which they may come, so the state falls back upon the establishment of a measure or "standard" of conduct, "due care," the care which an ordinarily prudent man would exercise in the same or similar circumstances. Again, the judge or jury may find that the defendant was acting with due care and that the injury was unavoidable. Nevertheless, the defendant, let us suppose, is rich and the plaintiff, poor; may such defendant be required to make compensation even though no fault can be found with his conduct? For the guidance of the judge or jury the state declares the "principle," no liability without fault. To this principle they are legally bound to adhere. This formulation of the specific rule for the particular case is often too intimately related to the process of determining the facts for practical segregation. Yet it may be distinguished. In the example given, just what reasonable prudence would have required under the circumstances is one thing; what the defendant did is another. The first is law; the second, fact.

5. Courts and the Law.

If the state may leave the formulation of rules for situations already past to officers of the government, it would seem to follow that a rule may be *ex post facto.* While constitutional provisions limiting the power of legislative bodies to enact retroactive laws are common, the vast body of (unwritten) case law which constitutes the bulk of English and American jurisprudence, is declared in exactly that manner. If no statute or previous authoritative decision has declared a rule for the specific situation before the court, it becomes the duty of the judge to formulate such a rule and apply it to the case in hand. As to that case it is clearly retroactive, but as a precedent for future decisions it becomes a rule of prospective conduct.

It is apparent from what has been said that courts play a large part in declaring the law of the state. It is, indeed, said upon the highest authority that the law is the body of rules, principles and standards recognized and enforced by the courts. Setting aside for the moment the question whether, in our sense, there is one "body" of law, what of the limitation to such rules, principles and standards as the courts apply?

6. Administrative Tribunals and the Law.

The term "court," of course, has a variety of meanings. But in the definitions referred to, court means a judicial tribunal set up for the rendition of justice according to law. It is conceivable that a state may exist without courts. But it is scarcely conceivable that at least the rudiments of judicial function be not performed by some one whose authority is supported by the state.

It may be argued that, however casual this functioning, such a person is *ad hoc* a court. Let us not, however, beg the question by the use of terms. It is entirely conceivable that non-judicial officers be authorized to deal with matters which require the application of rules, principles and standards of general application, set up by legislation or otherwise. In modern times we are yearly becoming more accustomed to the handling by "administrative" bodies of many types of business formerly handled by courts. Do the formulation, acceptance or application by such bodies of rules, principles or standards bring them within the meaning of the term "law"? The customary answer is, no.

No officer, not the king, himself, is above or immune to the law. His acts may be prerogative, but the very prerogative is legally established. And only the courts can finally determine what the law is. A judge may, to be sure, be influenced in his "finding" of the law by the wishes of his monarch, yet Coke's tenacious stand against King James not only proved the thing possible but clinched the argument in England until the present day. The validity of every act done, of every decision made by any officer under this regimen depends upon the law as the courts declare it. Courts, of course, apply legislative enactments, but if statutes mark out areas within which administrative officers may act free of judicial interference or review, those very statutes are subject to the scrutiny of the court. If *ultra vires* or unconstitutional, statutes are null and void.

More than this, the *meaning* of valid statutes must, in the last analysis, be determined by the courts. They mean what the courts say they mean, and confer such authority or discretion as the courts find to be conferred. Administrative agencies, furthermore, commonly refuse to regard their own decisions as precedents. Sometimes the law of their creation so commands them. This disregard of mandatory precedent prevents the concatenation of their decisions into predictable rules and thus tends to deprive them of the generality of law. All this leads common-law lawyers to deny to the rulings, rules or regulations of non-judicial officers, as such, the attribute of law. Such officers may in their doings apply law, but it is law because the courts affirm it. If the courts will not apply a rule or principle or standard used by an administrative officer, it is not law. Yet the fact remains that administrative rules and regulations issued pursuant to proper authority and properly "canalized" by guides or standards of legislative origin, may "have the force of law" and that decisions by administrative tribunals, judicial in every sense except in name, may have the finality of court decrees. Violations of administrative rulings often carry criminal penalties and the orders of administrative commissions often have the practical, if not the legal, effect of judgments for damages. Predicability, moreover, is so indispensable a factor in the rulings of bodies having control of business and other human interests that, despite their protestations to the contrary, such bodies must in fact observe their own precedents. Such observance does, in fact, generate rules, principles and standards which do, in fact, determine future conduct. Clearly we have here a spreading penumbra along the borders of the law whose shade grows darker as the years progress.

In other countries, e.g., France, administrative courts are established to pass upon questions arising out of public administration, a practice which would seem to broaden, even while it preserves, the definition under consideration.

7. Persons in the Law.

We have said in effect that law governs the conduct of human beings. Technically it is concerned with "persons." A human being may or, in the eye of the law, may not be, a person. Mere animation is not the test. A slave is a "Thing" like an animal, to which the law may extend certain protection but only through the medium of persons. The distinguishing characteristic of persons is their capacity for rights and their capacity for acts.

Human beings of full capacity (for rights and acts) are, of course, persons. Others of limited capacity—infants, married women in some state; those of unsound mind, *et* al.—may be said to have a limited personality. But the law also invests with personality aggregations of persons organized in certain ways for certain purposes. Of these the most common example is the corporation.

Whether a corporation is an "artificial" person created by the law, separate and distinct from the natural persons who are members of it, is a question that has given jurists some concern, and the answer in some cases has practical importance. Eminent scholars support the position that the corporation is not an artificial creation of the law; that its members are a society which is capable of a group will and that it has a real existence which the state merely recognizes; that the entity had such existence, in fact, before the state's recognition, and would continue to have it should the state refuse. These observations can not be denied; yet in practical fact the state does respond differently toward groups which are "incorporated"; for many purposes, though not for all, the

corporate entity is treated as a separate person, with capacities distinct from those of its members and different from those of groups not "created" corporations. "Recognition" itself makes a difference. It would seem, as Willoughby says, that the thinking of those who assent and of those who deny artificial entity is on different planes—that in juristic conception the corporation may be regarded as law-created but that this conception does not exhaust the possible modes of thinking on the subject. The controversy really illustrates the proposition that legal personality in general is a juristic concept on another plane entirely than the ordinary thinking of people. The law, *for its purposes* chooses to regard some beings as having, and others as not having, capacities for rights and acts: a real individual may not be a legal person; a real group may not have legal personality unless and until the law accords it.

8. Corporate Personality and the State.

Consideration of the nature of corporate personality leads directly to consideration of the nature of the state. Is it different in kind or only in degree from any other society?

The view has been plausibly expounded in recent years that there is nothing generically different about the state. It is a society, larger, stronger, perhaps, and more pervasive in its constituency and power, but not inherently different from any one of many other societies which claim the loyalties and influence the conduct of their members. The apparent difference deemed to exist when the state's chief functions were protection from foreign enemies and the maintenance of domestic order—functions which gave it a practical predominance over all other groups and individuals—seems, in this view, to fade out in these days when the state undertakes innumerable other duties which often give it the semblance of a giant public service company. The state, so it is said, is just one of many organized groups to which we assign certain tasks. Many of these tasks could be done as well or better by others. None could be performed only by the state. In thus "analyzing away the concept of sovereignty," questions of profound importance to the study of public law are brought into focus.

We may, however, raise the question whether this, too, is thinking on a different plane. Granted that the state shares with other societies the capacity for group will, the power to command loyalties, to influence, even to coerce conduct, to render various sorts of public service—does this exhaust the categories of thinking about the state? Does it comprise the only useful and pragmatic mode of thinking? Obviously it does not exhaust the categories. In this field as well, for example, as in mathematics, thinking can be carried on in any frame which will usefully segregate it for a given purpose. Is there any useful purpose to be sub-served by setting the state apart?

In the first place there are certain functions—e.g., national defense—which could be performed as well only by the substitution of another society of equal pervasiveness and power. But, this aside, there appears to exist in the minds of men a widespread, if not universal, requirement for some paramount entity before which none other can stand. Without it organization and order are frustrate. The unity and headship necessary for the satisfactory functioning of any enterprise can only be achieved in the enterprise of statehood by positing supremacy somewhere. To achieve this ideal men have conceived the state, a juristic concept, on a different plane entirely from the public service corporation or the fraternal society or the church or the labor union. It is an abstract conception, but it serves a need. Ideas are the framework of action as well as of thought. Every "organization" is an abstract conception, though it produce concrete results.

We shall, therefore, assume that the state for purposes of legal thinking is of a different order from other societies, corporate only by its own authority and juristically paramount to any other person or group within it.

9. Rights and Acts.

As we have said, the distinguishing characteristic of legal personality is capacity for rights and for acts—legal rights and legal acts. Legal acts are those which create or annul or otherwise affect legal rights. What, then, are legal rights?

Few words in legal literature have begotten more confusion or inspired the writing of more pages than the word "right." Its legal significance derives from its moral, and that, in turn, from its geometrical—straight. But in this progress it has acquired a variety of denotations, not to speak of connotations, which have been carried forward from position to position and finally spread out over the legal field like a tangled net. Blackstone speaks of "what is wrong" as though it were the opposite of a legal right. Avoidance of ambiguity requires that the term be divested of its moral significance and confined to a single meaning. A right—a legal right—is a human interest protected by the law. When a person can successfully call upon the law to secure or defend some interest, such person has a legal right. Securing or defending such interest may, according to moral

standards, be wrong. But if the state, through law, directs its agents to protect the person's enjoyment of the interest, he has a right. Ideally a legal right should not involve a moral wrong, and the law strives for the ideal. But morals change and conditions change, and the law does not always keep pace. Enforcing a right of ancient origin may result in a moral wrong according to the standards of the day, although once the consequences were believed morally right. Because of the fundamental nature of the legal concept, right, the importance of its correct and single definition can not be overstated.

A legal right always shadows a legal duty. No person can have a right unless some other owes a corresponding duty. That duty may be positive or negative, to do something or to refrain. But unless there be a duty it is bootless to speak of a right. The converse, however, is not true. There may be duties to which no corresponding rights attach.

With these fundamentals in mind, we may proceed to set off the field of public law.

10. Relationships.

Law, we have said, is coextensive with human intercourse. Its impact is upon relationships. A society of one is impossible, hence states and law come into existence only when there are numbers whose relationships require governance. Robinson Crusoe's island, before the advent of Friday, had neither law nor government. Those phenomena of human life which can have no appreciable bearing upon the interests of other human beings are not within the purview of law. Even theocracies which sought to control the religious life of their constituents had to stop at the threshold of the mind. Words might be deemed perilous to the souls of others, but thoughts could be your own. Slight reflection, however, makes clear the extremely small range of human conduct in organized society which has not some bearing upon others. Increase in population and integration of interests beget rules, regulations and laws because of the multiplication of relationships to be controlled.

The statement that law is coextensive with human intercourse requires, however, some clarification. The law of many relational situations is negative and says no more than that the state offers no redress for injury. "A cat," says the proverb, "may look at a king," implying that no matter how much the great may resent the gaze of lesser persons the law will do nothing for them.

Growing complexity of society tends toward the increase of positive regulation, but the early history of every legal system shows large blanks which are filled only one at a time under social pressure. Remedies for breach of contract, for example, were not always provided through the English courts.

Social pressure, indeed, is the key to the growth of the law. Clashes of interest beget controversies which, lest there be private warfare, call for the establishment of tribunals. Recurring controversies over similar issues tend to be settled in the same way—i.e., decisions become precedents. Rationalization of precedents elicits rules which receive the sanction of public authority. One by one, additional types of controversy are forced into the jurisdiction of courts. First courts, then law, is the historical order of development. Since law historically emerges from controversy through the medium of courts, it is to be expected that the bulk of precedents will spring from disputes between private persons. Still, the king may utilize the courts to determine questions arising in the course of public business. The English Court of the Exchequer originated in connection with tax matters. Most of the administration of public affairs, however, will long proceed without reference to the courts and will scarcely be recognized as having legal implications. Only as the habit of law permeates society and the contacts of men with public authority become numerous and important does there begin to emerge an appreciable body of public law.

II. Public versus Private Law.

Proceeding, now, to definition, shall we say that private law is the body of rules, principles and standards which the courts recognize as governing relationships between private persons? Public law is the body of rules, principles and standards governing relationships to which a state or its agencies are party.

12. The Problem of International Law.

This brings us to a consideration thus far avoided: States have relationships with states. Are such relationships likewise influenced or controlled by law?

Whether there be such a thing as *international* law, has vexed the minds of jurists for centuries and the vexation has increased rather than diminished with the later developments of legal science. It was much easier to speak of the law of nations when the lawyer's mind was still familiar with the Roman *jus gentium* and credulous of a "law of nature" than it is today when Austin's insistence upon the indispensability of state sanction has tinged, if not colored, the legal philosophy of everybody.

Writers upon international law, of course, affirm its existence. Writers upon other legal subjects are often less sure. There is, patently, a body of doc-

trine dealing with international relationships which is frequently consulted for guidance by those who have such relationships in charge. It speaks the language of law and employs its technique. It purports to speak with authority and official action is often taken in its name. But all of this may be affirmed of "Masonic law" or "Church Law" or of any one of many other bodies of group polity to which we have denied the name of law.

The crux of the matter is reached when we speak of sanctions. Sanction, in legal terminology, denotes means of enforcement. It may mean detriment, loss or punishment for the violation, or reward for the observance of law, or the direct intervention of public power to effect the law's commands. In municipal (state) law we can speak with assurance of the imposition of sanctions by the state. The might of the state is at hand for their enforcement and the exertion of its might is contemplated—nay, provided by the law itself. Sanctions are a part of the legal ordering of society within a state.

All of this tacitly assumes the state's supremacy in legal theory over any and every person, group or combination within its jurisdiction. That its sanctions may not always be effectively exerted is beside the point. In juristic contemplation the state always can, if it will, exert its power to enforce its laws, and the common will to uphold this theory is indispensable to statehood.

No such power to sanction can be posited in a discussion of international law. There is no super state. By definition each state is the equal of any other, and in practice each denies the supremacy of every other. In any given case this definition and denial may be juristic rather than real. But we are dealing now with law and by law Denmark is as free from outside control as Britain. By whose law? Certainly by her own, and, for that matter, also by Britain's, and by the law of every other state which "recognizes" Denmark's independence. International "law" itself agrees that there is no such coercive power over states as is assumed over persons in the theory of municipal law.

Unless, therefore, we are also prepared to confer the title "law" on other bodies of rules, principles and standards which lack state sanction, it is difficult to regard the floating body of international law as of a piece with the law we have heretofore discussed.

What, then, is this collection of rules, principles and standards that has been wrought out of international experience through eventful centuries? Its pragmatic importance is conceded. It seems to perform a "legal" function. Yet is it law?

Its appearance of performing a legal function results, largely from the adoption of its tenets by particular states. Parts or all of its tenets may be adopted in similar terms by a number of states and thus become parts or all of the international law of Britain, of France, of Denmark, of the United States, and so on. But it is as the international *law of Britain,* not as international law in general, that they acquire the ordinary character of law. It is as a *system* of laws rather than as law *per se* that this general body of rules, principles and standards should be studied.

This seemingly unique situation is not without its analogues. The unwritten law of England was carried to America and to other offshoots from the English nation and became the basis of their law. This body of rules, principles and standards was and is the law of England. The lawyer's tradition carried from the mother land has persisted in regarding it as one body of law in all the states in which it has been "received," notwithstanding important contemporaneous variations upon particular subjects from state to state. These variations but accentuate the truth, which must be apparent upon reflection, that there is the common law of England and the common law of New York and of Ohio and of New Zealand, etc., but that *the* common law, in the general sense, is a system of laws, not a body of law, which system has lent a degree of harmony to the laws of the several states.

For purposes of study, of criticism, of example, it is entirely in order to deal with international law in a unified way. As a pattern for individual state adoption it is highly important that the system have unity and completeness. As such pattern we shall treat it in these pages, but with the *caveat,* which will bear repetition, that, as a body of law common to all nations, it lacks the element of sanction by force and is, therefore, of a different order from the municipal law of any state.

13. The Scope of Public Law.

With this understanding, let us set down the subjects of public and of private law as follows:

Rules, principles and standards governing the relationships of States with states are *public law*.

- States with agencies of states are *public law*.
- States with private persons are *public law*.
- Agencies of states with agencies of states are *public law*.
- Agencies of states with private persons are *public law*.

Private persons with private persons are . ... private law.

Notwithstanding this apparent categorical preponderance of

public law it actually bulks small in the libraries of legal literature. Yet its importance is rapidly increasing. While private law is being worked over and refined by the efforts of judges, teachers, writers and law societies, public law is extending itself into new and constantly growing areas. Like all pioneering this growth is characterized by vigor rather than precision. The advance is along ragged lines and in many sectors certainty and predicability have yet to be matured. They will come later. But increase in governmental activity is the salient phenomenon of present day society; business regulation, often amounting to public assumption of managerial functions, direct provision of goods and services, management of industrial relations, measures for "social security," control of interstate and international intercourse, along these and other lines government reaches out to touch the interests of the people. All this contributes to the growth of public law.

The concept of public law as a unity, however, is hardly in the mind of the lawyer. To find it one must go to the students of jurisprudence and of political science. Anyone examining the standard classification of topics employed by law publishers in the United States will search in vain for the subject Public Law. Yet an analysis of the content of the topics which are listed will reveal an astonishing proportion more or less devoted to its exposition. The lawyer deals practically with public law every day of his life.

Part II

The Law of Constitutional Powers and Limitations

Part II, Chapter I

General Consideration of Constitutional Law

1. Nature and Scope.

Government is the agency through which the state expresses its will and effects its purposes. To bring government into existence, establish its structure and confer and limit its powers, are the principal functions of constitutional law. But, in addition, constitutions frequently contain provisions concerning the rights and duties, privileges and immunities of persons.

Constitutional law is usually distinguished from other law by the formal manner of its enactment and the relative permanence of its provisions. But some constitutions—e.g., that of England—exist largely in unwritten custom and national tradition; and many provisions of ordinary law date their origin far behind the oldest of the constitutions. Many statutes are really constitutional in their effect, and the real content of any constitution is often found in the judicial interpretation of its terms. This interpretation, moreover, frequently changes with the times. Indeed, a degree of pliancy in constitutional law is essential to permanency. Constitutions, in the long run, can be little more than brakes upon hasty, ill considered action. They can not permanently thwart popular desires.

In the attempt to achieve even relative permanency, constitutions usually deal chiefly with fundamentals, though occasionally provisions are found in constitutions that would more appropriately appear in ordinary legislation. To this end the language of written constitutions is usually characterized by generality rather than by detail. The Constitution of the United States has often been said to have acquired its strength and permanence from the breadth and simplicity of its terms.

2. Principles of Interpretation.

But is it evident that such broad and simple language requires constant interpretation, and this requirement puts the power of determining its meaning and effect into the hands of judges. The accepted meaning of the Federal Constitution, and the real form and powers of our state and National governments are, to a predominating extent, the result of John Marshall's constitutional interpretations and those of his associates and successors. Not the least important of these interpretations was the doctrine that the judiciary itself was the final arbiter of interpretation.

American acquiescence in the judiciary's claim of supremacy in this respect vests in the several supreme courts of the United States the power to invalidate acts passed by the several legislative bodies. In theory, courts do not invalidate statutes. In theory the function of the court is to ascertain the meaning of the legislative act and the meaning of the constitution to which such act must conform. If it does not conform, the Constitution, itself, makes the act null and void. All this, in a sense, is true, and it is well that the courts in their opinions frequently point it out. Nevertheless, it is also true that the process of ascertaining the meanings of legislative and

constitutional provisions is a process of human reasoning, with all the factors of strength and of frailty, of mental detachment and of emotional bias, of complete and of faulty information with which the reasoning process is always beset. Different judicial minds do not always derive the same conclusions from the same premises. The personal composition of a court, therefore, is often of major importance.

There are, however, certain well recognized rules of interpretation, constituting a technique of reasoning, to which the courts will generally adhere.

A constitution, like any other document, is to be read as a whole. The court, in the language of the lawyers, "will take the instrument by its four corners" and read each part in the light of all the rest. Wherever possible that construction will be adopted which will avoid contradictions and duplications of meaning. Effect will be given to every word, phrase, clause and sentence so far as is logically permissible. Words will be given their usual and ordinary significance unless it is clear that some other meaning is intended. "Words of art," having an obviously technical significance, will of course be construed in that sense.

Since written constitutions come into effect through popular assent, the meaning intended by the people is sought by the courts. The common understanding of words at the time the language was employed is therefore of cogent significance. This consideration, however, will not prevent the application of the terms employed to conditions arising later and not in contemplation at the time the language was adopted. Obviously, for example, neither the framers of the Federal Constitution nor the people who chose them had in mind the tremendous structure of federal regulation which has since been reared upon the words "commerce among the several states."

Language consciously adopted from previous constitutions or other legal documents will ordinarily continue to take the meaning given it by the construction of such documents. This rule is of considerable importance in construing the Federal Constitution for, contrary to the popular belief that it was struck off at a single heat as a product of sudden inspiration, almost every word in it had a history of judicial or other official construction at the time it was employed.

A practical construction by legislative or administrative bodies, long acquiesced in by the courts, to which economic and social life has become adjusted, will not readily be upset.

There is an ancient rule of statutory construction, coming down through Blackstone, that in seeking the true meaning of legislative language the court will take cognizance of the "old law, the mischief and the remedy." This rule is useful in constitutional construction. For example, the provisions of the Articles of Confederation, the "mischiefs" persisting or arising during their continuance, and the remedies that were sought through the framing of the Constitution are frequently referred to by the courts in the process of constitutional interpretation.

The "history of the times" is also a source of illumination to which the judges refer.

To ascertain the intent expressed by the words of a document it is often helpful to refer to what was written and said in the course of its preparation. Debates in the convention which framed a constitution are frequently referred to. Such debates and other matter extrinsic to the document itself, will, however, be received by the courts only when there is doubt or ambiguity in the language used. If the intent is manifest from the words themselves no outside helps to interpretation are permissible. Furthermore, extrinsic evidence is allowable only if the ambiguity be "latent." A "patent" ambiguity—e.g., a case in which grammatical construction permits more than one meaning-may be resolved only by intrinsic evidence, *i.e.,* by reference to the other provisions within the document's four corners. But where grammatical construction is clear and doubt arises as to the meaning of the words themselves, resort may be had to debates in the convention and, occasionally, to other extrinsic evidence. Such evidence, however, must be used with caution, for not infrequently a variety of opinions are expressed in debate, many of which find no lodgment in the final draft.

One particular book accepted by courts in the resolution of latent ambiguities in the Federal Constitution is the "Federalist," a collection of explanatory essays published by Madison, Hamilton and Jay, while the Constitution was in process of formation. Not only were these men prominent in the Constitutional Convention, but their writings were widely circulated among the people, and popular assent to the Constitution as drawn was, presumably, largely based on their explanations. ■

The American System of Government

1. The Federal and State Governments.

The Federal Constitution establishes the powers and fixes the limitations of the Federal Government. It also fixes the boundaries of state authority, although it leaves to the state constitutions the establishment of the respective state governments and the powers of their various organs. Save for the provision in the Federal Constitution that "The United States shall guarantee to every state in this union a republican form of government," the states are free to set up, through their own constitutions, such types of government as they choose. It can hardly be doubted, however, that the Federal Constitution if appropriately amended, could require of any state a prescribed form of government.

(1) GRANTED AND RESERVED POWERS. In dividing the powers of sovereignty the Federal Constitution confers upon the Federal Government certain enumerated powers together with the power to "make all laws which shall be necessary and proper to carry into execution the foregoing (enumerated) powers." It forbids the exercise of certain powers by the Federal Government and of certain powers by the states. All other powers are reserved to the states, respectively, or to the people. In contrast to the term "reserved" as applied to the powers of the states, the Constitution speaks of the powers granted to the Federal Government as "delegated."

In seeking to discover whether or not a particular power may or may not be exercised by the Federal Government it is necessary to ascertain whether it falls within the number of delegated powers. If the power has not been granted it may not be employed. In seeking to discover whether a particular power may be exercised by a state, it is necessary only to ascertain whether it has been granted exclusively to the Federal Government or forbidden to states. If neither, it is within state competency.[1] This consideration is of the utmost importance in determining the relative capacities of the state and Federal governments.

Not all federal powers are exclusively delegated to the Federal Government. Certain powers are exclusively granted to it; others are expressly denied to the states. Still others have been held by judicial interpretation to be of such manifestly "national" character as to forbid their exercise by individual states. Delegated powers not falling into any of these categories may be exercised by the states unless and until their exercise has been assumed by the Federal Government.

For example, control over places within states, purchased by the Federal Government for forts, arsenals, etc., are by affirmative constitutional grant exclusively within the legislative control of Congress. The states are expressly forbidden to coin money or emit bills of credit. Power generally to regulate interstate commerce has been held by judicial interpretation to be so manifestly necessary to national

requirements as to fall without the capacity of individual states. But control over harbor pilotage and other matters of purely local nature, while dealing with interstate commerce and therefore within Federal competency, is yet a proper subject for state regulation until Congress acts.

(2) MUTUAL INDEPENDENCE OF FEDERAL AND STATE GOVERNMENTS. For carrying out the powers allotted to them both, the state and the Federal governments are equipped with a full complement of governmental machinery. State governments can not require the performance of state functions by Federal officers nor can the Federal Government require state officers to perform Federal functions. Either, however, may voluntarily assist the other and, especially in earlier times, the employment of state peace officers to execute federal writs was common. State prisons are frequently availed of for the incarceration of offenders against Federal laws. Mutual helpfulness in the apprehension of criminals and in many other ways is standard practice.

Nevertheless, the essential integrity of both state and Federal governments has been jealously guarded from encroachment. Particularly is this true in the matter of taxation. Subject to specific limitation, each has full power to tax. But neither may tax the compensation of the essential officers of the other; if it might, theoretically, at least, either might tax the other out of existence.

(3) SUPREMACY OF FEDERAL OVER STATE POWER. Wherever the exercise of granted Federal powers clashes with the exercise of reserved state powers, the latter must yield. Laws passed under the taxing, police, or other fundamental power of states have been held void when their operation was deemed to interfere with Federal functions. 'There is no room in our scheme of government," said the Supreme Court in the Minnesota Rate Cases,[2] "for the assertion of state power in hostility to the authorized exercise of Federal power."

2. Relations between States.

Among the farthest reaching of the provisions of the Federal Constitution are those dealing with the relations of states and their citizens with other states and their citizens. Prior to the adoption of the Constitution, except for such limitations as were imposed by the Articles of Confederation, each sovereign state could deal with every other as an independent nation and could treat the citizens of every other as aliens. Had this situation continued the United States could never have been anything more than a league.

Section 10 of Article I provides that:

"No State shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, ex *post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress.

"No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

(1) COMPACTS BETWEEN STATES. States may enter, and frequently with the consent of Congress have entered, into compacts with each other. Some of these compacts, made at the time of the admission of one of the parties to statehood, have undertaken to modify the status which, upon admission, would have been conferred by the Constitution. Such political arrangements are generally not enforceable through court action. Other compacts relating to proprietary interests have been enforced by courts.

(2) SUITS BETWEEN STATES. States may, of course, negotiate with each other for the settlement of issues that arise between them. If amicable arrangements cannot be made one may sue the other in the Federal courts.

Within a few years after the adoption of the Constitution one state of the Union was sued by a citizen of another state and the jurisdiction of the court to hear the case was sustained. As neither states nor the Federal Government are suable without their consent by their own citizens, the suability of a state by the citizens of another state was deemed anomalous. It was corrected in 1798 by the adoption of the Eleventh Amendment to the Constitution.

(3) THE COMITY CLAUSE. Of equal importance with the prohibitions upon the states, above quoted, is the provision of Section 2 of Article IV that: "the citizens of each State shall be entitled to all the privileges and im-

munities of citizens in the several States." "It was undoubtedly the object of the clause in question," said the Supreme Court in an early case,[3] "to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."

The "comity clause," as it is called, does not, however, abolish all distinction between citizens and non-citizens of the states. It does not confer upon non-citizens the right of suffrage nor of holding office. Non-residents, though allowed to sue in the states' courts may be required to give bond for costs when residents would not be required to do so. Each state may fix its own requirements for admission to the professions.

In the meaning of the comity clause corporations are not citizens. It follows, therefore, that a state may prohibit a corporation organized in another state from doing business within its borders or attach such conditions to doing business there as the state chooses. This statement is subject to the qualifications however, that such state may not interfere with interstate commerce carried on by a "foreign" corporation, nor deprive it of the benefits of due process of law nor of the equal prohibition of its laws. Neither may it pass laws to impair the obligation of its contracts.

(4) PRIVILEGES *AND* IMMUNITIES. In the Fourteenth Amendment to the Constitution, adopted after the Civil War, occurs the clause: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In the Slaughter House cases[4] the Supreme Court was confronted with an interpretation of this language which threatened a sweeping change in our constitutional system. The State of Louisiana chartered a company to which it gave a monopoly of slaughtering cattle in the city of New Orleans. This monopoly was attacked on the ground, among others, that it abridged the privileges of other United States citizens who might desire to slaughter cattle in the city. The crucial question was whether the Fourteenth Amendment conferred upon the Federal government the power to override the law of a state passed in the exercise of its own police power. If it did, Congress, under the power conferred to pass enforcement laws, might legislate concerning vast areas of the social and economic life theretofore left exclusively to state regulation. A minority of the court was of the opinion that the Amendment made Federal citizenship primary and state citizenship incidental, and that the protected privileges and immunities of United States citizenship included all those which had previously attached to state citizenship. But the majority decided that the Fourteenth Amendment was adopted for the protection of the recently liberated Negroes and was not intended to effect so vast and radical a change in the principles of American government.

These words in the Fourteenth Amendment, accordingly, made little, if any, change in the rights of citizens. The rights to participate in interstate and foreign commerce, to have the benefit of postal laws, to use navigable waters, to go from state to state, to petition the public authorities, to visit the seat of government, to participate in voting, to have protection upon the high seas or when abroad—these interests which have generally been listed as the principal "privileges and immunities," were all equally well protected before the Fourteenth Amendment was passed.

(5) EXTRADITION. By the terms of Article IV, Section 2 of the Federal Constitution, "A person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority, of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

Congress has never attempted to put the management of extradition proceedings into the hands of the Federal Government, although such legislation might have constitutional warrant. Thus far the matter has been left in the hands of

the states. State laws regulate the details of the procedure. In practice the demand for delivery of the fugitive is made upon the governor of the state of refuge who, if he deems proper, orders the arrest of the person demanded. If the governor refuse such demand the Supreme Court has held there is no power to coerce him. In some states the governor's order extends no further than to bring the accused before the courts of his own state, who determine whether the prerequisites of extradition have been met. If they have, the

fugitive is then given over to the custody of the officers of the demanding state. A person is a fugitive from justice who, within a state, has committed an act made a crime by its laws and, when sought for apprehension, is found within the borders of another state.

Although forcible seizure and abduction from the state of refuge, without extradition proceedings, is itself a crime, a prisoner so returned to the state where the criminal act was committed may there be tried for his alleged offense. Those guilty of the abduction can only be prosecuted if, through extradition proceedings, they are returned to the state from which they took the prisoner.

A person legally extradited from a state of the Union for one offense may also be tried for others. The rule is otherwise, however, when the extradition is from a foreign country under a treaty.

(6) FULL FAITH AND CREDIT CLAUSE. Among other provisions of the Federal Constitution which limit states in the uncontrolled exertion of sovereign power is the "full faith and credit" clause which reads: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof." (Article IV, Section 1.) Congress, by appropriate legislation, has prescribed the manner of proving such acts, records and proceedings and has also, under favor of other clauses of the Constitution, extended the benefits of this provision to Territories.

This clause is most frequently availed of in connection with the enforcement of state court judgments. In this sphere the states are separate sovereignties and judgments rendered in one state have no immediate effect in another. But through "comity," implemented by the rules of "private international law," judgments obtained in one country may be sued upon and thus enforced in other countries; and this system of comity has been adopted by the American states. According to private international law generally, however, the courts which are asked to enforce such a judgment may make certain inquiries as to its rendition, particularly regarding fraud in its procurement. The right to make such inquiries as a condition to enforcement is greatly limited by the full faith and credit clause.

But the court rendering the original judgment must have jurisdiction before enforcement in another state will be accorded. In this respect the full faith and credit clause effects no change. To render a valid judgment the court must have had jurisdiction over the parties to the suit and jurisdiction over the subject matter. Jurisdiction over the subject matter is not the concern of private international law, but unless there be jurisdiction over the party against whom the judgment is rendered the courts of other states will not enforce it. To obtain jurisdiction over the party he must have been properly served with summons, *i.e.,* with official notice of the pendency and the nature of the suit. in suits "in rem" where the judgment exhausts itself in affecting rights regarding some particular piece of property or other *res* within the jurisdiction of the court, service may be "constructive," for example, by publication in a newspaper or by posting notice. But when the suit is *in personam,* that is to say, when the judgment binds and follows the person of the defendant and may be satisfied out of any property he has or may subsequently acquire, service must be "personal," *i.e.,* by reading to or leaving with him a copy of the summons or, in some states, by leaving it at his usual place of residence.

Jurisdiction to grant divorce is, by most state courts, held to exist when at least one of the parties has his domicile within the jurisdiction; and divorces granted by the courts of any state are generally recognized in the others. The marital status is treated as a *res* whose destruction or dissolution is the object of the suit, and constructive service is, therefore, allowable. A few states, however, notably New York, refuse to accord recognition to divorces granted on constructive service when the plaintiff is, by their courts, deemed the aggressor. This holding has been upheld, in large measure, by the Supreme Court of the United States.

The requirement that each state accord full faith and credit applies, by judicial interpretation, only to civil and not to penal judgments. In this interpretation the courts have followed the ancient and general rule that no state will enforce the penal laws of another. Penal laws are those imposing punishment for offenses which, by English and American constitutions, the executive of the state has the power to pardon.

3. New States and Territories.

The extension of the territory of the United States to its present size was probably in the mind of no one when the Constitution was established. There was, however, a great area beyond the borders of the thirteen original states and its eventual division into new states and their admission into the Union was provided for: "New States may be admitted by the Congress into this Union; but no new State shall be

formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress." (Article IV, Section 3.)

(1) ADMISSION OF STATES. The consent of Congress is thus essential to the admission of new states, and Congress may accordingly impose whatever conditions it chooses. Conditions in violation of the rights and privileges accorded states by the Constitution would, however, cease to be effective once admission was accomplished. No state may constitutionally be expelled from the Union.

In admitting a state to the Union the practice has been for the people of the territory concerned to draw up a constitution and then to make application to Congress for admission. Congress by Resolution creates the status of statehood.

In one case, Texas, a new state was formed by the direct incorporation of a foreign nation. In all other instances new states have been created out of territory already belonging to the United States. The greater part of such territory has been acquired since the Constitution was adopted.

(2) ACQUISITION OF TERRITORY. No express constitutional provision authorizes the acquisition of new territory. Yet it was obviously necessary from the beginning that such power be found. Thomas Jefferson, leader of the "strict constructionists," negotiated the Louisiana Purchase, although, as he thought, he "stretched his power until it cracked." The power to do those acts, which are "necessary and proper" to the accomplishment of the objectives of the Constitutions would seem to furnish adequate authority for the occupation and control of new lands in accordance with the settled practices of nations.

The annexation of territory has been accomplished in various ways, treaties, statutory enactments and joint resolutions being the most common. In at least one instance, however, mere Executive act has sufficed.

(3) STATUS OF ANNEXED TERRITORY. Each successive accession of territory to the United States has raised new questions regarding the character of the government and the status of the inhabitants of such territory. Eminent jurists have held that there were but two categories, states and territories. But from the holdings of the Supreme Court a less simple pattern must be described. Territories may be either "incorporated" or "unincorporated." The mere possession and control of an area does not make it a part of the United States. That result is accomplished only when Congress by proper action "incorporates" it. The consequential difference is important. The Constitution contains many provisions binding upon Congress when legislating for the United States. But Congress is not bound, at least it is not bound to the same extent, by these provisions when legislating for unincorporated territory. Customs duties, for example, must be uniform "throughout the United States." But this provision was held not to apply to duties on goods imported from Puerto Rico after its annexation. The right to jury trial and other incidents of court procedure do not obtain in unincorporated areas. Just which constitutional provisions do and which do not apply in such territory and the practical extent of such application has not yet been completely worked out.

Territories, both incorporated and unincorporated, moreover, may be either "organized" or "unorganized." Unorganized territories are governed by Congressional legislation and by officials appointed by the President with the Senate's approval. Organized territories on the other hand have bicameral legislatures elected by the inhabitants, which legislatures have power to pass laws "not inconsistent with the Constitution and the laws of Congress." Their governors, and judges however, are nominated by the President and confirmed by the Senate.

The District of Columbia is in reality a territory. In all matters which would fall within the competency of a state or territorial legislature, Congress legislates directly for the District. But power to pass municipal ordinances is delegated to its local authorities.

[1] There have been some expressions in recent opinions of the United States Supreme Court indicating a third class of powers, but it is not believed that they represent the view of the Supreme Court.

[2] 231 U. S. 352 (1913).

[3] Paul v. Virginia, 8 Wall. 168 (1869), citing Lemmon v. People, 20 N. Y. 607.

[4] 16 Wallace 36 (1873).

Three Branches of Government

I. The Legislative Branch.

In a sense it may be said that in the American constitutional system the legislative branch of government is that most responsive to the people. Its members are chosen directly from the people for the purpose of representing them in the framing of laws and policies. It has the power of the purse. Subject to constitutional limitations it may alter the organization of the government of which it is a part; it may initiate amendments to the constitution under which it functions; it may modify, annul or affirm the common law; it may make new laws to meet new requirements.[1]

Both Federal and State governments are organized upon the theory of the tripartite division of powers. City governments and those of certain other local subdivisions frequently follow the same model with omissions or modifications. According to this theory "legislative power" is vested in a congress, a legislature, an assembly, a council, a board of aldermen. In the smaller New England communities the town meeting, a form of popular assembly, retains legislative functions.

(1) COMPOSITION OF LEGISLATIVE BRANCH. In the Federal Government and in that of the states the pattern of organization is practically the same—an upper and a lower house, the lower house larger in numbers, the upper composed of representatives elected over wider areas. In one state, Nebraska, by constitutional amendment the legislative power is vested in a single chamber, somewhat after the manner of a city council.

(2) INITIATIVE AND REFERENDUM. In a number of states, which have adopted the "initiative and referendum," a portion of the legislative power is exercised by popular vote. Through the "initiative," laws may be made by popular action, and through the "referendum," acts passed by the legislatures may be so annulled.

These devices are valid for purposes of state legislation, but may not be employed to determine a state's assent to amendments to the Federal Constitution.

(3) THE FEDERAL CONGRESS. In the Federal Government the Constitution provides that: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Article I, Section 1.) Each house provides for its own organization, and chooses its own officers, except that the Vice President of the United States is, *ipso facto,* the presiding officer of the Senate. That body, however, may choose a president *pro tern pore* to act in the absence of the Vice President or when he exercises the office of President.

All bills for raising revenue must "originate" in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills. (Article I, Section 7) This power of proposing amendments makes the clause limiting the originating of revenue bills to the House a matter of form rather

than substance.

The power to "try" impeachments belongs only to the Senate, but impeachments—i.e., charges of misconduct for which office will be forfeited—are voted in the House.

The Congress may act only pursuant to power expressly or impliedly conferred by the Constitution. State legislatures may act unless constitutionally forbidden.[2]

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." (Article I, Section 4.) Congress has in the past occasionally exercised this power, but most of these regulations have now been repealed.

The Constitution requires one session of Congress each year. Neither House, without the consent of the other, may adjourn for more than three days, nor to another place.

Each House is required to keep a journal of its proceedings and from time to time to publish all of it, except such parts as, in its judgment, require secrecy. At the instance of one fifth of its membership, the yeas and nays, on any question, shall be entered on the journal.

(4) THE EXECTUTIVE IN LEGISLATION. "Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered; and if approved by two-thirds of that House, it shall become a law .... If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return; in which case it shall not be a law." (Article I, Section 7, clause 2.) Failing to sign or return a bill with objections before an adjournment which occurs within ten days of its receipt by the President is a "vest pocket veto." Similar provisions are found in the State constitutions.

(5) THE MONEY POWER. Perhaps the greatest element of congressional power lies in the authority to levy taxes and to make appropriations. The Constitution provides that: "No money shall be drawn from the Treasury but in consequence of appropriations made by law." (Article I, Section 9, clause 7.) Not only does this money power place practically all governmental activity at the mercy of the Congress, but the budgetary processes incident to appropriation give to it the means of affecting constantly the organization and conduct of executive offices.

Appropriation measures, it appears, may originate in the Senate, although this practice has occasioned objection.

The Federal provisions as to money matters are largely duplicated in the states.

2. The Executive Branch.

"The Executive power shall be vested in a President," who "shall take care that the laws be faithfully executed." (Article II, Section 1, 3.)

Although constitutionally bound to execute the laws and policies laid down by the legislative branch and to follow the judicial branch in its interpretation of the laws, the executive in the American system becomes the central figure in government. The executive is coordinate in rank and authority with the other two branches but by virtue of singleness of mind and initiative in action is in position to assume leadership in legislative as well as in executive function. This result is largely the outcome of the party system. The chief executive is the leader of his party; his election puts that party into control of the government, and its members in the legislature naturally follow his lead.

(1) THE LEGISLATIVE POWERS OF THE EXECUTIVE. The Federal Constitution requires that the President "from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper." (Article II, Section 3.)

(2) MILITARY COMMAND. By virtue of his position the

President becomes Commander-in-Chief of the Army and Navy and of the state militia when called into national service.[3] (Article II, Section 2.)

(3) FOREIGN RELATIONS. This power and that derived from his power, with the advice and consent of the Senate, to make treaties, to appoint and to receive ambassadors and other public ministers and consuls, Art. II, Sec. 2, place him, by constitutional authority, in practically

complete control of foreign relations.[4]

(4) RECOMMENDATIONS TO LEGISLATURES. Although the Congress has the sole power of raising revenue by taxation, and of appropriating for expenditure, the President may recommend subjects and methods of taxation, and present to Congress a detailed scheme of appropriation called the budget. In the latter particular, especially, the power of recommendation is of great persuasiveness, because the executive branch, alone, has the detailed experience in managing affairs which is necessary to intelligent appropriations. Budgetary practice differs greatly among the states. Some states have much better systems than the Federal Government; some have practically none.

(5) THE PARDONING POWER. The President by express Constitutional power may "grant reprieves and pardons for offenses against the United States, except in cases of impeachment." (Article II, Section 2.) Governors have an analogous power m the several states. A distinction has been drawn between executive power to pardon those found guilty of criminal contempts of court and those found guilty of civil contempts. The former may be pardoned; the latter may not.

(6) THE APPOINTING POWER. Perhaps the greatest single source of executive authority, however, is the power of appointment. "He [the President] shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of Departments." (Article II, Section a, clause 2.)

In the state governments the practice varies widely; in some the governors have a power relatively commensurate with that of the President; in others, executive authority is diffused among a large number of elected officers and independent boards.

In the Federal Government the executive functions are carried on chiefly through the Departments, whose heads constitute the President's Cabinet, and the so-called Independent Establishments, whose members are outside the President's official family.

While the heads of Departments, under the Constitution, are appointed by the President, it is not clear that the framers meant for the President to be the general administrative head of the Federal Government. The Secretary of the Treasury, when that Department was created, was made responsible not to the President but to Congress, although Secretaries of State (Foreign Affairs) and of War were made to report to the President, apparently, because, by express provision of the Constitution, the President was in charge of those services. But the power of appointment and removal inevitably subjected all the Department Heads to the presidential will and the exigencies of coherent administration required that this will be exerted. The Departments may therefore be said to be under presidential control.

The Independent Establishments, however, are not directly amenable to the President's will. After appointment their members do not report to him and removal is not solely within his power.

(7) REMOVAL. The power of removal is deduced from the power of appointment. Judicial officers are expressly exempted from this power, but executive officers are subject to it. The power of the Senate to concur in appointments is held not to require senatorial concurrence in removals.[5] In fact, wherever the power to appoint to executive office is lodged in the President, provisions of law attempting to limit the President's power of removal have been held void as trenching on the separate domain of the Executive Branch. Where, however, appointment is vested in Department Heads, it appears that Congress may, by law, attach limitations to the power of removal.

(8) BODIES INDEPENDENT OF THE EXECUTIVE. In recent years, however, judicial recognition has been accorded to a third category of officers, neither judicial nor executive, upon whom the power of removal by the President does not operate —quasi-judicial officers such as the members of the Federal Trade Commission,[6] who are deemed nearer in character to the judges than to executive or ministerial appointees. They may be removed only as provided by law.

As was forcibly pointed out in the report of the President's Committee on the Reorganization of the Federal Government,[7] the rapid growth of boards, commissions and similar bodies, not subject to presidential control, is tending to break down the executive leadership of the President and to scatter government functions among a headless aggregation of independent bodies. The President's lack of power to remove their members contributes to this end.

3. The Judicial Branch.

The Federal Government and

each of the state governments, as we have seen, is equipped with a complete set of governmental machinery. Each state, accordingly, has a system of courts endowed with all the powers of which courts are capable. But the Federal Government likewise maintains a full system of courts which operate throughout the same territory and exercise jurisdiction over the same persons as do the state courts. The territorial jurisdictions of the state courts are mutually exclusive, but the jurisdiction of the Federal courts, besides having territorial coincidence, overlaps, to some extent, that of the state courts. in subject matter. The existence of this dual and partially duplicating set of agencies springs from the provisions of the Federal Constitution.

(1) THE COURT SYSTEMS. The powers of the judiciary are enumerated as follows:

"Article III, Section 1. The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.

"Section 2. 1. The judicial power shall extend to all cases in law and in equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or citizens thereof, and foreign states, citizens or subjects.

"2. In all cases affecting ambassadors, other public ministers and consuls and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and to fact, with such exceptions and under such regulations as the Congress shall make."

In common with the other organs of the Federal Government the courts, thus provided for, have only such jurisdictional powers as are delegated to them. They are, therefore, technically described as "courts of limited jurisdiction" in contrast to the correlative state tribunals which are known as "courts of general jurisdiction." Nevertheless, as we shall see, Federal jurisdiction, where it exists, takes precedence over state jurisdiction of similar character.

The pattern of each state's court system is determined by its own Constitution and laws. That of the Federal system is provided by the foregoing language quoted from the Federal Constitution and the Congressional legislation thereby authorized.

The Federal Constitution, itself, establishes but one court, the Supreme Court, and confers upon it original jurisdiction in cases affecting ambassadors, public ministers, consuls and those in which a state may be a party. This original jurisdiction Congress may not enlarge. But the number of the Supreme Court judges, their compensation, the extent and character of the Supreme Court's appellate jurisdiction, the kind, number, location and jurisdictional characteristics of the "inferior" Federal courts, in short, nearly complete control of the entire Federal judicial system is left in the hands of Congress, which may provide and change its provisions subject only to the restraints of public opinion. Congress, of course, is constitutionally bound to appropriate money for the judges' salaries but if it should fail to do so no power could compel it. The courts, furthermore, are largely dependent upon executive action for the enforcement of their judgments and decrees, and this executive cooperation is subject to no Ultimate coercion but that of public disapproval. Appointments to judicial office are made by executive authority with senatorial assent. It will thus be observed that, powerful as are the courts in the determination of public policies in the United States, their power is so hedged by conditions and restrictions as to make it far from autonomous. If it be autocratic, the autocracy is maintained by popular assent.

The courts of greatest practical importance in any judicial system are the general trial courts of first instance. Nearly all cases begin there and comparatively few go higher. The backbone of each state's judicial structure is the "court of common pleas" or such tribunal by another name as corresponds in jurisdiction and power. Below it are commonly found such petty courts as justices of the peace, mayor's courts, etc., and above it the appellate, intermediate and supreme courts which are varioiusly named. So, in the Federal system the courts of greatest practical importance are the courts of first instance, the District Courts into which come initially nearly all the federal cases. Above the Districts Courts are the Circuit Courts of Appeal and above them the Supreme Court itself.

The Judiciary Act, passed in

1789, and since amended many times, provided originally that the Supreme Court should have a Chief Justice and five Associate Justices. In 1801 the number of associates was changed to four; in 1805 back to five; in 1807 to six; in 1837 to eight and in 1863 to nine. In 1866 Congress provided that no new appointments be made until the number of associates become six, but in 1869 the law was again changed to provide for eight associates, at which figure it still remains. commonly found such petty courts as justices of the peace, mayor's courts, etc., and above it the appellate, intermediate and supreme courts which are variously named. So, in the Federal system the courts of greatest practical importance are the courts of first instance, the District Courts into which come initially nearly all the federal cases. Above the District Courts are the Circuit Courts of Appeal and above them the Supreme Court itself.

The Judiciary Act at first created thirteen District Courts, and three judicial circuits. Two Justices of the Supreme Court and the resident judge of the District Court concerned were to hold sessions of the Circuit Court in each district twice a year. New districts and new circuits were created as the country grew, but the system remained substantially unchanged until 1891 when a new series of courts, the Circuit Courts of Appeals, was set up, one for each circuit. In 1911 the Circuit Courts were abolished leaving the District Courts, the Circuit Courts of Appeals, and the Supreme Court as the constituent units of the system. In addition to these "regular" courts the Federal system comprises the Court of Claims, the Court of Customs Appeals, the United States Customs Court, the Territorial Courts, the courts of the District of Columbia, the United States Court for China and the Consular Courts.

(2) BASIS OF JURISDICTION. Reference to the second section of Article III of the Constitution, quoted *supra,* will show that the delegated powers of the Federal courts extend to eight classes of cases or controversies. Of these the two most important in point of numbers are those presenting Federal questions, *i. e.,* arising under the Constitution, the laws of the United States or treaties, and, those exhibiting diversity of citizenship, *i. e.,* arising between citizens of different States. The original establishment of these two bases of jurisdiction went to the very heart of the case for the Constitution itself. Compared to their loyalty to the States there was but little loyalty among the people to the newly created central Government, and the creation of a Federal court to interpret the Federal Constitution and the Federal laws and treaties was shrewdly seen by the framers to be essential to the preservation and orderly working of the new regime. Distance and difficulties of travel, moreover, left the inhabitants of the different states strangers to each other and, as strangers, they held each other in distrust often bordering on hostility. The courts of each state stood ready to enforce the rights of the citizens of other states, under the rules of private international law as then understood, but mutual distrust and hostility made people loath to commit their interests to the arbitrament of "foreign" courts; hence the provision that controversies between citizens of different states might be tried in the Federal Courts. These reasons for the establishment of these two bases of jurisdiction have probably lost much of their original cogency but Federal questions and diversity of citizenship still supply much of their business to the Federal Courts. Admiralty and maritime cases also comprise a large part of this business.

Corporations have been held not to be citizens within the meaning of the constitutional clause in question. The courts, however, have created an irrebuttable presumption that all of the members or stockholders are citizens of the state which charters a corporation, so that practically the same result is reached as though the company itself was deemed a citizen.

Where Federal question or diversity of citizenship is the basis of Federal jurisdiction, the amount in controversy must, by Congressional regulation, equal a prescribed minimum.

The jurisdiction of the Federal courts depends upon the character of the controversy, *e.g.,* one arising in admiralty or bankruptcy; upon the character of the question to be determined, *e.g.,* the meaning or application of some provision of the Constitution or of a Federal law; or upon the character of the parties to the suit, *e.* g., ambassador, state of the Union, citizen of a state or of a foreign nation. In some instances the Federal jurisdiction is said to be exclusive, *e.* g., cases in admiralty, cases affecting ambassadors; in others the jurisdiction of the state courts is concurrent. It would take us too far afield to set up an exhaustive classification and explain the apparent exception to each general rule. It must suffice to observe that cases involving Federal questions and cases involving diversity of citizenship, for example, may arise in the state as well as in the Federal courts.[8]

(3) VARIATION BETWEEN RULES OF STATE AND COURTS. From what has been said it will appear that sometimes, though not always, a choice is open to litigants between the state and the Federal courts. One party

may prefer one, his opponent the other. Various reasons may dictate such preference; among such reasons may be the view of the law known to be entertained by the one or the other court.

That there should be more than one rule of law in a given jurisdictional area applicable to a particular state of facts is unfortunate. In theory it is impossible. In theory there can be only one such rule, and if two courts differ about it at least one of them must be mistaken. Yet in actual practice we find the Federal courts upon some few subjects continuously declaring rules at variance with those of the state courts, and the practical outcome of actual cases depending upon the existence of jurisdictorial facts which will carry the cases into one court or the other.

Some jurists who entertain a strictly territorial view of jurisprudence maintain the imperative necessity of legal Uflity in a given area. In their view there can be no Federal law apart from the law of the state in which it operates. Laws may be of Federal origin; Congress as well as the state legislature may enact them. But the Federal Constitution, the Federal Statutes, treaties which have the force of law, all, in this view, become parts of the law of the state itself and together with the "state" law make up the complete body of the state's jurisprudence. Federal courts apply the law of the states in which they sit and if their opinions vary from those of the state courts the difference is merely the result of human fallibility on one side or the other. The tenets of this theory square better with the older conceptions of state sovereignty than with the evolving conception of the national state. In any event, the stubborn fact remains that in certain types of cases the law of a given state as declared by the Federal courts differs from the law of that state as declared by the state courts. To be more specific:

Section 34 of the Judiciary Act provides that the laws of the several states, except where the Constitution, treaties or statutes otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. This provision leaves uncovered the entire field of equity, and some of the Federal courts have been inclined to follow their own versions of the substantive rules of equity in disregard of the state court rules upon the same subjects. In the field of common law the provisions of the Judiciary Act just referred to, reinforced by judicial precedent, have constrained the Federal courts in general to apply the rules current in the states of their respective location. Such courts, moreover, will give to a state statute the construction which has been given it by the highest court of that state and will follow changes in such construction if changes occur. But in Olcott v. The Supervisors, 16 Wallace 678 (1873) the Supreme Court said: ". . . It is only decisions upon local questions, those which are peculiar to the several states, or adjudications upon the meaning of Constitution or statutes of a State, which the Federal courts adopt as rules for their own judgments." Cases growing out of interstate commercial transactions have most frequently been regarded by Federal Courts as free from the binding force of state precedent.[9] In such cases the United States courts are prone to draw their rules of decision from the general system of the common law, rather than from the decisions of the particular States where they are sitting. "We are clearly of opinion," said the Supreme Court, "that the principles of common law are operative upon all interstate commercial transactions, except so far as they are modified by Congressional enactment." What such principles of the common law may be is, of course, to be determined by the Federal courts themselves.

It is yet too soon to descry the outcome of this occasional clash of authority in the field of unwritten law. The areas covered by Federal statutory regulation are annually increasing. The subjects indisputably "local, those which are peculiar to the several states" become annually fewer. Interstate commercial transactions persistently supersede those of intrastate character. Federal judges, furthermore, are generally lawyers of distinction whose opinions often carry more weight in the legal profession than do those of most of the state judges. In the slow, general progress toward the ascendancy of the national state the Federal branch of the American judiciary may well prove to be the stronger. There may yet be a "Federal Common Law."

(4) FEDERAL CRIMES. There are no common law crimes against the United States. The Federal courts have cognizance of those crimes only which are made such by Federal Statute. Congress may enact criminal statutes only in regard to such matters as are within the scope of delegated powers.

(5) THE LAW OF NATIONS. Congress, by Article I, section 8 of the Constitution is given power to "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." This would seem to imply the recognition of "the law of nations" as an independent body of international law. In fact, however, the American courts predominantly regard themselves as bound only by such rules, principles, stan-

dards of international law as are parts of the jurisprudence of their respective jurisdictions. The provisions of international law need not be proved as matters of fact by evidence, as must foreign law, but are within the purview of "judicial notice"; i. e., the courts are presumed to know it and, if they actually do not, may make their own investigations to inform themselves. Whether there be a Federal body of international law in addition to the bodies of state international law, is not entirely clear. Congress, it is held, may amend or alter the rules of international law. In an early case Chief Justice Marshall said: "Till an act (of Congress) be passed, the court is bound by the law of nations which is a part of the law of the land."

(6) THE COURTS AND POLITICAL QUESTIONS. In general it may be said that American courts, both state and Federal, have carefully refrained from obtruding themselves into the proper spheres of the executive and legislative departments of government. They have, it is true, taken upon themselves to say whether certain acts are within or without the powers granted by the constitutions. But with the exercise of such powers as are granted the courts have sedulously refused to meddle. Particularly is this true with regard to "political" questions and controversies. The *de facto or de jure* character of a foreign or of a state government, the existence of a state of insurrection warranting the use of the militia, the necessity for continued military occupation of conquered territory, these and many other questions as to the proper exercise of discretionary power have been held not proper for judicial decision. The line between political and judicial questions however, is not always sharply drawn. Just what questions are political is sometimes debatable.

[1] The vesting of law making power in a representative assembly was only gradually achieved in England. Originally the legislative power was in the crown. Occasionally a parliament was called together to confer and advise with the King. Only gradually did the substance of the power of legislation pass to the Parliament, and even today it is technically the "King in Parliament" who makes the laws.

2 State constitutions, of course may limit legislative action to prescribed subjects.

[3] See Chapter VI. War.

[4] See Chapter V, Foreign Relations: Role of the President

[5] Myers v. U. S., 272 U. S. 52 (1926).

[6] Rathbun *v.* U. S., 295 U. S. 602 (1935).

[7] Appointed by President Franklin D. Roosevelt.

[8] Federal laws provide for the "removal" of such cases to the United States courts under certain conditions.

[9] See Obligation of Contracts, herein, as to refusal of Federal Courts to follow state court construction of statutes where obligation of contracts is involved.

The Powers of Government

1. Separation of Powers.

The Constitution of the United States provides: Article I, Section 1, "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article II, Section 1, "The executive power shall be vested in a President of the United States of America." Article III, Section 1, "The judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish."

(1) ORIGIN AND MEANING OF THE PHRASE, "SEPARATION OF POWERS." No tenet of political theory is more firmly embedded in American constitutional law than the doctrine of the separation of powers. Foreshadowed by Aristotle and set forth by later writers as a deduction from the fundamental concept of liberty, it held the allegiance of the framers of the Federal Constitution and found expression in all the state constitutions as well. Reduced to its lowest terms it is simply the application to government of the principle of the division of labor. In its larger implications it is a device for the protection of individual liberty and right.

The device is simple in conception—not more than one kind of governmental power is to be lodged in the same person at the same time. The kinds of governmental power are three: legislative, executive, judicial. Government, therefore, ought to consist of three major departments, to each of which one of these kinds of powers should be committed. None of the departments ought to exercise any of the powers committed to the others. Through the "checks and balances" thus created the interests of the individual will be protected against governmental oppression and tyranny. So runs the theory.

(2) INCORPORATION INTO AMERICAN CONSTITUTIONS. In some of the state constitutions the theory is embodied both positively and negatively. The Massachusetts constitution, adopted in 1780, not only entrusts the three kinds of powers to three corresponding departments, but provides further that "the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them; to the end that it may a government of laws and not of men." Most of the state constitutions however, contain no such negative clause but, like the Federal Constitution, simply delegate each great class of powers to its appropriate department. In both cases the result is much the same. The judicially accepted doctrine that only such powers as are definitely granted may be exercised, coupled with another doctrine that delegated powers may not again be delegated, gives to the Federal Constitution a meaning not greatly different in this respect from that of the Constitution of Massachusetts.

(3) COMPLETE SEPARATION OF POWERS IMPRACTICAL. In none of the constitutions however, is the theory of the separation of powers completely adhered to. In the Constitution of the United States, for example, the President has a share in the legislative process through the veto; the Senate has the judicial power of trying impeachments and participates in the executive process of making appointments. With the sanction of judicial approval, moreover, Con-

gress has repeatedly delegated to executive officers and to administrative boards and commissions a host of functions which are in their nature at once legislative, executive and judicial.

This seeming contradiction of the theory of separation results in the last analysis from practical necessity. Complete separation of powers would so retard and stultify the activities of public officers as to bring modern government to a halt. The departures from the theory explicitly written into the Federal Constitution were chiefly the "checks and balances" devised for the further protection of individual right, but even in the earliest days the Government could scarcely have operated had the separation been literally complete. To perform the services, often resembling those of private business, with which government is now concerned, through the medium of mutually exclusive legislative, executive and judicial agencies, would result in delay and confusion that could not be tolerated. The assumption by government of "business" functions, accelerating rapidly during the last half century, has been accompanied by the creation of administrative bodies to which these functions have been committed. The powers delegated to them, if deemed "administrative," are upheld by the courts.

(4) ADMINISTRATIVE POWERS—WHAT ARE THEY? What are administrative powers and how do they differ from legislative and judicial powers? The attempt to answer this question at once calls for definitions of the terms, legislative and judicial, and sharp definitions are almost impossible to frame. The general fields of each are easy to locate but the precise boundaries are unknown.

Legislation is commonly thought of as the "enactment" of laws in words chosen by the enacting authority. This authority, generally speaking, may be king, council, representative or popular assembly. In the United States it clearly comprises the Federal and the State legislatures. It is usually also taken to include municipal councils and other analogous bodies having power to pass subsidiary laws (ordinances) for limited areas concerning limited subject matter. As to the Federal Government, Section 1 of Article I of the Constitution provides that: "All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." The judicial power as we have seen is vested in the courts—the Federal judicial power in the Supreme Court and the inferior courts established by Congress.

The judicial process is commonly regarded as the determination of controversies according to law. In its performance judicial officers frame the issues, consider the evidence, resolve disputed questions of fact, and determine the rights and duties of the parties in the light of the law applicable to the situation But as we have already seen, in many cases the judge is compelled to formulate the legal rule before he can apply it, and, in courts of last resort, the function of fixing such formulations for future use as precedents overshadows, in importance, the correct settlement of the controversies in hand.

But non-judicial officers also are under the frequent necessity of hearing evidence, framing issues, resolving questions of fact and rendering decisions in the light of what they deem to be the law. The distinction sometimes suggested, that courts act only when moved by private or public persons, whereas non-judicial officers act upon their own motion, cannot be maintained. Courts sometimes act judicially upon their own motion and non-judicial officers are frequently moved to act by private persons.

Legislative bodies as well as courts have power to punish for "contempts" of their authority.

To courts alone, however, is reserved the power to render binding "judgments" or "decrees"[1] and to determine finally the state of the law in any situation. To legislatures also is reserved a field—marked out, it is true, by judicial opinion, but gradually more sharply defined. That field is the establishment in major outline of legislative policy as distinguished from the filling in of minor administrative details. Whether a regulation is major or minor, *i. e.,* legislative or administrative, often cannot be told until it has passed the scrutiny of the highest court. But through the gradual accumulation of instances, the line is slowly being pricked out. The legislature cannot delegate its power to make a law but it can make a law to delegate a power to determine facts upon which the law can make its own action depend. "The true distinction," said the Supreme Court of Ohio, "is between the delegation of power to make the law which necessarily involves discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance to the law. The first cannot be done. To the latter no objection can be made."

(5) NATURE OF POWER VERSUS END TO BE ACCOMPLISHED. The separation of powers according to the nature of the processes involved in their execution has never been more than approximate. Generally speaking, powers involving a certain series of processes are wielded by the legislative bodies, powers involving another series of processes by the judiciary, and those

involving still another series by executive officers. But mutually exclusive utilization of such processes has never existed, and overlapping has increased with the need for it. The theory of the separation of powers has practically eventuated in the *distribution* of powers not according to their respective natures but according to the ends to be accomplished. The legislatures have powers to bring about certain results; the judiciary and the executives still others, and the accomplishment of certain purposes has been commuted to administrative agencies either by the transference of authority from the traditional branches of government or by the authorization of ends that are new. In this respect the distribution of powers among the departments of government is not generically different from that between the Federal Government and the states.

2. Delegation of Powers.

The concepts of the separation of powers and of the delegation of powers are logically distinct but in practice, as the foregoing discussion illustrates, it is difficult to consider One without the other.

The principle that power given to a designated person or body may not by such recipient be conferred upon another is, at bottom, a principle of the law of agency. Its acceptance as a maxim of constitutional law, however, is based upon the simplest canons of construction and is confirmed by the doctrine of the separation of powers. The sovereign will expressed in the constitutional grant must be taken as a mandate to exercise the power conferred. The trust reposed may not be shifted.

(1) LEGISLATION VERSUS ADMINISTRATIVE RULING. Legislative power, accordingly, may not be delegated. But powers to accomplish certain ends involving processes legislative "in their nature," are, as we have seen, frequently conferred by the legislatures upon boards and commissions. How, in practice, is "legislation" distinguished from "administrative" rulings and regulations?

A few examples from the hundreds available must suffice. The Interstate Commerce Commission is authorized by Congressional legislation to fix the rates which carriers may charge for their services. The only practical limitation upon the discretion of the Commission is that such rates must be just and reasonable.

The Tariff Act of 1922 authorized the President to proclaim changes in classifications and increases or decreases in rates of duty required to "equalize" the differences in the costs of production at home and abroad, whenever bis investigations indicated that the existing tariff rates did not "equalize" such differences.

The Secretary of the Treasury was authorized by Congress to set up standards for the grading of tea; these standards were to be based on purity, quality, and fitness, to be determined in part by taste. Experts were to advise the Secretary in the setting of the standards and the testing of the tea. Only such teas as come up to the standards might by imported into the United States.

The Secretary of War was authorized by Congress to require changes or alterations in bridges and navigable waters, when, after hearing, he should determine that such bridges constituted unreasonable obstructions to navigation.

In each of these cases the Supreme Court of the United States upheld the grant of regulatory power notwithstanding its legislative "nature." In each case the Court found the major outline of policy established by Congress—just and reasonable rates, difference in foreign and domestic cost of production, pure and fit tea, navigation free from unreasonable obstruction—and only the details of regulation or the ascertainment of conditions precedent to the law's operation left to the discretion of administrative officers. Under the pressure of apparent necessity the range of administrative regulation seemed to increase with each succeeding decision. Until the "New Deal" laws of the Roosevelt administration came before the Supreme Court of the United States, no Federal legislation of the kind under discussion had ever actually been stricken down by that tribunal as improper delegation.

In the "Hot Oil" cases[2] decided in 1935, however, the Court indicated that there were limits beyond which it would not go, even in periods of emergency. In an attempt to "stabilize" the oil industry Congress, by law, provided: "The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder . .

The Court said: "Section 9 (c) is assailed upon the ground that it is an unconstitutional delegation of legislative power ... The subject to which this authority relates is defined. It is the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. . . Accordingly we look to the statute to see whether the Congress has declared a policy with re-

spect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition." Finding none, the Court continued: "If the Constitution can make a grant of legislative authority of the sort attempted by section 9 *(c),* we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission. . . ." Referring to prior decisions the Court says:

"The constant recognition of the necessity and validity of such provisions—cannot be allowed to obscure the limitations of the authority to delegate if our constitutional system is to be maintained.

". . . We think that section 9 *(c)* goes beyond those limits.

As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule.... If section 9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function."

This decision was followed in the same year, by the decision in the NRA case.[3] The President, pursuant to Congressional authority had approved a "code of fair competition" for the industry concerned with slaughtering poultry. This code of business conduct was drawn by representatives of the industry, and when approved by the President was declared by the statute to have the force of law. Criminal penalties were provided for its violation.

"Congress," said the court, "cannot delegate legislative power to the president to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for rehabilitation of trade or industry." The NRA Act required the president, as a condition of approving a code, to find:

that groups which propose the code "impose no inequitable restrictions on admission to membership"; that the code "is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them"; that it will not permit monopolies or monopolistic practices; that the code "will tend to effectuate the policy" of the NRA law. These, the court found, were the only limitations upon the President's discretion. "Such sweeping delegation of legislative power," says the court, "finds no support in the decisions upon which the govern. ment especially relies."

Though state constitutions, as we have seen, generally fol. low and in some instances go beyond the Federal Constitution in restricting the delegation of powers conferred, the delegation of truly legislative powers to city councils and similar municipal legislative bodies has been continued without interruption since the beginnings of state Governments. The exercise of such powers by local authorities is of such long standing, and the practical necessity of its continuance is so great as to lead the courts to the view that it falls outside the reason of the general rule. In the absence of express prohibitions it has been assumed that the constitutions impliedly sanction the continuance of the practice.

(2) JUDICIAL WORK OF ADMINISTRATIVE BODIES. Discussion of the delegation of judicial powers logically proceeds upon a somewhat different basis from that of the delegation of legislative powers. Judicial bodies do not often attempt to *redelegate* the powers conferred upon them. Furthermore the Federal Constitution vests in Congress the power to see up inferior courts and fix their jurisdictions. Whether powers judicial "in their nature" may be exercised by bodies which are not courts is, therefore, largely a question of the separation of powers. The conferring of such powers in a wide variety of cases is so general as scarcely to need comment. The Interstate Commerce Commission entertains complaints and has regular procedure for hearing them. which includes pleadings, evidence, arguments, findings and orders, much like the procedure of courts, and reports its "cases" for the guidance of those concerned. The Federal Trade Commission and other "administrative" bodies do much the same. Immigration officials pass upon the questions of fact which allow or bar the entrance of persons into the United States. Postal authorities may in certain cases decide whether the mail of a given company shall be excluded from postal channels for fraud, one of the most drastic methods of control over business known to public administration. Utilities commissions pass upon questions of valuation in the process of determining rates and services. Industrial commissions determine the rights to compensation of persons injured in the courses of their employment.

1 Only judgments or decrees can finally determine private rights.

2 Panama Refining Co. *v.* Ryan, 293 U. S. 388.

3 A. L. A. Schechter Poultry Corporation v. United States, 295 U. S. 495.

Part II, Chapter V

Foreign Relations

In the United States the management of relations with foreign nations is almost completely in the hands of the Federal Government. The practical necessity of such exclusive control is recognized in the Constitution by grants of power to Federal authorities and by prohibitions upon the states. In addition to the power to make treaties, the Federal Government has the power to declare and carry on war, to raise and support armies, to provide and maintain a navy; to grant letters of marque and reprisal, to make rules for the government and regulation of land and naval forces and concerning captures on land or water, to provide for calling forth the militia, to provide for the common defense and general welfare, to regulate commerce with foreign nations, to define and punish piracies and felonies committed on the high seas, to appoint ambassadors and other public ministers and consuls, and to establish uniform rules of naturalization. States without the consent of Congress are forbidden to engage in war unless actually invaded or in such imminent danger as will admit of no delay, to keep troops or ships of war in time of peace, to lay tonnage duties, or to enter into agreements or compacts with other states or with foreign powers. States are absolutely forbidden to enter into treaties, alliances or confederations and to grant letters of marque and reprisal.

1. Responsibility of Federal Government.

The trend of judicial decisions and of administrative practice has, moreover, been strongly in the direction of concentrating the power to manage foreign relations in the Federal Government. That the nation speak with one voice in such matters is practically indispensable. That the National Government have the same powers which other governments possess in the field of foreign affairs is also highly desirable. These considerations have at times led the courts to sanction the exercise of powers for which no explicit constitutional authority could be found. The doctrine that the Federal Government has only such powers as are expressly conferred upon it is less rigidly adhered to in this area than in any other.

2. Lack of Power over States.

But while the Federal Government has the power to speak for all the states in dealing with foreign powers, it may under the Constitution lack the power to compel domestic action in accordance with its wishes. For example, the lynching of certain Italians by a Louisiana mob was protested by the Italian Government. The protest, of course, was lodged with the Government of the United States. But that government had neither the power to punish the persons concerned with the lynching nor to compel the state of Louisiana to do so. Congress could, however, appropriate money to compensate the injured Italian families. State land laws and other regulations respecting Asiatics may create international situations with which the Federal Government must deal; yet its hands may be tied with respect to the cause of the friction. Such consequences of the division of Powers between the Federal and the state govern-

ments condition the intercourse of the United States with other nations.

3. Role of the President.

International dealings range from the informal conversations of diplomatic officers and the international correspondence continually carried on between appropriate agencies, to the negotiation and ratification of formal treaties. Aside from the remote control implied in the Senate's power of confirmation of presidential appointments, the initiation and direction of informal dealings lies completely in the Executive Department. The President, furthermore, has the power to receive or reject foreign diplomatic representatives. He may dismiss foreign ministers or ambassadors. He may cause the United States to participate or to refrain from participating in international conferences. He may recall American representatives from the foreign posts and sever diplomatic relations. He may lead the United States to the brink of hostilities, or beyond it, although Congress alone may declare war.

4. Role of the Senate.

In the making of formal treaties, however, the President shares responsibility with the Senate. "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Article II, Section 2 clause 2. The initiative in the negotiation of a treaty is with the President, although the Senate by appropriate action may indicate its wishes. Preliminary negotiation is customarily carried on by commissioners appointed by the President. Such commissioners may, and sometimes do, include members of the Senate. The draft treaty reported by the commissioners must receive the approval of the Senate before it may be ratified. The Senate may approve, refuse approval, or propose reservations or amendments. If the last course is followed, the President may endeavor to secure assent to such modifications or may refuse to proceed further with the matter. In the event of final agreement on the form of the negotiated treaty, the President ratifies it and conducts the exchange of ratifications with the other contracting power. Customarily the President makes proclamation of the completed treaty, although such proclamation is not legally essential.

5. Treaties and Other Agreements.

There are various sorts of international agreements not called treaties, however, which the President may effect without senatorial concurrence. He may, for example, enter into *protocols* or other agreements preliminary to the making of treaties. As Commander-in-Chief of the Army and Navy he may agree to armistices or even more permanent understandings. The famous Rush-Bagot agreement, by which for many years the United States and Canada have eliminated fortifications and warships along the international boundary, was made in this manner. By Congressional authority the President may for limited periods negotiate "international trade agreements" respecting imports and exports, which do not require concurrence by the Senate.

The effectiveness of a treaty, once it is made, may depend upon the enactment of legislation to implement it, or upon the appropriation of money to execute its provisions. In either event Congressional cooperation is essential to the final result.

6. Dual Nature of Treaties.

The Constitution sets no express limits upon the scope of treaty making. No treaty has ever yet been declared unconstitutional, but it seems clear that a treaty which definitely contravened any provision of the Constitution would be held void. On the other hand, it seems equally clear that treaty making is not limited to those subjects which are covered by express grants of Federal power. This latter statement, however, must be considered in relation to the dual nature of treaties in the United States. Article VI, Section 2, provides:

"This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Every treaty thus becomes at once a compact with a foreign power and a part of the written domestic law. These aspects must, for many purposes, be kept distinct. Although, in the clause just quoted, laws and treaties are put on the plane of equality with the Constitution as the supreme law of the land, it is clear that both laws and treaties must conform to the Constitution in order to have validity. In point of ultimate authority the Constitution is supreme. But Federal laws and treaties which do conform to Constitutional requirements are co-equal in authority, and superior to conflicting state laws or state constitutions. It has been held by the Supreme Court that a later treaty will work a repeal of a conflicting provision of an earlier Act of Congress and a later Act of Congress will operate to abrogate the effect as a law of an earlier conflicting treaty.[1] It should be noted, however, that the treaty's

effect as an international agreement is not thus abrogated. The Congressional Act may render the United States unable to live up to the treaty and thus furnish ground for its denunciation by the other party to it; or it may lead to modification or annulment of the treaty by other means. But in and of itself the conflicting statute does no more than effect a change in the domestic law.

7. Treaties and the Reserved Powers of States.

The status of constitutional provisions as parts of the domestic law, superior to conflicting state laws, raises an interesting question as to the possible range of law making by treaty. If, as we have suggested, the treaty making power of the Federal Government extends to subjects not within the powers delegated to Congress, may that government through the exercise of that power regulate matters otherwise reserved to the states? To this question no satisfactory answer may yet be given. Expressions in the opinions of the Supreme Court are, seemingly, contradictory. But treaties have been sustained which regulate matters outside the legislative power of Congress. State laws within the normal scope of state authority have been voided because they were in conflict with treaties. As stated by one of the Supreme Court Judges:

"The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. But, with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."[2]

[1] Edye v. Robertson, 112 U. S. 580 (1884); Foster *v.* Neilson, 2 Peters 253 (1829).

[2] De Geofroy v. Riggs, 133 U. S. 258 (1890).

War

The term "war" as used in the Constitution has two meanings. Article I, Section 8, provides that Congress has the right to "declare war." As thus used the term denotes a state of public affairs. It may or may not be accompanied by armed conflict or the activities which such conflict calls forth. War in this sense is a legal, public status from which other legal consequences flow. Only Congress can create a "state of war." But Section io of the same article provides that no state, without the consent of Congress, may "engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." In this clause the term plainly means physical fighting or the preparation for it. In line with the Constitutional policy of placing foreign relations in Federal control, this clause inhibits conduct on the part of states which would force the hand of Congress in its dealing with other powers.

Congress has the power "to raise and support armies"; "to provide and maintain a navy"; and "to make rules for the regulation of the land and naval forces." As a precaution against military dictatorship, no appropriation of money for the army may be made for more than two years at a time..

States are forbidden to keep troops or ships of war in time of peace unless the consent of Congress be obtained.

Congress is also authorized "to provide for calling forth

the militia to execute the laws of the Union, suppress insurrections and repel invasions." It may likewise "provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." But to the states is reserved the power to appoint the militia's officers and to train them according to the discipline prescribed by Congress. The militia, therefore, while primarily an instrument for preserving the domestic peace, may be employed either by the state or the Federal Government for the war purpose of repelling a foreign invasion. Until called into Federal service the militia is under the control of state authorities.[1]

1. Commanding Position of the President.

Article II, Section 2, provides that: "The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several states when called into the actual service of the United States." His position as administrative head of the military, quasi-military and naval forces of the country, together with his control of diplomatic and other foreign relations, places in the hands of the President vast legal power in relation to war. He must, of course, as a practical statesman take constant account of public opinion. If it support him, the Congress will almost inevitably follow his lead in all that pertains to war.

War does not create Federal powers but, like other emergencies, it calls forth the exercise of powers which normally lie dormant. Conscription into military service is a familiar example of war power over individual liberty. The all-embracing character of modern warfare tends moreover to widen the scope of governmental control over property and economic life. The Supreme Court has placed certain limitations upon the powers of Congress to legislate regarding war but, in general, it is clear that whatever is practically necessary for the successful conduct of war is within the range of Federal competence.

If during a period of rebellion or invasion the public safety requires it, the writ of habeas corpus may be constitutionally suspended. Actual necessity alone, however, can render such sus-

pension legal.

The President's position as chief commanding officer in itself carries great power to issue administrative regulations and orders which have the force of law. Under the power given it to make rules for the regulation of the land and naval forces, Congress may and often does vastly increase this power. It may, likewise, diminish it.

Though Congress only may create a state of war, the President on his own responsibility may cause the forces of the country to engage in hostilities. In case of sudden invasion he may have no other alternative; but the possibilities are wider. Upon several occasions the marines and other military forces have been sent upon foreign soil *(e.g.,* into Mexico in 1914) where fighting has occurred without any declaration of war. President Wilson, after being refused Congressional authority, armed American merchant ships before the United States entered the Great War. Except through its power to withhold appropriations Congress cannot prevent such action.

2. Declaration of War.

Pursuant to its constitutional power Congress may affirmatively declare war or, as has generally happened, declare that a state of war already exists. Once the Congressional declaration is made, the legal effect of presidential acts may relate back to the times of their commission prior to the date of declaration. Such relation back is often important because the legal consequences of such acts in a state of war are different from those ensuing in a time of technical peace.

3. Making of Peace.

Peace and the concomitant ending of the state of war is normally brought about by treaty. Treaties, as we have seen, result from action by the President concurred in by the Senate. The result of war, however, may be so completely to destroy the opposing nation that no treaty is possible. In such event it would seem that the state of war may be abrogated by Congressional action. In the absence of Congressional action the Supreme Court recognized the date of a Presidential proclamation as the time of termination of the Civil War.

The state of war declared by Congress often continues for considerable time after the cessation of actual hostilities.

The Armistice which terminated fighting in the World War was signed on November 11, 1918, but the peace treaties with Germany and Austria were not signed until August 1, 1921, and August 24, 1921, respectively.

In carrying out the war powers which, we have seen, the President possesses, he must, for the most part, act through subordinates. Chief among these subordinates are the Secretary of War and the Secretary of the Navy. These cabinet officers, unlike some others, (e.g., the Secretary of the Treasury) are, by Congressional enactment, made directly responsible to the President. Commissioned officers, moreover, derive their authority from presidential appointment.

4. Organization for War.

The personnel of the Army and Navy is normally recruited by enlistment. As Commander-in-Chief the President may thus enlarge the size of the Army or Navy up to the limits set by Congress. Under conditions of modern warfare, however, it has been found desirable, if not necessary, to resort to conscription when great numbers of men are needed under arms. The constitutionality of this procedure has been tested and upheld.[2]

5. The Militia.

Congress, in the exercise of its authority to "provide for calling forth the militia" has empowered the President to draft into the military service of the United States any or all members of the National Guard and the National Guard Reserve, whenever the use of land forces greater than the Regular Army is authorized by law. When so brought into the Federal service they are *ipso facto* discharged from the militia. By this means, the constitutional question whether the militia may be sent abroad appears to have been set at rest. That question arose out of the provision, quoted *supra,* that the militia may be called into the service of the United States for the purposes of executing the laws of the Union suppressing insurrections and repelling invasions, all of which might be said to contemplate service within the United States.

Just when the President may employ either the forces of the United States or the organized militia in the suppression of domestic disorder sometimes becomes a nice question. The maintenance of the peace within each state is not a Federal function. On the other hand, preserving the existence and integrity of the National Government and ensuring the execution of its laws most emphatically are Federal functions. If these objectives cannot be attained by ordinary police measures, the Constitution plainly warrants the employment of armed forces. A broad discretion lies with the President. The courts will not wholly refuse to review this discretion, but it would seem that a very clear case must be made out before executive authority will be supplanted by that of the judiciary. In the Debs Case,[3] the Supreme Court upheld the action of President Cleveland in sending troops into Illinois without request from the

Governor when disorder, growing out of a strike, threatened the continuance of the mail service.

6. Military Tribunals.

Military law provides for the establishment of tribunals for the trial of offenses committed by those under military discipline. The Fifth Amendment by inference recognizes such tribunals when it relieves them of the requirement of trial by jury. These "courts martial" are not, however, parts of the judicial system of the United States. They are in reality administrative tribunals to which important powers are entrusted, powers which include the passage of the death sentence under the laws of war.

The jurisdiction of these tribunals in fact, has been extended by Congressional enactment to include civilians who give aid to the enemy. How far such jurisdiction over civilians may constitutionally go is not precisely known. It would seem to be limited to war time.

7. Military Personnel and the Civil Courts.

Those subject to military law and discipline are not thereby freed from the control of the civil law and the jurisdiction of the civil courts. For the same act one may be punished by both. Federal law may sanction what state law condemns, and in such case the Federal law should provide justification. Unless warranted by law, however, the command of a superior, even of the President himself, will not protect the offender.[4]

State courts may have jurisdiction over an offense committed by a member of the Army or Navy, but may be prevented from trying him because the enforcement of the judgment would unduly interfere with the military Purposes of the Government.

Whether one be in reality a member of the Army or Navy, whether Federal law does justify his conduct, whether his surrender to a state tribunal would unduly interfere with the functioning of the military service, may be determined by the Federal courts in habeas corpus or other appropriate proceedings. These questions may not, it appears, be determined by state courts.

In domestic territory outside the zone of actual hostilities, the civil authorities retain legal control even in time of war. President Lincoln in certain instances during the Civil War suspended the right of habeas corpus in such territory, but it has been generally considered that in so doing he exceeded his constitutional powers.

8. Occupied Territory.

Occupied enemy territory, whether part of the United States (in rebellion) or foreign soil, stands in difference case. Such territory in war time is, at least temporarily, cut off from relations with its former government and is wholly subject to military government by the occupying power. Under the rules of international law the military commander has supreme control. The United States Congress, of course, under Constitutional authority may lay down rules and regulations. Within limits so established the commander's expressed will is law.

It is customary in such cases to permit the local courts and other local officers to continue functioning in the conduct of local affairs. Their authority, however, is the will of

the military commander, not the law of the dispossessed government. But unless and until the provisions of the local law are altered by the decree of the commander, they are presumed to continue to govern the local tribunals. Government by military agencies, in territory which is to remain under control of the United States, may continue after the war period has ended. But in such case the status of the commanding officer changes. He no longer rules supreme as a military law giver but governs as an administrator of affairs under the laws of his country. He becomes civilly responsible for transgressions of his legal authority.[5]

[1] By Federal statute, "The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age, and, except as herein after provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia and the Unorganized Militia." Act of June 3, 1916, 39 St. L. 197 When employed under state authority in the preservation of the peace, e.g.. m maintaining "martial law" in a given area, their employment is authorized by the police power rather than the war power.

[2] Selective Draft Law Cases, 245 U. S. 366 (1918).

[3] 158 U. 5. 564 *(2895).*

[4] Little *v.* Barreme 2 Cranch 17 (1804).

[5] Reports on the Law of Civil Government in Territory Subject to military Occupation.

Taxation

The power to tax is indispensable to government. It is often said to be inherent in sovereignty. It comes first among the specific grants of power to the Federal Congress but, without this explicit grant, Congress would probably have power to levy taxes under the "necessary and proper" clause. The Articles of Confederation had withheld from the central government the power to tax, restricting the Confederation to requisitions upon the states, and the difficulties engendered by this system undoubtedly caused the Constitutional Convention to think first of taxes in their efforts to establish a stronger and more satisfactory regime. States, of course, possess the taxing power without constitutional grant.

The constitutional grant of power is comprised in the following language: "The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." (Article I, Section 8, clause 1.)[1]

1. Taxes Defined

Taxation is an appropriation of private property for a public purpose. It must, however, be distinguished from the power of eminent domain in which the "taking" is of some specific property and requires compensation. In the case of taxation the requirement is of a given sum[2] and it is immaterial whence it is derived. No compensation is required for tax money taken, although, in a general sense, the benefits of government are supposed to requite the tax payer for his outlay. Special assessments are, indeed, an exercise of the taxing power of states, distinguished, however, from taxes *per se,* by the fact that such assessments are for special benefits conferred by a public improvement—streets sewers, etc.,—and must not appreciably exceed the value of such special benefit.

2. Public Purpose.

Taxes may be levied for the support of any of the purposes of government but the purpose must be public. Both the Fifth and the Fourteenth Amendments provide that property may not be taken without due process of law, and this provision is construed to prevent the taking of private property for a private purpose. Just what is a public purpose is in the last analysis a judicial question, but it is settled doctrine in the courts that unless legislative determination of this question is clearly wrong, it will not be judicially upset.

In the "AAA" decision[3] the question was raised, but not answered, whether the imposition of a levy on the "processing" of cotton and other staple products, to produce a fund to compensate farmers for reducing their crop acreage, Was for a public purpose. In the Boston Fire case[4] it was held that a levy to produce a fund to loan to persons whose buildings had been destroyed in a disastrous city fire was not for a public purpose and was, therefore, invalid. But taxes to support stations for the sale of coal and gasoline at cost, and to construct and operate public utilities, etc., have been held to be for public purposes. The growing conception of the proper sphere of government activity has undoubtedly had its effect upon standards, both legislative and judicial. "A State may, in the public interest, constitu-

tionally engage in a business commonly carried on by private enterprise, levy a tax to support it, and compete with private interests engaged in a like activity."[5] But the objectives supported by the tax must, to comply with Constitutional standards, be for the benefit of the public generally, that is to say, of all who place themselves in a position to enjoy them, and not of particular individuals or groups.

3. Procedure in Levying Taxes.

Where the amount assessed against any particular person depends upon some variable, such as value or the amount of special benefit conferred, due process requires notice and an opportunity for hearing. Such notice, however, need not be given before the tax is levied; it is enough if opportunity is afforded in time to prevent illegal collection. The hearing need not be before a judicial body and may be quite informal

The exigencies of government will not brook captious or unnecessary obstructions or delays in the taxing process, and the rough requirements of fairness are about all that the courts will intervene to enforce. Where the amount of tax is fixed regardless of any variable to be determined in the process of administration, notice and hearing are not necessary. A poll tax is of this nature.

4. The Power to Destroy.

If the other requirements of law are complied with, the mere fact that a tax is heavy, even to the point of confiscation, is not enough to condemn it as unconstitutional. Property in the sense of ownership owes its existence to the state, and the legislative authority may fix any tax rate it deems fitting. "The power to tax," said Chief Justice Marshall, "involves the power to destroy."[6] In this connection, however, it should be said that exactions resembling taxes, levied under powers other than the taxing power, such as regulatory measures under the Commerce Clause, will be more closely scrutinized. An unreasonable exaction of such kind may be held void for lack of due process.

5. Classification of Property for Tax Purposes.

The power of taxation being vital to government, the courts are generally disposed to grant legislative bodies wide discretion in regard to ways and means. Classification of property and graduated rates of taxes are permissible when there is any reasonable basis for them.[7] Such devices must not, however, be purely arbitrary. If they are, the courts will hold them void for want of due process of laws.[8]

6. Federal Power to Tax.

With the exceptions contained in the Constitution, the Federal Government possesses the entire range of taxing power. This range is expressed in the four words, taxes, duties, imposts and excises. These words are to some extent interchangeable, "taxes" probably comprehending the other three. "Duties," specifically, are charges upon imports or exports, although the term, duty, is sometimes employed in a wider sense. "Imposts" are duties on imports. "Excises" are charges levied upon consumption, manufacture, sale or other specified uses of commodities within the country, and also upon the privilege of succession to property, pursuing occupations, exercising corporate powers, etc.

7. Limitations upon Federal Power.

The Constitution puts certain specific limitations upon the power to tax. They are:

(1) Duties, imposts and excises levied by Congress must be uniform throughout the United States. (Article I, Section 8, clause 1.) This clause has been held to mean only that the tax must operate with the same force and effect wherever the subject of it may be found.[9] It does not require apportionment nor does it prevent reasonable classification for purposes of taxation.

(2) "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration.. . ." (Article 1, Section *9,* clause 4.) What, besides capitation taxes, are comprised in the term "direct"? As the result of a line of decisions beginning in 1796,[10] it was said by the Supreme Court in 1881:[11] "Our conclusions are that direct taxes, within the meaning of the Constitution are only capitation taxes, as expressed in that instrument, and taxes on real estate." But in 1895 the Court decided that an income tax upon the rent or proceeds of real estate was a direct tax and that taxes on personal property and the yields thereof was likewise direct.[12] In later cases it was held, however, that taxes on agreements to sell or sales of personal property, were not invalid because not apportioned, but were excise taxes on the privilege of doing business rather than taxes on the property itself.[13]

This judicial broadening of the scope of the term "direct taxes" led to the passage of the Income Tax (Sixteenth) Amendment to the Constitution. To apportion income taxes among the states according to population was impracticable, and an income tax which excluded rents and interest would be manifestly unjust. To relieve the situation the Sixteenth Amendment provided: "The Congress shall have power to lay and collect taxes on

incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

This amendment paved the way for income tax laws Which now provide the largest portion of the Federal revenue, but the broad language, "incomes, from whatever source derived," raised new problems. Taken literally it seemed to warrant a Federal tax on the salaries of United States judges or those of state officers. The Supreme Court, however, early took the view that the amendment was passed for the specific purpose of taking income taxes out of the range of the requirement to apportion, and refused to extend its meaning so as to enlarge the subjects of taxation.[14] A recent decision regarding the salary of a state employee not deemed essential to state autonomy has, however, thrown the matter into some doubt.[15]

(3) "No tax or duty shall be laid on articles exported from any state." (Article I, Section *9,* clause *5.)* "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." (Article I, Section 9, clause 6.) "No State shall, without the consent of the Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." (Article I, Section 10, clause 2.)

These limitations are self explanatory.

The practical result of these constitutional provisions, limitations and interpretations is that the states are free to tax everything but imports and exports, and the Federal Government is free to tax everything except exports, polls, land and personal property, and the three latter could be taxed by apportionment. The fact that a permissible subject is taxed by the Federal Government is no bar to its being likewise taxed by a state. In fact, situations have frequently arisen in which the same subject has been taxed by the Federal Government and by several states. The problems of multiple taxation have come to be most perplexing and vexatious. As between the states and the Federal Government the remedy appears to lie chiefly in mutual forbearance. Both have jurisdiction over the same areas, and the citizens of one are likewise citizens of the other.

8. The Situs of Property for Tax Purposes.

As between the states, different considerations obtain. Much of the overlapping results from the nature of "situs." It has long been held that land, with its appurtenances, has a fixed situs and is subject for practically every purpose to the law of the jurisdiction in which the property is situated. But "personal property," *i.e.,* all property which is not technically land, has equally long been held to have its situs at the domicile of its owner. This holding is often a fiction, but the movable character of personal property and its likelihood of being moved at the owner's will make the fiction a convenient one for many purposes. Succession by inheritance, for example, is according to the law of the owner's domicile at death. An estate consisting of personal property located in several states thus descends according to one, instead of several, laws. The fiction, however, is not uniform in application. For tax purposes personal property may have its situs where it is as well as where its owner lives and except as noted below, may be taxed in both places. This is particularly true of intangible personal property, notes, bonds, stocks contract rights in general; tangible personal property is frequently, although not always, deemed to be taxable only at its actual situs.

In 1925 the Supreme Court ruled that real estate *and* tan*gible personal property* may be taxed only by the state of their actual situs.[16] And in 1930 the same court applied a single rule to intangibles.[17] Bonds were held taxable for inheritance only in the state of a decedent's domicile.[18] While the rule has not yet been applied to all varieties of property it appears that, so far as the states are concerned, a new policy has been established. But so far as the Federal Government is concerned the old rule remains. The securities of a non-resident alien who dies abroad may be taxed in this country if they are found here.[19] The due process clause of the Fourteenth Amendment has been deemed to forbid multiple taxation by the states, but the analogous clause of the Fifth Amendment does not forbid multiple taxation as between this and foreign nations.

9. Taxes for Regulative Purposes.

Not only may the power to regulate be employed to impose charges which amount to taxes, but in some cases the taxing power may be employed for purposes of regulation. congress must act within the range of granted powers.

In theory, therefore, any charge it imposes must be sustained either by the taxing power or by some other. The Courts will not inquire into the motive of Congress. If the charges imposed possess the characteristics of a tax and do not transgress any constitutional prohibition, it makes no difference that they are onerous or that they cripple or even destroy the business affected. If, on the other hand, the business or other activity af-

fected by a charge be within the power of Congress to regulate, and the charge comply with due process and other constitutional requirements, it makes no difference that it lacks some of the requirements of a tax. It must be said, however, that some of the cases are difficult to justify on this or any other theory yet advanced. Thus, a Federal charge of ten cents a pound on oleomargarine colored to look like butter was sustained although it was so large as to cripple the business.[20] The Court found that it was a tax an(l therefore within the taxing power of Congress, although admittedly Congress had no power to "regulate" the butter or the oleomargarine business. In Veazie Bank *v.* Fenno,[21] a heavy Federal charge on the issue of circulating notes by state banks was sustained although, clearly, the purpose was to destroy the business and with it any possibility of revenue. But, in this case, the regulation of the currency was within the power of Congress and the fact that the charge lacked one usual requirement of a tax—the raising of revenue— Was immaterial. On the same basis a prohibitive tariff has been held sustainable as an exercise of Congressional power over foreign commerce. In Bailey *v.* Drexel Furniture Co.,[22] however, a Federal charge upon business shipping goods in interstate commerce, after having employed child labor during the previous year, was stricken down by the Supreme Court. The Court found that the charge lacked the characteristics of a tax but was, in its nature, a criminal penalty. Falling, thus, outside the taxing power, and operating to regulate manufacturing, a subject matter within the control of the States, it had no constitutional basis of support and was deemed void.

The tax in the oleomargarine case appeared to fall perilously near the boundary of Federal competency because the charge was so heavy as to negative the purpose to raise revenue. In the Narcotics case,[23] the boundary was plainly passed. A nominal charge on traffic in opium was accompanied by an elaborate system of checking and inspection, designed to confer a "police" jurisdiction on Federal officers. It plainly lacked any design or capacity to raise revenue, and the regulation of "opium joints" was equally a State function. Yet the act was sustained, apparently on the general theory that only Federal power could effectively check this evil business.[24]

Of recent years a judicial tendency to check the use of the taxing power for purposes of regulation is becoming evident in the States as well as in the Nation.

[1] There was at one time considerable controversy as to whether this clause constituted a separate grant of power to provide for the general welfare; and also whether the taxing power here granted was limited the payment of debts. The welfare clause, however, is now generally deemed merely to qualify the power to tax, which is general for all purposes of government

[2] A state may, of course, require labor of its citizens, as for example, in the familiar "road taxes" which are to be "worked out."

[3] United States v. Butler, 297 U. S. 1 (1936).

[4] John A. Lowell *et al. v.* City of Boston, III Mass. *454* (1873).

[5] Green v. Frazier, 253 U. S. 233 (1920).

[6] Mc Culloch v. Maryland, 4 Wheaton 316 (1819).

[7] American Sugar Refining Co. v. Louisiana, 179 U. S. 89 (1900), Magown V. Illinois Trust & Savings Co., 170 W. S. 283 (1898).

[8] Liggett *v.* Lee, 288 U. S. 517 (1933).

[9] Head Money Cases, 112 U. S. 580 (1884).

[10] Hylton v. U. S., 3 Dallas 171.

[11] Springer v. U. 5., 102 U. S. 586.

[12] Pollock v. Farmers Loan & Trust Co., *157* U.S. reheard in 158 U.S. 601.

[13] Nicol v. Ames, 173 U. S. 509 (1898).

[14] Evans v. Gore. 253 U. S. 245 (1920).

[15] Helvering v. Gerhardt, *58* S. Ct. 969 (1938).

[16] Frick v. Pennsylvania, 268 U. S. 473.

[17] Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204.

[18] The determination of the decedent's state of domicile may be constitutionally decided by the courts of more than one state though the decisions may be at variance. Thormann *v.* Frame, 176 U. S. 350, followed in State of Texas *v.* State of Florida *et al.*, 59 S. Ct. 563.

[19] Burnet v. Brooks, 288 U. 5. 378 (1933).

[20] McCray *V* U. S., 195 U. S. 27 (1904).

[21] Veazie Bank *v.* Fenno, 8 Wallace 533 (1869).

[22] Bailey v. Drexel Furniture Co., 259 U. 5. 20 (1922).

[23] U. S. v. Doremus, 249 U. S. 86 (1919).

[24] The law was later amended so as to impose a tax of one cent an ounce.

Eminent Domain

The power of eminent domain, like its kindred power, that of taxation, is often said to be inherent in sovereignty. All sovereign states possess it; the States of the Union by virtue of their statehood, and the Federal Government by the same token. In the latter case it can be spelled out of the Constitution as implied from the granted powers and from the Fifth Amendment which provides: ". . . nor shall private property be taken for public use, without just compensation"; but even without this recognition the Federal Government would of necessity possess the power. The likenesses and differences between the powers of taxation and of eminent domain have already been noted. (See Taxation). Certain affinities with the police power will also appear. Although states possess the power of eminent domain by virtue of being states, they may by constitutional provision or other measures of self-limitation fetter its use, as in the provision of the Fifth Amendment just noted.

1. Basis of the Right.

Property rights in the legal sense derive from the state. Without the state's protection "property" could rise no higher than mere occupation—control enforced by the Possessor's own might. As a corollary of this fundamental proposition the state preserves the legal right, as well as the physical power, to take for its own purposes any article of property within its borders. This right is eminent domain Except for limitations imposed by the state upon itself, property may be taken, just as may life and liberty, without compensation. Eminent domain has its counterpart in military conscription.

The two most important self-limitations, rooted in the common law and now generally erected into constitutional guarantees, are: that the taking must be for public use and that just compensation must be made.

2. Public Use.

The use which qualifies as "public" may be use by the state itself, as in the case of a street, a court house, a post-office, or it may be use by some company or person for the benefit of the public, as in the case of a railroad, electric light, water, or pipe line company. Public utility companies possess the power of eminent domain; they may use it to acquire property needed for their purposes but the property engaged in their enterprises is legally said to be "dedicated" to the public use. Over such dedicated property the state has a large measure of control. Without public consent it may not be divested of its public character. Sometimes, though of recent years infrequently, a private, natural person may have the right of eminent domain. The uses which warrant the delegation of the power of eminent domain may change, and with them the extent of the right itself. Water mills for example, formerly were of large community importance and flowage rights over riparian lands above mills were often acquired through eminent domain. Diminution in the importance of water power brought corresponding changes in the efficacy of this use to confer the right of

condemnation. The uses for which property may be taken embrace parks, playgrounds, forest reserves, etc., as well as those of a business or governmental character.

Whether a public body, *e.g.,* a city, may take more land than is actually needed for a contemplated improvement involves some difficulty. In condemning land to widen a street, for example, a city may take "remnants," *i.e.,* part of lots not actually to be used in the improvement but too small to be longer useful for private ownership; it may also take enough additional land to protect that actually used from encroachment or injury; but whether it may acquire additional property with the purpose of holding it for sale at a price increased by the improvement, is as yet unsettled. Lower court decisions indicate that it may not.[1]

From what has just been said it will appear that the power of eminent domain residing in the state may be delegated by it to its subdivisions, such as counties, cities, school districts, or to non-governmental agencies whose business or activity is affected with a public interest. Since the states and the Federal Government are distinct sovereign-ties, however, neither may delegate the power to the other.[2]

Appropriation to a public use, though completely accomplished, is no bar to a reappropriation by another body if a "higher use" is demanded. A railroad may condemn land already in use as a park; a state may take it from the rail road for some paramount purpose of its own.

The power of eminent domain affects not only land but every kind of property both personal and real. Under the right of eminent domain the Federal Government in 1934 required the surrender of all gold coin in the process of "devaluing" the dollar. Intangible property, as well as tangible, may be appropriated. With a utility plant taken over by a city all the contract rights held by the former owner may be acquired.

3. Compensation.

The requirement that compensation must be made for property taken under eminent domain differentiates it from taxation (see Taxation) and from the Police Power. (See Police Power.) Although as a matter of policy, compensation frequently is made for property taken or injured under the police power there is no constitutional requirement therefor. But the boundary between the two is not clearly marked. "For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what would otherwise be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain."[3]

4. What is a "Taking"?

In a general way the "taking" contemplated in the terminology of eminent domain is a physical taking, but this is not always so. In condemnation proceedings to obtain land for a public purpose compensation must be made for "damages to the residue"—the portion of an owner s land not taken—as well as compensation for the part actually appropriated. Deprivation of full use, or the incapacitation of the property for its most profitable use, may be deemed a "taking" and require compensation. Equally palpable takings under the police power, e.g., the destruction of fruit trees to stop the spread of a blight, need not, constitutionally, be paid for.

Whenever the transaction is determined to be a taking under the power of eminent domain full compensation in money must be made. The value to be compensated for is the value at the time of the taking. An improvement may, of course, benefit, instead of injure, the "residue" of an owner's land. In such case the enhanced value may be set off against the value of the part taken.

The taking may be accomplished by agreement, and the compensation also. But if agreement cannot be reached the public authorities may proceed to take the property and have the amount of compensation determined in court later. Compensation is usually determined by a jury acting under legal instructions given by the judge.

1 Cincinnati *v.* Vester, 281 U. S. 439 (1930).

2 The Federal Government may condemn land in a state. It may even condemn land belonging to a State not used for state purposes. Whether it may take land used for state purposes, quere?

3 Hudson County Water Co. v. McCarter, 209 U. S. 349 (1908).

Interstate Commerce

Article I, Section 8, clause 3 of the Federal Constitution provides: The Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Great significance was attached to this language when it was put into the Constitution; foremost, perhaps, among the causes leading to its adoption was the state of commerce and communication between the States of the Confederation. But no one, it is safe to say, then dreamed of the tremendous potentialities, which reposed, latent, but vital, within these simple words. Together with the power conferred upon the Congress by subsection 18 of the same Section 8, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," the "commerce clause" has become the foundation for a great portion of the structure of Federal Government.

1. Development of the "Commerce Power."

It was some time, however, after the adoption of the Constitution before this clause came conspicuously into play. The provisions of Section 10, clause 2: "No State shall, without the consent of Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws"; and of clause *3* "No State shall, without the consent of Congress, lay any duty of tonnage"; and of Sec. 2 of Art. IV: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," were more immediately effective to curb the evils rife under the Confederation. It was not until 1824 that the Supreme Court, in the great case of Gibbons v. Ogden,[1] really called into requisition the powers of the Commerce Clause. Congress under the Commerce Clause had licensed Gibbons to operate steamboats in New York waters. But the State of New York had granted an exclusive license to operate such vessels to Robert Livingston and Robert Fulton, who had assigned this right to Ogden. The courts of New York at Ogden's request issued an injunction against Gibbons, but the Supreme Court of the United States upheld his right under the Federal license. Congress having undertaken to regulate the navigation in question, the license granted by the State of New York was of no avail. From this beginning has proceeded the expansion of Federal power over interstate commerce which has gone far to establish the dominance of the National Government.

Paramount authority over interstate commerce having thus been declared to be vested by the Constitution in the Federal Government, and no such authority having been given it over most other human pursuits, it becomes important to know what commerce is.

2. What Is Commerce?

In its ordinary sense the word "commerce" connotes business—buying and selling, the making of contracts, the appointment of agents, as well as the transportation of commodities, and all those other activities which go into the conduct of commercial enterprise. And in Marshall's earlier opinions there are indications that he was inclined to give the word some such comprehensive content. But subsequent decisions greatly narrowed this possible interpretation of the word "commerce" and have tied its meaning pretty closely to the concept of transportation. The making of contracts not con-

nected with transportation, the buying and selling of bills of exchange, the writing of insurance contracts, though conducted across state lines, are not, the courts say "commerce" in the terminology of the clause in question. But bills of lading and legal documents and agreements made in connection with transportation, if interstate in character, fall within the definition of the term. A drummer who takes orders for goods to be shipped from another state is engaged in interstate commerce but a peddler who makes sales from his stock which he carries with him is not. Sometimes the holdings of the Court are of doubtful consistency. Lottery tickets transported across State lines were held, by a divided Court, to be articles of commerce, the minority believing they fell into the same category as bills of exchange and insurance contracts. Advertising conducted on a national scale has been held not to be commerce, though the connection with the commercial handling of commodities is discernible. Bill posting, likewise, is not commerce. But the business of running a correspondence school has been declared to be interstate commerce because of the solicitation of students by local agents and the systematic intercourse by correspondence in the progress of the study.

To what extent a business or commercial purpose in the interstate transportation of goods or persons may be necessary to the concept of commerce is not entirely clear; the driving of sheep, the transportation of stolen automobiles, the transportation of women "for immoral purposes," the carrying of liquor for personal use only, have all been held to fall within the domain of Federal control. In general, however, a "commercial" purpose is observable in the transactions which constitute "commerce."

3. The Element of Transportation.

The term "transportation" has also had to be used in a somewhat elastic sense. Whether merely to walk for one's own pleasure across a state line comes within the scope of Federal control may be questionable. The element of transportation as well as that of business may be lacking. But the delivery of electric current across state lines, the transmission of "intelligence" by telegraph, telephone or wireless, the conveyance of water, oil or other fluids by pipe lines, all, by liberal interpretation, appear to fall within the term.

By the familiar judicial process of inclusion and exclusion, the term "commerce" has thus been invested with a technical meaning not amenable to simple translation into ordinary words. It has been divested of much of its natural "business" sense through limitation to the general notion of transportation. But, the meaning of transportation has been stretched to include intangibles such as "intelligence" and the transmission of electric energy. Marshall said that commerce was "intercourse" and this definition has been widely quoted. He immediately added, however, "It describes the commercial intercourse between nations, and parts of nations in all its branches"—a concept, as we have seen, both too large and too small for current, modern purposes.

It need hardly be said that the powers granted by the Commerce Clause extend to new means of transportation, new instrumentalities of commerce, as they are invented or put to use. "They extend from the horse with his rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies' are successively brought into use to meet the demands of increasing population and wealth." [2] The bus, the airplane and the radio, of course, follow these earlier inventions into the realm of Federal control when appropriately employed.

The concern of the courts to bring water transportation within the range of the commerce clause was especially acute when Gibbons v. Ogden was decided because, at that time, following the English law, admiralty jurisdiction was limited to waters where the tide ebbed and flowed. The commerce power was then, accordingly deemed the only means of Federal control over navigation upon inland waters—the Great Lakes as well as the rivers. Today, however, admiralty jurisdiction in the United States has been enlarged to embrace all navigable waters, thus giving to Congress another source of power over traffic upon lakes and streams.[3]

4. Commerce versus Production.

Perhaps the most fundamental line of cleavage maintained by the courts in the delimitation of the powers conferred by the Commerce Clause is that between commerce and production—manufacturing, agriculture, mining and the other extractive processes. The antithesis between such pursuits and "transportation" is, to be sure, less palpable than that between such industries and commerce in its generic sense. Nevertheless, the place where production ceases and interstate transportation begins has served to mark the rough and ready boundary of Federal control. If the activity be not "commerce," as defined by the courts, control rests with the states. In the first "child labor" case,[4] for example, Congress had by law prohibited to the channels of interstate commerce the product of any mine or factory in

which within thirty days of shipment, children under the age of fourteen had been permitted to work at all or children between the ages of fourteen and sixteen, for more than eight hours a day. "The act," said the Supreme Court (four judges dissenting), "in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are in themselves harmless. . . When offered for shipment and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power. . . . The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterward shipped, or used in interstate commerce, make their production a part thereof."

More recently in the "NRA" case, the "AAA" case and other "New Deal" decisions the same principle has .been upheld.

5. The Element of Intent.

The intent to put the goods into the channels of inter. state commerce is not controlling, as the Court observed in the child labor case. The same point had been made in former decisions. Logs hauled to a river town in New Hampshire for rafting to a point in Maine were held not yet subject to Federal control.[5] Nevertheless the element of intent is never to be disregarded, as will more clearly appear in the discussion of the interstate character of commerce.

6. When Is Commerce Interstate?

The Federal Government is granted power only over commerce "among the several States." When is commerce interstate? Again quoting from the opinion of Chief Justice Marshall in Gibbons *v.* Ogden[6] "The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the boundary line of each State, but may be introduced into the interior.... Comprehensive as the word 'among' is it may very properly be restricted to that commerce which concerns more states than one . . . . The completely internal commerce of a State, then, may be considered as reserved for the State itself."

Transportation which begins, continues and ends in the same state is intrastate. To be interstate it must cross state lines. But a movement whose termini are both within the same state is interstate if, en route, it passes into another. Intent alone is not determinative of the interstate character of a movement. Whatever the intent as to destination, intrastate character persists until actual delivery to a carrier for shipment or commencement of a continuous journey.[7] But if the physical aspects of transportation have begun, the intent may be looked to to give character to the transaction. Delivery to a carrier may be sufficient to transfer jurisdiction if the intent to transport to another state is manifest, though movement itself has not begun.

Once the interstate character of a transaction is established, Federal jurisdiction will attach to arrangements and agreements preparatory to or connected with the movement.

Mere intent, likewise, will not divest a movement of interstate character which has once been acquired. That character persists until physical arrival at the point of destination, even though the shipper or the consignee have the right to stop or divert its movement while en route. But destination itself, of course, is a matter of intent, and physical arrival at an altered point of destination will as effectually discharge the shipment of interstate character as will arrival at the original point of delivery. Mere cessation of movement, however, does not effect such discharge; Federal jurisdiction covers the terminal handling and arrangements, sometimes including assembling or testing, necessary to effect delivery from the carrier to the consignee.

In pipe-line shipments where a continuous flow of a fungible commodity is tapped at various points, some within and some without the state of origin, the character of the whole movement is determined by the main stream or current and not by casual or incidental deliveries within or without the state of origin. This is true though the oil or other commodity in the pipes belongs to different shippers. Once commingled in the piping system, each shipper's oil becomes a part of a general mass, from which he is entitled to take a quantity equivalent to that which he put in; and until segregation takes place his portion partakes of the character of the whole.

7. The Instrumentalities of Commerce.

Federal jurisdiction attaches not only to the movement of persons or property but to the instrumentalities of transportation both physical and human. Property actually used in interstate transportation, activities directly concerned therewith, persons engaged in such activities, all, for the purposes of the Commerce Clause, fall within the Federal jurisdiction. But difficult questions frequently arise as to structures, equipment or activities not directly utilized in interstate

transportation but more or less remotely connected with it. Freight handlers at a terminal handling interstate shipments are generally held to be engaged in interstate traffic. A taxi service operated by an interstate railroad in connection with its passenger business has been held not subject to Federal jurisdiction. Under recent holdings of the Supreme Court, persons engaged in certain work for a transportation company may be subject to Federal jurisdiction for some regulative purposes but not for others. Thus "back shop" workers, employed in conditioning railway equipment have been said not to be engaged in interstate commerce for purposes of the Federal Employers Liability Act (July 11, 1906)[8] but to be in interstate commerce for purposes of the Railway Labor Act (1934.)[9]

The simile of a "current" of interstate traffic, borrowed, perhaps, from pipe-line transportation, has been utilized to bring into Federal control businesses not actually engaged in transportation. Thus "stockyards" have been said to be "but a throat through which the current flows,"[10] and therefore subject to an act of Congress passed for their regulation. Grain elevators have been similarly dealt with.[11]

8. The Power to Regulate.

The whole grant of Federal power over interstate commerce is carried in the one word, "regulate." Standing thus, unqualified, by familiar rules of judicial interpretation it is entitled to the broadest construction. But whatever is done in this field by Congress, courts, or President must find its support in the meaning of this term. "What is this power?" says Marshall. "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in the Congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution.... The wisdom and discretion of Congress.. are, in this, as in many other instances, ... the sole restraints."[12] The limitations prescribed in the Constitution such as that contained in the "due process" clause, do, of course, in effect vest in the judiciary some power of restraint over Congress.

This plenary power has been construed to extend to the control of the instrumentalities of transportation, to the activities of those engaged in it, to the contracts and other legal arrangements connected with it. Rates, types, means and conditions of service, provisions for the safety of employers and the public, all these manifestations of the power to regulate are too familiar to require specific mention. An employers' liability law relating to suits for damages for injuries sustained by railway employees has been in effect since 1908. An act relating to hours of labor and other conditions of railway employment was passed in 1907, and later sustained by the Court. In 1916 the Adamson Act was passed; this Act, while purporting to fix the length of working days, in reality fixed the wages of railway workers. It was sustained by the Supreme Court but the opinion contained expressions indicating that the emergency conditions generated by the European war and the threat of a general railway strike may have influenced the decision.[13]

In 1920, following the experiences of the Great War, Congress enacted the so-called "recapture" clause of the Transportation Act (41 St.L. 456), which provided that a portion of the profits from the operation of the stronger roads above a fixed percentage should be held in trust for the benefit of the weaker roads which, at the rates permitted, could not earn profits equal to the minimum standard. This law was upheld by the Supreme Court as being within the Congressional power to regulate.[14] The Transportation Act provided also for the consolidation of the nation's railroads by areas or zones. The Court said; "To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety." "The Government may," said the opinion, "itself construct and operate roads, bridges or other means of transportation including railroads."

9. The Power to Protect.

The power "to protect" interstate commerce, derived from the power to regulate, has received wide application. It was made the basis of an' injunction against strikes issued by a Federal court.[15]

Not only does it vest power in the national government to use force, if necessary, to prevent physical interference with interstate traffic, but it has been held to warrant Federal agencies, such as the Interstate Commerce Commission, in imposing upon purely intrastate transportation regulations designed to protect interstate traffic from undue burdens. Rates charged by an intrastate line may be regulated by the Commission, if their effect, through competition, upon the rates of a parallel interstate line is such as to interfere unduly with the rate structure of the interstate road.[16]

10. The Power to Prohibit.

But the power to regulate interstate commerce implies power to prohibit as well as to protect and foster. The extent of the

power to prohibit is not entirely clear, but that it exists in certain cases there can be no doubt. Reference has already been made to the prohibition of interstate traffic in lottery tickets, stolen cars, immoral women, etc. In Hammer V. Dagenhart[17] a Congressional statute was under consideration which forbade interstate shipment of the products of child labor. The Lottery cases, the White Slave cases and the cases involving the interstate transportation of liquor were urged upon the Court as precedents. The majority rejected the contention saying: "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results.. . although the power over interstate commerce was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended. This element is wanting in the present case.

In his dissenting opinion (concurred in by McKenna, Brandeis and Clarke) Justice Holmes says: "The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid. ... It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives. The Act does not meddle with anything belonging to the States. . . when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the State line would depend upon their neighbors." The argument of Justice Holmes seems logically the sounder. Congress, apart from the Commerce Clause, had no power to prohibit "harmful results." Its power under the Commerce Clause was unfettered save by other Constitutional limitations, *e.g.,* "due process." For the Court to substitute its judgment for that of the Congress as to the reasonableness (due process) of the regulation smacked sharply of judicial legislation.

The power to regulate commerce is undoubtedly competent to sustain the imposition of exactions which, in effect, are taxes. Such "regulative" measures need not conform to the limitations imposed by the Constitution upon the Federal taxing power, e.g., the requirement that "direct" taxes be apportioned among the several States in accordance with population.

11. Agencies Developed under the Commerce Power

Under cover of the power to regulate commerce Congress has passed among others, the Interstate Commerce Act; the Sherman Act and its successive amendments, designed to control monopolies and restraints of trade; the Clayton and Federal Trade Commission Acts, designed to eliminate "unfair trade practices"; the Securities and Exchange Act, regulating the interstate traffic in securities; and acts to regulate radio broadcasting.

12. Limitations on the Commerce Power

The commerce power, as Marshall said, is complete in itself and acknowledges no limitations other than those prescribed, in the Constitution. Specific limitations are: "No tax or duty shall be laid on articles exported from any State," (Article I, Section 9, clause 5); "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another," (Article I, Section 9, clause 6); "No State shall, without the consent of the Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," (Article I, Section 10, clause 2); "No State shall, without the consent of Congress, lay any duty of tonnage," (Article I, Section 10, clause 3). Less specific, but no less binding or important limitations are contained in the clause which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," Article IV,

Section 2; the provision that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated" (Amendments, Article IV); the provision that "In suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," Amendments (Article VII). These last two provisions have had especial importance in the development of the Interstate Commerce Commission, the former in controlling its inquisitional power in investigating and controlling the affairs of railroads and others; the latter in determining the procedure of the Interstate Commerce Commission in the enforcement of "reparation orders."

13. Supremacy of the Federal Power

There is no question of the paramount power of the Federal Government over interstate commerce. Where Congress acts, state legislation must be silent.

Whether, however, the power of the Federal Government over interstate commerce is exclusive or whether it shares a concurrent jurisdiction with the States has often been a vexing question.

The exclusive character of Federal control over water transportation was more or less generally conceded after the decision of Gibbons V. Ogden,[18] but the states continued to assert the power to regulate interstate traffic upon land for a long time thereafter. Perhaps the most important decision affecting state power to regulate such traffic was that of Wabash, St. Louis & P. R. Co. v. Illinois.[19] In the absence of Federal regulation of railroad rates, the states had enacted laws relating thereto. But the Supreme Court in this case held that the matter of rates for interstate transportation was so clearly of national, as distinguished from local, importance, that it fell within the range of the Federal Government's exclusive powers. The situation precipitated by this decision did much to hasten the passage of the Interstate Commerce Act and the establishment of the Interstate Commerce Commission.

In dealing with the question of the exclusive power of Congress, the Supreme Court has not dealt with the control of interstate commerce as a unit, but has dealt separately with its component elements. The guiding principle is clear enough: those elements which are of national importance are exclusively within Congressional jurisdiction those of only local consequence may be dealt with by the states in the absence of Congressional action. In the application of this principle, difficulties and minor inconsistencies occasionally appear.[20] Regulation of harbor pilotage has been allowed to the states. Speed regulations and other safety measures may be imposed upon interstate carriers by states or cities. Quarantine measures may be enforced against those engaged in interstate carriage. The sale of intoxicating liquor upon interstate trains may be regulated by state law. License fees or other appropriate charges may be exacted of out-of-state motorists to help defray the expense of building roads and of police arrangements.[21] But, "If a State enactment imposes a direct burden upon interstate commerce, it must fall, regardless of Federal legislation."[22]

14. Burdens on Interstate Commerce

Just what constitutes a "burden on interstate commerce beyond the power of the states to impose, is hard to define. Some examples must suffice. A Georgia statute requiring the speed of trains to be checked at each highway crossing was stricken down upon showing that the practice made it difficult to maintain through train schedules. A law requiring trains to stop at each town of 200 inhabitants or more was held an undue burden; but a law requiring stops at all towns of 3,000 inhabitants was sustained. The requirement of a license fee of all drummers soliciting orders for goods to be shipped into the State was held invalid. States may not prescribe conditions upon which alone a corporation doing an exclusively interstate business may operate. Certificates of convenience and necessity may not be required of interstate motor carriers where the purpose of the requirement is the prevention of competition with local carriers. While state regulations affecting health, safety or morals, established under the favor of the police power, may operate upon interstate commerce if indiscriminately applied, such regulations may not be made to discriminate against interstate commerce. Inspection laws whose effect is to prevent the importation of food from other states, laws requiring inspection of flour from other states but not of that produced within the state, laws preventing the sale of milk imported from other states because the dealer had not paid for it the prices established in the state making the regulation, have all been held invalid because of discrimination.

The right to engage in interstate commerce implies the right to transport articles of commerce into any state. By logical construction it is further implied that states may not prohibit or unduly interfere with the sale of such articles by those entitled to dispose of them; otherwise the right to bring them in would be nugatory. Once, however, such articles lose their character as subjects of interstate commerce, they come under the states' power of regulation and control, the same as other personal property within state jurisdiction.

15. Original Package Doctrine

When is this interstate character lost? It is commonly said that it persists until the goods are taken out of the "original packages for purposes of sale." While this cannot be stated as an absolute rule, the "original package doctrine" has been adopted and adhered to by the courts as a convenient test of Federal jurisdiction. It was first promulgated in the case of goods imported from abroad, and was grounded upon the Federal power over foreign commerce plus the Constitutional prohibition of State duties upon imports or exports. Later it was extended

to interstate commerce.

As a consequence of shipment in interstate commerce the states' power to tax is not cut off; even in the original packages such goods are subject to state taxation provided it be not discriminatory or otherwise invalid. But in the case of goods imported from foreign countries the prohibition upon stare import duties restrains the states from levying taxes until the goods are sold. The "original package doctrine" came most prominently into public notice in connection with shipments of liquor into dry territory. As an article of interstate commerce it could not be excluded by the state and, in the original package it might be sold by the consignee. To meet this situation, which threatened to nullify State prohibition laws, Congress passed the "Webb-Kenyon Act" which forbade shipment in interstate commerce of liquor consigned to states forbidding its sale or use. This device has since been applied to articles made by prison labor and appears to offer a solution to certain other vexing problems of Nation-State relationships.

Just what is an original package and when is it broken? These questions have occasioned considerable litigation. It has been held in the construction of the Pure Food and Drug Act, that the immediate container, not the larger box, bale or other package in which smaller ones are assembled for shipping, was the original package, and that a State law requiring such immediate containers to be labeled or marked in certain ways before sale was invalid as an interference with interstate commerce. But packages of cigarettes shipped loose, without the usual shipping cartons, in baskets, or even piled on the car floor, were held, upon legal test, to be subject to state police regulation as soon as they entered the state. While in strict logic the paper package in which the cigarettes are usually retailed may well have been considered the original package—size being immaterial—the

obvious intent to use logic to circumvent the police regulation of the state in a field where both health and morals were thought to be involved, was not overlooked by the Supreme Court. The cases, in fact, merely prove that the "original package doctrine" is not a rule, but merely a convenient criterion which will not be employed in an inappropriate place. In the last analysis the courts will decide upon all the facts in any given case whether the interstate character of a shipment has been lost.

16. State Taxation and Interstate Commerce

Direct burdens may not be laid upon interstate commerce by taxation any more than by other means. Neither the instrumentalities nor the business nor the goods carried, may, as interstate commerce, be taxed by the states. "No State," says the Supreme Court, "has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to regulation of it, which belongs solely to Congress."[23]

On the other hand, property devoted to interstate transportation may be taxed as property and corporate franchises granted by States to companies doing interstate business may be taxed as property, provided the tax be not discriminatory and is not a direct burden on commerce itself. The capital of a corporation doing an interstate business may be taxed by the state of its creation. A property tax no more serious than that borne by similar property generally, and not in any special way hindering or preventing the conduct of interstate business, is generally not deemed a direct burden.

Articles of interstate commerce while actually in transit are not subject to tax, but such articles may be taxed before they enter upon transportation or after they have lost their interstate character. The right of persons to move in interstate channels may not be taxed.

In the taxation of corporations engaged in interstate commerce a principal difficulty is that of arriving at a base or measure upon which to assess the tax. Trackage in one state may derive its value mainly from the fact that there is trackage in another. Rolling stock moves from state to state so that it is practically impossible to ascertain with certainty the number of cars subject to taxation in any given period.

Taxation of gross income as such is regarded as a direct burden. But gross income has been allowed to be used as a measure of the volume of business which in turn could be treated as a measure of proportion. The length of line within the state may also be compared with the total owned by the company and the proportion applied to the total value of the company's taxable property. Any such measure may be inapplicable in a particular case, but unless some special inequity appears the courts are likely to sustain it.

As distinguished from gross income, net income arising from interstate commerce may be taxed as such.

17. Foreign Commerce

The power of the Federal Government over foreign com-

merce is, if anything, more comprehensive than that over commerce between the states. In addition to the authority granted in the Commerce Clause, identical in wording with that over interstate commerce, the Federal Government has exclusive control of international relationships by Constitutional grant and by accepted international usage. The Federal judicial power over maritime matters is exclusive, and of recent years the doctrine has been accepted by the courts that Congress may legislate over the matter which is subject to the jurisdiction of the courts.

The power to levy tariffs, for many years deemed to he grounded in the Commerce Clause, is now held also sustainable by the Federal power over foreign relations.

18. Commerce with the Indian Tribes

Commerce with the Indian tribes has long ceased to have great importance in the affairs of the United States. The problem of sustaining, educating, and generally caring for the Indians has come to overshadow it, but commerce, such as there is, is regulated by the Federal Government. Traffic in intoxicating liquor is generally prohibited and buying and selling upon the reservations is conducted under license. Unlicensed traders are generally not allowed to deal with the Indians who still maintain their tribal organization.

[1] Gibbons v. Ogden, Wheaton 1, 194 (1824).

[2] Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 708 (1878).

[3] The jurisdiction of the courts over admiralty cases has now been made the basis of Congressional jurisdiction as well. Congress may legislate regarding matters concerning which the admiralty courts may adjudicate.

[4] Hammer v. Dagenhart, 247 U. S. 251 (1918).

[5] Coe v. Errol, 116 U. S. 517 (1886).

[6] Gibbons *v.* Ogden, 9 Wheaton 1, 194 (1824).

[7] Coe *v.* Errol, 116 U. S. (1886).

[8] Howard v. Ill. Cent. Ry. Co. 207W. S. 463 (1907).

[9] Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515 (1937).

[10] Stafford v. Wallace, 258 U. S. 495 (1922).

[11] Lemke v. Farmers' Grain Co., 258 U. S. 50 (1922).

[12] Gibbons v. Ogden, 9 Wheaton 1, 196 (1824).

[13] Wilson v. New, 243 U. S. 332 (1917).

[14] Dayton-Goose Creek Ry. Co. v. U. S., 263 U. S. 456 (1924).

[15] United Mine Workers *v.* Coronado Goal Co., 259 U. S. (1922).

[16] Houston E. & W. Texas Ry. Co. *v.* U. S., 234 U. S. 342 (1914).

[17] In Hammer *v.* Dagenhart, 247 U. S. 251 (1918).

[18] Congress had acted in granting a license to Gibbons, so the question whether the States might act in the absence of a Federal statute was not really before the Court in Gibbons v. Ogden.

[19] Wabash, St. Louis & P. R. Co. *v.* Illinois, 118 U. S. 557 (1886).

[20] Cooley *v.* Board of Port Wardens, 12 Howard 299 (1851).

[21] Bowman v. R. R. Co., 125 U. S. *465* (1888).

[22] Minnesota Rate Cases, 230 U. S. 352 (1913).

[23] LeLoup v. Port of Mobile, 127 U. S. 640 (1888).

Postal Facilities

Somewhat akin to the "Commerce Power" is the power of the Federal Government over the postal facilities of the nation. It rests initially upon clause 7, Sec. 8, Art. I of the Constitution: "[The Congress shall have power] To establish post-offices and post-roads."

1. Development of the Postal Power.

It was believed by many when the Constitution was adopted that the power conferred was essentially regulatory;[1] that the word "establish" meant to locate or designate and that the power of Congress was limited to the designation of routes, the location of suitable offices, and the protection requisite to the mail service carried on by contract.

That conception has given way, however, to one of a more proprietary character under which the Government, itself, conducts the business of the postal service and extends its aid and protection to enterprises connected therewith. Thus, the Government has lent its credit to the construction of railways and now subsidizes steamship and airplane lines because of their connection with the handling of the mails.

2. Is the Federal Power Exclusive?

The postal clause itself is deemed not to confer upon the Federal Government an exclusive power. But by the action of Congress in taking over the field and prohibiting others from entering it, it now enjoys a monopoly of the business of carrying mail. Just what is mail may be a subject of controversy. "Letters and mailable packets" were spoken of in the early decisions. But express packages often differ in no generic way from "mailable packets." The Government has, it is true, gone into the express business in its handling of "parcel post" material, but it has not undertaken to monopolize that field. So, also, has the Government gone into the (postal savings) banking business in connection with the postal service.

3. Power to Prohibit.

The power over the mail service carries with it the power to exclude from the mails objectionable matter. Obscene, incendiary or seditious matter may be refused. A large discretion lies in the hands of the Post Office Department as to what is unmailable, but in the case of action that is arbitrary, unreasonable, or lacking in good faith, resort may be had to the courts.

Difficulties concerning the Federal power over mail matter arise, "not from the power of Congress to prescribe the regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transmission of the mail.[2] These rights are guaranteed by the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." Sealed letters and packages (to be distinguished from unsealed material purposely left open for inspection), are legally as sacred from unreasonable searches and inspections while in the hands of the postal au-

thorities as they would be in private premises. Warrants for search or seizure must be "upon probable cause, supported by oath or affirmation, and particularly describing the ... things to be seized." (Fourth Amendment).[3]

4. Power to Punish.

Federal control over mail matter extends farther than to mere exclusion; it carries the power to punish the sending by mail of fraudulent, indecent, seditious or other matter declared by Congress to be prohibited. Much of the power resembling the police power of the states, enjoyed by the Federal Government, is grounded in the control of the mails. Of equally drastic effect with the power to punish is the power to refuse mail service to concerns engaged in fraudulent or other prohibited practices. A "fraud order," as it is called, is usually fatal to the continuance of a business against which it is issued. The requirements of due process as to notice, hearing and opportunity for defense must, of Course, be observed; but the hearing may be administrative; it need not necessarily be judicial.

5. Rights of the States.

While the states may not interfere with the transmission of matter accepted for carriage by the postal service, it does not follow that the states are bound to permit its receipt at destination. An Attorney General's opinion has held that such receipt may be prohibited by a state if the matter mailed is subject to objection. In this view the analogy to interstate commerce fails. Doubtless, however, such action on the part of a state would have to pass the test of reasonableness.[4]

6. Protection of the Mail Service.

The Federal Government has the constitutional right to employ its power, either civil or military, for the protection of the mails enroute. In the Debs case[5] the President sent the militia to restrain strikers from interfering with the mails. The injunctive power of the courts is available to the same end.

Perplexing questions have arisen with regard to the authority of states, under their police powers, to interfere with the carriage of the mails.

Injuries occasioned by the negligent operation of mail trucks or other facilities may give rise to actions for damages against the Federal employees who are at fault, but the Government, itself is immune to suits in tort actions. It has been held that a Federal employee driving recklessly through a public street may be arrested and fined by municipal authority, but truck drivers may not be restrained from carrying the mail until they procure licenses to drive. Warrants for arrest charging felonies may be served while a driver is on duty, but there must be no undue interference with the progress of the postal cargo. Whether the same privilege under state police power extends to arrests for minor offences, *mala prohibita,* is not so clear.

1 This view was taken by President Monroe in his veto of the Cumberland Road Bill.

2 Ex parte Jackson. 96 U. S. 727 (1878).

3 Wire tapping to secure evidence of bootlegging was held not under the Protection of the Fourth Amendment. Olmstead v. U. 5., 277 U. S. 438 (1928).

4 Cushing's *Opinions of the Attorney General, p.* 489.

5 Debs case, 158 U. S. 564 (1895).

Money

One of the most important powers conferred upon the Federal Government is that relating to money.

"The Congress," says the Constitution, "shall have power . . . To borrow money on the credit of the United States; ... To coin money, regulate the value thereof, and of foreign coin; ... To make all laws which shall be necessary and proper for carrying into execution the foregoing powers". (Article I, Section 8.) "No State shall . . coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts". (Art. I, Section 10.)

1. Money and Banks

The first severe test of the Government's power in this field related to its power to charter a bank. Because of the effects upon national prosperity believed to have been occasioned by the Bank of the United States it became a subject of political controversy. Maryland levied a tax on the notes issued by the branch operating in that State, and imposed penalties for non-payment. The power of the Federal Government to charter the bank and the power of the State of Maryland to tax it came before the Supreme Court in the case of McCulloch v. Maryland.[1] Chief Justice Marshall's opinion, deciding the case in favor of the bank, is regarded as the greatest he ever wrote. "Although," he said, "among the enumerated powers of government [in the Constitution] we do not find the word 'bank' or 'incorporation', we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies." To handle and transmit the funds of the Government Congress might choose the means most suitable. A bank was within the range of reasonable choice. As one of the measures "necessary and proper" for the carrying out of its acknowledged powers, Congress might charter a bank. If Congress had power to create, no State might, by taxation, burden or destroy it. So ran Marshall's argument.

2. Federal Financial Agencies

The power thus asserted to establish a bank has since been employed to create the Sub-Treasury System, the National Banking System, the Federal Reserve System, the Federal Land Banks, the Reconstruction Finance Corporation, the Federal Home Loan Banks, the Intermediate Credit Corporation and other institutions engaged in banking or akin to it. The measure of control over banking and thereby over credit enjoyed by the Federal Government through the Federal banking system is obvious.

3. Paper Money

This control was strengthened by the decision of the Supreme Court in the case of Veazie Banks v. Fenno.[2] State banks not under supervision by the Federal Government were issuing notes which passed from hand to hand as money. Many of these banks were unsound and their frequent failures impaired confidence in their currency. Often their notes were accepted only at discount, and confidence in the entire monetary system was injured. To

eliminate state bank notes from circulation Congress levied upon them a tax of ten per cent—enough to make it unprofitable for banks to issue them. In the Veazie Bank case the Supreme Court sustained the constitutionality of this tax, and state bank notes ceased to circulate. Although this result was accomplished by the exercise of the taxing power, it could have been accomplished by direct prohibition under the power to control the currency. The Federal power in this field is paramount.[3]

Bank currency, however, is but one implement of credit. Another is paper money issued by the Government itself. States are forbidden to "emit bills of credit," *i.e.,* notes, promises to pay, pledging the general credit of the issuer and meant to circulate as money. The Federal Government, however, is under no such prohibition, but, on the contrary, is left in full possession of this field.[4] Under its power to borrow it may issue such instruments of credit as it desires. Resort to this device during the Civil War encountered the difficulties of depreciation. "Greenbacks" circulated at large discounts. They were, however, by law, made "legal tender"; that is, creditors were bound to accept them at face value in the settlement of existing contracts. In a test case, the Legal Tender Acts were held invalid, Hepburn *v.* Griswold, 8 Wall. 603 (1869), the power to "regulate the value" of money being limited to "coin. In a later case, however, the same issue came again before the Court, and this time, reversing its prior decision, the Legal Tender Acts were sustained.[5] "Under the power to borrow money . . . and to issue circulating notes . . . . its [Congress's] power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof."

4. The Value of Money

But while a creditor could be compelled to accept greenbacks at par in the settlement of existing contracts, in future agreements he might stipulate for higher prices. The value of paper money in terms of commodities might still go down. So to guard against fluctuations in the value of "hot money," long-time contracts were made to carry clauses stipulating payment in gold coin of the weight and fineness prevailing at the time the contract was made. The market value of gold was regarded as more stable than the purchasing power of paper money. The monetary disturbances attendant upon the Depression years following 1929, marked by the devaluation of the currency of many European countries, led Congress in 1933 and again in to enact legislation which resulted in diminishing the gold content of the American dollar from 25 8/10 grains of gold to 15 5/21 grains. The Congressional Resolution (Joint Resolution of June 5, 1933), declared that "every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby" was against public policy; and further, that "every obligation heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public or private debts." Furthermore, under the power of eminent domain the Government required the surrender to it of all gold and gold certificates for which payment was made in currency of the lowered gold value.

5. Gold

No question was made of the Government's constitutional power to reduce the gold content of the dollar, nor of its power to appropriate the gold. But the constitutional validity of the Congressional Act invalidating the "gold clauses" in contracts made before the passage of the Resolution of June 5, 1935 was challenged in the case of Norman v. Baltimore & Ohio R. R. Co.[6] The holder of an interest coupon, containing a gold clause, sued to recover, instead of the face value of the coupon, $22.50, the alleged value of the number of grains of gold called for in his contract, $38.10. By a divided court the provisions of the Resolution of June 5, 1935, were sustained. "Contracts," said Chief Justice Hughes, "however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but, when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." The decision of the Court was, in reality, an application of the familiar legal principle that every contract when made has in it by implication the terms of all relevant provisions of law. While the precise point had never actually been decided, the decision of the Court was foreshadowed by dicta in the prior cases respecting the Legal Tender Acts.[7] It should be noted that the Federal Government is under no constitutional restraint (as are the States) with regard to the passing of laws impairing the obligation of contracts. Bankruptcy Acts are for that very purpose.

Whether a contract calling, not for money in gold, but for gold as a commodity would be differently decided is uncertain. One lower court has held that the dollar value of the number of grains stipulated for would have to be paid if the gold could not be delivered. Under the Congressional Resolution this appears doubtful.

In another case [8] it was held by the Supreme Court that the gold clauses in its own contracts (Liberty Bonds) could not he abrogated but that the plaintiff showed no damage by reason of the failure to pay him in the gold stipulated for. If gold were given him he could at once be under obligation to turn it back to the Treasury in return for "devalued" dollars.

The result of this line of decisions is to give the Congress comprehensive and apparently complete power over money in the United States.

[1] McCulloch *v.* Maryland, 4 Wheaton 316 (1819).

[2] Veazie Bank *v.* Fenno, 8 Wall. 533 (1869).

[3] Bailey v. Drexel Furn. Co., 259 U. S. 20 (1922).

[4] A resolution in the Constitutional Convention expressly to give this power to the Federal Government was voted down. But it has been implied from other clauses.

[5] Juilliard *v.* Greenman, 110 U. S. 421 (1894).

[6] Norman v. Baltimore & Ohio R. R. Co., 294 U. S. 240 (1935).

[7] Knox v. Lee. 12 Wall 457 (1870); Trebilcock v. Wilson, 12 Wall. 687 (1872).

[8] Perry v. The United States, 294 U. S. 330 (1935).

Police Power

In current discussions of constitutional problems no power is more frequently referred to than the "police power." Yet this term made its first appearance in our judicial literature more than a third of a century after the adoption of the Federal Constitution, and another half century elapsed before its use became general in the language of the law. Its growing employment has been paralleled by the growing demand for public regulation of private interests in behalf of public health, safety, morals and convenience.

1. Development of the Police Power.

When first used the term implied simply the residuum of powers reserved to the States; it later acquired a more specialized connotation, that of State power to regulate private interests in the protection of the public welfare. The private interests regulated were at first chiefly those in property. Gradually they have come to embrace interests in commercial and other types of human activity. The phases of public welfare to which such protection has been extended have most frequently been those related to health, safety or morals. Gradually they have also come to include certain elements of convenience and economic well-being. The precise scope of the police power never has been and, probably, never will be defined. Developing conditions progressively call for variations of its use. As each new variation is tested our knowledge grows but its expanding circle, never closes. The maintenance of the peace by ordinary police officers and the enforcement of martial law by the National Guard are common examples of the exercise of the police power. So also are the regulation of the medical and other professions; compulsory vaccination and immunization; smoke abatement; the regulation of food and drugs; quarantine and inspection measures; removal of wastes and garbage; control of intoxicants, gambling, lotteries, and amusements. Segregation of the races (subject to the provisions of the Fourteenth Amendment) has also been sustained. "Blue Sky" laws, aimed at the prevention of fraud, and similar regulations are founded on the police power.

Whether and how the police power shall be exercised is a matter for legislative—in some cases, perhaps, for executive—determination. Whether a particular act is within or without the boundary of the police power is finally determined by the courts.

2. Constitutional Limits of Police Power.

Granted that a given state regulation is sanctioned by the state laws and Constitution, the question still remains whether it is within the State's police power as limited by the Federal Constitution. If the regulation falls within a category of acts which states are constitutionally forbidden to perform, or if it falls within a category, assigned exclusively to the Federal Government, it is beyond the scope of state competence. Many police regulations have been sustained, however, which incidentally affect the subjects of Federal power. Local laws, for example, may regulate the speed of trains through municipalities although such trains are engaged in interstate commerce. The selling of liquor on such trains may be controlled. Harbor regulations may affect the movement of ships in foreign commerce. When such regulations cease to be incidental is a matter for the courts.

3. Due Process and the Police Power.

The Fourteenth Amendment furthermore, provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The nature of "due process" is discussed under another heading, but it may be said here generally that due process involves reasonableness, adequate notice, opportunity to be heard, and the absence of arbitrary action, caprice or bad faith. Only such State police regulations as comply with the requirements of due process are within the police power of a State. It is true that the United States Supreme Court has said:

". . . neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community." This, however, is but stating the same proposition with a different emphasis. Unreasonable requirements may not be set up.

It is for the courts to say in the last analysis whether such requirements are met. Whether a given regulation is reasonable, having regard to all the relevant circumstances, is a question upon which judges may well differ and it is not surprising that dissenting opinions frequently accompany majority decisions.

In approaching such a question courts generally recognize that they are not to substitute their judgment for that of the legislature as to the wisdom of the policy embodied in the act. They may as a body entirely disagree with its policy and yet sustain it as within the state's competence. Only if it is clearly lacking in reasonableness or the other elements of due process may they strike it down. But judicial history shows that honest judicial minds often differ as to what is clearly unreasonable.

In Muller v. Oregon,[1] a state law prohibiting the employment of women in laundries for more than ten hours a day was upheld as a reasonable regulation, upon the ground that women's physical structure and the function they perform in the perpetuation of the race warranted a different rule from that which applied to men.

In Lochner v. New York,[2] a state law regulating hours of labor and other working conditions for adult men was held invalid. In a subsequent case, however this holding was substantially reversed.[3]

In Adkins v. Children's Hospital,[4] the court held a minimum wage law for women lacking in due process. This law authorized a commission to determine the minimum scales of wages upon which adult women could reasonably maintain health and morals, and forbade contracts of employment at lower rates.

In Weaver v. Palmer Bros. Co.,[5] the court held invalid a law which prohibited the use of shoddy under any circumstances in the manufacture of bedclothing.

4. Business Regulation and the Police Power.

Reasonable regulations of private interests for the protection of health, safety, morals, and welfare may clearly be based upon the police power. The power to regulate the rates and other details of the business of public utilities and of businesses "affected with a public interest" may also be said to be a phase of the police power. Such regulation has sometimes been sustained because of the "public" nature of these enterprises. But a recent decision of the Supreme Court of the United States says that the expression, "affected with a public interest" means no more than "subject to the exercise of the police power."[6]

5. Taking of Property and the Police Power.

In general property may not be "taken" under the police power. Under favor of the police power tubercular cattle may be killed, diseased nursery trees may be destroyed, gambling devices may be smashed, houses may be dynamited to prevent the spread of disastrous fire, but the "taking" of property can only be accomplished under the power of eminent domain. While private property taken for public use in the public exercise of the latter power must be paid for as a matter of constitutional law, property destroyed or damaged under the police power need not be paid for, although, in the interests of practical justice, legal provision is often made by states or their subdivisions to compensate owners for property so destroyed.

6. Taxation and the Police Power.

The power of taxation, another method of taking private property without the consent of the owner, is, of course, to be distinguished from the police power. It should be observed, however, that police regulations are often carried out in the guise of taxes or fees resembling taxes. Automobile registration fees are a good example.

7. Is There a Federal Police Power?

Technically speaking, the police power belongs only to states. It has been judicially stated that it was reserved to the states by the Tenth Amendment as one of the "powers not delegated to the United States by the Constitution nor prohibited by it to the States."[7] "But," continues the same authority, "it is none the less true that when the United States exerts any of the

powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose.

Through the exercise of the commerce power, the taxing power, and various other powers delegated to it, the Federal Government makes and enforces many regulations indistinguishable in character from regulations grounded on the police power. There is, however, this important circumstance to remember: whereas the police power of the states, inherent in sovereignty, may be exercised in any appropriate case unless constitutionally prohibited, the Federal power must be found in some one or more of the Constitutional delegations. Unless a Federal "police" regulation can be predicated upon some granted power it is void. Nor may Congress by the exercise of the delegated powers regulate those phases of the people's life which are reserved to the states. Federal attempts to regulate child labor under the commerce power failed in the courts because the subject matter was deemed to be within State cognizance.[8] So also did the "NRA," some phases of the "AAA," and the "Guffey Coal Bill." But it should be noted that the question, really, was not so much whether the matters were reserved to the States as whether the delegated powers of the Federal Government were broad enough to embrace them. For if a matter be within the scope of Federal power it cannot be reserved to the states; where State interests and Federal interests clash the latter will prevail.

8. Bartering Away the Police Power

It is a general doctrine of the courts that the police power, vital as it is to the public welfare, cannot be contracted away, and that, consequently, contracts or grants purport to exempt parties from the operation of the police power are no prohibition against its subsequent exercise.[9] There are, however, certain apparent exceptions to this general rule. The legislature, for example, may, by grant or contract, for limited periods of time, forego its right to regulate utility rates. But such contracts will be strictly construed and, probably, cannot be assigned.

[1] Muller v. Oregon, 208 U. S. 412 (1908).

[2] Lochner v. New York, 198 U. S. 45 (1905).

[3] Bunting *v.* Oregon, 243 U. S. 426 (1917).

[4] 261 U.S. 525 (1923).

[5] Weaver v. Palmer Bros. Co., 270 U. S. 402 (1926).

[6] Nebbia v. People of State of New York, 291 U. S. 502 (1934).

[7] Brandeis, J., in Hamilton v. Kentucky Distillers and Winehouse Co., 251 U. S. 146 (1919).

[8] Hammer v. Dagenhart, 247 U. S. 251 (1918).

[9] See Obligation of Contracts for further discussion of this point.

Due Process of Law

Under the heading of Police Power it was observed that the exigency of events called into operation from time to time new manifestations of the state's power, and that the reservoir from which they were drawn came to be known as the "police power," an undefined term, designedly left vague, lest by definition some of its latent resources be cut *off.* In somewhat the same way through constitutional enactment and judicial interpretation there has been developed a limiting concept, undefined and elastic, which is applied in an endless variety of ways to keep the acts of all the agencies of government, including the courts themselves, within the bounds of reason. That concept is "due process of law."

1. Development of the Concept of Due Process

Its history is long; it derives from an older phase of similar import, "the law of the land." At Runnymede King John was made to swear that: "no free man shall be taken, or imprisoned, or disseized, or outlawed or exiled, or in any way destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land" *(per legem terrae).* Doubtless the phrase was familiar in the mouths of the lawyers before the Great Charter. In its present form, due process of law, it appeared in some colonial documents about the time of the American Revolution and was put into the Fifth Amendment to the Constitution in 1791. It appeared again in the Fourteenth Amendment in 1868.

2. Reason, the Essence of Due Process

The courts -have consistently refused to define due process, preferring to let its meaning develop as circumstances dictate, by the gradual process of inclusion and exclusion. The core of its meaning, wherever and however applied, is reason, that typically legal concept of Anglo-American jurisprudence. But the word, reason, itself is a "term of art," which denotes, not so much the mental process to which psychologists now apply the name, as a working conformity to concomitant circumstances. It smacks of common sense; yet as a "term of art" its sense sometimes becomes technical rather than common. When King James put to Lord Coke his famous question. "Have I not reason as well as my judges?" Coke replied, "that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it."[1]

It is this reason, the reason of the law, which pervades the concept of "due process." As the reason of the law it is the property of the courts. "Due process" has become the strongest weapon (or, as some think, the most serviceable shield) in the judicial armory when dealing with the exercise of the powers of government. But it brings the courts to the verge of the judicial domain, and at times subjects them to the charge of usurping the powers of legislation.

3. Scope of the Doctrine

Its development in the United States has outstripped its development in the land of its origin.

In America it is held to affect the processes of legislative as well as executive and judicial bodies and to apply to substantive as well as to procedural rights.

4. Restraint Only upon Government.

The mandate of "due process" is a command laid upon governments. The Fifth Amendment, applying to the Federal Government only, provides that: "[No person shall] be deprived of life, liberty, or property, without due process of law": The Fourteenth Amendment, applying to the States, provides: "nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It seems settled that both due process clauses constitute restraints upon government action only and not upon that of private persons. Infringement by such persons upon private rights of life, liberty or property is relegated to the control of other appropriate laws; nor will the due process clause avail to correct judgments, affecting private rights, alleged to be erroneous either in point of law or in point of fact.

While the courts have declined expressly to say 50, the meaning of "due process in both Amendments appears to be the same. As applied both to the Federal Government and to the states, it restrains the acts of the legislative, the executive, and the judicial branches. It restrains "administrative" as well as other action.

5. Procedural Import of Due Process

In the United States the phrase "due process of law was at first deemed to be one of procedural import; as it is still in England. In its procedural aspects it is held to require that the governmental agency in question have jurisdiction of the person whose rights are to be affected; that he be given timely notice of the pendency and nature of the charge or complaint against him and adequate opportunity to present his contentions in the matter; that the tribunal be fair and impartial and free from fraud or bad faith; that the decision be not arbitrary or whimsical or frivolous but that it comport in substance with the dictates of reason. In these elements repose the essence of "due process." But the particular forms of its manifestation are as broad and as varied as the law.

Due process does not necessarily mean judicial process, though the procedure of courts must conform to its requirements. A proceeding before an administrative body or an executive officer may supply all requirements if the fundamentals are observed. Neither pleadings nor rules of evidence, nor jury trial nor any other particular form or practice is requisite unless it be pertinent to the particular tribunal or the particular proceeding. "Due process" does not prohibit change; procedure may be reformed to improve the service; to hold otherwise would be to deny every quality of the law but its age and render it incapable of progress and improvement.[2] Settled usages, especially those of long standing, are, however, of importance in judging of the fulfillment of the requirement of "due process."

It is not necessary to due process that there be a right of appeal. If the first proceeding complies with the requirements it is enough.

6. Substantive Requirements of Due Process

But in the United States the requirements of "due process" are not limited to procedure. An act of the legislature, or of an administrative tribunal pursuant to legislative action, may be void for lack of "due process" although procedurally open to no objection, if it affect substantive rights in an arbitrary or unreasonable way.

The decision of the Supreme Court of the United States in Munn v. Illinois[3] appeared to establish the doctrine that businesses affected with a public interest, whether common callings or not, were subject to any police regulations which legislatures might see fit to apply. Dedication of its property to public use by a business concern was deemed to entail this consequence. Later cases have modified this doctrine, however, by bringing into play the principle of due process. Public utilities and other businesses affected with a public interest are protected from spoliation or other unreasonable regulation by the due process clause.

"It seems to us," said the Supreme Court in one of the earlier pronouncements looking in this direction, "that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby, vested in B., would, if effectual deprive A. of his property without due process of law."[4] Somewhat eliptically, the court reasoned that such action by the legislature would be the *equivalent* of a judgment without due process, and thus brought the requirement, theretofore deemed procedural, over into the field of substantive law. But having once employed a fiction to bridge the gap, the courts have ignored the bridge and held openly that "due process" is a substantive as well as a procedural requirement. This doctrine has been chiefly employed in rate cases, in proceedings under eminent domain and generally in cases where

claims of taking without just compensation have been set up. Thus, a compulsory rate so low as not to afford a utility company reasonable return on the property it has dedicated to public use is deemed to be a confiscation which is a taking without due process of law. Undervaluing the property in *fix*ing the rate base produces the same result and is likewise forbidden. The Supreme Court has attempted to lay down a set of criteria to be observed in these cases,[5] but in operation they leave much to be desired. They lead circuitously to the starting point—reasonable return—and no farther. They do, however, break down the concept of reasonable return into its accounting elements and enjoin consideration of all phases before conclusions are reached.

In the fixing of rates and cognate matters, modern practice generally provides for action by some administrative tribunal such as a public utilities commission. In reviewing the proceedings of such bodies the courts, generally, pass only upon matters of law, leaving the findings of the commissions final in the field of fact. In rate cases, however, the Federal courts have held that "due process" requires them to pass upon the questions of fact involved in the determination of values as well as upon pure questions of law.[6]

The benefit of "due process" is extended to all persons by both the Fifth and the Fourteenth Amendments. It is not limited to citizens. Corporations are within its protection and aliens may claim its benefits. Congress has by law made it possible for aliens seeking entry into the country to invoke the action of appropriate authority.

[1] See *Prohibitions del Roy* (1612), 12 Co. Rep. *63, *65.

[2] Hurtado *v.* California, 110 U. S. 516 (1884).

[3] Munn v. Illinois, 94 *U. S.* 113 (1876).

[4] Davidson *v.* New Orleans, 96 U. S. (1878).

[5] Smyth *v.* Ames, 169 U. 5. 466 (1898).

[6] Ohio Valley Water Co. *v.* Ben Avon Borough, 253 U. S. 287 (1920).

Retroactive Laws

There is a general feeling, shared by the public and the courts, that retroactive or retrospective laws are unfair. Some state constitutions contain provisions concerning them, but the Federal Constitution, in terms, prohibits only laws that are *ex post facto.* This prohibition applies both to the states and to the Federal Government. *Ex post facto laws* were early defined to apply only to crimes and misdemeanors and this limitation has persisted.

1. Definition of Retroactive and Ex Post Facto Laws

Retroactive laws are those which apply to conditions already in existence when the law is passed. *Ex post facto* laws apply to criminal acts already committed. In Calder *v.* Bull,[1] the Supreme Court of the United States said that an *ex post facto* law includes: "(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than when it was committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender." Later decisions have to some extent modified this definition; the fourth category is now, perhaps, too broad, and the whole is now, perhaps, too narrow. A later Supreme Court decision sums up the definition of an *ex post facto* law as one which alters the situation of the accused to his disadvantage.[2] A law which alters the situation to the benefit of the accused is not prohibited. For example, a statute lengthening the time between conviction and execution is not *ex post facto,* for the law presumes a desire to live as long as possible.[3] Laws imposing indeterminate sentences instead of the old fixed punishments are not *ex post facto.* Laws imposing heavier penalties on habitual offenders are not invalid. But a law requiring conviction by a jury of eight instead of twelve violates the rule.

2. Effect of Due Process and Other Constitutional Clauses

Retroactive laws, other than those relating to penal offenses, are, as has been said, not specifically forbidden in the Constitution and for the most part are permissible. The "due process" clauses, the clause forbidding laws impairing the obligation of contracts, and other constitutional limitations often result, however, in the prohibition of retroactive legislation.

3. Vested and Contingent Interests

Most frequently protection is extended to "vested rights." Vested rights are defined to consist in "an immediate right of present enjoyment or a present fixed right of future enjoyment."[4] Vested rights are distinguished from those which are "contingent" or "expectant." A right is vested when there is an ascertained person with a present right to present or future enjoyment; it is expectant when it depends upon future happenings, such as the right of an heir to inherit provided he survives his ancestor.

Laws relating to marriage

and divorce and to the property rights of spouses may be retrospectively changed. Dower and curtesy during the life of the consort are not vested, but "inchoate" rights which may be altered by the law. Once vested by death, however, they may not be so altered. The same may be said of the rights of heirs.

One may have a vested right of action, *i.e.,* to maintain a suit, which cannot be taken away by statute. A judgment, too, creates a vested right.

The constitutional protection, of course, does not prohibit the passing of a law but only its application to a case in which its operation would work a prohibited result.

4. Procedural Regulations

Procedural regulations are, generally speaking, not within the prohibited area. The effect of a change in such a rule may in any given case affect property or other interests, but the change is within the right of the state. Thus, a statute of limitations may be shortened and a right of recovery may be lost thereby, but the litigant has no constitutional right to complain.

5. Court Decisions As Retroactive Laws

The function of courts in the declaration of law through the media of precedent has been discussed elsewhere. (See Part I, page 5.) In that discussion it was pointed out that in a very real sense each decision which establishes a new precedent declares retroactive law, i.e., the rule declared is applied to a set of happenings already complete. As to future states of similar fact, of course, the rule declared in the precedent is prospective. Except where vested interests have been acquired upon the strength of a prior decision of the same point, the retroactive nature of a judicial decision encounters no prohibition in the Constitution.

6. Curative Acts

"Curative" acts are generally not prohibited. Deeds, defectively acknowledged, may be legalized if to take advantage of the defect would be inequitable. Certain moral obligations, such as those of a municipal corporation, may be converted into legal ones by legislation.

1 Galder v. Bull, 3 Dallas 386 (1798).

2 Ex Parte Medley, 134 U. S. 160 (1890).

3 As to any given person the court's conclusion in this case might be debatable In the last analysis, however, the court must decide. For example, a law changing the punishment from a hundred lashes to a year's imprisonment was held not *ex post facto.*

4 Pearsall *v.* Gt. North. Ry., 161 U. S. 646 (1896).

Obligation of Contracts

Among the commercial troubles which led to the formation of the Constitution were State bankruptcy and insolvent laws designed to alleviate the prevalently bad situation of those in debt, and State acts of repudiation, or other measures impairing the public credit. Article I, Section 10, clause 1 of the Constitution was made, therefore, to carry the provision: "No State shall ... pass any—law impairing the obligation of contracts."

1. Contracts and the Due Process Clause

No similar stricture was imposed upon the Federal Government. The Fifth Amendment, however, adopted almost immediately after the adoption of the Constitution contained the "due process" clause (See Chapter XIII, Due Process of Law) which has been so interpreted as largely to prevent Congressional action amounting to the impairment of contractual obligations, except where a specific grant of power, *e.g.,* the bankruptcy power or the money power, authorizes such action. Until the passage of the Fourteenth Amendment, on the other hand, the States were not subject to a "due process" clause, and the chief instrument of Federal control over state legislation was found in the clause forbid ding the impairment of the obligation of contracts.

2. Prohibitions Directed at Governments

Like the "due process" clause, the clause prohibiting the impairment of contractual obligation is directed at governments, not at private persons. It offers no remedy for breaches of contract nor for erroneous judicial findings in contract cases. Even where the party defaulting on its contract is a State or city, the "contract clause" furnishes no ground of relief. The clause, however, binds States and their governmental subdivisions, including cities, not to exercise their law making power in the proscribed manner.

3. Judgments As Well As Statutes Included

By the indulgence of a fiction the judgments of courts, as well as the enactments of legislatures, have sometimes been brought under the "contract clause." Departing from the general rule, that Federal courts will follow the decisions of State courts in construing the State's statutes, the Federal courts have held that where a State court has reversed an earlier decision upholding the validity of a State law, contracts entered into in reliance upon such earlier decision will be protected by the "contract clause." So far as such contracts are concerned the later decision is of no avail.

4. Meaning of the Term "Contracts"

Before the provision in question can be brought into play a contract must exist. If the transaction whose obligation is claimed to be impaired is not in law a contract, there is nothing for the provision to act upon. In determining whether there be in reality a contract the Federal courts will follow their own judgment rather than that of the State courts.

While the law of contracts as now known to the courts has largely been developed since the Constitution was framed, it has

generally been held that the "contract clause" refers to contracts in the ordinary legal sense. It applies both to executed and executory, to implied and express, contracts. It does not, however, apply to "quasi-contracts," situations in the borderland between contracts and torts which the courts treat as if *(qua si)* there were real contracts between the parties. Such situations are not contracts and the courts have properly excluded them from the operation of the clause.

5. Public Contracts Included

The contracts of public bodies, States, cities, the United States, itself, are protected as well as those of private persons. A distinction must be noted, however, between the legal validity of a governmental agreement and the enforcement of it. Governments are continually making contracts (See herein The Law of Public Contracts, Part VI, Ch. 1) but neither the states nor their subdivisions nor the Federal Government can be sued unless they have consented; consequently the remedy may be lacking even though the right exist. The "contract clause" does not operate to give such a remedy where otherwise there is none.[1]

6. Dartmouth College Case

The most famous instance of the application of the "contract clause" to a public contract is that of the Dartmouth Co1lege case.[2] The legislature of New Hampshire had passed an act changing the government of Dartmouth College from private to public hands. The school had long operated under a charter and under that charter had received gifts. The Supreme Court held that the charter was a contract between the State and the College which was protected by the Constitution against impairment by the state. The decision of this case has been much criticized by legal scholars, but it has stood in the courts and has become a landmark in the law of corporations. One of its results has been the moulding of corporation law to protect against its operation. Corporate charters now almost universally carry provisions for their own amendment, or even cancellation, at the will of the state. Such provisions, of course, cannot operate retroactively. Another effect has been to give impetus to the development of the doctrine that corporate charters and similar agreements are to be strictly construed against the corporation. Grants of immunity from taxation and agreements exempting utility companies from rate regulation[3] will be subject to the rule of strict construction.

7. Municipal Charters

The charters granted by States to municipal and other public corporations are not subject to the "contracts clause." Such corporations are, in essence, arms of the state itself, government subdivisions, and hence not really separate parties with whom contracts can be made.

8. Bankruptcy Laws, Federal and State

Although the Constitution confers upon Congress the power to pass "uniform laws on the subject of bankruptcies throughout the United States" (Article I, Section 8, clause 4), the power has been deemed not exclusive in the Federal Government. In the absence of Congressional action the field is open to the States, and upon several occasions, when there were no Federal bankruptcy acts, state laws were in operation. The States, however, unlike the United States, are subject to the "contracts clause," and cannot, therefore, pass laws for the impairment of pre-existing contracts.[4] As to contracts made subsequently to the enactment of the laws, the situation is different; the law, itself, is deemed an implied condition in each contract, hence there is no impairment.

As has been said, the Federal Government has been held subject to limitations growing out of the "due process clause" of the Fifth Amendment roughly equivalent to the "contracts clause." But the Federal Government, under the specific grant of the bankruptcy power, is relieved of inhibition in this field.[5]

9. Rules of Procedure Not Affected

It is a principle familiar to the lawyer that there are no vested rights in remedies. Changes in procedure, in the length of statutes of limitation, in the rules of evidence, in the means of enforcing judgments and in many other matters are within the power of states, regardless of private rights which may be affected. The "contracts clause" has no effect to prevent such procedural changes. It has been held, however, that the total abolition of a remedy such as would render a contract right null, may not be accomplished.

10. Contract and Property Rights

In this connection a distinction must be observed between contract rights and property rights. Contracts create, primarily, rights *in personam, i.e.,* state-protected interests enforcible against the other contracting party out of any property he then has or may acquire. Property rights attach to particular things. Even the bankruptcy power may not annul vested rights in property; it may only cancel rights *in personam.*[6] Thus, when the Supreme Court came to consider the moratoria

legislation passed in various states and by Congress during the Depression of 1930-34, it held void the Frazier-Lemke Act which purported virtually to destroy the liens of mortgages (property rights) while upholding laws which postponed foreclosures for a limited time. The latter effect, indeed, as a matter of procedure, was probably within the equity powers of the courts without enabling legislation.[7]

[1] The Federal Government and most States have set up courts of claims or equivalent tribunals or have authorized suits on contracts in the ordinary courts, in which contract claims may be adjudicated.

[2] Dartmouth College v. Woodward, Wheaton 518 (1819).

[3] Such agreements for limited periods have been held valid notwithstanding the general rule that the state's police and taxing powers cannot be granted away.

[4] Sturges *v.* Crowninshield, Wheaton 122 (1819).

[5] In similar manner the Federal Government, under the "money power," may devalue the currency and perform other acts which amount taking of property or the impairment of contract rights.

[6] See, however, herein the state's capacity to deal with property under the Police Power (pages 143-144).

[7] The "contracts clause" of the Federal Constitution has been uniformly held not to apply to divorces. While the status of matrimony is created by contract, marriage, itself, is not a contract; it is a true status, in which rights and duties are fixed by law. As such it has never been regarded as 'Within the scope of the Constitutional prohibition. Obviously it was never intended to divest the state of jurisdiction over divorce.

Equal Protection of the Laws

At the time of the adoption of the Fourteenth Amendment the implications of the "due process" clauses had not been as fully developed by judicial decision as they have been since; this fact may account for the addition of the words, not found in the Fifth Amendment: "nor" (shall any State) "deny to any person within its jurisdiction the equal protection of the laws." In the zeal of its sponsors to further the objects of the Thirteenth Amendment and to complete the work of the Civil War, nothing was to be left to chance. As events have transpired, however, it is doubtful whether anything substantial has been added to the "due process' clause by the "equal protection" clause. It has been stated judicially that the due process clause vouchsafes a minimum of protection to life, liberty and property while the equal protection clause guarantees equality.[1] But the concept of equality has been so fully developed in the construction of the phase, due process of law, as to leave little, if any room for a contribution from the equal protection clause. The Federal Government, limited only by the former, appears as effectually circumscribed in this respect as are the States.

1. Similarity to the "Due Process" Clause

Much that has been said under the head of Due Process of Law is applicable here. The equal protection clause applies only to governments, not to private persons. It extends its protection to persons and not merely to citizens. It includes therefore within the scope of its benefits both aliens and corporations. The enabling clause of the Fourteenth Amendment has not served to make it a source of affirmative, new law.

2. Classification and Equal Protection

Since the contribution made by the "equal protection" clause, if any, concerns itself with the prevention of discrimination, the matter of classification becomes a subject of prime importance. If, in the language of Justice Holmes, "the Fourteenth Amendment is not a pedagogical requirement of the impracticable,"[2] it is obvious that reasonable classification must be made. Laws fitting for one occupation may not properly apply to others; laws proper to one locality may ill befit places in distant parts. Classifications based upon real differences have, therefore, been steadily upheld; but to render the classifications valid the differences must exist, and they must consist in something more than the fact of divergence between members of the same class or species.

3. Examples of Classification

Thus it is established that licenses may be required of professional persons and not of others, that licenses may be required for the practice of one profession though not of another; that aliens may be put under restrictions not applicable to citizens; that corporations may be taxed differently from natural persons; that chain stores may be subjected to taxes

not imposed upon single unit businesses. But if the difference is merely specious, cloaking a discrimination between persons in the same situation, the requirement of equal protection is violated. A city ordinance regulating laundries in wooden buildings, so phrased as to permit its application to Chinese and not to other operators in similar situation, Was held bad by the Supreme Court of the United States.[3] A requirement of the Philippine Government that all merchants keep their books in English or Spanish was held void as discriminating against the Chinese.[4]

4. Zoning and Planning

Zoning ordinances and planning regulations, if reasonable are upheld by the courts. But laws undertaking to segregate the races in their ownership of property have, generally, been stricken down. Thus an ordinance, ostensibly applying both to whites and Negroes, prohibiting the purchasing of property in any block where the majority of the houses were owned by persons of the other race, was declared void.[5] In many instances, however, segregation regulations have been upheld under the police power in the interests of peace and safety.

5. Race Discrimination

Laws raising the issue of discrimination between the races in the matter of hotel and railroad accommodations, etc., have been of frequent occurrence. In general it may be said that the Constitution does not require identity of treatment but it does require equality. Substantially similar accommodations must be accorded, but segregation may be required. To a lesser degree the same doctrine has been applied to schools. When financial resources have been insufficient, however, the failure to build additional schools for Negro pupils has been condoned.

6. Taxation

In the matter of taxation the necessity for classification is obvious. Both as to territory and as to subject matter complete uniformity would be impossible. But within a given district, e.g., a city or county, or as applied to a particular class of persons or things, the principle of uniformity must prevail. The Federal Government, though not bound by the "equal protection" clause, is bound by the requirement of uniformity in indirect taxation. (See herein, Taxation.) The result, therefore, is similarity in this respect between the Federal Government and the States.

7. Administrative Action

While, as has been said, the "equal protection" clause applies to governments and not to persons, it is not limited in its application to acts of legislation. Administrative action, for example, taken in the process of the governments affairs must conform to the requirements of "equal protection." In Yick Wo v. Hopkins; *supra,* the objection of the Supreme Court was partly to the fact that the ordinance regarding laundries was capable of being so administered as to work a discrimination.

[1] Truax *v.* Corrigan, 257 U. S. 312 (1921).

[2] Dominion Hotel Co. v. Arizona, 249 U. S. 265 (1919).

[3] Yick Wo *v.* Hopkins, 118 U. S. 356 (1886).

[4] Yo Cong Eng. *v.* Trinidad, 271 U. S. 500 (1926).

[5] Buchanan v. Warley, 245 U. S. 60 (1917).

Bills of Rights

A practice followed by the framers of many written Constitutions is that of setting forth lists of matters concerning which the governments established are under restraint or prohibition. Such lists are conventionally called bills of rights. Most of the state constitutions embody such bills. The first ten Amendments to the Federal Constitution are often spoken of as The Bill of Rights. Certain of the prohibitions in these Amendments are dealt with elsewhere. Certain others are treated in the following paragraphs.[1]

1. Right to Bear Arms

"A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." (Amendments, Article II.)

This Amendment, like the others of the first ten, applies only to the Federal Government and does not impair the right of states to pass laws upon the subject.

Many state constitutions, however, have similar provisions which affect the legislatures organized under them. In general the carrying of concealed weapons is held subject to legislative regulation, and in some states 'the carrying of deadly weapons of any kind may be prohibited. In a few states, however, the courts regard the prohibition of the carrying of weapons as unconstitutional.

2. Right of Assembly

"Congress shall make no law respecting... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (Amendments, Article I.)

This Amendment, also, applies not to the states but only to Congress. State constitutions generally have similar provisions. A political convention is an 'assemblage m this sense. But nearly all state constitutions permit state regulations of gatherings, in the furtherance of police regulation. A state may not, however, prohibit an assembly called together for a proper Federal purpose.

3. Religious Freedom

Article I of the Amendments provides that: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof". State constitutions generally provide likewise, but the Federal provision carries no inhibition upon the states.

Religious freedom does not include the right to engage in criminal practices or those commonly regarded as immoral. Belief and opinion, of course, are free, but the expression of opinion or the organization for its propagation, if subversive or tending to disorder may be controlled notwithstanding a claim of religious sanction. Polygamy or bigamy may not be carried on under cover of religion. "Faith-healers" may be restricted under the power to regulate the practice of medicine.

4. Freedom of Speech and Press

"Congress shall make no law... abridging the freedom of speech or of the press." (Amendments, Article I.) This prohibition upon the Federal Government, has its counter part in most, if not all, state constitutions. Much the same protection is guaranteed by the "due process" clause which protects "liberty" against unwarranted invasion.

The freedom of the press includes the right to publish the truth with good motives and for justifiable ends, free of license or censorship, whether it re-

spects governments, magistracy or individuals.[2] Indeed the privilege to publish goes farther; one may not be restrained in advance from speaking or publishing matter which is untrue, but the abuse of the *right* to utter or publish is subject to the right of those affected to sue for libel or slander.

There are, however, certain limits to the right to publish and take the consequences. Seditious publications tending to a present breach of the peace or disruption of the government, and the publication of matter tending to corrupt public morals or impair the public safety, may be prevented. Regulations as to the manner of publication are permissible; one may not in defiance of law or ordinance litter the sidewalks nor deface public buildings with hand bills or posters. One may not publish matter which will obstruct the processes of justice in the courts.[3]

Constitutional Law, embodying ancient doctrine, guarantees complete freedom of speech in parliamentary bodies and in courts of justice so long as the remarks are germane to the proceedings; and a fair report of such proceedings may also be made in the press.

5. Life, Liberty and Property

The words life, liberty and property, as used in the Constitution are representative terms intended to cover every right to which persons are entitled under the law. Self-defense, free speech, religious liberty, freedom from arbitrary arrest, the right to do business, to labor, to contract, to acquire property, all these and more are implied by the words life, liberty, property. Liberty means the freedom to use one's faculties, to move about, to pursue any lawful calling, subject, of course, to such restraints as may be necessary for the common welfare. Property implies ownership and control over physical things and incorporeal interests; it includes the right to possess and enjoy in every way consistent with the rights of other persons. Life, liberty and property are all held, of course, subject to the police power and such other restraints as are constitutionally vested in government.

The words "liberty" and "property" in this connection are more or less synonymous. Labor has been held a commodity, and hence, property, although Congress in the Clayton Act (1914) declared that labor is not a commodity. But the right to labor is also an attribute of liberty, and freedom to follow any lawful calling where one wills is guaranteed by the Constitution. Liberty of contract is guaranteed, but contracts have also been included within the designation "property."

[1] For a discussion of the "comity clause," "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States, (Article IV, Section 2), see herein, Interstate Relations.

[2] "Ruling Case Law," Constitutional Law, Section 240.

[3] Government may exclude improper matter from the mails. See herein, The Postal Power.

Part III

The Law Of Public Administration

The Nature of Public Administration

As used in this work, the term "administration"[1] means government in action. Such action comprises both the making and the execution of laws and policies and embraces the activities of government in all its branches.

1. Objectives of Government Action

Government action has for its objectives a variety of ends which vary with the conditions of time and place. In modern times the functions of government relate chiefly to national defense, the conduct of foreign relations, the maintenance of domestic peace, the ascertainment and securing of justices the education of the people, the preservation of health, the care for public welfare, the regulation of private economic activity, the carrying-on of certain public economic activity including the provision of various goods and services, together with a measure of overall planning. Incidental to the accomplishment of these ends are the internal government functions, those relating to the maintenance and operation of government itself: to wit, public finance, the provision of public personnel and the management of public property. To these should be added a function which is receiving increasing recognition, the reporting of government activities.

2. Means of Accomplishment

For the accomplishment of these ends government employs a variety of means, chief among which are legislative command, official order, official license, proprietary operation, and contract. Any of these means, singly or in combination, may be employed to effect the accomplishment of any of the ends set forth in the preceding paragraph.

3. Legislative Command

By legislative command, duties may be imposed upon those Within the government's jurisdiction. These duties may relate to private conduct or to relations between persons and the state. Such duties may be enforced indirectly through the creation of private rights or directly through the operation of rewards or penalties.[2] Thus, the Sherman Law lays a command upon all citizens as to monopolies and restraint of trade. It creates rights to recover damages in those injured by disobedience to the command, and also imposes penalties for such disobedience to be enforced through criminal prosecution. The Guffey Coal Act lays down certain commands as to the conduct of mining operations and establishes a reward, through the remission of taxes, for compliance.

4. Official Order

Perhaps the best known, and until recent years by far the most common, type of official order is that issued by judicial officers. These orders, generally called judgments or decrees, are usually based upon determinations or findings (a) of fact and (b) of law. The findings of law may be based upon legislative enactment or its interpretation or upon the tacit adoption by the state of prescriptions of conduct found in custom, morals, necessity or convenience. These official findings of law are in most instances the only official statement of what is the law upon such points and, in the aggregate, comprise the great bulk of legal authority to be found in law books.

In Anglo-American countries until quite recently the power to issue official orders affecting private interests was pretty largely confined to courts.[3] In recent decades, however, under the pressure of industrial and commercial development, the order-issuing power has been liberally bestowed upon non-judicial officers of all kinds, some of whom are "regular" officers in executive positions, some of whom, members of regulative boards and commissions, are created for the special purpose of issuing orders concerning particular types of interests. Such non-judicial, order-making officials also often make findings, and in the realm of fact such findings are often

conclusive. But their findings as to law are not conclusive, and the statement of such a finding does not constitute an authoritative pronouncement as to what is the law upon the point. It may, however, be highly persuasive when presented to a court, and a continued series of such findings may do much toward molding the judicial statement of the law.

Official orders issued by non-judicial officers have in recent times come to be known as "administrative orders" in contradiction to judicial orders which are issued by courts.

5. Official License

A license allows the doing (or not doing) of what without the license would be illegal. Although as a means of accomplishing the ends of government it is often a more drastic measure than the administrative order, its use until recent times was much more common. Its drastic character results from the fact that until the license is granted the conduct in question is automatically prohibited, and if the license is withdrawn such conduct must automatically cease. The terms upon which licenses are obtainable may, however, be laid down by statute so that the actual granting or withholding of a license involves little discretion. This practice accounts for much of its earlier widespread use in a period hostile to personal government. But the conditions of grant or withdrawal may also be largely confided to the discretion of the issuing official, and this practice is much more common at the present time when more complex circumstances make official discretion more necessary. Licenses, including in the term permits and franchises, may be issued by any of the several branches of government, but the common practice is to delegate the power to issue or withdraw them to non-judicial officers.

6. Proprietary Operation

While governments may accomplish certain of their objectives by influencing the conduct of private persons, they accomplish others by the direct exertion of their own powers. By the exertion of their own powers is meant the accomplishment of their purposes with their own resources of equipment and personnel and under the management of their own officers. Their own resources may be supplemented, of course, by leasing or hiring of equipment, and in particular their resources of personnel are commonly supplemented by the employment of persons through contract. National defense, the carrying on of public economic activity, the management of public property and the internal functions of government are largely accomplished by proprietary operation.

7. Contract

In addition to the use of its own resources, both physical and human, in the accomplishment of its ends, governments frequently contract for the performance of specified tasks by private persons. The fabrication and supplying of materials, the building of structures, ships, roads, etc., the performance of certain services such as the transportation of mail matter, are familiar examples. In addition, a great part of the service required by government in its various functions is supplied by persons who are not officers but employees, working under contractual arrangements.

[1] The term "administration" has no settled or uniform meaning in the writings of authorities on government Some treat it as more or less synonymous with the executive function, separating it from the legislative and the judicial. Yet we constantly speak of the "administration of justice" in the courts, and the enactment of legislation is often regarded as part of an administrative program. Other writers differentiate administration from the formulation of policy—Goodnow regarded the process of government as consisting of two parts, policy making and administration. Yet the executive, as well as the legislative and judicial processes, involves the formation of policy as well as its execution. The setting of policies occurs at every level of official authority from the highest down to the lowest, where policy forming becomes inconsequential and action is said to be ministerial. To effect a separation of policy making from its execution when the two are thus intimately bound together in official action is unrealistic. It seems on the whole better, therefore, to employ the term "administration" in the widest sense, including in its scope all government in action. In this sense it includes legislative as well as other policy making. It includes judicial action as well as executive action. It includes also the action of those boards, commissions and other similar bodies which have come to be called "administrative" because they partake of the nature of all the major branches of government.

[2] As set forth in Part I, a right exists when a person may call upon the state to exert its force to protect that person's interest. The person having the right may at his pleasure call or refrain from calling upon the state for its enforcement. Where direct enforcement of duties is in order, this option does not exist, though the officers of government may have a discretion as to enforcement.

[3] In England the sheriff, the chief administrative officer, was attached the court.

Government Structure and Organization

For effective action, government requires structure and organization. The establishment and elaboration of governmental structure and organization are functions of Public Law.

1. Structure

The law which establishes the structure of government is often in character constitutional. The Federal Constitution erects the three main branches of the national government and defines the power which each is to wield. The state constitutions do the same for their respective governments.

But the principal as well as the minor departments, institutions and establishments of both state and Federal governments are erected by statute, and the structure of local governments is nearly always statutory in origin. Much of this legislation is virtually constitutional in character, although in the American sense it lacks the authority of constitutional law.

The establishment of official positions is likewise to some extent effected by the constitutions, but to a far greater extent by statute. The Federal Constitution provides only for the highest officers in the government, and though the state constitutions frequently carry such provision farther down the scale, they also relegate the establishment of most officers to the legislatures.

2. Organization

The arrangement and correlation of Operations within and between the several branches, departments, institutions and other units of government, which, in general, may be referred to as organization, is rarely effected by constitutional provision but is largely accomplished by statute. Statutory organization, however, is often supplemented by official organization, i.e., that which derives from the power and authority of officers. As the tasks and responsibilities of government become more weighty and complex, the tendency to entrust the details of organization to administrative officials becomes more pronounced.

While official positions, i.e., those occupied by officers, are established by constitution or by statute, official power often extends to the creation of positions of employment. The creation of such positions, however, is also frequently accomplished by statute.

The filling of official positions or those of employment may be regulated by constitution, statute, or, in the cases of municipal or other local governments, by ordinance. The appointment of employees, of course, may be entirely a matter of administrative order.

Official Power and Authority

All power and authority vested in public officers in the final analysis roots in the constitution of the state. In the American constitutions, however, this conference of power is usually expressed in general terms leaving details to be elaborated by statutory enactment or judicial interpretation.

1. Judicial Officers

The powers of judicial officers having been much more fully elaborated than the powers of non-judicial officers at the time of the adoption of the Federal Constitution and those of most of the states, the broad grants of judicial power contained in these constitutions generally sufficed to invest the courts with all the powers which courts had traditionally exercised. It is not uncommon to find judges and lawyers speaking of the "inherent" powers of courts which may not be taken away by legislative action.

2. Non-judicial Officers

Non-judicial officers, however, had won no such position of autonomous authority; the ideal of "a government of laws and not of men" set forth in the Constitution of Massachusetts, assumed definitive rules of action for public officers with little scope for discretionary behavior where private rights were involved. But public officers in this concept

meant non-judicial officers. Judicial officers were supposed to be fully controlled in their action by the unwritten law— except in the comparatively few instances where statutes supervened—and, therefore, likewise limited to non-discretionary action. But since they, themselves, determined the substance of the unwritten law this limitation was much less rigid than those applying to non-judicial officers. The binding force of precedent, however, confined each individual judge to predetermined action except when new points arose. Unfettered by *stare decisis,* non-judicial officers naturally exhibited less consistency of action, which undoubtedly led to the popular feeling that they were less to be trusted. In consequence their powers have been pretty consistently limited to those expressly conferred by constitution or by statute.

3. Range of Discretion

The vastly increased range and complexity of duties assumed by governments in recent times has, however, made detailed statutory specification of official power and authority less and less feasible. More and more necessity has been felt for increased discretion—increased emphasis upon the requirements of the individual case, and less dependence upon the authority of rigid rules. The result of this pressure has been two-fold: a tendency on the part of legislatures to confer powers designedly broad and general and a tendency on the part of courts to construe the powers conferred liberally rather than restrictively.

It follows that non-judicial officers in the United States still derive their authority from constitutions and statutes and can legally do nothing for which such authority can not be found, but the range of their discretion as well as the number and importance of their powers has been greatly augmented

4. Limitations on Official Power

In determining the extent of official power it is necessary to regard constitutional and statutory prohibitions as well as grants. The principal constitutional limitations have been discussed under the title of Constitutional Law. Federal officers share the limitation applying to the Federal Government generally, namely, that authority for their activity must be spelled out of the Federal Constitution itself else it does not exist. It is not enough that such authority appear to be conferred by a Congressional statute.

It follows that non-judicial officers in the United States must still derive their powers almost, if not completely, from the written law, *i.e.,* from constitutions and from statutes, but the range of their discretion as well as the number and importance of their powers has been greatly augmented.

Administrative Personnel

Government acts through persons—natural persons for the most part, although corporate entities of one kind or another are not uncommonly utilized for the accomplishment of governmental objectives.[1]

1. Corporate and Natural Persons

Corporations whose ownership and control are entirely governmental have recently been employed for a variety of governmental purposes. The Mississippi Barge Line, the Merchant Fleet Corporation and the various port authorities are familiar examples. The technical relationship of the government to such a corporation is usually that of stock-holding proprietor, but the relationship may be simply that of contracting party, and instances are not unknown in which a corporation, such as a bank, has been held by the courts to be an officer of government.[2]

2. Officers and Employees

The persons through whom government acts are usually regarded as falling into two classes, officers and employees, but the line of distinction between them has become so blurred as to render the classification of little general value. A third category is mentioned in the Federal and some other statutes, that of agent, but an agent may be either an officer or an employee and the designation seems a catch-all rather than a distinctive classification.

In its earlier connotation the term "officer" signified a person who exercised sovereign power. He was a part of the government itself, and his acts were official in the sense of partaking of ultimate authority. The term "employee," on the other hand, connoted secondary relationship to sovereign power, a service relationship arrived at typically through contract. The analogy of proprietor and employee in private business was not unapt, the officer being a part of the proprietary family, the employee being outside the family circle.

In their present usage, however, the terms officer and employee are frequently interchangeable. The employee as well as the officer exercises parts of the sovereign power. Employment in the "Civil Service" has come to be by appointment rather than by contract. Methods of compensation and other elements of the service relationship have come to be practically the same in both categories. The "public service" has come to comprise both officers and employees, and the differentiation, when it becomes necessary, is often a difficult matter for the courts.

Yet the separate terms, officer and employee, continue to be used in the law, and it sometimes becomes important to differentiate. Constitutional and statutory provisions forbidding the simultaneous holding of more than one "office" at a time, for example, often require decision as to whether a given position is an office or an employment.

In general, it may be said that the position of an officer must be created by law, and the position of employment may be created either by law or by official order. Positions created by contract are not offices; they may or may not be positions of employment. Positions or stations filled by popular elections are offices. But aside from this, the manner of choice of incumbent provides little reliable guidance as to the nature of a position. Appointive

positions may be either offices or positions of employment.

3. Officers in the Federal Service

The United States Constitution provides that officers may be chosen in four ways: by the President with Senatorial confirmation, by the President without such confirmation, by the heads of departments, and by the courts. Does this mean that no others in the public service of the United States can be officers? There is authority to this effect, but the necessities of modern government have called for a more liberal interpretation of this principle. Strictly pursued, under it the appointees of independent establishments like the Interstate Commerce Commission could not be officers, but a liberal interpretation of the term "head of department" has helped to solve the difficulty.

The term of an officer's incumbency is generally fixed by law, but in many instances it is "at the pleasure" of the officer who appoints him. Such appointing officer usually serves for a fixed term, but this is not always the case.

The compensation of officers is almost always fixed by law; that of employees may be fixed by law or by official order.

4. Civil Service

In the Government of the United States, a minority of the states, and many cities and other local units of government, "Civil Service" laws have been enacted designed to establish and control the conditions of employment of certain classes of positions. At first these positions were mainly of minor importance, but successive additions to their number have brought in higher and higher ranks. Emphasis at first was upon appointment and tenure—the evils of political appointment and precarious tenure having shocked the public conscience. Gradually the emphasis has shifted, or at least widened so as to take in the questions of training, promotion, discipline, transfer, retirement and separation from the service.

Typical Civil Service laws now provide for the giving of examinations and other tests upon the basis of which eligibility lists are compiled. Standing on the lists is determined by the rating accorded the applicant. Appointments are made from the lists in the order of standing from the top down, a choice being usually allowed the appointing officer, however, among the first three names on the list. As a reward for war service, it has become common for the Civil Service laws to require that additional credit be given veterans in making up the ratings for the lists.

For the purposes of rating and appointment and compensation, classifications are provided for in the Civil Service laws. In the Federal service, the Professional and Scientific Service, the Sub-professional Service, the Clerical, Administrative and Fiscal Service, the Custodial Service, and the Clerical Mechanical Service are each divided into a series of grades according to the qualifications demanded and the responsibilities involved. Within each of these grades compensation is made according to a range of salaries established by law. The classified service of any government may not, however, embrace all the positions in its civil service.

It is usual for Civil Service laws to establish a commission or other administrative authority which has supervision of examinations and ratings, and which certifies from the lists names for appointment. This authority also customarily has control of salary changes, promotions, demotions and transfers from one part of the service to another. It often, also, has certain quasi-judicial functions regarding discipline and discharge.

With varying degrees of strictness, Civil Service laws provide against discharge or demotion for reasons unconnected with the quality of service rendered. Political and religious affiliations especially are excluded from consideration in the employment, promotion, demotion, or discharge of civil servants

These laws now generally provide for annual vacations, sick leave, and other conditions of employment.

5. Workman's Compensation

The Federal and certain of the state laws also provide for compensation in case of accident or occupational disability occurring in the course of the employment. They also provide schedules of travel and other subsistance allowances when service is performed at other than the usual places.

6. Civil Liability of Public Servants

In the performance of his duties, the acts of an officer or employee frequently affect the interests of private persons. States do not allow themselves to be sued in their own courts except with permission granted by law, and such permission is rarely granted where the basis of suit is a tort or wrong not resulting from a breach of contract. But the state's immunity does not extend *in toto* to its officers or employees, and the public servant may find himself under the necessity of defending an action for damages brought by the injured person.

In some instances the fact that an act was done in pursuance of official power and authority is a complete defense. Legislators are completely immune to suit for anything said by them in the processes of legislation; re-

ports, resolutions and votes, as well as speeches on the floor or in committee, are entirely protected, no matter how harmful such utterances may be to the interests of any person whatever. The public interest in complete freedom of legislative action is deemed to outweigh any private interest.

The same protection surrounds judicial officers so long as they are concerned with matters over which they have legal jurisdiction. Mistakes as to law or fact, even corrupt action, will not make a judge liable to suit if the action is in a matter of which he has jurisdiction. The protection is shared by attorneys, who are officers of the court, as to anything said by them in the trial of cases. In England this protection extends to any remarks made in a trial. In the United States the remarks must be germane to the proceeding.

Judges in courts of inferior jurisdiction, such as justices of the peace, in order to enjoy the immunity of judges in some states, must at their peril keep within the limits of their authority. Superior courts may generally determine for themselves whether a matter is within or without their jurisdiction. There seems to be a growing tendency to extend this immunity to inferior courts as well.

Non-judicial officers enjoy the protection of official authority so long as they keep within its limits and, further, so long as their action is in good faith. Mistaken belief as to the extent of authority will not afford protection, and acts done corruptly within the scope of authority may afford grounds of action. The limits of authority are frequently the limits of discretion. Within the field of discretion the officer is not liable for mistakes in judgment. Where there is no discretion and the act is purely ministerial, erroneous action may create liability.

It must be observed, however, that transgression of official authority does not *ipso facto* create liability. The other elements of tort liability must be shown.

It must also be observed that immunity from civil suit does not protect the officer or employee from disciplinary action by his superior nor from impeachment.

[1] The modern resort to the government corporation, such as the Tennessee Valley Authority and the Reconstruction Finance Corporation in America, and the British Broadcasting Corporation and the London Passenger Transport Board in England, are reminiscent of the British East India Company, the Hudson's Bay Company, and the proprietary colonies which settled parts of the United States. These corporations, both ancient and modern, combine the functions of private (artificial) persons and governmental bodies. They bear resemblance to railroad and other public utility companies having the power of eminent domain, to municipal corporations having both private and public "sides," and to governmental commissions having powers of operation and of regulation.

[2] This holding, however, presents an unusual circumstance and should not be regarded as a normal possibility.

Elections

The ultimate source of political power is the popular will, and in the democratic states the accepted mode of ascertaining the popular will is the election.

1. Objects and Forms of Election

Elections are most frequently held for the purpose of selecting persons to fill the political offices. Less frequently, however, elections are resorted to for the purpose of securing an expression of the popular will upon measures of public import. In some of its manifestations, this form of election is called a *plebiscite.* In the United States it is most familiar as the initiative and referendum, the *initiative* being a device for initiating legislation by popular vote, the *referendum a* device for submitting legislation, passed in the usual way, to the voters for approval or disapproval. Another form of election, much discussed a few years ago, is the *recall.* Where it is in use, public officers may be recalled from office by popular vote during the term for which they are elected. Another suggested use of the recall was a species of referendum upon official acts and orders, including judicial decisions. This device has received little, if any, favor.

It is now common to have the candidates put forward by political parties chosen by elections called *"primaries."* At such elections only members of a party can vote for its candidates.

2. Methods of Voting

A number of different methods of voting are employed. The simplest and most common is that in which the decision goes to the person or the measure for which the highest number of votes is cast. The theory of such an election is that it registers the will of a majority to which, for the good of the whole, the minority must bow. When, however, there are more than two persons or measures opposed to each other, it is possible and even probable that none will receive a majority, and in such event pluralities rather than majorities rule the whole. Where the number of candidates is large, such plurality may be a small fraction of the whole. This circumstance has led to the establishment of so-called *"run off" elections* in some jurisdictions, in which the earlier vote or votes merely qualify the winners for participation in the final election at which, it is often provided, the number of candidates is limited to twice the number of places to be filled. To avoid the multiplication of elections, *preferential voting* is sometimes provided for, at which the voter marks the names of several candidates in the order of his preference. Another variant of the method of voting is called *"cumulative,"* in which each voter is allowed a number of votes for each place, which he may bestow as he sees fit.

3. Proportional Representation

Upon a different principle is the method of voting employed in proportional representation. In this system the

object is not to obtain a representation of the majority but representation of groups. These groups may be formed upon any basis whatever, but each voter in the whole body is free to vote for the representative of any group as he sees fit. His vote will count for only one candidate, but, to insure that it will not be wasted upon a candidate who would be elected without it, the voter is allowed to designate his preference for second or other successive choices, in case his first choice does not need his vote. He may thus vote for as many candidates as there are, numbering his preferences in order from one to the last.

When the ballots are counted, a *quota* is established by dividing the total number of valid ballots cast by a number equal to the number of places to be filled plus one, and to the quotient thus obtained adding one. This quota will be found to be the smallest number of votes which could be obtained by each of the persons to be elected without leaving over enough votes to elect another. The quota having been established, the ballots are divided and counted according to first choices. All candidates who have quotas are declared forthwith elected. If any have surpluses above the quota, the surpluses are distributed to the remaining candidates according to the subsequent choices indicated. The particular ballots to be so distributed out of any first choice candidate's total are ascertained by lot, as, for example, by the taking of every tenth ballot. After each such distribution, another count is made to ascertain whether any further quotas have been thus secured. As fast as quotas are obtained, the recipients are declared elected. If the total permissible number of quotas has not been obtained by the continuation of this process until there are no more surpluses to distribute, the ballots cast for the candidate receiving the smallest number of first choice votes are then distributed according to the subsequent choices marked upon them. This can do that candidate no harm, because all possibility of his receiving a quota is now gone. This process of successive elimination of the lowest remaining candidate goes on until the requisite number of quotas is obtained or, as may happen, the last place is filled without a quota.

4. State and Federal Laws

In the United States the conduct of elections is regulated by state laws, although there is a Federal Corrupt Practices Act.[1] Under the constitution, however, the times, places and manner of holding elections for Senators and Representatives may be prescribed by Congress except as to the places of choosing Senators.[2] Under this clause Congress has upon several occasions made regulations for such elections, but in 1894 such regulations were, with few exceptions, repealed. The Constitution also prescribes the general method of choosing the President and the Vice President, but the actual conduct of voting is left to the regulation of the states.[3]

5. Official Ballots

In any constituency where the number of voters is large, it is manifestly desirable to limit the persons to be voted for to a manageable number. This objective is accomplished by the establishment of official ballots bearing the names of candidates. Only those names are printed on the ballots whose owners have received the endorsement of recognized parties, or have obtained the endorsement of specified numbers of petitioners, or in some other way have shown that they have a considerable following. Party endorsements may be obtained at primary elections or, in some places, at party conventions. Recognition as a party for the purpose of having a place on the ballot usually depends upon the showing, as to votes cast, made by such group at a preceding election.

Official ballots generally provide space for writing in the choice of a voter who desires to vote for some other than a person whose name appears thereon.

Election laws usually provide for the arrangement of each party's candidates in columns under appropriate designations. Such designation may be simply the party name or it may, in addition, consist of some emblem to guide the choice of those unable to read.

The candidates' names may, however, appear without party designation of any kind. Sometimes, especially in judicial elections, the names "rotate," *i.e.,* appear in alphabetical order with a different name at the top of each successive ballot issued.

6. Voting Machines

In a number of states, voting is conducted by the use of machines without ballots. Such machines permit the voter to register his choice by the operation of levers or buttons, and automatically record and count the votes. The use of such machines is constitutional but must be provided for by state law.

7. Polling Places

polling places are selected by the election authorities, but must comply with such requirements as the law may prescribe. Such requirements usually include booths so arranged as to permit secrecy in marking the ballots and proper arrangements for keeping them safe and secret until such time as the count begins. Only such persons are allowed to remain in the polling places as the law prescribes. Beside the necessary election officials, who are generally party representatives, a limited number of challengers and witnesses to the count are generally permitted. Within a prescribed space around a polling place, to be designated by markers, no persons are allowed to engage in the distribution of literature or other forms of "electioneering."

8. Registration of Voters

In populous places where the voters are not personally known to all in the vicinity, the laws usually provide for the registration of voters. Registration consists in the public enrollment of the

voter's name, together with his address, age and sex, and the length of his residence in the district. Other identifying information may also be recorded. Only those who are registered a prescribed length of time prior to the date of election are allowed to vote.

9. Marking the Ballot

Formerly voting was "open," but it is now generally provided by law that each voter's ballot is to be kept secret from the time it is marked until it is counted. To this end it must be so folded as not to permit the markings to be observed, handed to an election official, and by him deposited without unfolding in a box provided for the purpose. This box is not to be opened until the polls close. Further to insure secrecy, laws frequently provide that only black lead pencils may be used in marking the ballots. Such pencils are provided in the booths.

If any voter by reason of infirmity desires help in marking his ballot, the laws frequently provide that booth officials, representing opposing parties, may, in each other's presence, give him such aid as he requires.

10. Straight and Scratched Tickets

It is usually provided that a voter may vote a "straight ticket," *i.e.,* place his X or other designated mark in a circle at the head of his party's column of candidates. So placed, this mark indicates a vote for each person in the column. If the voter who makes such a mark desires to vote for one or more persons nominated by another party, he may draw a line through his party's candidates for those positions and place an X opposite the name of the other party's candidate. In this event his vote will count for all candidates in his own party's column on the ballot except those marked out. Such a ballot is known as a *"scratched ballot."*

11. Counting the Ballots

In counting the ballots the fundamental rule of law is to ascertain the intention of the voter and to preserve the secret of the voter's identity. To the latter end, rules for marking the ballot by the voter must be followed by all. Peculiar marks might easily furnish a guide to the voting of individuals.

Counting may begin only at a time specified by law, usually at the close of voting, and must continue uninterruptedly until it is finished. Tabulations must be made on prescribed forms. All those entitled to participate in the count are generally required to participate as to every ballot; division of the task among members of the body is prohibited.

Where *proportional representation* is employed, the entire count of the ballot is generally at some one central place— not at the several polling places.

When the counting is completed, *certificates* of the result must be executed by the proper officials. These certificates become the official evidence of title to the offices filled.

Ballots, after being counted, are generally required to be kept for a limited period of time so as to be available for a recount in case error is claimed. After such time they are destroyed.

[1] 43 Stat. 1070, 2 U.S.C. 241.

[2] Art. I, Sec. 4, Subsection 1, modified by Constitutional Amendment XVII.

[3] Art. II, modified by Constitutional Amendment XII.

Official Action

Officers have only such powers as are conferred upon them by law, and the law confers these powers only upon such persons as are invested with the office to which the powers pertain. In a sense it may be said that the powers are conferred upon the office rather than upon the officer, but since only persons can exercise powers, it is more realistic to regard the powers as conferred upon the office holder.

1. Evidence of Official Status

It becomes important to know, therefore, in every instance, whether the person who purports to exercise official powers has in reality been invested with the office. His title to the office may derive from election or from appointment. Both election and appointment signify the will of those who have the right to choose that the person chosen shall have the office, but, to be effective for the purpose, that will must be expressed in the manner required by law. If the choice is expressed through election, the electoral procedure must be complied with and the results of the election must be certified by the proper officers and in the appropriate manner. If the choice is expressed by appointment, the appointing officer must himself possess the requisite status and authority and must certify his designation of the appointee in appropriate form.

2. "Color of Office"

If a person takes possession of an office when there has been neither the substance nor the form of his choice, his actions in his purported capacity are null and he himself may be liable in damages to any person injured thereby. But it sometimes occurs that possession of office is taken when there is a defect of title either in substance or in form and yet title to office may appear to be in the possessor. The count of votes, for example, may have been erroneous and yet the certificate of election may have been issued in reliance thereon. Or the voters' choice may actually have been made, but through inadvertence the formalities of certification may have been improperly complied with. In such case the person in possession is said to act "under color of office" and for certain purposes his acts may be as valid as though his tide to the office were clear.

3. Officers De Jure and De Facto

This doctrine of color of office is grounded in necessity. The uninterrupted continuance of official functioning is often of great importance to the public and the consequence of nullity in official power may be serious public inconvenience. Accordingly the law recognizes the status of an "officer *de facto,"* one who acts under color of office, although lacking some element of complete title, in contradistinction to the status of "officer *de jure,"* in whom all the elements of title are legally perfect.

The acts of an officer *de facto* are usually, therefore, valid insofar as the public is concerned. Subordinates are justified in acting upon the instructions of such officer, the business of the office is validly transacted, and persons whose interests are affected by the official acts performed are affected as though the acts were those of officers *de jure.* In other words, the state's powers are effectively exerted, although the person exercising them may not have had perfect right to bring them into play.

4. Personal Standing of De Facto Officer

But the consequences to the person thus exercising the powers of the state may be different. Personal advantages flowing from the possession of the office may be lost. A suit to recover salary or other emoluments will generally fail. And the protection afforded by title to the office against the demands of persons injured by official action may fail. As against such person the *de facto* officer may stand as a mere tort feasor, one who has done a private wrong without the protection of official authority. Where the act of such *de facto* officer, however, results in a criminal charge—as, for example, of murder for the slaying

of a resisting offender— the courts are inclined to regard bona fide color of office as a defense.

5. Form of Official Action

To import validity to official action it is frequently necessary that it be accomplished in a prescribed manner or evidenced in a prescribed way. Particularly where the official act affects the interests of private persons is it necessary that it be evidenced by a proper record or certificate and performed with due regard for reasonableness, fairness and good faith. Indeed, the requirement of record grows out of the requirement of reasonableness, fairness and good faith. The record enables those affected to know just what has been done and whether these requirements have been met. It must not be supposed, however, that all official conduct must be in writing nor that every detail of those transactions requiring record need be set down. It is enough if the vital features of such action be entered of record.

6. Action of Official Groups

Where the official act in question is to be done by a body consisting of a number of persons, it is the corporate action of the body rather than the separate acts of the members which produces legal results. The views or conduct, even the votes, of such members are of no consequence as official acts and in many instances need not be recorded or made available to persons affected. Sometimes, of course, the formal votes of members must be recorded so as to supply evidence of the taking of official corporate action.

Unless otherwise specified in the law establishing a board or other official group, the vote of a majority binds the whole. Whether the required proportion be of those present or of the total membership must be determined from the governing law. Such law will also set the minimum number of members who may constitute a quorum to do business.

7. Meetings

Unless otherwise expressly provided, the official acts of bodies having more than one member must be done in meeting, *i.e.,* where the members are physically present. While the views of members may be expressed by letter or messenger and any acts preliminary to official action may be accomplished out of meeting, the actual voting on questions put must be while meeting is regularly in session. "Round robins," letter or telephone votes or other attempts to signify suffrage are invalid against attack. If no attack is made, however, the presumption of regularity attaching to a record which is correct on its face will suffice to put the action into effect.

8. Majority Rule

The requirement of meeting grows out of the theorem that the action taken is the action of the group, not of its members. Group action implies a group will, and the process of forming a group intent implies the interaction of one mind upon another until a common understanding is arrived at. The provision for majority rule is only a concession to practicality. It makes the arbitrary assumption that the mind of the majority is that of the group.

9. Evidence of Official Action

Where the law requires record evidence of official action, as a general rule no other evidence will suffice. The record itself must be produced, and oral testimony or other secondary evidence of the official transaction will not be received.

Such record evidence, furthermore, must show all the facts necessary to the jurisdiction of the official body and all the essential elements of the action itself. There are, however, certain presumptions of regularity which will be indulged in in the absence of direct proof to the contrary. Thus, a record attested by the clerk as that of a board's action will be presumed to indicate a proper vote until the contrary is directly shown.

If the body's action is required by law to be evidenced in any particular manner, as, for example, by the attestation of its clerk, or under his official seal, or by the signatures of all the members, these requirements must be met.

10. Official Action and Vested Rights

It is in general true that the incumbents of official position can not bind their successors. Thus, laws passed at one legislative session may be repealed at the next, policies adopted by one officer may be revoked by his successor, appointments made in one administration may be replaced by others made in that following.

But where official action has resulted in the acquisition of vested rights the power to revoke such action is generally cut off. Thus, a title to land acquired by a settler in pursuance of the completed official action of the officers of the Land Office can not be revoked by a later set of officers. Accounts finally settled by the proper officers can not later be reopened so as to divest the parties of title to property acquired in the transaction. If, however, the acquisition of the title or other vested interest has been brought about by fraud or duress, a court of equity may upon application by the government set it aside.

Part IV

The Law of Administrative Regulation

Part IV, Chapter 1

The Nature of Administrative Regulation

State regulation of human conduct may be effected through the imposition of duties which are directly enforced by state agencies or through the creation of private rights which enable their possessors to call upon the state for enforcement. The existence of both rights and duties may be proclaimed by legislative or by other official action. In the Anglo—American system of government the traditional agency for official declaration of rights and duties has been the judiciary. To it, furthermore, has been largely committed the enforcement of duties directly imposed, e.g., the duties imposed by the criminal laws, and the enforcement of rights given to private persons when, and if, such persons demand such enforcement.[1]

1. Direct and Indirect Enforcement of Duties

In the periods marked by a high degree of individualism, the states tended to rely upon the device of private rights, leaving to the possessor of such rights the option of seeking their enforcement, the states themselves assuming the role of umpire in determining whether those rights have been violated. Having made such determination, a state would put its force at the disposal of the successful litigant. Only in matters where the public interest was deemed paramount to private interest did the state resort to direct enforcement of duties. Such matters were generally those relating to the public order, the public safety and, as a corollary, the protection of life, property, health and morals.

In the more recent period marked by a greater insistence on public as contrasted with private interests, however, states tend to rely more strongly upon the device of direct enforcement of duties and to multiply the number of agencies to which such enforcement is committed. A larger and larger number of acts are given the character of crimes and misdemeanors—acts not immoral in character but contravening public sentiment—and are thus brought within the regulative cognizance of courts. And non-judicial agencies of direct enforcement are set up for the administration of new regulations which the courts are deemed less well fitted to handle.

To these non-judicial agencies are frequently committed powers which partake of the nature of legislating, judging and executing. To differentiate these powers from the legislative, executive and judicial powers constitutionally vested in legislatures, courts and executives, the courts have adopted the designation "administrative"; and the non-judicial agencies of administration to which such powers are committed have come to be known as administrative agencies.

2. Scope of Administrative Enforcement

The term "administrative regulation" is used in this part of this book, therefore, in a more restricted sense than that which might be inferred from the text of Part III, in which "administration" was defined as all government in action. The more restricted meaning is harmonious with the larger, in that administrative regulation partakes of the nature of all three of the traditional powers of government. But in its acquired connotation it describes regulation effected through agencies other than the legislatures and the courts. "Official regulation" might be a better term, but for convenience the more popular usage will be followed.

3. Supplementary Character of Administrative Regulation

Administrative regulation is, for the most part, of a supplementary character. It pursues the administrative policy set forth in the law from which it derives its authority, and at the same time often elaborates the details of that policy so as to "fill in the gaps." Legislative provisions applied to complex and wide-spread conditions, to be successful, must be broad and general in terms. The attempt to be specific in detail is seldom within the competence of legislators; and in any event some adaptation to the conditions of time and place is nearly always desirable. This adaptation is secured through the exercise of official discretion.

4. Range of Administrative Regulation

The range of human activity subject to administrative regulation is as broad as the law. As applied to non-commercial activities, it has been accepted as normal for generations. As applied to business activities it has encountered more resistance—naturally enough, in view of the fact that business is largely grounded on Contract, in which the idea of individual right and freedom is carried to its peak. As the demands of society as a whole have encroached more and more upon the prerogatives of the individual in recent times, the utilization of administrative regulation in the control of business enterprise has enormously increased. Indeed, its flexibility has rendered it so adaptable to the complexities of business that business regulation has come to be its outstanding function.

5. Direct and Indirect Means of Regulation

The accomplishment of governmental objectives through administrative regulation is effected both directly and indirectly. Directly, the law may declare its policy and impose upon persons the duties incidental thereto. The function of enforcing these duties may then be given to administrative agencies which through the exertion of the power of making rules, findings and orders may both supplement the major policy in detail and carry it into execution. Indirectly, the law may act toward the accomplishment of some other objective, such as the collection of revenue through taxes or the purchasing of commodities for proprietary operations, which measures in effect will regulate the lines of conduct aimed at. Much of the most important regulation is accomplished in this indirect manner. The execution of these measures is confided to public officials in whom certain discretionary powers are of necessity reposed.

The two chief means for the accomplishment of governmental objectives through administrative regulation are the license and the official order, often referred to as the administrative order to distinguish it from judgments or decrees or the other orders of courts.

(1) THE LICENSE. A license is an authority or permission granted by some agency of the state to do that which without such permission is illegal.[2] Permits and franchises are akin to licenses. Technically, a permit describes a permission to do a single thing, e.g., to build a house, whereas a license usually refers to a course of conduct. A franchise technically implies authority to make some use of public property, e.g., to operate street cars in a public thoroughfare, but the term is often applied to other sorts of permissions. In fact, the terms "license," "permits" and "franchise" are often used interchangeably, the Supreme Court of the United States having at times used them as virtual synonyms.

The device of licensing is preventive rather than curative: in this lies much of its effectiveness as a means of regulation. The person seeking the license may be required to show proper qualifications before the license is issued and may be stopped in his activities by the suspension or revocation of his license in case of failure to comply with requirements. This device, therefore, invests the state with a species of paternal control often more effective than any other legal remedy. A lawyer, for example, who misappropriates the funds of his client is subject to the summary power of the court to order restitution in addition to the ordinary civil liability enforceable by suit. A motorist who shows recklessness or ineptitude on the road may have his license revoked and be thereby barred from further driving.

The requirement of "due process" must be observed in the granting or withholding of licenses; consequently, favoritism must not be shown nor arbitrary, capricious or corrupt *official* action be committed. But reasonable classifications may be made for the purposes of licensing so long as the differences are real. Within classes, however, equality of treatment is mandatory.

(2) THE ORDER. The administrative order has already been substantially described. It is not essentially unlike the order of a court. It must comply with due process, but if it does so comply within the range of the officer's power and authority it binds the interests of those affected by it as effectively as a court order. Facts found as a basis for it are usually, though not always, unreviewable in the courts. But such an order does not declare the law; rather it is normally re-

viewable by the courts to test its legality. Legally it is not a binding precedent, though, practically, consistency is indispensable in continued official dealings. It may require the doing of many sorts of acts which courts may order, but its provisions are not self-executory. No process issues directly to compel their obedience. But courts may make such orders the basis of their own orders, and refusal to comply may then be punished as a contempt of the courts. The administrative order does not adjudicate private rights but it may interpret and enforce duties imposed by the state. In so doing, it may make findings which become the basis for adjudications when acted upon by courts. Such action by courts may be mandatory.

6. Constitutional Aspects of Administrative Regulation

Administrative regulation may be grounded in any of the basic powers of government. State regulation is based largely upon the police power. Federal regulation finds much of its support in the commerce clause of the Constitution and the clause conferring power to regulate money. But any of the other powers of state or Federal government may be invoked, particularly when the regulation is sought or obtained by indirect rather than by direct measures. The more important of these powers have been discussed in the portion of this book devoted to Constitutional Law.

The principal limitations upon the exercise of these powers have likewise been discussed under the headings of due process of law, equal protection of the laws, the obligation of contracts, and the necessity for express grants of constitutional power to the Federal Government. In administrative agencies, the constitutional difficulties attendant upon the fusion of powers partaking of the nature of the legislative, the executive and the judicial, have also been discussed under the headings of delegation and separation of powers. These discussions will not be repeated here, although they are basic to many of the problems of administrative regulation.

[1] For a discussion of the nature of rights see Part I.

[2] Private persons may also grant licenses to perform acts upon their property which without such licenses would be illegal.

Procedure in Administrative Regulation

The state, through administrative regulation, constantly affects private interests. These interests may be those of person, or property, or reputation—in short, any of the interests known to the law. They may be affected by any of the multifarious processes of government which impinge upon the economic, the social, the moral or the intellectual life of the people.

So long as the administrative agencies exercise the powers confided to them in the manner prescribed by law, those whose interests are affected must abide the result. If, however, the administrative power is abused or its limits transgressed, the law purports to afford redress, either by way of prevention or of reparation; but it must be observed that in some respects the means of redress have as yet been only imperfectly developed.

1. Effect of Procedure upon Private Interests

Those whose interests are affected by administrative action may complain either because of the manner in which a power is exercised or because the limits of the power itself have been transgressed. The one may as seriously affect the person's interests as the other, and such person is as much entitled to protection against improper procedure as against the improper assumption of substantive power.

The present chapter, therefore, will be devoted to the legal requirements of administrative procedure. The next will deal with the limits of administrative power.

2. Nature of Administrative Procedure

Administrative procedure is as diverse as administrative action; it must of necessity vary according to the nature of the proceeding and the objectives to be attained. To the lawyer, trained in the rigors of court procedure, it often seems formless and even chaotic. But regulative functions formerly vested in courts have often been committed to administrative agencies because of a popular belief that the stiff formalities of court procedure impeded the attainment of desired results, or that rights were sometimes lost in the meshes of procedural red tape. Such administrative agencies were often expressly released by law from the obligation to follow the rules of court procedure, and in some instances were commanded to disregard them.

3. Formality versus Informality

Experience has shown, however, that informality can sometimes be overdone. Procedure, after all, is only the organization of effort for the accomplishment of results, and complete disorganization may be more harmful than over-organization. Lack of organized procedure not only impairs efficiency but it easily results in injustice. It is but a short step from careless procedure to tricky procedure, and the unwary may be as effectively undone by formlessness as by overformality. There is more than a little truth in the legal adage that "formalism is the handmaiden of liberty." Ways of doing things which are known in advance to all who are acquainted with the agency in question not only facilitate the dispatch of business

but tend to preserve the substance of fairness and rectitude. And, what is quite as important, they serve to maintain public confidence in that fairness and rectitude. The ideal, therefore, is the development of the kind of procedure in each agency which will best fit its peculiar requirements, sufficiently regular for efficiency and predictability, sufficiently flexible for dispatch and the attainment of justice in each particular case.

4. Rules of Procedure

To a large extent, each agency makes its own rules of procedure. In many cases the statutes which create them specifically authorize them to do so. In some cases a few items of procedure are prescribed and the rest left to the agency itself. In nearly every case experience tends to formulate the procedure best adapted to the requirements.

Obviously no single system of procedure will satisfy the requirements of agencies whose function is licensing, agencies whose function is the issuing of orders, agencies whose objective is direct regulation, agencies whose function is regulation through the administration of tax laws or the purchasing of goods. Wherever private interests may be effected by administrative action, however, certain minima of procedural requirements must be observed. These minima may be succinctly described as the requirements of due process of law.

5. Procedure and Due Process—Notice and Hearing

The most informal procedure must comply with the requirements of due process. The elemental requirements are notice and hearing.

Neither notice nor hearing are required where they can do the person concerned no good. The establishment of a general policy may generally be accomplished without notice to individuals. Thus, the establishment of a general tax rate, or the determination to exercise the power of eminent domain for the making of a public improvement, or the decision to impose a general police regulation, may be law. fully accomplished without notice to any individual whose interests may be affected. In such cases, however, a general notice to all concerned may be required by the law conferring the power to act.

But the application of a general policy to particular persons will require notice if notice will avail such persons anything. Thus, the valuation of particular pieces of property for tax purposes requires notice, but the assessment of a uniform poll tax does not. Notice, however, need be only in such form as will substantially serve the end. Thus, notice given by a statute fixing the time for hearing complaints has been held sufficient. But notice of a proceeding in the Interstate Commerce Commission to order reparation for an overcharge on a freight shipment must be given personally, for such an order, if made, may be made the basis for a court order which is a judgment.

The right to personal notice may be waived either expressly or impliedly. The holder of a liquor license, for example, may be held to have assented to proceedings for cancellation by the very acceptance of the license.

Notice means original notice, *i.e.,* notice of the origination of the proceedings; it is not necessary that fresh notice be given of every step. One having proper notice of the pendency of a proceeding is bound to follow the subsequent steps by his own diligence. Such diligence may consist in the employment of counsel.

It is essential to due process that a party concerned be apprised of the substance of any complaint which is made against him and of the nature of the demands or requirements sought to be enforced. It is not essential to due process that such information be given in any particular form nor that it be given at any particular point of time. But it is essential that it be given in time to enable the party to prepare to meet the charges and to present his own side of the issue.

Notice should specify the time and place of hearing when hearing is to ensue.

It is not always necessary that notice precede official action. In emergency cases under the police power property may be possessed before notice is given. Even under the power of eminent domain it is sufficient if notice is given before an owner's rights are actually disposed of. Since those rights may be only rights to compensation, the property may be seized forthwith and notice of the compensation proceeding given later.

Hearing need not be formal to comply with the requirements of due process. But it must be fair. Opportunity to meet charges, to present facts, to make comment or argument if it would be helpful, are generally regarded as in. dispensable. No particular form or length of argument, however, is essential; the sound discretion of the official body is the guide.

As a corollary to the requirement of a fair hearing is that of a fair and impartial tribunal which acts reasonably and in good faith. Arbitrary, capricious or corrupt action violates due process.

6. Steps in Formal Proceedings

In some of the larger administrative agencies, such as the Interstate Commerce Com-

mission, the state utilities corn. missions, or certain bureaus in the Department of Agriculture, the volume and regularity of business have stimulated the development of procedure almost as regular as, although not precisely like, that of courts. Hearings before these bodies proceed along regular lines and fairly definite rules are followed. Some of these bodies have issued printed rules of procedure. The more important steps in formal procedure follow:

(1) COMPLAINT, DEMAND OR PROPOSAL. In "formal" proceedings complaints, demands or proposals which affect private interests are formulated in writing in much the same fashion as are petitions or bills of complaint in court procedure. Such formulations should be sufficiently complete and specific to advise the party concerned of the nature and effect of the proposed action and to enable him to prepare his defense or counterclaim. The formulations must be broad enough to lay the foundation for all evidence to be introduced, and for the final order to be issued. Amendments, however, are usually allowed with liberality, provided only that the party concerned is not taken by surprise and has additional time, if necessary, to prepare to meet the new allegations. Such complaints or demands should set forth in simple and concise language the ultimate facts necessary to make out the case, leaving evidentiary facts to be brought out in proof.[1]

Demurrers are not usually employed in the procedure of administrative bodies, but motions, accomplishing much the same purpose, may be used.

Answers, either in denial or in confession and avoidance of the allegations of the complaint, may be filed by the party concerned.

As the result of these written filings, the issues, *i.e.,* the points upon which there is disagreement, emerge, and the evidence is directed only to the establishment of controverted points.

In much administrative procedure, however, the issues are brought out more informally, either in the shape of informal communications, or orally at the hearing. In such cases the points in issue may only emerge after the evidence is in, the tribunal itself formulating them in its own way, perhaps only in its own mind.

(2) HEARING. Statutory requirements aside, and those set up by the administrative body's own rules, the hearing need have only the elements necessary to "due process," *i.e.,* fair opportunity to present one's cause, good faith, impartiality, serious attention. The judicial rules of evidence need not be adhered to, nor is any particular order of presentation necessary. "Hearsay" evidence may be received if it reasonably tend to prove the point in issue. Witnesses need not be sworn.

But reasonable opportunity to rebut the evidence produced by the government must be afforded. In this connection, a point much argued is whether the body conducting the hearing may consider evidence drawn from its own files and not submitted to the party concerned for cross-examination or rebuttal. The general consensus of opinion in the United States is that it may not; that "due process" requires a disclosure of all the evidence to be considered by the tribunal and full opportunity to disprove or rebut it. The effectiveness of this requirement has limits, however, for portions or all of such evidence may already be in the minds of the members of the board, and its effect upon the issues of the pending case may be difficult to exclude or impossible to estimate. Such results are inherent in a system of adjudication in which the functions of legislator, prosecutor and judge are merged in the hands of the same persons. Reliance can be placed only in the requirements of impartiality and good faith.

One of the prime requisites for effective "hearing" is the power to compel the production of pertinent evidence. In such proceedings this power is implicit in the power to punish for "contempt." Courts possess this power as an indispensable attribute of judicial authority. Do administrative tribunals likewise possess it or may it be conferred upon them?

That they do not possess it as an inherent power hardly needs argument. That it may not be conferred upon them even by statute has been repeatedly affirmed. In a case reviewing the authorities, the Supreme Court of Indiana reached the conclusion that the power to punish for contempt belongs exclusively to courts, except in cases where the State Constitution expressly confers it upon some other body or tribunal.[2]

A leading Federal case on the subject is that of Interstate Commerce Commission v. Brimson.[3] The Interstate Commerce Act had empowered the Commission to "inquire into the management of the business of all common carriers—and [to] keep itself informed as to the manner and method in which the same is conducted and [to] have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform its duties and carry out the objects for which it was created." Brimson and others were subpoenaed and ordered to produce certain books and to answer certain relevant questions. They refused. The

Commission, thereupon, pursuing the provisions of the Act invoked "the aid of [a] Court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers and documents."—In disposing of the matter the United States Supreme Court said: "The inquiry, whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession, and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution... of the exercise by either house of Congress of its right to punish . . . the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises.[4] . . "Without the aid of judicial process of some kind, the regulations that Congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced. One mode ... of compelling a witness to testify ... is to make his refusal . .. an offense ... punishable by fine or imprisonment. A criminal prosecution of the witness under such a statute ... would be a case or controversy, within the meaning of the Constitution, of which a court of the United States could take jurisdiction. Another mode would be to proceed by information.... If however, Congress, in its wisdom, authorizes the Commission to bring before a court of the United States for determination the issues between it and a witness, that mode of enforcing the Act of Congress, and of compelling the witness to perform his duty, is said [by the defendants] not to be judicial, and is beyond the power of Congress to prescribe.

"We cannot assent to any view of the Constitution that concedes the power of Congress to accomplish a named result indirectly . . . but denies its power to accomplish the same result directly. . . ."

This method of compelling the production of evidence, authorizing an administrative tribunal to seek the aid of a court in the enforcement of its order, has become standard throughout the United States. It transfers to the court the power to determine finally the propriety of the request, and makes refusal to answer, when such propriety is determined, a contempt, not of the commission but of the court.

In determining the propriety of questions to be answered, the courts are mindful of the "due process" clause and of the constitutional provision against "unwarrantable searches and seizures." Amendments, Art. IV. Boards and commissions have generally broad powers of investigation appurtenant to their power to regulate but they may not, in the language of Justice Holmes, "direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime."[5]

The constitutional provision excusing any person from incriminating himself applies to testimony before administrative bodies as well as before courts. The legislature may, however, provide that no testimony so given may be used against such person, and in such case the privilege of refusing to testify is removed. The immunity granted must, however, be as broad as the privilege which is taken away.

While a litigant is entitled to the consideration of the full number of members necessary to pronounce a decision, it is not necessary that such entire number hear the testimony of all, or indeed of any, of the witnesses. The testimony may be taken by masters, examiners or other properly deputized persons and presented in transcript for the consideration of the members. Where the number of members is large, the statutes frequently authorize boards or commissions to sit in sections. Sessions of the whole membership of the Interstate Commerce Commission, for example, are relatively infrequent.

(3) ARGUMENT. There is no right to any particular form or argument unless it is conferred by statute. Indeed it is within the discretion of the administrative body to dispense with it entirely. There may be cases, however, where such refusal would amount to an abuse of discretion.

It is common practice to limit argument to written briefs.

(4) FINDINGS. In the absence of statutory requirement, no particular form of finding from the evidence presented to an administrative body is necessary. The findings may be embodied in writing but there is no constitutional requirement that they be so. Yet in whatever form they be discoverable, it must appear that they bear reasonable consonance to the law and the facts and be not merely whimsical or arbitrary or in bad faith; otherwise the requirements of "due process" are not met.

(5) THE ORDER. While much administrative activity is transacted informally, the vital part of any formal administrative pro-

ceeding is the order in which it terminates. It is by the record that the body speaks, and the order is the vital part of the record. Like the verdict of a jury and the other preliminary steps in court procedure which, in and of themselves have no effects, so the steps preliminary to the order are only effective as leading to it. It is the order which affects the rights of parties, and all subsequent steps are based upon

it. If the courts take jurisdiction in the premises it is to review the order, to affirm, annul or modify it. Declarations or explanatory statements made by the body's members or representatives have in themselves no legal force. They may, however, help to interpret it or to indicate the result of future decisions.

(6) REHEARINGS AND APPEALS. While proceedings for review are often provided in administrative matters, neither re-hearings nor appeals are necessary to comply with due process of law. If the first 'hearing be constitutionally adequate no further proceedings are necessary. It is not uncommon, however, for the statute creating an administrative body and prescribing its procedure to provide for an administrative review. Thus, an order of the land office may be reviewed by the Secretary of the Interior, or an order of the immigration authorities by the Secretary of Labor. In some instances reviewing bodies are expressly established, such as the Board of Tax Appeals in the Federal revenue service and the Court of Customs and Patent Appeals.

It is an established principle of law that where a right of administrative review is provided, courts will not take jurisdiction to review until the administrative remedy is exhausted.

7. Judicial Review.

It is generally held that findings of fact made by administrative bodies will not be reviewed by courts for correctness; if the procedure has been proper and the limits of authority observed, the administrative conclusions as to fact will not be disturbed even though the court thinks they are erroneous. Courts will, however, review the administrative Proceedings for the purpose of seeing whether the law has been complied with, including the law conferring and limiting jurisdiction and power.

In a few classes of cases, notably utility rate cases, the Federal courts have asserted the right to retry the facts as well as to review the law. A judicial finding of the value of a property for the purposes of rate fixing has been held essential to due process.[6]

[1] The rules here are not substantially different from those governing the preparation of petitions under Judicial Code procedure.

[2] Langenberg v. Decker, 131 Ind. 471 (1892).

[3] 154 U.S. 447 (1894).

[4] Even the power of Congress to punish has been held to be limited to cases in which it was investigating a matter about which it had a right to inquire, e.g., in the legitimate exercise of its legislative function. It may not assume judicial functions. Kilbourn v. Thompson, 103 U. S. 168 (1881).

[5] Federal Trade Commission *v.* American Tobacco Co., 264 U.S. 336 (1924).

[6] Dissenting opinions have challenged this doctrine with much force. Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920).

Part IV, Chapter III

Official Power and Administrative Regulation

Procedural matters aside, the law of administrative regulation is mainly concerned with the extent and limits of official power. Such power may be ministerial—power to do only those acts which the statute prescribes in those ways which are designated; that is to say, it may be non-discretionary in character. Much official power is of this kind, and many non-discretionary acts are of the greatest consequence in the affairs of state. But such power and such acts present few legal problems other than those concerning the constitutional right of the legislature to prescribe the acts in the first place. The chief legal problems arise in connection with discretionary acts, those which are not prescribed by law nor subject to correction or reversal by courts.[1]

1. Official Discretion and Judicial Review

It is often said that the field of official discretion is marked by the limits of judicial review. This statement overlooks the limits on discretion which may be imposed by legislation, but for many purposes of legal discussion it substantially states the case. It does not, of course, measure the field of discretion; it merely says that the field extends to another of similarly undefined area. But from the decisions of the courts in particular cases, a line can be pricked out from point to point, which establishes a somewhat elastic boundary.

2. Self-limitation by Courts

It is, indeed, worthy of note that the limits of judicial review have been largely established by the courts. But the court decisions have resulted largely from the interpretation of statutes and many of such statutes would doubtless have been amended in plainer language had the opposite interpretation been put upon them. But it should also be observed that the courts have occasionally asserted a disposition to take back some of the territory they have voluntarily relinquished, and in some cases have succeeded in doing so.

3. Discretion and Fact-finding

It has already been observed that the courts pretty generally refuse to overhaul the findings of administrative agencies as to the facts of any given situation, though their self-restraint is not uniform.[2] Where it exists, this administrative capacity for final decision has an important connection with administrative discretion, for most discretionary acts involve the determination of facts. Discretion, however, transcends the determination of facts; it involves, likewise, the determination of action. Assuming the existence of known facts, the question confronting the administrator is what to do about them, a question which the mere facts, themselves, do not always answer.

4. Discretion and Policy-making

Discretionary action may be action in the line of a policy or it may be action from case to case with no line of policy guiding it. From the time of the Greek philosophers, political science has wrestled with the problem of settled rules of conduct versus justice in particular causes. This problem, of course, has chiefly vexed the courts. Settled rules of law are essential both to stability and to progress. Economic

and other enterprise can only flourish where the rules can be depended on to remain fairly constant. Hence, the general urge driving legislatures as well as courts to bring stability and consistency into the law. But general rules, inflexibly adhered to, often work hardship in individual cases. Human intelligence is not equal to the task of framing general propositions sufficiently comprehensive to include all possible cases. Even if all existing instances could be known before a generalization were made, new variations would be created by ever changing Life before the generalization could be apprehended. Hence, the rebellion on the part of many persons against the tyranny of rigid rules and the demand for "justice" in every case on its own facts. In this struggle between "law" and "justice" the issue of battle wavers from side to side as the one or the other desideratum appeals to the public consciousness. The desire for justice in particular Cases, as well as the desire for flexibility and dispatch in the transaction of business, is responsible for the creation of many administrative agencies to perform tasks which formerly were entrusted to courts. Not being law making bodies, the administrative bodies need not observe precedents. The statutes creating them, furthermore, often enjoin that each case be settled "on its own merits." Hence, we find boards and commissions and other administrative agencies professing a high degree of case to case action. In point of fact, however, some degree of consistency is indispensable to successful operation; some establishment of policy is vital to administration of any kind. Within the field of his discretion, each administrator may establish policies, lines or schemes of conduct looking to the future.

5. Discretion and Personal Government

From the standpoint of those whose interests are affected by administrative regulation, the important point in connection with discretionary action is its freedom from the impact of private rights. When the acts of courts through the operation of *stare decisis* become the basis of rules of law, private rights grow up in their shadow, for interests acquired in reliance upon precedents will be protected when the precedents are followed. But if the precedents need not be followed, no rights will arise for there will be no assurance of the protection of interests.

It is this characteristic of administrative action which brings it into sharpest controversy. Discretionary action becomes "personal government" in which the administrator is free to act as he thinks best, without the compulsion of law. So long as he remains within the sphere of his discretion, his acts cannot be corrected in the courts and the effect of such acts upon the interests affected must be borne without redress. The "conservatives," therefore, generally distrust administrative regulation. Liberals, on the other hand, citing its freedom from the drag of precedent and its "business-like" directness in action, turn to it more and more as an instrument of progress.

6. Range of Administrative Regulation

Any attempt to set forth in concrete detail the range and variety of discretionary action would array all the agencies of government in their impact upon private interests. The few examples following must suffice.[3] They give some idea of the nature and scope of discretionary regulation.

"Perhaps we are most accustomed to the idea in the field of local government. We have long had our Boards of County Commissioners, our School Boards, our Boards of Township Trustees. We have grown accustomed to the fact that they levy taxes, decide which of two tracts of land shall have the benefit of a new road, decide whether a contractor has or has not complied with the specifications in his contract; that they make and execute the necessary regulations for the conduct of schools, the building of bridges, the fencing of cattle, the abatement of nuisances. We are beginning to get accustomed to the 'commission' form of government for cities. Although we have long had boards of elections charged with the ministerial task of providing the necessary facilities and performing the actual work of holding the elections, we are hardly yet used to the thought that these boards can perform the judicial functions of determining who may vote, of passing on the validity of disputed ballots, and of finally declaring which of two contesting candidates is entitled to the office.

"So, too, the delegation to a tax commission of all or most of those powers, formerly exercised by courts, in the cases of disputed assessments, etc., is still new enough to arouse a recollection of the past in the mind of the average lawyer. Likewise the proposition to take from Congress the prized privilege of settling quadrennially the political and legislative questions pertaining to import duties, and to vest that function in a Tariff Commission, is still sufficiently novel to provoke sharp controversy on both sides of the political fence.

"But, passing from the consideration of these 'governmental' matters, we find the Interstate Commerce Commission firmly in control of nearly ninety per cent of the transportation business of the country. State

railroad commissions control the most of the remainder. Not only may these bodies fix the rates of freight and fare and prescribe the routing, the distribution of cars, the nature of the facilities offered and the kinds of services to be performed by the carriers, but they may require exhaustive reports of the business and earnings of the companies, they may prescribe the forms of accounts to be kept and prohibit all others, may permit or refuse arrangements and combinations between the carriers themselves—in short may practically control the business of the railroads from beginning to the end. And in addition they may hear complaints of violations of the law and may assess damages to the injured parties. In this connection it must be borne in mind that the interests affected are not only those of the railroads but also those of the shipping and the traveling public. One has but to put himself back into the attitude of mind of fifty years ago when the business of transporting goods and people was practically a private affair, subject only to a little more public control than other business, and that control exercised mostly through the courts, to see the addition that has been made to the field of administrative action. And one has but to consider the power that lies in the control of railroad rates and services to 'make or break' businesses, industries, cities and whole sections of the country, to appreciate the effect of these bodies upon daily life.

"Broadening our circle of view in this same field, we find that not only is the matter of railway transportation committed to the more or less complete control of administrative bodies but that the various State and local Public Utilities Commissions, Public Service Commissions and other commissions of more specific jurisdiction such as Corporation Commissions, Boards of Gas Commissioners, etc., have an almost equally comprehensive grasp on the regulation of the street railways, the telephone companies, the gas and electric companies, the water companies and all of the other semi-public agencies for community service. Rates, services, extensions of equipment, additional capitalization, franchises to enter a field already occupied, the maintenance of a system of competition or of a publicly regulated monopoly; these and many other matters are dealt with by commissions.

"Taking a step farther away from the field of public utilities, we find a large class of enterprises, private in character, but put under commission regulation because they 'are affected with a public interest.' It will be sufficient to note the grain elevators and warehouses, the insurance companies, the former dealers in intoxicating liquors, the taxicab drivers, the dealers in corporate securities, the motion picture operators.

"One more step brings into our view the Federal Trade Commission, empowered by statute to secure the enforcement of the Sherman Law, that is to say, to prohibit the exercise, by any person or business organization, of an unreasonable restraint of trade or commerce whether affected with a public interest or not.

"If it be thought that all the foregoing instances rest upon something of a public nature in the character of the business regulated, let us now cross an imaginary line and enter the domain of *private* enterprise. Boldly in the foreground stand the great Industrial Commissions, administrative bodies which have absorbed the functions formerly exercised by the state mine inspectors, the inspectors of factories and workshops, the inspectors of bakeries, sweatshops, etc. They regulate and prescribe (within certain limits) the kind of building the factory may be housed in, the kind of lighting, the use of safety devices, of fire escapes, of dust collecting machines, the ventilation of the mines, the width of the 'pillar' that must be left between workings in veins of coal. They regulate the conditions of work for women and children. These and many other regulative functions are committed to their judgment and their power. Many states, that have not gone so far as to consolidate these functions in the hands of single commissions, still maintain separate boards having like powers over single industries.

"If it be observed that many of the powers thus far enumerated are novel regulations of private industry, developed only within the recent years, and that such regulation was never very largely exercised by the orthodox agencies of government, the matter of compensation for industrial accidents brings us back at once into the realm of courts and juries. No longer does the injured workman in the states having the so-called workman's compensation insurance go into court to prove, according to the rules of evidence, that he was injured in the course of his employment through the negligence of the employer, while he, the employee, was himself free from contributory negligence, had not assumed the risk, and was not a fellow servant of the man who caused the injury. Instead, the Industrial Commission, the State Insurance Commission, or other similar body by whatever name, ascertains, under the powers given in the law, whether the man was injured in the course of his employment, and how badly; it then proceeds to award reparation according to a tariff laid down in the law. The

award may be met out of a fund provided by an assessment on all the businesses subject to the law, or it may become a judgment binding the property of the employer. Certainly no one can doubt that the administrative field has grown here at the expense of the courts.

"Still it may be argued that these regulations are the outcome of merely modern conditions of industry, of the 'factory system,' and that they apply only to industries where some considerable number of employees is kept at work. Nevertheless if one desires to engage in the practice of law or of medicine or of dentistry or of the profession of veterinary surgeon, he must first satisfy some administrative board or commission that he has the requisite training or experience and that he is of such moral character and general standing that he is entitled to a certificate or license. Nor does this board's control end with the giving of the certificate. It may generally entertain complaint as to the professional conduct of the licensee and, after hearing, may revoke or suspend the permission to continue his practice. School teachers, public accountants, and many other classes of professional persons are likewise subject to a very real administrative control.

"Nor is this control limited to the professional classes. To become or to continue to be a plumber, a steam engineer, an electrician, an auctioneer, frequently requires the same submission to the control of an administrative board.

"In truth it is not necessary to be an employer, an employee, a business or professional man, a skilled workman, or a workman at all, to feel the force of this administrative power. If one own a piece of property, the Board of Health or the Tenement House Inspector may order it repaired, remodeled, or even torn down. If, having torn it down, one desires to rebuild it or, for that matter, if one desires to mend the roof of or to add a veranda to his own dwelling, or to erect any other building upon his own property, he must first submit his plans to the Commissioner of Buildings and obtain his certificate before he can lawfully proceed. Nor is one such certificate sufficient; he must continue to obtain the approbation of the commissioner or his deputy at each stage of the work and must secure finally a certificate that the structure complies with all the terms of the Building Code.

"Thus we have in active operation a system of administrative control extending from purely governmental matters down through the public and quasi-public categories and well into the private interests of the citizen. We have intentionally omitted from consideration the great mass of administrative action carried on in the 'regular' governmental departments. The processes of the Treasury Department, the Land Office, the Immigration Bureau, the War Department and other branches of the executive establishment are in no essential degree different in this respect than those which we have discussed. But mention of them has been omitted to focus attention upon the newer, the 'irregular' organs of administrative control, if they may be so called, which are the particular subject of this study.

"Nothing, perhaps, can more vividly illustrate the extent to which the life of the community is being regulated by administrative bodies than the effect that is being produced upon the practice of the legal profession. There is beginning to develop a body of administrative practitioners, many of them not lawyers, but men having experience and familiarity with the methods of doing business in the commissions and other administrative bodies before which they practice. In some cases, notably the Patent Office, admission to practice before the administrative body is limited to those who hold a certificate issued by the body itself.

"But one thing remains to be shown to make the picture complete. Not only have the commissions invaded the realm of the classical departments of government, but the very courts have in some instances turned to commissions for help; in others the courts have adopted their methods and themselves become nothing essentially different from commissions. We see the criminal courts imposing the 'indeterminate sentence. The court's function here goes only to the extent of committing the offender to the penitentiary; the length of his term, *i.e.,* the extent of his punishment, is determined by a Board of Parole or a Board of Pardons. But not merely are the functions of the court exercised by these boards, but the courts themselves, or branches of the courts, have in some cases become nothing more than boards of settlement. Such, for example, are the 'courts of conciliation,' the 'settlement rooms,' etc., now frequently found in the municipal court systems. Such, assuredly, are the 'small debtor's courts' recently provided for in Kansas where the disputes are designed by the statute to be decided, not by men learned in the law, but by men who have 'sympathy with the poor.' And such to all intents and purposes are many of the 'domestic relations' courts that have been created in the last few years under the influence of the sociological impulse."

7. Typical Examples of Administrative Regulation

Bounded only by the statu-

tory requirement that railroad rates must be reasonable and non-discriminatory and by the constitutional requirements of due process, both procedural and substantive, the Interstate Commerce Commission may set the rates at which interstate carriers must transport both passengers and freight. It may, in addition, determine the details of service, such as the number and kinds of cars, the placement of sidings, the stops for trains, the character of couplings or block signals. It may also determine the plans and the details of financing and capital structure, the issuance of stock or bonds, etc.

Public utilities commissioners may regulate the affairs of street railway, light, water, gas and other public service companies in similar ways.

The Federal Trade Commission may investigate the business conduct of concerns engaged in interstate business and determine whether its practices are monopolistic, in restraint of trade, or acts of unfair competition. Numerous state agencies have similar powers over intrastate businesses.

The Securities and Exchange Commission has the Power to license all dealers in securities whose trading has any inter state character—which means practically all such dealers-and as a condition of getting and keeping its license each dealer must comply with requirements as to membership, capitalization and resources, business methods, accounting procedure, etc., which the Commission makes. All issues of securities for interstate trading must be registered with the Commission in a manner prescribed by it.

State Banking Commissions regulate the loan policies of banks, make periodic examinations for "soundness" and may, m some states, upon a finding of unsoundness, forthwith take over and liquidate such banks. Building and loan and insurance companies are generally subject to similar administrative handling.

The operators of grain elevators and milk dealers may be subject to extensive regulation as to rates, prices, and service.

The Department of Agriculture may recommend to farmers the types of cultivation, the numbers of acres to be planted to certain kinds of crops, the return of certain lands to forest or pasture, and may make or withhold "bonus" payments for compliance with or disregard of such recommendations.

The Bituminous Coal Commission through regional boards may determine the prices for different grades of coal. Operators who do not comply with the requirements are subject to certain excise taxes which are remitted to those who do comply.

Police authorities must determine whether to enforce "parking" ordinances rigorously or leniently. Gambling, horse racing, the costumes of bathers at public beaches, and countless other "police" matters often require the determination of administrative policy, within the boundaries of policy established by the law.

8. Extent of Discretionary Action—Examples

While the principle of "sound discretion" to be exercised by non-judicial officers has been recognized by the courts and text writers for centuries, only recently have interests so diverse and so varied been committed to discretionary regulation. Its growth has followed no general pattern, but has come piecemeal, subject by subject, as political pressure developed from public awareness of shortcomings and abuses. Its development, furthermore, began in a period when juristic and political philosophy was strongly committed to individualism and "the rule of law," and each new instance of discretionary regulation was looked upon as an exceptional phenomenon to be justified by special circumstances, rather than as a normal growth stimulated by evolving conditions. As a consequence, the line marking the boundaries of discretionary power is jagged and tortuous, broken at times by gaps of uncertainty and contradiction. Each field of regulation having been worked out more or less independently of others, consistency between them is, at best, imperfectly developed, and reasoning from one field to another is frequently impossible. Concrete illustrations of the extent of discretion can best be given, therefore, in a few separate areas.

(1) ELECTIONS. The political phases of government in general developed before the regulative phases, and tests of administrative power in these fields were therefore made before the larger doctrine of administrative law was developed. This circumstance is mentioned because the period of the test often gives a clue to the philosophy of the judges, and precedents, once established in a given field, tend to persist into subsequent periods.

The process of voting is generally accomplished under the direction of local officials who are called upon to decide many questions both of fact and of law. These questions frequently relate to the right of individuals to vote, which right may be determined by age, residence, citizenship, educational qualifications, etc. In the older cases the citizen's remedy for the wrongful refusal of his vote was a suit for damages against the offending officers, a fact which in itself probably influenced to some extent the courts' views. Malicious

or corrupt denial of suffrage always rendered the officer liable, but honest mistakes of judgment caused more difficulty. The Massachusetts courts regretted the hardship on honest, and often unpaid, election officers, yet saw no rational escape from the conclusion that the officer must be held responsible; for to hold otherwise would leave the voter without remedy and open wide the door to disfranchisement. New Hampshire courts, on the contrary, perceived the necessity of putting trust in the honesty and good judgment of somebody in governmental affairs, and saw no more reason why such trust should be withheld from administrative officers than from judicial officers. If election officers might sometimes make mistakes, so might juries and even judges, for whose mistakes there was no redress. It is obvious that the area of discretion allowed in New Hampshire was greater than that in Massachusetts. Judicial opinion has continued to divide on this subject, but the modern tendency, partly formed by statute, has been in the direction of the larger latitude. The decision as to who is elected as well as to who may vote is now generally vested in the election officials, subject, of course, to review in the courts where questions of law are involved.

(2) REVENUE. Revenue being the "life blood" of government, the courts have generally been chary of sustaining the complaints of taxpayers when to do so would impede or prevent prompt collection.

Nevertheless, discretionary officers such as tax assessors, who assess taxes which are without lawful authority, have generally been held liable for damages at the suit of those from whom exactions were illegally made. Mere collectors, however, acting regularly under warrants, are protected by the official character of their acts. For the erroneous performance of ministerial duty on the part of a collector, however, there is no immunity, even though the act done is commanded by a superior.

Though tax officials may be liable for the assessing of illegal taxes, courts of equity will not interfere to enjoin collection unless some basis of equitable jurisdiction appears beside the mere illegality of the tax. This is on the ground that the courts are not the proper agency to interfere directly in the administration of tax matters. Where there is some other ground of equitable jurisdiction, such as lack of other adequate remedy, or manifest inequality between taxpayers, the courts on occasion have enjoined collections. In some states, statutes expressly deny to courts jurisdiction to enjoin tax collections.

Where the question for decision is merely that of valuation for tax purposes, the assessing officer's decision is usually held final if it is made regularly and in good faith. Courts will not correct mistakes in judgment. But if the assessor persists in applying coercive measures for the collection of taxes on property not owned by the person proceeded against, the assessor will be liable for damages.

If appellate bodies are set up in the administrative system, all steps open to a claimant in such bodies must be taken before resort is had to court action. But a statute reciting that the decision of such appellate body was "final" has been held to mean final only so far as the administrative officials are concerned and not to bar proper remedies in the courts. Where, however, the highest official in a taxing system, e.g., the Secretary of the Treasury, has interpreted the statutory law upon a given point, the courts will, if possible, follow his interpretation.

There is a growing tendency to substitute recovery of payments from the public treasury for damage suits against tax officials as a remedy for illegal collection.

(3) HEALTH, SAFETY AND MORALS. Where the public health, safety or morals of the people are concerned, the law frequently invests administrative officers with drastic powers. Buildings and people may be quarantined to prevent the spread of disease; property may be destroyed to prevent the spread of fire, blight or pest; traffic may be detoured around dangerous places; theatrical exhibitions may be prevented if their tendency is to incite immorality or public discord.

In some of the earlier statutes, jurisdiction to act was made to depend upon the existence of the condition to be remedied. Diseased meat might be destroyed, but the power to destroy it depended on whether it was diseased, a "jurisdictional fact." Jurisdictional facts were frequently held not finally determinable by the officer claiming the jurisdiction, the extent of jurisdiction being regarded as a question of law. The manifest tendency of such statutes to quench the ardor of officers has led to modes of drafting in more recent statutes which relieve the officer of the consequences of mere mistakes in judgment. The hardship on those whose interests are mistakenly injured is often relieved by provision in the statutes for compensation for property taken or destroyed under the police power.

Where the question of the right to act is not susceptible of determination by scientific test, as in the case of diseased meat, but depends upon judgment as to public morals or public danger, courts are more likely, on

review, to substitute their own judgment for that of the administrative officers. Yet even here the actions of mayors, boards of censors, health officers, etc., tend more and more to finality in the absence of bad faith or sheer arbitrariness.

Where the nature of the case will permit it, notice and opportunity for hearing are generally prerequisites to action which will destroy property or otherwise cause damage. But if the proper procedural steps are pursued and the facts are reasonably clear, administrative officers may act with impunity. Thus, after proper notice a wooden roof may be taken off a building where the law prescribes a fireproof one; a building partly erected in violation of some building code provision may be torn down; a saloon may be padlocked if it is operated in defiance of law. Raiding squads may destroy property used for gambling; "opium joints" may be broken up.

In this field the device of licensing has had wide application. The administrative order is frequently resorted to by health boards, building commissions, and other administrative bodies. Summary action in abatement of nuisances is also frequent.

(4) PUBLIC CALLINGS. Even in the periods of staunchest individualism, "common callings" were subject to kinds and degrees of regulation, particularly economic regulation, from which other businesses were free. A common calling was one in which there was a sufficiently high degree of public concern to warrant such special regulations. Inns, mills, stage coaches, at times farriers and "victualers," were well known examples. With changed conditions, some of these callings lost their "common" character and others acquired it. Farriers ceased to be "common," while insurance companies, banks, milk producers, and others, have been added to the list along with "public utilities."

Regulation of common callings was, at first, under the provisions of special rules of law carried on largely through the courts. Innkeepers and common carriers were deprived of certain legal defenses in damage suits which were open to other people. On the other hand, they enjoyed certain special advantages by way of lien for the collection of their bills. But the growing importance of railroads and utility companies, and the common belief that their wealth and size gave them special standing in the courts, led to the creation of special administrative agencies for their control. The public character of their service, the fact that they enjoyed the delegated right of eminent domain, and the fact that their property was "dedicated" to public use, were looked upon as furnishing justification for vesting administrative agencies with a degree of regulatory power approaching that of management. Prices and services were regulated as well as practices relating to health, safety, morals and convenience. The details of this power have been previously noticed.

The term "utility" came to comprehend a limited list of enterprises including street railway companies, gas and electric companies, water companies and telephone companies whose businesses were quasi-monopolistic in character. Often they were spoken of as "natural monopolies," *i.e.,* enterprises in which free competition was not desirable and in which public regulation was substituted as a curb to any tendencies toward extortion. But as business conditions developed, certain other enterprises, not partaking of all the characteristics of utilities but having special importance to the public welfare or convenience, were subjected to pressure for similar regulation. Among these were grain elevators, banks, insurance companies, and others which were said to be "affected with a public interest." This phrase for a time appeared to have acquired a technical meaning, although the category of businesses included in it was never closed. Businesses "affected with a public interest" were, by that fact, supposed to be constitutionally susceptible of regulation Which purely "private" business might not suffer. Just what characteristics resulted in "public interest," however, and just what businesses were "affected" continued a subject of debate until, in a case sustaining a high degree of regulation of the milk business in New York, the Supreme Court of the United States threw over the whole concept of a technical class of businesses affected with a public interest by declaring that the phrase meant no more than "subject to the exercise of the police power."[4]

(5) BUSINESS. Legal and political opinion which has long accepted business regulation in the interests of health, safety or morals, has resisted the idea of regulation of prices and those other phases of business activity which depended chiefly on contract. By judicial decision, the right of "freedom of contract" was repeatedly brought within the protection of the "due process" clauses of the Constitution, either as a species of property or as a kind of liberty of which the possessors could not be deprived. Exceptions were made of utilities and of businesses "affected with a public interest"; but "private" businesses were largely exempt from such control. Administrative regulation of these contractual phases of business was deemed a taking without

due process and, hence, unconstitutional. The New York milk decision *(supra),* by breaking down the partition which separated one category of business from another appears to have made possible the extension of economic regulation to any class of business. The question is no longer whether a business falls within or without a definite class; the question now is whether that particular business has characteristics of sufficient public concern to warrant its subjection to economic regulation, and that question must be settled on its own merits in each case. So far as state regulation is concerned, the question is primarily one for the legislatures acting under state constitutions. So far as Federal regulation is concerned the question is primarily one for Congress acting under the Federal Constitution. In either case, if legislative authority vests powers of economic regulation in administrative officers the courts may finally be appealed to, but the courts are less likely to substitute their judgment as to the degree of public concern for that of the legislatures than they were when definite categories were maintained.

9. Summary

It thus appears that there are no areas from which administrative regulation is constitutionally excluded. The measure of regulation in each area is primarily a question of legislative authority. The validity of legislative authorization is a question for the courts. Judicial decision may narrow the scope of discretion within the limits of legislative authorization or it may strike it down entirely as violating constitutional limits. Generally it may be said—although there are exceptions—that administrative determinations of fact will not be reviewed by courts. Discretionary action will not be disturbed by judicial decision. Questions of law, however, are always subject to judicial review and the extent of administrative discretion is a matter of law. The precise limits of discretion must be ascertained by examining the decisions in each particular field. No broader lines can be drawn.

[1] In one sense it may be inaccurate to speak of an area of official action unreviewable by courts. The constitutional requirements of good faith and freedom from corruption, arbitrariness and mere caprice pervade all regulative acts, and the courts will intervene to preserve these requirements. But if these requirements be regarded as themselves marking one of the boundaries of discretionary conduct, it is permissible to define discretion as the area free from legislative prescription and judicial review. This freedom may be conferred by constitution, but it may also result from legislative or judicial forbearance.

[2] In some cases the legislatures have prescribed administrative finality as to facts.

[3] Excerpt from the author's article, "Administrative Commissions and the Administration of Justice," 2 *Cincinnati Law Review,* p. 1 (1928). Since the date of this article many new instances have occurred.

[4] Nebbia v. People of State of New York, 291 U. S. 502 (1934). ■

Relief Against Administrative Regulation

Persons aggrieved by the regulative acts of public officials may seek relief in a number of ways: (1) they may appeal to the judgment, conscience or sentiment of the administrators themselves; (2) they may appeal to the courts; (3) they may appeal to the legislatures; or, finally, (4) they may appeal to the political forces behind government in an effort to obtain a change in the law, a change in administrative policy, or a change in the personnel of administration.

With the last two alternatives, political rather than legal in character, we are not here concerned.

1. Relief through Administrative Channels

The first alternative, appeal to the administrative system itself, is of considerable importance, though of relatively much less importance in the Anglo-American regime than in the Continental. In the earlier French conception of the tripartite division of governmental powers, there was no place for that supremacy of judges which is characteristic of our system. The acts of executive officers were not subject to the regular scrutiny of the courts which results from our conception of the "rule of law." Executive officers being on a plane of constitutional equality with judicial officers, their acts were reviewable, if at all, only by superiors in the executive ranks. This theory of administration has led to the establishment of a separate system of tribunals within the executive department, in which matters pertaining to administrative action are adjudicated. At certain points there is an interplay between these administrative courts and the judicial courts, but, to a degree unknown to us, the decisions of the administrative tribunals are final and binding, and their pronouncements are law. In other Continental countries a somewhat similar condition exists.

2. Particular Administrative Tribunals

In the United States, as has been shown before, all officers are amenable to the general law, and the final interpretation and declaration of the law is the function of the courts. But administrative officers are constantly called upon for preliminary, working interpretations of the law, and in addition are fully clothed with authority to determine facts and administrative policy. Moreover, the usual hierarchy of authority provides a natural appellate system; and in some services special administrative tribunals have been created, within the administrative system, charged with duties which are quasi-judicial. Such tribunals in the Patent Office, in the Custom's service, and in the Revenue service have already been described. Some of the "independent" commissions like the Interstate Commerce Commission and the Federal Trade Commission are charged with duties which consist largely of quasi-judicial action, and conduct their affairs very much as courts do. Workman's compensation boards handle most of the accident claims which formerly passed through the courts.

Those whose interests are affected by administrative regulation, therefore, are bound in the first instance to look to administrative agencies for relief. They may be required to seek the revisory action of executive superiors or the review of the quasi-

judicial tribunals. They may urge matters of fact, of policy or of law. They may be heard informally or they may be required to present their cases with all the formality required by courts.

Until they have exhausted all their administrative remedies as a rule, courts will not hear them. And in such legal procedures as are open to them, the courts, in most cases, will accept determinations of fact made by the administrative bodies and will give great consideration to their interpretations of the law. A long-settled course of construction followed by administrative officers, working under a statute, is very likely to be acquiesced in by the courts.

(1) MILITARY TRIBUNALS. In the military service, also, administrative tribunals occupy a position of the highest importance. Military courts in the administration of military discipline may even decree the penalty of death.

(2) CLAIMS BOARDS. In some states, claims boards consisting of administrative officers pass upon a wide variety of claims against the states themselves, which would be litigated in courts if the states were suable. The awards made by the boards take the form of recommendations to the legislatures that funds be appropriated and paid. In effect, the functions of such boards approximate those of the Federal Court of Claims, but the boards handle tort claims and claims of an equitable nature, whereas the Court of Claims has jurisdiction only of claims arising out of contract. The boards do not, however, finally adjudicate private rights, and their pronouncements are not law.

3. Judicial Review: Legal Remedies

In the event that resort to administrative discretion itself is unavailing, the person whose interests are affected may seek redress in the courts. A variety of measures is open to him which, taken together, is supposed to constitute a complete system of relief. It is a system, however, which has grown by accretion rather than by design and, in fact, leaves much to be desired as a means of redress and as a means of controlling administrative action.

Judicial review of administrative action may be sought both in law and in equity, according to the nature of the relief desired. In the law courts the relief sought may be substitutional or specific. In the equity courts the relief sought may be prohibitory or mandatory. In addition to the foregoing, certain statutory procedures have been established both for the restraint and the enforcement of administrative orders.

4. Substitutional Redress

(1) AGAINST THE OFFICER. The chief reliance of the common law for the control of administrative action has long been the suit for damages against the offending officer. Without the protection of official authority, his conduct is often actionable. His plea of official authority sets up a defense and the denial of his authority raises the issue in the case. The court must then determine whether or not the acts done are within his powers. If they are, he is not liable; if they are not, he is. In the process of determining his liability, the court also determines the extent of his authority in that particular direction. A series of such decisions may mark out a complete circle bounding his discretionary powers. As a matter of practice, the circle is hardly ever completed.

As a means of relief to the claimant, the damage suit is rarely satisfactory. An administrative officer is seldom financially able to respond in damages to any great amount; the first suit or two will probably exhaust his entire resources. Official bonds are likewise often inadequate. Bonds which provide adequate protection are likely to be prohibitive in cost.

On the other hand, subjection to suit is often unjust to the officer who, in the honest exercise of his best judgment, has overstepped a limit of authority which, until established in the suit itself, is unknown to anybody. The natural effect of all this is to render officers cautious to the point of inefficiency.

In suits for damages against public officers or employees, the principle of *respondeat superior* generally does not apply. The fact that one person works under the direction of another in the public service does not make him the servant or the agent of that other, for both are servants or agents of the state itself. The superior, therefore, does not become liable for the torts of the inferior.

(2) AGAINST THE GOVERNMENT. Another, and from the claimant's point of view a more satisfactory means of substitutional redress, is the suit against the government itself. But while such suits proceed against a defendant able to pay, the number of cases in which the remedy is available is very limited. In the first place, sovereign states and their subdivisions are not suable in their own courts without their express consent, and in the United States the Eleventh Amendment to the Constitution prohibits suits against one state by the citizens of another. Consent to be sued is, for the most part, limited to actions arising upon contract with a few exceptional permissions to sue in tort. For tort, therefore, the claimant is nearly always rel-

egated to his action against the officer or employee who injured him.

States or their subdivisions are not liable for failure to enforce police laws or ordinances, even though private injury results from such failure. In general, tort liability will not arise from acts which are "governmental." It may arise from acts which are "proprietary," *e.g.,* if a city construct a sewage system, it will be liable for breaks caused by faulty construction or negligence in maintenance. Just which activities fall within the governmental area and which within the proprietary area however, is a never-ending subject of judicial debate. Sewers, streets, water works, garbage collection, etc., are usually regarded as proprietary. Police activities are governmental. Fire prevention is in dispute. The demarcation is not logically worked out.

States make contracts through their proper officers and generally acknowledge a liability upon them comparable to that of private persons. They also generally permit themselves to be sued on their contracts. But there is a class of claims, intermediate between those arising on tort and those arising on contract, which are said to be quasi-contractual. A quasi-contract arises from a situation in which there is no true contract but which is treated *qua-si* (as if) there were One. Such a situation often arises where a contract is attempted but not completed, so that no contractual obligation exists, yet, in pursuance of the proposed agreement, One party has performed service or paid money or conveyed property which enriches the other. For such "unjust enrichment" the courts generally award redress. The law often hedges about the contractual dealings of governments, how. ever, with requirements of formality, and without these formalities attempted contracts are not binding. In these formalities lies the public's protection against official dishonesty or carelessness. To allow recovery in quasi-contract against a governmental unit for benefits conferred under a void or incomplete contract tends to break down these safeguards. Hence, such recovery is often denied in actions against public bodies when it would be allowed against private persons.

Where an officer acting under a mistaken belief in his authority takes private property for Government use, the Government is not responsible for its value. The claimant is left to his action against the officer. Duties or taxes illegally exacted, however, may be recovered—subject to many qualifications which cannot be pursued here. Where property occupied for governmental use is claimed to belong, as of right, to the state, no claim for compensation can be asserted in quasi-contract by one who disputes the state's title.[1] But if the use or taking is authorized by law and is not under a claim of prior title, relief in quasi-contract has been allowed.

(3) SPECIFIC REDRESS. In addition to substitutional redress through damage suits, the law may afford relief against administration action through specific recovery of property. If the property in question is personalty, the remedy may lie in "replevin"; if realty, the remedy may lie in "Ejectment."[2] Ordinarily, neither of these actions can be maintained against the state itself. But if the title to the property in question is in dispute, actions in replevin or ejectment may be brought against the officer in possession. If title to the property is really in the claimant, the officer has no right to occupy or to use it. The court may proceed then to determine the title and to eject the officer or dispossess him if the claimant's right is established.[3]

5. Extraordinary Legal Remedies

Specific relief at law may also at times be had through resort to the so-called extraordinary legal remedies of certiorari, quo warranto, mandamus, prohibition, procedendo, and habeas corpus.

(1) CERTIORARI. As aptly put by Professor Ernest Freund,[4] "The writ of certiorari is for the purpose of bringing up for review:

"(1) The judgment of a court, where appeal or writ of error is not a matter of right, but the higher court directs the case to be certified to it by the lower court for review. .

"(2) The conviction of an inferior court of criminal jurisdiction . . . .

"(3) The quasi-judicial decisions of administrative authorities. . . ."[5]

It has sometimes been said that certiorari is available to test the acts of administrative officers only when they "exercise judicial powers," but the cases which hold this doctrine often ascribe judicial character to acts administrative and sometimes legislative in their nature. For example, a New Jersey court held a municipal ordinance directing the building of a new street to be "judicial for this purpose."[6] Curiously the order to repair an old street was called "ministerial." In Illinois the order of commissioners fixing the boundaries of a drainage district was held "judicial."[7] In this case the court summarized the office of certiorari thus: "It lies in all cases where inferior tribunals have exceeded their jurisdiction or have proceeded illegally, and no appeal is allowed and no other mode is provided for reviewing their proceedings. Where the

controversy involves the investigation of facts not appearing upon the record, certiorari is not the proper remedy. The act reviewed must be judicial in its nature and not ministerial, but it is sufficient if it be quasi-judicial; the body whose act is reviewed need not be a court of justice." Acts within the lawful discretion of an administrative body are not reviewable, but the limits of discretion, as well as of jurisdiction, may be ascertained in this proceeding.

A court, having taken jurisdiction in certiorari, does not thereby acquire the right to exercise the administrative body's discretionary power. Where discretionary action is necessary, the court, having corrected any errors of law, should remand the matter for the proper exercise of the body's discretion. Where, however, as the result of the court's ruling, only one course of action remains open, so that there is no longer any room for discretion, the court will often make the order itself or remand with directions to make it.

Like the other extraordinary remedies, the granting of a writ of certiorari is in the court's discretion. If the relator has not availed himself of his administrative remedies or has unduly delayed, or if the consequences of allowing the writ would be harsh or inequitable, the courts may refuse it.

(2) QUO WARRANTO. The purpose of the writ of quo warranto is to try the title to office or to the exercise of some public right or franchise. As stated in an early case, "the common law regards the proceeding by writ of quo warranto as the most appropriate remedy for the King, by which he may at pleasure require any subject, exercising a public franchise or authority which he cannot legally exercise without some grant or authority from the crown, to show by what warrant or authority he exercises it, and thereupon demand and have a judicial trial and determination of the legal right of the defendant to exercise such office or franchise. . . ."[8] American statutes have modified the common law doctrine somewhat, but in its essentials the function of quo warranto is the same—to test authority to act. Corporate authority may be tested as well as official authority, and the title of a person to act as an officer of a corporation may in appropriate case be tried. In view of the growing importance of the Government corporation, this feature may acquire increased utility.

It is not the function of quo warranto to test the legal correctness of official action where there is a right to act, but only to test the legal right to act at all. Quo warranto is not in the nature of a writ of error.

Where a person was commissioned by a governor as a special judge to try certain specified cases, the Supreme Court refused a writ of quo warranto designed to prevent him from trying other cases. Having title to the office of judge, he could not be ousted from his office for exceeding his authority.[9] But where statutes expressly widen the common law power different results may accrue. Thus where a statute provided that "in case any person shall . . . exercise powers not conferred by law, . . . the Attorney General . . . may present a petition to any court of record . . . for leave to file an information in the nature of quo warranto,"[10] the court refused to dismiss an application for a writ to compel a school board to permit colored children to attend schools other than the one provided for their exclusive use. ". . . If the board, in the discharge of its duties as a corporation, exercises powers not conferred by law, it is apparent that it will fall within the obvious meaning of the statute."[11] Like certiorari, quo warranto lies in the discretion of the court to which application is made. In People ex rel. Lewis v. Waite,[12] the court said: "The granting of leave to file such informations has uniformly been held, both in this country and in England, to be within the sound discretion of the court. Leave is not given as a matter of course, but a court ought not arbitrarily to refuse leave. . ."

In its original form in England, the writ of quo warranto could be brought only by the Attorney General and it was solely in his discretion whether he should do so. In some American states this rule has been followed,[13] but the Statute of Anne[14] changed the rule in England, so that the officer was required to bring the action upon the relation of any person desirous of prosecuting it. Even where this statute has not been copied in the United States, the courts have sometimes held that the discretion of the Attorney General is not absolute. If without good reason he refuse, the petitioning citizen may seek a writ of mandamus to compel him to sign the petition. ". . . Where he declines to act for any reason other than that the facts . . . do not warrant the relief which the proposed relator seeks, or that the [papers] presented to him are not in proper legal form, his declination is an abuse of his discretion. . . ."[15]

(3) MANDAMUS. The action of mandamus is one in which a court of competent jurisdiction is asked to issue an order to an inferior court or to an administrative officer commanding that something be done. The action commanded must within the legal power of such officer, but the order may not coerce his discretion. It may command a ministerial act, *i.e.,* one involving no dis-

cretion, or it may command that a discretionary act be done, but not how it shall be done; the officer may be ordered to exercise his discretion but not told how to exercise it.[16]

The writ may be issued against an officer or against a board or commission. If a single officer against whom an order has been made, dies, the order dies with him, but if against a continuing board the death of a member or his retirement from office does not abate the writ.

It is well settled that a writ of mandamus will not lie against the President of the United States. As head of a coordinate branch of the Government, the courts could not enforce such an order and, accordingly, they will not make one. But this immunity does not attach to officers under the President's direction. In Kendall v. United States, 12 Pet. 524 (1838), it was held that the Postmaster-General was subject to an order, issued by the Circuit Court of the District of Columbia,[17] to perform a ministerial act.

Courts will not instruct officers as to how to perform their duties. Edward F. Dunne was elected Mayor of Chicago after a campaign in which he had promised, if elected, to take measures to suppress vice and gambling. After his induction into office certain dissatisfied constituents sought an order in mandamus to compel him to carry out these promises. The court refused the order pointing out that the enforcement of the law, entrusted to the mayor, was a matter that involved much discretion, and that the courts could not undertake to substitute their judgment for his.[18]

Although discretion properly exercised may not be controlled by judicial action, there is always this implied limit or boundary of its exercise, viz., that it must not be arbitrary. From ancient times the rule comes down in legal tradition that: "Where anything is left to any person to be done according to his discretion it must be done with a sound discretion and according to law."[19]

(4) PROHIBITION AND PROCEDENDO. The writs of prohibition and procedendo require little more than mention. The first results in an order staying further action by an inferior tribunal, the second in an order that such tribunal proceed.

Neither is extensively used in the control of administrative action. There is authority to the effect that neither is available for such purpose, but the better view is believed to be that both are available. The same results can often be obtained, however, by the more familiar processes of injunction or mandamus.

Neither Prohibition nor Procedendo, of course, can be used to coerce discretion, although the exercise of discretion may be stopped by prohibition.

(5) HABEAS CORPUS. Habeas corpus, best known to the public of all the extraordinary legal remedies, is a proceeding to test the legality of imprisonment. It is an order from a court having jurisdiction in habeas corpus, to produce the body of the prisoner together with the warrant for his commitment. If the court finds that he is being detained without legal authority, it may order him released.[20]

While the writ of habeas corpus is said to be "in the nature of" a writ of error, it may not under modern practice be used as a substitute for proceedings in error to test the correctness of judicial rulings in cases in which there is jurisdiction to proceed. Rather it is a proceeding to ascertain the legal right to detain at all; as, for example, in cases where there is no jurisdiction of the defendant's person, or where the statute under which the detention is justified is unconstitutional, or where the body or officer detaining the prisoner has no legal power to effect his imprisonment. This latter type of case is the one most frequently occurring in the field of administrative regulation.

Perhaps the best known cases are those in which immigrants—especially Asiatics—have been detained at the port of entry by immigration officials. The writ of habeas corpus is available not alone to citizens but to all persons within the jurisdiction of the court, and Congress, by legislation, has brought arriving immigrants, though not yet entered, within the purview of its benefits.

A question early litigated was whether immigration officers had the right to pass upon the facts upon which the right to admission depends. If the officers had no such right, they could neither detain nor deport the applicants. Habeas corpus, therefore, was an appropriate remedy. The Supreme Court of the United States held that Congress may vest such power in administrative officials, whose decision on the facts is final.[21] Even where the applicant's claim for admission is based upon alleged citizenship, the fact—of citizenship—may be finally determined by such officials.[22] Where, however, the question is not one of fact but of law, the court will review the finding.[23]

Before the court will take jurisdiction in habeas corpus, it must appear that the applicant has exhausted all administrative remedies.[24]

Where the question raised is one of due process, *e.g.,* whether the applicant has had reasonable opportunity to present his claim, or whether the officials were in good faith, it appears habeas corpus will lie. But if, upon trial, it appears that a fair hearing was

had, the court will proceed no further. The merits of the case will not be opened up.[25]

The writ of habeas corpus is available to test, in similar fashion, the legality of the detention of persons held by sheriffs, police officers and other officials who frequently have to act, in the first instance, upon their own interpretation of the law.

6. Equitable Remedies

The supplemental character of equity jurisdiction is explained elsewhere[26]; so also is the personal nature of the order issued by the equity courts. In line with the general doctrine that equity will not take jurisdiction where there is an adequate remedy at law, those seeking equitable relief against administrative action must be able to show that none of the legal remedies heretofore discussed will give him adequate relief.

(1) INJUNCTIVE RELIEF. The damage suit has been shown, however, to be a remedy of limited value, and the extraordinary legal remedies of certiorari, quo warranto, mandamus, prohibitions procedendo and habeas corpus, began as "prerogative writs which were hedged about as they developed with so many restrictions as seriously to curtail their usefulness. Equity, on the other hand, after a troublous beginning, enjoyed a luxuriant growth and developed a flexibility of recourse well adapted to the exigencies of administrative regulation. But for the traditional limitations upon its jurisdiction, it would probably become the chief, if not the only, form of judicial review of official action. Where statutory additions have been made to the common law category of remedies, the powers and procedure created are equitable in their nature.

(2) LIMITS OF EQUITY JURISDICTION. Equity is concerned with private rights—property rights, according to some authorities. Unless some invasion of private right appears, equity will not intervene.

Neither will it ordinarily interfere with the execution of the criminal laws nor the fundamental processes of government. It will not attempt to enjoin the commission of crimes, nor will it stay prosecutions for them unless some element of private right appears which can not be otherwise protected. It has already appeared that equity will not normally interfere with tax collections. Nor will it attempt to control public officers in their political duties. In Georgia v. Stanton,[27] decided soon after the Civil War, the courts were appealed to to enjoin the execution by Army officers of the "Act [1867] to Provide for the More Efficient Government of the Rebel States." The Supreme Court said: "No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in judicial form, for the judgment of the court . . . we are called upon to restrain the defendants, who represent the executive authority of the Government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul and totally abolish the existing state government of Georgia, and establish another and different one in its place." This, the court held it had no power to do.

The appointment to or removal of persons from public office is ordinarily within the discretionary power of administrators and will not be interfered with by the courts. Title to an office is not regarded as property, so as to bring it within the protection of equity. However, in In re Sawyer,[28] in which the Supreme Court of the United States held the equity courts powerless to restrain a city council from removing a mayor from office, Chief Justice Waite, dissenting, said: "I am not prepared to decide that an officer of a municipal government cannot, under any circumstances, apply to a court of chancery to restrain the municipal authorities from proceeding to remove him from his office without the authority of law. There may be cases, in my opinion, when the tardy remedies of quo warranto, certiorari, and other like writs will be entirely inadequate."

Unless some recognized basis of equity jurisdiction is shown, such as deprivation of property without due process, courts will not interfere with the enforcement of laws or Of municipal ordinances. An attempt was made to restrain the enforcement of an ordinance of the city of Chicago which required a sufficient number of street cars to carry passengers in comfort and provided fines for each separate offense. Equity jurisdiction was invoked upon the ground (1) that numerous suits had been brought against the company and therefore the suit was in the nature of a "bill of peace" [29]; (2) that the ordinance was impossible of fulfillment and hence in violation of the "due process" clause; (3) that the terms of the ordinance such as "comfortably" and "over crowding" were so vague as to render the ordinance void for uncertainty. None of these contentions was allowed by the court.[30]

Where, however, none of the known legal remedies will avail to give adequate relief against regulative action, equity may be asked to enjoin the acts of officials who go beyond the limits of their discretionary power or—what is the same thing—who proceed under purported powers which are constitutionally void.

(3) STATUTORY EXTENSION OF EQUITY JURISDICTION. In the development of the functions of the Interstate Commerce Commission and the other numerous bodies which have been patterned upon it, the fact that such bodies had no power actually to adjudicate private rights, or to set in motion directly enforcement processes, was a serious obstacle. The obstacle was surmounted, however, by the utilization of the processes of equity. When a commission has made its finding and order, which purport to impose duties upon the person addressed, such person may either obey or refuse to obey. In the latter case, the commission, according to prevalent practice, may petition a court of equity for an order similar to that made by the commission. In such cases the findings of fact made by the commission are usually binding upon the court. The court, however, may review all questions of law which have arisen, including all questions of jurisdiction and of constitutional authority. Just what questions are questions of fact is not always easy to answer, and the courts sometimes encroach a little upon administrative finality by stretching the category of questions of law. The court of equity, having determined the legal question, makes its own order which determines private rights and sets in motion the processes of enforcement.

Because of constitutional requirements regarding jury trials in cases where money judgments are sought, the original statute conferring enforcement powers upon Federal equity courts had to be amended so as to permit "reparation orders"[31] to be taken into law courts and litigated before juries.

From the foregoing—in this and the preceding section— it will appear that, in many cases, the equity courts become forums for judicial review of administrative orders either at the instance of the person affected, who may ask to have the order enjoined, or, at the instance of the commission making it, who may ask to have it enforced.

7. Need for Simpler Form of Remedy

The law has yet to develop a good, flexible means of judicial review which is generally applicable. The greatest progress has been made in the field of injunctive relief in equity. But equitable relief, like that afforded in the "extraordinary legal actions," is largely discretionary with the judge. To a considerable degree, relief to the litigant is "of grace rather than of right," a situation hardly desirable in a period when administrative regulation is so prevalent. In isolated instances, systems of direct review by appeal (retrial of both facts and law) from the orders of administrative agencies have been set up. The experience with such systems has thus far not been encouraging. Courts of law cannot have expert knowledge in all the special fields in which commissions work; neither have they the technical staffs, nor, of greatest importance, the time to overhaul completely the activities of administrative bodies. Important utility cases, for example, often take months, even years to try. Judicial tribunals cannot properly suspend all other work to do this over again.

Many thoughtful persons are advocating an intermediate system of specialized courts, superior to the administrative agencies, inferior to the regular Supreme Courts, for the handling of this growing body of administrative law. There is much to commend the suggestion. But the development of such a plan will require time and experience. It is doubtful if either public or professional sentiment is yet ripe.

There is, however, little but crystallized inertia to prevent the installation of a simpler, less technical, more effective procedure for doing what is now done through the ancient devices of the courts.

[1] The issue of title may perhaps be tried in a suit in ejectment. See Part V, ch. II, Judicial Procedure, discussion of Ejectment.

[2] For explanations of the nature of these actions, see Judicial Procedure, Part V, ch. II.

[3] By this means the heirs to the property now constituting the national Cemetery at Arlington were able to recover it after unlawful occupancy by Federal officers. The Government then acquired it by purchase.

[4] "Cases on Administrative Law."

[5] From ancient times it has been held that within the scope of discretion administrative action will not be reviewed, but "if they [officers] do not proceed according to statute then all is void and coram non judice." Ball *v.* Pattridge, 1 Sid. 296. (Court of King's Bench, 1666.)

"if they, [officers] under pretence of such [legislative] act, proceed to incroach jurisdiction to themselves greater than the act warrants, this court will send a certiorari to them to have their proceedings returned here; to the end that this court may see that they keep themselves within their jurisdiction, and, if they exceed it, to restrain them." Rex *v.* Inhabitants of Glamorganshire, 1 Ld. *Raym.580.* (Court of King's Bench, 1700.)

[6] Treas. of Camden *v.* Mulford, 26 N.J.L. 49 (1856).

[7] Drainage Com'rs. *v.* Griffin, 134 Ill. 330 (1890).

[8] Ringo, J., in State *v.* Evans, 3 Ark. *585* (1841).

[9] State v. Evans, *supra.*

[10] Ill. Rev. St. (1874), Sec. 1, Ch. 112, p. 787.

[11] People ex rel. Longress v. Board of Education of City of Quincy, 101 Ill. 308 (1882).

[12] People ex rel. Lewis v. Waite, 70 Ill. 25 (1873).

[13] People ex rel. Demarest v. Fairchild, 67 N.Y. 334 (1876).

[14] St. 9 Anne c. 20.

[15] People ex rel. Raster v. Healey, State's Atty., 230 Ill. 280 (1907).

[16] The action of mandamus under the statutes of American States is somewhat different from its prototype in England. At common law it was not an action by the relator. Neither the writ nor the return was a pleading. No issues of fact were raised, no trial had, no judgment rendered as between the relator and the respondent. It was a prerogative writ solely within the discretion of the court, issued in the name of the King. If the relator wished to controvert the truth of facts alleged in the return, his only remedy was a separate action for a false return.

Under modern statutes mandamus has become an action. The petition under the new practice alleges facts which may be controverted, and the issues raised may be tried by the court. The action may be in the name of the relator who, if seeking something for himself, must be the real party in interest; but if he brings the action in behalf of the public, he need not be.

[17] This court was distinguished from the regular Circuit Courts of the United States to whom the power of issuing writs of mandamus has not been given.

[18] 219 Ill. 346 (1906).

[19] 1 Lil. Abr. 477.

[20] "The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. English judges, being originally under the influence of the crown, neglected to issue this writ where the Government entertained suspicions which could not be sustained by evidence; and the writ when issued was sometimes disregarded or evaded, and great individual oppression was suffered in consequence of delays in bringing prisoners to trial. To remedy this evil, the celebrated Habeas Corpus Act of '31, Charles II, was enacted, for the purpose of securing the benefits for which the writ was given. . . . This statute excepts from those who are entitled to its benefit persons committed for felony or treason . . . as well as persons convicted or in execution. . . ." Chief Justice Marshall, in *Ex parte* Watkins, 3. Pet. 593 (1830).

[21] Nishimura Ekiu v. U.S., 142 U. S. 651 (1892).

[22] United States v. Ju Toy, 198 U. 5. 253 (1905).

[23] Gonzales v. Williams, 192 u. S. 1 (1904), where the question was Whether Puerto Rico, from which the applicant came, was then a part of the United States. This was regarded as a question of law.

[24] United States *v.* Sing Tuck, 194 U. S. 161 (1904), in which an appeal from the immigration officer to the Secretary of Commerce and Labor was not taken.

[25] Chin Yow v. United States, 208 U. S. 8 (1908).

[26] Part V, Ch. III, Equity Procedure, p. 283.

[27] Georgia *v.* Stanton, 6 Wallace 50.

[28] In re Sawyer, 124 U. 5. 200 (1888).

[29] Equity will sometimes act to prevent a multiplicity of suits.

[30] City of Chicago *v.* Chicago City Ry. Co., 222 Ill. 560 (1906).

[31] Orders to refund specific sums of money found to be overcharged on freight shipments.

Part V

The Law of Judicial Procedure

Civil Procedure

The law under which we live in Anglo-American countries is a product not only of growth but of fusion. Like a mighty river, it has widened and deepened as tributary stream after stream has blended its contents with those of other branches. The great sources were two, civil power and ecclesiastical power. The great tributaries were correspondingly two, the common law and equity. Smaller contributions were made by the jurisprudence of the Star Chamber, by the law merchant, by admiralty, by the ecclesiastico-civil jurisdictions of probate, divorce, etc.

1. Courts and the Development of Law

But law (apart from legislation) develops through courts; and the main divisions of our law can be traced directly to the courts in which they were laid down. From the courts of the King's Bench, the Exchequer, and Commons Pleas flowed the decisions which declared the common law, King's Courts all, upholding the civil as against ecclesiastical authority. But in the office of the King's Chancellor, originally an ecclesiastical office, developed the court

equity, from whose decisions come the great coordinate branch of our law which bears its name. The administration *of* estates, divorce, family law, were also originally ecclesiastical functions, and the marks of their origin survive their absorption into the civil law.

2. The Role of Procedure

One potent factor in the formation of law by courts is procedure. Each of the main types of court developed a procedure of its own.

Procedure, moreover, is of prime importance *per se* in the administration of justice. Lack of proper procedure spells chaos. Over-development of procedure produces technicality and, sometimes, abortion of justice. In any event, the rules of procedure may be as important in determining one's rights as are rules of law.

3. Procedure Public Law

The law of procedure is public law. The rules of procedure are laid down to regulate the conduct of judges, practitioners and litigants—to govern the relationships between the state, its agents, and private persons. The rights of private persons may be, and often are, affected by the operation of these rules, as indeed they are by the operation of public law generally, but this effect is secondary. Primary incidence is not upon the relationships of persons to persons but upon those relationships to which the state or its agencies are parties.

An understanding of the basic principles of procedure can best be obtained by observing the history of their development.

Part V, Chapter II

Common Law Procedure

1. Forms of Action

The Conqueror and the succeeding Norman King found a full-fledged, though simple, system of jurisprudence in Saxon England which they did not abolish but gradually supplanted by a system developed in the King's Courts. These courts they set up alongside those of the older regime. Little by little the newer courts absorbed the legal business of the realm, borrowing from the older courts even while slowly crushing them to death. Gradually the old *gemots* were replaced by the newer assizes; the old procedure, with its wager of law, its ordeals, its trial by battle, was replaced by a newer system in which mechanical modes of trial were replaced by rational modes. The jury, at first simply a neighborhood assembly convoked by the King's officers to assist in ferreting out property subject to taxation, became a part of the regular trial machinery. Its incorporation into the trial system was one of the two most important elements in conditioning the form and direction which that system later assumed.

2. The Original Writ

The other was the Original Writ. Suits in the King's courts could be begun only by permission, permission granted pretty much as of course, if the fees were paid, but indispensable, never the less, to further proceedings.

The original writ was not in form a permit but an order, an order issuing out of chancery, under the great seal, in the King's name, commanding the defendant, at a time fixed, to appear and satisfy the complaint made against him or show why he should not be required to. In order that the defendant might know what was demanded the writ set forth the nature of the case and the relief requested. In the simple society of that day the cases brought gradually classified themselves into a few simple categories for each of which a single form of order, or writ, would suffice. But even then, office routines tended to harden into binding regulations, and the number of original writ forms became set. New ones could with difficulty be obtained. Five principal forms for a time seemed adequate for most of the business which came in—writs of Detinue, Debt, Covenant, Trespass, and Replevin.

(1) DETINUE. Perhaps the simplest was Detinue. In this form of action the plaintiff alleged, in substance, that the defendant had some tangible thing belonging to him which he, the defendant, would not give up. Plaintiff prayed for its return and damages for its detention.

(2) DEBT. Akin to Detinue was Debt. The object of demand might be money, a loan, or the price of something sold. The thought of the time assimilated this demand to that of Detinue; the defendant "detained," not a thing but a sum, the equivalent of a thing, and because it belonged to tile plaintiff, the defendant ought (owed) to give it up. No notion of contract or of promise broken was involved.

The theory was simply that the defendant ought to surrender what was not his. But this indentification of a sum with a thing implied fixity of amount; an unliquidated amount did not

fit into the concept. Hence the action of Debt could only be brought for a "sum certain."

(3) COVENANT. As civilization passed the barter stage there were bound to crop up, now and then, cases based not on possession detained but on promises broken, on benefits conferred in misplaced reliance on plighted word. But the courts were slow to undertake the enforcement of promises The undertaking involved difficulties. Could jurymen simple unlettered men acting in groups—be trusted to as. certain from conflicting testimony whether John had really plighted faith to Thomas, or, if he had, whether the circumstances were such as to make the promise legally binding? The law compromised; if the promise were written so that its terms were certain, the court would hear and give aid— provided the promise was solemnly entered into, a *considered* promise, not one lightly or frivolously given. This consideration was deemed to be shown by the promisor's seal; if he placed his seal upon the parchment he was bound. A sealed and written promise was a "covenant." In the action of Covenant it could be enforced.

(4) TRESPASS. Then, of course, there were trespasses, unlawful interferences with the person or the property of the plaintiff. These might be intentional or unintentional, harmful or merely unwarranted. The law—at first generally administered by clerics, for few others could read—drew a moral distinction between intentional and unintentional interferences. It paid little heed even to intentional, personal touchings unless there was anger, nor to the intentional touchings of movable property unless there was damage done. But intentional entries upon land if long acquiesced in, might lay the foundation for an assertion of title. So the action of Trespass recognized three subdivisions: trespass to persons called *Trespass Vi et Armis,* trespass to movable property, called *Trespass de Bonis Asportatis,* and trespass to land, called *Trespass Quare Clausum Fregit.*

(5) REPLEVIN. Replevin was at first devised as a remedy for the speedy recovery of a tenant's animals or other chattels wrongfully seized (distrained) by his landlord for nonpayment of rent. Upon the giving of a gage (bond) the chattels were at once restored,[1] leaving the merits of the case to be later determined. Gradually Replevin came to be used generally for the recovery of personal property unlawfully taken and detained.

3. Actions on the Case

These five writs did well enough, apparently for a considerable period. But they were incomplete. Accidental injuries often caused as much damage as intentional ones, yet Trespass required intent. Broken promises were often the causes of loss though neither written nor sealed. At length a statute was promulgated[2] authorizing the framing of new writs upon the model of the old ones, actions (modeled) "upon the case." Few new actions resulted: the really important ones were those of Trespass on the Case (eventually called "Case"), General and Special Assumpsit, Trover, and Ejectment.

(1) CASE. Trespass on the Case supplied the need for relief for non-intentional trespasses where the defendant's fault was negligence rather than ill will. It also came to be used where the harm resulted from indirect means rather than the direct application of force, as, for example, where the defendant put an obstruction in the plaintiff's path over which he stumbled at night. Case became the foundation of modern negligence law. Case also became a remedy for deceit and fraud.

(2) ASSUMPSIT.. Out of Trespass on the Case, curiously, grew also the remedy for breaches of simple contracts, *i.e.,* contracts not under seal. To obtain something by making a promise which was not kept was not far removed from deceit. If one originally meant not to return it, or pay for it, the promise was a fraud, and who could tell the state of the promisor's mind? So actions on the case began to be brought, in which the deceit was alleged; and the utility of these suits was such that the proof of the state of mind was little insisted upon. Gradually the allegation of fraud was dropped and the law recognized an action to enforce obligations whose basis was the promise, not the fraud.

The idea of contract grew with the growth of business until gradually people began to imply contracts from conduct where none were expressed in words. Goods sold and delivered, without any words, oral or written, were deemed to have been taken under a contract to pay the reasonable price. Such "implied contracts" could be sued on in General Assumpsit, as the defendant was said to have "assumed" an obligation to pay. Where the contract was a specially expressed agreement the action was Special Assumpsit.

"Consideration" in time came to have an entirely different meaning from that implied above, *i.e.,* serious attention to the promise. It came to savor of the idea of *quid pro quo,* though this idea became purely fictitious in some places. But so completely did the substituted meaning possess the field, that the law

came to say, "the seal (on a Specialty) imports consideration," meaning that the transfer of a *quid pro quo* was conclusively presumed.

(3) TROVER. Trover was developed as an action to recover the value of goods "converted" by the defendant to his own use. It took its name from the fictitious allegation in the early form of the proceeding that the goods had been lost by the plaintiff and found by the defendant, who instead of returning them used them as his own.

(4) EJECTMENT. Ejectment may simply be described here as an action to recover the possession of land. As superior title was a defense, the right of title could be tried in this action.

Into these "forms of action" practically all procedure in law courts was compressed until the middle of the nineteenth century. In some states the forms of action still persist. The common law was organized on this procedural frame and until recent times the digest titles of the law were not Torts, Contracts, Persons, Agency, etc., but Trespass, Assumpsit, Case, and the like.

4. Pleadings

Every system of trial develops some scheme for getting down to the really controversial points. In the common law system two circumstances contributed to the particular development which took place: the use of the jury and the ambulatory character of the courts. Juries of untrained men could not be expected to grasp the essential issue, to winnow the relevant from the irrelevant, if parties and witnesses simply appeared and retailed their stories *ad libitum.* The issues had to be carefully developed and the evidence con. fined to them. Furthermore, when the judges went from town to town on circuit it was desirable that the hearings proceed with dispatch in order to conserve the time of the court and also of litigants, who left their normal affairs and came with their witnesses to have their cases tried. This purpose was accomplished by pleadings.

Pleadings were written statements filed by the parties in alternate sequence in which the essential features of the case were developed through the process of assertions, admissions, and denials. To guard against abuse the statements made had to be sworn to and evidentiary proof at the trial had to conform to these statements. The object of the pleadings in each case was to reduce the controversy to some single controverted point, either of fact or of law. Sometimes, however, a case might develop more than one branch, each branch having such a single issue. This process of pleading had to be complete before the trial began. The purpose of the trial was to determine the single issue developed in the pleadings.

(1) DECLARATION. The plaintiff's opening pleading was the Declaration. In it he set forth the substance of the facts which he expected the evidence to support, which facts, he contended, entitled him to the relief he prayed for.

The defendant, thereupon, within a given number of days, was under the necessity of filing a Demurrer or a Plea. If he did neither, judgment might be taken against him by default.

(2) DEMURRER. If the defendant thought that the allegations of the Declaration, though true, did not, under the law, entitle the plaintiff to the relief sought, he would demur. A Demurrer raised the question of the legal sufficiency of the facts alleged. In common parlance it said: admitting what the plaintiff says to be true, what of it? It called upon the court to say whether, assuming the truth of the plaintiff's statements, the law would accord him relief. If the court sustained the Demurrer, *i.e.,* found the issue of law for the defendant, the case was ended unless, upon leave given, the plaintiff could amend his Declaration to better effect. If the court found against him, he was then bound to answer to the facts, or submit to final judgment. Though for purposes of testing the point of law, the Demurrer admitted the plaintiff's allegations to be true, this admission (except in very early times) was not final. It was an assumption for the purpose of the argument rather than a real admission.

(3) PLEA. If, however, the defendant believed the facts stated in the Declaration "made a case" he might *plead, i.e.,* he might deny the plaintiff's allegations of fact or he might set up additional facts which would put a different face upon the story. He might, as the lawyers said, plead by way of traverse or by way of confession and avoidance. Pleas in confession and avoidance admitted the truth of the opponent's allegations but alleged other circumstances claimed to constitute necessary parts of the complete narration. Pleas by way of traverse and pleas by way of confession and avoidance were pleas *to the merits.*

There was another kind of plea, the Plea in Abatement, which did not concern itself with the merits of the case at all, but, ignoring them, set forth facts whose import was to halt the progress of the case because of some formal insufficiency or reason for postponing the proceedings.

If, now, the defendant set up *new matter,* i.e., facts in avoid-

ance of the legal import of the plaintiff's allegations, the plaintiff in turn might come back on his own part with a Demurrer, a denial or a plea in confession and avoidance. And so at each stage in his turn might the defendant and again the plaintiff, until an issue was raised—an issue of law by demurrer or an issue of fact by traverse. The effect of this succession of filings was further and further to narrow the case until the pleadings of fact ended in an issue involving (ideally) some single, controverted point of fact, or until a Demurrer raised an issue of law.

If a Demurrer was filed by either party at any stage of the case it had this peculiar quality: it *searched the record, i.e.,* it reached back to test the legal sufficiency, not only of the pleading to which it was immediately addressed, but of all the pleadings in the sequence to the beginning, and judgment on the Demurrer went against the party whose pleading was first legally insufficient. A Demurrer was thus a two-edged sword; one might lose on his own Demurrer although the last pleading of his adversary was defective.

(4) OTHER PLEADINGS. The alternate fact pleadings of the parties had specific names:

By *Plaintiff*	By *Defendant*
Declaration	
	Plea
Replication	
	Rejoinder
Sur-Rejoinder	
	Rebutter
Sur-Rebutter	

The stage of Sur-Rebutter was seldom reached and beyond that no specific names were applied.

(5) TECHNICALITIES OF PLEADING. In the course of centuries many technical rules were evolved relating to the science and practices of pleading, which had the merit of compelling close and accurate analysis on the part of counsel but which had the demerit of providing pitfalls for the unlearned or the unwary. They contributed to the result of making the handling of cases a game in which, at least sometimes, the interests of litigants were subordinated to the rules of procedure. "The case went off on a point of pleading" became a common phrase of the reporters. From a technical standpoint, however, the common law system of pleading was a splendid and complete development—a true monument to the logic of the law.

In a number of states of the Union this system is still substantially in vogue.

5. The Judge and the Jury

The trial of cases in law courts is typically a proceeding in Which a jury is impaneled to pass upon questions of fact While the judge decides questions of law and instructs the jury as to the law applicable to their deliberations. Both of these statements are, to be sure, approximations rather than exact statements of the truth. In the course of his duties the judge has to pass upon many subsidiary and some major questions of fact and even if it does not have to decide, the jury has to apply, the law in reaching its verdicts.

The jury's findings, in its peculiar field, are mandatory. The court has a supervisory function which extends in proper cases to setting aside the jury's verdicts, but setting aside a verdict means a new trial in which another jury will be required to pass upon the same questions. Judgments can only be rendered upon jury verdicts; until a valid verdict is returned no further progress can be made.

The jury's verdict, however, in and of itself, produces no final results. The verdict simply becomes the basis for the judgment, the order of the court which sets in motion the executive processes of the law. In some cases the judgment itself establishes rights in property; in others it causes the proper officers to proceed to seize and sell defendant's property in order to realize money to satisfy the plaintiffs claims.

6. Execution of Judgment

In general, before the statutory changes worked a fusion of legal and equitable procedure, the executionary powers of the law courts were limited to the rendition of possession of specific real or personal property and the seizure and sale of property for the purpose of producing money. Law courts could not insure compliance with the final civil orders through imprisonment or other personal punishment. Equity courts, on the other hand, were traditionally limited to personal orders and could not directly affect property rights. By statute, however, these powers have been coalesced to a large extent.

[1] Protracted detention would often mean the ruination of the tenant.

[2] Statute of Westminster 2nd, 13 Edw. 1, Ch. 24 (1285).

Equity Procedure

Partly because of the rigid incompleteness of the common law forms of action,[1] the equity courts developed a broad jurisdiction supplementing that of the common law courts.

1. Variations from Common Law Procedure

In the equity courts a system of procedure developed considerably at variance with common law procedure, partly because of borrowing from the trial systems of the ecclesiastical and the Roman Law and partly because the cases were tried, not to juries, but to judges. Where the trier of facts was a trained lawyer, fewer mechanical devices for framing the issues and for excluding irrelevant matter were necessary. There developed in the equity courts no forms of action and the rules of pleading were marked by greater simplicity and liberality.[2]

Instead of suing out an Original Writ the complainant in an equity suit began by filing in the office of the chancery clerk[3] a Bill in Equity. Jurisdiction of the defendant Was obtained by the serving upon him of a writ of subpoena which commanded him, under penalties, to appear and satisfy or answer the complaint.

In keeping with the characteristic propensity of equity to look at truth and substance rather than at form, one who brought a bill had to be the real party in interest.[4]

In case of default upon the defendant's part, either for appearance or proper pleading, a decree might be taken against him *"pro con fesso" i.e.,* by default.

2. The Bill

The Bill of Complaint, or, as it was more commonly called, the Bill, served not only the function of a pleading as did the Declaration in a law suit, but also that of an examination of the defendant, seeking discovery of pertinent facts known to the defendant upon which to base a decree. Indeed, the structure of a Bill came in time to be one of the most elaborate and formal known to legal practice.5 It consisted of nine parts: (1) the address, (2) the introduction, (3) the stating part, (4) the confederating part, (5) the charging part, (6) the averment of jurisdiction, (7) the interrogating part, (8) the prayer for relief and (9) the prayer for process.

The address simply stated the correct title of the court in which the Bill was filed. The introduction gave the names and places of abode of the complaining parties and such additional descriptive matter as was necessary to establish the court's jurisdiction. Since equity jurisdiction was supplementary only to that of law courts these facts were important.

The stating part performed the office of a pleading, setting forth the ultimate facts upon which the complainant relied for relief. The factual sufficiency of the bill depended wholly on the statements made in this part. Statements in other parts could not supply deficiencies here.

The confederating part was a curious formal allegation that the defendant and divers other persons unknown had combined and confederated together to defraud the complainant. It prayed that they be made parties when discovered. It appears to

have been believed that this allegation was essential to the addition of new parties after suit began and that the allegation of conspiracy or confederation was essential to the court's jurisdiction. Neither belief in fact was sound. This part later was regarded as useless.

The charging part marked a clear departure from the traditions of common law pleading. It undertook to set up the defenses which it was assumed the defendant would make, and to answer them in advance, characterizing such defenses as fraudulent and pretended. In common law pleading it was improper to put defenses into one's opponent's mouth—"to jump the stile before one came to it." Under the "Equity Rules" of the Federal courts this part is Optional with the pleader.

The averment of jurisdiction in the court of equity was probably always surplusage and under present practice may be omitted.

The interrogating part was also a departure from common law procedure. It called upon the defendant to state, both upon information and belief, all such matters as were pertinent to the case, *i.e.,* to furnish the proof, if he had it, upon the basis of which finding might be made against him. This function of "discovery" was one of the salient characteristics of the Bill.

The prayer for relief set forth the complainant's demands; first in detail and then, lest anything be missed, generally. Only such relief as was prayed for would be granted.

The prayer for process set the clerk's office in motion to issue the necessary subpoena.

Of these nine parts into which the Bill was divided, the stating part (3) and the interrogating part (7) were the prime essentials, the stating part serving to lay the foundation of fact, the interrogating part to obtain from the defendant the "discovery" necessary to enable the complainant to establish his allegations.

3. Defendant's Response

As in suits at law, the defendant might respond to a Bill by raising an issue of law or an issue of fact. To effect these results there were available the Disclaimer, the Demurrer, the Plea and the Answer. If he desired not merely to assert a defense but to obtain affirmative relief against the complainant, he might file a Cross Bill.

(1) DISCLAIMER. The Disclaimer was not really a measure of defense; rather it was a written assertion that the def end

ant disclaimed any right, title or interest in or to the subject matter of the complainant's demand.

(2) DEMURRER. The Demurrer, borrowed from the law courts, raised the question of the legal sufficiency of the Bill as shown upon its face. The Demurrer, however, was available only to attack the Bill. It could not be used at a later stage.

(3) PLEA. If the defendant wished to oppose the Bill upon a ground not involving the merits and not appearing upon the face of the bill, he did so by Plea. The Plea in equity, much like a Plea in Abatement at law, set up reasons why the suit should be dismissed, delayed or barred, without challenging the *merits* of the complainant's contentions.

(4) ANSWER. If the defendant meant to contest the merits of the claim he did so by Answer. The Answer was a statement of fact in which the substantive defense was set forth. If the complainant objected to the Answer for want of legal sufficiency either in form or substance he did so, not by Demurrer, but by filing Exceptions.

4. Replication

The only other regular pleading in equity suits was the Replication. If the complainant filed no exceptions to an answer, he closed the pleadings by filing a Replication. This pleading set up no further facts, but merely denied the truth and sufficiency of the Answer and reaffirmed the truth and sufficiency of the Bill.

5. Heads of Equity Jurisdiction

(1) STANDARD BILLS. Although equity grew up to remedy the deficiencies in the law, in time it, too, became more or less crystallized, both in substance and in procedure. In somewhat the same fashion as law procedure became set in the forms of action, so equity procedure became set, less rigidly, in a number of characteristic Bills. If a litigant's requirements could not be satisfied by one of these types the door was not closed, but innovation met tacit resistance. The principal types were: Bills for Foreclosure of Mortgages, Bills to Redeem Mortgaged Property, Bills for Partition, Bills to Quiet Title, Bills of Peace, Bills to Reform Instruments, Bills for Specific Performance, Bills to Set Aside Fraudulent Conveyances, Bills for the Infringement of Patents and Copyrights, Creditors' Bills, Bills of Interpleader, Bills of Certiorari, Bills to Perpetuate Testimony, Bills of Discovery.

(2) THE INJUNCTION. The one growing point in equity procedure in modern times has been in the field of the injunction. As distinguished from the specific types of relief listed in the last paragraph, the injunction might be put down as an innominate type. As usually defined it is an

order to do or not to do some act. This definition, though too broad to be useful, is difficult to narrow without inaccuracy. Perhaps the following represent the principal classes of cases in which injunctions are most often issued: Cases to restrain the prosecution of suits at law where such prosecution would be inequitable; cases to prevent breaches of contract, where the rules of equity permit; cases to prevent the commission of torts where property rights are involved and damages at law would not be adequate; cases to prevent the breach of some trust, confidence or contract.

(3) SUBSIDIARY RELIEF. In addition to these types of proceeding in which the relief asked is the principal object of the suit, there are a number of other proceedings in which the relief is subsidiary to some other main object. Such are proceedings for receivership, for the sequestration of property, for the taking and perpetuation of testimony.

(4) EQUITY TRIALS. The trial of cases in equity is basically trial by the judge; both facts and law are tried to the court. At the discretion of the judge a jury may be summoned to pass upon some particular question about which there is doubt or difficulty, but the verdict, when rendered, is not binding upon the court but is advisory merely.

In many instances the court appoints a master commissioner to examine the witnesses and make report and recommendation as to findings. The rulings of the master and his findings and recommendations are, of course, subject to revision by the judge.

(5) EQUITY ACTS IN PERSONAM. The decrees of an equity judge, at first, were enforceable only by punishment of the defendant's person. They did not operate directly upon property or the title thereto. Statutes have, however, now quite generally given to decrees in equity much the same power to bind property as have the judgments of law courts. In the states where law and equity procedures are distinct the foregoing still represents in substance the method of equity procedure. In the Federal courts, with certain modifications affected by the Equity Rules, it represented equity procedure up to September 16, 1938. Since that date, Federal Procedure has been greatly modified.[6]

[1] See Common Law Procedure.

[2] While there were no "forms of action" there developed a series of stereotyped bills, to be noticed later, which in a sense performed the office of the forms of action: namely, to frame the thinking and organize the concepts of practitioners in the equity courts. Unless one's case fell substantially within one of the recognized types of bill, there was a tacit presumption that equity could do nothing for him. In some respects, too, the drafting of a Bill in Equity came to be a more rigidly formal matter than the drafting of a Declaration in a law court.

[3] In England the bill was originally filed in the office of the "Six Clerks" (pronounced clarks) who had charge of the records.

[4] In the law courts emphasis was upon the legal title rather than the substantial interest.

[5] At first it was quite simple, merely stating the ultimate facts and praying relief.

[6] Procedure in Federal Courts, *supra.*

Code Procedure

About the end of the first quarter of the nineteenth century a gathering dissatisfaction with the old systems of procedure in the law and the equity courts began to come to a head.

1. The Reform of Common Law Procedure

Dissatisfaction proceeded from a number of prime and many subsidiary causes. The most important were the excessive technicality that had grown up about the forms of action and the rules of pleading, and the rigid separation of the courts of law and equity. The former often resulted in lawyers' battles in which the merits of the cause were only subordinate considerations; the latter, in the frequent necessity of proceedings in both law and equity courts to secure complete relief in a single controversy, or in the frustration of merited relief because of the limited powers of both courts.

So completely had the minds of lawyers been saturated with the traditional doctrines, however, that amelioration was difficult. An inherent and eternal difference which compelled the separation of law from equity was believed to exist, and this difference applied as well to the forms of action.

But in England and America, certain more adventurous

spirits agitated for change and in 1848 David Dudley Field[1] and others persuaded the legislature of the State of New York to adopt the Code of Civil Procedure. This so-called Field Code with local variations was adopted in rapid succession by a number of other states, and eventually all but a small minority modeled their procedure upon it.

2. Bases of Reform

Code procedure is marked by two main departures from that which it replaced: the abolition of the forms of action and the union of law powers and equity powers in the same court. The system of pleadings and the mode of procedure were also modified, chiefly by the infusion into the legal system of ideas taken from that of equity.

In the main, the fundamentals of pleading are preserved. Though simplified in form, the objective of the pleadings is still the same—to arrive at a single issue either of fact or of law—and, so far as applicable, the old rules of pleading continue.

3. The Code Pleadings

The pleadings of fact under the codes are:

By *Plaintiff*	By *Defendant*
Petition	
	Answer
Reply	

Allegations of new matter contained in a Reply are, by Statute, deemed to be controverted without further pleading, so the series ends there.

The Demurrer under the codes performs substantially the same office as at common law. The grounds of demurrer, however, are specified by statute, the statutory grounds including those formerly available to found either a General or a Special Demurrer. In addition, the Demurrer now performs most of the service formerly performed by the Plea in Abatement.

A characteristic of the code procedure is the freer employment of the Motion.[2] Borrowed largely from the equity practice the Motion in code practice has found an expanded usefulness, serving a great variety of purposes including, at times, some of those formerly accomplished

by the Plea in Abatement. Written motions are provided for as well as oral ones.

(1) PLEADING FACTS. The basic principle in code pleading is that of pleading only facts. The requirement for Petition, Answer or Reply is that the pleader shall set forth in simple and concise language[3] the "ultimate facts in issue." Ultimate facts are distinguished from "evidentiary" facts, those circumstances to be adduced in evidence at the trial which will sustain the broader conclusions comprehended in the "ultimate" facts. All the ultimate facts which are necessary to make a case for relief or defense under the appropriate rules of law must be stated. Facts not pleaded may not be proved at the trial. If the statement omits facts necessary to make out the case, the pleading is subject to Demurrer.

Ultimate facts have to be sharply distinguished from conclusions of law. These may not be pleaded. If they are, they may be ordered stricken out on Motion or simply disregarded as nullities. A Demurrer will be sustained if the remaining allegations do not make out the case.

The relief requested must be prayed for. In general no other relief will be granted, although some courts will grant whatever relief the facts show a party to be entitled to.

(2) AMENDMENTS. In accordance with the purpose of code procedure to simplify the requirements for accomplishing justice, courts are liberal in granting the privilege of amendments to pleadings. Mistakes or omissions may be corrected so long as the opposing side is not surprised or unduly burdened. Additional costs, however are generally assessed against the party asking the privilege of amendment. Even after the evidence is all in it is not uncommon for a court to allow an amendment of a pleading to "conform to the evidence."

(3) ADDING PARTIES. In line also with the Code purpose to do justice simply, is the liberal provision for adding parties. Complete settlement of a controversy in a single proceeding is the ideal, and to this end new parties may be added if they have any interests which would be affected by the judgment or decree. Such new parties when duly summoned may come into the case by way of Answer or of Cross Petition or both.

(4) CROSS PETITION. The Cross Petition is a device borrowed from equity, designed to enable parties defendant, either original or additional, to set up demands for affirmative relief. A defendant may have a defense against the demand of the plaintiff. He may also have a cross claim of his own against the plaintiff or against some other defendant. To facilitate the complete litigation of an entire matter in one suit the codes provide for the filing of Cross Petitions in which affirmative claims, of a nature so related to that of the subject matter of the suit as to be fairly triable in one proceeding, may be set forth.

(5) NOTICE PLEADING. In a limited number of states a still further simplification of pleading and procedure has been set up by statute. In this system the plaintiff in his Petition needs only advise the defendant in general terms that he is being sued and the nature of the claim made. The issues are not framed in the pleadings. Evidence is freely admitted at the trial and the issues are really pointed out for the first time in the court's charge to the jury. This scheme as yet has not been widely adopted.

(6) PROCEDURE IN FEDERAL COURTS. Under the rules for procedure in the Federal district courts effective September 17, 1938, the principles of code procedure have been still further simplified. There is but one form of civil action for both law and equity cases. Demurrers have been abolished, motions performing their essential office. The court in its discretion may order counsel to appear before trial to consider the simplification of issues, the desirability of amendments to pleadings, the possibility of admitting certain facts, the limitation of expert witnesses and other matters. The right to trial by jury is preserved, but only upon demand. If not demanded it is waived. At any stage of a proceeding the court must disregard any error which does not affect the substantial rights of parties.

[1] Brother of Cyrus W. Field who laid the first transatlantic cable.

[2] In equity procedure a Motion is an oral application to the court for rulings incidental to the progress of the case. A written Motion called a Petition.

[3] Thus abbreviating certain common law and equity forms requiring "artificial" verbiage.

Trial Procedure

The issues having been developed through the pleadings, a case is set down for trial in accordance with statutory rules as to time, and the exigencies of the court's calendar.

While the codes abolished the distinctions as to form between law suits and equity, they did not abolish the differences between the substantive rules nor the differences between the kinds of relief that might be granted. Cases, therefore, which "sound in equity" are still tried by the court,[1] while those which are legal in their nature are tried by juries.

The rules of evidence are more strictly applied in jury cases; otherwise, the mode of trial procedure is not very different.

With local variations, the order of procedure is about as follows:

I. Opening Statements

After the jury has been impaneled and sworn, counsel for the plaintiff makes his "opening statement," in which, without argument, he sets forth the nature of the case, the claims of the parties, and what he expects to prove by evidence. Opposing counsel then makes a similar statement of his side of the case.[2]

2. Introduction of Evidence

The next step is the introduction of evidence. This may consist in the presentation of written documents or other tangible things or the taking of oral testimony. In the examination of witnesses, counsel for the party calling the witness first examines him "in chief" and then opportunity is offered the other party or parties to "cross-examine." When plaintiff has introduced all his testimony he "rests" i.e., he rests or relies upon the facts he has proved to make out his case in law.

3. Motions for Judgment

At this stage opposing counsel has opportunity to make one of the several motions known to the law to have the court give judgment in his favor because plaintiff's proof is legally insufficient. If the motion is overruled the defendant must then introduce his own evidence.

Plaintiff, of course, as well as defendant, may profit by evidence adduced by defendant's witnesses.

After the defendant has rested, plaintiff has opportunity for rebuttal, *i.e.,* evidence to oppose that which the defendant has produced. Plaintiff may not, normally, however, introduce in rebuttal proof that should have been brought out in his case in chief.

At the conclusion of all the evidence defendant may renew his motion for judgment (or directed verdict). If it be again overruled the case is ready for argument.

4. Special Charges

In some jurisdictions either side may ask the court to give to the jury "special charges" before argument, propositions

of law which counsel desires the jury to have in mind before the argument begins. These are usually given in writing and may be commented upon by counsel.

5. Argument

The time allowed for argument is generally within the judge's discretion. Plaintiff's argument comes first, then defendant's, after which plaintiff may conclude. Ordinarily plaintiff's counsel may divide his time as he chooses between his

opening and his concluding speech. Again, however, he should not reserve his points in chief for rebuttal. If, as sometimes happens, plaintiff's counsel only sketchily argues the case in his opening, defendant's counsel may waive argument entirely, in which event no rebuttal argument is permitted. Either side, of course may waive its argument whenever it pleases.

6. General Charge

After argument the court "charges" the jury.[3] The "charge" is a complete statement of the law applicable to the case, including the procedural parts of the trial in which the jury participates.[4]

7. The Verdict

After the charge, tie jury "deliberates." Usually this is accomplished in the privacy of the jury room; sometimes, in clear cases, the jury returns its verdict without retiring. When the jury is ready with its verdict it so advises the court through the bailiff, and in open court the verdict is announced. Either side may, if it chooses, have the jury "polled," *i.e.,* have each juror asked whether it is his verdict.

At common law the verdict had to be unanimous. Failure to agree upon a unanimous verdict entailed a new trial. In some states now, however, verdicts in civil cases may be returned by three-fourths of the jurors.

In recent times in many states women as well as men have been made eligible to jury service.

After the verdict is received the jury is discharged.[5] The losing party then customarily avails himself of the right to file a motion for a new trial, setting up any of the statutory grounds upon which such motion may be based. Unless the court finds that error prejudicial to the interests of the loser has occurred in the trial, the motion will be overruled.[6]

8. Judgment

If such error is found the verdict is set aside and the case must be tried again. If not, judgment is entered upon the verdict.

[1] See infra, Equity Procedure, for use of juries in equity courts.

[2] In some jurisdictions the defendant reserves his opening statement until plaintiff's evidence is in.

[3] In equity cases, of course, there is normally no jury and no charge.

[4] The charge is supposed to guide the jury's deliberations. In point of fact, however, it is frequently not well understood and serves its chief purpose as a basis for proceedings in error in a reviewing court. Through this process it becomes the medium through which much of the common law is settled and declared.

[5] If the pleadings as finally framed by amendment or otherwise do not set forth facts sufficient in law the loser may move to have the verdict set aside and for "judgment on the pleadings *non obstante veredicto.*"

[6] In the older practice any error was reason for setting aside the verdict.

Procedure for Review

Both state and Federal judicial systems provide for the review of the proceedings of trial courts. These systems differ widely in the number and character of the appellate courts but all provide essentially the same fundamental types of revision. This revision is of two main kinds, revision of findings of facts and revision of rulings of law.

1. Appeal

As to facts, the procedure in equity cases varies from that in law cases. In equity procedure the trial court's findings of fact are subject to "appeal,"[1] *i.e.,* a trial *de novo* of the entire case in an upper court. Appeal (in this sense) does not depend upon the commission errors of law by the trial court, but, generally, may be had as of right by giving bond and taking the other necessary steps. Among these steps is the filing in the upper court of a transcript of the testimony taken below, together with all of the original papers, *i.e.,* the pleadings, process, motions, entries, etc.

At the retrial all the evidence may be taken again, but it is common practice to introduce testimony anew only upon disputed points, using the transcript for the rest.

Upon the perfection of proceedings for appeal the lower court's finding simply drops out of sight so far as facts are concerned.

2. Error

A dissatisfied party may "go up" from a trial court's judgment in an equity case by proceedings in error as well as by appeal. Law cases may also be reviewed "on error." Error proceedings raise only questions of law and the procedure in error is essentially similar in equity and in law.

To perfect typical proceedings in error the dissatisfied party files a "supersedeas bond" to stay execution of the judgment or decree. He then files in the reviewing court a Petition in Error (the name differs in different jurisdictions), in which the alleged errors of law are specified, a Bill of Exceptions, which is a transcript of the evidence or such parts thereof as are necessary to show forth the points of law involved, the original papers in the case, and a transcript of the docket and journal entries.

3. Briefs

The main argument in error proceedings is usually made by brief. A brief is a written presentation of the reasons for declaring the law and deciding the cause as the author of the brief desires. In courts of final jurisdiction it is customary to require the briefs to be printed.

4. Oral Argument

In addition to argument by brief, oral argument of limited duration is commonly, though not universally, permitted.

Oral argument, however, is generally only supplementary to the briefs. Its main purpose is to give opportunity for questions by the court upon points not completely elucidated in the briefs.

5. Decision and Opinion

After argument in the reviewing court the case is ready for decision. The decision proper is contained in an "entry," *i.e.,* a finding and order spread upon the records of the court which is the embodiment of the court's action. Frequently also the court "hands down" an "opinion" which is a written statement of the legal reasoning by which the court arrives at the result reached. The

opinion is valuable to the legal profession as a contribution to the law for the future. The opinions of appellate courts are generally printed in books called "reports." These reports are the chief repositories of the law in Anglo-American countries.[2]

6. Further Proceedings for Review

If the appellate court to which an error proceeding has been taken is an intermediate court, error proceedings may again be taken from its judgment to a court still higher. Ordinarily this would be to a court of last resort. In most states and in the Federal Government the courts of last resort are known as supreme courts. In a few states, notably New York, the highest court is the Court of Appeals.

Error proceedings may also be taken from an intermediate Court which entertains an "appeal" in an equity case.

7. New Trials

The result of an error proceeding may be a final judgment or an order remanding the case to the court below for further proceedings according to the law as it has been laid down in the reviewing court. Where the proceeding below is a trial before a jury this is the usual order. There is no retrial of facts in an appellate court in law cases. Retrials are accomplished by new trials in the original court of first instance.

[1] The term, appeal, is used in various senses. In some jurisdictions it connotes a proceeding for the review of law as well as of fact. This is also the popular conception. Strictly, however, appeal is a retrial of the facts in a reviewing court and is to be distinguished from "proceedings in error" in which the law of the case is reviewed.

[2] Access to their contents is given to readers by digests and other "law-finding" books. The literature of the law is the best indexed literature there is.

Legal Evidence

In the preceding discussions of judicial procedure it has appeared that the work of formulating the issues and clearing the ground of extraneous matter is performed by the pleadings before the trial. The pleadings assert the existence of facts which if true, make a case or establish a defense. Their truth or falsity remain to be determined at the trial. The process of establishing the truth of assertions made in the pleadings is "proof." Proof is generated by "evidence."[1]

1. Evidence and Proof

Although the terms, *proof* and *evidence,* are often used synonymously it is well to keep them separate. Evidence is not proof; it is that which generates proof. Failure to observe the distinction has caused confusion in discussions of the "burden of proof."

2. The Burden of Proof

Trial practice proceeds upon the premise that "He who asserts must prove." It follows that the party who has the affirmative of the issue raised by the pleadings carries the burden of proof. Normally the party is the plaintiff. Often, however, by cross petition a defendant may assert a counter claim, denied by the plaintiff, as to which the defendant has the burden of proof. This burden, the burden of establishing the affirmative of the issue in question never changes; it continues to rest upon the party having such burden through out the trial.

There are, however, occasions of frequent occurrence when the burden of going forward with the evidence shifts. This shift is often spoken of as a shift in the burden of proof.

Such a shift in the burden of going forward with the evidence occurs whenever facts have been adduced which the law regards as sufficient to establish an allegation. Until disproved by further evidence the allegation stands as proved. For example, in a suit to collect on an insurance policy the pleadings will allege the death of the insured. No direct proof of his death, let us suppose, may be available, but evidence may be adduced to prove that he has not been seen or heard of, by those who naturally would hear of him, for seven years or more. From such evidence the law presumes that he is dead, *i.e.,* it draws an inference of death which dispenses with the necessity of further evidence. At this juncture the burden of going forward with the evidence shifts; the defendant must adduce evidence that the insured is alive or lose the point. If it does introduce such evidence the burden of going forward with the evidence again returns to the plaintiff. The burden of proof, however, has not shifted.[2]

3. Presumptions

Proving an allegation consists in presenting evidence which sustains a logical inference that the allegation is true.[3] There are, however, certain conclusions which the law permits to be drawn from certain facts without the presentation of sufficient evidence completely to support the conclusion as a matter of logic. Such conclusions or inferences are called "presumptions." They rest upon general human experience and may (generally) be rebutted by evidence

proving that in the particular instance the general experience is belied.

Presumptions may only be drawn from evidence. Proof of absence for seven years, *supra,* had to be made before the presumption of death could arise. It follows that presumptions may not be based upon presumptions.

Of the many presumptions recognized by the courts, a few examples follow: A person shown to be alive and well at a certain time will be presumed to continue alive for a reasonable time thereafter. A letter duly addressed, stamped and mailed will be presumed to have been delivered. In England (but not in the United States) women beyond a certain age are presumed incapable of bearing children. Officers in the regular discharge of their duties are presumed to have been duly elected or appointed.

4. Admissions

A party having the burden of proof may be relieved of the burden of producing evidence by the admissions of his opponent. Such admissions may be made in the pleadings[4] in open court at the trial, or at other times and places. In the latter case the fact of having made the admission must be proved by evidence, the same as any other fact. In certain instances admissions may be inferred from conduct as well as from speech or writing.

5. Judicial Notice

In addition to the foregoing there is another way in which certain facts may come to the attention of the court without proof by evidence, namely by "judicial notice."[5] Where such facts are in question the court, without proof, will take cognizance of them.

Such facts are those which form part of the common knowledge of all ordinary persons, such as the alternation of day and night, the succession of the seasons, the ordinary effects of heat and cold, the ordinary effects of intoxicating liquor, the legal standards of weight and measure, the values of domestic currency, the geographical boundaries of domestic territory, etc., etc. Judicial notice does not extend to such facts as usually require reference to dictionaries, encyclopedias, etc., nor to scientific works. Nor does it extend to facts which require proof by experts.

6. Common Knowledge

In addition to these means of bringing specific facts before a tribunal without the presentation of evidence, it should be remembered that both court and jury cannot help bringing to bear upon the issues of any case before them, the whole matrix of knowledge and experience with which they are equipped. The professional training of judges is trusted to restrict the utilization of such knowledge to proper purposes. jurors, however, under modern practice, are chosen from those who have no special knowledge of the facts in controversy.[6]

7. Kinds of Evidence

Evidence may be of various kinds. It may consist of oral testimony delivered in open court or in transcripts thereof when given in "deposition" form. It may consist of written documents or of tangible things. It may consist of the land, water, buildings, structures, or other outside objects of which the judge grants the jury a "view". It may be direct or "circumstantial."

8. Relevancy

In the establishment of proof by evidence, the first primary rule of law is that of relevancy; that is to say, the court will listen only to such facts as have a logical tendency to support the allegations in question. If no such logical inference can be drawn from them they will be excluded. Whether such logical inference can be drawn is a question for the judge. It does not follow, however, that a jury will draw the inference if the judge permits them to have the evidence.

9. Materiality

The second primary rule is that a fact offered in evidence, though logically relevant, must have a minimum of probative value or it will be excluded. To hear every fact which might conceivably have any logical bearing would in many cases protract a hearing indefinitely. The court, therefore, will listen only to facts which have weight or materiality sufficient to warrant the time and attention. This question of weight or probative value is, likewise, one for the judge; that is to say, the judge will determine whether the fact shall be heard at all. What weight the jury will give it, if admitted, is for them to determine.

10. Competency

In addition to the logical requirements of relevancy and materiality the courts have developed certain other rules regarding the admission of testimony or other evidence. These rules have developed largely, though not wholly, in response to judicial experience in the trial of cases to juries. They are chiefly rules of exclusion, and the technical learning of the law of evidence consists in great measure in the ramifications of these rules and the exceptions to them. They may roughly be described as rules of competency, such evidence only as complies with them being regarded by the law as competent to prove the allegations in issue. In the trial of cases to judges without juries

their rigor is often considerably relaxed.

(1) HEARSAY. The first of the rules of competency is that which forbids the reception of "hearsay." A witness may testify only to facts of which he has first-hand knowledge. He may not testify as to what he has learned from the statements of others nor may he testify as to what others have said or written. This rule obviously is not based on relevancy or materiality. In the ordinary experience of life such evidence is constantly acted upon. It rests chiefly, perhaps, upon the requirement of sworn testimony and the guaranty of the right of cross-examination. Statements made out of court by others, to the witness, are not made under oath. Nor is the person who made them subject to the testing and probing of cross-questioning which experience has shown to be of great importance in assuring full, accurate and truthful reports.

There are, however, a good many exceptions to the hearsay rule, as there are to all the rules of exclusion. In some instances the courts are practically compelled to accept hearsay because no better evidence is possible. Statements concerning one's own parentage furnish an example. Declarations "against interest," *i.e.,* declarations which tend to injure the declarant, are sometimes received on the theory that people will not often lie in order to harm themselves. Statements concerning matters of common or public interest are also frequently received.

(2) RES GESTAE. Statements made by others may be testified to if they are part of the *"res gestae."* Strictly, the *res gestae* include only those statements which form an intrinsic part of the incident reported upon, for example, an exclamation of recognition as one is shot by his assailant, or an order called by one member of a train crew to another just prior to a collision American courts have tended to enlarge the exception to include narrative statements made immediately or shortly after an occurrence, as one court expressed it, "while the dust is still in the air." This extension seems to depart from the reason upon which the exception rests.

Testimony as to what another person said is only excluded by the hearsay rule when such testimony is offered to prove the truth of the fact related. If the object of the testimony is to prove that a statement was made (regardless of its truth) or that a conversation took place, or that a certain subject was discussed, the rule does not apply. The fact of such statement or conversation is to be proved as any other fact.

(3) CHARACTER. Another rule of exclusion is that which forbids the reception of evidence of a person's character as a basis for an inference that he did or did not commit a particular act. This, again, is a type of inference which common experience often draws, but the Anglo-American courts have with some exceptions refused to permit it, especially in civil cases.[7] This refusal is grounded on the observation that particular conduct is too frequently at variance with one's general habits and traits to be reliably inferred from proof of them.

Of course, character itself may be an issue. Where the object of testimony is to prove character as a fact in itself, not as a basis for inference as to the commission of an act, the rule does not apply.

(4) RES INTER ALIOS ACTA. Somewhat akin to the "character" rule is that which prohibits the reception of evidence of acts or events similar to the acts or events in issue. This rule is known in the law as the rule of "res inter alios acta." The substance of this rule is that the mere fact that such other acts or events have occurred may not be made the basis for inference that the particular act or event in issue took place Such other acts may be those committed by others or by the person, himself, whose conduct is under scrutiny. Unless it can be shown that there is some logical relationship between the acts or events, such as that of cause and effect, the law rejects the evidence. Thus, evidence that other persons have met with similar accidents at the same place, or that, in other houses where gas collected in the drains, sickness occurred, has been held inadmissible. The reason for this rule is not so much that such evidence is irrelevant, as that its admittance would open up collateral issues in each instance which would drown out consideration of the issues in the principal case. Just what factors entered into each other accident, *supra,* or other sickness in each other house, would have to be probed.

Where, however, the act in issue and the one sought to be proved are shown to be in the same, regular and continuous course of dealing, the evidence may be allowed.

Where all essential conditions arc proved to be similar, evidence of similar occurrences may be admissible. Experiments under controlled conditions approximating those existing in the principal case are frequently admitted in evidence.

(5) OPINION EVIDENCE. Another rule of exclusion is that which forbids the reception of "opinion evidence." Opinions are species of inferences or conclusions, and as to the facts in is-

sue the formation of such conclusions is the function of court or jury. In most instances an opinion given would be based at least in part on facts not presented in evidence and therefore not subject to cross-examination. In any event the average person's logical processes are not so perfect as to warrant the reception of their results as competent evidence. The "lay" witness, therefore, is required to limit his testimony only to facts, leaving the drawing of inferences from them to the court or jury.

There are, however, a good many exceptions to this rule. In the first place, it can never be more than approximated. No exact line between fact and opinion can be drawn. The everyday processes of perception and classification by which the mind apprehends "facts" are in their essence the formation of conclusions. But a rough and ready distinction between fact and opinion is readily made by common sense, and this distinction is that which the law requires. The decision in each case is for the judge.

Then, too, there are certain matters about which the assembling of probative facts is difficult. In a will contest, for example, the question may be whether the testator was of sound mind. To arrive at a valid conclusion upon this point may require the assembling of a vast number of little facts of conduct, each in relation to the others. Persons close to the deceased may not be able to recall an adequate number of such facts or to state them adequately; and yet they may honestly agree that the subject was abnormal. The law accordingly permits such observer to express the opinion: "sane'' or insane.

11. Experts

The chief exception to the rule against opinion evidence is that which permits testimony as to the opinion of "experts." One who by education, training, or long familiarity can be "qualified" as an expert may be permitted to state his opinion as to a fact in issue within the range of his particular competency. To "qualify" he must be shown to possess the knowledge, training, experience or other qualities requisite to the standing of an expert. And upon cross-examination the fact basis of his opinion may be fully explored. What, if any, weight may be attached to his opinion, when given, is, of course, for the court or jury.

The reason for relaxing the rule in favor of expert testimony is a practical one. Many facts have bearings which only scientific, artistic or technical competency can apprehend, and in these cases the judge or jury may be wholly unqualified to draw the proper inferences. The expert, therefore, is permitted to *help them think.* The significance of powder burns as to the firing of a gun, of the condition of the body as to the fact of death by drowning—upon multitudes of such questions the opinion of the expert is deemed admissible.

Few rules of the law are more frequently decried by the public than that regarding expert testimony. Its liability to abuse is obvious. The value of such testimony depends upon (a) the competency of the witness and (b) his honesty and candor. The latter, especially, is difficult to assure. Yet to dispense with expert testimony would entail serious consequences. Experts called by the court rather than by the Parties would, perhaps, yield better results.

12. Real Evidence

The exhibition in court of tangible things is one of the permissible methods of generating proof. Such things are sometimes spoken of as "real evidence," real being used in the generic sense of pertaining to a thing.

The permission to make such exhibitions of things in court is said to be in the sound discretion of the judge, although the satisfactory nature of this evidence under proper conditions renders refusal unlikely unless special reason is shown.

Before such evidence may be introduced, the thing of course must be properly identified as that with which the case is concerned, or, in some cases, as a faithful representation of it. Casts or moulds may in proper cases be shown.

The exhibition may consist of a human body or some part of it. An injured member, for the injury of which the action is pending, is often shown to the jury. Where such exhibition may tend unduly to excite the passion or prejudice of the jury, however, permission to make the exhibition may be refused.

The fatal bullet or the lethal weapon is often exhibited in criminal trials.

13. Best Evidence

A rule universally acknowledged is that the evidence offered to prove a fact in issue must be the "best evidence which the nature of the case permits." "Best" means "primary," in the sense of original as distinguished from substituted. Secondary evidence is that which shows on its face that there is a more direct or original means of proof.

The best evidence rule is now generally held to apply only to documents. Parol (oral) evidence of a fact which might be proved by the exhibition of some tangible thing is not, for

that reason, secondary. The production of the thing is generally not mandatory.

Where the best evidence of a fact, however, is a document, the

fact can be proved by no other means unless the failure to produce the document is satisfactorily accounted for, which, in general, means proving that it cannot with reasonable diligence be produced. The reason for this rule is that failure to produce the best evidence raises an inference that the best evidence, if produced, would not substantiate the fact, or that the best evidence has been tampered with or destroyed.

The mere circumstance that a fact could be proved by a writing does not necessarily mean that the writing is the best evidence. A letter, for example, reciting a certain fact may be of no higher degree than any oral narrative; in such case the oral is of the same grade as the written evidence.

In general the best evidence of the existence and terms of a written contract is the writing itself. The same rule applies to wills, letters, telegrams, bonds and written notices. Original books of account are the best evidence of the transactions represented therein.

Instruments of transfer, such as deeds, bills of sale, mortgages, and the like, are the best evidence wherever title is in issue.

Foreign law[8] if reduced to statutory form must in the United States be proved by the production of a properly authenticated copy thereof. In England it appears that such law may be proved by parol evidence the same as unwritten law may be proved.

Copies as distinguished from original documents are secondary evidence and may only be produced after satisfactory accounting for failure to produce the original. There may, of course, be more than one "original," each of equal degree, as for example when duplicate "copies" of a contract are made and executed.

[1] It has already been pointed out that those facts only may be proved Which are alleged in the pleadings. Under the more liberal modern practice, a trial court will sometimes permit evidence to be given and then permit the pleadings to be amended to conform to it. Unless a reviewing court finds, however, that the evidence and the pleadings do conform, the non-conforming evidence will be disregarded.

[2] There is disagreement among courts and writers on this point, but the text is believed to represent the better view.

[3] This inference, of course, has to be drawn by the court or jury.

[4] See pleas in confession and coordinance, *supra.*

[5] The court, of course, takes judicial notice of the law of its jurisdiction Officially the judge knows all the law by which he is bound. If through briefs or argument counsel present to him citations and authorities it is but to jog his recollection. He does not, however, officially know foreign law. Where such law becomes material in a trial it has to be proved *as* matter of fact by proper evidence.

[6] In its earliest days the jury was chosen from men in the neighborhood *because* they had knowledge of the facts in controversy.

[7] In criminal cases the inference is sometimes indulged.

[8] As elsewhere stated, foreign law is not judicially noticed but must be proved as a fact by evidence.

Part VI

The Law of Public Contracts

The Nature of Government Contracts

A modern state may aptly be said to have multiple personality. On the one hand, it behaves like a sovereign ruler: it protects its people from enemies, it keeps order, it administers justice, it prescribes duties and tries to see that they are fulfilled. On the other hand, it behaves like a private person: it buys and sells, it owns, it builds, it manages, it supplies goods and services. In recent times this personal or *"fiscal"* side of the state's nature has been enormously expanded; the state has assumed the role of public service corporation in addition to that of ruler.

In carrying out these business functions a state frequently enters into contacts. Sometimes these contracts are made on behalf of the entire state; sometimes they are made by, and bind only, certain political subdivisions of the state. In either event it is the state itself which authorizes the contract and gives it validity.

In this country the contracting body may be the United States of America or some unit of government subject to Federal control, or it may be a state, a county, a city, a town ship, or some other political subdivision of a state.[1]

1. Public and Private Contracts Contrasted

Although a state in entering into contracts behaves for the most part as if it were a private person, still the separation of its personalities is never quite complete and the ruler personality lurks often in the background to modify the import of its contracts.

It is accepted legal doctrine that "the government" may contract precisely as may any private person, but in reality the legal situation created by the agreement of a state is considerably different from that created by the agreement of a non-sovereign person. "A contract," says Sir Frederick Pollock, "consists in an actionable promise or promises."[2] A promise is "actionable" if the promisee, through an action at law, can invoke the power of the state to compel the promisor to fulfill his agreement or pay damages for failure. This state sanction is an indispensable element. Without it, the parties to an agreement must rely upon each other's good faith or upon such extra-legal pressures as they may be able to bring to bear. Without it, the agreement is legally not a contract. But while all private persons subject to a state s jurisdiction may be compelled to observe their contractual duties, the state itself is obviously under no such external compulsion. Without its express consent it may not even be sued. So long as it remains "sovereign" it acknowledges no power competent to coerce it; if it performs its contractual promises, therefore, it does so because it wills to, not because it must, although, of course, frequent or persistent failure to perform will work their effects upon future attempts to contract.

The state's will to be bound by its agreements must be expressed in law. Such expression must cover the process of making agreements to which legal effect will be accorded and the process of securing compliance with these agreements after they have been made. But between the time an agreement is made and the time it is to be carried

out the law may change. There are no means by which earlier law makers can fetter the powers of their successors. If the state which owes the obligation sees fit by law to alter the terms of its performance, there is no legal way to prevent it.[3] Instances of such changing of the terms of performance are not rare. Manipulation of the values of money frequently provides the means.

As a practical matter, it must be observed, the failure of states to perform agreements as they are made is not common except in the cases of long time contracts, *e.g.*, of bond issues. And, it must also be observed, the record of private contractors in the performance of long time obligations is likewise far from perfect. Default on short time promises either by private contractors or by states is comparatively rare.

Changes in the law affecting the performance of private contracts, furthermore, are almost as frequent as changes in the law affecting public contracts. Moratoria, exemptions from execution, and similar remedial changes, are not barred by constitutional prohibitions against impairing the obligations of contracts.

While, therefore, it must be said that the legal situation of contracting states is somewhat different from that of contracting private persons, still the ordinary net result is not greatly different. The state's will to bind itself is, in general, about as good a sanction as the state's will to bind others to their agreements.

2. Peculiarities of Government Contracts

To the extent that states bind themselves by their agreements, they assume the status of private persons divested of sovereign authority. Such peculiarities as attend the process of becoming bound, grow out of the fact that states can act only through representatives and that the public interests represented are deemed paramount to all private interests. These peculiarities concern, chiefly, the evidence and extent of authority of contracting officers and the requirement of the utmost good faith on the part of those who deal with and for the state. The principles underlying these manifestations of peculiarity apply also to private contracts but are less rigidly adhered to in the private field.

3. Quasi-contracts and Implied Contracts

While states generally acknowledge liability arising out of contracts, they generally deny liability arising out of torts.[4] The law recognizes a third category of obligation midway between tort and contract which has acquired the name of quasi-contract because, for purposes of affording remedy situations which lack the elements of contract are treated as if (qua-si) real contracts existed. The obligations arising out of such situations are sometimes referred to as contracts implied in law to distinguish them from contracts implied in fact, which are real contracts made without the use of express language. Subject to restrictions to be noted later, contracts implied in fact will be recognized by states; the difficulties are difficulties of proof. But contracts implied in law for the reasons expressed elsewhere[5] are less readily acknowledged.

4. Special Statutory Requirements

The making of government contracts by public officers is more completely hedged about by statutory requirements and restrictions than is the making of most private contracts. Especially is this true in the making of contracts of purchase, which comprise the bulk of government contracts. Among the more important of such requirements are the following: requirements as to the taking of bids, their form, contents, method of opening, etc.; as to advertisement for such bids, and the waiver of this requirement upon occasion; the banning of bids on the part of relatives and other close associates of government officers; the allowance of preferences to local as distinguished from out-of-state bidders; the use of goods made in penal and other public institutions; the standards of financial ability and general capacity on the part of contractors; the wages and other labor standards in the making of goods bought by the state; and the inspection of goods purchased before payment may be made.

[1] It is common to speak of state contracts as being made by governments, and in the sense that they are effected through the agency of governments this usage is not incorrect. It is well, however, to keep in mind that the government which effects the contract is only the agency and that the real contracting party is the state.

[2] Pollock on Contracts, 8.

[3] Political or international pressures are not within the scope of the present consideration.

[4] See Administrative Regulation: Relief.

[5] Same reference as last preceding note.

Requisites of Validity in Government Contracts

In the main, the requirements which an agreement must meet before the law will accord it the status of a contract, are the same in public and in private pacts. In the one, as in the other, there must be competent parties, meeting of the minds, lawful object, consideration—in short, all of the ordinary elements required by contract law. In spelling out each of these elements, however, special emphasis is laid upon particular matters in government contracting, which require particular mention.

1. Capacity to Contract

The United States and each of the several states have capacity to contract irrespective of special constitutional authority. Such capacity is inferred from the mere fact of statehood. Constitutional inhibitions may, however, limit the exercise of this capacity in particular ways. Minor governmental units, both state and Federal, have such capacity to contract as is delegated to them by law. Cities commonly have capacity to contract over a wide range of subjects. Other units have capacity according to their requirements. Contract is regarded as one of the means by which states may accomplish the object of their creation. But a state can enter into contractual relations only in pursuance of authority conferred by law.

2. Authority to Contract

Only such persons as are authorized by law to do so can represent the state in the making of contracts. Attempts to bind the state by agreements entered into by unauthorized persons are null. The power to bind the state, furthermore is strictly construed, the authority of any particular person being limited to such terms and subject matter as are inferable from the statute conferring it. Authority to contract may be conferred upon individuals, boards, or other bodies of multiple membership, and corporations entrusted with governmental powers. The fact that the state confers authority to contract does not mean, however, that the entire state and all its resources are necessarily bound by every contract made by its representatives. Most of such contracts bind only the particular units of government in whose behalf they are made.

Contracts attempted by persons lacking authority may in general be ratified by a state through its proper officers, and when ratified have the same effect as though they were originally valid.

Contracts made by persons duly authorized are contracts of the state and not of the officers. Such contracts may extend beyond the terms of the officer's incumbency.

An officer otherwise authorized to bind the state by contract may lose his authority as to a particular contract by reason of personal interest or other circumstances which render it improper for him to represent the state.

Those who make contracts with governmental bodies are presumed to know the extent of the authority of persons who purport to represent them. No such person can augment his authority by his own representations. The state is not liable for losses incurred through trusting unauthorized representations, however innocently made, although such person might thereby incur a personal liability to the party injured.

Where the approval of a superior officer is required before a contract entered into by an inferior one becomes binding, no contract results until such superior's approval is signified in the manner required by law.

3. Form of Contract

Wherever writing or any other matters of form are prescribed by law, compliance with such prescription is essential to the validity of a government contract. The form is often one of the safeguards of the public interest relied upon by the state, and the agreement does not become a binding contract unless the requirement is met. This is one of the most important points to be observed by those entering into business relationships with governments. The state's obligation upon a contract can only be obtained by the compliance with all formal requirements. Assurances and representations by officers, even though authorized to contract, are of no avail to bind the state unless the required procedure is followed. Defectively executed contracts are null. Means may be found through quasi-contractual obligation or otherwise to secure compensation for benefits mistakenly conferred upon a state in reliance upon such a defective contract, but such compensation can generally be obtained only with difficulty.

In the absence of legal specification as to form, the state Will be bound whenever the elements of a contract can be established, just as a private person would be. In such cases a contract may be proved by oral testimony, by separate Writings, even by acts without words, provided the intent to contract can be deduced from them.

4. Consideration

The element of consideration plays the same part in government contracts as it does in private contracts. The breach by a government of a contract by which it is bound has been held sufficient consideration for the execution of a supplemental agreement growing out of the same subject matter. The adjustment of thousands of contracts terminated by the United States at the conclusion of hostilities in the World War was effected by the use of this principle.

5. Appropriation of Funds

A requisite of validity often overlooked by those who deal with governments is the common statutory requirement that no contract for the payment of money can be entered into unless the funds have been appropriated. In some cases the law goes farther and requires that the funds shall have been collected and in the treasury.

It has been held, however, that a contract for the continuation of certain work when the money should subsequently be appropriated was valid. One who by contract undertakes an entire work for which a distinct appropriation is made is bound to ascertain the status of the appropriation. But one who undertakes some minor portion of a project for which a general appropriation is made, is not bound to know the status of the appropriation account.

Interpretation of Government Contracts

From the proposition that a state, when it contracts, puts itself upon a plane of legal equality with the other contracting party, it follows that the ordinary rules of construction, developed in the field of private contract, apply to government agreements, with such adaptations only as grow out of the situations covered. The primary purpose of construction is to ascertain the intent of the parties as embodied in the contract. To ascertain this intent, the language, its purpose, the surrounding circumstances and those leading up to the making of the contract may all be looked to in their proper relationships. Language will be construed most strictly against the party using it; written provisions will prevail over oral understanding; hand or typewritten provisions over printed ones; specific language will prevail over general language.

1. Incorporation

Preliminary writings may be incorporated by reference into the final draft of a contract unless some specific legal rule prevents it. Contracts of purchase made upon receipt of bids which are based upon circulars or other papers inviting proposals, are to be regarded as embodying all the relevant documents which make up the complete record of the transaction.

2. Construction by Parties

Where the terms of a contract are ambiguous, it has been held that the parties may adopt such construction as they expressly or tacitly agree upon, and after one of them has acted upon that construction to his disadvantage the other can not set it aside. It becomes part of the contract, in reality a new agreement as binding as the original. The difficulties of proof may, of course, be considerable, and other applicable rules relating to modification of contract provisions must be observed.

3. Clerical Errors

Obvious clerical errors in the terms of a contract, such as mistakes in totals where unit prices are given, are not binding upon the parties.

4. Patent Ambiguities

If, in essential provisions, there is irreconcilable conflict between the several terms of a contract or between the final contract form and the specifications, the whole will be held void for uncertainty. Patent ambiguities can not be resolved by parol evidence. A latent ambiguity may, however, be cleared up by oral testimony or explanatory documents.

5. Quantities and Amounts

Definite quantities specified in a contract, of course, control. But a contract to furnish such quantities as are "required" has been construed to mean such quantities as are needed by the government for the purpose indicated during the time specified.

6. "Cost Plus" Contracts

In times of war or other disturbance of economic conditions affecting price levels, the device of "cost plus" contracts has been extensively employed. In its simplest form the device consists of provision for delivery price made

up of costs to the supplier plus a percentage of profit based upon the cost total. Where the elements of cost are specified in the contract, such specifications must prevail, but in the absence of such provisions, ordinary cost accounting practice will be followed. Proper traveling and transportation expenses, and accounting and other professional costs incidental to the accomplishment of the work are allowable. Attorney's fees incurred in litigation, not part of the performance of the contract, will not, however, be allowed. The principle of good faith on the part of those dealing with governments requires the contractor in cost plus contracts to keep the costs as low as is reasonably possible.

7. Extra Work

In government as in other construction contracts the matter of extra work presents difficulties. The first problem is to ascertain just what work is properly included in the terms of the contract itself. For what is covered, including necessary preparatory measures and those incident to removal of equipment and other "clean up" operations, there can be no extra allowance. The contractor, moreover, is bound to know the terms of his contract and can not be paid for work or materials furnished inadvertently or in mistaken reliance upon its terms. But if work not called for by the contract is performed in pursuance of orders or instructions given by an authorized person, compensation will generally be allowed. Changes in plans after the contract is made, delays caused by the government, etc., will provide a basis for extra compensation if the contractor is put to additional expense thereby.

8. Interest

It is a statutory rule of the United States government that it pays no interest on claims against it prior to judgment. Hence, interest on borrowed money generally can not be included in the items of extra compensation. This rule is not unusual among states and local governments.

9. Maps, Plans, etc.

If maps, plans or informational data basic to the conduct of the work are furnished by the government, extra expense occasioned to the contractor by errors or important omissions may lay the foundation for extra compensation.

Termination, Modification & Assignment of Government Contracts

1. Mistake, Fraud and Duress

The ordinary rules and doctrines of contract law regarding the effects of mistake, fraud, duress, undue influence, etc., apply in general to government contracts as well as to private contracts. By ordinary rules, in case of mistake preventing a meeting of the minds either party may refuse performance and, if sued, may set up the invalidity of the contract as a defense or may seek the aid of equity to have the purported agreement set aside. Where a real assent has been given by the parties but such assent on the part of one has been obtained through fraud, duress, or undue influence, such party may at his option treat the contract as void or valid and take steps in accordance with such election. If he treats it as void he may refuse performance and resist suit by the other party, or sue for damages in deceit, or sue to recover what he has parted with.

If one party is a government, however, it would ordinarily not be subject to an action in deceit, which is a tort. The officer who was guilty of the fraud or other deception might be subject to a personal suit for damages.

Rescission by the government for fraud can only be accomplished by an officer authorized to take such action.

2. Cancellation of Contracts by Consent

By mutual consent, contracts validly made may be cancelled or set aside, but such action on the part of a government can only be taken by a properly authorized officer and then is subject to such restrictions as may be imposed by statute.

3. Modification of Contracts

Subject to statutory restrictions, government contracts may be modified by the mutual consent of both parties, just as may private contracts. The requirements of bids, and the specifications as to form surrounding most government contracts often raise nice questions as to changes in their terms. To permit modification after the contract is entered into may in effect result in discrimination against other bidders who were bound by the original specifications. This consideration is generally outweighed, however, by the interests of the government in being able to effect necessary changes as the work proceeds. It is accordingly held in regard to the United States and many other governments that modifications in the interests of the government may be made. No modifications not in the interest of the government can be made. Not infrequently, original contracts contain clauses regulating modification. Unless forbidden by law, modifications of written contracts may be effected by oral agreement.

Modifications can be assented to only by authorized persons, and in many governments only by heads of departments. To permit engineers in charge or others of subordinate rank to agree to modifications would forfeit many of the safeguards which the law throws about the public interest.

The mutual promises of the parties are sufficient consideration to support an agreement of modification.

4. Modification before Execution

Whether an unexecuted contract partially performed can be made the subject of a modification agreement is a subject which has occasioned much dispute. Logically there seems no good reason why it may not. Under a ruling by the Comptroller General of the United States at the close of the Great War, however, it was held that there could be no supplemental agreement unless there were first a valid and existing contract. Congress therefore passed a special statute to permit equitable settlement of thousands of war contracts which were being performed at the Armistice, although the formal papers had not yet been signed. Without such statute the private parties to such contracts would have been left to pursue doubtful remedies in quasi-contract for benefits conferred without compensation.

5. Assignment of Contracts

In the absence of statutory prohibition, government contracts may be assigned. But the fact that the right of assignment tended to result in collusive bidding led Congress to enact a law forbidding the assignment of contracts with the United States. The assignment of a contract, whether by formal written agreement or otherwise, worked an annulment of the contract itself unless, through its proper officers, the Government saw fit to treat the contract as still subsisting. It has been held also that the Government may, if it chooses consent in advance to an assignment.

Assignment under this statute means assignment of the entire agreement, not of the mere right to receive payment; such an assignment is allowable.

Corporate reorganization which takes the form of transferring contracts and assets to a different company has been held not to constitute an assignment under this statute if the substance of the transaction is merely to change the legal entity and to continue the same business.

Changing partners in a firm which holds a government contract is not an assignment, although technically the new partnership is a different entity from the old.

Banking arrangements for securing capital to carry on the work are not assignments.

Performance & Breach of Government Contracts

Agreements to which the law gives the character of contracts impose burdens and obligations upon the parties to them. This tie or binding obligation may be discharged by mutual agreement; by performance of the obligations imposed by the agreement; sometimes, but not always, by one party's breach of the obligations imposed; by impossibility of performance; or by operation of law. In general, these means of discharge operate on government agreements as well as upon private ones. Certain peculiarities, however, should be noticed.

Mutual agreement as a means of discharging a contract has already been noticed. Discharge by operation of law, *i.e.,* by bankruptcy, by intentional alteration, or by merger of the agreement into another of higher order, presents few if any variations from the rules of private contract law. It remains, therefore, to consider the matters of performance and breach.

1. Sub-contracts

A contract may be performed completely by the contractor or through sub-contractors to whom he lets parts or all of the work. The rule against assignment is not broken by letting sub-contracts so long as the contractor remains responsible for the character of the work. Indeed, the contractor can not by sub-contract relieve himself of this responsibility

unless the government by provision in its contract agrees to such result. In general, so long as the original contractor sees to it that the specifications of the contract are fulfilled, it is immaterial to the government by whose hand the result is actually brought about. To this rule exceptions must be noted, however, in cases where the personal character of the work renders performance by the contractor himself of importance. In the case of military supply work or other service where confidential dealings are essential, sub-contracting may not be permitted.

2. Supervision by Officers

In many government contracts the work is to be performed under the direction of and to the satisfaction of a designated board or officer. This provision vests in the board or officer a measure of discretion by which the contractor must abide. The limits of this discretion are marked by the terms of the contract, by usage and custom, and at times by administrative ruling or by law. As elsewhere, the concept of discretion also embodies the elements of fairness and good faith. Corrupt, arbitrary or wholly unreasonable action is not within the permissible limits. Gross mistake—as in measurements—may constitute a breach of discretion.

3. Time as an Element in Performance

Time is often one of the important elements in government contracting, both to the contractor and to the government. Where by its own act—through proper officers—the government has made it impossible for the contractor to perform within the time limits, such limits are deemed waived. If such action on the government's part results in additional expense or loss of profits to the contractor, damages may be awarded him by the courts. It has been ruled by the Comptroller General of the United States, however, that the time between the original letting and the necessary approval of a contract by a superior officer may not be added to the number of days limited in the contract. The time begins to run when the contract is let. The legality of this ruling seems questionable.

4. Waiver

Conditions of a contract may be waived either expressly or impliedly in much the same way as private contract law provides.

5. Anticipatory Breach

Failure to perform the terms of a contract may be excused by

the action of the other party in indicating in advance a refusal to accept performance. But such refusal on the part of a government officer should be definite and, generally, in writing before it is acted upon by a contractor. An expression of opinion that the material or work will not be required, even though strong and positive, has been held not to relieve a contractor from delivery at a later time. A successor in authority may entertain different views as to the need for performance.

6. Change in Law

Performance by governments is generally controlled by the same rules as those controlling performance by contractors. Where, however, a change in the law affects its performance the government is generally not liable as for breach of con tract. On the other hand, changes made by the exercise of sovereign power, either by law or by administrative order, which affect the capacity of the contractor to perform, do not render the government liable for damages. Thus, embargoes laid upon shipping, or regulations of interstate commerce, or provisions of the Legal Tender Act which interfere with the performance of the contract, will not lay the foundation for damage claims or suits.

7. Implied Conditions

Appropriate legislation may be made an implied, if not an express, provision of all government contracts within its scope. A good example is the Walsh-Healey Act,[1] which requires compliance with certain wage, hour and other labor standards on the part of contractors who supply goods to the Federal Government. With certain exemptions—contracts in amounts up to $10,000 constitute the principal one—this statute applies to all suppliers. It appears, however, not to apply to the suppliers of suppliers, nor to those who transport such goods as common carriers. Attempts to carry the regulation of such laws behind the immediate contracting party usually fail because of the extent and complexity of the production process. The substance embodied in a given article of supply may have to be traced back through many hands before it appears as raw material in the original mine, forest or field.

8. Tender of Performance

In order to lay the foundation for recovery in court, tender of performance is sometimes necessary. Where the government has by unequivocal language indicated a refusal to accept or has put itself or the contractor in a position rendering performance impossible, tender is not necessary although it may as a strategic measure be advisable. In general, however, where claims for payment or for damages are to be asserted in the absence of full performance, a showing of ability, readiness, and willingness to perform as per contract is essential.

9. Interest

With the exception of interest charges accruing up to the time of judgment, the Federal Government is liable for damages for breach of contract according to the usual rules of contract law. Not all governments have this rule concerning interest.

10. Government As Ward

The requirement of utmost good faith imposed upon those who deal either with or for governments sometimes results in placing a government in a legal situation resembling that of a trustee's ward. Acts which might otherwise be considered breaches of contract are sometimes condoned by the Courts because of this principle.

11. Impossibility of Performance

Where performance is rendered impossible by reason of the destruction of the subject matter or of any of the other causes recognized by the ordinary law of Contracts, the contractor is excused. But the mere fact that the thing contracted for becomes impossible by reason of labor trouble or scarcity of materials or transportation difficulties, though beyond the contractor's control, does not in general excuse him. If through legislation or other exercise of sovereign power, however, the government has put performance beyond the legal capacity of the contractor, he will be excused from performance.

12. Acts of God

Acts of God in the true sense, i.e., those manifestations of Nature which can not reasonably be foreseen and provided against, are excuses from performance. Mere natural phenomena, however, unless provided against in the contract are not ordinarily grounds for non-performance.

13. Re-letting

By current usage in the drafting of contracts and by the provisions of the ordinary law, the usual rules concerning the taking over and re-letting of work abandoned by a contractor are applied to government contracts. They will not be repeated here. Failure to perform without intentional abandonment may work the same results. Considerable discretion is allowed government officers in determining when abandonment or failure have occurred, but the discretion must be reasonable and honest.

[1] 41 U. S. C. 35 (1936).

Part VII

The Law of International Relations

Part VII, Chapter I

General Consideration of International Law

In the opening chapter law was defined as the body of rules, principles and standards, regulating human conduct, which are recognized and enforced by courts, but it was pointed out that there is a difference of opinion among legal scholars as to the precise nature of the body of rules, principles and standards purporting to regulate the conduct of states. Some writers refuse to recognize this body of doctrine as law in the sense in which they have defined municipal law. Others insist that it meets every necessary test. The author's view was there expressed, that in so far as these rules, principles and standards are adopted into the jurisprudence of any particular state they become parts of its law on a parity with the other parts,[1] but that the general floating body of doctrine usually referred to as international law is more accurately described as a system of laws, analogous to *the* Common Law of which each of the states of the Union has adopted its own version. This international system of laws in itself seems to be of persuasive rather than of binding authority. There is much Voluntary conformity to it. It often serves, in detail, as a model for the development of law in particular states. It is, moreover, frequently invoked by states in their negotiations with each other and, where so invoked, its tenets are often made the basis of agreement or settlement. By treaty or agreement, also, it may be adopted by two or more states for purposes of arbitration or adjudication. Adherents to the World Court abide by decisions which are often based upon provisions of this general body of "law." But this general, floating body of doctrine can hardly be said to be the expression of any corporate will and for the most part lacks the element of sanction. As law, therefore, it stands in a somewhat different category than does Municipal Law.[2]

For purposes of the present discussion it seems unnecessary to pursue the Point farther. Whatever the precise theoretical nature of international- law, it has a large and growing practical importance. We shall in these pages try simply to set forth the outlines of its more salient phases.

1. Origin and Development

International Law is sometimes said to have begun with Hugo Grotius (1583—1645), but while his writings, together with those of a line of others who followed him, did much to organize and disseminate this body of doctrine, its origins lie far behind the earliest records. The greatest single source of modern international law was the Roman law from which Grotius and the other writers drew heavily. But no body of law springs full grown into existence, and behind the Roman Law were the Grecian, the Egyptian, the Babylonian and doubtless many other bodies of law which contributed to the swelling stream.

Great impetus was given to the formulation of modern international law by the rise of nationalism consequent upon the breakdown of the universal authority of the Church. Prior to this breakdown the Church was the binding force in Christendom and the keynote of all early medieval Philosophy was the bolstering of its authority against the disintegrating forces of paganism and temporal rule. During all this period the Church stood ready to perform the functions of mediation and negotiation which international intercourse required and, in this performance, to apply the Principles which had developed in its experience through the centuries. Many of those principles, of course, Were adopted from the Roman Law and other sources.

With the dissolution of this central authority came a need for something to take its place, and this need inspired the labors of Grotius and his successors. The

great names in this line are those of Grotius, Pufendorf (1632-97), Leibnitz (1646-1716), Bynkershoek (1673-1743), Christian de Wolff (1679-1754), and Vattel. Of these undoubtedly the greatest is that of Grotius, for to him fell the task of shaping and organizing a body of theory for which an urgent need was beginning to be felt by all of Europe. It is doubtful if any fundamental conception has been added to that theory since. His great work, *De Jure Belli ac Pacis* (1625), is a landmark in the field. Pufendorf sought to put an ethical basis beneath the theory. Leibnitz, a scientist, felt the danger of grounding so vital a doctrine upon purely theoretical conceptions, and turned to the actual practices of international intercourse and diplomacy for the materials of study. Bynkershoek was both a scholar and a jurist. He brought to the subject a great experience as lawyer and judge. Wolff was a philosopher as well as a lawyer and performed a great work in restating the entire subject in the light of the more accurate sources of information which had been developed since the time of Grotius. But his work was written in Latin at a time when classical scholarship was less esteemed than formerly; consequently it remained for Vattel to popularize his labor.

In the further development of international law the writings of these men have acquired a standing akin to that of Coke and Littleton in the development of the common

law, a standing of authority more or less independent of the sources from which they drew. Others have continued to write and their writings have greatly contributed to further progress, but their works are those of commentators rather than of law makers.

2. Sources

Among the sources of international law, other than the writings of publicists, are treaties, international usage and custom, and the decisions of tribunals, dealing with international questions. To be strictly accurate perhaps decisions should not be rated sources but authoritative means of formulating doctrines.

3. Enactment and Codification

A number of efforts to enact or codify its salient principles have contributed to the development of international law. Of these the most important were the Hague Conferences which dealt with the usages of war on land and water and with the *modus operandi* of peaceful settlement. From them resulted the establishment of the Hague Court of Arbitration and the International Prize Court of Appeal.

Since the authority of international law rests largely upon the voluntary acceptance of its tenets by the states concerned, those engaged in its formulation have naturally turned for inspiration and support wherever they could to recognized doctrine. Its principles have been sought in the *jus gentium,* in natural law, in the teachings of ethics and philosophy. As a development of European civilization, its underlying assumptions were those of the Christian religion. But the defection of Russia from Christianity and the entrance of non-Christian countries, such as Turkey and Japan, into the councils of international intercourse have necessitated the search for a newer and wider base.

4. Fundamental Postulates

At bottom international law rests upon a few fundamental postulates. Among the most important are these:

- The supreme power of each state within its own borders.
- Each state's dependence on every other state.
- Each state's equality with every other state.
- The freedom of the high seas.

[1] "The law of nations (whenever any question arises which is properly the object of its jurisdiction) is here [in England] adopted in its full extent by the common law, and is held to be a part of the law of the land." (4 Blackstone Comm., p. 67.) "The law of nations is part of the municipal law of Great Britain." (Ware v. Hylton, 3 Dall. [U. S.] 199, 228 [1796].) "International law so far as this court is concerned [Scotland] is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of Scotland." (Mortensen v. Peters, 8 F. [Just. Cases] 93.) "The court [U. S.] is bound by the law of nations which is part of the law of the land." (Marshall, J., in *The Nereide, 9* Cranch, 388, 423 *[1815].)* "Congress shall have power . . . to define and punish ... offences against the law of nations." United States Constitution, Article I, Sections 8 - 10. It must be noted however, that different states are not in complete agreement as to what are the provisions of the law of nations.

[2] The courts of every state, in considering causes of international import, reach their conclusions as to what the particular rule or principle or standard is before they apply it in the decision of a case. Whether it be believed that these courts are bound only by such parts of the general body of doctrine as have been adopted by their respective states, or that they are bound by international law in general but exercise their own judgment as to the content of each separate provision, the result in most cases is not very different.

States and Governments

A state has already been defined as a society organized for political purposes. It is deemed to have a corporate will distinguishable from the wills of its members. Internally, if it possess full statehood, its will is supreme. Externally, it repudiates the supremacy of any other will and stands upon a plane of legal equality with every other state.

1. Sovereignty

Supreme will connotes supreme power; supreme power connotes sovereignty. Sovereignty is variously defined but perhaps as cogent a definition as any is that given by Justice Story: "the supreme absolute uncontrollable power, the just *summi imperii*, the absolute right to govern."[1]

Supreme power and absolute right to govern can obviously pertain only to internal affairs, for the recognition of autonomy in other states negates the idea of such omnipotence beyond domestic boundaries. Other states nevertheless may be concerned with the manifestations of this internal power and right as they affect such states themselves or their nationals. Sovereignty has, in consequence been sometimes said to be of two kinds, internal and external. This seems less accurate than that sovereignty has its internal and external aspects.[2]

To constitute a full fledged state, a political society must have unity. In its external aspects this unity must be complete. In its internal aspects it may vary in degree In its dealings with other states there can be but one will, one voice. But in respect of its own domain and the exercise of people its sovereign powers may be parceled out among different authorities. Thus, to the outside world the United States of America is a single sovereign state. Foreign states deal with it alone. It is responsible for, though it may not be able to control, the conduct of all of its constituent members. But within its borders the powers of sovereignty are divided between the Federal Government and the States. The sovereignty however is single and this division could by constitutional changes be revised. The powers of sovereignty may reside in a single person, as in the case of an absolute monarch, or in a limited group, or groups of persons, or in the entire people composing a political society. The unity necessary to the existence of a state may arise from the creation of a single political society or from the union of several such societies. Internally the exercise of the powers of sovereignty may be divided between these societies. Externally the union must be so complete that one will directs and one voice speaks for all.

2. Status in International Law

Only full fledged states are regarded in international law as having complete legal status in the family of nations. There are, however, political societies, possessing less than the full complement of attributes necessary to statehood, which are given recognition for certain purposes. Thus a confederation or other alliance of political societies may lack either the external or the internal unity necessary for statehood and yet be accorded a limited legal status in international relations. Neutralized states, protectorates and, perhaps, oth-

ers lacking full legal freedom of action, are given limited status. Even groups which can not be called states in any legitimate sense may be accorded rights and held to obligations; of these, "belligerents" is a good example.[3]

3. Statehood and Territory

State sovereignty as conceived in modern times implies a definite territory. Whether the possession of such territory is indispensable to statehood is a question upon which there is not universal agreement, but many writers affirm the necessity. A nomadic tribe moving about in an area not within the boundaries of any other state might, perhaps, for most purposes be regarded as a state. But at the present time it is doubtful whether any such group would be accorded membership in the family of nations.[4] (See infra, Family of Nations, Chapter III).

The American Indian tribes living within the boundaries of the United States are not foreign nations. Rather they have been denominated "domestic dependent nations."[5]

The South African burghers, after the British proclamation of annexation were not a state; they had then no territory.[6]

4. Territorial Integrity

Territorial integrity is one of the elements of statehood most stressed in international relations. The concept of sovereignty as supreme power within a state's boundaries implies of necessity that no other state may exercise power there except by permission. Aliens may be utterly excluded or permitted to enter or remain on such terms only as the state may prescribe. No other state may lawfully use a country's territory for the passage of troops or other agencies of war, even though the object be merely transit, unless permission be granted.[7]

Bridges or submarine cables may not be attached to the soil of any state without its permission. Ships may ply its territorial waters, and aircraft navigate the air above it, only as it allows.[8]

5. Intervention

Notwithstanding this principle of territorial integrity, uninvited entry upon a state's domain appears in certain cases to be countenanced by international law. Such entry is called intervention. The protection of another state's nationals in time of crises or peril is a familiar ground of intervention. The enforcement of treaty rights is another. The preservation of "international equilibrium" has been made the basis of intervention,[9] and so even have the dictates of humanity. The last ground was assigned by the United States as a reason for intervening in Cuba. The basis for "legal" approbation of intervention in all but the first of these cases is rather shaky. Its best justification is necessity. In truth, such intervention is exceedingly likely to lead to war unless the intervenor is strong and the other nation is weak.

Some writers who regard intervention by individual states as unlawful are inclined to countenance the practice if carried out by a concert of several powers. Such concerted action, it is argued, is less likely to be motivated by or to result in territorial spoliation.[10]

However accomplished, there can be no doubt that successful intervention impairs *pro tanto* the sovereign in dependence of the state upon which entry is made. But where the motive is proper and the means used are not disproportionate to the requirements, international law withholds its condemnation from this species of "vigilante" justice.

6. Servitudes

By treaty or by custom one state may have "rights" either temporary or permanent, over portions of the domain of another.[11]

By analogy to the usages of municipal law these "rights" are sometimes spoken of as servitudes. Examples are: the right to fish in territorial waters, to transport or maintain troops on the "servient" state's soil, to construct or operate railway or pipe lines.

Some doubt was thrown upon the utility of the servitude conception, at least as regards fisheries, in the decision of the Atlantic Fisheries case.[12]

A claim by the United States to have a servitude over certain British waters for fishing purposes was denied, in part, because this doctrine (that of servitude) being but little suited to the principle of sovereignty . . . and to the present international relations of sovereign states, has found little if any support from modern publicists. . . ." Whether or not it be true that modern publicists have cooled toward the concept of the international servitude, the suggestion that it is ill suited to the principle of sovereignty has force. Not only is the derogation from untrammeled control implicit in the idea of servitude an encroachment upon the fact of sovereignty but the tacit assumption of a legal right on the analogy of municipal law involves the correlative assumption of a superior power which can protect the interest concerned. Where, however, there is a tribunal, such as that of The Hague, to which appeal may be made in case of dispute, the concept is not without validity.

In any event, whether it be called by the name servitude or not, the fact of control by one state over some portion of the territory of another, for a limited

purpose, is well known to international relations.

7. Aerial Navigation

The development of air transportation has, of course, created many new problems with regard to territorial sovereignty. The ancient principle of control of the air above as well as of the soil beneath the surface of a state's territory has not been abandoned, but certain international agreements have been made which help to solve the difficulties. Regulations as to registering, marking, and flying aircraft are among the matters dealt with.

8. Ships

For certain purposes ships are regarded as parts of the territory of the state to which they belong, *i.e.,* the state of their registry. This fiction, that a ship is a floating island, is particularly useful while a vessel is upon the high seas beyond the jurisdiction of any state. It is of diminishing utility when the ship touches port in foreign territory, but even there, for many purposes, the fiction is indulged. The authorities of the state visited will ordinarily not interfere in the discipline or other internal affairs of the ship. But this restraint is from motives of comity rather than from lack of right. Such authorities may, if they see fit, legally take from such a ship a person accused of murder or other offense committed within the confines of the state and, after trial, punish him. The ship, and all on board, upon entering the territory of the state visited become subject to its jurisdiction.

9. Ownership and Acquisition of Territory

In determining a state's rights to territory, perhaps the most important element is occupancy. A state whose people have long occupied the land on which they live is assumed to have sovereign rights thereto.

It is perhaps a reflection of the less perfect development of international, as compared to municipal, law that title by prescription may be acquired through long possession by a state even though such possession was taken under no claim of right.

Discovery of territory not belonging to any other recognized state is legal ground for a claim of ownership provided such discovery is followed up by occupancy. Such discovery must be made by the nationals of the claiming state or by persons acting for it. It is customary to give notice by proclamation or otherwise of the claim about to be asserted.

Territory may legally be acquired by conquest. Mere military occupation, however, does not of itself amount to annexation, although the government of such territory may for the time, pass into the hands of the conqueror. Such military occupancy may continue for an indefinite period, but until the conquering state by appropriate act incorporates the territory into its own domain it remains foreign.[13]

Title may also be acquired by agreement; m fact the most common method of acquisition in modern times is by cession. The agreement to cede may be voluntary or it may be brought about by threats or compulsion. Valid title presumably may be transferred by cession even though the territory be not occupied by the transferee, but such naked title would in the long run rest upon force.

Of recent times the will of the inhabitants is often consulted before a cession of territory is consummated. This will is ascertained through plebiscites. The practice is a recognition of the paramount interests of those in actual occupation and an indication of the growing force of enlightened opinion and humane sentiment. On the other hand, forcible expulsion of whole populations from the land of their nativity is not unknown today.

A state may acquire territory through accretion, *i.e.,* the deposit of soil by the action of water. Its land area may also be increased by the subsidence of waters. Within the territorial boundaries such additions may take place through natural or artificial causes.

Where a boundary stream changes its course by imperceptible stages the boundary changes with it, but if the stream suddenly changes its bed the boundary remains where it was.

10. States and People

States consist of people, yet in their external relations states (whether of full or limited status) deal only with states. The nationals of any state, aggrieved by the action of another state, must make themselves heard through the medium of their own government.[14]

States are, however, in some ways concerned with each other's people. They are concerned for one thing to know that there are enough people in a given political society to merit recognition as a state. Just how many has never been determined. "A considerable number" or a portion of mankind" and similar vague suggestions have been made by various writers; probably no more definite determination would be practical. But each recognizing state will determine for itself whether the number is sufficient. While the need to make such determination does not very frequently arise, still in border areas, in newly settled places, or in territories of strategic importance the question may become troublesome.

11. Citizenship

Another matter of concern is that of transferring allegiance. The means of acquiring citizenship in another state[15] are the concern of internal law, but whether the acquisition of a new citizenship terminates the previous One is a matter about which the states do not all agree. Some states hold that a person may have citizenship in but One state at a time. Others hold that one may have a dual citizenship. Some maintain that citizenship may be voluntarily surrendered by the taking of the proper formal steps, others that allegiance can not be thus cast off. Some make citizenship dependent on birth within the territory; others make it to depend upon descent. Some combine the two, claiming the allegiance of those born within the country and those born of their citizens abroad.[16]

The whole matter seems badly in need of clarification by international agreement. Conflicting claims to the allegiance of persons subject to more than one such claim have been frequent causes of international friction. Such cases have usually been settled individually and not according to any widely accepted rule. Generally, however, the law of the country in which the person resides when the question arises, will prevail. Thus a naturalized American who returns to a country which still claims his citizenship may find himself subject to military duty there. His American citizenship will not protect him from it.

Where territory is transferred from one state to another the citizenship of the inhabitants is determined by the law of the state to which they are transferred. In the absence of treaty stipulations to the contrary, such citizenship follows the sovereignty over the territory, at least so far as relations with outside states are concerned. But the extent to which such persons may be admitted to the advantages of citizenship in the state of their new allegiance is wholly dependent upon the law of such state itself.

A state may by agreement assume certain responsibility for some part of the citizens of another state. Such persons are known as "protege's."

12. Governments

Government is the agency or the complex of agencies through which a state declares and effectuates its will. A government must be distinguished from a state, but for the purposes of international law a state must have a government. While a state which has once received recognition might continue to be recognized for a time without a government, no new state will receive recognition as such until it has a government deemed capable of exercising the functions of sovereignty. With the form or the personnel of a state's government international law has no direct concern, but such governments must be capable of exercising the state's power in a manner consistent with international obligations. A state may, of course, be destroyed with the destruction of its government, but, on the other hand it may continue to exist with statehood unimpaired, through a succession of governments.

Foreign nations can deal with a state only through its government and this circumstance frequently imposes upon them the necessity of deciding whether a particular government is one with which they will deal. The necessity for this decision may arise from a variety of causes: the government in question may be uncertain of continued tenure; or it may be weak and incapable of fulfilling its functions; it may have come to power through methods distasteful to other states; it may represent social or economic theories repugnant to their principles; it may be one of two or more agencies claiming to be the government of the state. From these considerations it results that a government may be recognized as *de jure* or *de facto.*

(1) GOVERNMENTS DE JURE. Recognition as a government *de jure* implies not only the full possession of the requisite power and authority but their rightful, that is to say lawful, possession. But each nation of which recognition is sought must determine for itself whether the possession of power and authority is rightful; hence *de jure* government has been defined as "one which in the opinion of the person using the phrase ought to possess the powers of sovereignty."[17]

Of course the concurrence of many states in this judgment, particularly if the more powerful are included among them, tends to strengthen the verdict.

(2) GOVERNMENTS DE FACTO. A *de facto* government, on the other hand, is one which, for the time at least, actually exercises the power of sovereignty although such exercise may be deemed wrongful or its continuance doubtful.

The necessity of having a government with which to deal frequently leads to the recognition of a government as one *de facto,* although, for any of the reasons above suggested, final recognition as a government *de jure* may be deferred or withheld. Furthermore, a succeeding government of the same state may find it necessary to recognize the *de facto* existence of a predecessor.

While contemporary recognition of a government as one *de facto* only, usually implies a suspended judgment subject to change, such recognition validates, in the eyes of the recognizing state, the official acts of the government so recognized.

Such validation in general relates back to the time when the claim to recognition was set up. It must be kept in mind however that recognition by one power does not effect validation in the eyes of others, and that the legal effects of an act done under the authority of a particular governmental entity may be different in different states.

The inhabitants of a territory in which a *de facto* government is set up are legally warranted in submitting to its authority and obeying its commands.

The results of the administration of the law and the adjudication of private rights conducted under a recognized government *de facto* will ordinarily be respected in other countries and in the same country under succeeding governments.

A *de facto* government may come into existence in many ways. It may be the first attempt at government in a newly settled area. It may result from the overthrow of a preceding government and the establishment of another. It may exercise authority over all of the territory of a state, or it may seek to establish a new state in a part of such territory. It may be set up by the inhabitants of the area concerned, or it may result from the conquest and temporary occupation of such area by a foreign power.

Continued and successful control by a *de facto* government usually results in recognition as a government *de jure.*

13. Succession

A state may relinquish its power over a given territory either by reason of ceasing to exist or by the surrender of such powers over such territory. In either event another state may assume these powers. The process by which this assumption of powers takes place is called succession.

The new state in the exercise of its sovereignty can, of course, effectuate its own will upon the interests of the inhabitants, but it has become settled custom, so well settled as to be sometimes described as "law," that the private rights of the inhabitants will not be disturbed; property will not be confiscated nor personal rights and obligations interfered with. A failure to observe this custom may well lead to international complications.

While possible, the total extinction of one state and the erection of another upon the identical territory is not common. In such case the identity of the state is usually preserved, though a succession of governments may occur.

But new states are not infrequently formed out of parts of the territories of old ones or the combined territories of several. Territory may also be transferred from one existing state to another. Sometimes, as in the case of Texas, the erection of a new state out of the territory of an older one is but a step toward the eventual incorporation of such territory into another existing state.

The transfer of territory from one state to another may be voluntary or it may be accomplished by force or coercion. While a state by its constitution may limit or even inhibit the power of any government to alienate territory, there can be no doubt that the state itself possesses the power both to alienate and to acquire. Such power is inherent in the concept of sovereignty.

14. Rights and Duties of Successor States

In general it may be said that a successor state takes upon itself both the rights and the obligations of the predecessor It succeeds to the public property, money, buildings, equipment etc., to the treaty rights and powers, and likewise to the debts and duties. But to this general principle there are exceptions. Where territory is ceded by treaty, the public funds will not necessarily pass. Where a state is wholly extinguished, its treaties, of course, are rendered null: the new state may replace them by treaties of its own but such replacement requires voluntary action on its part. A conquering state does not assume the debts of the conquered unless it chooses to do so; international law does not require it.

[1] Cherokee Nation v. Southern Kansas R. Co., 33 Fed. 900 (1888). There is a confusion of terms in this definition; power and rights are treated, apparently, as equivalents. The right to govern may, however, be regarded as flowing from the supreme power.

[2] Bluntschli, "Theory of the State," 3rd Ed., p. 501, says: "This sovereignty of the state may be looked at from without and from within:

from without as the independence of a particular state in relation to others . . . from within as the legislative power of the body politic." This statement seems to confuse the terms, power and independence. Nevertheless it points the way to the important idea that supreme power is the chief internal attribute of sovereignty, and independence the chief external. The chief attribute on the internal side is that of power; on the external that of independence.

By self-limitation, of course, a state may fetter the exercise of its sovereign powers, but it cannot, as to other states, evade the consequences of their possession. The fact of independence carries with it the onus of exerting power

in such manner as to avoid offense to other states. Failure in this respect may result in measures by such other states designed to coerce or retaliate.

[3] A neutralized state is one which has by agreement given up the sovereign right to take the offensive in war or to engage in conduct which would normally lead to war.

A protectorate is a state of limited sovereignty which is prohibited from foreign relations except by the permission of some other state called its protector.

Belligerency is dealt with under the heading of War. It may be said here that when the status of belligerency is accorded a group, its members are free from individual responsibility to the power giving recognition for acts which would otherwise be criminal—provided such acts are done in accordance with the "laws of war." A group recognized as belligerent is likewise entitled to certain other rights accorded states engaged in war. Mere insurgency or insurrection does not carry these rights and privileges, although insurgents are sometimes given a status approaching that of belligerency.

[4] The pope, since the extinction of the Papal States, has not been considered a sovereign by the United States, although most other governments recognize him as such.

[5] Marshall, J. in Cherokee Nation v. Georgia, Pet. 1 (1831).

[6] Van Deventer v. Hancke and Mossop Transvaal L. R. (1903), T. S. 401.

[7] In this respect the modern practice differs from that of ancient times when passage for war purposes was demanded as of right. (See infra Chapter V, War.)

[8] In technical parlance the term "territory" is too limited to describe the spatial scope of sovereign authority. The more inclusive term is "domain." This term includes the land, the air, and the water over which the state legally exercises supreme power. Land comprises the surface and the subsoil of indefinite depth. The "air" comprises the space above the land surface of indefinite height. The water includes, of course, the inland lakes, rivers, canals and other waters with the exception of "internationalized" rivers. These comprise most, but not all, of the world's navigable rivers which may be entered from the sea. They are open to the navigation of the vessels of all nations, on much the same terms as is the open sea. Unless otherwise agreed, a boundary river divides the two countries at the "thalweg" or "thread of the stream," *i.e.,* the deepest channel into which the water recedes when low. Besides inland waters, a belt of water three miles wide along the sea shore is within the domain of a maritime nation. This width was originally fixed as being within cannon shot and hence subject to control from the shore. It has now become conventional; attempts to increase it to the range of modern artillery have not been successful. Where the seashore is indented the national boundary line runs from headland to headland unless the gulf or bay is so wide as to become part of the open sea. Just when it is part of the open sea is not entirely definite Buzzard's Bay, width one to two marine leagues, is territorial Water. So is Delaware Bay, fifteen miles wide, and Conception Bay, twenty miles wide. But Behring Sea is part of the ocean; so is the Bay of Fundy, seventy-five miles wide. According to the institute of International Law, the water is open sea where the distance across the mouth of a bay or gulf is more than twelve marine miles, unless continued usage of long standing sanctions a greater width. Many authorities however, set this width at six miles.)

[9] The balance of power in Europe and the Monroe Doctrine in America are familiar examples of this ground.

[10] See Fiore, "International Law Codified," Title XVIII (Borchard Translation).

[11] The use of the term, rights, in this connection must be noted with discrimination The definition of a legal right as an interest which the law will protect has to be employed with caution where the "protection" of the "law" generally means something different from the protection afforded by municipal law.

[12] The Hague Court Reports, 1916, p. 441, et seq.

[13] As to the ways in which the United States may acquire territory and the different kinds of status such territory may have, see Constitutional Law, Part II, Ch. II, page 38 ff.

[14] A state may of course, permit itself to be sued in its own courts either by its citizens or by aliens. But no such suit can be maintained without such State's expressed consent.

[15] There are three concepts of especial importance in connection with the presence of a person within a state: residence, domicile and citizenship. Residence implies something more than mere transient visitation. It involves a more or less fixed abode but ignores the intent of continuance or political affiliation. An alien may have residence without domicile or citizenship. One may have more than one residence at a time. Domicile implies civil status. Many

civil rights depend upon it—e.g., the course of descent of personal property is governed by the law of the person's domicile at death. Every natural person has a domicile, but only one. His domicile of origin persists until a new one is acquired by choice. A domicile of choice is acquired by the concurrence of physical presence (usually residence) and an intent to make the place his more or less permanent home. No particular length of previous residence is essential, nor need one affirmatively intend always to remain there. But there must be no present intent of going to live elsewhere. Some jurisdictions hold that a domicile of choice may be abandoned without acquiring a new domicile of choice. But in such case the domicile of origin "reverts." Citizenship implies political status. It may or may not confer suffrage or any other particular incident but it does imply incorporation into the body politic. The requirements vary from state to state. Often they involve much the same qualifications as does domicile. But the two should not be confused.)

[16] The Fourteenth Amendment to the Federal Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This amendment changes the previous law which denied that mere birth within the territory could confer citizenship. A Congressional statute provides further that children born abroad, whose fathers are American citizens who have lived in the United States are to be considered citizens of the United States. This of course, creates double citizenship wherever the country of the child's birth makes citizens of all those born within it. France likewise applies both the *jus soli* and the *jus sanguinis.* A number of states permit persons born in one country to citizens of another to choose their nationalities upon attaining majority. Great Britain, Mexico, Portugal, Italy, Greece, Spain, Belgium and France are among this number.

[17] Wheaton, "International Law," 5th Ed., p. 36.)

Intercourse

When considering the subject of intercourse between states it is customary to speak of the Family of Nations. Inclusion within the Family of Nations is effected by recognition." In the last analysis each state determines for itself whether and when it will accord recognition, but the example of the more powerful or of those especially concerned is likely to be followed unless some cleavage of interest divides the international councils. It is not uncommon for recognition to be accorded by a joint act.

1. The Family of Nations

Admission into the Family of Nations is limited to those states enjoying full and complete sovereignty. Since the development of modern international law occurred during the period of "European" supremacy, the Family of Nations Was long regarded as comprising only nations whose culture was fundamentally Christian. in a sense the tenets of Christianity were regarded as inarticulate major premises in diplomatic reasoning. But the necessity of dealing with Turkey, the rise of Japan to world power, and the defection of Russia from the ranks of nations professing Christianity have resulted in the practical abandonment of this limitation.

2. Recognition

While recognition that a state possesses full sovereignty is essential to membership in the Family of Nations, other entities of lesser standing are often recognized for purposes of international relationships. There are states of limited sovereignty. International law takes cognizance of states *de facto* as well as of governments *de facto,* and groups which have not even attained statehood *de facto* are frequently recognized for appropriate purposes.

Insurgents whose strength and importance make them more than mere rioters or rebels are sometimes so recognized. Associations or combinations of states are also coming to have legal recognition in international councils. Of these the League of Nations is the outstanding example.

Recognition is a matter for the political departments of governments, not for the courts. When recognition or non-recognition of foreign entities is of importance in judicial cases, the courts will accept as conclusive the decisions of the political authorities of their own governments.

Membership in the Family of Nations entitles a state to participation in international councils and deliberations as a matter of course. States, not members; may and often do participate by invitation.

3. Agencies of Intercourse

(1) THE DIPLOMATIC SERVICE. Intercourse between states is carried on largely by the diplomatic and the consular services.

The diplomatic service stems from the head of the state who, according to international usage, is entitled to represent and speak for it in foreign relations. The degree of his authority to speak may be circumscribed by the state's own laws or constitution, but other states will look to him alone whether he be King, President, or "Leader." His tenure of office may be of limited duration but while it continues he is entitled to the honors, precedence and consideration due his government.

Diplomatic functions are usually carried out through the officers of the diplomatic corps, persons who are "accredited" by their governments to the states with whom relations are to be maintained. These functions embrace the conduct of negotiations, the protection of national rights and interests, and the furnishing of information and advice upon conditions in the state

to which the officer is accredited.

The practice of sending diplomatic representatives to other countries has gradually developed during the last five or six centuries out of beginnings made by the European city states. Diplomatic officers are of four grades: (a) ambassadors, legates and *nuncios,* who are said to represent the person of the sovereign; *(b)* envoys and ministers, who represent the state, but not the personal sovereign; *(c)* ministers resident, generally entrusted with less important duties; and *(d) charges d'affaires.* The United States, having no personal sovereign, sent abroad no ambassadors until 1893 when Congress provided for sending representatives of this grade to those nations which sent ambassadors to this country.

A diplomatic mission does not begin until the representative has been received by the state to which he is sent. It is the right of such state to refuse to receive any particular individual or to ask that he be recalled after he has been received. The indication that a designated representative is *"persona non grata"* is not an indication of unfriendliness toward his country. It simply calls for the sending of another representative.

The person, the retinue and the residence of a diplomatic representative are in many respects free from the operation of the laws in the country to which he is accredited. He partakes of the sovereign character of his state which, of course, is not subject to the laws of any other state.[1]

Should he commit offenses worthy of punishment his recall would be asked and reliance would be placed upon his own state's taking suitable measures of retribution. Should he, however, indulge in conduct likely to cause immediate harm, e.g., disorderly conduct or reckless driving, he might be restrained though he might not be punished.

A change in the government of the accrediting state frequently terminates the mission of a diplomatic representative. The new government may of course retain him.

War from its beginning and during its continuance, suspends diplomatic intercourse. The dismissal of an ambassador or minister is frequently the signal for the commencement of hostilities. Time is allowed for such officer to effect his departure from the country with his retinue and effects. Upon his departure he generally entrusts his country's nationals, still within the jurisdiction, to the protection of the representative of some mutually friendly power.

(2) THE CONSULAR SERVICE. Somewhat akin to the diplomatic service is the consular service.[2]

In general it may be said that the diplomatic service is concerned with political matters and the consular service with business matters. This generalization, however, is subject to many exceptions. In former times the consul had much more extensive power, amounting practically to complete jurisdiction over the nationals of his nation in the country to which he was accredited. In some non-European countries this is still largely true. In certain internationalized territory, e.g., the international settlements in China, the consular courts have jurisdiction of all cases to which nationals of the respective accrediting states are parties. In Tangier for a specified time, by treaty, the consuls of the treaty powers constituted the government of the city. But the normal run of a consul's duties is confined to such services to commercial intercourse as the reception of ships' papers, the taking of depositions, the adjustment of differences, the observation and reporting of facts having a bearing upon business conditions.

Consuls are generally appointed by the heads of states but are not always citizens of such states. They may be subjects of the states to which they are accredited. Some states will receive no others. Consuls, as well as diplomatic representatives, must be received by the admitting states before they may function. The document certifying such reception is known as the "exequatur."

Consuls, too, are entitled to certain immunities in the countries to which they are sent. Their offices and papers are free from search or seizure. They may not be arrested except on criminal charges. They may fly the flag of their states over their consulates.

More than one consul may be sent to a given country. It is not unusual to find a consular representative of an important commercial state in each of the principal cities of another commercial state.

Beside regular diplomatic and consular representatives, special agents are frequently dispatched for special purposes. They are generally equipped with appropriate credentials and are accorded the privileges and courtesies necessary to their missions.

4. International Agreements

Nations, like individuals, in the conduct of their affairs depend largely upon the promises of others that certain conditions will be created or maintained. Municipal law has developed an elaborate set of rules concerning those agreements which the states will enforce. Such agreements are contracts.

In speaking of international agreements it is frequently assumed that the ordinary rules of contract law apply. This however, is true in only a limited sense.

International agreements do require "meetings of the minds" of competent parties and, if made by agents, the proper authorization. But the "free assent," which is frequently spoken of as necessary, may be given under the stress of the most stringent compulsion—the freedom being merely freedom to agree or to take more punishment. "Consideration," in the technical sense employed in Anglo-American law, is not necessary. The "object" of the agreement need be lawful in a much less rigid way.

International agreements are described by a variety of terms: "treaties," "conventions," "protocols," "sponsions," "cartels," etc. Treaties are the most solemn and usually the most general in content, although a treaty may relate only to a particular matter. But an agreement relating to a single subject is more often called a convention. A convention is generally formal in character. If the agreement is less formal it is sometimes called a protocol or *proces verbal* which may be in form no more than the signed minutes of a conversation. Agreements reached between representatives who lack or have overstepped their authority are called sponsions. Cartels are agreements made between belligerents concerning some such matter as the exchange of prisoners. Some of these terms are frequently interchanged.

Most international agreements are reduced to writing and some, especially treaties, require ratification, *i.e.,* formal assent to the agreement reached by the negotiations.

(1) TREATIES IN THE UNITED STATES. The Constitution of the United States provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties." The Senate's part in the treaty-making Process is frequently spoken of as ratification, but, technically, ratification is performed by the President after the Senate's consent to the "making" of the treaty is obtained.

Many international agreements not called treaties are made by the President without submitting them to the Senate.

(2) MOST FAVORED NATION" CLAUSE. Many treaties, especially those relating to commercial matters, contain what is called the "most favored nation" clause. An example is found in the treaty between France and the United States made in 1778. It provides that neither party shall "grant any particular favor to other nations in respect of commerce and navigation, which shall not immediately become common to the other party." The effect of such clauses is to grant equality of treatment in the rights contracted for to all nations with Whom treaties are made. They have become very important m connection with tariffs, quotas, and other regulations of international trade, for the reason that any concession granted to one country immediately becomes generalized to all countries whose treaties contain most favored nation clauses.

(3) TERMINATION OF AGREEMENTS. Treaties may in their terms be perpetual or for limited periods. They may be terminated by mutual agreement or by "denunciation" by either party. Such denunciation may, of course, lead to retaliatory measures or even to war. Treaties may also be terminated by the extinction of one of the states party to it or by war between them.[3]

The effects of the termination of a treaty will depend to a great degree upon whether its terms are already executed or remain executory. A cession of territory already accomplished will not *ipso facto* be revested by the termination of the treaty providing for the cession. The breaking of treaty relations between the United States and England by the War of 1812 did not annul the independence of the United States granted by the prior treaty. But as to all matters which still remain to be done the treaty ceases to operate.

5. Disagreements

(1) NEGOTIATION. The differences and disagreements which are bound to occur in the intercourse of nations are ordinarily settled through negotiation carried on by the regular diplomatic officers.

(2) MEDIATION. If the differences cannot be adjusted in this manner, as for example, in case of the dismissal or withdrawal of diplomatic representatives, it is not uncommon for a third state to tender its "good offices" in an effort to bring the parties to the dispute into agreement. Such tender of good offices is a friendly act recognized by international law as the right of any member of the Family of Nations. If the tender is accepted, the third power may Participate as a mediator in the attempt at settlement.

(3) ARBITRATION. *(a) The Hague Tribunal (Permanent Court of Arbitration).* Where negotiation fails and mediation for any reason is not effective, arbitration is frequently resorted to. This method of settling disputes has been known and practiced from the time of the ancient Greeks but its great vogue is more recent. The exhaustion of Europe consequent upon the Napoleonic wars coupled with the development of democratic ideas in the nineteenth

century, fostered a widespread belief that war was an unprofitable way to settle differ-

ences. Arbitration became common. In 1899, by The Hague Convention, the Permanent Court of Arbitration was organized. This so-called court is in reality a panel of competent persons from which member states, parties to disputes, may choose arbitration boards. The panel is made up of persons "of known competency in questions of international law," who are nominated by the member states. When two nations agree to a settlement by arbitration they may select from the panel a board of arbitrators, or they may both select two members leaving to those selected the choice of an umpire. In case of failure to agree upon an umpire some third power may be asked to name one or one may be chosen by lot. There is alternative provision for a smaller board of three members.

It is usual to define the controversy in a "compromis" and to formulate the issues in a series of pleadings. After the hearings have been held the board's own deliberations are secret. Unless otherwise agreed at the outset the findings and decision of the board are final.

(b) Judicial Settlement (Court of Arbitral Justice). At the second Hague Convention in *1907* an attempt was made to establish a Court of Arbitral Justice, which should resemble more nearly a judicial body than do the boards of arbitration. It was to be in continuous session and to decide cases on the basis of law, whereas the arbitral tribunals are called together for a case at a time and decide on whatever basis appears expedient with a view to settlement. The states concerned, however, could not agree upon a method of choosing the judges and the project failed.

(c) Permanent Court of International Justice. But in

1920 the Assembly of the League of Nations approved the statute which established the Permanent Court of International Justice. This court consists of eleven judges chosen separately by the Assembly and the Council of the League for nine-year terms. It has one regular session each year and such additional sessions as may be necessitated by its business. It is directed to reach its decisions through the application of rules established at international conventions and recognized by the contesting parties: international custom; the general principles of law recognized by civilized nations; and judicial decisions and the teachings of qualified publicists. If the parties agree, any particular case may be decided on general principles of equity.[4]

The Court is open to members of the League of Nations and to such other states as are mentioned in the Annex to the Covenant. As to those members and states which so signified in signing the protocol the jurisdiction of the Court is compulsory in all disputes concerning the interpretation of treaties, questions of international law, the existence of facts which if established constitute breaches of international obligation, or the nature or extent of the reparation to be made for the breach of any international obligation. Other cases may be entertained by the court if the parties agree.[5]

The Permanent Court of International Justice did not displace the Permanent Court of Arbitration, which continues to function.

The attempt to substitute adjudication for arbitration in the settlement of international disputes meets with many of the same difficulties which attend the development of international law. The element of coercion is so largely lacking and the extent of dependence upon voluntary agreement is so great that many of the larger and more trouble some questions are practically outside the scope both of law and adjudication. But it should not be overlooked that a vast number of "ordinary" matters are regularly taken care of by law through adjudication and that many of these, if not so disposed of, might grow into causes of serious friction. The continued functioning of legal agencies will gradually tend to draw into the system questions of greater number and difficulty. The habit of referring disputes to tribunals in which recognized rules are applied will make for stability and predictability in international intercourse. Ultimately the submission of "vital" questions may be expected. The growth of private law and of domestic courts followed much the same course.

[1] This immunity from legal restraint is in reality granted by the law of the state to which the representative is accredited. This law, for reasons of policy, regards the representative "as if" he were clothed with a foreign sovereignty.

[2] By the Act of May 24, 1924, it was provided that "hereafter the Diplomatic and Consular service of the United States shall be known as the Foreign Service of the United States."

[3] The effects of war upon treaty relationships will be more fully dealt with under the head of War.

[4] Statute of Permanent Court of International Justice, Article 38.

[5] *Ibid.*, Article 36.

Coercion

When amicable means fail in international relations, coercion is frequently resorted to. International law does not forbid coercion but it does seek to regulate it. Coercion in its strongest aspect is war, but there are a number of coercive measures recognized by international law which are "peaceful" in their primary aspects. Some of them involve the use of physical force; some do not. Any of them, of course, may lead to war.[1]

1. Non-intercourse

Of these, perhaps the mildest in form is non-intercourse. The refusal to trade with the offending nation or its people may cause sufficient inconvenience or discomfort to bring about the desired result. But unless it does occasion considerable inconvenience it is almost sure to be ineffective and if it does the loss to the citizens of the state resorting to it may be as great as to those of the state which is being coerced. Moreover, the popular discontent aroused in both countries is exceedingly likely to lead to further complications, and if under the modern name of "economic sanctions" the restriction of trade is carried out in unison by a number of states, war is a strong probability. The experience of the United States with this form of coercion has been unsatisfactory.

2. Embargo

Often associated with the measure of non-intercourse is that of embargo. Embargo consists in the seizure and sequestration of the ships or other property of the offending states within the limits of the state making the demand. Sometimes the term is applied to the restraint of the demanding state's own people in the use of their ships or goods, but this latter practice is really non-intercourse. An embargo may be laid upon enemy ships within a country's ports upon the outbreak of war. Prior to 1914 it had become common practice to allow such ships a number of "days of grace" to finish loading and to depart, because it was believed that this practice was conducive to general trade and commerce; but the economic character of war as developed in the great world conflict led many states to deal more harshly with enemy property.

3. Retorsion

Another means of "peaceful" coercion is called retorsion. It consists in subjecting the property or subjects of the offending state to the same or similar hardships or inconveniences imposed upon those of the demanding state. It may consist of restraint upon individuals, restrictions upon commerce, refusal of clearance to vessels, levying of duties corresponding in severity to those complained of, or other retaliatory measures. Its modern use has been chiefly in the realm of commerce. Not infrequently it has proved effective.

4. Reprisal

Akin to retorsion is the measure of reprisal. It, too, consists in retaliation in kind for injuries inflicted, but whereas retorsion usually consists in measures legal in themselves, such as the imposition of heavy duties, reprisal may consist in acts of warlike character. Territory may be seized or cities bombarded. Such acts obviously differ from war only in purpose and extent. So long as they are confined to the infliction of harm comparable in kind and degree to that inflicted by the other party, international law does not in terms forbid them. Whether the other party will regard them as hostile is another matter.

Reprisals often take the form of injuries to commerce. It is hard to draw a clear line between reprisal and retorsion.

5. Pacific Blockade

Still another "peaceful" means of coercion is the so-called pacific blockade. Without declaring war the nation resorting to it undertakes to blockade one or more of the ports of the offending country with the object of forcing compliance with its demands. In earlier times the attempt was made to enforce such a blockade against the ships of third parties and the right was claimed to capture vessels disregarding it. In more recent times, however, strong nations including the United States and England have refused to acknowledge this right, insisting that there can be no blockade involving neutrals unless there is war. Neutrality in time of peace, they say, is a meaningless term. This view has gained ground and it is now generally held that a pacific blockade can effect only the commerce of the parties directly involved. In this restricted form it is obviously much less effective, but it may serve to produce the results desired without resort to war in the legal sense. The blockaded nation has the option of declaring war if it chooses.

The pacific blockade is typically a measure to be taken by a stronger against a weaker power. It provides the advantages without the disadvantages of declared war.

6. Bombardment

The bombardment of cities or the seizure of territory have been mentioned as possible means of reprisal. Such measures have also been resorted to without the excuse of retaliation for injury. With such conditions they can scarcely be regarded as anything but acts of undeclared war. Yet they appear to have a limited recognition in international law.

7. Display of Force

Another "peaceful" measure of coercion is the "display of force." It amounts to a threat of war without the use of words.

[1] Except as forbidden by treaty, war is recognized by international law as a means of securing national interest. In 1928 however, fifteen nations, including the United States, Belgium, France, Great Britain and the British dominions, Italy, Japan, Poland and Czechoslovakia, signed the Kellogg-Briand Treaty in which they "condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy." Later this treaty was signed by some forty-five other nations, thus becoming truly world-wide in its scope. The intent of this treaty is to outlaw war. Whether it will have that effect in practice remains to be seen, consequence that seems to be emerging is the "undeclared war."

War

The strongest measure of coercion is war. War implies the abandonment of those rules and amenities of conduct which characterize peaceful relationships and the infliction of such injury upon the people and property of the enemy state as will induce it to yield. It is not merely a contest between armies. The sporting concept of war as a fight between combatants, upon the analogy of a fight between champions in feudal days, is rapidly giving way to the concept of war as a contest between whole peoples in which all their resources, military, economic, scientific and ideological, are mobilized for the struggle. On each side the whole nation goes to war and the whole nation, with all its resources, becomes the object of attack.

1. Legal Recognition of War —Limitation

Except as modified by treaty, international law recognizes war as a means of accomplishing national ends. It seeks to some extent to regulate the conduct of war between the belligerents and the treatment of neutrals but the changing character of modern warfare has put a severe strain Upon many of the older rules.

In addition to a number of important efforts to regulate by treaty the methods and conditions of warfare,[1] there have been two outstanding efforts to limit or prevent the occurrence of war: the Covenant of the League of Nations (June 28, 1919) and the Kellogg-Briand Pact.

(1) THE COVENANT OF THE LEAGUE. The Covenant of the League of Nations provides, in effect, that none of its members shall go to war for any cause without having first submitted the matter to arbitration or to judicial settlement or to the Council of the League, nor shall they go to war for three months after the arbitration award, the judicial decision or the Council's report. (Article XII, Covenant of the League of Nations.)

Disputes between Members which are recognized as suitable for submission to arbitration or judicial settlement must be so submitted, and signatories agree never to resort to war against any member which complies with the terms of an award or decision. Disputes as to the interpretation of treaties, as to questions of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of reparation to be made for such breach, are declared to be "generally suitable" for submission to arbitration or judicial decision. As to other kinds of disputes, the question of suitability is left to the judgment of the parties concerned.

Disputes not submitted to arbitration or judicial decision must be submitted to the League Council. If the members of the Council (other than the representatives of parties to the disputes) unanimously agree upon a report, the members of the League agree not to go to war against a party which complies with it. If the report is not thus unanimous the members may take such action as they see fit. In the event of failure by the Council to effect a settlement it must publish a statement of its findings and recommendations.

Disputes found by the Council to be about matters within the "domestic jurisdiction" of either party are not further dealt with by the Council.

The Council may refer disputes to the Assembly of the League for settlement. (Articles XI, XII, XIII, XIV, XV of the Covenant.)

It is the "friendly right" of any member of the League to bring to the attention of the Assembly or the Council any matter affecting international relations which threatens to disturb international peace or understanding. (Article XI of the Covenant.)

If any member of the League resorts to war in disregard of its covenants it is *ipso facto* deemed to have committed an act of war against all the other members. Such other members are then bound to sever trade and financial relations with the offending country. The Council is bound to recommend to each member the military or naval contribution it ought to make to the forces necessary to "protect the covenants" of the League. Violations of its covenants subject a member to expulsion.

It will thus be seen that the Covenant does not "outlaw war"; it binds the members by contract not to resort to war under certain conditions, but recognizes their right, and, indeed, their duty, to make war under certain other circumstances. It seeks peaceful settlement, but the recognized alternative is war.

(2) THE KELLOG-BRIAND PACT. The Kellogg-Briand Pact has been popularly said to "outlaw" war. It does not in terms do so, but its signatories, numbering nearly all the nations of the earth, agree "to renounce war as an instrument of national policy" and to attempt certain peaceful means of settlement before resorting to war. What effect has this agreement had upon the international law of war?

Treaties duly made become parts of the law of the United States, but do not necessarily become parts of international law in the general sense. International law does, however, look to treaties and conventions as sources, and a treaty signed by the entire family of nations must have much persuasive force. Long continued acquiescence in its terms would certainly result in their adoption into the body of the law.

Insufficient time has elapsed however, since the formulation of this treaty to warrant the assertion of such acquiescence. There has, moreover, been a strong tendency on the part of some of its signatories to disregard it or at least to evade it by the conduct of hostilities without declaration of war. It seems, therefore, premature to say that the former provisions of international law regarding war have been abolished or even modified. Any particular state which goes to war in violation of its treaty agreement may incur whatever penalties the treaty violation involves. The treaty violation *per se* may be unlawful; it does not follow that war *per se* is unlawful.

For the purposes of the present discussion it must be assumed, therefore, that international law still recognizes war as a means of settling differences and that the rules and principles relating to war as developed through the centuries are still applicable when appropriate situations arise. Were it not so the legal positions of private persons and of neutrals in times of hostilities would be difficult of appraisal. International law has made some progress in defining these positions with regard to both rights and duties. An assumption that no "legal" war existed might well lead them to act in ways incompatible with conditions of actual conflict, with consequent repercussions of a serious nature. So long as international law is ineffective to restrain nations generally from engaging in actual hostilities, it seems necessary to recognize war as a phenomenon of international relations.

2. The State of War

The term, war, has two distinct meanings: the one refers to the physical activities involved in fighting and the preparation for it, the other to the legal relationship sometimes known as the state of war. The two are not necessarily Coincident. Fighting may take place without legal recognition of the existence of war and a state of war may precede fighting or continue long after it has definitely ceased.[2]

The effect which war produces upon the rights and obligations of states and persons renders it generally desirable that the physical fact of war be accompanied by the legal state. It is often of importance to know the exact time when the state of war begins and ends.

The state of war may be created by express declaration or it may be implied from conduct and circumstances, Either party to an international controversy may declare war. On the other hand, both parties may engage in hostilities without any express declaration. If there is a declaration of war, it may, and often does, fix the day, hour, and minute of its commencement. If both sides declare war these dates may not coincide. In such case, the courts of each belligerent state follow the dicta of their respective governments. In states other than the belligerents the question is one of fact. If war is not formally declared but is implied from conduct, it will generally be held to have begun at the time of the first hostile act. In the absence of a fixed date a declared war will also relate back to the beginning of hostile conduct.

(1) DECLARATION OF WAR. In earlier times it was customary to send heralds to announce the intention to make war. In modern times the announcement is usually made by a public act,

which is given publicity through the ordinary news channels. If the diplomatic representative *of* the country concerned is still present the declaration Will be "notified" to him. He will of course be asked to leave.

(2) UNDECLARED WAR. A number of circumstances appear to be conducive to the prevalence of undeclared war. Chief, perhaps, is the importance of surprise; under modern conditions of warfare mobilization is a process requiring considerable time, and a nation's prospect of victory may depend largely upon being able to strike before its opponent is ready to defend. Another circumstance is the existence of treaties, such as the Kellogg-Briand Pact, which fetter the signatories' freedom to declare war. In a number of recent instances, hostilities in every way resembling war have been carried on under the pretence of defense or reprisal without the formal creation of the war status. The failure to declare war has likewise been availed of by neutrals to avoid putting into effect provisions of their law forbidding trade with belligerents.[3]

It is apparent that the failure to declare the existence of the state of war involves the determination of many rights and obligations in uncertainty and confusion. The determination of these rights often requires the preliminary determination, as a question of fact, whether the state of war has existed, and, if so, when it began or when it ceased.

(3) THE ROLE OF COURTS. Such findings frequently have to be made by courts. The function of a court in making such finding should however be clearly distinguished. Courts do not declare war; that function devolves upon the political authorities. But the courts may have to find as a fact whether the acts of the political authorities have resulted in a state of war.

(4) PROVISIONS OF THE HAGUE CONVENTION. The provisions of The Hague Convention signed in 1907 stipulate that there shall be a declaration of war prior to the commencement of hostilities. This declaration is to be "a reasoned declaration" or "an ultimatum with a conditional declaration of war." Neutrals must be notified without delay, and are not to be bound by the state of war until notice is received. Notice may be given by telegram and, presumably by radio.

(5) THE TERMINATION OF WAR. War in the legal sense is ordinarily terminated by treaty. This, for the reasons already mentioned, is the most satisfactory way, at least so far as the determination of interests is concerned. But a state of war may come to an end without a treaty. Hostilities may simply cease. Cessation for a long enough period will be adjudged to indicate an end of the war status, but for just how long must be decided in each case.

The victory of a state over a portion of its inhabitants engaged in a "civil" war will usually be followed by a proclamation of peace.

The conquest of one state by another, resulting in the extinction of the latter, is likewise generally announced by a proclamation ending the war.

3. Hostilities

(1) THE LAWS OF WAR. Certain rules concerning the conduct of hostilities have grown up through the centuries and received the assent of civilized nations. These rules, in general, have been designed to eliminate "unnecessary" suffering and damage and to incorporate the elementary dictates of humanity into international law. Several treaties and conventions participated in by the powers generally have attempted to codify the more important regulations.

The conditions of modern conflict, as exemplified during the World War, however, have rendered the observance of some of these rules difficult and their disregard has been frequently noted. In a war between peoples, as distinguished from a war between armies—a war in which all the resources of each side are employed to destroy the power of the other —the concepts of unnecessary suffering and unnecessary damage become blurred and often meaningless. It is practically impossible to prescribe the weapons which each must use or to limit the injuries inflicted to specified kinds of persons or property.

(2) SPECIFIC RULES. While the rules have not been expressly abrogated and, nominally, still obtain, it must be recognized that their force has in many cases been much weakened and that some of them may eventually disappear. It is usual for each belligerent to issue instructions to its fighting forces prescribing the limits and the character of hostile action, and these instructions presumably embody the tenets of international law. The fear of retaliation as well as the dictates of enlightenment have generally induced each nation to conform measurably to the common pattern, and the consensus of opinion thus engendered has, in turn, become one of the sources of law upon the subject.[4]

According to the Hague Convention the laws, rights and duties of war apply to armies and also to militia and volunteer corps commanded by persons responsible for their subordinates, having fixed emblems recognizable at a distance, carrying their

arms openly, and complying with the laws and customs of war. Forces not complying with these conditions are not entitled to the rights and benefits which such laws and customs confer.

It is an established principal that treachery and the misuse of recognized symbols, such as the Red Cross, are unlawful. But it is lawful to employ strategems and surprises and to deceive the enemy as to plans and intentions so long as prohibited means are not employed. Among the prohibited means are the simulation of the enemy's uniforms or insignia, the misuse of the flag of truce and, on land, the flag of the enemy. Curiously, the use of false colors at sea is not forbidden.

The use of poison and of poisoned weapons or missiles, and the use of arms, projectiles or materials of a nature to cause "superfluous" injury is, in terms, forbidden. To what extent the rule is still binding in practice it is difficult to say "Poison" gases were of course much resorted to in the World War and the possible future use of disease germs as well as chemical poisons has been much discussed. It is probable that belligerents will go as far as they think they can without undue danger of injury at their own hands. Both germs and gases have grave dangers in this respect.

The use of explosive and of copper bullets is forbidden Barbed weapons are banned.

In the early days of aircraft, attempts were made to prohibit the discharge of bombs from airplanes, but this attempt has now been abandoned.[5] The making of military observations from aircraft was at one time regarded by certain nations as spying, but this view has likewise been given up.

To kill or wound an enemy who has surrendered is forbidden, and the announcement that no quarter will be given or that no prisoners will be taken is contrary to international law.

The bombardment of undefended places is forbidden, but refusal on the part of inhabitants to deliver supplies demanded has sometimes been regarded as a valid excuse. Prior to bombardment of a fortified place warning is to be given the authorities unless an assault is contemplated. Churches, hospitals, schools, works of art and historic monuments are to be spared wherever possible. Such places are to be marked by the defenders if such marking is feasible.

Sacking and pillage are prohibited although contributions, requisitions or even foraging may be permissible under proper circumstances. (Cf. Private Interests, *infra .)*

The Geneva Convention of 1906, which is incorporated by reference into the Hague Convention of 1907, provides that sick or wounded officers, soldiers and other persons officially attached to armies, shall be respected and cared for without distinction of nationality, by the belligerent in whose Power they are. A belligerent compelled to leave his wounded in the hands of an adversary ought to leave with them, however, such personal and material assistance as he can. Such abandoned persons, of course, become prisoners of war and, subject to the rules pertaining to the sick and wounded, are to be treated as such. The belligerent left in possession of the field after each engagement is required to make search for and to protect the wounded. The dead also are to be protected from spoliation or ill-treatment Badges, tokens and insignia found upon the bodies of the enemy dead are to be forwarded as soon as possible to the authorities of their own countries. Belligerents are to keep each other mutually advised of interments and transfers, together with admissions to hospitals and deaths.

Persons charged exclusively with the care of the sick and wounded who fall into the hands of enemy forces are not to be made prisoners but are to be allowed to continue their work of ministration until sent back to their own lines.

Those who are shipwrecked are, in general, entitled to the same treatment accorded the sick and wounded.

(3) PRISONERS OF WAR. Prisoners of war, according to international law are to be humanely treated.

By The Hague Convention Respecting the Laws and Customs of War on Land it is provided that such prisoners are in the power of the hostile government but not in that of the individuals or corps who captured them. Their personal belongings, except horses, arms and military papers, remain their own property. Officers excepted, the captor state may avail itself of their labor but such labor must not be "excessive" nor must it relate to military operations. Prisoners may work. for the state or for private persons. Such work must be paid for and the compensation, after deduction for their maintenance, must be given them upon their re

lease- If there be no such work provided the captor state is bound to maintain them, in general, upon the same footing, regarding clothing, food, etc., as its own troops.

Prisoners are subject to the laws, regulations and orders in force in the army into whose hands they have fallen. For insubordination or infractions of the rules they may be punished. Escaping prisoners recaptured before rejoining their own armies or quitting the territory of the captor are liable to punishment. But those who make good their

escape and are subsequently captured again are not subject to punishment for the escape.

Prisoners are bound, upon interrogation, to disclose their true names and ranks; failure forfeits any advantage to which rank or class entitles them.

Prisoners may be released on parole. Parole is a verbal agreement made upon honor as a condition of release to do or not to do the things stipulated in the agreement. The captor is not bound to release any prisoner on parole nor is a prisoner bound to accept such release. But if he does, his country has no right to require of him thereafter any service in contravention of his parole. Such country may, however, regulate in advance the conditions upon which paroles may be accepted. It may even prohibit such acceptances One who violates his parole, if again captured bearing arms, forfeits the rights of prisoners of war.

It has been customary for belligerents to exchange prisoners from time to time, the exchange being conducted in accordance with an agreement called a "cartel." In effecting exchanges, scales of value are usually established according to rank and other conditions. In recent times such exchanges have been less frequent.

Escaping prisoners who reach neutral soil are free. The neutral country may refuse to receive them or may assign them places of residence. Prisoners brought by a belligerent force or vessel into a neutral country (unless under stress of *vis major)* are likewise free.

Regularly accredited newspaper men, contractors and others attached to an army, but not belonging to it, have in general the same status, if captured, as prisoners of war.

Officers captured are to receive the same pay as officers of corresponding rank in the captor army, the amount paid to be refunded by their own governments when peace is made.

The wills of prisoners are to be received or drawn up on the same conditions as apply to soldiers in the army into whose hands they have fallen.

(4) SPIES. Persons captured as spies are not entitled to treatment as prisoners of war but are subject, upon conviction in a military court, to the penalty of death. A lesser penalty may, of course, be inflicted.

To be considered a spy one must have resorted to deception, either through disguise or false papers or false statements or otherwise. According to the Hague Convention an individual can be considered a spy only if, acting clandestinely or on false pretenses, he obtains or seeks to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Soldiers not in disguise, who have penetrated such zone of operations to obtain information, are not to be considered spies, nor are soldiers or civilians charged with the delivery of dispatches, either for their own army or for the enemy, if they carry out their missions openly. A spy who, after executing his mission, rejoins his own army is not thereafter subject to punishment for such past spying.

(5) OCCUPIED TERRITORY. The occupation of enemy territory by a belligerent may be a war measure only or it may be the first step in conquest. At this point we are concerned only with the former aspect.

Although the occupation may be casual, as in the case of mere passage, it generally involves the necessity of governing for the time being the area occupied. Law and order are necessary to the invading force as well as to the in-habitants, and the continued functioning of the local authorities is generally impracticable. The duty of governing therefore devolves upon the commander of the forces in occupation, and his will becomes for the time being the source of local law. He may, and according to international law should, interfere as little as possible with the operation of the former territorial law concerning private rights, but it must be recognized that he may change such laws if he desires and that he and not the state formerly in control is the authority behind the laws.

According to the Hague Convention of *1907* territory is considered occupied only when it is actually placed under the authority of the hostile army. The occupant then has the duty to reestablish law and order, respecting so far as possible the laws in force in the country.

Pillage is prohibited. Family rights and honor, private property and religious conventions are to be respected The population must be free of compulsion to furnish information about its own military forces or means of defense; nor may the people be pressed to take an oath of allegiance to the occupying power.

Taxes and other revenues may be collected by the occupying power, but the local procedures should be followed where possible. Local administrative services should be maintained out of the revenues. Contributions may be levied, but only for military or administrative purposes and upon the written order of the commander.

Requisitions in kind or in services may also be made, but they must be "in proportion to the resources of the country" and must not involve the inhabitants in military operations against their own nation.

The cash, funds and immovable property belonging to the

state, and the supplies of arms, ammunition, stores and means of transport may be seized and, generally, so may all movable property of the state which can be used for military purposes. Property devoted to charitable, educational or artistic purposes should be exempt. So should movable property of non-military nature.

So also may means of communication or transportation or property of military value belonging to private persons or companies. Such property, however, is to be paid for when peace is made. The property of public bodies such as communes, and of religious, charitable, educational and scientific bodies is to be treated like private property.

(6) MILITARY RULE. The governmental acts of the occupying commander are those of a *de facto* government and are entitled to recognition as such. During occupation the obedience of the inhabitants to such government is justified. It is within the lawful province of the commander to make such rules for and exercise such restraint over the conduct of the inhabitants as may be necessary under all the circumstances.

The rule of a military commander in occupied territory is called martial law or, more properly, military rule. Military rule also applies of necessity to the area immediately surrounding an army in the field, wherever it may be. Civil authority can not function adequately under such circumstances. Military rule, however, is in its essence of temporary character and should be withdrawn as soon as civil power can reassert itself.

It is often an essential element of warfare, especially under modern conditions, to cut off communications and supplies from the opposing power. Success in this endeavor depends largely upon the attitude of neutral countries. This phase of the question will be dealt with elsewhere. (See *infra* Neutrals.) But success often also depends upon the interruption of communications by sea.

(7) BLOCKADE. One measure recognized by international law is that of blockade. Through blockade a belligerent seeks to prevent the access of vessels, both enemy and neutral. A declaration of blockade, if made effective by actual force, is legally binding on neutrals. A mere "paper blockade" is not binding. The declaration to be legally effective must designate the precise coastal areas covered and the time when the blockade begins. It must also be brought to the attention of neutral vessels in such a way as to give them actual or presumptive notice. Presumption of notice may arise from a variety of circumstances such as lapse of time, common or general knowledge, clearance from a port to which the knowledge had been given.

Vessels having notice are legally bound to keep out of an effectively blockaded area. The obligation persists if the blockading force is temporarily absent because of storm or weather. But there is no such obligation if the force is withdrawn.

Vessels crossing the blockade line may be stopped and if they persist in proceeding may be legally captured or, if necessary, sunk. The liability to capture of a vessel found within the blockaded area depends largely upon whether its master has knowledge of the blockade. It is important, therefore, that proper warning be given it before extreme measures are taken.

A captured vessel must be taken before a prize court where the propriety of its capture will be determined. If the blockade was not legally declared or the vessel in question not properly notified, or if for any other reason such vessel was within its rights in being within the area, it should be released. If it was properly subject to capture, the title of its owners is forfeited.

A neutral vessel which is in port when the blockade is put into effect should be allowed a reasonable time to depart. What is a reasonable time has to be determined in each case and lies largely in the discretion of the blockading power. Periods varying from three days to thirty days have been proclaimed.

Permission to pass the blockade may, of course, be given. Vessels putting into a blockaded port under stress of weather are not legally liable to capture. Within a reasonable time they should be allowed to depart provided they have not discharged or loaded additional cargo.

There has been great diversity of opinion as to the continuance of a vessel's liability to capture after such liability has accrued. According to opinion held in continental countries, a neutral vessel remained liable to capture only while continuously pursued by a blockading vessel and then only until she reached a neutral port. English authorities, however, held that she remained liable for the duration of her voyage—if the violation of the blockade occurred while issuing from the port invested, she remained liable until the end of her voyage; if she left neutral waters bound for a blockaded port, liability attached at once and continued until she returned to her home port. The Declaration of London, 1909, attempted to limit the liability to the "radius of action" of the blockading vessels. This, however, was never ratified. American opinion seems to have vacillated, inclining at first toward the continental view but later shifting toward that held by the English. The World War was marked by continuous

protests, by all concerned, of the violations of rules believed to obtain.

(8) MINED AREAS. In addition to the blockade, international usage appears to sanction the marking out of certain sea areas for defensive purposes within which a belligerent claims exclusive control. Such areas may be mined, provided the regulations concerning the kinds and handling of mines are observed, and force may be employed to prevent neutrals from violating the rights claimed. Such areas should be notified to all the world and may, presumably not extend unreasonably beyond the limits of the belligerents' territory.

(9) WAR ZONES. In the Great War an attempt was made by Germany to extend this principle by the designation of war zones" within which neutral vessels were declared to assume the risk of injury incident to war measures taken against the enemy countries. Such zones generally surrounded such enemy countries. This German attempt, however, was never acquiesced in.

(10) RIGHT OF CAPTURE. In general, a vessel's liability to capture depends upon whether she or her cargo is liable to condemnation. Contraband is liable to condemnation and a vessel carrying contraband may be made liable to condemnation by so doing. The unratified Declaration of London of 1909 made the vessel liable to condemnation if the contraband goods carried made up half of her cargo or more. This rule, however, is not uniform.

Engagement in unneutral service may likewise render a vessel liable to condemnation. Such service among other things may consist in transportation of persons for the purposes of engaging in the war, in the carrying of military intelligence, assisting the operations of the enemy or in participating in hostilities.

Neutral vessels should not be destroyed before adjudication of their claim to neutrality unless considerations of safety, or the success of the enterprise in which the captor ship is engaged, make destruction necessary.

A neutral private vessel may lawfully be captured if there is reasonable ground for suspicion that it is subject to confiscation. Whether or not it is actually liable to confiscation should be determined in the prize court. Irregularity in her papers, attempts to break blockade, resistance of search, enemy convoy or participation in unneutral service are reasonable grounds for suspicion.

Neutral public vessels are not subject to capture. Except in neutral waters, enemy vessels, both public and private, unless employed on a cartel mission or engaged in religious, scientific, charitable or hospital services, are subject to capture anywhere. Coast-fishing vessels and small boats are, however, exempt.

Before a vessel captured in war is sold or converted to the use of the capturing power, it should be taken without change of condition into a prize court for the purpose of having the rights of its owner and the owners of its cargo determined.

Cargo may be dealt with differently from the ship, depending on the knowledge and intent of the consignors or consignees.

(11) PRIZE COURTS. Prize courts are national courts. The setting up of prize courts in neutral territory or on vessels in neutral waters is unlawful. Each power may bring captured vessels before its own courts and their determinations are final.[6] An attempt in 1909 at the International Naval Conference, London, to create by treaty an international prize court failed because the protocol drawn up was never ratified.

It has frequently been said by the judges of prize courts that they apply international law. The Convention Relative to the Creation of an International Prize Court provided that if no treaty covered the question the rules of international law should be followed. If no generally recognized rule were known the courts were to apply the principles of "justice and equity." In truth, however, as has hereinbefore appeared, each court must often determine for itself what are the rules of international law, so that the result is probably not very different from the application of the nation's own rules upon the subject.

A captured neutral vessel should in general be taken to the nearest home port of the captor for prize court adjudication. She should be treated with all reasonable consideration and preserved from damage so far as is consistent with circumstances. Her crew should, of course, be cared for.

(12) PRIZE MONEY. In former times a vessel lawfully captured belonged to the officers and crew of the capturing ship or ships. Under modern rules it belongs to their state. In some states, however, part or all of the sale proceeds of a condemned ship are distributed among them. In the United States this practice was abolished by Congress in 1899.

(13) VISIT AND SEARCH. It is now generally recognized among the states that neutral private vessels are subject during the continuance of war to the right of visit and search by the regularly commissioned vessels of a belligerent. This right has not

always been recognized, the stopping of a neutral vessel having formerly been regarded as an infringement upon the sovereignty of the vessel's flag. But the great practical importance of preventing contraband from reaching the enemy in modem warfare has led to the present recognition of a belligerent's right to ascertain for itself whether a suspected vessel is really neutral, whither it is bound, and the nature of its cargo, *i.e.,* whether contraband or not.

To effect this result a belligerent vessel may lawfully stop a neutral vessel[7] and send aboard a proper number of officers and other persons to obtain the desired information.

Such visitation may occur anywhere on the high seas but may not take place in neutral waters. The belligerent vessel should make known her identity. All consideration for neutral rights and interests should be shown consistent with the accomplishment of the objective. But the right includes search as well as visitation, and if concealment or resistance are encountered the search may be forcibly made. A vessel fleeing or resisting the demand to lie to for visitation may be pursued and, if necessary, taken by force.

An enemy vessel is under no legal obligation to submit to visit or search and may resist or escape if she can. But, of course, she takes the risks of capture or destruction.

(14) NEUTRAL CONVOY. Considerable controversy has arisen over the so-called right of neutral convoy. Certain nations have maintained the right to certify to the character of a ship and its cargo and to conduct it to its destination under the convoy of a public vessel. According to this view, the belligerent may stop the ship and its convoy for the Purpose of inquiry but is bound to take the word of honor of the captain of the convoy ship and to forbear to make search for itself. This right has been disputed, however, by England and other states, which claim that the determination of a cargo's character is for the belligerent, not for the neutral.

It has generally been held that neutral public vessels themselves are exempt from visit and search, but there has been some recent tendency to question this rule especially where the public vessel is engaged in commercial uses.

(15) LETTERS OF MARQUE. In former times it was customary for states at war to issue letters of masque and reprisal, commissions authorizing such vessels to attack enemy vessels and prey upon enemy commerce. This practice has been largely discontinued, although Spain in the Spanish American war declared that she retained the right—which she did not use. The United States has made several treaties with particular countries designed to eliminate the practice, but no general abrogation of it has taken place.

(16) ARMED MERCHANTMEN. The arming of merchant ships is likewise an ancient and at times, it would seem, a nearly universal practice. It was resorted to by the United States and other countries during the World War. The status of such a ship after she is thus armed has occasioned much debate. Does she become a warship? In a memorandum issued by the United States in 1914 the presumption was accepted that such a ship was a warship but that such presumption might be rebutted if the caliber of the guns was six inches or less, the guns few and the ammunition little. the guns not mounted on the forward part of the ship, the vessel manned by its original crew, carrying passengers unfitted for military service, and cargo of a peace time nature. Further, the speed of the vessel must be slow and its destination such as to indicate continuance of its peace time pursuits.

The Hague Convention of 1907 provided that a merchant vessel does not become a warship in legal acceptance unless it is placed directly under control of the country whose flag it flies; that such vessel must bear the distinguishing marks of war vessels; that the commander must be in the service of the state and the crew subject to military discipline; that the vessel must obey the laws of war and the belligerent using such vessel must announce her conversion to war purposes.

Some neutral countries have refused permission for armed merchant vessels of belligerent countries to visit their ports during war, thus putting them into the category of warships. Other countries have continued to treat them as merchant-men.

(17) INTERCOURSE DURING WAR. Although intercourse between the forces, subjects, and representatives of belligerents is normally suspended during hostilities, there are certain forms of communication which are regarded as necessary to "civilized" warfare.

Some of these relate to the cessation of hostilities or to negotiations looking to such cessation. Raising a white flag, at the same time ceasing to fire, is an indication of a desire to communicate and usually of a desire to surrender or arrange an armistice. The enemy is under no duty to respond by ceasing fire nor to receive the communication, but if he does it should be in good faith. If the enemy desires not to receive the communication it is customary to give

the messenger opportunity to retire in safety. The bearer of the message (officially known as a *parlimentaire)* is bound not to make use of his reception to gather military information.

(18) ARMISTICE. An armistice is an agreement to suspend hostilities for some specified purpose, usually the negotiation of peace. It may specify a definite period of time or certain

conditions upon which it shall terminate. It may suspend all hostilities or those only within a specified area. If hostilities are suspended generally preliminary to peace negotiations the armistice is usually concluded by the respective governments concerned. Such agreements have political as well as military significance. If the armistice is local or strictly military, it may be effected by the military commanders on their own authority.

(19) CAPITULATION. An agreement to surrender made by the commanders of forces, vessels or strongholds is called a capitulation. Strictly construed, the term "capitulation" is limited to matters of military rather than of political significance, although the latter are obviously a likely consequence of the former. In general, however, to accomplish political results the agreement needs to be ratified by the proper government.

(20) CARTELS. Some forms of inter-enemy communication relate to the conduct of hostilities or the exchange of prisoners. Such forms are commonly known as cartels.

Permission to traverse an area held by a belligerent may be given to enemy persons under specified conditions. Such permission, if in writing, is called a "safe-conduct." If the permission is extended to many persons it is usually evidenced by "passports."

4. Neutrals

The modern concept of neutrality is of comparatively recent growth. It recognizes the legality of war in the international sense and postulates the existence of certain reciprocal rights and duties on the part of belligerents and neutrals which come into existence with war and cease when war ends.

(1) NEUTRAL TERRITORY. On the one hand, belligerent states are bound scrupulously to respect the territorial areas, waters, and air spaces of neutral states and to refrain from war measures of any kind therein. Prisoners of war escaping into neutral territory may not be pursued or recaptured there. Neutral vessels liable to capture for breaking blockade or other causes and which take refuge in neutral ports may not be followed into such ports. Belligerent war vessels in neutral ports at the outbreak of hostilities must leave promptly—in the absence of any specific local regulation, within twenty-four hours. Belligerent war vessels calling at any neutral port during the progress of war may not remain longer than twenty-four hours, or such other brief period as the country visited may itself prescribe. Belligerent air ships may not navigate the air above neutral territory, unless under stress of weather or other cause beyond control.

Although in times past, the practice of bringing a prize into a neutral port for sale has been tolerated, the modern doctrine condemns such practice. A prize should be taken to a port of the captor's country for adjudication and disposal, although temporary assistance may be sought in a neutral port if the prize vessel is in unseaworthy condition. Prize Courts may not lawfully be established in neutral territory or neutral waters.

Neutral territory may not be used for military bases, nor for the establishment of wireless stations or other means of communication. It may not be used for fighting.

(2) DUTIES OF NEUTRALS. On the other hand, neutrals under the modern doctrines are bound to refrain from the use of ships or other facilities for the carriage of enemy troops or military personnel, the transportation of military supplies or the transmission of military intelligence.[8]

War vessels of a belligerent may touch at neutral ports but, as just stated, their stay must be brief. While there, if necessary, they may take on limited supplies of coal, water, or provisions, but on a peace time rather than a war time basis. This somewhat vague condition has been further elaborated in some cases so as to permit, for example, a supply of coal sufficient to carry the ship to its nearest home port, or, in other countries, to fill its bunkers. According to the Hague Convention such vessel may not again take on supplies at any port of the same neutral power for a period of three months. Not more than three (some countries permit four) belligerent ships of the same power may anchor in a neutral port at the same time. It is incumbent upon the neutral state to compel the departure of vessels violating these rules or to intern them.

Repairs necessary to seaworthiness may be made in a neutral port provided they can be accomplished within the time limit, but neutral states are bound not to permit the construction or outfitting of war vessels in their territories.[9] Neutral states are likewise under obligation by international law to prevent within their territories recruiting or other forms of military assistance to belligerents. *A*

fortiori they may not render such assistance themselves.[10]

A state's obligation to prevent the rendition of military aid to a belligerent by its nationals within its borders is not absolute; it is limited to the exercise of due care, under the circumstances, to discover and prevent the prohibited acts. In the *Alabama* Case (See Note #9) this duty of care was said to be in "proportion to the risks" incurred by the belligerent likely to be injured by the failure to prevent the unneutral act.[11]

A state is not liable under international law because some of its citizens on their own initiative join the forces of a belligerent. It may, of course, prohibit or punish such conduct.

The duty to prevent persons within its borders from aiding a belligerent is limited to the prevention of acts of "military" nature. The selling of non-military goods or the making of loans by citizens is not prohibited by international law, although it may be by the municipal law of the neutral country itself. Under modem conditions, however, this distinction between military and non-military is becoming difficult to maintain. War is becoming "economic" in character and practically all commodities may have war value. Ample proof of this may be had in the expansion of the lists of contraband articles.

(3) CONSEQUENCES OF BREACHES OF DUTY. Violation of the obligation of neutral states to refrain from unneutral acts or to prevent their occurrence within their borders may subject such states to undesirable consequences. Such acts by the state itself will be regarded as "unfriendly" and may lead to diplomatic difficulties or even to war. Failure to regulate the conduct of private persons subject to their control will usually give rise to claims for damages. Such claims if disputed are often submitted to arbitration. Their persistent rejection may, of course, also lead to war. Much of the "note writing" engaged in by states aggrieved by the conduct of belligerents is for the purpose of making a record for future arbitration proceedings.

A neutral state's duty to prevent the violation of its neutrality by a belligerent may require the use of its armed forces to prevent such violation. But, again, this duty is not an absolute one to prevent the abuse, but a duty to do all that it reasonably can under the circumstances. It may not have the power, or its forces may not be near enough or otherwise so disposed as to make prevention possible. But it is bound to forbid the violation and to back up its word as far as it reasonably can. Failure to take available measures may make it liable for damages, as, for example, in the case of failure to repel a belligerent ship which comes into a neutral port to sink a vessel which has sought refuge there; or failure to intern such refugee vessel if it stays there longer than the permissible time.

It has already been shown that neutrals, in addition to the duty to refrain from aiding belligerents or participating in the war, and the duty to take positive action in certain cases to maintain the neutrality of their domains and their citizens, have the duty to submit to certain belligerent measures designed to insure neutral conduct. Such belligerent measures include visit and search, blockade, etc., hereinbefore discussed.

5. Private Interests

PERSONAL RIGHTS AND DUTIES. While, under the provisions of international law, war imposes upon states certain obligations as to the conduct of persons subject to their control, there are many respects in which the conduct of individuals does not affect the legal situation of the states to which they owe allegiance. As to such conduct individuals assume their own risks and may find their interests affected by the power of other states.

6. Combatants and Non-combatants

International law draws a distinction between combatants and non-combatants.[12]

Combatants may be persons owing allegiance to neutral countries as well as to those engaged in the war. If regularly enrolled in the forces of a belligerent power, such persons acquire the rights and assume the obligations incident to the combatant status. That status carries certain obligations and confers certain privileges. International law requires states to require their combatants to observe the laws of war. (See p. 388, Hostilities.) But it also entitles combatants to the rights and privileges of belligerency. Acts which, if done by ordinary persons, would constitute riot, murder, or other crimes, are free from legal blame if done under orders as acts of military service.

Combatants captured by enemy forces are entitled to the treatment prescribed for prisoners.

Persons who spontaneously take up arms in defense of their countries against invasion by enemy forces are likewise entitled to the treatment accorded combatants provided they themselves respect the laws and customs of war.[13]

Non-combatants are those who take no direct part in war and include, generally, women, children, those engaged in religious, charitable or hospital service and those whose occupations are deemed peaceful in their nature. Such persons are not legally subject to injury or

capture as are combatants. They may, however, be subjected to such restraints as are necessitated by the exigencies of military situations.

(1) SUBJECTS OF NEUTRAL STATES. The subjects of neutral states who do not directly or indirectly engage in activity relating to hostilities are exempt from hostile treatment. Such persons may, of course, be admitted to belligerent countries on such conditions as these countries prescribe, or they may be entirely excluded-. If admitted or allowed to remain after hostilities occur they may be subjected to the civilian regulations applying to the population generally. They may be excluded from certain parts of the country; they may be taxed on income or property within the country; they run the risks of injury incident to the presence of armed forces or the occurrence of fighting. In short, they are subject to the general rule that each state may control the conduct of all persons within it whether citizens or not. They may not, however, lawfully be compelled to join the belligerent's military forces or participate in military activities.

War, in fact, may subject the nationals of neutral states who are within the confines of other neutral states to certain restraints or inhibitions. Such other states are legally bound to prevent the occurrence within their jurisdictions of acts which would jeopardize their neutrality, and to that end may impose restrictions upon aliens as well as citizens.

As stated by the court in Small's Administrator v. Lumpkin's Executrix,[14] "In . . . war from the time it is declared or recognized, all the people of the territory and subject to the dominion of each belligerent, without regard to their feelings, dispositions or natural relations, become in legal contemplation, . . . the enemies of all the people resident in the territory of the other belligerent, and all negotiation, trading, intercourse, or communication between them unless licensed by the government, is unlawful."

(2) CONTRACTS AND OTHER LEGAL RELATIONSHIPS. In consequence of this principle, the making of new contracts or the establishment of other new legal relationships such as agencies or partnerships between the nationals of hostile belligerents is prohibited, and attempted contracts, etc., are legally null.

As to relationships already subsisting at the outbreak of war certain distinctions must be drawn. Acts done in pursuance of such relationships must cease if they involve communication with enemies. Executory contracts or parts of contracts are usually abrogated. Partnerships are generally dissolved. But an agent who can carry on without instructions from or communication with his enemy principal may do so and will be held accountable after the war is over for the results of his effort. Contracts fully executed may be simply suspended. An insurance contract upon which premiums may not be paid will cease to have force as a contract, but the cash value, as of the time when war began, may be recovered after the war is ended. Contracts injurious instead of beneficial to an enemy person may be enforced.

Redress through the courts is denied alien enemies during war. Alien "friends" may generally sue in the courts of any state, but alien "enemies" may not. Alien enemies may, however, be sued and judgments against them satisfied out of property within the jurisdiction. It follows that they may appear and defend, and, if defeated may have the benefit of appeal to higher courts. They may not, however, press counter-claims.

(3) PROPERTY RIGHTS ON LAND. In general alien property rights in neutral countries are unaffected by war, although, as has been shown, such property may not be put to uses which will jeopardize the neutrality of such countries.

The property of subjects of neutral states which is located within a belligerent country will also, in general, be respected although such property may be subjected to the same treatment accorded that of the local population. If such property is injured by legitimate war measures, *e.g.,* if it is in the line of fire, its owner will not be entitled to compensation. If such state is occupied by a hostile power, such property may be requisitioned, levied on for contributions, or seized as though it belonged to the local population.

Property belonging to enemy nationals within a belligerent state is dealt with according to its character. Immovable property, such as land and buildings, will ordinarily not be confiscated but may be taken for temporary use. Movable property, as has been shown, may be the subject of requisitions, contributions, etc., but, at least until the Great War, was not regarded as subject to general confiscation unless it was of military nature.

(4) PROPERTY ON WATER. (a) *Goods.* Goods of enemy private ownership in transit on water are liable to capture if in enemy ships unless demonstrably of non-military character.

Goods of enemy private ownership in transit under neutral flag are not subject to capture unless they are "contra band."

Goods of neutral private ownership in transit in enemy ships are not liable to capture unless

they are "contraband'

Goods of neutral private ownership in transit in neutral ships are not subject to capture unless they are "contraband."

The traditional doctrine dating back at least as far as Grotius, is that goods shipped by water are of three classes:

(1) goods useful for war such as arms, munitions and military supplies; (2) goods which may or may not be useful for war, depending on circumstances; (3) goods of no use for war. While this distinction still subsists, the methods of modern warfare have tended to make the first and second classes one. Under the provisions of international law, citizens of neutral states have the right to sell and ship any kind of goods to belligerents, if they can. But belligerents have the right to visit and search neutral vessels to ascertain the character of goods on board and to capture and condemn all goods which are "contraband." The risk of such capture is taken by the owner of the goods when he ships them. But such shipment does not *per se* affect the neutral status of such owner's state or country.

Contraband. Whether goods are "contraband" depends on their character and destination. Neutral goods of any class destined *bona fide* for neutral markets, are not legally subject to capture. Neutral goods of the third class mentioned above may lawfully be shipped to a belligerent and are not subject to capture. But goods of the first, and under appropriate circumstances, goods of the second class, if destined for a belligerent country are contraband and may be seized or destroyed. According to the traditional doctrine, goods of the second class must be destined for the armed forces" of the enemy.

It is customary for belligerents to issue lists of articles of the second class (sometimes called "conditional contraband,") which they will consider contraband. Neutrals often protest the inclusion of certain items. This may result in a withdrawal of the disputed items, or the neutral states, protesting, may have to acquiesce or go to war about it. Under conditions of modern warfare, the items included are likely to be very numerous and diverse. The adaptability or convertibility of nominally harmless goods or commodities into war materials is always in question. Destination for armed forces is likely to be presumed. War goods actually destined for belligerent countries though nominally destined for neutral ports are still contraband- The question becomes one of proof. During the Civil War the United States insisted upon the doctrine of "continuous voyage." Under this doctrine a cargo going to a neutral port, there to be transshipped or otherwise forwarded to a belligerent, was held subject to capture, from the beginning of the voyage. This doctrine was much criticized at the time; the Declaration of London, 1909, restricted it to "absolute contraband," i.e., articles of the first class; but later experience has tended to expand rather than to weaken it. During the World War the question became really one of "ultimate destination." This, of course, involved the question of intent which is often difficult to prove. The devices to conceal ultimate destination are numerous. Belligerents are, however, likely to give themselves the benefit of doubt and the question finally becomes one of probability under all the evidence.

Goods forming the cargo of a ship condemned for violation of a blockade are likewise subject to condemnation unless the cargo's owner neither knew nor could have known of the intention to violate the blockade.

Non-contraband goods on the same ship and belonging to the same owner as does the contraband are liable to condemnation along with the contraband.

In its earlier history the United States asserted the doctrine that "free ships make free goods," that is to say, that goods of whatever character, if carried on a neutral ship were free from capture. But this claim has been practically abandoned. The United States in the past has also persistently declared its willingness to adhere to the rule that private goods on the sea may not be captured at all, but this too, has failed of acceptance. It appears inconsistent with the idea of blockade.

(b) Vessels. With the exception of cartel ships and ships engaged in religious, scientific, charitable or hospital service, enemy vessels are subject to capture by belligerents anywhere outside of neutral waters during war time. Certain other ships, such as those engaged in coastal fishing and "small boats" of no war value, are also supposed to be exempt from this rule. The rule is thus not generically different from that regarding enemy property on land because shipping in general has at least potential use for war purposes, especially in modern times when supplies of nearly all kinds are of military significance.

Neutrally owned private vessels, if engaged in unneutral service become liable to capture and forfeiture.

Neutrally owned private vessels become liable to condemnation for willful violation of blockade.

Neutrally owned private ships carrying contraband are subject to capture on the high seas or in belligerent waters. They may also be liable to condemnation. According to the unratified Declaration of London, 1907, they become so liable if the proportion of the cargo is

greater than half by value, weight or volume. This rule is not always followed, but the proportion of contraband in the cargo has a bearing on the probability of knowledge. Complete and justifiable ignorance on the owner's part of the nature of the cargo may exempt the ship from condemnation. Such ignorance is unlikely when the cargo is largely contraband. It may well exist if the proportion of contraband is slight.

[1] The most important of such efforts are: The Declaration of Paris, 1856; The Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1906; the following conventions resulting from the Second International Peace Conference at The Hague in 1907: Convention Respecting the Laws and Customs of War on Land; Convention Respecting the Rights and Duties of Neutral Powers and Persons Case of War on Land; Convention for the Adaptation to Naval War of the Principles of the Geneva Convention; -Convention Concerning the Rights and Duties of Neutral Powers in Naval War; and The Declaration London 1909.

[2] Under the Constitution, Congress alone can declare (the state of) war. But the President may cause the nation's forces to engage in fighting without such a declaration or to cease fighting while the state of war continues.

[3] The course of the President of the United States during 1937 in regard to the fighting between Japan and China is a case in point.

[4] The one hundred and fifty seven Articles of War elaborated by Professor Francis Lieher for the conduct of the armies of the United States during the Civil War came eventually to be very generally accepted and to exert a great influence upon the formulation of international conventions Such as the Laws and Customs of War on Land adopted at The Hague in 1899 and 1907.

[5] New inventions in the history of warfare have frequently been frowned upon as illegal. The crossbow, the musket, the torpedo, and the submarine mines were successively so regarded.

[6] In the United States the Federal District Courts sit as courts of prize With appeal to the Supreme Court.

[7] This is sometimes spoken of as the right of approach.

[8] A distinction must be drawn between military personnel and persons merely engaged in diplomatic or other civilian service for the enemy. In 1861 a war vessel of the United States took from a British ship, sailing from Havana to England, Messrs. Mason and Slidell who were on their way to intercede with Great Britain and France on behalf of the Confederacy. Strong representations made by Great Britain against this act were backed up by most of the other European powers, and the United States promptly surrendered Mason and Slidell to the commander of a British ship. The United States itself had previously protested similar takings on the part of England.

[9] In 1862 a vessel called the Enrica was fitted out in England but not there armed or equipped for war. She was taken later to a French port and fully equipped as a warship. Under the new name of *Alabama* she preyed upon the commerce of the United States, inflicting great damage. Representations made by the United States to England resulted in the submission

of the American claims to arbitration at Geneva. The arbiters in 1871 held the British Government culpable and awarded damages of $15,500,000. The finding was upon the ground that the British Government had not used "due diligence" to discover and prevent the outfitting of the ship.

[10] In former times—indeed, as late as the nineteenth century—neutral States themselves made loans and sold war materials to belligerents. This Practice is now regarded as illegal.

[11] It is customary for neutral states by appropriate measures to prescribe regulations for their citizens with regard to belligerents.

[12] This distinction, as shown elsewhere herein, is becoming harder and harder to maintain in modern warfare because of its economic character. Men and women in factories have come to have almost equal military importance with soldiers in the field. The activities of men in uniform frequently consist more in work than in fighting. The objectives of military operations may be the destruction of means of supply and subsistence as well as the subjugation of military or naval forces.

[13] The Hague Convention of 1907, concerning War on Land.

[14] Small's Administrator *v.* Lumpkin's Executrix, 28 Grat. (Va.) 832 (1877).

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