LEGISLATIVE REGULATION

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A STUDY OF THE WAYS AND MEANS OF WRITTEN LAW

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FOREWORD

IN 1920 the Commonwealth Fund, through its Committee on Legal Research, inaugurated a program of legal research, the major part of which has been devoted to the relatively new subject of Administrative Law. The plan contemplated a general survey and a number of special studies. The first of the special studies was one of the Federal Trade Commission, written by the late Gerard C. Henderson, and published in 1924. An account of administrative procedure in connection with statutory rules and orders in Great Britain, by Professor J. A. Fairlie of the University of Illinois, appeared in 1927, and the first two volumes of a comprehensive treatise on the Interstate Commerce Commission, by Professor I. L. Sharfman of the University of Michigan, in 1931. A study on the administrative control of aliens, by Dean William C. Van Vleck of the George Washington University Law School, was published early this year; and there is in the final stage of preparation another study on the administrative powers and methods of the Department of Agriculture by Frederic C. Lee, lately Legislative Counsel to the United States Senate. A full examination is being made of the operations of workmen's compensation commissions in a number of states, under the direction of Professor Walter F. Dodd of the Law School of Yale University.

The general survey, written by the writer of the present treatise, was published in 1928, under the title: *Administrative Powers over Persons and Property*. It was indicated in the preface to that book that a logical complement to it would be a comprehensive study of the ways and means of regulative legislation, and in pursuance of this idea the book that is now offered has been written.

While the study is published by the Commonwealth Fund, it was undertaken upon the initiative of the author, who assumes entire responsibility for opinions and conclusions expressed.

March, 1932

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PREFACE

A BOOK on legislation requires, by way of introduction, an explanation in two respects:

First, as to its scope. There is, at present, much discussion as to the place of legislation in legal science and in legal education. Constitutional law and statutory interpretation are essential phases of the subject with which lawyers are familiar. Neither can be ignored in dealing with the constructive aspects of legislation, although, the approach being different, most of the case material may be ignored. Beyond these two subjects there is uncertainty. Mr. Robert Luce's recent books on *Legislative Assemblies, Legislative Procedure,* and *Legislative Principles,* indicate other lines of approach, which are somewhat more remote from the lawyer's interest; if we add the study of pressure groups, of the interactions of public opinion and of legislation, of the movements of legislation over given periods, and the relation of legislation to administration, we arrive at a system of politics of legislation so wide and comprehensive in its ramifications, that the detail of legislative form and content will inevitably be subordinate and neglected. If we concentrate attention on the content of legislation, the difficulty is to avoid drifting into particular legal disciplines. Capital punishment, divorce, the status of married women, the control of investment trusts, oil conservation, child labor, small loans, mechanics' liens, motor vehicle traffic, civil service, primary elections, regional organization, and a hundred other subjects constitute interesting problems of legislation; but if a study of legislation were to undertake to deal with all of them, it would accumulate valuable material in aid of a system, but the very mass of the material would in all probability prevent an adequate development of general principles. A study of tax and revenue legislation is a study of public finance; a study of administrative legislation is a study of public administration; the study of criminal legislation, while not coextensive with a study of crime, is almost undistinguishable from a study of criminal law. A study of procedural legislation might concentrate on the difference between code law and the law that is based on custom, precedent, and rules of court; and so a study of private law legislation may

emphasize the respective provinces of written and unwritten law. If that is done, the attention is shifted from content to form, and legislation will emerge as a specific and legitimate branch of jurisprudence. That is a fruitful line of inquiry where legislation competes with the unwritten law as a source of legal rules. But legislation as such also challenges attention and study where it transforms freedom which is subject to necessary law, into freedom directed by rules of law which are adventitious and not absolutely necessary. Since this law is the practically exclusive product of legislation, we may expect to find it controlled by conditions and limitations inherent in the legislative process. This, in any event, is the dominant thesis of the present study, which is consequently described as a study of legislative regulation.

The difference between regulative and declaratory law is assumed rather than developed in all its aspects and implications. It involves the question to what extent law is the product of ratiocination, and to what extent other factors than reason enter into its formation. A comprehensive inquiry would probably bring out an additional line of cleavage between legislation and custom on the one hand, and judge-made law on the other, and would thus complicate the study by opening up problems of legal philosophy not essential to more practical aspects of the legislative process. The topics dealt with in the book are intended to be of some value to those concerned with the function and tasks of legislation: the possibilities of general as distinguished from special legislation, problems of phraseology and style, available forms and methods, and the technical detail of penal and civil regulation. More abstract and theoretical aspects of legislation may well be deferred.

The second preliminary observation relates to source material and authorities. In writing a legal treatise based in the main on case law it is possible to undertake an almost exhaustive examination of at least the American and English decisions with the aid of the elaborate digests that have been prepared for the use of the legal profession. It is impossible to examine statutes in a similar manner. On any given topic the substantive statute law in force at any given time can be collated; but significant forms and developments of legislation are scattered over a mass of otherwise uncorrelated statutes, with no existing or possible index to point the way. The material used in this book has

been gathered incidentally to the study of legislation for a variety of purposes, and pursued for a considerable number of years. In a general way one can get acquainted with the statute books of a few jurisdictions, but not with all the technical detail that they contain. In no particular instance can it be claimed that illustrations offered give anything like a complete or adequate picture, and if the writer himself has gained the impression that illustrations are fairly representative, he cannot substantiate that impression to the satisfaction of others. In the nature of things, moreover, an exhaustive presentation of material, if possible, would serve no purpose: legislative technique is not, like judicial doctrine, a matter that can be established by preponderance of argument or authorities; it is essentially a matter of judgment and expediency. But precedent plays as important a part in legislation as it does in judicial decisions, though in a different sense: legislators do not like to use new methods of expression, but a form once used has considerable persuasive effect. And, of course, if it can be shown that forms that have been used are undesirable, it is not necessary to prove that they have been authoritatively condemned.

But even with this explanation it must be conceded that the source material of the book is fragmentary and sporadic. Cases, of course, could be indefinitely multiplied, but the book is not intended to compete with treatises on statutory construction. Illustrative citations of statutes are more or less haphazard; and while it is believed that conclusions drawn are valid, it is fully recognized that with regard to many of them there may be legitimate differences of opinion. It is hoped in any event that students of legislation may derive some aid from an attempted systematic presentation of the subject.

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

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PART I

LEGISLATION AS A FORM OF LAW

CHAPTER I

WRITTEN AND UNWRITTEN LAW

§1. Declaratory and Regulative Rules. A just appreciation of the relation between written and unwritten law must be based upon the recognition of a distinction between two types of rules, the one declaratory, the other regulative in character. The declaratory rule is in the nature of a rule of decision; in a community acknowledging the reign of law it is the inevitable product of default or controversy, implicit in a given situation and the result of factual, conceptual, or textual interpretation; the expression of justice, and, as such, claiming rational validity. The regulative rule is the expression of government, in the nature of a rule of conduct, imposed upon rather than implicit in a situation, conventional in character, and generally operating with form requirements, precise quantities, or administrative arrangements. The relation between written and unwritten law differs according as either type of rule dominates in a given field of law, private, criminal, or public. The controversies over codification which in Germany are associated with the names of Savigny and Thibaut, and in America with the names of David Dudley Field and James C. Carter, have emphasized the competitive aspect of the relation, because they were concerned with private law exclusively. Upon a more comprehensive view, which covers also criminal and public law, the aspect changes, and there is much less of competition and much more of coöperation and distribution of functions.

§2. Civil Codes. When we contrast codified with unwritten law, we have in mind codes of substantive private law. It so happens that in the division of the western world into legal jurisdictions, those that look for sources of authority to Rome are code jurisdictions, while those that look for sources of authority to England, are jurisdictions in which the bulk of the private law remains uncodified.[1] The excep-

[1] In England, some branches of the private law have been given written form, constituting codification of a very restricted scope: the law of bills of exchange (1882), of partnership (1890), of sale of goods (1893), and of marine insurance (1906). In the United States, a similar movement has been inspired by a desire for uniformity. See §37, *infra*.

tions (Hungary in Europe, in America the "Field Code" states, and Georgia) are negligible. The French Code of 1804 is the earliest of modern codes now in force, and by reason of the influence it has exercised, the most important; the German Code of 1900 is generally regarded as juristically the most carefully framed, and for that very reason the deliberate adoption of a simpler and more popularly phrased codification by Switzerland in 1912 attracted much attention.[2] A trend toward codification is manifested in the framing of civil codes for the Soviet Union Republics, and in the adoption of the Swiss Code by Turkey in 1926.[3]

Since in France, Germany, and Switzerland codification meant national unification of regional diversities of law and legislation, it was a logical step for these codes to abrogate the common law. But an entire supersession of unwritten law is impossible. Expressly or tacitly, codes recognize the possibility of controversies not covered by an explicit rule of decision, and assume or direct a reference to analogy or general principles to supply such gaps. In code and common law jurisdictions alike, the principles of the conflict of laws are left to be developed by doctrine and practice; this is true even in Germany where the Introductory Act of the Code contains an incomplete set of provisions intended in the main as rules for making German law applicable and foreign law inapplicable. And above all it is impossible to conceive of a code as operative without the aid of an unceasing process of interpretation which gives life and content to its rules. But the written rules make an ever-present background, and this expresses itself in the practice of placing at the head of every private law decision in the printed Reports of the German Imperial Court, a reference to an appropriate provision of the Civil Code.

[2] The Introduction to the Exposition of the Preliminary Draft of the Swiss Code, published in 1902, and apparently written by Professor Eugen Huber, gives a noteworthy account of the task of codification.

[3] See *Journal of Society of Comparative Legislation*, 1902, p. 71: "A Table of European Codes"; article on "Modern Civil Law," by C. S. Lobingier, in *Corpus Juris;* article on Turkish law in Stier-Somlo's *Handwoerterbuch der Rechtswissenschaft*, vol. VI, p. 106; as to new Russian Codes: Heinrich Freund, *Zivilrecht der Soviet Union*, p. 2.

In the Scandinavian countries older codes are still partly in force. A Blue Book Report on Consolidation of Statute Law, July 21, 1835, quotes King James I in 1609 speaking of laws ruled by precedent: "save only in Denmark and Norway where the letter of the law resolves all doubts without any trouble to the judge." McIlvain, *Political Works of James I* (Harvard Political Classics), 1918, p. 312.

In comparing code law with unwritten common law, we have to consider the relation of code law to interpretation, to law reform, and to regulative legislation.

1. *The interpretative elaboration of code provisions.* The outstanding difference between a civil code and the Anglo-American system of case law is that code provisions are limited in number while the number of cases is unlimited. The accumulation of case law shows that the process of elaborating principles and rules can be extended almost indefinitely, stopping only at the point, often arbitrarily assumed, where subdifferentiation of type situations yields to individuation in the form of what is called a question of fact. Case law is a form of casuistry, even though we may concede it to be legitimate casuistry, and it can lay no claim to exhaustiveness. This must from the outset frustrate any attempt to build up a body of case law into exhaustive categories of rules, and any such attempt will inevitably result in the formulation of propositions, on the one hand, so guardedly qualified as to be unintelligible to one not cognizant of the type of factual situation from which the abstraction was drawn, and on the other, quite likely to be unfruitful, if sought to be applied to a novel situation not present to the mind of the one who formulated the abstraction. It is in consequence more conformable to a didactically phrased, than to a legislative statement. It is interesting, in the light of this observation, to compare statements of the law of torts—a branch of the law which necessarily operates with abstractions (such as negligence or proximate cause) which at the core are matter of common sense, but have an extremely wide margin of uncertainty. The French Code has only five sections, as against thirty-one sections of the German Code, while the Swiss Code, with twenty-one sections, stands between them. On the other hand, the more didactically worded Code of Georgia has one hundred and nineteen sections; and unofficial statements are even more elaborate: Jenks' *Digest of English Civil Law* has three hundred and fifteen sections on torts, and the *Restatement of the American Law Institute* (not claiming to be intended for legislative enactment) gives in one of the tentative drafts two hundred and forty-nine sections to only a fragment of the subject.[4]

[4] It is easier to compare the American Law Institute restatement with a code in the matter of torts, than in the matter of other subjects, partly because with regard to some restatement subjects (trusts, conflict of laws) there are no code parallels, partly be-

The necessity of keeping a code within the limits of a manageable legislative project operates as a practical check upon the codifier. The notes accompanying the first draft of the German Civil Code bear frequent testimony to the recognition of the necessity of avoiding casuistry. The entire German Code has 2385 sections, the French Code, 2281. Plan and principles of formulation being different, this approximation in bulk is striking and significant. It goes to show at least some agreement as to the line where the legislator should yield to a non-legislative process of interpretation. But since the line cannot be fixed with precision, it must also be true that legislation and interpretation to a considerable extent overlap, and that much of code legislation is in the nature of a factual or conceptual, if not textual, interpretation.

If legislation cannot rival the unwritten law in the mass production of declaratory rules, what is the object of codification? Of the three impelling reasons that historically have made for codification: unification, law reform, and clarification, it is the latter which is most likely to be drawn in question. Opponents of codification may contend that rules which must avoid the detail of case law make a pretense at clarification which must be illusory, and that the pretended benefit is paid for by the loss of flexibility which is the great merit of unwritten law. The lack of certainty may well be conceded, and no lawyer will be misled by the apparently categorical form of the rule; but the layman's purpose will often be served by intelligible explicitness falling short of absolute certainty; and this gives the written rule a political and educational value which nations living under codes fully appreciate.

On the other hand, the difference in flexibility between the written

cause the scope is very different (contracts, agency), partly because the particular rules of law are peculiar to the Anglo-American system (real property). The difference in degree of specialization between restatements and codes is probably greater in torts than in contracts. As regards the restatement of the law of contracts, see the comments of a foreign jurist in 5 *Zeitschrift f. ausländ. und internation. Privat-Recht* 32, 37: "The rules laid down in the Restatement are not as general as those of the B.G.B. Rules which we state for the entire law are stated only for the law of contracts—a branch of the law more restricted than our law of obligations. Each particular rule is likewise less general. The problem, when a declaration becomes effective, and when the communication of a declaration is dispensed with, is resolved into particular instances. On the other hand, the expression is very abstract, so that the novice gets the meaning only from the illustrations."

and unwritten law is apt to be greatly overestimated: so far as the argumentative form of a judicial conclusion implies elasticity, it must be remembered that judicial decisions generally turn on points which codes leave to interpretation, likewise expressed in inconclusive and therefore elastic form, whether through judicial decisions or through the writing of jurists. And in so far as the imperative form of a legislative conclusion may seem to imply inelasticity, it seems relevant to make two observations: first, that rules of unwritten law which correspond to code provisions are often accepted as settled with a rigidity hardly inferior to that of an imperative statement; and, second, that the legislative statement is flexible at least within the limits of inevitable expressional ambiguity and implication, and that the codifier has it within his power to choose latitudinarian terms to suit his purpose. The value of the provisions of the German Code concerning malice (§226), good faith (§157), and acts *contra bonos mores* (§826) lies in their intentional generality.

The French Code of Commerce in its original form made the carrier assume a warranty of goods carried against loss or damage (art. 103). It was silent as to contracting out. The "jurisprudence" of the courts permitted stipulations which at least shifted the burden of proof to the shipper. In 1905 the article was amended by making clauses containing contrary provisions in bills of lading or tariffs of charges void. Controversies continued as before, and the Court of Cassation held in 1924 (Sirey 1926 I 295) that in view of the term "contrary," mere modifying stipulations were not intended to be forbidden.

With the French law, whether before or after 1905, may be compared the minute and elaborate provisions of the German Code of Commerce dealing with the matter (§§425–473), the involved and cumbersome provision of the Federal law last amended in 1930 (§20 [11] of the Interstate Commerce Act), said to represent an agreement between shippers and carriers, and the unwritten common law (see R. M. Perkins, "Judicial Relaxation of Carriers' Liability," *Iowa Law Bulletin,* vols. III and IV). We have here a striking illustration of the demand for a written rule, and of the limitations of the legislative power in satisfying the demand. It may be that in the last result there is little practical difference between legislative formulation and the lack of it; but the written rule, if of problematical positive value, probably does also little positive harm, and, in its French form at least, has not stood in the way of flexibility.

A German discussion of the difference between absolute and yielding law ("Zwingendes und Nachgiebiges Recht," in Stier-Somlo's *Handwoer-*

terbuch der Rechtswissenschaft, vol. VI, pp. 1139, 1143) pronounces against the advisability of foreclosing by a general rule the question whether a provision is or is not to yield to contrary stipulation, considering that this should be a question of interpretation from case to case.

2. *Codification and law reform.* One of the incidental benefits of codification is that it affords opportunities of correcting sporadic forms of anomaly or injustice which make no appeal to class interest or to popular imagination, and which are therefore likely to remain unremedied in the ordinary course of legislation. The German Civil Code contains a considerable number of such minor reforms, some of them traceable to the Prussian Code of 1794; the unwritten law had failed to develop these equities in Germany, as it has failed to develop them in England and America to the present day. Reform movements that have a social appeal may gather sufficient strength to set in motion the processes of ordinary legislation without having to wait for codification. Such reforms are apt to constitute new declaratory law, i.e., a reinterpretation of a legal situation upon the basis of new principles; and for such reinterpretation the unwritten can hardly rival the written law. Whatever may be thought of the theoretical possibilities of the judicial process in substituting new principles for old, the course of transformation is apt to encounter at some stage the obstacle of judicial conservatism. Thus courts of equity might have extended the emancipation of the married woman so as to give protection to her earnings, but they failed to do so and legislation had to interpose.[5] We can imagine ways and means by which the courts may alter the anomalies of the law of infancy; but it seems that needed changes will have to await legislative action. It is true, on the other hand, that the change in the law of the respective rights of the two parents has largely been the result of judicial action, and might conceivably have been left to it altogether. Again, however, we find legislative intervention; the proclamation of the equal rights of the two parents by the Illinois Act of 1901 was a characteristic legislative step: for not only must such equality, closely analyzed, mean an ultimate reference to judicial decision, but there is the typical latitude of the general formula which leaves it open for the court

[5] As to the relation of judge-made law to legislation in the development of the law of married women, see Dicey, *Law and Public Opinion in England,* pp. 395–398.

to declare that the legislature tacitly assumed the superior right of the child, and to determine disputes accordingly. Judicial action will thus dominate; but what counted in the demand for statutory recognition, was moral and political effect. Where law reform has strong social implications, the practical tendency, whatever the possibilities of unwritten law, will be to transfer the scene of the change from the relative obscurity of the court room to the political atmosphere of the halls of the legislature, although it is also true that occasionally the relative obscurity of the court room will serve the purposes of law reform better than an open legislative struggle.[6]

3. *Regulative rules in private law.* In order to assign to legislation its proper place in private law, it must be realized, that, normally speaking, the judicial process cannot produce the rule that is regulative in character. Occasionally, a fortuitous reading of precedents (as in the Rule against Perpetuities), or the following of statutory rules by analogy (as in the period of prescription), has enabled judge-made law to operate with precise quantities; in other cases (age of majority, days of grace) immemorial custom has produced the same result; but the characteristic product of judicial reasoning is the doctrine of laches without definite time limits, in contrast to the twenty years of the statutes of limitations.

It is a familiar feature in the history of the common law that the full fruition of a doctrine is lost because it stands in need of supplementation by regulative devices. In the law of real property, a system of settled or future interests in land creates considerable inconvenience, unless accompanied by powers of sale, but the common law developed only the former, and legislation had to supply the latter. In the law of conveyancing, the equitable doctrine of priorities based on value, lack of notice, and the advantage of the legal title, was necessarily unsatisfactory without the institution of public records, and this depended upon legislation. The common law has to choose between no liability and unlimited liability, while statutes have created liabilities with upper limits, and rights to notice on behalf of the

[6] Where law reform is effected by legislation, which merely substitutes a new principle for one supposedly inferior which is discarded, without resorting to regulative devices, the resulting rule does not change its nature, since it remains rationalistic or propositional. To describe the new rule as declaratory, may appear somewhat misleading, if the term must be reserved for the declaration of an already existing rule;

person charged, which neither common law nor equity produced. As the law becomes more socialized, the demand for qualified, in preference to absolute, rights increases; and in satisfying this demand, the uncompromising logic of the courts has proved inferior to legislation.

In any of the European civil codes it is possible to distinguish the relatively permanent stock of abstract and conceptual doctrines, largely the inheritance from Roman jurisprudence, from the innovations which involve administrative arrangements. The progress of the law lies largely in the latter, and a considerable part of this more modern law (title registry, corporation law, etc.) has been built up outside of the codes. Accident liability is transformed into schemes of compensation and of social insurance, the labor law becomes a system of administration, and many commercial transactions are placed under some form of official supervision. The declaratory part of the private law retains its absolute importance, but, in comparison with the regulative part, its relative importance is constantly diminishing.[7]

§3. Criminal Codes. In nearly all modern states we find comprehensive statutes which purport to cover in one legislative act all important offenses by defining them and specifying the punishment of each. England stands out as a jurisdiction which has never enacted such a criminal code; but by a series of enactments beginning in 1861, statutory form has been given to the law relating to practically all the crimes that engage the attention of the courts,[8] and only few minor and obscure offenses continue to be punishable upon a common law basis.[9]

the term is, however, not inappropriate, if understood as merely declaring a proposition to be just and sound, although a change of opinion as to what is just and sound has taken place. In a comprehensive division of rules into the two categories "declaratory" and "regulative," "declaratory," for lack of a better term, is used in the wider sense.

[7] See an anonymous article on "*Jus* and *Lex* in the Development of the Roman Law" in 31 *Juridical Review* 110, 1919. The difference does not quite coincide with that between declaratory and regulative rules; but there are interesting analogies.

[8] Volume IV of the *Complete Statutes of England* (pp. 251–855) gives not only a full view of the statutory law, but also, in a preliminary note, an account of the history of legislation. The law of a few offenses (perjury, larceny) has been stated in systematic form, so that the statutes constitute limited codes.

[9] Russell on *Crimes and Misdemeanors* (6th ed.) treats as common law offenses:

Of the American criminal codes, some recognize the continuing punishability of unspecified common law offenses, while others follow the principle which continental jurists express by the maxim, *nulla poena sine lege;*[10] but even where in theory the common law survives, it is of slight practical importance. The opposition to the recognition of the unwritten common law as authority for the punishment of crimes has always been strong in America, and has been a factor in the rise of the doctrine that the United States as a federal government has no common law.[11]

The sphere of the unwritten law in connection with the cognizance of crimes lies in the elaboration of doctrines concerning the nature of the criminal act, criminal responsibility, etc.[12] The practical necessity of having a statutory basis for the punishment of serious offenses is so obvious, that for the specification of crimes the unwritten law can no longer be regarded as a serious rival of statute law. The choice lies between a series of statutes such as we find in England, and a code. If the task is well performed, the comprehensiveness and unity of a code is a superior form of expression; but this superiority is jeopardized if there is a habit of either sporadic outside legislation dealing with crime, or of unsystematic and piecemeal code amendment.

When we thus think of criminal law as a legitimate subject of codification, and as a unit with respect to it, we do not include in it the mass of regulative legislation which is supported by penalties.

common affray, common assault, challenge to fight, libel and slander, public nuisance, and official misconduct—none of them felonies. Nearly all citations are to old cases. Conspiracy, another common law offense, is treated of in connection with attempts.

[10] The Criminal Code of Illinois (Division II, §20) provides: "All offenses not provided for by statute law may be punished by fine and imprisonment, in the discretion of the Court." On the other hand, the Criminal Code of Texas provides (art. 3): "In order that the system of penal law in force in this state may be complete within itself and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act of omission unless the same is expressly made a penal offense, and a penalty is affixed thereto by the written law of this State."

[11] See Tucker's *Blackstone,* ed. 1803, vol. IV, App. A: "Of the Cognizance of Crimes and Misdemeanors."

[12] In a jurisdiction recognizing only statutory offenses, would an attempt to commit a statutory crime, in the absence of a general or specific provision, be punishable? Clearly not, although there appears to be no direct authority on the point. The question may arise under the Criminal Code of the United States, which contains no general provision covering attempts.

The familiar distinction between *mala in se* and *mala prohibita*[13] here expresses itself in the form of statutes: the law does not forbid in terms the commission of ordinary crimes, but defines them and fixes punishments; while police regulations assume the form of prohibitions.[14] The wrongfulness which is taken for granted in one case by what purports to be a rule of decision, is first established in the other case by what purports to be a rule of conduct. The criminal law has its origin in the concepts of crime and guilt, regulative legislation is associated with the concept of public welfare; but the concepts of peace and order are common to both. The police power sets in at a point which lies this side of generally conceded wrong, where circumstances of time or place or action create a public menace that can be checked by appropriate precautionary measures. These measures are likely to be of a conventional character, and to call into play administrative powers or arrangements of various kinds. We therefore pass from criminal into public law.

§4. PUBLIC LAW. The outstanding factor in the relation of unwritten and written law in the field of police, revenue, and public administration, is that the starting-point is an act of government which is regulative in character. This entire law, therefore, in the modern state at least, rests upon a substructure of written enactment, and the unwritten law can enter therefore only at a subsequent stage of operation; the regulative law is primary, and the declaratory law is secondary.

The regulative act of government, being conventional and positive, does not, like declaratory law, claim to be rationalistic or reasoned law. But if its meaning and application give rise to controversy, there will be occasion for an interpretative rule of decision which is declaratory and rationalistic, and the establishing of which may be left to a court. It is open to the legislature, if it foresees the controversy, to lay down an anticipatory rule of decision, and thus superimpose declaratory upon regulative law. Or it may regulate in such a man-

[13] See a note on the distinction in 30 *Columbia Law Review* 74.

[14] See Wach, "Struktur des Strafgesetzes," *Vergl. Darstellung des deutschen und ausländ. Strafrechts, Allgem. Teil* VI, 46.

ner that particular doubts cannot arise. To illustrate (from the field of private law) by the familiar formalities in the execution of a will: if the law requires a signature and a dispute arises as to what constitutes a signature, a declaratory rule is called for; the legislature may anticipate a particular doubt by requiring signing at the end, which is in the nature of a more minute regulation; or it may (as is done in Virginia) require the will to be so signed as to make it manifest that the name is intended as a signature—which is in the nature of a rule of interpretation.

While the legislature has full power to supplement regulative by declaratory law, it uses the power with moderation, manifesting its sense of what is appropriate for legislation, and what is appropriate for judicial action. There is probably no legislative measure in which it does not happen that the legislature, realizing that the provisions of a bill do not solve all of the even foreseeable controversies, refuses to furnish the solution, but deliberately prefers to leave the text of the law to be developed by judicial construction. And it is a noteworthy fact that where a legislature comes to revise a statute which has undergone judicial interpretation, it rarely incorporates in the revision (not even for the purpose of further clarification) the results of judicial interpretation, but will take cognizance of interpretation only if it desires to neutralize or overturn its effect.[15]

There is of course no hard and fast rule that determines the legitimacy of declaratory law in connection with regulative legislation. Practical considerations may make it as legitimate to incorporate in-

[15] See 12 *American Jurist* 496, citing chapter 21 of the Laws of North Carolina of 1833–34 providing for a Digest of Laws, and containing the provision that "no change shall be made by the said commissioners in the phraseology or distribution of the sections of any statute which has been the subject of judicial decision, by which the construction thereof, established by such decision, shall or can be affected."

In 1885 two distinguished English jurists, Sir James FitzJames Stephen and Sir Frederick Pollock, undertook to state in codified form the judicial interpretation of section 17 of the Statute of Frauds, see 1 *Law Quarterly Review* 1; but the statutory codification of the law of the Sale of Goods in 1893 reproduced in section 4 this section 17 with some changes, but without any attempt to give the same explicit expression to the case law that had grown up around the section. Thus article 12 of the Stephen-Pollock codification provides: the price at which the goods were sold must appear, if it was agreed upon by the parties, but it need not be stated if it was not specifically agreed upon—expressing the ruling in *Headly* v. *McLaine*, 10 Bing. 482, 1834. But the Sale of Goods Act does not express this rule. See M. D. Chalmers, *Sale of Goods Act*, 1893, 9th ed., pp. 20–26.

terpretative matter in a statute as they may make it legitimate to codify unwritten law. Conspicuous illustrations are found in revenue legislation: the income tax law has at present a good deal of matter that is declaratory rather than regulative (see Revenue Act of 1928, sections 21–25, 101, 111–117, compared with section 103 which appears to be regulative); and in a measure which vitally affects numerous individuals in their property rights this seems eminently appropriate.[16]

The difference between written and unwritten law thus extends from civil and criminal justice to the field of public law. If we emphasize the difference in private and not in public law, it is because in the presence of a textual foundation we are in the habit of speaking of interpretation, without perhaps fully realizing that the process of elaborating law in view of new combinations of circumstances which place the application of existing law in controversy, is essentially the same whether we start from a statutory text or from a common law principle.[17]

[16] It is quite a different matter for the legislature to undertake to state purely theoretical implications of its regulative provisions. If the statement is correct, the result is a platitude, as in 17 U.S.C. 41, where the copyright is distinguished from the property in the material object copyrighted; should the statement be incorrect it will probably be futile, *nec enim* (as Gajus says, Dig. 7, 5, 2) *naturalis ratio auctoritate senatus commutari potest.* It is the Supreme Court, and not Congress, that committed itself upon the question whether a rate order is a judicial or a legislative function (*Prentiss* v. *Atlantic Coast Line,* 211 U.S. 210, 226, 1908). As to the attitude of courts toward abstract definitions in codes, see *Ellis* v. *Prevost,* 13 La. 230, 236, 1839.

Even a systematic study of regulative legislation may refrain from setting up rigid schemes of classification, and from committing itself to a choice between categories. It is freer in this respect than a study of American constitutional law which is concerned with justifying legislative regulation on the basis of recognized powers. In sustaining novel restrictions on rights of property in connection with the movement for zoning and city planning, the courts have relied upon the police power of the state, and text writers have freely accepted that theory. I have attempted to show ("Problems of the Law of City Planning and Zoning," 24 *Illinois Law Review* 135, 1929) that zoning restrictions violate the principle of the police power that restraints upon private right are not adjusted to "capacity to bear," and that this part of the law can be better understood by recognizing on the one hand the interdependence of public and private improvements, and on the other hand, rights and duties with respect to conformity which have been slowly evolving with a better appreciation of urban and suburban needs. It would be unfortunate if the validity of legislation were to depend upon the universal acceptance of scientifically sound theories. What is needed, is substantial equity and (under our constitutional limitations) some formula that will satisfy the courts and the legal profession. The formula having served its purpose of sustaining the legislation in principle, the search for equity will continue, and it is with this that a science of legislation will be concerned. But it will be speedily realized that there is no one brief formula to resolve all the complicated problems of equitable adjustment.

[17] There is this difference between "textual" and "conceptual" interpretation, that

Moreover the term "interpretation" is not strictly applicable where we deal with the larger aspects of governmental relations and public power. These underlie public regulative statutes without necessarily being in the minds of the legislature dealing with some particular statute. They constitute the province of general public or administrative law, which on the continent of Europe, but not in England or America, is, in consequence of a special historical development, to a large extent withdrawn from the jurisdiction of the ordinary civil courts. When we think of the common law of continental countries as codified, we should remember that this applies to private and not to public law. And when we think of the mass of public law in all countries as statutory, we should remember that this applies to their regulative provisions, and not to the declaratory law that defines the legal implications of these provisions.[18]

For the declaratory law which interprets regulative provisions, we are in the habit of looking to judicial decisions. Administrative "rulings" which undertake to interpret (as distinguished from administrative regulations) are inconclusive, yielding to different judicial interpretation. This assumes that rulings can be, and are, carried to the courts. So far as a ruling is adverse to the government, and acquiesced in by the chief administrative authority, it is of course practically conclusive; and of the rulings which are adverse to private interests and might be contested, only a small fraction are contested as a matter of fact. The declaratory public law as it is actually applied is therefore largely administrative law in the sense that it is the product of administrative action.[19]

§5. NOTE ON PRAGMATIC CHARACTER OF DECLARATORY LEGISLATION. A comparison of declaratory with regulative legislation makes the former

the former can always take refuge in the supposed intent of the legislature—a factor which makes statutory interpretation in many cases virtually unassailable on grounds of logic, and makes prediction as to judicial construction of a statute a game of hazard.

[18] It is, for instance, only in quite exceptional cases that a statute will lay down rules as to the civil consequences of non-compliance of regulative provisions, in the way of liability or avoidance of contracts. See *infra*, §83, under Enforcement Provisions. Many regulative statutes involve the problem of official liability, but statutes are nearly always silent upon the point. For an exceptional provision, see §24 (3) of the Illinois Securities Law; also English Pilotage Act, 1913, §19.

[19] The administrative practice which thus in a qualified sense performs the function of law is not to be confused with the administrative practice which is in con-

appear as akin to judicial interpretation, purporting, like the latter, to express rules of reason and of justice. A comparison between declaratory legislation and judicial interpretation will, on the other hand, tend to bring out the relatively less rationalistic character of the former. Since an act of legislation entirely dispenses with the argumentative form of the judicial opinion, it is not apparent on the face of the statute that the conclusion was a reasoned one; occasionally, the reasoning is supplied in a committee or commission report to the legislature, but it is interesting to note that the most elaborate exposition of this character known to the history of jurisprudence, the German "Motive," accompanied only the first draft of the Civil Code, while the second draft, which became law, has no similarly elaborate substantiation. In any event, the legislature as such is not in the habit of supporting the law which it produces, by arguments or reasons, and it is almost inevitable that under the circumstances the ultimate decision, reached by a political form of procedure, should be an act of the will as much as, if not more than, an act of judgment. Dogmatic in form,[20] it is also apt to be pragmatic in its formation.

This pragmatic character of the legislative act leads to important differences between it and judicial interpretation, on the one hand, as to its practical operation, on the other hand, as to its scientific status.

a. *As to its practical operation.* Judicial interpretation is applied retroactively to the determination of antecedent controversies. A declaratory, like a regulative, legislative act, operates prospectively only. Continental jurists recognize what is designated as "authentic" interpretation by the legislature, which has retroactive force, but it is rare, and the practice is deprecated. In America such interpretation would raise a constitutional question; however, if it does not interfere with vested rights, or if, in criminal cases, it is in favor of the accused, it is not necessarily invalid. In England an act of 1542 explained the Statute of Wills of 1540, and an act of 1685 explained the Intestate Estates Act of 1670. In America the Act of Congress of February 26, 1845 (5 St. L. 727) passed to counteract the decision in *Cary* v. *Curtis* (3 How. 235, 1845; see *Arnson* v. *Murphy,* 109 U.S. 238, 1883, and *DeLima* v. *Bidwell,* 182 U.S. 1, 174–180, 1900), was given the form of corrective interpretation; and since the act was one in substance restoring a remedy against the government there could be no objection to its retroactive operation, although it does not appear that it was so applied. Ordinarily a legislative interpretation will operate as an

scious variance from law, by voluntary observance of restraints or by concessions which the law does not demand. The practice of consulting members of Congress in the distribution of executive patronage is of this kind. Conceivably a historic process of evolution may transform such practice into unwritten customary law, but such a process defies juristic analysis.

[20] "A code must be dogmatic. . . . The statute must never be either a reasoning or a dissertation." Jaubert, *Discours sur la loi relative à la réunion des lois civiles en un seul corps de lois,* March 21, 1804.

amendment, and, as such, prospectively; the not uncommon form, "shall not be construed to . . .," while condemned in Pennsylvania (*Titusville Ironworks* v. *Keystone Oil Co.,* 122 Pa. 627, 1888), is unobjectionable, if properly understood and applied.[21] The denial of retrospective operation to declaratory legislation, shows that it is held to be different from an act of judicial interpretation.

b. *As to its scientific status.* Both in England and America, the content of declaratory, like that of regulative, legislation, is juristically taken for granted, and only its interpretation (or—in an appropriate case—its constitutional validity) is regarded as lying within the province of scientific jurisprudence. This attitude is conformable to a jurisprudence dominated by case law. A court, not being an agency of law reform, can accomplish nothing by discussing the legal merits of a proposition that is legislatively foreclosed; therefore the lawyer, arguing a case, will likewise refrain from futile efforts to demonstrate the legal unsoundness of a legislative rule which cannot be aided by corrective interpretation. Legal science, as represented by teaching and writing, adjusting itself to professional needs, falls in with this spirit. On the other hand, judicial interpretation is a legitimate subject of forensic comment, even where it is a question of past interpretation, so long as there is a possibility of influencing a court in the direction of distinction or reinterpretation. Legislation, both declaratory and regulative, has a scientific status only as a matter of constitutional law and what is known as statutory construction; and a juristic science of legislation, from the point of view of analyzing the legal thought that goes into formulating the content of written law, remains to be developed.[22]

[21] As to non-retroactive effect of "shall not be construed," see "The Need for a National Budget," *House Document 854, 62d Congress 1st Session,* p. 62, referring to 13 *Comp. Dec.* 429.

[22] The following may serve as illustrations of the "jurisprudential" attitude toward legal propositions according as they are matter of interpretation or foreclosed by legislative acts:

1. The Illinois Corporation Act of 1872 makes assenting directors liable for the excess of indebtedness over the amount of capital stock. Such a liability is intelligible only upon the theory that such excess is improper and unlawful—a theory contrary to common financial practice, and unmeaning if applied to non-par-value stock. Had any court declared a rule to the like effect, it would have raised a controversy, and would in course of time have been reversed; but the statute remained undiscussed, passed into the law of many other states, and was retained in the Illinois Revision of 1919.

2. The case of *Myers* v. *United States,* 272 U.S. 52, 1926, is regarded as one of the monuments of constitutional law, because it establishes by a course of reasoning the theory that executive power implies a power to remove officers. If it is possible to dogmatize on this matter, it may be argued that the power to remove should follow the appointing power in the mode of its exercise, or that it is independent, or that the power, unless created by legislation, does not exist at all. Had the Federal Convention placed in the constitution an explicit rule of absolute power of removal, lawyers would not have been interested to ask whether the rule represented a logical solution of the problem; they would have looked upon it only as something calling for further interpretative elaboration, and the rule itself would have been relegated to a textbook on Civil Government.

CHAPTER II

GOVERNMENT-LEGISLATION AND LAW-LEGISLATION

PRELIMINARY NOTE. As a matter of history and of present practice, the distribution of legislative powers among the organs of the state is controlled by the relative importance attached to different kinds of law and to the power to effect changes therein. While differences in this respect can to some extent be associated with the distinction between regulative and declaratory law, it is more accurate for this purpose to contrast two classes of legislation which may conveniently be designated as government-legislation (including police, revenue, organization, and public services) and law-legislation (including private law, criminal law, and procedure), respectively. In this division law-legislation carries with it the regulative rules in aid of it, and—in part, but not altogether—government-legislation carries with it the declaratory law that is incident to it.[1]

Historically, the distinction has been important in claims of royal legislative power; at the present time it is important in the delegation of legislative power to subordinate governments.

It is therefore proposed to discuss the difference, first, with reference to the executive ordinance power; and second, with reference to local legislative powers.

§6. THE EXECUTIVE ORDINANCE POWER. For England, the difference between the two types of legislation has found expression in Chief Baron Fleming's argument in Bates' case (1606; quoted in Prothero's *Statutes and Constitutional Documents,* p. 341; also in my *Police Power,* p. 6). The substance of the statement is as follows: A distinction should be made between an ordinary and an absolute power of the king. The ordinary power is for the execution of civil justice; it is exercised by equity and justice in ordinary courts, and is designated

[1] The term "law-legislation." The German publicist Robert von Mohl used a corresponding term in an essay on the drafting of this class of legislation, which will be found in the collection of his miscellaneous writings, *Staatsrecht, Voelkerrecht, und Politik,* 1862, vol. II, pp. 375–633, "Die Abfassung der Rechtsgesetze." This is the fullest German treatment of the subject which I have found. It covers the legislative process as well as the technique of drafting, but distinguishes the art from the science of legislation, the latter relating to the content or principles of private law, criminal law, and procedure. Mohl also gives a bibliography of works on legislation, extending from 1780 (Filangieri) to 1858, speaking of most of them as unimportant and superficial. He recognizes, however, the value of Bentham's contributions to law reform. Mohl's essay itself contains a great deal of valuable matter.

by the civilians as *jus privatum,* and in England as common law. This law cannot be changed without Parliament; indeed, it can never be changed altogether in substance, although its form and course may be changed and interpreted. The king's absolute power is concerned with the general benefit of the people; it is most properly named policy and government, and is not guided by the rules which direct the common law only; and as the constitution of the body of the people varies from time to time, so changes the absolute law, according to the wisdom of the king for the common good, and things done by the king within these absolute laws are lawful.

While this conveniently leaves the place of the criminal law in the scheme of distribution of powers between king and Parliament undetermined, it marks off a province of absolute royal power which it identifies with government, while it disclaims such absolute royal power within the province of law. The governmental royal power was commonly exercised during the seventeenth century in the form of proclamations, and the compilation of public acts known as Rymer's *Foedera* shows the range of matters to which these proclamations related: public health (quarantine measures during the great plague); building regulations for London; highways; prices and monopolies; the printing press; and plays.

This distinction between government and law was not peculiar to English legal and political thought, but is found on the continent of Europe from ancient to modern times. Three references may suffice by way of illustration:

German legal historians distinguish between popular and official law in the old Germanic systems. The former included all that belonged to the jurisdiction of the popular courts, and regulated the relations of the people to each other. In the enactment of the official laws, on the other hand, which related to the organization and administration of common affairs, popular coöperation was dispensed with, the king acting merely with the consent of his magnates (Schroeder, *Deutsche Rechtsgeschichte,* §32).

This view of royal power survived in the Netherlands until the Constitution of 1848: it was assumed that all matters which according to then prevailing theories were part of police, could be regulated by ordinance, whereas the province of legislation (besides matters enu-

merated in the constitution) covered only civil and criminal law (Hartog on the Public Law of the Netherlands in *Marquardsen's Handbuch,* p. 46).

The same theory of royal power is preserved in the present constitution of Sweden: under article 87 civil and criminal laws are enacted, amended and repealed by the Riksdag in concert with the king, while under article 89, as to laws relating to the general economy of the kingdom and the principles to be followed in all branches of public administration, the Riksdag merely presents addresses to the king, who, after consulting the council of state, takes such action as he considers most beneficial to the kingdom.

As a matter of constitutional form, this difference between law-legislation and government-legislation has tended to disappear, if either the Royal Prerogative yielded to the claims of Parliament, as it did in England, or if it succeeded in establishing its sovereignty independent of representative institutions, as it did for a considerable period of time in a number of European countries.

An absolute king might, however, again recognize the difference in regulating the processes of legislation. Thus in 1823 the Prussian government prescribed preliminary deliberation by the Estates for making an alteration in the law of persons and property. In 1838 the Minister of the Interior gave it as his opinion that restraints placed upon the employment of child labor in factories involved no change in the law of persons or property, but merely police protection against the abuses of industrial egotism, and the matter was dealt with by mere executive regulation in 1839; six years later, however, the subject was placed upon a statutory basis (Anton in volume II of Schmoller's *Jahrbuecher,* p. 52).

On the whole, the course of history has been to wrest legislative power from the executive (except in the form of administrative regulations issued under delegation from the legislature) and to require for public-welfare enactments the same concurrence of organs of popular representation, that, at some time or other, has almost everywhere in Europe been required for changes in the law of civil and criminal justice. Instead of codes superseding unwritten law, we find, in public law, statutes superseding proclamations and decrees.

In European countries, however, by virtue of the survival of mo-

narchical traditions, the older theory of governmental power (as distinguished from law or justice) as inherent in the Executive, continues to have some effect with regard to the establishment and regulation of the governmental services. Thus we find in English law a recognition of what is known as "prerogative legislation" (*Encyclopaedia of the Laws of England, h. t.*). We are told that the abolition of the purchase of army commissions was effected by Royal Warrant of July 20, 1871, Mr. Gladstone, on failing to get through Parliament his Purchase Abolition Bill, having recourse to the power of prerogative legislation; and that the status, rights, pay, and promotion of the Home Civil Service are regulated by Orders in Council issued under the Royal Prerogative. But new ministries have in recent years been always established by Act of Parliament, and nearly all important Orders in Council seem to rest on delegated power. In France there is perhaps a wider power of inherent "executive decree" regulation of public services. So far as public service regulation is dependent upon funds, it also depends upon the action of the legislature which has the "power of the purse."

In America we have never had this older theory of governmental power. The American Revolution meant a break in the tradition of executive power, whereas the French and German revolutions left that tradition untouched, just as the tradition of judicial power was left untouched by the American Revolution. Unlike the judicial power, the executive power in the several American states has, apart from specific constitutional provisions, no coercive or dispositive content. In view of its international status, and of the power of removing officers recognized by the Supreme Court,[2] the same is not quite true of the federal executive power; but the powers of the President can certainly not be determined by reference to the powers of the Crown; and particularly the status of the Crown as the legal holder of the title to the public domain is occupied in this country by Congress, and not by the President. When the Smithsonian bequest was made to the United States, an act of Congress was deemed necessary for its acceptance, while such an act in England, it is conceived, would clearly lie within the Royal Prerogative.[3]

[2] *Myers* v. *United States*, 272 U.S. 52. 1926.

[3] See *President's Message*, December 17, 1835 (3 *Pres. Mess.* 187). In the absence

Prerogative law and common law. The term prerogative legislation calls attention to the diminishing status of the royal power as a conglomerate, repository, or source of valuable rights and privileges. Blackstone's account of the King's Prerogative, which should be read in connection with the chapter on the King's Revenue, leaves the impression of something vague and decadent, and this impression is more than confirmed when we note that Sir William Anson in his *Law and Custom of the Constitution* ignores most of the items listed by Blackstone. When, apart from foreign affairs and public office, we now think of Royal Prerogative, we have in mind the pardoning power and the bestowal of titles and dignities; even a royal corporate charter signifies at the present time little more than formal status. The king as an arbiter of commerce is even in Blackstone's pages an evanescent figure, and as "head of the church" he never claimed the power of granting divorces which in a similar capacity German territorial sovereigns exercised down to the end of the nineteenth century. A remnant of the prerogative was perpetuated when the statutes of monopolies made a saving in favor of patents to inventors; but having achieved a parliamentary status, they ceased to be part of the prerogative.

In German constitutional history the term "Regalia" may be taken generally to correspond to the rights classified by Blackstone as King's Prerogative and King's Revenue; however, by a development the reverse of that which took place in England, the power of the territorial princes in the seventeenth and eighteenth centuries became absolute, so that the rights of the personal sovereign and the powers of the state tended to become confused in legal nomenclature, making it possible to apply the term "Regal" to the imposition of taxes. In a number of other connections the "Regalia" appeared to have a more special significance. Thus Klueber's *Public Law of the German Federation,* a standard treatise, first published in 1817, speaks of the following as Regalia: supervision of highways; coinage and currency; the post office; the privilege of mining; forest and hunting rights; rights in public waters; the licensing of manufacturers; protection of aliens and of Jews; the grant of privileges and dispensations, including monopolies and copyrights; market and fair privileges; charters of guilds; and the creation of banks and other moneyed institutions.

While there is no attempt to give unity to these miscellaneous powers by some consistent legal theory, there appears to be an inclination to differentiate them from ordinary justice or the power of police, and the thought suggests itself that the unifying element may be found in the recognition of the universal fact, that every organized community offers sources of

of legislation, the President formerly, by virtue of presumed executive authority, granted to foreign cable companies licenses to land submarine cables in the United States. Later on, the authority was disclaimed, and in 1921 it was placed upon a statutory basis (Moore, *Digest of International Law,* §227; 47 U.S.C. 34–39).

profit not identified with the subjects of ordinary property or of common law rights. They may be matter of common right (*publici juris*), or positions of advantage which give the opportunity of making the community contributory to the accumulation of wealth and profit, or again there may be equitable claims to sole rights or privileges by reason of original discovery or priority of enterprise. In all these cases the representative of public power will tend to claim the unappropriated resources, turning the *jus publicum* into a *jus regium,* or will check private exploitation by making it dependent upon a grant of royal or sovereign privilege. In either case the right thus newly created will stand outside of the common law, either by reason of claims of royal immunity, or by reason of terms annexed to a grant of privilege; with the result that the prerogative will become the source of new and special law. The justice-concept and the welfare-concept of the state will be supplemented by what may be called a patrimonial concept, in accordance with which the community either claims a share in the sources of wealth which its existence makes possible, or places special restraints upon the exploitation of these resources.

The special character of this law expresses itself in the history of legislation in the following ways:

1. Where the general law is codified, this special law remains outside, uncodified, or the subject of separate codification.

2. In the Constitution of the United States, this special law has to some extent been assigned to the legislative power of Congress: coinage, post office, patent, and copyright; through the possession of the public domain Congressional legislation has also become important in the law of mines and public waters.

3. Where the police power is held to be constitutionally restricted in favor of private right, this doctrine is relaxed or denied in connection with the same subjects over which the royal power claimed special control. We can thus in part account for the doctrine of qualified property and of property or business affected with a public interest. Note, e.g., the references in *Munn* v. *Illinois,* 94 U.S. 113, to Hale's *Treatise de Portibus Maris.*

4. For a variety of reasons, the special law incorporated doctrines which from a common law point of view appear anomalous, subjecting the right of property to special limitations, so in connection with patents, copyrights, public waters, etc.; not to speak of privileges and immunities which we still associate with the government as a holder of rights. Some of these doctrines are perhaps more in harmony with what is called the spirit of modern social legislation than corresponding common law doctrines.

The connection of legislation with the prerogative law is perhaps more important from the point of view of constitutional law than from the point of view of legislative technique; but a passing reference to the connection seems appropriate.

§7. THE MUNICIPAL ORDINANCE POWER. The distinction between law-legislation and government-legislation finds a striking recognition in the practice of delegating legislative powers to local governments. The enumeration which is customary in charters or city acts does not attempt systematic classification; but an analysis will show that the subjects covered are always confined to police, revenue, organization, and public services or undertakings. There is never any thought of including matter of private law; and while criminal law and police legislation shade into each other by insensible degrees, local legislation never extends to felonies, and by limiting penalties to fines or brief jail sentences, the ordinance power is practically confined to minor offenses.

The practice of limitation is so firmly established that it may be regarded almost as unwritten constitutional law; whether a reference in a written constitution to local government should be construed as excluding control over private law, has not been authoritatively decided. It is interesting that one of the very few exceptions to the rule rests upon constitutional provision: the constitution of New York gives the city of New York power to regulate the presentation, ascertainment, and discharge of claims against the city—a minor matter, which, however, with reference to tort claims, involves power to control private law.[4] Perhaps the sporadic powers to require party walls constitute another exception.[5] It is no exception, that a city may by its ordinances indirectly affect civil rights (as, e.g., where a court holds that exceeding a local speed limit constitutes negligence, or that a sale made without a locally required license will not support an action for the price, *Miller* v. *Ammon,* 145 U.S. 421, 1892); for the ordinance may not of its own force make the violation of a speed regulation *prima facie* or conclusive evidence of negligence, and if a state court should lay down a rule variant from the decision in *Miller* v. *Ammon,* an ordinance could not, like a statute, declare the nullity of the contract in express terms. It thus appears that it is not the ordinance, but the general law, which establishes the civil consequence of

[4] In Minnesota it has been held that this matter may be covered by a Freeholder's Charter (*State* v. *St. Louis County,* 90 Minn. 457, 1903), but the charter provision happened to be in harmony with legislative policy as expressed in analogous statutes. As to Texas, see *Civil Statutes,* art. 1075, No. 6, and *Green* v. *Amarillo,* 244 S.W. 241, 1922.

[5] McQuillin, *Municipal Corporations,* §392.

violation. It is undisputed that a city cannot exempt itself from tort liability, or make its claims liens on real estate (*Linne* v. *Bredes,* 43 Wash. 540, 1906; *O'Connell* v. *Sanford,* 256 Ill. 62, 1912; *Etheridge* v. *Norfolk,* 148 Va. 795, 1927).

Not even the most ardent advocates of home rule suggest an extension of city powers into the field of civil justice, nor can this acquiescence in a principle of legislation be ascribed to an apprehension of resulting inconvenience. If cities of the size of New York or Chicago had their own private law, the anomaly would not be as great as that of a separate private law for Nevada or for Delaware. The London District in England and the Chicago District in Illinois have, through the operation of special or of optional legislation, distinct systems of land transfer, without embarrassment to the rest of the country or state.

The exclusion of the city from civil justice must be taken as the expression of a profound conviction that there is a province of law which only a sovereign jurisdiction should be permitted to control.[6]

It is not a qualification of the general principle that a city can, through the exercise of appropriate powers, influence or control private rights; in like manner, an individual may vary most of the law of contracts through stipulating the application of some other than the legal rule. A city may also, in the exercise of a licensing power, make it a condition of a license that the licensee give a liability bond (*State* v. *Deckebach,* 117 Oh. St. 227, 157 N.E. 758, 1927, and authorities there cited), although it could not impose the liability directly. Reference has been made to the constitutional power of the city of New York to regulate the presentation, ascertainment, and discharge of claims; so far as such claims rest on contract, contractual stipula-

[6] Therefore the exclusion does not apply if the city is also a state. Many German cities formerly had their own private law; the so-called "Reformation" of the city of Frankfort, enacted in 1509, survived in some respects until 1900. The same was true of Hamburg.

If the grant of local powers of legislation is made "subject to law," or "subject to general laws," the exclusion of the city from the sphere of private-law legislation follows as a matter of construction. For the general law of the state, including, as it does, the entire common law, has a positive rule of law for every private relation. Any piece of local legislation bearing on private law must therefore alter state law, and be contrary to it. In private law, the absence of a restrictive rule means an affirmative rule of freedom. It is otherwise in penal legislation: that an act is not a common law crime, has never meant that it cannot be locally regulated, and therefore a local penal ordinance is not in conflict with the general criminal law of the state which it supplements.

tions could accomplish substantially the same purpose. So, also, a city ordinance may provide that a conveyance of city property must be countersigned by the comptroller, this being a limitation upon the power of an agent, while a limitation upon the governing body itself, e.g., that a conveyance shall require an authorizing ordinance passed by a two-thirds or three-fourths majority of the council, can only be established by statute. While a city, in thus making practical law by stipulation, acts by virtue of its corporate capacity, it has the advantage over a private corporation that restrictions placed by ordinance upon delegated powers are notice to those dealing with the city (*Mayor of Baltimore* v. *Eschbach,* 18 Md. 276, 1861). A practical appraisal of the city's lack of power over private law must take into account the possible effect of stipulations, and the frequent equivalence of management to the effect of declaratory law.

The exclusion of local government from any share in law-legislation should be compared with the status of the government of the United States. Our constitution—different in this respect from the federal constitutions of Germany and Switzerland—withholds from Congress the general power over private law. But in giving Congress the power to make all laws necessary or proper for carrying into execution any of its powers (1–8–17), it permits, in connection with any of the federal services, modifications of the ordinary law in the full discretion of Congress: thus married women postmasters were made liable on their bonds at a time when coverture disabilities still existed in some of the states (Act of June 8, 1872, R.S. 3834, 39 U.S.C. 34); obviously a city could not do this. However, an examination of the legislation of Congress concerning public land, public parks, public moneys, the government services, and the civil services, shows that for most of it the federal government's managing power was adequate without recourse to its sovereign law-making power. If we except a few penal provisions, provisions for summary adjudication of minor infractions (in connection with the national parks), and occasional rules establishing presumptions, there has been little occasion for altering general rules of law except as these rules would in any event be yielding to party disposition.[7]

[7] In making an appropriation to pay compensation for an injury for which the United States does not allow itself to be sued, it appears to be the practice of Congress

There remains this difference between municipal and federal control through management, that the municipality is debarred from the interpretation of its regulations, since controversies are adjudicated by state authority, whereas the interpretation of any federal statute, if adverse to a claim of federal right, may be carried to a federal court. The United States thus has the last word on the law of its service relations, while the city must content itself with forestalling adverse interpretation by anticipatory stipulations so far as these lie within the compass of proprietary or contractual regulation.

to insert a provision to the effect that no attorney shall receive of the amount appropriated more than ten per cent on account of services rendered, any contract to the contrary notwithstanding, and making violation a misdemeanor (see *Congressional Record,* June 25, 1930, pp. 12081, 12082). A city could not make such a provision.

CHAPTER III

GENERAL AND SPECIAL LEGISLATION

§8. Types of Special Legislation. The gradations from special to general are infinite. The following may serve for illustrations: an act granting a pension to an individual, an act appropriating money for an official salary, and an act fixing the salary of a particular office. The first act would generally be described not merely as special, but as private; the second would generally form part of an annual or biennial appropriation act, special in the sense that it soon becomes "*functus officio*," and will not find a place in a collection of general statutes; the third may or may not find a place in the general statutes; it would perhaps not generally be designated as special, but it may well fall short of a general standard that might or should govern official salaries.

A category of private acts is recognized in the legislation both of Congress and of the British Parliament; in the latter they are not officially printed, in the former they are separately printed and separately dealt with in a "private bill calendar." In the British Parliament there is a highly standardized private-bill procedure, prescribed by standing orders of the two houses, so that we are almost justified in speaking of a general law which finds expression in special legislation; such was the English law of divorce until 1858, and later on the law of divorce for Ireland, until the Parliament of the Irish Free State, by refusing to make a standing order for bills of this character, in effect put an end to divorce; such also is the law of public utility franchises in England; whereas Congress which deals with tort claims against the government by private bills, has not undertaken to standardize this legislation in a similar manner.

The characteristic mark of special legislation of the second type is that, while not of strictly individual, it is of concrete rather than abstract application. Thus an appropriation act supplies the financial needs of the government for one fiscal period, a river and harbor act provides for specific local improvements or undertakings, and a special charter act applies to one particular city. The fluidity of the distinction between special and general appears when we remember that

we speak of general ordinances of the same city though of equally confined application, and that we entirely ignore the concreteness of territorial limitation in the general laws of a given jurisdiction. There will always be a strong political tendency for a legislature to keep the initiation or authorization of important financial, organization, or development projects in its own hands instead of delegating these matters under general regulations, and the result will be the enactment of special or local laws. This tendency accounts for a large part of the legislative activity of Congress, and most of the ordinances enacted by any city council are special in the same sense if, indeed, they are not strictly personal or private; in the session laws of a number of American states, on the other hand, if appropriation acts are ignored, there is very much less of this special legislation, partly owing to the fact that for a long period of time American states abstained from works of local improvement (the development of systems of state roads is quite recent), partly owing to constitutional provisions prohibiting local or special laws with reference to specified classes of matters. The history of these provisions and of their interpretation shows the abuses of special legislation, the impossibility of eliminating it altogether, and the very considerable success which has attended the forced substitution of general and standardized measures for special acts in achieving legitimate objects with reference to a number of important subject-matters, so, e.g., in the displacement of special charters for private corporations by general incorporation laws.

The same political conservatism which makes the legislature prefer a specific and concrete to an abstract disposition, will also make it prefer an abstract rule of less general to one of more general scope. The commitment is less, and the just appraisal of consequences and effects is easier; in refusing to generalize more than necessary, the legislature follows the path of least resistance. Viewing, however, the legal system as a whole, the inevitable result is complexity and disharmony, and so far as unequal legislation means discrimination, the result may also be, if not actual injustice, at least a less instead of a more perfect dispensation of justice. This is an aspect of special legislation which cannot be ignored in a comprehensive study of legislative regulation; and it can be best considered by briefly surveying

the situation on the basis of the main divisions of law as they have developed in the course of legal history: private law; civil procedure; criminal law; police, taxation, and revenue; service and organization. In connection with each of these classes it will be important to determine to what extent there is available in aid of legislation a body of general principles that can be drawn upon by way of reference in any particular legislative project.

§9. PRIVATE LAW AND SPECIAL LEGISLATION. The completeness with which the law of persons and of property is covered by the common law or by codes, makes special legislation in this field a relatively negligible factor. Code and common law categories are wide and abstract, and have accommodated themselves in a surprising degree to cover the novel interests created by mechanical and industrial inventions. Even where physical conditions have been revolutionized, as in the control of the air, only a small amount of change has been called for in fundamental legal principles.

In private law it is possible to speak of a tendency away from specialization. Thus, owing to the fact that the common law does not recognize a general right to corporate capacity, legislation had to be called into play to furnish facilities for incorporation; this legislation started with special charters, gradually passed to the piecemeal recognition of limited classes and purposes for incorporation under general rules, and eventually reduced these classes by widening their scope, so that, barring those corporate undertakings which require special administrative supervision (banking, insurance, public utilities), it has been possible to consolidate incorporation laws into a few comprehensive statutes.

Occasionally, on the other hand, specialization is in private law a factor of progress. We find a greater hospitality to innovation in the periphery than in the center of legal life and action. Desirable reforms that could make no headway in England, found less or no resistance in the American colonies, so in the matter of recording mortgages and conveyances, and it is interesting to note that in England the system of recording deeds was first applied in connection with

the great improvement scheme of the Bedford levels in 1663—a very remarkable instance of special legislation. Equally remarkable was the promptness with which in Prussia as early as 1838 the special conditions of railroad transportation were recognized by the establishment of the principle of absolute liability, just as now in a limited way the same principle has found a place in the new law of aeronautics, and just as the special perils of sea navigation have produced rules of liability variant from those of the common law. And so again it is now in connection with labor legislation, that the justice of absolute liability is beginning to gain recognition. Whether in these cases we have anomalies or new germs of general law, it would be difficult to say; in any event it is clear that specialization *per se* is not always to be deprecated.

Private law enters into public service legislation in so far as governmental service functions through the forms of property and contract. The common law accords to the sovereign government and, to a minor degree, to subordinate public corporations, as parties to civil relations, a number of privileges and immunities (non-suability of the sovereign, non-liability or qualified liability in tort, exemption from statutes of limitations, special rules as to interest, benefit of special obligation on official bonds, etc.); and these become automatically applicable to services established by statutes, and modify the general rules of private law to which these services are generally subject. Theoretically, the legislative power to establish a service involves the power to make special law for that service, a power belonging not only to the states which control private law in general, but also to the United States by virtue of its power to legislate incidentally to the performance of any of its functions. But it is a power not generally exercised, or exercised in the main only where the exercise may also be explained as an expression of the managerial discretion of any owner who may vary yielding dispositions of the law by special stipulations; in this form services may also be subjected to special rules by municipal ordinance, although a municipality has otherwise no control over private law.[1] Special private law is thus exceptional in public service legislation.

[1] See §7, *supra*.

§10. PROCEDURE AND SPECIAL LEGISLATION. The amount of legislative activity called for in connection with procedural law is affected by the necessity of providing the requisite judicial machinery. In those American states in which procedure is not codified, the statutory matter dealing with practice is much exceeded by that dealing with courts, and in the latter there is a good deal of special legislation, notwithstanding the fact that the essentials of judicial organization are fixed by the constitution.

Congress is likewise called upon to act not only for the establishment of particular courts, but also for fixing the terms of courts (28 U.S.C. ch. 5). In foreign countries the practice varies; in Prussia, e.g., the lowest courts are organized by executive ordinance, the higher courts by statute (Act April 24, 1878, §§21, 37, 47); but it may be assumed that there is a larger delegation of power by the legislature in this respect in Europe than in America.

The possibility of uniform and general standards in rules of practice appears in the fact that Congress has on the whole been content to dispose of the matter by delegation to courts or by reference to the law of the states (28 U.S.C. 723, 724, 726, 728, 729, 730, 731). It also appears in the relative brevity and great stability of the chapters of the Revised Statutes of Illinois entitled "Chancery" and "Practice," and in the constitutional provision of Illinois and many other states forbidding local or special laws regulating the practice in courts of justice.

Whether codification of the law of civil procedure tends to do away with special legislation, depends upon the saving and repealing provisions of the particular code, and its relation to local legislation in general. The Civil Practice Act of New York provides (§62) that the courts referred to in the act are enumerated in sections 2 and 3 of the Judiciary Law (which in their turn refer to "other local courts as now constituted"), and that each of those courts shall continue to exercise the jurisdiction and powers now vested in it by law according to the course and practice of the court, except as otherwise provided. This shows that the Civil Practice Act does not purport to be an exclusive source of law.

Civil procedure was codified in New York and in Germany in the

same year (1877). The German Code, prior to the war, was changed twice, first after the enactment of the Civil Code, which necessitated extensive alterations to conform procedure to the new substantive law, and again in 1909 when about one hundred sections were amended, mainly in relation to courts of inferior jurisdiction. In New York, amendments to the Code were of annual occurrence, and in some years numbered upward of fifty; in 1909 when the Board of Statutory Consolidation recommended about one hundred changes which were adopted, there were in addition twenty-three separate amendments. In 1920 the Code was superseded by the Civil Practice Act (with some other accompanying acts); the number of amendments to the Civil Practice Act was twenty-four in 1922, twenty-eight in 1923, twenty-one in 1924, nineteen in 1925, twenty-nine in 1926.[2]

What does the marked disparity between New York and Germany in the number of amendments signify in the way of special legislation?

Most of the amendments are undoubtedly proposed because the existing provisions appear inconvenient or inequitable in the light of some special situation;[3] but their adoption by the legislature must be accepted as evidence that they do not exclusively serve private advantage, and this is confirmed by their subsequent incorporation in such a revision as the Civil Practice Act constitutes. This would then point in part at least to inferior serviceability of the codification of New York as compared with that of Germany. In litigation, freedom of action can exist only within narrow limits, because every step is immediately challenged by an adverse interest, and must also observe the requirements and limitations appropriate to the exercise of judicial control. There is then the choice between judicial discretion, rules so phrased as to leave room for some latitude of application, uniform rules which compel adjustment to them on the part of varying situations, and differentiated rules that seek to adjust themselves to varying situations. The number and length of sections testify to the policy pursued as between these alternatives. The desire to differentiate,

[2] It is stated in *Senate Report 440 No. 2, 70th Congress 1st Session,* p. 15, that the California Code of Procedure was amended 340 times from 1917 to 1925.

[3] See the observations of Senator Root, quoted Frankfurter and Landis, *The Business of the Supreme Court,* p. 198, note 66.

which is manifested by the longer code, will inevitably fall short of its aim, and the more elaborate code will be the one more frequently amended. In comparing the German Code with that of New York, it is therefore significant that it has not only about half the number of sections, but also that the sections are much more concise in expression. Only a detailed examination of the legislation of New York, however, can disclose the full significance of the unceasing stream of amendments.

§11. CRIMINAL LAW AND SPECIAL LEGISLATION. In the great majority of modern states there is a body of criminal law the unity of which is expressed in codification. It is everywhere understood that regulative statutes, although supported by penalties, stand outside of the criminal law of the codes. More doubt exists as to purely penal statutes which forbid and punish, without attempting to regulate, newly arising or hitherto unpunished objectionable practices. If such statutes are incorporated in the criminal code, they become in form part of the general criminal law, while if they are left outside they are in a sense stamped as special legislation. In Germany such a distinction appears to be observed. In a jurisdiction like Illinois some confusion is created by the practice of unofficial revisers incorporating penal statutes in the Criminal Code, as if they were amendments of or additions to it.

If the addition of offenses of a very specialized type to the stock of those crimes which are found in all criminal codes can be designated as special legislation, it is not necessarily special in the sense of varying from a standard.

We may, perhaps, speak of special legislation in criminal law, if the legislature yields either to the pressure of a particular group to single out its interests for penal protection, or to a temporarily aroused public sentiment in consequence of some particular occurrence. The examination of any American statute book will disclose instances of either kind. Special protection has thus been sought both on behalf of and against railroad companies; the legitimacy or desirability of such measures, and the possibility of generalizing their provisions, must be judged from case to case. "Occasional" criminal legislation

will in course of time be recognizable as such by its virtual obsolescence; but the chances are that it will remain unrepealed. With the facility of introducing and passing bills that prevails in American states, such special criminal legislation will be more common than it is in European countries.

Leaving aside the types of "group interest" or "occasional" legislation just mentioned, we have to take cognizance of a policy of the criminal law opposed to unduly generic offenses.

It is a general common law principle that an act or other form of conduct, merely defined as violating a legal duty, or in addition also as causing loss or damage, constitutes an actionable civil injury, and the German Code provides in an even more general way, that whoever intentionally injures another in a manner contrary to the common standards of right conduct is bound to indemnify him (§826).

There is no corresponding common law principle or code provision to the effect that conduct involving a culpable state of mind, and causing danger or injury to public interests can be prosecuted as a punishable offense;[4] but certain types of acts designated by readily ascertainable objective criteria of objects or interests attacked and of method or manner of injury, are specified as distinctive offenses, and certain kinds and grades of penalties fixed for their punishment. The result of this system of specialization is that if a misdeed does not fit into one of the specified categories, the wrongdoer is not criminally liable, however morally culpable he may be, or however dangerous or detrimental his act.

This system of specialization is necessarily a matter of degree, and there are a few offenses in which the constituent elements are indicated in such a general manner that the characteristic features of the system are almost lost. In the common law, and in some American codes, the offenses of nuisance and conspiracy are the most conspicuous instances in point. Under the German Criminal Code the definition of fraud is likewise very general, requiring only injury to property rights and intent of unlawful gain (§263), and the Criminal Code of the United States (§215, 18 U.S.C. 338) punishes (if using the mails for the purpose) "any scheme or artifice to defraud," whereas the

[4] The status of unspecified common law offenses is too obscure to be considered as establishing such a principle.

criminal codes of New York or Illinois have no similarly generic offenses of fraud, punishing only more specifically defined practices.

On the other hand, the American codes, following the common law, treat official misfeasance as a generic offense, while the German codifiers believe that without more concrete specification this would be too far-reaching, and that there is no need for abandoning in this case the principle of specialization.

Would it be possible to establish generic categories of offenses covering such acts (in Illinois made punishable by specification) as the sale of abortifacient drugs, the bribing of players in athletic contests, the giving of tobacco to minors, the use of the flag for advertising purposes, fortune telling, sending false fire alarms, exhibiting criminals or deformed persons?

Would wide generic offenses covering possible practices, not at present foreseen, be preferable to a multiplication of specific offenses, some of them possibly unnecessary or unwise?

Is the greater conservatism of foreign criminal legislation possibly due to greater reliance upon general police orders issued under a wide delegation of executive power?[5]

A comparison between criminal codes and criminal statutes of different jurisdictions would be of considerable interest, but would have to take account of other methods of reaching offensive practices.

And in considering legislative availability, it may not be sufficient to find a workable definition of comprehensive generic offenses, without also inquiring and determining whether the establishment of offenses of very wide scope is criminologically desirable.

Obviously, the subject of special legislation in criminal law presents much more than a technical legislative problem.

§12. PENAL REGULATION AND SPECIAL LEGISLATION. Regulation substitutes conventional arrangements for declarations of principles—arrangements designed to counteract evils which elude the checks and

[5] It is said that in Prussia there are 15,000 authorities that have power to issue police regulations. Schiffer, *Deutsche Justiz*, p. 197. Current American statements as to the enormous number of penal or regulatory statutes enacted by our legislatures are often exaggerated; see the analysis in 16 *St. Louis Law Review* 51. We have, however, to add in America, to the number of statutory offenses, those created by local ordinances.

restraints of ordinary civil and criminal justice. Only very occasionally can this be done by rules dealing with categories as wide as those of the private or criminal law. It was at least theoretically possible to seek to repress trusts by penalizing all restraints of trade; it was also possible to seek to repress unfair methods of competition within the entire range of interstate and foreign commerce by giving an administrative commission power to issue "cease and desist" orders; but it would have been manifestly impossible to require licenses for the same purpose without limiting the requirement to carefully specified classes of transactions. In like manner publicity requirements (labels, notices) must be adapted to conditions, and this is still more true of provisions for health and safety. The rising and growing demand for regulative legislation has therefore normally been directed against tendencies that appeared in connection with definite categories of social and economic organization, and the resulting statutes have been correspondingly limited in scope. In this sense regulative legislation is almost necessarily special legislation, questions of selection and exemption being part of its ordinary routine.[6]

In attacking regulative legislation as an impairment of constitutional rights, this feature of specialization has furnished ground for the argument that it violates the equal protection of the law, and in a number of states this line of attack has met with some success.[7] The Supreme Court appeared to countenance this construction of the constitution when it annulled the anti-trust law of Illinois because it exempted producers of grain and raisers of live stock from its provisions (*Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 1902). The exemption from a general criminal statute made the argument appear in its more plausible form; yet the subsequent general acceptance of the policy of giving farmers' coöperatives a special status has discredited this decision,[8] and with it the entire doctrine of the invalidity of regulation limited to special trades or occupations. It was a convenient method of questioning the legitimacy of a new policy reducing liberty by regulative legislation, but the principle of regulation being once conceded, it must proceed by the method of selection and exemption, and the necessary imperfections of that method can

[6] See §27, *infra*.

[7] See my *Police Power*, §§691–738.

[8] *Beatrice Cream Co.* v. *Cline*, 9 Fed. 2d 176, 1925.

hardly compare in capriciousness and inconsistency with the decisions that have undertaken to subject classification to judicial checks.

§13. ADMINISTRATIVE POWERS AND SPECIAL LEGISLATION. Regulative legislation is, generally speaking, not enforceable without official organs charged with duties of supervision and information. The private law requires for its enforcement only the machinery of the courts and of its ministerial officers; the criminal law, in addition to these, requires prosecuting officials and the police; but experience has demonstrated that these cannot be relied upon to deal effectively with practices dissociated from ordinary crime, disorder, or breach of peace. And not only does a regulative statute need the additional official apparatus, but administrative officials also lack the common law powers universally associated with courts and their ministerial officers. Official organs as well as their powers must therefore be provided from case to case, and it is only when it becomes a question of obtaining judicial relief against the exercise of these powers that a basis of generally available common law is regained. Notwithstanding the habit of following precedents in legislation, it is inevitable that statutes, independent of each other, should vary in their provisions concerning the organization and powers of administrative authorities and to the extent of such variation there will be special legislation.

The diversity of administrative powers is greatly reduced where the government is organized into a number of executive departments, as it is in the federal administration of the United States. It is then possible to assign the execution of a new regulative act to the appropriate department, relying upon its existing organization aided by the provision of necessary funds. A good deal of federal regulation has thus in recent years been assigned to the Department of Agriculture, although it is also true that independent commissions have been created for some regulative statutes of the first importance (Interstate Commerce Commission, Federal Trade Commission, Shipping Board, Federal Reserve Board, Radio Commission, Power Commission). Many cities have a similar hierarchically organized government. In the states, on the other hand, the administrative organization was until recently disintegrated with mutually independent offi-

cers, boards, and commissions, and with only imperfectly developed powers of supervision and direction vested in the chief executive. Within the last ten or fifteen years a change has been made through the so-called civil administrative codes, which have undertaken, so far as the constitutions would permit, to organize state governments on the executive side somewhat on the model of the federal administration.[9]

In European states the situation with respect to uniformity of administrative power is in some respects more favorable than in the United States. There is greater coördination through central supervision over local government which is practically undeveloped in our law; and in Germany, which has both federal and state legislation, many federal acts are administered through the states, which implies relations between federal and state organs unknown to our system.

Both in France and Germany, moreover, administrative authority has a status analogous to judicial authority in the Anglo-American law; that is to say, some powers are either implicit in the nature of the office, or rest upon statutory texts of the most general application. If a building law, or a factory law, is committed for execution to the "competent authorities," police powers of a very general character are made available, which have been defined and circumscribed by the "jurisprudence" of the administrative and ordinary courts, so that a great body of law has become articulate which in our law is still dormant. In Prussia, moreover, there has been consolidating legislation with regard to the essentials of administrative organization and powers (acts of July 30 and August 1, 1883), and in England the experience of years of administration has been crystallized in revisions of health and factory laws which have standardized important administrative powers. There is, as yet, much less of this kind of standardization in America.

What has been said of administrative powers in aid of regulation, also applies, with qualifications, to administrative powers in aid of revenue. But revenue legislation is likely to be less diversified than regulative legislation, and in each jurisdiction we are therefore likely to find a higher degree of standardization in revenue than in police

[9] W. F. Dodd, *State Government*, 2d ed., chap. 9: "Reorganization of the State Executive."

power administration. Customs tariffs have in America changed in accordance with the exigencies of party policy; but except in the cases where administrative methods have been of vital influence upon tariff policy (flexible tariff and tariff commission), customs administration has been divorced from party policy; it has been relatively permanent and, so far as not permanent, it has pursued an interesting course of development toward more effective and better safeguarded standards of administration. Similar tendencies are noticeable in internal revenue administration. Revenue administration in the states has been stagnant rather than permanent, a loose system of administration having been perpetuated by the unrealizable standards of the general property tax.

§14. PUBLIC SERVICES AND SPECIAL LEGISLATION. 1. The organization of public services is either bureaucratic or self-governmental.

If bureaucratic, the managerial disposition of public funds may be accomplished with a minimum of statutory regulation. Public power is exercised through the private law forms of authorization and agency, contract, property, payment, etc. The legislature may either delegate in a few words, sentences, or paragraphs, or may prescribe minutely. Compare the eight sections of the Panama Canal Act of 1902 (32 St. L. 481) with the title of the U.S.C. on "Public Lands." An appropriation may imply every authority requisite for management, or, on the other hand, the appropriation (in the absence of constitutional restrictions) may be the vehicle for special regulation, establishing conditions for employment or any other limitation or requirement in connection with the proposed expenditure. The practice of Congress in this respect appears in the Report of President Taft's Commission of Economy and Efficiency (*The Need for a National Budget,* chap. XI, "Organic Law Included in Acts of Appropriation"). In chapter 11 of title 31 of the U.S.C. ("Appropriations") about one hundred sections represent particular directions in connection with appropriation to some one or other of the executive departments that have been retained as permanent laws of special application.

Such special legislation may not only become inconvenient when it

results in multiplicity or confusion of jurisdictions, but may also introduce into the civil service differences with regard to classification and compensation that constitute substantial injustice. A remedy for such a condition may then be found in comprehensive dealing with the entire subject, substituting general for special legislation. Of this character is the federal Classification Act of 1923, appearing as chapter 13 of title 5 of the U.S.C.; and there are city ordinances trying to effect the same purpose. In foreign countries the subject of official salaries has been dealt with systematically, either by statute or by executive regulation, and statutes incidentally fixing salaries, so common in our legislation, are exceptional.[10]

If organization is self-governmental, or if it attempts to give to boards or bodies a distinct legal status, it involves a good deal in the way of legislation. Instead of operating with familiar private-law categories, legislation finds practically no common law basis at all to go on, the old law of corporations, as laid down in eighteenth-century treatises (Kyd, Grant), being utterly inadequate. In creating the office or body, care has to be taken not to omit provision for contingencies which, in the absence of aid from the common law, might occasion failure or lapse of power or action.[11] If self-government is carried to the point of operating with autonomous resources—and this is the essence of local self-government—the exercise of fiscal powers (taxation and borrowing) has to be hedged about with safeguards.

The result is elaborateness of statutory provisions, with inevitable variations in detail, and in any event separate provision for each new class of governmental units, all of which constitutes special legislation. A self-governing pension fund for some branch of municipal service like the police, calls for a long and complicated statute (see for Illinois, Smith-Hurd's *Statutes,* 1927, pp. 517–596), while half a dozen

[10] See *Memorandum of Ministry of Health on Local Government Bill, 1928* (1928 Cd. 3220), p. 12: "By an Act passed in 1858 the salary of the Registrar-General was fixed at £1200. Clause 22 meets the present situation by providing that the salary of the Registrar-General shall be such as may be determined by the Minister of Health with the approval of the Treasury."

[11] See *infra,* §87, *Vesting provisions.* In one of the first English Consolidation Acts, that on Highways, 13 Geo. III, c. 78, 1773, the section providing for the appointment of surveyors occupies three pages of the printed text. See Dwarris on *Statutes,* p. 863. As to the number of English Highway Acts, and various attempts at consolidation, see Sidney and Beatrice Webb, *The Story of the King's Highway, passim.*

words in a city act suffice to enable a city to create a police force without independent legal status. The mass of statutes constituting the school law of Illinois is almost altogether taken up with organization, only a small number of sections being devoted to educational policy. The revenue act of Illinois provided that the assessed valuation for taxing purposes should be a stated proportion of the full value, and statutory tax rates are adjusted to this valuation, these rates being fixed in connection with the organization of government units. When in 1927 the assessed valuation was raised to full value, existing tax rates had to be correspondingly reduced, and it was found necessary to amend about a hundred different acts. This demand upon legislative activity is avoided where, as in the federal administration, self-government is eliminated; but congressional traditions of controlling the administration make a greater demand than the parliamentary traditions of Europe, which accord to the executive government a greater power of organizing the administration for action.

2. The objectives of public services are called into being by statutes successively enacted and greatly varying in scope. Inevitably there will be variation in details even where details could be regulated upon a general plan for all services, adopting like principles for analogous conditions. The highest possible degree of standardization in this respect will be a theoretical counsel of perfection. There may, however, be also circumstances that will lead to a limited standardization in particular fields: scientific progress in the understanding of public needs, or occasionally considerations of economy and efficiency, or international understandings or coöperation. In the field of the social services, in particular, such tendencies may manifest themselves. A study of recent English legislation for the reform of local government and the poor law, or of the German efforts for consolidating social insurance legislation, may illustrate such advance from special to general legislation.

3. In every modern state many public services are carried on by local governments, generally under statutory delegations of power. Where there is a practice of special local legislation, the delegations are apt to vary; but there is probably everywhere a tendency toward general local legislation, subject to exceptions and qualifications. However, general local legislation means only uniformity in the terms

of powers; and if these powers are wide, they leave room for variations in exercise. The legislature may insist on uniformity of exercise in definite respects; or it may give facilities for unified action by powers of coöperation between localities; but it may respect local autonomy. To the extent that it does, non-standardization is deliberate legislative policy for supposedly beneficial ends. Local self-government, like individual liberty, is the negation of standardization.

§15. Local Improvements and Undertakings and Special Legislation. A fruitful field for special legislation is furnished by legislative attempts to control local undertakings and improvements: so-called private-bill legislation in England, river and harbor acts and public building acts in Congress, hard roads legislation in the states, paving or sewer ordinances or zoning ordinances in cities. If the legislature desires to have a voice in this form of exercise of governmental power (often of greater moment to constituencies than general legislative policies), a local and consequently special act will be the result. Special legislation of this type is peculiarly susceptible to considerations and influences which the legislature itself may, in course of time, find to be burdensome and undesirable; with the result that efforts have been made to find ways and means to check abuses.

In England there has been developed, through standing orders of the two Houses of Parliament, a fixed procedure for handling private bills which is quasi-judicial and makes arbitrary variations practically impossible.[12] Congress for a number of years has pursued the practice of providing for all river and harbor improvements in one act carrying a lump sum appropriation which is allotted to various projects by executive act, although the Committee Report to Congress, by reciting estimates for designated projects, gives an indication of the probable distribution. See, e.g., River and Harbor Act of January 21, 1927, 44 St. L. 1010, compared with 24 St. L. 310, 1886.[13]

[12] Freund, *Standards of American Legislation,* pp. 295–298; Clifford, *History of Private Bill Legislation,* 2 vols., 1887; May, *Parliamentary Practice,* 1906, chap. 29.

[13] *Congressional Record,* January 5, 1925, p. 1198, statement by Chief of Engineers: "The present custom is for Congress to make lump-sum appropriation for carrying on river-harbor improvements authorized by Congress, and the allotments from this lump-sum appropriation to the separate projects are made by the Secretary of War

In 1926 Congress enacted a General Buildings Law (40 U.S.C. 341–348) entrusting the Secretary of the Treasury with the execution of a building program subject only to quite general directions as to local distribution—perhaps the first attempt in this particular field to eliminate or reduce the pressure of local demand.

§16. LEGISLATION BY REFERENCE AND THE CODIFICATION OF PROVISIONS OF SUBSIDIARY OPERATION; CONSOLIDATION ACTS. The foregoing outline of the practice of special legislation has also indicated various ways in which the practice, so far as undesirable, can be reduced or eliminated. One of the most effective methods is to formulate uniform clauses to be incorporated in the application of statutes in which they may be serviceable, and what is known as legislation by reference is a step in that direction.

Legislation by reference has been commented on by English writers, and more often unfavorably than otherwise (Ilbert, *Legislative Methods and Forms,* pp. 254–256; Thring, *Practical Legislation,* pp. 48–58).

It appears in a perhaps undesirable form, where in legislating upon one subject-matter, provisions found in an act relating to another subject-matter are made applicable, as, e.g., where the rule-making procedure of the British Factory Act is by reference incorporated into other regulative statutes creating rule-making powers. A conspicuous

upon the recommendations of the Chief of Engineers of the Army. If there are any projects in the pending authorization bill upon which work should not be carried on, it is only necessary for the President to indicate to the Secretary of War that no allotments for these projects should be made."

See also *Congressional Record,* December 29, 1924, pp. 918–919; and *68th Congress 2d Session, House Report No. 105.*

See also River-Harbor Act, January 21, 1927, 44 St. L. 1010:

"That the following works of improvement are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision by the Chief of Engineers, in accordance with the plans recommended in the reports hereinafter designated: Thames River, Conn., in accordance with the report submitted in House Document numbered 107, 69 Cong. 1st Session" (follow 64 other projects).

Section 4 authorizes preliminary examination surveys at about two hundred named localities.

After report submitted, no supplementary additional report is to be made unless authorized by law.

See W. F. Willoughby, *National Budget System,* 1927, chap. 15, "Appropriations for Public Works."

instance in American legislation is found in section 25 of the National Prohibition Act, providing that "a search warrant may issue as provided in title XI of public law number 24 of the Sixty-fifth Congress, approved June 15" (this is the Espionage Act); but in the U.S.C. this title now appears as part of the Criminal Code, so that the reference now has a more appropriate form.[14]

In America the practice is less common than in England;[15] as instances may be cited an early act of Louisiana (1836) providing that all municipalities shall each within its limits possess all powers then possessed and exercised by the city of New Orleans (see *New Orleans* v. *McDonough,* 2 Rob. 244, 1842); or an act of Illinois (1857, p. 29) referring for the organization and jurisdiction of inferior city courts to the recorder's court of Chicago and the court of common pleas of Cairo (see *Weinhard* v. *Tynan,* 53 Ill. App. 17, 25, 1893; the form here is particularly unfortunate); or an act of Illinois making applicable to park districts a law concerning local improvements enacted for cities (Laws, 1895, p. 286, §11). In the acts of Congress we find that the provisions of the Transportation Act concerning attendance of witnesses are made applicable to the Department of Agriculture (7 U.S.C. 15); the meat inspection laws are made applicable to dairy products (21 U.S.C. 132); for forfeiture proceedings reference is made to the law concerning imports (15 U.S.C. 292), and for remedies on behalf of injured seamen, to the laws concerning injured railway employees (46 U.S.C. 688).

For federal legislation we should also note the adoption of state laws to be observed in federal administration; above all the so-called Conformity Act (R.S. §914, 28 U.S.C. 724) making state common law civil procedure applicable in the district courts, and the act giving U.S. marshals the powers of sheriffs (R.S. §788, 28 U.S.C. 504).

Referential legislation has the advantage of giving assurance that what is proposed to be enacted has already received legislative approval in another connection. Perhaps this counts for more in England where legislation is proposed by the government to Parliament,

[14] 27 U.S.C. 39, referring to 17 U.S.C. 434–454 (18 U.S.C. 611–631).

[15] There are constitutional provisions apparently forbidding the practice in New York (III, 17) and in New Jersey (IV, 7 [4]); the latter was applied in *Christie* v. *Bayonne,* 48 N.J.L. 407, 1886; the former does not appear to have been successfully invoked.

than in this country where it normally originates in the legislative body itself.

What counts in connection with the subject of general and special legislation is the effect of referential legislation in producing harmony to the extent of its operation.[16]

In order to maintain this harmony, the reference should operate so as to follow variations of the incorporated act by subsequent amendments; and this result may be accomplished by explicit provision (referring to the act as amended from time to time) or by making the reference to the law by generic description rather than by title or even by date; but the latter method is not absolutely reliable in view of judicial decisions holding that the reference is to the statute in its form at the time of incorporation.[17]

If legislation is by reference to another act as from time to time amended, it has to count with the possibility that future amendment of the incorporated provision may be adapted only to the act of which it is part, and be unsuitable to the incorporating act. To the extent of this contingency it is blind legislation.

If, on the other hand, legislation is by reference to the act at the time of incorporation, not automatically incorporating subsequent amendments, not only may the benefit of harmony be eventually lost, but a static condition is produced which may reflect a superseded legislative policy.[18]

The desirability of this type of legislation by reference is thus open to question; what counts in its favor, is the practical difficulty of ob-

[16] In the case of the Federal Conformity Act, while harmony is produced between the practice of the District Court and the local court in the same state, disharmony results as between the several District Courts. This is a special situation.

[17] *Kendall* v. *United States,* 12 Pet. 524, 625, 1838; *Charleston* v. *Johnston,* 170 Ill. 336, 1897. Where the reference is by state to federal legislation, incorporation of unknown future amendments may be considered inadmissible, *State* v. *Webber,* 125 Me. 319, 1926; but this objection is technical in view of the fact that future acts of Congress will in any event be part of the law of the state.

[18] A striking illustration of this is found in 18 U.S.C. 468 (Crim. Code §289, R.S. §5391), which, in places within a state, but ceded to the jurisdiction of the United States, punishes acts made penal by the laws of the state "now in force": "and every such State . . . law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State. . . ." It is probable that this provision, dating from the Reconstruction Period (1866), was intended to serve some particular local purpose, and has been continued without any realization of its possibilities.

taining the codification of subsidiary provisions, and the greater likelihood of having developed, through experience in administering some particular branch of legislation, model clauses which lend themselves to more general application. Where such clauses are available (as, e.g., in the English Public Health and Local Government Acts) the balance of advantage may be in favor of incorporating them by reference.

Codification of subsidiary provisions. We have examples of such codification above all in our codes of procedure (which should be contrasted with the absence of codification of administrative procedure); also in eminent domain statutes, in civil service laws, in some states (e.g., New York) in laws regulating appointment and removal of officers, and in general interpretation statutes. Provisions of general city acts serve a similar purpose for municipal ordinances, since the creation of new administrative powers and remedies is generally not within the scope of local legislative powers.

The advantage of such subsidiary acts is not confined to the greater uniformity which they create, and the legislative time and space which they save. Separate general legislation of a subsidiary character is likely to ensure a degree of care in the consideration of technical detail which is otherwise difficult to obtain, since subsidiary operative clauses are apt to be regarded as technical and perfunctory matter, when presented as part of measures of more general interest, whereas as separate acts they become "lawyers' " measures, and as such are likely to receive adequate attention.

The commitment of a number of laws to one government department for administration may result in the standardization of administrative clauses; an example is found in the Illinois Act of 1927 regulating the granting and revocation of licenses for professions, trades, and occupations under the jurisdiction of the Department of Registration and Education (Civil Administrative Code §§60a–60k); even more comprehensive are the Prussian general administrative acts of July 30 and August 1, 1883. In England parliamentary committees were responsible for the codification of subsidiary provisions in the Clauses Consolidation Acts of 1845, which are described in Ilbert's *Mechanics of Law Making,* pp. 130–132. These were intended to be incorporated by reference in private acts; their enduring availability

is attested to by the fact that the mortgage provisions of the Commissioners' Clauses Act of 1845 were incorporated by reference in the Land Drainage Act of 1930.

To what extent subsidiary legislation can be profitably framed in aid of other statutes cannot be determined without a careful survey of each field to which it may appear to be adapted. Acts of this character constitute only a slight legislative commitment; for their mere enactment gives them no mandatory character; that comes only from voluntary acceptance, express or implied, by the legislature in connection with subsequent legislation; the legislature may at any time override them and insert different provisions in a particular act. So far as available and successfully carried out, the codification of standing clauses constitutes legislative standardization of the best type.

Consolidation acts. While the "clauses" acts of 1844–47 are described in the English Statute Book as "acts for consolidating. . .," the term "consolidation act" more especially refers to the superseding of a number of statutes, each special in character, or each dealing with a subject in only a fragmentary manner, by one statute dealing systematically with the entire subject. It is the method of the "comprehensive plan" applied to legislation, analogous to the application of the same method to any subject-matter calling for regulation, and carries with it the presumption of superior performance by reason of the opportunity given of reviewing parts in relation to the whole. Consolidation is nearly always combined with revision and amendment, and the revision of the entire body of statute law may take the form of a number of consolidated acts, so in New York (1909, 1913). In European countries, in which the magnitude of the task practically forbids a revision of all the statutes, consolidation acts perform a similar function with regard to specific topics: to realize the accumulation of special legislation in the course of centuries it is instructive to read the list of seventy-nine repealed laws in the Prussian Water Act of 1913 which includes French ordinances of the time of Louis XIV. The Land Drainage Report of 1927 (Cd. 2993), which preceded the consolidating English Land Drainage Act of 1930, spoke of the "confused tangle of authorities, established by the piecemeal legisla-

tion of 500 years," but the act repealed only sixteen statutes. The Preliminary Note to the subject "Criminal Law" in the *Complete Statutes of England* states that the Perjury Act of 1911 repealed 132 statutes, and the Forgery Act of 1913 repealed 73 statutes.

PART II

GENERAL LEGAL ASPECTS OF REGULATION

CHAPTER IV

METHODS AND FORMS

PRELIMINARY NOTE. When some social or economic situation seems to demand legislative relief, the first question will be which of the principal manifestations of governmental power should be called into play: justice, police, taxation, or the management of public property and personnel resources. An agricultural relief policy may thus consider the alteration of the law of landlord and tenant, the regulation of boards of trade or stockyards or grading legislation, changes in customs duties, or loans of public money, or public improvements of various kinds. In the American system of government, questions of constitutional law will enter into the choice, but in the main the choice will be determined by other than legal considerations, and at this early stage technical legal problems will remain in the background.

Of the four principal manifestations of governmental power, it is the police power which is chiefly associated with the idea of regulation. Regulation is incidental to the other powers, but of the essence of police. It is impossible to determine controversies, to punish crime, to raise revenue, or to use public funds, without appropriate rules of law, but in approaching the police power the very first question is whether there should be regulation or freedom from regulation.

The choice being between freedom and non-freedom, it becomes a vital matter to consider the degree in which different modes of regulation impair freedom of action, and differences require attention which in other fields of law are mere logical categories. The differences being the result of practical conditions, they not only cease to be mere logical categories, but logical accuracy becomes a secondary matter, and it will be found that there are no sharp dividing lines.

From this point of view it is proposed to consider the difference between civil and penal, substantive and formal, direct and deferred control, prohibitions and requirements, facilities and requirements, and some more detailed modalities. It will also be proper to discuss certain general factors that enter into the problem and the process of regulation.

This general discussion will be followed in a subsequent part of the treatise by a more detailed study of the technique of regulation as it affects the drafting of statutes.

§17. CIVIL AND PENAL REGULATION. The difference between civil and penal lies in the nature of the sanction on which main reliance is

placed for securing observance. A regulation is civil if the attainment of some legal result is made dependent upon compliance with prescribed conditions or upon the existence of prescribed prerequisites. This form of regulation is therefore appropriate where it is vital to the party whose conduct is regulated that the result of his course of action be a legal result. A regulation is penal, if non-compliance calls for public measures of enforcement by way of penalty, because the purpose of the illegal act is answered by the attainment of a factual result.

The requirement that a ship be registered might be sufficient as a civil regulation, since without possession of the status dependent upon registry the ship cannot have entry or clearance. Indeed while the American law also provides a penalty, the English law lacks one; but the English law gives power to detain a non-registered ship which is at least in the nature of a penal sanction.

The line between civil and penal is not always easy to draw and may for practical purposes be a matter of indifference.

A civil regulation has occasionally a secondary penal sanction, so where the unlawful assumption of corporate capacity may, in a judgment of ouster in a quo warranto proceeding, result in a fine. Normally also a penal regulation operates civilly through the avoidance of a contract made in contravention to it; and this secondary civil sanction may commend itself to legislative policy because it calls for no public administrative effort; but it normally counts for little in the general scheme of enforcement, and it may injure rather than aid the general *morale* of the situation.[1]

Administrative is in many respects equal to penal enforcement, as, e.g., where the regulation of immigration relies upon deportation by way of exclusion or expulsion.

Civil regulation expresses itself by the creation of powers, of disabilities, or of form requirements, and frequently by a combination of the three. Civil liability, while not in itself a form of regulation, may be in aid of regulation, or rules of liability may under the particular terms of a statute assume the character of regulations (limitations of liability, notice requirements, etc.).

In the framing of statutes, civil regulation presents totally different

[1] See §§81 and 83, *infra*.

problems from penal regulation. The controlling factor is that civil regulation is in a sense self-enforcing, since non-compliance carries its own penalty of non-attainment of desired results; the entire apparatus of enforcement provisions becomes unnecessary. There is on the other hand the great danger that legislative caution may overreach itself, and create injustice in the effort to protect, a risk which in civil regulation cannot be entirely avoided, but which can be reduced by a more careful study of its ways and means than is or has been customary. A great part of the technique of civil regulation lies in the avoidance of needless formalism and in the development of saving provisions and saving devices.[2]

From the point of view of legislative technique it is important, that to a constantly increasing degree both civil and penal regulation depend upon the aid and intervention of official power. As an adjunct to civil regulation, official power offers in the main a merely civil aspect; but as an adjunct to penal regulation official power is on the one hand an instrument of penalization, while on the other hand the observance of appropriate checks and safeguards in the exercise of that power constitutes civil regulation.

If the growth of regulative legislation is occasionally made the subject of adverse comment, the reference is always to penal regulation; civil regulation rarely presents a political or constitutional issue.

Civil regulation is part of the ordinary apparatus of private law and is freely made applicable to individuals; penal regulation (as distinguished from the prohibition of crimes or malpractices) rarely applies to individuals acting in a private capacity.

If a civil regulation consists in a formal requirement, its purpose is to avoid the necessity of ascertaining equities dependent upon facts which are difficult to ascertain, by insisting upon conventional arrangements which can be more easily proved. Since inherent equities may thereby be sacrificed, the question of form *versus* informality constitutes one of the major problems of legal policy. The formal requirement, if the legislature adopts it, is entirely devoid of any ethical basis, whereas an ethical element normally enters into a civil regulation operative by way of disability or by way of liability. Normally, also, some ethical justification is expected for the establishment of a

[2] Chap. XIII, *infra*.

penal regulation, but the penal regulation in aid of revenue forms an exception to this rule. At the present time ethical considerations enter into revenue legislation, where taxation incidentally serves other than revenue purposes. It is, however, interesting to note that in foreign trade regulation the distinction appears to be observed, that outright import prohibitions generally seek some ethical justification, while the mere consideration of national or fiscal advantage is regarded as a sufficient basis for import restrictions which take the form of revenue measures.

Penal regulation and the prohibition of wrongful conduct. In view of the fact that penal regulation normally seeks some ethical justification, cognizance should be taken of the distinction already adverted to between criminal law dealing with *mala in se,* and regulative legislation dealing with *mala prohibita.* The line is one that cannot be sharply drawn, coinciding with the likewise fluid distinction between declaratory and regulative law. Where legislation operates with purely conventional terms (hours of labor, rates of interest), it is clearly regulative; where it operates with recognized categories of misconduct, it is declaratory. Where it operates with terms of degree (unreasonable, unjust, etc.) it is declaratory if it penalizes directly, and regulative if (as is common now) it provides for administrative regulation. The same seems to be true where terms are used descriptive of malpractices which have no common law status of criminality, restraint of trade and monopoly being conspicuous instances. The Sherman Act was conceived as a measure of criminal law rather than as a regulative statute. Its character appears in the simplicity of its structure and the absence of an administrative apparatus. Penalization of wrongful conduct as distinguished from regulative legislation will be discussed in the chapter dealing with *Definiteness of Terms* (chap. VIII).

§18. PROHIBITION BY WAY OF DISABILITY. There are very few cases in which a disability of a civil character is superimposed upon an antecedent common law right. Mortmain legislation which prohibits testamentary gifts under certain circumstances furnishes an instance in point; but it plays no important part in America. If the Rule

against Perpetuities were a legislative product, it would be a typical illustration; the Rule, however, operates as a rule of unwritten law.

The common form of prohibition by way of disability is that found in qualified enabling legislation. There is a common law incapacity in the first instance, which the law lifts in part, subject to qualifications. The conspicuous instances in point are corporate disabilities. A pure statutory grant or benefit, subject to limitations, is of a similar character. If, on the other hand, the statute first forbids the exercise of what might be regarded as a natural capacity, except under a license or permit, and then imposes restrictions or limitations, these hardly differ from other cases of restrictive regulation.

It will be noted that in the control of transportation the United States leaves the law of corporate capacity to the states, the Interstate Commerce Act operating through penal prohibitions; on the other hand, national bank legislation is enabling legislation with attendant disabilities, and the commerce power of the United States is not used to regulate banking operations of state banks.

The limitation of an enabling act may result from implication or narrow construction. The National Bank Act of 1864 was silent upon the subject of branch banks, except that it required the certificate of organization to state the particular city, etc. (using the singular) at which it was proposed to conduct operations (see §6, No. 2 of Act of 1864); and the important branch-banking power was denied mainly upon general principles of construction (29 Op. A.G. 81, 1911; *First National Bank* v. *Missouri,* 263 U.S. 640, 1924).

The expression of a prohibition as a qualification of an enabling provision, is of practical importance, since it is not, like penal regulation, felt to be an impairment of liberty and still less of constitutional rights.[3] It is, moreover, a matter of legislative psychology, if a disability is lifted, not to lift it altogether, or to lift it only gradually; witness the course of married women's legislation and of incorporation laws. The result is the persistence of restrictions or requirements that have ceased to represent any clear policy; qualification requirements that are commonly evaded or made perfunctory; limitations upon the duration of corporate life that are inconvenient and serve no

[3] Even a religious corporation must submit to restrictions upon the holding of property, or to the observance of prescribed conditions in the making of mortgages.

purpose; limitations upon charter objects or upon the combination of objects, the wisdom or unwisdom of which has never been thoroughly considered. And whereas penal regulations are most doubtful and precarious if they attempt to control economic forces, civil disabilities are predominantly of economic operation. They are tolerated because they conform to settled custom, denying liberties that have never been enjoyed, or because they lend themselves to accommodation or evasion.[4]

The amount of regulative legislation contained in the statutes of a given jurisdiction is likely to be taken as an index to the relation between the respective provinces of restraint and liberty. It is, however, a reliable index only in so far as non-regulation means common law liberty, not in so far as non-regulation means common law disability. If insurance or railroad transportation cannot be carried on effectively without corporate facilities, little is gained by non-regulation, unless the common law disability is first lifted. During the earlier part of the nineteenth century the place of present-day regulative statutes was to a large extent taken by special corporate charters. Their supersession by general regulative legislation is a gain rather than a loss to liberty.

It would require an exhaustive survey of statutory civil disabilities to verify the applicability of the above suggestions to any given jurisdiction.

§19. STATUTORY LIABILITY. It is convenient to use the term liability to indicate the legal duty of indemnification for loss as distinguished from an obligation assumed or imposed by law irrespective of loss or

[4] In Illinois, the corporation law until 1925 excepted from permissible charter objects the business of loaning moneys. From an early period the Eastern money which contributed to the development of the state was furnished in part by loan and mortgage companies incorporated in other states. The corporation law of Illinois provided that foreign corporations doing business in the state should be subject to all the restrictions imposed upon corporations of like character organized under the general laws of the state. In order to avoid repudiation of debts to Eastern loan companies, the provision was construed as if it read: where the general laws of this state provide for the organizations of corporations, foreign corporations of like character shall be subject to the same restrictions (*Stevens* v. *Pratt,* 101 Ill. 206, 217, 1882), so that, there being no loan corporations in Illinois, foreign loan corporations were free to do business. Equity was thus saved at the expense of defeating any intelligible state policy, but forty-three years elapsed before the statutory disqualification was removed.

default. The terminology, however, is not observed in practice, for what in accordance with it would be an obligation to pay a tax is commonly spoken of as a tax liability. The law of liability is typically declaratory law, evolved upon the basis of principle, in Anglo-American jurisdictions by judicial decisions, and illustrating, in its development in different legal systems, the possibility of divergent views of justice, as, e.g., in the treatment of contributory negligence and of employers' liability, in the matter of unjust enrichment, the accountability of a possessor in good faith, the tort liability of an insane person or an infant, etc.

Where the law is codified, the code will naturally lay down rules controlling some or all of these matters, and may incidentally change previously existing law; in England and America fundamental legislative changes have been rare, the most important being probably the introduction of a cause of action for wrongfully causing death; but there has been sporadic legislation concerning principles of liability in particular circumstances or relations: thus in England the liability to restore winnings at games (16 Car. II, c. 7 and 9 Anne, c. 14), and the exemption from liability for accidental escape of fire (6 Anne, c. 3); in America special rules of liability in connection with the operation of railroads (cattle, fire), the sale of liquor (civil damage acts), the recovery of property from inadvertent trespassers who have made improvements (occupying claimants' acts), and the qualification of the law of employers' liability, which in a few states, preceded workmen's compensation legislation. So far as these statutes merely substitute one principle for another, they furnish interesting illustrations of the history of private-law legislation.[5]

[5] Liability legislation, which is not regulative in character, involves only the statement of adequate, consistent, and legally sound propositions. But this may be a matter of great legal difficulty, and no skill in drafting can avail without a mastery of substantive law. A regulative provision is more or less isolated in character, while a declaratory provision must fit into a system the parts of which are interdependent. A fragmentary change may fail to do justice to a new legal situation, or may carry unintended implications. The hazard may be avoided or reduced by cautious form of statement, particularly by using the expedient of legislation by reference; and the courts may be relied upon to aid by judicial construction.

The New York legislation of 1929, chapter 467 (§12a, of Court of Claims Act) establishing the principle of tort liability of the state accomplished its main purpose by one sentence of moderate length. The consent to have this liability "determined in accordance with the same rules of law as apply to an action in the Supreme Court against an individual or a corporation" constitutes legislation by reference, and simpli-

Liability legislation assumes the character of regulative legislation, if either liability serves the purpose of regulation, or if the law not merely establishes liability, but subjects it to regulative provisions.

a. *Liability as a form of regulation.* This is illustrated by the laws which make railroad companies liable for cattle killed on their right of way in the absence of a sufficient fence. The basis of such legislation is the power to require railroad companies to fence their rights of way against cattle; but the obligation is not directly imposed, the company having the option to compensate for loss of cattle.[6]

Under the same head should be placed the peculiar rule of the law of corporations, introduced into the Illinois Corporation Act of 1872, and from there copied by other states, which makes directors liable for assenting to an indebtedness in excess of the amount of the capital, to the amount of such excess (§23 of the Illinois Act).

Where, as in the laws of fencing against cattle, the assumption of liability is optional in lieu of the adoption of a safeguard, a consideration of relative advantages may induce the assumption of the risk of liability; but where, as in the corporation law, the liability is imposed as a consequence of avoidable action, it operates in effect as prevention of such action.

Absolute liability means a duty to indemnify for loss, but not a duty based upon default, and therefore may be regarded as being contrary to rational principle. It has in consequence been questioned on constitutional grounds, successfully so in connection with the first workmen's compensation legislation (*Ives* v. *South Buffalo R. Co.,* 201 N.Y. 271, 1911), and the rule had to be sanctioned by express consti-

fies the task of formulation. But it also requires great caution. A reference to the liability of municipal corporations would, in view of the state of the law of New York on that subject, probably have defeated almost the entire purpose of the act. The reference to individual and corporate liability raises the question as to liability for official acts beyond the sphere of private action, as, e.g., for error in the course of the exercise of the police power. It is easier to suggest the doubt than to remove it. Other formulations would have created other difficulties. It is doubtful whether any declaratory statement can be made as clear as a regulation.

[6] These laws are very different from the fence laws, which are described in *Buford* v. *Houtz,* 133 U.S. 320, 1890, compliance with which was a condition precedent for maintaining an action for trespass by cattle. The American change of the English rule which required an owner to fence his cattle in, to a rule which required the owner to fence other cattle out, was accomplished by custom (see *Seeley* v. *Peters,* 10 Ill. 130–142, 1848). The statutes determined the sufficiency of the protecting fence, and were thus regulative in character.

tutional amendment. However, upon analysis, the rule *Respondeat superior* is a rule of liability irrespective of fault, and a still stronger illustration is found in the rule of admiralty (contrary to the common law rule, see *Transportation Co.* v. *La Compagnie Générale,* 182 U.S. 426, 1900), that the ship is liable for the fault of the pilot whom it is by law compelled to employ (*The China,* 7 Wall. 53, 1868). If absolute liability is looked upon as a form of charging an undertaking with the inevitable risk of loss attending it, it represents a rational principle of justice; but a more perfect "rationalization of justice" may require adjustments or qualifications which the processes of unwritten law have failed to develop, and which in any event are more conformable to regulative legislation.

b. *Liability regulation.* It is, if not inevitable, at least natural, that if legislation concerns itself with liability, it should not content itself with merely stating or altering principles, but seek for conventional adjustments that have a tendency to achieve better equity than the mere operation of a simple rule of liability is apt to do.

The following seem to be the prominent forms of liability regulation:

(1) Limitation of liability. It is characteristic that while there was, until the advent of workmen's compensation, no attempt to curb the extravagances of damage claims in case of personal torts, the introduction of a cause of action for wrongful death was at once and everywhere attended by the fixing of maximum amounts recoverable; even prior to Lord Campbell's Act, the early legislation of Massachusetts pursued this policy when it made negligent management of highways (resulting in death) actionable. By the constitution of 1894, New York prohibited any such limitation, but had to qualify this prohibition in order to make workmen's compensation legislation possible. All workmen's accident compensation operates with limited benefits, which in substance represent something like apportionment of loss between employer and employee.

Congress recognized the principle of limited liability in connection with shipping by the so-called Harter Act of 1893.

Limited liability of a corporation may be looked upon as the logical result of the separate entity theory, and generally is not expressed by statute, but left to be inferred from the nature of the corporation.

(2) Protective expedients. Workmen's compensation laws place a duty of accident notification upon the employee, as a safeguard against possible fraud, and a similar duty is created by statute in favor of municipal corporations. Provisions may be called for to take care of cases where the injured person is not *sui juris* (*O'Connell* v. *Sanford,* 256 Ill. 62, 1912) or where failure to notify is not prejudicial, or appropriate equities may be worked out by judicial construction.

English legislation making railroad companies liable for damages caused by fire due to sparks escaping from locomotives empowers the company to enter upon adjoining land to clear it from inflammable material. This provision manifests a care in correlating right and liability which is not found in American statutes, but is indicative of possible elaboration of rules of liability.[7]

(3) Provisions to make liability effective. Workmen's compensation laws require employers to satisfy the appropriate administrative authorities that they are financially prepared to meet compensation claims, or to insure themselves or to give bond to secure possible claims (Illinois Act, §226). Similar safeguards are being discussed in connection with the operation of automobiles and have been put in effect in Massachusetts. See J. P. Chamberlain, "Compulsory Automobile Insurance," 12 *American Bar Association Journal* 49, January, 1926.

Legislation of this kind is clearly regulative; therefore, while a municipal corporation has no power to declare rules of liability, it may under a power of regulation, exact a bond to secure the satisfaction of damage claims, as a condition of granting a license (*State* v. *Deckebach,* 117 Oh. 227, 157 N.E. 758, 1927).

(4) Priorities and liens. Priority is important in case of insolvency; and the recognition of priorities forms part of bankruptcy legislation and of laws for the administration of decedents' estates. Priorities

[7] There is room for argument that rules placing upon a party who claims liability upon the part of another, correlative obligations toward that other person, particularly the obligation of giving notice, are founded in the equity of the situation, and therefore have rather a rationalistic than a conventional or regulative character. They certainly illustrate the fluid character of the distinction. Two points should, however, be noted that justify their being treated as regulative: the one that neither common law nor equity has developed correlative obligations of this kind which appear in our law almost exclusively as statutory equities; the other that the statute usually injects into the obligation some conventional element such as a time limitation.

recognized by courts of equity and of admiralty are based upon inherent differences in claims that can be worked out as a matter of logic; whereas legislation is free to give effect to considerations of social welfare and to pursue other collateral ends.

A lien, in addition to giving priority, permits the satisfaction of claims out of property after it has passed out of the ownership of the debtor. In appropriate cases, it may also be used to secure claims of a quasi-contractual character, on behalf of parties who have no personal claim against the owner. Lien legislation is an important part of every American statute book. Besides enlarging the range of possessory liens in analogy to those of the common law, it creates liens not dependent upon possession, but upon systems of public registry. The statutory lien based upon quasi-contractual claims is the characteristic feature of mechanics' lien legislation, which is a peculiarly American institution. It involves a complex system of notices and declarations, and great care is required in order not to do injustice to the owner. After a century of experimenting legislation, it cannot be said that all substantial equities have been worked out with complete success; and it is significant that some of the most careful laws, notably that of Illinois of 1903, permit the owner to stipulate by contract against the application of the system to his property (§21).

§20. Substantive and Formal Regulation. In the balance which has to be struck between government and liberty, the legislature will frequently prefer indirect to direct control. One important method of indirection is to leave social and economic objectives free, while compelling the observance of prescribed modalities of action which are supposed not to be destructive of the essence of liberty. It is necessary to choose this guarded form of expression to indicate the difference between substance and form which, in the nature of things is fluid. There is hardly any conceivable formal requirement, which may not under circumstances become matter of substance, or which may not lose its formal character by being pushed to extremes; publicity is usually a matter of form, but occasionally secrecy may be vital to a legitimate interest; the color of glass may be form, because indifferent, but the requirement that oleomargarine be colored pink has

justly been held equivalent to prohibition (*Collins* v. *New Hampshire,* 171 U.S. 30, 1897). There is a great deal of regulation that bears on classification, organization, or procedure; and in these matters the relation between form and substance may become so close and doubtful as to require separate consideration.

In most cases, however, a formal requirement will be easily recognized as such, and will present a legislative problem less vital in character than a substantive regulation. Moreover, formal requirements, in so far as they are not inconsistent with freedom of development, are capable of a high degree of standardization, and a definite legislative technique can be built up with reference to them; whereas the details of substantive regulation generally concern experts other than lawyers, and general principles of legislation concerning them are very much more difficult to establish.

A substantive regulation does not lose that character merely by reason of being expressed only as an item of a required statement. Thus in the National Bank Law the prohibition of branch banking resulted originally in the main from the implication carried by the prescribed certificate of organization (using the singular in stating the place of location). See also 46 U.S.C. 263, and *U.S.* v. *Paryntha Davis,* 3 Ware 159, 1858; 1 Cliff. 532, 1860. The practice of thus regulating matter of substance is questionable, since items of formal statements are not likely to be scrutinized as closely in the enactment of a bill as independent substantive provisions; however, in incorporation laws, the provision for the certificate of incorporation is so commonly used to state qualifications or limitations, that these are not likely to escape attention.

Confusion may also arise from a discrepancy between a substantive requirement and a prescribed form of statement. An applicant for naturalization must during the last preceding five years have *behaved* as a person attached to the constitution; the required oath contains a declaration to the effect that he *is* attached to the constitution. May the *behavior* test be ignored in view of the form of the oath?[8]

A form requirement may be simply in confirmation of a substan-

[8] The test was ignored, without, however, noticing the particular point, in *Schwimmer* v. *United States,* 279 U.S. 644, 1929, and *United States* v. *Macintosh,* 51 S. Ct. 570, 1931.

tive regulation, intended to operate in aid of enforcement; or it may be in substitution for substantive regulation, or it may serve as a basis for the exercise of administrative power.

The form requirement as a substitute for substantive regulation is an important instrument of legislative policy. It may with reasonable adequacy serve the purpose of preventing fraud; it may have a very strong tendency to standardize in the direction of uniformity; and it will have some tendency to standardize in the direction of quality. In any event, it may satisfy the pressure for bringing some kind of legal control to bear upon a situation for which substantive remedies appear unavailable.

A survey of the important departments of regulative legislation shows an abundant recourse to formal provisions: filing and report requirements in connection with public utilities, banks, and insurance companies; in connection with shipping, registry, name, ship's papers and log-books, shipping articles; in connection with commodities, marks and labels; in connection with industry and the employment of labor, registers and occasionally certificates; all of these being generally supported by appropriate administrative powers of examination and inspection. The technique of these provisions will be considered separately.

The history of regulative legislation frequently shows a progress from formal to substantive regulation. The movement for the regulation of investment trusts naturally starts with propositions to enforce publicity. The English Act of 1909 prescribes as the principal method of controlling the business of insurance quinquennial actuarial reports and abstracts to be deposited with the Board of Trade, and lacks entirely the standardizing provisions of our insurance laws. The economic control of railroads in America began with a measure mainly operating through publicity, the Massachusetts Act of 1868; but gradually substantive regulation asserted itself, and became the generally prevailing type when Massachusetts adopted it in 1913.

On the other hand, substantive may decline into formal regulation. The Revised Statutes of New York undertook to standardize a number of commodities in certain respects (flour and meal, beef and pork, hops, distilled spirits, butter, and pressed hay); but with regard to other commodities, legislation concerned itself only with the man-

ner of packing, and provided for certification on that basis. Inspection apparently became perfunctory, and a mere matter of fees, and was abolished and forbidden by the constitution of 1846; and finally the substantive regulation, which had survived on the statute book, because not inspection legislation in the technical sense, was repealed in 1922.

§21. REGULATION BY CLASSIFICATION. Classification as a form or method of regulation appears in the Interstate Commerce Act not only where that term is used (49 U.S.C. 1, subd. 5, 6) but also as an essential element in prescribed forms of accounts (49 U.S.C. 20, subd. 5). Classification also lies at the basis of grades and standards that are made applicable by recent legislation to a growing number of agricultural commodities or products of the soil, making available for official control methods that had been evolved by voluntary trade practices in accordance with exigencies of business.[9]

It is obvious that if a matter with reference to which publicity is to be secured is complex and multifarious, intelligibility to the public as well as the effective application of administrative checks will frequently depend upon orderly methods of presentation which in appropriate cases are equivalent to classification. The term classification implies something of rationalization[10] excluding merely mechanical division or arrangement (order of time or place, alphabetical order). The process being thus a semi-scientific one, it may be contended that its compulsory adoption is no interference with legitimate liberty.

For administrative and publicity purposes alike, however, mere classification is not enough, if the number of units requiring classification is very large, and comparison between them is part of the scheme of control; what is needed in that event, is uniform classification. The uniform scheme will still claim to be objective and scientific; but the efforts to arrive at it will reveal legitimate differences of

[9] The commercial practice of grading applies to articles not as yet covered by legislation, such as coal, iron ore, pig iron, lumber, hides and leather. See Huebner, *Agriculture and Commerce*, p. 259.

[10] It is interesting to note that in the German *Handwoerterbuch der Staatswissenschaften* the subject of grading (*Sortirung*) is discussed under the head: Rationalization of Agriculture.

opinion, and the final result being at best a forced compromise, there can be no longer any pretence that possibly legitimate freedom is not interfered with.

That grading, as usually understood, has some element of conventionality, if not arbitrariness in it, is shown by the fact that the term is not applied where there is a possibility of scientific accuracy. Gold and silver have grades of fineness, but there is no such grading as is applied to grain or cotton or tobacco or apples. Grading as a system of regulation is also inapplicable where individual differences count for a great deal, as in the case of pearls. With all the European legislation concerning wine, wine has never been graded, and with regard to tea, the legislation of Congress establishes only a minimum standard (21 U.S.C. 43).

The question then arises whether imposed uniform classification is matter of form or of substance. It is a plausible contention that mere conformity to a scheme of presentation is consistent with substantial freedom of choice and decision; but closer analysis shows this to be, to an extent at least, a fallacy. Not only may a scheme of arrangement vitally affect ultimate substantive results; but inevitably any such scheme will control impressions produced on others, and thereby become an essential factor in determining values. Apparent form is thus turned into substance. This is particularly true where symbols of classification are used which carry the association of qualitative differentiation (A, B, C, D), or explicitly express quality.

The aspect of the matter changes, however, where the classification relates to group standards, and group membership facilities are desired or needed by those who are subjected to the law. If the classification represents the best opinion of the group, non-adherence to it makes a presumption (although possibly unjustified) of ulterior and questionable purpose. In practice it will be found that compulsory classification nearly always represents group-evolved standards, and that it is ordinarily not imposed unless the appearance of conformity to group standards is intended to be produced. In that event the imposed classification is no interference with legitimate freedom.

It is from this point of view that grading requirements which constitute an outstanding phase of recent regulative legislation should be judged: the grades are those in customary use or evolved by expert

conferences (note particularly the efforts to agree upon international cotton standards), and they are not imposed unless transactions are by grade ("of or within" the grade or standard;[11] "not to apply to private types used in good faith and not in evasion . . ." U.S. Cotton Standards Act, 1923, §2; Illinois Grading Act, 1923, §11; ". . . permitted to sell by sample or by type, or under a name not false or misleading which does not include terms of the official standard," U.S. Grain Standards Act, 7 U.S.C. 76). While the question whether a classification imposed by statute, if conceded to be constitutional, is matter of form or matter of substance is often an academic one, the determination may, if classification is a matter of rule-making power, be practically important, for the purpose of interpreting the extent of delegation. There is less of a delegation of legislative power, if rules relate to matter of form than if they relate to matter of substance, and a court in passing upon the validity of an administrative regulation may be legitimately influenced by this consideration. An Australian statute gave a government board power to prohibit exports not conforming to board regulations concerning trade descriptions, and defined a trade description as a description referring to the nature, number, quantity, quality, purity, class, grade, measure, gauge, size or weight of goods, or any mark which according to trade custom or common repute is commonly taken as an indication of any of the above. A board regulation required an official to grade butter, classifying it according to points representing flavor, texture, and color as superfine 95–100, and so forth. It was held that this exceeded the power of the board, the term trade description as used in the act referring to something preëxistent to the action of the board, and not to something devised by it (*Woodstock Co.* v. *Commonwealth,* 15 C.L.R. 241, 1912 [Austr.]). Presumably the regulations might have covered size of lettering, method of affixing, and similar detail. The act was construed as giving the board mere power over matter of form, and the court apparently considered that an official system of grading went to the substance of commercial freedom.

Perhaps an analogous question might be presented, if a corpora-

[11] As to the meaning of this, see opinion of Solicitor of Department of Agriculture of June 15, 1928, with reference to millimeter descriptions of cotton, printed in 127 *Commercial and Financial Chronicle* 7, July 7, 1928.

tion were permitted to be organized for lawful purposes, the articles of incorporation to state the purpose according to rules prescribed by the Secretary of State: would the Secretary of State have power to classify purposes, and require the articles to state under which of the classes the corporation proposed to come? Probably not.

The Interstate Commerce Act requires both reasonable rates and reasonable classifications. The Sherman Act having been held applicable to railroads, agreement on uniform rates was declared unlawful (*Joint Traffic Association Case,* 171 U.S. 505, 1898); yet the Interstate Commerce Commission justly regards a single, i.e., uniform, classification to be essential to secure compliance with the law (*Report, 1907,* p. 191); and uniformity, unless imposed by law, must be the result of agreement. If the application of the Sherman Act to regulated rates is sound in theory, its non-application to classification must mean that classification is regarded as belonging to those "trade practices" of common interest with regard to which concerted action is legitimate, because it does not destroy competitive freedom of action.

Accounts of large undertakings involve systematic classification of financial items. They illustrate the close relation of form to substance in regulation. The Interstate Commerce Act provides (§5, subd. 5) that the Commission may prescribe the form of all accounts, the classes of property for which depreciation charges may be properly included as operating expenses, and the percentages of depreciation in such case. Under the authority to prescribe the form of accounts, the Commission has specified what shall be operating expenses and what capital expenditure, thereby controlling capital structure, and, incidentally, therefore also rates (William E. Hooper, *Railway Accounting,* chap. 3, pp. 36, 57). It was therefore a logical development that control over accounting was followed by control over capital issues.

A delegated power to classify should be understood as meaning a duty of comprehensive and systematic classification, and is generally understood and exercised in that way. Zoning legislation has however revealed the danger of special legislation involved in piecemeal amendment of an originally comprehensive scheme of classification, and similar tendencies have manifested themselves in connection with civil service salary classification. A constitutional power to classify property for purposes of taxation is liable to the same danger. It is not

clear whether the systematic character of classification can be enforced by judicial construction of the term.

It is an inevitable concomitant of regulation by classification that in the absence of precisely measured criteria, boundary line cases will produce controversy. Where the law singles out only one category, the boundary line controversy will be only as to application or non-application of the law, but classification involves two conflicting positive rules. The slight intrinsic value of such controversies makes a power of expeditious determination desirable, and grading requirements are therefore not uncommonly accompanied by official powers to certify the grade; these however are "ministerial" powers and not powers of conclusive determination.

§22. DEFERRED CONTROL. Instead of formulating a regulation for general application, control may be deferred for exercise from case to case as the need arises. The legislature will lay down a merely qualitative standard, and leave its adaptation to circumstances to administrative action. The nature of the discretion involved in the administrative action will determine whether a standard is merely enforced, or whether the standard is left to be developed through the "trial-and-error" method of decisions from case to case.

If the question left to be decided by the administrative authority relates to public interest or expediency, or to personal qualifications other than mere integrity of character, or to adequacy of plans, or reasonableness of rates, or other controversial matter, and discretion is not guided by more particular language, this shows that the legislature did not have in mind, or did not care to express, a standard specific enough for statutory formulation, and administrative power then means deferred control.

However, long-established practice with regard to some intrinsically controversial matter may have standardized considerations to such an extent as to render it improper to speak any longer of deferred control. Perhaps this has become true of the English censorship of the stage.

There will always be a strong temptation to the legislature to con-

fine itself to laying down standards which will receive administrative application. There is otherwise the alternative between, on the one hand, phrasing prohibitions or requirements in merely qualitative terms for direct judicial application and, on the other hand, finding specific prohibitions or requirements that will meet the case. The first alternative presents the difficulty that will be explained in discussing the general problem of indefinite terms. The second alternative presents the difficulty of singling out practices for condemnation that are not intrinsically evil, or (in the case of requirements) of unduly standardizing social or economic practices. Delegation for administrative application offers an escape from this dilemma.

The relation of the licensing power to underlying rights of property may be left entirely open by appropriate legislative phrasing, so in the English Petroleum Productions Act of 1918, §2: "Nothing in this act shall be construed as conferring on any person any right to enter or interfere with land for the purpose of searching or boring for or getting petroleum which he does not enjoy apart from this act, or shall prejudice or affect the rights, if any, of any person interested in any land in respect of petroleum gotten through or from the land in which he is so interested."

Administrative power involving merely expert judgment of facts should not be held to constitute deferred control. If the law requires a structure or plan to be safe, or a food product to be wholesome, some doubt may arise; but on the whole there is in such a case an assumption that standards are sufficiently certain to be passed upon in an objective manner; and the justification of a refusal to certify will normally present a question of fact which if controverted can be decided by a court. Probably the power of the New York Bank Commissioner to prohibit a practice specified by him as unsafe is intended by the legislature merely as a checking and not as a standardizing power. The "ministerial" character of the power is of course clearer if qualitative terms are avoided and qualifying or disqualifying acts or circumstances are specified in the law, and it is most clearly marked by the laying down of purely formal criteria—a policy adopted in New York for the control of the liquor traffic in 1896.

That a standard is not sufficiently definite for penal enforcement,

does not necessarily mean that it is not sufficiently definite for judicial control; and if readily controllable, the standard is a legislative, and not an administrative standard.

However, if there is a real difficulty as to the certainty of the standard, it does not aid materially to make the availability or non-availability of mandamus the criterion of non-discretion or discretion; for this merely shifts the doubt and its determination to the judicial forum.

Deferred control may be expected to be a feature of new and untried policies; and this seems to be borne out by the economic legislation of Congress.

Two of the principal acts of Congress dealing with economic interests illustrate the uses of deferred control.

The Interstate Commerce Act operates in the main through formal requirements and through administrative powers vested in the Interstate Commerce Commission. Thus rate control is exercised through publicity secured by filing, and through the power to correct unreasonable rates. Adequate service is sought to be secured by appropriate order-issuing powers. New establishment, abandonment, consolidation, and financing are controlled by discretionary consent requirements. These provisions constitute the bulk of the provisions of the original act as well as of its amendments.

By comparison, the specific prohibitions of the Interstate Commerce Act are few: free passes; pooling; the commodities clause; ownership of competing waterlines; raising of rates that have been reduced in order to meet competition; the long-and-short-haul clause; interlocking directorates; perhaps also, the disclosure of information received from shippers (§15, subd. 11). And the Interstate Commerce Commission has power to relieve the carrier from the three most important of these (pooling, long-and-short-haul clause, ownership of competing waterlines). In the great structure of the economic control of railroad transportation the specific prohibition thus plays a decidedly secondary, if not an insignificant, part.

The Federal Trade Commission Act of 1914 generically forbids unfair methods of competition, but is effective only through administrative orders operating as deferred control, the concept of unfair competition not being sufficiently clarified (except in cases of fraud) to

constitute a standard, the violation of which Congress thought should be met by punishment. A penalty is attached only to the violation of a "cease-and-desist" order. Undoubtedly it was hoped that the decisions of the Commission would eventually evolve something like a code of fair and unfair trade practices.

The difficulty of defining unfair competition not tainted by fraud may be appreciated if we consider the attempts to reach specific practices regarded as unfairly competitive. The only prohibition that has achieved any legal standing is that against what has been called self-service of public utilities (the commodities clause of the Interstate Commerce Act); indeed the Supreme Court of Illinois has succeeded in establishing the rule against warehousemen storing their own grain as a logical result of the constitutional status of the warehousing business (*Hannah* v. *People,* 198 Ill. 77, 1902); while measures for the suppression of peddling, of the manufacture of oleomargarine, of gift sales, and of ticket brokerage, have been short lived or have even been declared unconstitutional (Freund, *Police Power,* §§283, 289, 291, 293).

The remaining one of the three great economic measures of Congress, the Sherman Anti-Trust Act, appears on its face to be directly prohibitive, but has its chief operation through restraining injunctions, which are a species of administrative power, and therefore likewise of deferred control. Had there been only penal enforcement, the gradual process of clarification of the concepts of restraint of trade and monopoly would hardly have been possible.[12]

The difference between penal and administrative enforcement may also be studied in the law of obscenity and immorality. In England,

[12] The Interstate Commerce Act was passed in 1887, the Sherman Act in 1890. By 1890, then, Congress had already embarked on the policy of legislating with the aid of administrative powers, but these powers were at that time neither fully developed nor fully understood; it was only by the amending act of 1906 that the Interstate Commerce Commission received adequate powers. Under the circumstances, it is not surprising that the Anti-Trust Act undertook to operate with direct prohibitions. When immigration legislation had its inception in 1882, the thought of legislating through administrative powers was still more remote, and this legislation has continued to make its provisions directly operative; but if a policy of "selective immigration" is being agitated, this will doubtless imply a good deal of administrative intervention. In particular, the contract-labor prohibition of 1885, would at the present time, perhaps, be more likely to assume the form of selective admission under administrative safeguards.

the censorship of the stage, under a law operating with very general terms, has produced a reasonably definite set of standards through a constant administrative practice, whereas the occasional judicial definition of obscenity in criminal cases has done very little to fix the limits of toleration.

The proper uses and the relative advantages of different administrative powers in aid of legislation, and the detailed provisions required to make them effective, while commonly associated with administrative law, also constitute among the most important problems of statutory draftsmanship, around which a great deal of recent legislative development has centered.

The technique of deferred control is the technique of the vesting and the regulation of discretionary administrative powers.

The statutory wording of the power, the nature of the subject-matter, and the construction placed upon the power by the administrative power or ultimately by the courts, will determine whether or not the power constitutes deferred control.

It is legitimate in an analytical study of administrative powers to differentiate grades of discretion and to attempt to discover their implications as regards desirability or undesirability of delegation, effect upon administrative practice, and amenability to judicial control. But it may not be, and frequently is not, expedient to make all implications of legislative action explicit. An examination of the texts of statutes discloses a preponderance of neutral phrases equally serviceable for non-discretionary and discretionary certification. Such ambiguity constitutes theoretical imperfection of drafting, but may nevertheless be prudent and therefore good legislative practice. It may serve the legislative purpose to disguise the inability to find standards by using broad generic terms and by assuming that these are capable of being applied by non-arbitrary administrative discretion and even by quasi-judicial methods.

It is finally proper to observe that administrative rule-making powers do not constitute a form of deferred control in the sense here discussed. If the administrative authority is capable of framing a general rule, the framing of such a rule cannot be beyond the capacity of the legislature, although it may be poor economy for the legislature to assume the burden. If, on the other hand, standardization presents

fundamental objections or difficulties, they must also confront the subordinate rule-making body. In distinction from delegation for individual disposition, delegation for administrative regulation does not avoid, but merely shifts, the problem of formulating standards as explicit rules.

The deferred control operates either by way of permit (advance determination) or by way of order (corrective intervention).

If administrative power is used in aid of regulation, the legislature may favor a policy of advance determination or a policy of corrective intervention, or may attempt to combine the advantages of both methods. The advance determination is in form of a license, permit, approval, consent, or certificate, granted upon the application of the individual, and without which he is, under penalty, forbidden to act; the corrective intervention is in form of an order imposing upon the individual the duty of action or omission or cessation, which he is, under penalty, required to obey.

The system of licensing places the burden of moving upon the individual; it lends itself equally well to a policy which makes certification a purely ministerial act, and a policy which gives the widest discretion in granting or withholding certification; in many cases certification will be a matter of course, and will therefore tend to become a matter of routine and clerical administration. On the other hand, the legislature cannot avoid specifying the acts or things for which a license is required, since it would be manifestly meaningless to say that an individual must obtain a license when he proposes to do anything affecting public health, safety, or morals.

The system of administrative orders places the burden of moving upon the administrative authority; it presupposes default or delinquency, and facilities for advising the authority of the need of intervention. In the nature of things such intervention will not be of the same routine character as the grant of a permit, but will involve some discretion; but the widest kind of discretion which is possible in the exercise of a licensing power is generally speaking inappropriate to the exercise of a directing or prohibiting power which is in its nature quasi-judicial and will therefore normally be exercised by quasi-judicial methods. Since the order is founded on default or delinquency, it is sufficient for the legislature to indicate in a general way the field of

malpractice which authorizes the exercise of the power, with reference to such wide categories as health, safety, interstate commerce, etc., without the degree of specification essential for the exaction of licenses. For illustration, it is sufficient to refer to the Federal Trade Commission Act of 1914; to curb unfair competition by a system of licenses applicable to the entire range of interstate and foreign commerce would have been manifestly impracticable. The cases, in which legislation operates with directing powers not based on default or delinquency, are, particularly in America, so novel and exceptional, that they as yet present no typical problem, but are entirely governed by special considerations.[13]

It is impossible to formulate in a general way the conditions which should determine the legislative choice between the two alternatives of advance determination or corrective intervention, and in many cases considerations will be closely balanced—considerations which involve legislative and administrative facility and the interest of individual liberty.[14] As in the case of federal meat inspection, requirements of the export trade may be controlling in favor of certification, where normally a system of prohibiting orders would seem to be more appropriate.

The following legislative arrangements combine features of the two systems:

Provision for certification may be accompanied by a "notice and hearing" requirement, which has become conspicuous in the Transportation Act of 1920. Procedurally the license is thereby assimilated to the order. Under the decisions of the Supreme Court, administrative action must, under such a requirement, be supported by the record evidence, and, if the statute operates with so wide a discretion as the consideration of the public interest, it may be of controlling importance, whether under the terms of the statute, it is the grant or the refusal which must be thus supported. Instead of the neutral and inconclusive forms of expression which statutes so frequently prefer, we

[13] See Freund, *Administrative Powers over Persons and Property*, pp. 78, 79.

[14] For an administrative expression in favor of a revising rather than an approving power, see the *Report of the Massachusetts Department of Public Utilities, 1920, Pub. Doc.*, vol. I, p. 27.

Note the ambiguous phrasing "subject to review and determination" of the Federal Reserve Board in connection with the discount rates of Federal Reserve Banks, 12 U.S.C. 357.

have here a case where both the legislative choice of language and its judicial interpretation require the closest scrutiny.

Statutes occasionally adopt what may be called a "veto system." The method is to require the individual to give notice of his proposed action to the administrative authority, which is then given an appropriate time to forbid the action; but after the lapse of the designated time without administrative prohibition, the individual is free to proceed. The system may or may not exclude subsequent corrective intervention by new orders.[15] Administratively this ranks with license requirements, since it constitutes a routine check; while legally it ranks with directing powers, throwing the affirmative with consequent burden of making a case upon the administration. This is the method of dealing with rate increases under the act of Congress of 1910, which, however, appears to have been induced simply by considerations of convenience. The adoption of the system has been plainly due to consideration for private right in the English Theatre Act of 1843 and in the Town Improvement Clauses Act of 1847 (§§38–41, 110, 111), and in the Prussian Mining Law and the German Trade Code as regards mine or factory regulations made by the owner. It is impossible to discover in America any distinct legislative policy in favor of the veto system.[16]

A combination of license and orders may also be found in the power to grant a license upon conditions, which the Transportation Act of 1920 appears to favor. The conditioned license is from another point of view a conditional order, although the method is advance determination and not corrective intervention.

The following gradation may be observed:

a requirement of submission of a plan for approval or disapproval, with a practical opportunity for the administrative authority to indicate its preference, but with a duty to accept or reject the plan as it is;

a statutory requirement or prohibition, but with an optional alternative, which may be proposed by the individual subject to official ap-

[15] Note also the form: operative two months after submission unless sooner approved, but disallowable at any time (English Railways Act, 1840).

[16] In the case of corporate consolidations depending upon approval, there is also the inconvenience of the unfavorable effect of premature publication of plans upon bargaining power. See observations of the Interstate Commerce Commission in disallowing the proposed merger of the M. K. & T. R. Co. with the St. L. & S. W. R. Co. (124 I.C.C. 401, 441, 1927).

proval, or offered by the official for acceptance by the individual; this is in effect a dispensing power or power of variation (see English Railways Act, 1845, §66);

a power, with reference to plans required to be submitted, to disapprove or approve with modifications (Shipping Act, 1916, as to agreements between carriers; English Explosives Act, 1875; Metalliferous Mines Act, 1872); in that case the authority must be in a position to show some objection to the offered plan;

a power to annex conditions specified by statute; this is uncommon;

finally, the power to attach conditions in the discretion of the authority, or without qualification.

The discretionary or unqualified power to annex conditions to a license constitutes the widest form of deferred control; it is wider than an administrative regulation, since it may vary from case to case. While variable from case to case, it becomes inflexible after the initial grant, unless a power to modify is given by statute (which is not common), or (which is of doubtful validity) reserved in the license.[17] Under a strict view of the delegability of legislative power, the constitutional validity of the conditional license might be doubted. It raises a number of questions of construction and enforcement, which are as yet unclarified, and to the clarification of which we shall have to look to judicial decisions rather than to explicit legislative provision.[18]

§23. REGULATION THROUGH ORGANIZATION. This constitutes a special form of deferred control, and also under nearly all legal systems, a major division of legislation.

[17] *United States* v. *Chic., M., St. P. & P. R. Co.*, 282 U.S. 311, 1931.

[18] In my treatise on *Administrative Powers*, I undertook to survey, for four selected jurisdictions, the entire statute law controlling rights of persons and of property by the aid of administrative powers. A comprehensive survey of this kind is possible where the legislature has the choice between invoking administrative aid and dispensing with it. In governmental-service legislation, an enumeration of administrative powers would simply mean an enumeration of all statutes, since no such statute can dispense with administrative aid. An attempt to give a complete view of the entire field of regulation, where the legislature has the choice between regulation and non-regulation, would be more appropriate to a treatise on economic and social science than to a treatise on legislation; that choice is a matter of political philosophy and not of legislative technique.

In substance, the state, instead of regulating directly, provides for setting up a machinery of control by self-government.

If the process consists in the establishment of such subdivisions of the state as counties and cities, we have local self-government in the specific sense of the term, and a true delegation of legislative power, the problem of regulative legislation being shifted, and also qualified by the limitations of the delegation.

A comprehensive view of legislation discloses the following forms of regulation through organization:

1. requiring that the undertaker of some enterprise adopt some plan for its conduct (compulsory planning);

2. permitting a number of persons to organize themselves into a body for joint action (incorporation);

3. delegating to such a body governmental or quasi-governmental functions with reference to groups of interests (privileged corporations);

4. delegating power to groups in which adhesion is not voluntary on the part of all the members (public districts or bodies);

5. giving to representatives of interest-groups a share in the exercise of regulative power;

6. conditioning a power right or privilege upon obtaining the consent of a majority (referendum).

1. *Compulsory planning.*[19] The expectation is that an inherent guaranty of the observance of standards will be found in the adoption and disclosure of a plan of organization and action. This would be regulation through publicity. However, in addition to requiring that a plan be submitted, the law will regularly reserve a power of official approval or disapproval. Illustrations are furnished by the English Coal Mines Regulation Act of 1887, the English Lunacy Act of 1890 (establishment and conduct of private asylums), and the German Insurance Law of 1901; perhaps there are similar American statutes. Regulation of this type operates through the sanction of a penalty for operating without a plan.

2. *Incorporation.* The history of incorporation legislation shows the following stages: the grant of special charters, where an object seems worthy of encouragement, the charter serving also as a vehicle of pub-

[19] See also §70, *infra.*

lic control over the chartered body and its undertaking; facilities for incorporation under general laws which are enacted with reference to specified classes of objects; extension of these facilities to practically every legitimate object of economic or social endeavor, subject to specified exceptions (e.g., excluding incorporation for carrying on agriculture); finally an increase of checks and safeguards against the abuse of corporate organization, for the protection of creditors, minority stockholders, and the investing public, manifest in the more recent American corporation laws, in the German joint stock company legislation, and in the elaborate English Companies Act of 1929; a similar tendency toward increase of checks is not as yet observable in the laws for incorporation of non-profit activities.

Incorporation is in the main a facility, and not a requirement; but in England associations for gain of more than twenty persons must proceed under the statute, and in America the corporate organization is absolutely required for specified classes of insurance, and occasionally for banking.[20]

Corporation legislation is civil regulation, but with incidental penal provisions.

3. *Privileged corporations.* A group based upon voluntary adhesion of members is vested with functions which are an attribute of sovereignty. Conspicuous instances at the present time are the power of condemnation given to railroad companies, and the note-issuing privileges of national banks. Constitutional difficulties limit the scope of this type. Professions were formerly (and in England to some extent are now) placed under the control of voluntary associations; but the trend of development has been to transfer this control to the state, and to recognize the professional association at most for non-determinative functions, such as the initiation of prosecutions. In New York insurance rate-making associations figure in the legislative supervision over insurance rates (70 *Annals of American Academy of Political and Social Science* 172), and in Germany stock exchanges are used by the government for checking undesirable practices in speculation (Act of May 27, 1908).

The United States uses the corporate form to some extent for governmental purposes; indeed, national corporate charters are ordinarily

[20] See Freund, *Police Power*, §§365, 401.

granted only where the corporation is an instrumentality of government.[21] It may be that the corporation is nothing but a part of the administrative organization, all the resources being furnished by the government, and the President appointing the governing board (so in case of the War Finance Corporation and the Inland Waterways Corporation);[22] or the organization may be private and voluntary, as in the case of the national banks; or the government may take the initiative and have a voice in management, the law making also provision for private and non-official membership, as in case of the reserve banks, federal land banks, and federal farm loan associations (see U.S.C. title 12, "Banking"). However, the farmers' coöperative associations which are recognized by the act of 1922, and by the Agricultural Marketing Act of 1929, and which, under the latter act, may qualify as stabilization corporations, are created under state and not under federal authority.

It may be that this type of regulation will increase in importance with the increasing complexity of the problem of state control over economic interests.

4. *Regulation through public districts or bodies.* The distinguishing characteristic is the coercion of non-consenting minorities. The legislature may create the body directly, or leave it to be created by the voluntary initiative of prospective members, defining prerequisites and procedure (see *infra,* §90, as to required provisions). The prerequisites ought to recognize the essentials of political integration, if a comprehensive delegation of powers is intended. It may be that the grant of self-government cannot avoid altogether the possibility of oppressive use of majority powers which courts of equity cannot reach, but legislation should make it impossible to create organizations in such a way that an area of great wealth but very few occupants is exposed to exploitation by a numerically larger group which takes advantage of local contiguity. Occasionally this result has been prevented by judicial construction of municipal incorporation laws (*State* v. *Village of Buhl,* 150 Minn. 203, 184 N.W. 850, 1921; "Re-

[21] But see, as to national trade unions, 29 U.S.C. 22–25.

[22] See W. F. Willoughby, "The National Government as a Holding Corporation," 32 *Political Science Quarterly* 505, and *Congressional Record,* June 18, 1930, p. 11491. The advantage of the governmental corporation is that its use of public funds is relieved from the necessity of periodical appropriations.

port of State Examiner of Minnestota on Hibbing Expenditures," *Chicago Daily News,* January 20, 1923; "Plucking the Goose as a Town Policy," *The Survey,* October 16, 1915; *State* v. *Lammers,* 113 Wis. 398, 1902; *Waldrop* v. *Kansas City S. R. Co.,* 131 Ark. 453, 199 S.W. 369, 1917; but see *Kelly* v. *Pittsburgh,* 104 U.S. 78, 1881).

Abuses of this kind perhaps account for the decision of the Supreme Court of Michigan that the creation of a district cannot be left entirely to unofficial determination (*People ex rel. Shumway* v. *Bennett,* 29 Mich. 451, 1874), resulting in legislation which calls for a decision by the governing board of the county (Compiled Laws, 1897, 2691 [2]; see also *Elliott* v. *Wille,* 112 Neb. 86, 1924).

The problem of the public district in its larger aspects belongs to the study of local government and the law of municipal incorporation. A special phase, more closely related to regulative legislation, is the furnishing of facilities for joint local improvements, particularly drainage and irrigation, in which a majority determines the creation of the district and the planning and the management of the scheme, compelling the adhesion of a minority and subjecting it to pecuniary charges. In many American states, the organization takes the form of a judicial proceeding, the court determining the existence of the basic statutory prerequisites. In European countries and a few American states, administrative authorities are given a voice in the creation and management of the scheme, passing not merely upon the existence of statutory prerequisites, but upon the question of expediency. There is much variation in detail (see Freund, *Administrative Powers over Persons and Property,* §253).

5. *Interest-group representation.* The distinctive feature of this phase of organization is, that public power is exercised by persons professedly standing for a special interest (whereas normally persons holding public office, once elected or appointed, are supposed to represent the public interest), but also acting under official responsibility. This is not a common form of organization in America, and was perhaps most conspicuously applied in the boards administering minimum wage laws, which were composed of representatives of employers and employees, and of regular government officials, the latter holding the balance of power. Considerable interest attached to the working out of numerical proportions and required concurrence to reach a

decision. Since these laws, so far as they purported to be compulsory, were declared unconstitutional (*Adkins* v. *Children's Hospital,* 261 U.S. 525, 1923), this form of organization has had but little development. The Federal Government of the United States lacks the possibility of regulating through self-governmental agencies or through interest-group representation, owing to the fact that under the constitution all officers must be appointed either by the President, or by heads of departments, or by the courts. There is, therefore, a difficulty in vesting official powers in self-governmentally organized bodies, which appeared in the Farm Relief Act of 1927, vetoed by President Coolidge; the Attorney General was of the opinion that even to limit the President in his appointments to nominees of farmers' organizations was unconstitutional.[23]

In European countries the utilization of interest-representation bodies for purposes of control plays a very important part, and consideration of the methods employed would require a separate study. The reorganization of the English coal industry by the Coal Mines Act of 1930, the first legislative attempt to "rationalize" industry, proceeds through provision for schemes to be developed by self-governmental bodies acting in conjunction with the Board of Trade.

6. *The referendum principle.* The exercise of a power right or privilege is made dependent upon the consent of a majority of parties in interest not acting under official responsibility. The arrangement is met with particularly in connection with local improvements. Its danger is that (notwithstanding the fact that purchased consents are ille-

[23] Where the government acts by way of service or aid and relief, it may recognize interest-group representation, accepting existing organizations without controlling their make-up. Conspicuous examples are found in the Railway Labor Act of 1926 (see *Texas & N. O. R. Co.* v. *Brotherhood,* 281 U.S. 548, 1930) and the Agricultural Marketing Act of 1929.

See Railway Labor Act, 1926, §2:

"It shall be the duty of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . .

"Representatives shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other." See case cited above.

Section 3 provides for boards of adjustment to be created by agreement between carriers and their employees.

gal, *Doane* v. *Chicago City R. Co.,* 160 Ill. 22, 1896) a majority may sell out a minority, or that the interests of the majority and of the minority are not identical, in which event the theory that this is only a method of overcoming captious obstruction fails. The possible lack of equity has led to decisions which make the constitutionality of majority powers whether by way of authorization or of veto, doubtful (*Eubank* v. *Richmond,* 226 U.S. 137, 1912; *Cusack Co.* v. *Chicago,* 242 U.S. 526, 1917; *Washington* v. *Roberge,* 278 U.S. 116, 49 S.Ct. 50, 1928). The objection probably does not apply where affirmative official action is required, and that action is merely conditioned upon, but not made mandatory by, the consent of owners, and the corresponding protesting facilities may then be given to a minority as well as to a majority of owners.

It also deserves consideration whether it is equitable to vest powers in a majority of the holders of obligations having a common security, to be exercised in case of default. There is no such legislation in America; but a provision of the Mechanics' Lien Law of New York permits 55 per cent in amount of the lien holders to agree to a postponement of all liens to a subsequent mortgage; here, however, it is a question of statutory, and not of contractual, liens (Lien Law, §§27–29).

§24. Registration and Certification. A classification of methods of regulation which distinguishes between publicity requirements, administrative checking powers, and administrative discretion exercised from case to case, must recognize that these distinctions are to some extent fluid, that they are not always reflected in legislative terminology, and that often they are not clearly present to the legislative mind. The statute may, e.g., simply say that incorporators shall file articles of incorporation in the office of the Secretary of State, and shall obtain from him a certificate of incorporation without clearly indicating the function of the certificate. Legislative ambiguity must then be resolved by judicial construction.

The term "filing" in American statutory terminology is often used to denote the individual act of handing in a paper at an office. More accurately, it signifies the official act of placing the paper on record.

Where, as in case of a deed, the instrument is transcribed and the original returned with a record notation, filing for record as the individual act may be distinguished from the official act of recording (see *Nattinger* v. *Ware,* 41 Ill. 245, 249, 1866).

If a publicity requirement is accompanied by, or consists in, a registration requirement, compliance will naturally be evidenced by an official acknowledgment, and this will have the appearance of a certification. Occasionally it will be legislative policy to mark the difference which will then express itself in carefully chosen phraseology. Illustrations are furnished by American Blue-Sky laws and by French or German laws relating to freedom of press, assembly, or association. In the Blue-Sky laws there is a desire on the part of the state to avoid the semblance of approval, and there is at most a bare communication advising the party that the statement required of him has been filed.

When legislation on the continent of Europe was ready to abandon the system of special permits for public assemblies and associations, it was deemed desirable to retain a system of public notification. In the interest of political liberty, this had to be safeguarded to prevent the need of acknowledgment from being turned into an instrument of disallowance. Thus the French Law of Associations of July 1, 1901, provides that the administrative authority must acknowledge receipt of the notification, and may not refuse it on the ground of the illegality of the association; if the required notification statement is incomplete, a refusal of acknowledgment for that reason must be judicially sanctioned.[24] Such a careful elaboration of the difference between registration and certification is not found in American legislation.

Certification which is more than receipt is in the nature of approval, although it may not be conclusive in this respect.

While mere registration, so far as the official act is concerned, is neutral and respects private liberty, it may also be true that a mere registration requirement may tend to standardize private action. Thus Patterson in his treatise on the *Insurance Commissioner in the United States* has observed (p. 258) that the requirement of the

[24] The bill originally introduced by the government had omitted any provision for receipt to be given for the notification; but such receipt is in the interest of the individuals concerned since it facilitates proof of compliance.

filing of all policy forms used by companies indirectly compels the adoption of uniform contract provisions, at least on the part of any one company.

The modalities of registration and certification are illustrated by the proposed act of Congress relating to trademarks (*Congressional Record,* April 21, 1930, pp. 7663–7668). The distinctions are:

1. registration followed by a certificate, which is *prima facie* evidence of ownership, gives an exclusive right to the symbol "Reg. U.S. Pat. Off.," and makes the use of that symbol a condition precedent to the recovery of profits or damages in the absence of proof of infringement after actual notice (§§1, 2, 23, 7, 12);

2. register of marks communicated by an international bureau, upon payment of registration fee, the owners of the marks so registered having the rights and benefits conferred by international convention (§3);

3. register of marks of articles of export under the act of March 19, 1920, giving effect to the Buenos Aires Convention, involving only a determination that the mark distinguishes the goods, and is not of a character forbidden by law, the certificate of registration being merely evidence of claim of right (§4);

4. entry of marks used in interstate and foreign commerce on payment of a smaller fee; for lack of such entry within the first year of use a special fee must be paid on subsequent application for registration. The entry is evidence of claim of right (§5);

5. optional entry of marks used solely within a state, which is likewise evidence of claim of right;

6. assembly for search purposes of any marks in actual use.

Until recently the law of copyright illustrated the requirement of registration without official certification, while official certification was and is required for a patent; but copyright legislation enacted in pursuance to international convention has made the existence of copyright independent of registration.

Where required marks or designations are difficult to apply or verify, legislation will tend toward certification. Under the Cotton Standards Act of 1923 official standards must be used in interstate commerce, but certification is left optional. The "knowing" violation of the act by improperly classifying would therefore seem to be more

difficult to prove, than in the Grain Standards Act of 1916. Where grading ceases to be purely optional, it is only logical to provide for official certification of grades, and as a rule grading statutes have provisions to that effect.

§25. REQUIREMENTS AS DISTINGUISHED FROM PROHIBITIONS. Requirements are logically distinguishable from prohibitions by the test that a cumulation of prohibitions produces no conflict, while a conflict may result from a cumulation of requirements. Thus speed regulations being in the nature of prohibitions, if different authorities establish different limits, the more prohibitive, i.e., the lower, limit will prevail (the question of the possible demoralizing effect of a more lenient local standard is a different matter, and will be considered later);[25] light regulations on the other hand are in the nature of requirements, and two rules, one requiring a red light, the other a yellow light, would create a conflict, soluble only by the elimination of one of the two rules. If the Eighteenth Amendment gives concurrent power to the states and the United States, it is assumed that legislation under it will be in the main prohibitive in nature, and that in subsidiary requirements conflicts will be avoided.

Prohibitions are more easily enforceable than requirements, and the violation of a prohibition (offense of commission) is less easily excused than the violation of a requirement. This is recognized in the practice of administration ("Report on Labor Law Administration in New York," 7 *American Labor Legislation Review* 273). It has also been stated as a proposition of German law that where a prohibitive police regulation is adequate, a police requirement is inadmissible (Walter Jellinek, *Gesetz und Gesetzesanwendung,* pp. 256, 293).

In determining (if that should become necessary) whether a provision is in the nature of a prohibition or a requirement, the positive or negative form of the rule is not controlling. It amounts to the same thing, whether the statute says: "All vinegar shall be branded" (Illinois Food Act, §11), or whether it says: "No person shall sell . . . unless the words . . . shall be plainly branded." (*Ibid.,* §28.)

[25] See §39, *infra.*

Requirements are probably more commonly phrased in negative than in positive form, and so far as the practice is or can be observed, it calls attention to the conditional nature of the provision: a requirement is regularly imposed only by way of condition attached to an act, an undertaking, or a business, so that on the one hand its effect may be avoided, and on the other, compliance with it, or its enforcement, is presumably less of a burden than foregoing the advantages which cannot be had without it. If a requirement cannot be conveniently phrased in negative form, it thereby manifests its unconditional character, and is apt to constitute, both from the point of view of policy and of enforcement, an extraordinary exercise of legislative power.

A prohibition in form may approach the nature of a requirement, if the avoidance of the forbidden things involves special precautions or duties of ascertaining facts or relations. Circumstances must determine the justice of throwing the peril of illegality upon an individual (age of consent in illicit relations; age in the case of industrial employment). It is an elementary rule of all legislation to avoid provisions or conditions involving undue difficulties of compliance or of proof of compliance;[26] but there is no available set formula to deal with the problem, which requires consideration and treatment from case to case.

Requirements constitute a more difficult legislative problem than prohibitions.[27]

It is presumably always possible to refrain from acting; but action may presuppose the possession of capacity or of pecuniary resources or of the coöperation of others. The difficulty may be so obvious in the case of private individuals, that the requirement will not be imposed; on the other hand it may be negligible in the case of great undertakings, such as the operation of a railroad, until the requirement reaches such proportions (construction of new lines) as to compel the legislative conditioning of the duty upon ability to perform (Interstate Commerce Act, §1 [21]).

[26] See §55, subdivision 10, *infra*.

[27] The common law recognizes this in its extreme reluctance to recognize positive duties—a policy that can be traced in criminal law, in the law of nuisance, and in the law of parent and child. See §27, *infra;* also *Chambers* v. *Whelen,* 44 Fed. 2d 340, 1930.

The English Coal Mines Act of 1887 requires the employment of certificated managers, but provides a penalty only if the mine is worked without one for more than fourteen days, and in addition permits the owner to exculpate himself by showing that he has used all reasonable means to employ one (§20). This goes to show that emergency exceptions may have to form part of a carefully elaborated requirement provision, while they are by no means equally necessary in the case of prohibitions.

There is also great difficulty in the way of penalizing non-compliance with a requirement which is indefinitely worded or contents itself with prescribing the attainment of a result. On the other hand, to prescribe the performance of the requirement in every detail may unduly impede that freedom of movement which is a condition of progress and efficiency. Requirements are therefore much more manageable in formal than in substantive provisions. It is the compromise between the maintenance of necessary standards in results and the avoidance of undue standardization of methods, which accounts for the introduction of the administrative order into the mechanism of English and American law.

An administrative regulation as distinguished from an individual order may encounter the same difficulty as a statute. The Federal Revenue Act requires the keeping of such records as the Commissioner may prescribe. But the best that the Commissioner has been able to do by way of regulation is to require the keeping of such records (etc.) as are necessary to establish the amount of the gross income and the allowable deductions (Regulation 411). It is not easy to establish a punishable offense on such a basis.

Prohibition, restraint, requirement: It is possible to distinguish, as a matter of legislative policy, between prohibition and restraint, if the former term is applied to the outlawing of some category of things or acts in its entire range, covering harmless as well as harmful manifestations. The term prohibition has thus a specific meaning in liquor legislation. It was also properly applied to the now obsolete policy of entirely forbidding substitutes for butter. Prohibition thus understood constitutes an interesting chapter in legislative history (Freund, *Standards of American Legislation,* pp. 84–95), but otherwise the line between prohibition and restraint is a fluid one.

Prohibition and requirement are mutually exclusive in this sense that where legislation proceeds upon a theory of moral condemnation, it will not compromise by regulatory measures which involve the recognition of quasi-legal status. The best illustration is furnished in our law by the repudiation of the policy of licensing houses of prostitution or gambling places. Prohibition, on the other hand, may have to be fortified by requirements imposed with reference to non-prohibited borderline practices. If the Eighteenth Amendment prohibits the sale of intoxicating liquors for beverage purposes, the licensing of the sale for medicinal purposes is legislation appropriate to enforce the prohibition.

Prescribing results instead of methods: Where a statute merely indicates general qualitative standards, administrative action must be relied upon to give them a content sufficiently definite for enforcement. It will then often be a question whether there is administrative authority merely to require results or also to prescribe methods; an individual order demanding a given result only, without prescribing method, may be sufficiently specific for enforcement because it is directed to some concrete condition requiring to be remedied.[28] The situation is somewhat different where the statute itself aims to be sufficiently definite for enforcement. Whether this is possible without prescribing methods to be pursued must depend upon the subject-matter dealt with. The question will arise only with regard to requirements and not with regard to prohibitions. An examination of the Illinois Health Safety and Comfort Law will show that it is possible to establish requirements without specifying methods, by referring simply to enclosures, controlling or communicating devices, equable temperature, freedom from gas or effluvia, etc. The provisions of the act are divided between these and absolutely specific requirements, but of such a character that the method pursued is indifferent (e.g., more than one egress). If results depend upon methods, and success involves judgment, an administrative determination may be called for in case of doubt; but a *prima facie* case of compliance or

[28] See my *Administrative Powers*, etc., p. 149. For German law, see Walter Jellinek, *Gesetz und Gesetzesanwendung*, pp. 210, 294. German authors point out that where there is deviation from an approved plan but the adopted plan is unobjectionable, there can be no warrant for corrective police intervention (Arnstedt, *Polizeirecht*, II, 809). See 33 U.S.C. 491.

non-compliance can be made out more easily than where the statute merely requires a workplace to be safe, and the owner has much more freedom than where the statute prescribes specific methods.

§26. Facilities as Distinguished from Requirements. Every civil regulation operates in a sense as a facility; but so far as the foregoing of the facility involves loss or disability (non-registration of a deed, non-compliance with testamentary forms and resulting intestacy), it will be practically felt to be a requirement.

Of considerable practical significance, however, is the substitution of a facility for what might be made an absolute or penal requirement, as, e.g., if an alien, instead of being compelled, were merely given an option, to register, in order to have greater convenience of proof of residence in an application for naturalization.[29]

In the nature of a pure facility is the reëntry permit given to an alien temporarily departing from the United States (8 U.S.C. 210); for the law expressly provides that the permit shall not be the exclusive means of establishing that the alien is returning from a temporary visit abroad. The certificate of citizenship given to a seaman is of the same character (46 U.S.C. 686, Acts of 1796). Such a permit or certificate should be compared with the consular visa, which is required, although not conclusive of the right to enter (8 U.S.C. 202g, 209f). The certificate of arrival provided for by the act of 1906 (now 8 U.S.C. 106) is put in the form of a statutory duty placed upon the Bureau of Immigration, serving merely incidentally as a facility to the alien.

The difference between facility and requirement becomes of considerable importance in legislation regulating the practice of professions and the marketing of commodities, representing the two legislative policies of either optional or compulsory certification.

Laws exist in many states for the public certification of "registered nurses," whose competence is ascertained by the application of statutory qualification tests (prescribed training, examinations). Only those thus certified may use the designation, the unwarranted use of

[29] If optional registration in the case of aliens is or has been resisted, it is on account of the apprehension that it may serve as an entering wedge for compulsory registration.

which is otherwise forbidden under penalty, the regulation being to this extent a penal one.[30] On the other hand, everywhere in the United States at present physicians must be certified or licensed in order to have the right to practice at all; instead of a facility, there is an absolute requirement; and this absolute requirement has within recent years been applied to a constantly increasing number of professions and vocations.

A compromise is found in the system of optional, but privilege-carrying certification. This is applied both in England and in Germany to physicians. In England the unregistered physician is incapable of filling any official position requiring medical qualification, or of granting any legally required certificates; neither in England nor in Germany is he permitted to call himself by the designations usually applied to medical practitioners. Of course, a multiplication of disabilities approximates the optional to the compulsory system.

In many states the optional system applies to accountants ("Certified Public Accountants"). In 1925 Illinois undertook to place all public accountants under a license requirement. This act the Supreme Court of Illinois declared unconstitutional by reason of a resulting discrimination in favor of existing practitioners, but the court also thought that the police power did not justify the placing of the business of accounting under a license requirement, except under conditions specially affecting the public interest (*Frazer* v. *Shelton,* 320 Ill. 253, 150 N.E. 696, 1926). Thereupon another act was passed in 1927 requiring registration if the business includes the preparation of financial statements knowing that they are to be used (among other things) for the information of stockholders or inactive or silent partners, or as an inducement to any person to invest in or extend credit to the audited concern. (The act also provides that applicants must have had three years' practice in public accounting, yet the practice of public accounting without a certificate is forbidden.) Such a system is optional in name, but compulsory in substance.

The optional system has the advantage from the point of view of legislative policy that it permits the setting of a very much higher level of standards of qualification, and the advantage from the point

[30] In North Carolina, from 1858 to 1885, unlicensed medical practitioners were merely debarred from recovering for their services (Laws, 1858–59, ch. 258).

of view of legislative drafting that it makes it possible to dispense with careful definition of the thing, matter, or practice subject to certification. The latter consideration may be controlling in favor of the optional system: in the case of nurses, an outright prohibition would probably be impracticable, since it would cover common services that it would be absurd to interfere with even if rendered for compensation.

The system of optional, but privilege-carrying, certification has the advantages of the optional system, and gives some of the safeguards for the protection of the public which are supposed to belong to the compulsory system. Where the system, by reason of incidental disabilities, approaches practical compulsion, it permits the continuance or the use of practices the devotees of which are willing to forego every advantage but that of bare toleration (Christian Science, magnetic healing, etc.).

In the marketing of commodities the purely optional type of certification is illustrated by the annual appropriation act for the Department of Agriculture. Under the head "Food and Drug Administration" an appropriation is made to enable the Secretary, in cooperation with other official or private agencies, or independently, to investigate and certify to shippers and other interested parties the class, quality, and/or condition of cotton, tobacco, fruits and vegetables, poultry, butter, hay, and other perishable farm products when offered for interstate shipment or when received at designated markets, under rules and regulations prescribed by him, including payment of fees to cover the cost of the service, the certificates to be received in federal courts as *prima facie* evidence of the statements therein contained; also another appropriation for inspecting food products when desired by shippers, before shipment to foreign countries, in which chemical or physical tests are required before the products are allowed to be sold.[31]

Optional is also the system of licensing warehouses under the Warehouse Act of August 11, 1916 (7 U.S.C. ch. 10); whereas the Grain Standards Act of August 11, 1916 (7 U.S.C. ch. 3) is compul-

[31] In 1923 there was reported the setting up by the Federal Fuel Distributor of an entirely voluntary plan of certifying quality and type of coal shipped in export. The coal exporters were asked to raise the sum necessary to meet the cost of operation. See 116 *Commercial and Financial Chronicle* 2597, June 9, 1923.

sory for grain sold in commerce if the sale is by grade. The Cotton Standards Act of 1923 (7 U.S.C. ch. 2) pursues a middle course: interstate sales of cotton must (unless by sample or on the basis of private types) conform to the official standard, but certification is optional. The Grain Futures Act of 1922 provides for the certification of "contract markets" for dealing in futures. English legislation for seed certification (1920) is optional. The Wisconsin Marketing Act, which provides for grading of farm products under official inspection, permits the marketing of products without conforming to standards, but requires ungraded products to be marked as such (Statutes 99–10–4). The ungraded products escape the inspection fee; if inspection is to be applied to them without certification, it can only be on the theory that the bare passing means that the product is not condemned as unwholesome.

Purely optional certification requires no penalty provisions if general rules of law are adequate against the use of false or pretended certificates. If, however, the optional certification carries privileges, by way of designation or otherwise, these must be protected by appropriate penalties.

There appears to be a steady pressure toward substituting compulsory for optional certification, where it is administratively practicable, and the optional system is often merely an entering wedge for the introduction of licensing requirements.

For the practice of medicine the compulsory license system was introduced for the state of New York in 1797, for Illinois in 1819, while Massachusetts did not punish practice by unauthorized persons until 1894.

The situation in England when the non-compulsory system of the Medical Practice Act of 1858 was established, was peculiar: the evil then was that of different bodies with powers partly concurrent and partly exclusive, the exercise of which was frequently motivated by mere corporate interest; what was wanted was licensing reform, and the question of dealing with unlicensed practitioners was a secondary matter. The system that was about to be established not being a strictly official one, the proposition of a licensing monopoly was vulnerable. The similar privilege which had been granted by the law of 1815 to the society of apothecaries had proved ineffectual if not a

source of abuse, and the cost of prosecution was so prohibitive as to create a practical immunity for unlicensed practitioners. In consequence of all this the act of 1858 omitted penal clauses and confined itself to placing the conditions of qualification upon a more regular basis. The recital by way of preamble customary in English statutes was to the effect that it was expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners. In 1882 a parliamentary commission of which Mr. Huxley and Mr. Bryce were members, investigated the system, and recommended its retention.

In Germany, medical practice was first regulated by the cities, and later by the states, and from the latter part of the seventeenth century, unauthorized practice was generally forbidden. When, in 1869, the whole law of trades was codified by federal (after 1871 imperial) authority on the basis of the principle of freedom of vocation, the government proposed not to apply this principle to physicians but to require them to be licensed. It had been part of the then existing restrictive system that licensed practitioners were compelled to render services in case of need, when thereunto requested. The Berlin Medical Society opposed this obligation, and in order to get rid of it, they proposed to throw medical practice open to all who wished to engage in it. The government opposed this, but the proposition was carried in the Reichstag. Druggists and midwives require licenses, but in the case of physicians, the state merely certifies to proper training upon the basis of official examinations, and forbids the assumption of a designation or title that would indicate professional training or qualification, unless officially certified.

Both in England and in Germany, the non-compulsory system is thus due to a special historical development.

CHAPTER V

POLICIES AND STANDARDS

§27. SELECTION AND EXEMPTION. Where legislation prohibits with reference to terms denoting malpractices (see §§61–63, *infra*), it can be made generally applicable without singling out classes of transactions or of persons or property, and this whether it operates by way of direct penalization (restraint of trade under the act of 1890), or by way of creating a power of administrative corrective intervention (unfair competition under the act of 1914). But it is difficult to conceive of a licensing requirement that would not specify the things to be licensed; and, if legislation operates with conventional prohibitions or requirements, these necessarily vary with the conditions to which they apply, and presuppose some degree of legislative specialization or classification.

It is for this reason that validity of classification as a constitutional problem has become an issue mainly in connection with the exercise of the police power. The disfavor with which some courts have regarded the advance of economic regulation has perhaps been responsible for some decisions, in which the doctrine of arbitrary classification has been unduly extended. In the law of taxation specific constitutional limitations have to be observed; there appears to be, apart from these, a disposition to concede a considerable latitude of power of classification and specification, although the decision of the Supreme Court forbidding discrimination against corporations is significant (*Quaker City Cab Co.* v. *Pa.*, 277 U.S. 389, 1928).

In the administration of justice the unequal treatment of parties by allowing the recovery of an attorney's fee from the unsuccessful defendant might be theoretically questioned, but has been sustained, where the defendant's business is subject to adverse discrimination (*Atchison, etc. R. Co.* v. *Matthews*, 174 U.S. 96, 1898; see Freund, *Police Power*, §§637, 714, 727, 735).

As to a possible duty of equal treatment, where the state acts as owner or employer, see T. R. Powell, "The Right to Work for the State," 16 *Columbia Law Review* 99.

The full consideration of the equal protection of the law must be left to treatises on constitutional law.

The care which is required to avoid undue favor on the one hand and unnecessary burden on the other is illustrated by decisions relating to licensing requirements. In Ohio an act which required all those engaging in the business of plumbing to procure a license, but provided that in case of a firm or corporation the examination and licensing of any one such member of such firm or of the manager of the corporation should satisfy the requirement of the act (but without providing that the partner not licensed should abstain from the technical operation of the business), was held unconstitutional (*State* v. *Gardner,* 58 Oh. St. 599, 1898). On the other hand, it was held unconstitutional in New York to require all members of the firm to be licensed irrespective of the fact that a member might desire to confine himself to the mercantile side of the business (*Schnaier* v. *Navarre Hotel Co.,* 182 N.Y. 83, 1905). If possible, such particular circumstances should be taken care of by appropriate construction of the terms of the statute.

An abstract contention that the mere fact that regulation must vary according to the conditions regulated, affords in principle no justification for singling out for regulation one condition, and leaving another condition, susceptible of different regulation, unregulated, is met sufficiently by pointing out that it is impracticable to say that the legislature having found means adequate to cope with one evil, cannot apply them without also finding means to cope with analogous evils; to say, for instance, that legislation dealing with food substitutes or imitations (irrespective of injury to health) is inadmissible unless substitutes or imitations in other commodities are also dealt with.

Some degree of inequality being inevitable, the question is whether it is possible to list relevant considerations, that should guide, perhaps as a mere counsel of perfection, legislative selection and exemption.

The following have probably always been regarded as legitimate grounds of discrimination: extraordinary physical or moral hazard, special opportunities for fraud and appeal to special confidence, and differential physical conditions. These account for the special legislative treatment of railroads, mines, factories, banks, insurance, ware-

houses, commission merchants, physicians, lawyers, the liquor trade, peddlers, auctioneers, and young persons in industry. The special treatment of shipping is historically due to nationalistic considerations. Religion and political party affiliation are perhaps the clearest instances of inadmissible grounds of adverse discrimination.

Judicial decisions show differences of opinion with regard to the following considerations: race, sex, size and numbers, and supposed social or economic weakness. While mere ability to bear a burden, now a recognized factor in graduated taxation, would generally be repudiated as the foundation of the differential exercise of the police power, the occasional exemption of small concerns from regulative measures may in part be due to economic disability, although other plausible grounds of justification are generally available.

In all countries there has been within the last fifty years a great recrudescence of regulative legislation, succeeding a period in which economic doctrines of *laissez faire* were dominant. There has not been a notable difference in this respect between Europe and the United States, notwithstanding our constitutional protection of equality. If that protection has kept from American statute books a good deal (not all) of racial discrimination, not only that discrimination, but also other discriminations of a similar kind, are also absent from European statute books. An equalitarian spirit of legislation is due to modern democratic ideas, and not to the safeguards of a written constitution. To measure the extent of class legislation, it would be necessary to compare modern with mediaeval regulation. The movement for the licensing of professions and trades has some of the mediaeval motivation of class restriction and exclusiveness, but the revival of regulations "for the improvement of the commodity," while necessarily specialized, and while undoubtedly a return to mercantilistic ideas, cannot in any proper sense be regarded as class legislation.

When a regulative project is presented for legislative consideration which is not clearly inspired by the pressure of special interests or by hostile prejudice, the legislature, in the absence of adverse decisions, will generally have a right to assume that limited range of application is not an objection, and occasionally, in the face of doubtful decisions, will be justified in accepting the risk of invalidity. The question will present itself at the threshold of consideration, and the only

aid that can be given by legislative technique is through a possible preamble reciting the special conditions calling for regulation.

As a matter of legislative drafting, exception or exemption is of more importance than initial and affirmative selection. Regulation being adventitious and an impairment of possible liberty, a careful survey of the field will very commonly disclose conditions in which the proposed restriction or requirement will be undesirable, inappropriate, or harmful. Exemption is therefore a recurrent problem of regulative legislation, and, while often capable of solution only from case to case, may be made the subject of some general observations.

Emergency and similar exceptions. It will be shown later on (*infra,* §60) that an exception phrased in indefinite terms may have the effect of practically nullifying a main prohibition or even of making the statute unconstitutional (*Cline* v. *Frink Dairy Co.,* 274 U.S. 445, 1927). There are few statutes which do not work hardship or even injustice under exceptional conditions; and where new legislation is proposed by way of regulation, plausible claims can always be advanced for relaxation or non-application to specified classes of cases. Well-grounded claims will be likely to receive favorable consideration, and instances are too familiar to require citation.

A plea for exception or exemption on the general ground of emergency would hardly be put forward in the form of a direct statutory exception since the nullifying effect would be obvious; the demand is generally for an emergency dispensing power. The tendency is, however, against the grant of such a power, since it is almost certain to be exercised with undue liberality, and to be practically more destructive of the statutory policy than an unqualified or discretionary dispensing power, which may be harmless because liable to be declared unconstitutional (*People* v. *Klinck, etc. Co.,* 214 N.Y. 121, 1915).

An administrative dispensing power should be qualified by indicating the conditions under which the exemption is to apply, the ascertainment of the condition being then left to the proper official. See, e.g., the British Factories and Workshops Act, 1901, §§36, 49 (3), 50 (3). It may be further qualified by limiting the permissible extent of the exemption, or by conditioning it on appropriate safeguards (*ibid.,* §§52, 54, 55, 58).

Genuine and inevitable cases of emergency carry their own remedy, since they are not likely to be pressed for prosecution.

A statute providing for a dispensing power should indicate whether the power is to be exercised with reference to a class of cases (by rule or regulation), or from case to case. If the former it must justify itself as a permissible delegation of legislative power.

If a statute makes an unconstitutional exception in direct terms (not by way of granting a dispensing power), the statute, and not the exception, is unconstitutional, since the courts are unable, without making a new law, to read the exception out of the statute.[1] The usual severability clause may, if strongly worded, seem to cover the case; but it is unlikely that the courts will give it that effect. It is grammatically possible to provide for the contingent elimination of the exception, but ordinarily that course would be politically inexpedient.

Where specification rests upon systematic differentiation, the risk of invalidity can, in appropriate cases, be reduced by making it appear on the face of the statute that selection and exemption fit into a general scheme. This is well illustrated by section 40 of the British Factory Act of 1901, in which two successive subsections make exceptions from two different requirements of the act; there are five exceptions from the first, and four of these five apply to the second.[2] The exceptions being numbered, a glance reveals the difference, and makes it

[1] *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 1901. Otherwise, if the exception is due to an amendment. *Frost* v. *Corporation Commission*, 278 U.S. 515, 525, 1929.

[2] The provision reads substantially as follows:

1. The provisions of this act (requiring same hours for meals for women and children) shall not apply to the following factories, namely:
   1. blast furnaces, or
   2. iron mills, or
   3. paper mills, or
   4. glass works, or
   5. letter press printing works.

2. The provisions of this act (prohibiting women and children from remaining during mealtimes in manufacturing rooms) shall not apply to the following factories, namely:
   1. iron mills, or
   2. paper mills, or
   3. glass works (with exception), or
   4. letter press printing works.

clear that it is not a matter of inadvertence, but that the exceptions are the result of a comprehensive survey. This makes a strong presumption for the legitimacy of the exceptions.

A question has been raised, particularly in connection with game laws, whether legislation proceeds more effectively by enumeration of things intended to be placed under prohibition or restraint, or by wholesale prohibition with enumerated exceptions; but it seems difficult to pronounce in favor of one or the other alternative as a general principle. Constitutionally, the method of the Eighteenth Amendment ("for beverage purposes") may be safer than the method of the Kansas constitution (15, 10: "except for medical, scientific, and mechanical purposes") which inadvertently omits sacramental purposes. The Kansas statute (General Statutes, 1915, §5500) which admitted the latter exception undertook to correct the constitutional omission.

Exemptions may be required, because not within the purpose of the prohibition or by reason of countervailing considerations. A labeling or packing requirement may be inappropriate for articles intended for export, general trade restrictions may call for exceptions in the interest of scientific research, or licensing requirements may be appropriately relaxed in favor of those licensed for a profession or pursuit of admittedly higher grade. These exceptions are apt to be urged upon the legislature on behalf of the interests involved, and will then receive consideration almost as a matter of course. It is probably impossible to list all legitimate grounds of exemption.

Exemption of private transactions. Since penal regulation deals with abusive tendencies rather than with consummated wrongs, it is relevant to observe that every social danger is aggravated if it manifests itself in activity for profit and in organized activity, and also that any defect of social control tends to produce profit seeking or organized activity exploiting the underlying weakness.

On the other hand, not only is legal control more readily and effectually exercisable over these activities than over the shortcomings of social control in their private or individual manifestations, but administrative and other practical considerations may make it seem undesirable to give an undue extension to the apparatus of legal repression.

Regulative statutes are generally so worded that their non-applica-

tion to persons acting in a purely private and individual capacity is clear. If the rule that in a misdemeanor every accessory is a principal were applied to regulations concerning sale or employment, the parties intended to be protected would be penalized, and enforcement might be hindered by rules concerning the testimony of accomplices.

It is significant that the Eighteenth Amendment did not undertake to cover the consumption of liquor in its otherwise comprehensive prohibition.

The so-called White-Slave Act speaks of "any person who shall knowingly transport or cause to be transported . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." The Supreme Court has interpreted this to apply to the taking of a woman across a state for private illicit intercourse (*Caminetti* v. *United States,* 242 U.S. 470, 1917; also *United States* v. *Burch,* 226 Fed. 974, 1915); but, although this is a case of criminal and not of regulative legislation, there has always been a widespread feeling that the law should have been confined to the commercial or profit-making exploitation of vice (see *People* v. *Draper,* 154 N.Y.S. 1034, 1915).

The so-called Blue-Sky laws, requiring licenses for the sale of securities, are evidently intended only as checks upon those who sell as a matter of business. The term "dealer" has been interpreted as not including an owner who sells (*State* v. *Stockman,* 21 Oh. App. 475, 153 N.E. 250, 1926), and in California it has been held unconstitutional to extend the requirements of the law to persons selling privately (*People* v. *Pace,* 73 Cal. App. 542, 238 Pac. 1089, 1925).[3] The law of Illinois exempts sales by the owner for the owner's account exclusively when not made in the course of continued and repeated transactions of a similar nature—a phrasing which has presented difficulties.

The German word, *gewerbsmaessig,* often used in statutes, aptly expresses the idea which our statutes have to circumscribe for lack of an exact English equivalent. If "tradewise" could be used as an adjective, there would be a convenient way of marking the proper province of a good deal of regulative legislation.

In many cases exemption of private transactions will be almost a

[3] See also *People* v. *Friedman,* 249 N.Y. 86, 162 N.E. 592, 1928.

matter of course by reason of inherent limits of enforceability. This is particularly true of requirements as distinguished from prohibitions. The federal income tax law requires every person to keep such records as the Commissioner of Internal Revenue shall prescribe. The regulation says that in accordance with this provision every person subject to the tax carrying on the business of producing or selling any commodity or merchandise (except the business of growing and selling products of the soil) shall keep such books of account or records as are necessary to establish, etc.; in other words no attempt is made to cover private individuals. Where the private individual cannot be ignored, every effort is made to facilitate the performance of his duty (blank returns, personal assistance, etc.); and the common legislative practice is to secure records relating to private personal matters by placing duties upon persons professionally connected with the occurrence (vital statistics; see §67, *infra*).

A provision which is or was found in some states to the effect that a boarding-house keeper must inform boarders that oleomargarine is served instead of butter is plainly unenforceable.

The common law clearly avoids imposing such requirements. It recognizes the offense of misprision of treason which consists in mere failure to give information, and which is also recognized by the Criminal Code of the United States (18 U.S.C. 3; also Illinois Criminal Code, art. 265); whereas the common law offense of misprision of felony seems to involve active concealment (Stephen's *Digest of Criminal Law,* §157). In his *History of the Criminal Law* (II, 238) Stephen speaks of both forms of misprision as "practically obsolete." Misprision is not found in the Penal Law of New York, and misprision of felony is not found in the Criminal Code of Illinois. On the other hand, the Criminal Code of the United States (18 U.S.C. 251) defines misprision of felony in the same terms as misprision of treason, although it makes the former offense only a misdemeanor. Attention has been called to the provision as a sort of curiosity in connection with liquor prohibition legislation. It was held that so long as the violation of the law was only a misdemeanor, the section was not applicable. *Presont* v. *United States,* 281 Fed. 131, 1922.[4]

[4] The provision in 8 U.S.C. 48, giving a civil remedy for neglect or refusal to prevent the violation of civil rights. against one "having power to prevent or aid in preventing" seems to have reference to the neglect of official duties.

The decisions to the effect that the law (short of a reasonable period of adverse possession) cannot deprive an owner of his property for failure to take active measures against acts of aggression (*Meyer* v. *Berlandi,* 39 Minn. 438, 1888; *Randolph* v. *Builders, etc. Co.,* 106 Ala. 501, 1894), likewise reflects the theory that requirements of a positive character are contrary to the policy of the common law.

§28. STANDARDS OF REGULATION. Regulative legislation is generally concerned with social or economic or technical practices, and its standards are therefore primarily of other than legal interest. The very fact, however, that voluntary observance is, or is to be, transformed into compulsion by political authority, raises considerations of a specifically legal character; and a legislative standard, by virtue of being legislative, has consequences and implications that are related to the nature and operation of law. This specific aspect manifests itself both in the level and in the stability of standards, and cannot be ignored in a study of legislative regulation.

a. *The level of standards.* Where legislation is regulative in the sense that it undertakes to control action that would otherwise be free, social conventions concerning the quality of free action affect the quality of the legislative standard. Anti-social tendencies are to be eliminated or reduced, and perhaps inferior practices are to be raised; but it can rarely, if ever, be the object of legislative policy to enforce standards equal to the best that are voluntarily observed. The highest grade of achievement may be the legitimate goal in prescribing rules to be observed by the government's own agents in conducting the government's own business (labor conditions in public works, management of public institutions, etc.), but not where it is a question of controlling private action. High grade action does not ordinarily result from fear of punishment. And in forcing standards upon the community, legislative policy cannot safely disregard strong minority attitudes. Legal reactions will differ according as the difficulty is merely one of enforcement or also one of opinion. It is interesting to compare in this respect prohibition policies as applied to narcotic drugs, to prostitution, and to the liquor traffic. Technical difficulties of enforcement are probably greatest with regard to the illicit dealing

in drugs, because they are easily concealed, and legitimate use lends itself so easily to abuse; but there is no public sentiment hostile to restriction, and legal policy has therefore a clear field. Prostitution is probably ineradicable; but illicit practice is contrary to avowed and conceded ethical canons, and while police integrity is exposed to temptations which may prove too strong for ordinary human nature, a reasonable policy will keep the resulting demoralization within bounds. Liquor prohibition, on the other hand, encounters the difficulty that it runs counter to a widespread sentiment as to legitimate freedom of action. This is supported by the law itself, if legislation recognizes the possession and consumption of liquor as lawful; but while the outlawing of these would in some respects simplify the legal aspects of enforcement, the more important discrepancy between legal standards and strongly held minority standards would remain, and constitute a disturbing factor in the structure of law.

Generally speaking, the standards of regulative legislation may be described as abuse-correcting rather than as model-setting or initiating, and this relative quality must be attributed to limitations inherent in the nature of law.[5] For illustration, it may be sufficient to refer to laws regulating rates of interest and hours of labor. Since this limitation is largely due to difficulties of enforcement, it follows that, e.g., in the regulation of professions, higher standards are possible under a system of optional than under a system of compulsory certification.[6]

Moreover, standards are nearly always intended to operate as minimum standards, and this is usually expressed in the wording of the statute. The exclusion of higher-grade categories can be a rational objective only, if legislation does not aim at quality, but at uniformity. It would seem therefore that in zoning ordinances, the marking of a district for an inferior use would presumably not be intended to forbid a superior kind of an establishment; however, particular circumstances may require a different interpretation (*City Planning Conference Proceedings, 1919,* p. 166). It is owing to similar considerations that the licensing requirements of a less skilled profession do not forbid acts falling within the practice of that profession by a member of a more highly skilled profession.

[5] Freund, *Standards of American Legislation,* pp. 137–143.

[6] See §26, *supra.*

Where legislation is in the nature of a rule of decision rather than of a rule of conduct, the guiding custom is apt to be found in voluntary party practices in the way of anticipatory agreements or dispositions by which future controversies are sought to be avoided. Custom in this sense has played an important part in the law of property relations of husband and wife: the dotal régime of the Roman law, the community system of the Teutonic law, and the married woman in equity, in England and America—all of which have exercised their influence on legislation. The continental institution of Notaries Public, whose coöperation was sought in important property arrangements, produced notarial practices which ripened into legal customs, and these in their turn furnished the standards incorporated into civil and commercial codes.

If there is no room for party disposition (compare in this respect the personal with the property rights of husband and wife), we can speak of custom only if we identify custom with the rule of decision the justice of which is acknowledged by community deference and acquiescence. In Anglo-American jurisprudence we find this custom evidenced in the main, if not exclusively, by the practice of the courts. Its standards are therefore judicial standards—standards judicially evolved, or judicially accepted as established beyond question. And these are the standards that furnish the guidance for legislation which seeks to correct or improve them. In such problems as the punishment of crime, divorce, torts, or illegal or voidable contracts, standards of legislation necessarily lack the guidance of antecedent social custom. And if they are influenced by judicial standards, it becomes an important subject of inquiry, how these are evolved and what are the factors conditioning the conclusion of a court that such and such is the rule of law established in a given jurisdiction. Many legislative standards thus lead us back into the obscurity of legal custom.

The study of standards as affected by the legislative process opens a field of inquiry, which has not yet been surveyed or outlined. As one line of approach may be suggested a comparison between the standard of the statute and the standard of the administration of the same statute; for a marked variance between the two, such as we find in several fields of the law, will always constitute an interesting challenge. It will probably make a considerable difference, whether the

administrative variance will involve positive action or merely inaction. Thus, if we find in Massachusetts statutes that make amusement licenses freely revocable, a constant non-exercise of the power may indicate an administrative repudiation of the legislative standard, but in the nature of things this must be more or less conjectural; on the other hand, if in the law of divorce, we find cruelty and desertion construed in such a manner as to make divorce practically a matter of consent, the abstract standard of the statute book is seriously drawn into question. The extent of such discrepancies, their significance, and possible methods of dealing with them, constitute some of the vital problems of standards and if it is claimed that standards should be measured by "living law," it should be borne in mind in connection with such discrepancies, that the deliberate, and, so to speak, active refusal to change an abstract standard is just as much living law as the deliberate refusal to apply it.[7]

b. *Stability of standards.* Stability is characteristic of legislation, as it is of all law. If it is the unwritten law that strikes us as static, it is because its movement is obscure and imperceptible; legislation, on the other hand, seems to present a constant movement, and movement may seem to involve change. It would require a careful analysis to determine to what extent the new legislation, the amount of which is undoubtedly abundant, constitutes an abandonment of standards; but it requires only little reflection to realize that the existing stock of statutes can be added to almost indefinitely without discarding existing legislation.

Under the American system of government, the stability of legislation is affected by constitutional provisions. The constitution itself represents a legislative act of very exceptional stability; and it is therefore to be observed, that while it controls regulation, it does not ordinarily undertake by its own terms to lay down standards of pri-

[7] It has been suggested that the policy of the Eighteenth Amendment would be repudiated in England, if for no other reason, because of the existence of stricter standards of administration than those prevailing in America. The former attempts of European countries to regulate the movement of population have been abandoned largely because with the growth of stricter methods of administration restraints on marriage and on internal migration proved to be unenforceable. The American immigration legislation represents one of the most ambitious undertakings to deal by regulation with the population problem; but it is interesting to note that the system of restraint is somewhat relaxed on the land borders, where enforcement is most difficult.

vate conduct. The Eighteenth Amendment of the Federal Constitution is an innovation in this respect, and an innovation of questionable legal soundness; it is safe to say that in preferring outright prohibition by the constitution itself to a grant by the constitution of federal legislative power to prohibit, political expediency prevailed over legal considerations. It is almost axiomatic that there should be legislative power on behalf of freedom, even in cases where the exercise of that power would be undesirable. It is quite a different question whether there should be corresponding legislative power in the direction of restraint. Our bills of rights place checks upon that power—checks with regard to which the stability that belongs to any constitutional provision is strengthened by sentimental attachment to historic guaranties. But the stability of standards thus secured is negative in character; it expresses itself in the "invisible" effect of absence of legislation.[8]

A legislative program seems almost inseparable from the organization of political parties; and this would seem to indicate a connection of party politics with legislative changes. In American legislative history, tariff changes have been commonly associated with changing party domination. But apart from the customs tariff, it would not be a simple matter to associate the great regulative acts of Congress with either Republican or Democratic administrations, still less to establish (except perhaps in the most exceptional cases) that they were enacted by votes divided by party lines. In state legislation such a connection is still rarer. Even more striking is the fact, particularly traceable in English legislation,[9] that regulative acts placed upon the statute book

[8] Since American constitutional limitations restrain only governmental action, they fulfill their purpose without reference to the standards of social practices. The equal protection clause of the Fourteenth Amendment refers to equal laws only, and does not undertake to secure social or economic equality; its value must be justified partly by the discriminative legislation which it has prevented, partly by the moral effect of the ideal of equality which it proclaims. In like manner, the law of England has generally recognized the principle of legal equality; and while social inequality may have exceeded that of other countries of Europe, there has always been a pronounced national consciousness of a superiority resting upon non-discrimination in point of law.

[9] In the early part of 1931 there was in England an effort on the part of the government to undo some of the legislation that was enacted in 1927 under the threat of the general strike; but it is noteworthy that the conservative government did not attempt to disturb the essential provisions of the Trade Disputes Act of 1906.

against political opposition, are not likely to be disturbed when the opposition comes into power. In long retrospect, the movement of regulative legislation presents itself as singularly unaffected by the vicissitudes of political life.

The possibility of adding indefinitely to regulation without abating from the sum-total of existing regulation signifies a notable difference between policies of restraint and of relaxation of restraint. Additional restraint can be accomplished without repudiation of earlier measures, whereas relaxation means the abrogation of previous law, and therefore the disavowal of established policy which the legislature may be reluctant to make. A comparison between legislation concerning the liquor traffic and legislation concerning public amusements is instructive. The progressive disfavor which the liquor business encountered found expression in a progressive stringency of legislative standards, while the growing toleration which transformed the former quasi-outlaw social status of places of public amusement and of Sunday recreation is hardly traceable in the statute books.

It is conformable to the conservative spirit of law, that legislative programs should be only gradually realized. This applies both to increase and to relaxation of restraint, and produces the apparent instability of repeated amendments. These may represent either gradual enlightenment of the legislature, or a gradual wearing down of opposition; occasionally also, as in the earlier liquor legislation, the fluctuations of a protracted struggle. There are striking differences in the rate of change: we find the mining laws of Illinois amended in every legislative session from 1915 to 1927, and perhaps as frequent amendments in workmen's compensation laws; in child labor legislation where progress is also gradual, the rate is much slower, and if we think of married women's legislation as an example of the relaxation of restraint, the progress toward complete emancipation has generally been by widely separated steps. In connection with policies of liberalization we have to take cognizance of a very peculiar legislative indisposition to lift restraints otherwise than subject to reservations, sometimes of an almost irrational character. It was thus almost impossible to determine why the Illinois Married Women's Act of 1874 should have forbidden a married woman to make a contract of

partnership without the consent of her husband—a restriction that was not dropped until 1921. Or to illustrate from the constitution of Illinois: the amending article prohibits the submission of amendments at one time to more than one article of the constitution; the inconvenience of this is recognized; but instead of abrogating the restriction, it was proposed in 1923 to substitute two articles instead of one. No one would have thought of this as an original proposition. Instances of this kind could probably be multiplied from any statute book.[10]

The apparent instability of successive amending statutes may thus, on closer analysis, in some cases turn out to be a special form of manifestation of conservatism. Amendment is in many cases accompanied by technical repeal; and repeals are common incidents to statutory revisions. But the general stability of standards is most strikingly exhibited in the scarcity of outright repeals. The great wholesale repealing acts in England are virtually, though not technically, in the nature of revisions (Ilbert, *Mechanics of Law Making*, p. 32).[11] It might be interesting for any given jurisdiction to trace the history of repeals unconnected with amendment or revision.

There attaches to a statute the sanctity of the "law of the land." This ethical quality does not necessarily belong to a judgment, or to an administrative act, or even to a written constitution, although of course the historical and sentimental attachment to a constitution may transcend that felt toward any particular statute. When it is so often lightly proposed to give to an administrative regulation the force of law, it is apt to be overlooked that a duly enacted statute has right-

[10] How is it possible to account for the Connecticut law of 1808 punishing a woman concealing the death of her bastard child by setting her on the gallows for one hour with a rope around her neck, except by bearing in mind the older law which made such concealment presumption of murder? See Capes, *Poor Law of Connecticut*, p. 129.

[11] Repeals as independent measures are notable legislative performances: so the repeal of Catholic Disabilities in 1844, 7 & 8 Vict., c. 102, supplemented by 16 & 17 Geo. V, c. 55 (as to which see Allen, *Law in the Making*, pp. 271, 272), and the repeal of the Contagious Diseases Acts (1866 to 1869) in 1886, 49 Vict., c. 10. See Fawcett and Turner, *Josephine Butler*, pp. 91–106.

As to reluctance to any change in law, see Bonner and Smith, *Administration of Justice from Homer to Aristotle*, p. 75.

The observations on stability have little application where some particular legislation becomes a political or partisan issue, so tariff legislation in the United States, and former liquor legislation in the states. It was the constant fluctuation of liquor legislation that led to constitutional prohibition as a measure of stabilization.

fully a higher status than a regulation difficult to discover or to trace to its source.

In view of the difficulty that attends the outright repeal of a statute, interest attaches to the formerly common practice of English legislation to provide a term to which an act was to endure; at the time of its expiration it was likely to be continued, and in many cases, was finally made perpetual. This older practice is to be distinguished from the one still observed with regard to certain classes of acts (military establishment, finance), to renew the act every year (Expiring Laws Continuance Acts). There appears to be no easily accessible account of the origin or the prevalence of the former practice;[12] some parallel to it is found in the limitation by old New York city charters of the duration of ordinances to one year (e.g., charter of Hudson, 1785). An act of New York of 1766 prohibiting peddling was limited in duration so as to expire Jan. 1, 1770. We also find that in connection with the creation of a Department of Foreign Affairs in 1789 a motion was made to set a time limit to the operation of the Act (1 *Annals of Congress* 576). In Colonial times, there appears to have been a special objection to perpetual revenue bills (Beer, *Old Colonial System,* I, 212–214, 219). And Locke's 79th Article of the Laws for Carolina provided that to avoid multiplicity of laws which by degrees always change the right foundations of the original government, all acts of parliament whatsoever shall, at the end of one hundred years after their enacting respectively, cease and determine of themselves without repeal (quoted in Barrington, *Observations on Statutes,* p. 560). The method of unlimited duration, but with provision for periodical revision which we find in American constitutions and in international treaties (e.g., Treaty between Germany and China, September 2, 1861, art. 41), is due to similar caution. Occasionally, a time limit may commend itself as a compromise where consent to a permanent measure cannot be obtained (New South Wales Industrial Arbitration Act, 1901, §104; *Contemporary Review,* 1913, p. 88). The expedient of temporary acts as an offset to an undue stability of statutory standards deserves more consideration than it has received. See the discussion for Germany in Eugen Schiffer, *Die Deutsche Justiz,* 1928, pp. 186–205; an article on antiquated police regulations in *Deutsche Juristenzeitung,* 1912, p. 1434; and an article on "Desuetude," 43 *Juridical Review* 260, 1931.

Of course, a great deal of legislation is of such a character that it automatically ceases to operate after it has performed its function; this is true of appropriation acts, which make up much of the bulk of annual session laws. Schiffer, in the work just cited, states that the German Official Jour-

[12] Illustrations are given by Williams, "Experiment in Legislation," 14 *Law Magazine and Review* (4th series) 299, 304, 1889.

nal down to January 1, 1926 (i.e., for a period of about fifty-five to sixty years) promulgated 11,140 legislative acts of which between eight and nine thousand are no longer in force; also, that the earliest act coming before the Supreme Administrative Court of Prussia for application was one of 1220 concerning land taxes of ecclesiastics. The Statute of Merton of 1235 appears to be the earliest English statute admitted into collections of statutes now in force.

c. *The problem of standards in general.* The following additional observations suggest themselves on the basis of what has been said before:

(1) Any attempt to discuss "standards of legislation" as a factor in social conditions should realize that the term "legislation" means different things according as it is used in the sense of the making of statutes, or in the sense of the existing statute law. Standards of legislation in the first sense will of course more closely correspond to existing social standards than standards of legislation in the second sense; but standards in the first sense cannot be correctly appraised without taking into account the active or passive resistance to the change of existing statutes as a powerful and continually operating factor. It is obvious that if a correspondingly broad view is taken, the record of the legislative output of a period fails to give a correct picture of prevailing standards.

Dicey in his *Law and Public Opinion in England in the Nineteenth Century* (which is perhaps the outstanding discussion in the English language of the social background of legislation) considered in the main only the active movement of legislation, and without undertaking to give an exhaustive survey. Such a survey, even if exhaustive as to the new statute law of the period, would have been incomplete without noting the failure to deal with problems that received legislative attention in other countries, but were, at least temporarily, put aside in England.

(2) If we concentrate attention upon standards of regulation, we should consider any relevant differences in respect of standards between regulative and other legislation. It is quite possible that purely penal legislation has sometimes a wider and sometimes a narrower range of canons than an attempt to regulate.

The era of growing industrial consolidation was inaugurated by a statute declaring combinations to be unlawful and criminal, while

regulative legislation by its very nature would have been compelled at least to compromise with the new tendencies. An age of growing temperance was marked by penal legislation based upon the principle of total abstinence, whereas the course of English licensing legislation merely registers a public sentiment increasingly stringent with regard to the consumption of liquor.

We have thus two conspicuous instances where regulation furnishes a truer index of the *mores* of the community than the cruder type of criminal legislation.

In explaining the difference between formal and substantive regulation, and between indirect and direct legislation,[13] it has been shown, on the other hand, that methods of regulation are available which permit standards to remain unexpressed on the face of the statute, or expressed only by reference to terms which are so general as to cover different concrete contents at different periods or in different places. To some extent, therefore, regulation lends itself to an evasive legislative attitude toward standards.

(3) Finally, so far as social and economic legislation is the vehicle of expression of active social forces, we must ask what specific part legal science, as distinguished from other social sciences, has in the fixing of standards. Reform movements with reference to crime predominantly depend for success upon appropriate legislation. If, on this basis, criminology is included in the science of legislation, this is, in a sense, a matter of terminology. But if the matter is arguable, it may be pointed out, that such an inclusive definition of legislative science or legislative jurisprudence will cover all social sciences so far as they seek expression of their aims in legislation, and the scope of the definition makes it almost valueless for practical purposes. It is more to the point to note that no social scientist, when he comes to translate his policies into statute law, will be able to dispense with legal aid. The mechanism and structure of the written law is clearly a monopoly of legal science, and it is this technique which forms the subject-matter of the present study; it is not liable to be confused with other social sciences; but it can contribute little to the problem of substantive standards except in the subsidiary detail of enforcement and similar provisions.

[18] See §§20, 22, *supra*.

Possibly, the person trained in legal science may be able to make another contribution: he is perhaps peculiarly qualified to estimate the influence exercised upon the realization of social ideals by the factors of compulsion, of the administration of justice, and of legal tradition. These are obstructive and disturbing, and therefore, in a sense, negative factors; so far as they do operate, they are in part unavowed and inarticulate; they have however in their support the authority of a good deal of constitutional law, and they are represented by influential groups in all legislative bodies. It may be the task of legal science to appraise these factors as to their legitimacy and value, and perhaps this should be the undisputed province of sociological jurisprudence,[14] one of the tasks of which would be to inquire wherein the social aspects of the written differ from those of the unwritten law.

§29. THE QUESTION OF FREEDOM FROM REGULATION. In discussing freedom from regulation as a legislative problem cognizance must be taken of constitutional law in two ways:

In the first place, the courts have construed constitutional liberty as meaning (to some extent) freedom from regulation, and freedom from regulation, which elsewhere is at most a policy or principle, may therefore in America become a right. Constitutional relations, moreover, exercise an influence in the direction of non-regulation in two other ways: the federal power over commerce prevents state regulation where interstate commerce might be affected, and there is absent in America the practice of delegating to the executive the power of regulation in matters of police which exists on the continent of Europe. It is probable that regulation with a larger radius of operation is more liberal than where it has a smaller radius; and that regulation in the hands of legislative bodies may be less intensive than regulation in the hands of executive officials; and while facts may occasionally be contrary to these tendencies, and while improved technical machinery of control may reduce the handicaps or the latitudinarian-

[14] It is of course realized that the usual concept is a wider one. See Roscoe Pound in 24 *Harvard Law Review* 591, 25 *ibid.* 140, 489, and in 7 *Proceedings of American Sociological Society* 148.

ism of large scale regulation, yet the factors mentioned should, for the present, perhaps be counted as factors making for freedom.

In the second place, constitutional law alters the nature of the problem of freedom as a legislative problem. The legislature must accommodate itself to judicial doctrines of immunity from regulation, and difficult borderline questions in that respect require solution. In answering them, the legislature acts at its peril, but hardly on its responsibility; its responsibility begins where it can feel that it is a free agent; and the question of freedom from regulation is therefore most profitably discussed upon the assumption of possession of constitutional power.

The nineteenth century is generally associated with economic theories opposed to regulation. The traditional forms of regulation practiced in preceding centuries had become largely obsolete through industrial changes;[15] and in America impatience of restraint antedated its judicial expression by many years; indeed, the judicial expression was a protest against legislative change, which in its turn reflected a change of public opinion favorable to regulation. The non-regulation, which was the dominant note of a long era, related to economic interests, for new forms of mechanical power and new conceptions of hygiene produced an enormous expansion of the police power. Nor was economic non-regulation indiscriminately observed: it was only in America that railroad transportation was free for any length of time; and in Germany, and later on in Great Britain, there was incisive agrarian legislation. At present, the theory of economic freedom is nowhere unquestioned, and in every country there has been a great revival of regulation. While tendencies are similar, the actual state of the law presents striking variations; we note as conspicuous instances the non-regulation of banking and insurance in England, and of banking in Germany; and of the labor contract in America. Perhaps it is not incorrect to say that if at present regulation is dispensed with, there are likely to be positive reasons against it.

The social as distinguished from the economic liberties (religion, speech and press, assembly) are supported by a strong conviction of

[15] Compare such regulative acts as 1 Jac. 1, c. 22 (1604) with such repealing acts as 49 Geo. III, c. 109 (1809).

their desirability, whether specifically protected by constitutional clauses or not. Freedom is therefore the settled policy in all liberal systems of legislation; in America the fact that the Supreme Court has extended its protection against state legislation to cultural freedom, although the specific clauses of the Federal Constitution apply only to the legislation of Congress (*Meyer* v. *Nebraska,* 262 U.S. 390, 1923; *Pierce* v. *Society of Sisters,* 268 U.S. 510, 1924), is as significant as that the right of association, which is not specified, is practically as firmly established as the right of assembly, which is specified.

The decision in the case of *New York* v. *Zimmerman,* 278 U.S. 63, 1928, to the effect that oath-bound associations may be required to register membership lists shows that there is room for some regulation which does not touch the essence of liberty; and when political liberties were established on the continent of Europe, publicity requirements were always held legitimate. How far such requirements may be carried in the case of the not strictly religious activities of religious societies (education and charity), is, in the absence of attempts to regulate, an open question. If newspapers are required to publish statements concerning ownership, this is in connection with mailing privileges, to which constitutional guaranties do not apply.

A practical consideration of social liberty cannot ignore the fact that to an increasing degree its full enjoyment depends not only upon unrestrained private initiative but upon having the benefit of government-controlled facilities: public places, public institutions, mail transportation, the control of the air, thus calling for governmental coöperation instead of mere governmental neutrality. Can there be freedom of science if the teaching of certain doctrines is barred from the public education system? When this freedom was written into the Prussian constitution, it could have no application to other than state-controlled institutions, for there were no private universities. Freedom of teaching in America demands for practical purposes legislative abstention from interference with education in the state universities, a practice which is voluntarily observed.[16] And as interesting as the absence of legislation is the effort made in connection with radio control, to secure equality of opportunity in the enjoyment of broadcasting facilities. Not only is freedom from regulation increasingly de-

[16] The legislation forbidding the teaching of evolution may be ignored.

pendent upon legislative good will, but the phrase has become unmeaning in so far as adequate freedom in the sense of free scope of endeavor and of action demands regulation in support of it.

There is nothing at present in the economic sphere corresponding to the profound conviction of the essential value of cultural liberty. It is recognized that high quality of product or service cannot be forced by law; it is no longer recognized that competitive freedom is an automatic cure for evils and abuses; and the value of freedom for progressive development is estimated in the light of countervailing considerations. And there is the growing feeling that state control is a legitimate and desirable instrument for redressing social inequality.

In some respects non-regulation is a matter of survival. This is true of banking and insurance in England. In 1923, however, industrial insurance by collecting societies was in England subjected to a strict supervisory régime, while the corresponding "fraternal" insurance in America is still, likewise as a matter of survival, carried on under looser laws than the incorporated insurance business.

In England the railroad gauge was regulated by law as early as 1835 (Clifford's *History of Private Bill Legislation,* I, 66). In America it remains unregulated to the present day, voluntary conformity having accomplished the object which in its absence would have had to be secured by legal compulsion.

Great diversity is found in the legislative attitude toward structural standardization. The shipping laws of the United States contain specific rules with regard to a number of matters (boilers, dangerous cargo, life-saving apparatus, manning of vessels, accommodation of steerage passengers, and, to a less extent, of the crew); but in some other respects specific regulation is absent: no official cognizance is taken of the seaworthiness of sailing vessels except upon complaint (46 U.S.C. 653, 658), and with regard to steamships, the provision is only that they must be suitable for service (46 U.S.C. 391).

Structural requirements for the safety of railroad operation have received considerable legislative attention; for dangerous machinery in factories there is the interesting example of standardization in the Health, Safety and Comfort Act of Illinois (1909); and for the safety of mines there are models in the legislation of Illinois and Pennsylvania. On the other hand, legislation has not concerned itself with the

structural safety of motor vehicles (the New Jersey provision, Laws, 1926, ch. 195, that automobiles having more than a stated width will not be licensed, having reference to highway accommodation), whereas in the matter of traffic movement there is detailed regulation as a matter of course. For structural non-regulation of automobiles, the observation of a Committee of the American Bar Association (*Report, 1929,* p. 291) with regard to aircraft is pertinent: "The desirability of not setting out statutory criteria of airworthiness should be evident if the states are to keep abreast of this rapidly developing art." It was said with regard to building regulations in 1927 (*Illinois Municipal Review,* March, 1930, p. 94): "An examination of the code drafted for submission to the legislature (of Illinois) in 1914 would show it to be out of date because better and more economical types of construction have been developed since it was drafted, but which would not have been permitted under it." After the Chicago Building Code had specified brick as a structural requirement, it took years of effort against the resistance of interested parties to obtain an amendment permitting the substitution of hollow tile. (*Chicago Tribune,* Editorial on "Political Brick," June 14, 1925. The amendment was made March 3, 1926.) Notwithstanding this, building regulations are apt to go into great detail.

Regulation in connection with food products (also drugs and condiments) has been greatly discussed: legislation is upon an undisputed, but not very effective, basis, if it confines itself to the prohibition of ingredients generically described as unwholesome or injurious. More controversy exists as to the legitimacy of labeling or other publicity requirements, particularly if they are intended to be of an odious character. But the most serious difficulties have been presented by attempts to prescribe quality by outlawing specific products or ingredients. The legislative prohibition of oleomargarine ultimately failed; but certain preservatives and substitutes have come to be forbidden in the face of great opposition, and the legitimacy of the prohibition is in some respects still controverted.[17]

A striking and obvious example of non-regulation, owing to neces-

[17] *Encyclopaedia Britannica,* Article "Adulteration"; Harvey W. Wiley, *History of a Crime Against the Food Law,* 1929.

sary respect for scientific and technical freedom, is the absence of standardization of medical treatment; even the legitimacy of compulsory vaccination is controverted; the legislation requiring an officially specified remedy to deal with ophthalmia neonatorum is an almost unique instance of its kind.[18] Legislation concerning intoxicating liquors and narcotics shows the difficulties presented by medical freedom, and also the formal requirements to which it may be subjected.

Regulation is in many cases due to the pressure of organized interests. The result may be indistinguishable from pure public-interest regulation (mines, factories); or it may render the regulation controversial (full-crew laws; La Follette Seaman Act, 1915). In any event, it is always of interest to compare organization demands for legislation with organization rules not sought to be written into law, because the comparison will bring out the difference between the limits of publicly and privately enforceable standardization. The quality as well as the amount of detail of what is prescribed by an organization for its members is often totally unsuitable for political recognition, and in some respects may be compared to the difference between general ordinance requirements and specifications in a particular local improvement, the former being an exercise of governmental, the latter an exercise of corporate power.[19]

Uniformity is generally not an object in itself, though it may be desirable in secondary and formal matters as facilitating administrative enforcement. But uniformity may be the expression of equality, and as such be an objective of policy, or become a necessary concession to equalitarian demands where large numbers are concerned. The latter consideration may enter into certain phases of labor legislation; the former is controlling in the regulation of public utilities.

The quasi-monopolistic service of large numbers, which is characteristic of public utilities, creates a demand for regulation which must

[18] See *Journal of the American Medical Association,* May 30, 1931, p. 1874. The governor of Illinois, on the advice of the attorney general that the measure was unconstitutional, vetoed a bill on the subject in 1931, which was intended to supersede an act of 1915, in some respects less mandatory in its provisions. Wisconsin 146.01 is an act of this type.

[19] See, e.g., *Chicago Council Proceedings,* September 11, 1929, pp. 897–929, an ordinance for the improvement of a particular street.

be satisfied although a basis of standardization is not scientifically established. In that event it is expedient for the law to enjoin a duty of reasonableness, to be enforced from case to case by administrative action. Regulation in such a case operates as deferred control.

It is quite possible that the constitutional doctrine of liberty as applied to the labor contract may in part be due to the fear that under a democratic system regulation in the interest of labor as to wages or hours of labor may become mere "majorisation"; but railroad rate regulation which is held valid, is open to the same objection.

Where regulation takes the form of deferred control by administrative action upon complaint from case to case, as it does in the case of railroad rates, the fact that a relief measure in a supposedly public interest is set in motion by parties having a direct pecuniary stake in the result, tends further to obscure the public-welfare aspect of regulation.

In estimating the extent to which private action is subject to regulation, account has to be taken of the various grades of regulation: substantive regulation imposed by the legislature directly; substantive control exercised under delegated authority by way of general rule; the same by way of individual order; and formal regulation imposed in the same threefold manner. The statute book sets forth the amount of direct regulation; the amount of indirect regulation must, on the face of the statute book, remain conjectural, since statutes show only powers, but not their exercise. It is also difficult to speak with certainty about the part played by "subordinate" regulation, because, apart from quantity and quality, it would be necessary to take into account administrative accommodation to private interests both in original formulation and in subsequent application.

If it is assumed that formal requirements represent a compromise between the policy of freedom and the policy of regulation, it might appear worth while to ascertain the relative proportion of the two forms in any given body of statutes, but since the difference is largely one of degree, it would be almost impossible to agree upon a clear boundary line.

Altogether, a wholesale quantitative appraisal of regulation as a mode of legal control is so difficult that general impressions will necessarily have to serve in place of accurate data.

§30. METHODS OF RATIONALIZATION. The problem may be stated in this way:

Regulation is the exercise of a much freer legislative discretion than the declaratory legislation which codifies or reforms the common law, partly because the rules which it establishes are not inescapable, but voluntary or adventitious, and partly because the terms in which they are expressed are largely conventional. Regulation, while it professes to be reasonable, does not profess to be rationalistic, and it has something (if the term is not used in an objectionable sense) of an arbitrary character. The ideal of legal order being conformity to reason, the arbitrary element in regulative legislation may be expected to call forth efforts to bring the conventional rule into some relation to the rule of reason. In so far as such a tendency exists, and to the extent that it is successful, we may speak of rationalization of regulation, and the manifestations of that tendency require some notice.[20]

It will be convenient to distinguish as methods of rationalization the comprehensive plan, the formula of adjustment, and the recourse to delegation.

Rationalization may be achieved or aimed at by large-scale regulation. The bringing together of a great many units in one scheme naturally draws attention to relative merits and equities, and tends to produce balance and proportion, which, if not a guaranty of intrinsic justice, may be the best available substitute for justice. This may be called the method of the comprehensive plan. The term has become a technical one in the law of zoning and city planning, where the superiority of the method over piecemeal regulation is conceded. The

[20] No account is here taken of the systematization of legislative efforts to furnish a high-grade product with regard to each particular measure. This systematization is associated in America with the establishment of legislative reference and drafting services and bureaus. See G. A. Weber, *Organized Efforts for the Improvement of Methods of Administration in the U.S.*, New York, 1919, Part III; J. H. Leek, *Legislative Reference Work, A Comparative Study*, Philadelphia, 1925; R. Luce, *Legislative Procedure*, 1922, chap. 25; Frederic P. Lee, "The Office of Legislative Counsel," 29 *Columbia Law Review* 381; *Statute Law Making*, by various authors, in volume III of *Iowa Applied History*, edited by Benjamin F. Shambaugh, Iowa City, 1916. For England, see the works of Sir Courtenay Ilbert, *Legislative Methods and Forms*, 1901, and *Mechanics of Law Making*, 1914; for France, H. Labbé, *La Préparation des Lois*, 1901; for Germany, R. von Mohl, *Abfassung der Rechtsgesetze*, 1862 (noted above, chap. II, p. 18, note 1); also the references in §§52 and 54, *infra*.

comprehensive plan is also the characteristic feature of salary classifications; and it plays its part in workmen's compensation schedules.[21]

The fixing of figures is often haphazard and arbitrary (evidenced by the practice of leaving them blank in draft schemes), but the dealing with many cases at the same time will be conducive to uniformity or proportionateness. Thus in the matter of penalties a criminal code is apt to show better coördination than disconnected criminal statutes; just as in a system of flexible penalties inequality of punishment could be reduced if it were possible to deal with a number of convictions at the same time.[22]

The inherent equity of large-scale regulation is imperiled by its liability to piecemeal amendment. And this calls attention to the imperfection of the method itself. The equity is a matter of balancing many units, and the balance can be only approximate. While attempts to "gerrymander" the original scheme can be easily detected and dealt with, minor inequities are inevitable or may appear only in operation. Corrections may then be called for; but special interests are sure to take advantage of this, and will try to undermine the original scheme under the guise of amending it. The constant changes in zoning ordinances and in salary classifications show the seriousness of this danger in legislative bodies which are not restrained by an exceptional morale or by the political influence of a high-grade executive authority. In the absence of these the method of the comprehensive plan is exposed to the danger of gradual deterioration, against which adequate remedies either have not as yet been discovered or have not been put into effect.

Where the matter is one of subordinate local legislation by ordinance, it would seem possible to provide by statute, that a comprehen-

[21] The "comprehensive plan" is also represented in codifying revisions of entire fields of law, and accounts for the rationalizing reforms that can be found in every civil or criminal code.

[22] *Encyclopaedia of the Laws of England,* Title: "Customs," p. 290:

"The infliction of sentence by the magistrates, however desirable it may be on various grounds, has led to one disadvantage which was previously avoided. Under the old system the sentences throughout the kingdom being adjusted by a Central Board, were so far as any system can be, uniform and commensurate. They now vary, of course, according to the view on such offenses of the different benches or presiding magistrates; but some central uniformity is still aimed at by all cases of more than a month's sentence being reported to the Treasury for consideration as to whether or not, in comparison with a general standard, the sentences should, to any extent, be remitted or not."

sive ordinance, adopted upon the basis of a survey by a commission, and administered by a commission, shall not be amended without referring the proposed amendment to the commission for a report, and that, in case of an adverse report, the amendment shall not be passed over the veto of the mayor. In appropriate cases, there might be, in addition, provision for judicial relief from the unjust or unequal operation of the amendment (and also of the original plan), and such relief may, indeed, be forthcoming on general equitable principles without explicit provision (*Phipps* v. *Chicago,* 339 Ill. 315, 1930; *Michigan-Lake Bldg. Co.* v. *Hamilton,* 340 Ill. 284, 1930).

Where the comprehensive plan is in form of a statute, a self-denying check upon amendments would have only moral operation, unless written into the constitution. In view of the rigidity of constitutional provisions, the remedy might be worse than the evil. Prohibition of legislative action is, generally speaking, more undesirable than the inconvenience of special legislation.

Formula of adjustment. A formula of adjustment may be available where regulation operates with figures and perhaps in other cases. Such a formula may enter into a "comprehensive plan," and give to it something in addition to, and more stable than, the mere balancing of units, or it may work automatically as a controlling principle, giving the assurance or at least the impression of objectivity.

A striking illustration is furnished in English public utility regulation by the provision for the so-called sliding scale, whereby permissible dividends are made to bear an inverse ratio to the rates charged (Gas and Water Facilities Amendment Act, 1873, §7: shall not divide more than five per cent per annum on their ordinary capital for any half year in which more than the statutory maximum price is charged, or, if they have not paid five per cent for two preceding years, more than the average of the last two years).

Formulae of adjustment have not found their way into legislation as readily as they have been discussed by students and experts as possible standards. Propositions have been put forward to use them as bases for the regulation of railroad rates (30 *Quarterly Journal of Economics* 205), of street-car service (for the city of Chicago), of wages (29 *Harvard Law Review* 13, 12 *Journal Society Comparative Legislation* 202), of tax assessments (*Proceedings National Tax Asso-*

ciation 1913, pp. 234–285, 449–454), and for progressive rates for taxation (a mathematical formula was at one time used in Australia); but while they may have been used administratively, it has been deemed inadvisable to make them mandatory by statute.

There are two striking instances of the recognition of a formula in recent legislation of Congress: in the national origins clause of the Immigration Act of 1924, and in the reference to method of apportionment for congressional elections in the Census Act of 1929. But the government expressed serious doubts as to the practicability of the national origins clause, and if Congress had not committed itself to it before the attempt had been made to work it out in detail, it would probably not have been adopted; and as regards apportionment, a scientific controversy arose as to the relative merits of the method of major fractions and the method of equal proportions,[23] and Congress remained neutral, requiring that both methods be recognized in the reports to be made to it by the President, and, in the event of administrative apportionment, making the last preceding congressional method controlling.

Recourse to delegation.[24] Delegation by the legislature offers the advantage that a legislative principle can be given legally binding effect upon the subordinate legislative process. The constitution alone can bind the legislature, and it is not easy to use the fundamental law for guiding regulative legislation. A legislature may by resolution formulate the principles to which a proposed scheme of regulation shall conform, but if the statute as enacted departs from the principle, it is the departure that has legal effect and not the principle. If, on the other hand, a statute formulates a principle to be observed in a scheme of administrative regulation, and the regulation departs from the principle it is the principle that controls, provided it is so expressed that the courts can give it legal effect.

The question then is, whether the formulation of principles to control delegated regulation is feasible or in actual use; if not feasible, the

[23] 67 *Science* 509, 581.

[24] No attempt is made in this treatise to deal with the great subject of administrative regulation. A note on "Regulative or Rule-making Powers" will be found in chapter XI of my *Administrative Powers over Persons and Property.* The subject requires a separate study.

statutory formula will not serve the purpose; and if not used, the reason may be that it is not feasible.

Attention has been called to the precarious status of the "comprehensive plan" owing to the abuse of piecemeal amendment. If the framing of the plan is delegated to a subordinate authority, can the legislature formulate a principle which will restrict the amending process to legitimate uses? Suppose it is desired to make it clear that classification must always be systematic classification, is there an available formula that can be given effect by a court? Or will the legislature be compelled to substitute for an abstract formula a new administrative device, such as a preliminary report by an expert body?

Or is it possible, in the law of zoning, to supplement the comprehensive plan by laying down a principle of fair conformity to group or neighborhood standards and against unfair coercion into such conformity? And if such principle can be made capable of protection by a system of administrative and judicial appeals, how much will the check upon abuse contribute toward constructive rationalization? (See 24 *Illinois Law Review* 135, and cases cited *supra.*)

It is significant that in several cases in which Congress has undertaken to lay down principles for administrative guidance, it has with apparent purpose chosen language in such a manner as to exclude judicial control (49 U.S.C. 55; 39 U.S.C. 543; *Ann Arbor R. Co.* v. *U.S.,* 281 U.S. 658, 1930).

It is probably true that when the legislature intends that regulation shall adjust itself to complex conditions, it will be inclined to rely upon administrative aid, and may, indeed, offer administrative action as a form of rationalization.

The difficulties presented by the older type of coal-weighing legislation furnish an illustration. The value of coal depending in part upon the size of the pieces mined, and this in turn depending upon the skill and care of the miner, a practice had grown up in the coal-mining industry of paying the miner for the coal mined by him by weight; but in order to eliminate small pieces, the coal before being weighed was sifted by passing the rejected pieces through a screen. As a result, the miner received no pay for part of the coal mined by him which yet had a certain market value and which was appropriated by

the owner. In view of this abuse, the miners procured the enactment of statutes which required the weighing of coal before passing it through a screen. As the Supreme Court of Ohio pointed out, this remedied one injustice by another, the owner now being compelled to pay irrespective of the quality of work and product, and both in Ohio and in Illinois the coal-weighing acts were declared unconstitutional (*Re Preston,* 63 Oh. St. 428, 1900; *Millet* v. *People,* 117 Ill. 294, 1886). In Ohio, the legislature thereupon referred the controversy to a coal-mining commission, and in accordance with its recommendation a law was enacted which in substance provides that the coal as mined and weighed shall contain no greater percentage of slate than ascertained and determined by the Industrial Commission of Ohio, and that miners and operators shall agree for stipulated periods upon the percentage of fine coal and slack coal allowable in the output of a mine. This law was sustained by the U. S. Supreme Court in *Rail & River Coal Co.* v. *Yaple,* 236 U.S. 338, 1915. See also English Coal Mines Act, 1887, §12, subd. 3. The details of equitable adjustment are thus left partly to administrative regulation, and partly to self-regulation by the interested parties, which, it may be expected, operates with the aid and advice of the Commission.

The regulation of railroad rates entirely through administrative action, is in the first instance due to inherent difficulties of legislative specification; but it is also clear that the method chosen represents a process of rationalization. The special feature of the administrative power is that it is exclusively one of corrective intervention. The rate structure proceeds from the initiative of the carrier, and the state or its agency has no primary responsibility for the resulting system; and it is hardly conceivable that merely corrective action will produce entire reconstruction; the process of rationalization does not therefore involve standardization *de novo;* moreover, since there is no delegation for regulation but only for particular orders, administrative action is not called upon to formulate explicit rules; and theories will appear only as reasons for decisions. If in a sense, then, the entire process stops short of rationalized regulation, it may for that very reason more easily give color to the impression that there is at least a gradual progress toward an ultimately rational solution. All deferred control, operating under guaranties of procedure and subject to judicial review, is

in this sense a method of rationalization, and in this sense the growth of administrative law reflects the effort or tendency of legislative regulation to conform to rational standards.

If administrative action, then, does represent rationalization, the rationalizing process will be aided by the check of judicial review, and may be hindered by legislative interference. Students of rate regulation study judicial decisions with even greater interest than administrative rate orders, if only because the judicial action is more authoritative, and—particularly if it is the action of the Supreme Court—more conspicuous. Legislative action is not interference if it merely improves the administrative process, and does not resume into its own hands the function that it has delegated, either directly or by specific mandate. Tendencies to resume delegated authority should be of special interest to any student of legislation.

Reference may also be made to the time element in regulation as a method of bringing it into conformity with equity:[25] provisions for harmonizing existing conditions with new policies, or for giving assurance of the continuance of a new policy for a reasonable time; also to the part that may be played by compensation in equalizing condi-

[25] If the carrying out of a contract is rendered unduly burdensome by new regulation, there may be an equitable claim to legislative interposition to redress the disturbed balance of interests. The following are two instances of legislative relief:

1. Tariff Act, 1864, §97 (13 St. L. 273): "That every person . . . who shall have made any contract prior to the passage of this act, and without other provision therein for the payment of duties imposed by law enacted subsequent thereto, upon articles to be delivered under such contract, is hereby authorized and empowered to add to the price thereof so much money as will be equivalent to the duty so subsequently imposed on such articles, and not previously paid by the vendee, and shall be entitled by virtue hereof to be paid, and to sue for and recover, the same accordingly."

2. German Reparation (Recovery) Act, 1921, 11 Geo. V, c. 5: "§4: Where any person is under a contract entered into before March 8, 1921, liable to accept bills of exchange or make advances in connection with the importation of any goods, he may apply to the High Court, and the court, if satisfied that by reason of the provisions of this Act the enforcement of the contract according to its terms would result in serious hardship to him, may, after considering all the circumstances of the case and the position of all the parties to the contract [subdivision 2 gives the Lord Chancellor power to provide for notice to other parties to the contract] and any offer which may have been made by any party for a variation of the contract, suspend or annul, or with the consent of the parties amend, as from such date as the court may think fit, or stay any proceedings for the enforcement of, the contract or any term thereof or any rights arising thereunder, on such conditions (if any) as the court may think fit."

It will be noted that the English Act follows the line of less resistance by leaving the entire matter to delegated action.

tions; and to the special problems presented by policies which depend upon restriction of numbers. Attention is called to these because what seems to be the most equitable way of dealing with a situation may encounter embarrassing constitutional doctrines or outright prohibitions.

Legislative planning. Corresponding to the method of the "comprehensive plan" is the method of what may be called "program" legislation, i.e., framing measures in such a way that their effectuation may either be distributed over a number of years, or be postponed to a date sufficiently distant to permit adjustment to a new order. Conspicuous instances of the latter kind are the provision of the United States Constitution, article 1, section 9, prohibiting legislation adverse to the importation of slaves prior to the year 1808, and the provision of the constitution of Louisiana of 1879 (art. 167) prohibiting all lotteries after January 1, 1895. Distribution over a number of years is at the present time not uncommon in connection with undertakings (buildings, highways, and other improvements) involving the expenditure of public moneys. While a legislature cannot bind its successors, and prospective appropriations are generally impossible under state constitutions, there may be strong inherent guaranties that the program will not be disturbed.

The legislative program may also have a place outside of undertakings of a proprietary or service character. A conspicuous instance was furnished by the great scheme of social insurance which was inaugurated in Germany by Bismarck and carried into effect by a series of measures extending over a number of years (1881–1889). Such a program differs from one laid down on opportunistic considerations either by a party platform, or by some government or administration for a particular legislative session or period, and without professing to give systematic elaboration to some underlying idea or principle.

If it is proper to apply the term "legislative planning" to such elaboration of comprehensive schemes, the question arises on what scale such planning is possible. There was a time when the construction of systems of legislation covering the entire domain of government was deemed possible. The writings of Bentham, and the work of Filangieri (1780–1788) may be cited as instances in point; the German Cameralists (Justi, Berg, and others; see A. W. Small, *The Cameral-*

ists, 1909), while less well known, were of practically equal influence. Of comprehensive schemes of actual legislation we may mention Colbert's measures in France, and the second part of the Prussian Landrecht of 1794. In more recent times we find attempts on the part of writers to build up on scientific principles entire systems of legislative regulation of such comprehensive fields as public finance, agricultural economics, or labor legislation. But if there is any attempt to cover the entire field of regulative legislation in this theoretical way, it is apt to be on the basis of a philosophy of individual freedom, i.e., of a minimum of governmental action, and the practical evolution of law and government has been away from that philosophy.[26] By general consent, it is regarded as impossible to deal practically with even one comprehensive subject of regulation otherwise than by a gradual process of piecemeal legislation.

We may compare in this respect regulative legislation with constitution-making on the one hand, and codification on the other.

The constitution considered as a piece of regulation is devoted mainly to organization, and organization lends itself to systematization for the very reason that the substance of control is deferred. The substance of control in a constitution is either negative, operating by way of prohibition or limitation, or it consists in the laying down of general policies without elaborating them; the provisions are blank checks rather than definite commitments. The practical difficulties of elaboration of detail are thus avoided. Even so, the constitution, while comprehensive, is never scientific. It represents a series of political compromises, and the methods of a constitutional convention are generally looked upon as the very negation of scientific work.

Codification, on the other hand, is conceded to be the most scientific

[26] The judicial enforcement of constitutional limitations upon regulative legislation, whether under the police or the taxing power, proceeds by reasoning from the concepts of due process and the equal protection of the laws. The result by way of correction is negative, eliminating a certain amount of regulation. It might be interesting to speculate, what, under a very liberal application, particularly of the principle of the equal protection of the laws, might be done by the courts in forcing a rational distribution of tax burdens, e.g., in the taxation of railroads for highway purposes; compare *Kansas City Southern R. Co.* v. *Road Improvement District,* 256 U.S. 658, 41 S. Ct. 604, 1921, with *Memphis & C. R. Co.* v. *Pace,* 282 U.S. 241, 1931. As regards the police power, it amply appears from my own treatise on that subject that occasional judicial correction of abuses has not resulted in the rationalization of legislation.

form of legislation. This is particularly true of a civil code, but even a criminal code may possess a high degree of "rationalization." Nothing could illustrate more clearly the difference between declaratory and regulative law, between justice and government. As soon as we pass from the relatively permanent concepts of private and criminal law to the compromises between government and liberty, we have to abandon the idea of *in toto* rationalization. Even as a matter of theory the only method of rationalization would be the formulation of abstract principles to be administratively applied, and such a method would be politically inadmissible.

If with regard to any particular measure of regulation, considerations of reason will often have to yield to considerations of expediency, the domination of expediency with regard to the most comprehensive form of legislative planning is almost axiomatic.

§31. REGULATION OF GOVERNMENTAL SERVICES. It will appear in another part of this study that the technique of both penal and civil regulation involves a good deal of administrative activity, which requires legislative attention from the point of view that such activity is part of the machinery of control. It is obvious that governmental instrumentalities of control must also have their service side or aspect, and that consequently there must be provision for personnel and funds without which administration cannot be operated. When we study civil or criminal law, we are not likely to overlook civil or criminal procedure; but the student of law is apt to take for granted the service or management side of the judiciary: the arrangement of judicial districts, of terms of court, provision of court-houses and offices, court officials, the supply of financial resources, and the custody and disbursement of funds. All these arrangements must find their warrant in written law or legislation of some kind.

This service aspect of government is primary and ubiquitous, and not merely incidental or subsidiary, where the governmental function consists in the public carrying on of some undertaking of a proprietary or corporate character, and not in the control of persons or of private property. Where legislation provides for such service functions, it may be difficult to distinguish between service, which, like

the service subsidiary to control, is directed to the provision and conservation of instrumentalities, and service (for which there is no exact parallel in the mechanism of control) which is directed to the development of the objective of the undertaking; for organization which is primarily a matter of instrumentality, may also have a decisive effect upon policy and achievement. From the point of view of legislative policy the difference between the two aspects of the service may become important for the reason that the development of the service objective is likely to demand a similar scope of freedom and initiative to that which is generally deemed essential to the success of a private undertaking. In the governmental or public undertaking this liberty necessarily means official discretion, and to that extent official freedom from regulation, whereas the routine function of the conservation of resources and the handling of personnel admits of a good deal of standardization. The difference appears in the practice of legislation; and, generally speaking, in the statute law which deals with governmental services, a great many more provisions are devoted to organization and the routine side of the administration than to prescribing the manner in which the ultimate objects of the undertaking shall be realized. This is perhaps most conspicuous in public school legislation. In the Statutes of Illinois, the chapter on Schools, one of the most voluminous of the book, gives only a minimal amount of its provisions to the fixing of educational policy, in part due to propagandist zeal (teaching of the physiological effect of alcoholic liquor); and the legislature would be as likely to prescribe methods of university instruction as to prescribe the manner of conducting military or naval operations. And we find almost the same abstention with regard to charities and corrections: it is only when some phase of policy (outdoor relief, corporal punishment, convict labor) becomes a contested issue, that regulation will find its way into statute law. It is quite likely that if there were a system of government-operated railways, statute law would respect administrative discretion very much in the same way as statutory railroad control at present respects the managerial discretion of private ownership; if in the postal service rates are fixed by statute, it is because, like passenger rates, they are capable of standardization, or because considerations of business are subordinated to other considerations. But legislation will generally determine

general questions of principle as to the terms on which services shall be rendered (gratuitous or paid, preferences or non-discrimination), just as these questions are prominent in legislative public utility regulation.

The extent to which statute law will go into detail in regulating the "administrative" as distinguished from the functional side of governmental services varies greatly, and will depend largely upon established tradition or historical development; it is interesting to compare the large amount of legislation given to army organization with the refusal to meddle with university organization where private competition has to be met. In every American jurisdiction, the greater portion of the bulk of statute law appears to be devoted to the regulation of the service side of government.

There has developed with regard to organization and management of personnel and funds in the public services a very large amount of experience, which constitutes the science of administration and of public finance; and since this experience consisted largely in the growth and discovery of abuses, it produced a corresponding amount of legislative regulation by way of correction and of parliamentary control.

To every legislative body that part of its work that deals with finance will appear as yielding in importance to no other; and apart from generally established scientific principles that may have secured recognition, every legislative body will develop its own traditions, customs, and technique dealing with appropriations and the control of public funds. In the practical work of legislation familiarity with these rules is of course essential, but they are too special and varied to find a place in a study dealing with the legal aspects of legislative regulation. The same is true of other aspects of finance which engage the legislative sense of responsibility less directly: the delegation of financial powers to local governments, and the creation of financial burdens which will have to be met out of resources over which the legislature exercises no direct control.

The regulation of governmental services, whether on their functional or on their "administrative" side, invites comparison with the other types of legislative regulation which are the main subject of this study. If the classification is applicable, the regulation of govern-

mental services is penal rather than civil; but the criterion of the penal sanction is almost lost. In the regulation of private conduct, penalties are intended to counteract the constant inducements to non-compliance which the desire for private self-determination and for private gain creates; but it is obvious that official conduct is not equally exposed to the same temptations. There is, on the contrary, the official or bureaucratic habit or tradition which supports regularity of action and often prefers regulation to free initiative, and also a specific sense of responsibility which operates more strongly than a private sense of obligation in the face of legal requirements. It is of the essence of a civil regulation that its sanction consists in the failure to obtain a legal result, if it is not complied with. In so far as official action is subject to similar regulation, it is obvious that the sanction operates much less strongly as an inducement to compliance, for the loss resulting from the failure of the contemplated legal result will not fall on the delinquent official personally; yet, so far from this being felt as an additional weakness, formal requirements operate more effectively if they involve official than if they involve purely private action. If there is occasional failure, it is because there is, on the one hand, an undue cumulation of technical requirements, and on the other hand, particularly in rural local governments, inadequate legal training on the part of officials to master prescribed technicalities. The situation would hardly be aided by the imposition of penalties.

As a consequence, the regulation of governmental services dispenses with the elaborate apparatus of penal and enforcement provisions which characterize ordinary regulative statutes. Grosser forms of official misconduct or corruption are covered by general provisions of criminal codes; for persistent delinquencies on the part of appointed officials, there exists the power of removal. To ensure official integrity, and particularly to safeguard public funds, legislation has, moreover, recourse to a system of official bonds, which, even without express statutory provision, the common law invests with an obligation of more than ordinary strength. This is one of the few points at which legislation is aided by an unwritten public law.[27]

[27] The Criminal Code of the United States has a chapter dealing with "offenses relating to official duties" (18 U.S.C. 171–216), and there are additional scattered provisions punishing official misconduct. Similar provisions will be found in state crimi-

Note on regulation incidental to revenue. Revenue legislation involves regulation in three respects: the selection of subjects of taxation and the fixing of rates is in itself a regulative process; the taxing power is commonly exercised with a view to producing collateral effects (protective tariff; high license fees; supertaxes), and thus constitutes indirect social and economic regulation; and there are in connection with taxation miscellaneous requirements and prohibitions for facilitating the effective collection of the revenue.

A great deal of thought has been given to methods of taxation, and there is perhaps no other branch of legislation in which the economy, efficiency, and equity of possible measures have been so systematically and thoroughly considered; and to the student of regulative legislation the leading treatises on taxation furnish a great deal of valuable material. This is also true of those restrictions and requirements which are merely incidental to the collection of the revenue; for fiscal zeal has experimented with all legally available expedients, and legislative policy has been influenced relatively little by the "favor of liberty" which restrains regulation in the exercise of the police power. The elaborate provisions of the Federal Internal Revenue Laws concerning distilleries and distillery warehouses (26 U.S.C. 281–424) furnish an example; analogous regulations undoubtedly exist in other countries, although under foreign systems they are likely to proceed from administrative rule-making powers.[28]

nal codes. There is also a title of the United States Code dealing in part with official bonds (title 6); this likewise is not exclusive; see, e.g., the provisions as to postmaster bonds in 39 U.S.C. 34–40.

[28] See my *Administrative Powers*, p. 216.

CHAPTER VI

LIMITATIONS ON LEGISLATIVE POWERS AS A LEGISLATIVE PROBLEM

PRELIMINARY NOTE. The limitations to be considered are (1) those resulting from positive constitutional provisions relating to governmental organization or action, and occurring wherever there is a written constitution which is judicially enforceable; (2) those arising under the fundamental guaranties of due process which have been a conspicuous feature of American constitutional law; (3) those incidental to territorial limitations and to the division of powers into state and national under federal constitutions (United States, Germany, Switzerland, British Dominions, Latin-American states, Soviet Union); and (4) those of subordinate local legislation which are found in all states, and, being usually statutory limitations, are within legislative control.

A charter of local government resembles a federal constitution of the American type in being primarily a grant, and only incidentally a limitation, of powers; a state constitution of the American type assumes the possession on the part of the state of power to deal with (to borrow the phrase used in acts of Congress with reference to territories) "all rightful subjects of legislation." From a purely drafting point of view the difference is diminished in the case of "home rule" charters, which give full powers of "local government," the definition of that concept being then matter of construction. No federal constitution has set up a corresponding concept of "national government." Such a concept would present insuperable difficulties of construction, particularly by reason of the fact that national powers are paramount, whereas local powers are generally made subordinate to statutory legislation and therefore receive continual implied definition by the preëmptive operation of state statutes.

The establishment of (as distinguished from the adaptation to) constitutional limitations presents problems of legislative technique in two respects: the phrasing of grants and limitations of power differs legitimately according to the grade and dignity of the repository of the power; and the wisdom of granting or withholding power depends upon considerations of law as well as of policy. There will be occasion for referring in different connections to peculiarities of constitutional as distinguished from statutory phraseology. On the other hand, legal principles applicable to the substance of constitutional limitations have an extremely precarious standing; they have a chance to assert themselves only where principles are entirely non-contentious. As soon as the field becomes controversial, political considerations will inevitably dominate, and legal principle will have to yield

to expediency. No attempt will therefore be made to examine these principles and the following observations will be confined to the problem of adapting legislation to limitations on legislative power.

§32. RESULTING LIMITATIONS.[1] A decision of the Supreme Court of Illinois illustrates the doubts cast upon legislation: A civil service act of the usual type was enacted in 1911, to apply to the subordinate places in the various departments of the state government. The validity of the law was contested by several clerks in the office of the secretary of state assigned to the performance of statutory functions. The contention was that since the secretary of state was a constitutional officer, his power to appoint necessary subordinates could not be controlled by legislation otherwise than through the constitutional power over appropriations. The court by a bare majority decided the case against the contestants. The principal opinion took the ground that the fact that an office was constitutional did not destroy the general legislative power to regulate the details of its organization and the tenure of the subordinate officials. One judge specially concurred on the ground that the particular duties assigned to the officials who attacked the statute were statutory, but conceded that the secretary of state cannot be controlled by legislation in the appointment of subordinates whom he needs to perform functions which belong to the ordinary province of a secretary of state. The dissenting judges denied entirely the power of the legislature to regulate the appointment of subordinates of a constitutional officer. The opinions rendered thus represent the three attitudes toward the problem of resulting limitations: the view in favor of a full legislative power of regulation in matters not expressly regulated by the constitution; the opposite view that constitutional status excludes legislative regulation; and the middle view that constitutional recognition implies at least some degree of independence as against the legislature, which must be determined from case to case (*People ex rel. Gullett* v. *McCullough,* 254 Ill. 1, 1912). The lack of legislative power would be almost uncontroverted if the constitution gave the constitutional officer the power in terms to appoint his subordinates, as was the case in New York with

[1] See 5 *Publications of Academy of Political Science* 98: "The Problem of Adequate Legislative Powers under State Constitutions."

regard to the superintendent of public works (*People* v. *Angle,* 109 N.Y. 564, 1888), necessitating a constitutional amendment to make civil service rules applicable to that branch of the service.

The doctrine of resulting limitations is coeval with the final establishment of the judicial power to declare laws unconstitutional. It was applied in *Marbury* v. *Madison* (1 Cranch 137, 1803), to a statute undertaking to vest the Supreme Court with original jurisdiction other than that specified in the constitution. The uncertainty of its operation is illustrated by the tacit adoption of the opposite doctrine when it came to the question whether inferior courts may be given concurrent jurisdiction over matters assigned by the constitution to the Supreme Court (Willoughby, *Constitutional Law,* 1st ed., §557).

An analysis of statutes declared unconstitutional in a number of leading states down to the end of the nineteenth century showed that these resulting limitations furnished the ground of invalidity in about 20 per cent of the cases. The proportion is large when it is considered that the resulting limitation of the type indicated involves no valuable principle. It raises a technical objection, not within the contemplation of the framers of the constitution, more often than otherwise the result of an accidental turn of phrase, or due to the impracticability of properly qualifying rules that are formulated in such a compendious document as the constitution. Often the possible objection furnishes a ready pretext for the refusal to enact legislation on the plea of lack of constitutional power.

The problem is similar to that of statutory rules of practice and procedure, to which courts feel bound to give a literal interpretation. To meet the difficulty, the New Jersey Practice Act of 1912 provides as follows: "These rules shall be considered as general rules for the government of the court and the conducting of causes; and as the design of them is to facilitate business and advance justice they may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice."

By analogy, and much more conservatively conceived, there might be a canon of constitutional construction to the effect that the provisions of the constitution express fundamental principles and policies and shall be construed accordingly; and that therefore the legislature

may regulate the exercise of constitutional powers for the better carrying out of their purposes, and may, without violating the spirit of a provision, apply the provision with the necessary qualifications demanded by the practical requirements of government.

Such a canon of construction, in order to be operative, would have to be written into the constitution itself. The prevailing temper of framers of constitutions is probably more correctly indicated by the provision adopted in California to the effect that the provisions of the constitution are mandatory or prohibitory unless by express words they are declared to be otherwise (art. I, §22).

The problem, it must be concluded, is one with which the legislature cannot deal adequately.

§33. FUNDAMENTAL LIMITATIONS. Fundamental limitations present a legislative problem where the legislative view differs from established or apprehended judicial construction, or where the legislature believes that there is a possibility of legislation notwithstanding the limitation. It is legitimate for the legislature to act upon its own view where judicial decisions are not clear or have become discredited; and where a judicial decision has proceeded upon some assumed theory of legislative power, it is appropriate for the legislature to declare its own theory in express terms.

Fundamental limitations do not necessarily operate in favor of parties sustaining special relations to the exercise of legislative power. It may be contended that so far as rights depend on legislative creation, they are subject to absolute legislative discretion. But that contention, if pushed to extremes, might in the long run defeat constitutional guaranties altogether. It would thus be fanciful to think of removing from the protection of the constitution entire categories of prospective rights on the theory that the transmission of property by death or the future creation of corporations are matters of unrestricted power. Hardly less favor would be accorded to the argument, in connection with criminal legislation, that one criminal conviction may forfeit all future rights of an offender.

Is it more plausible to contend that the legislature may prohibit, and then lift the prohibition by providing for the grant of licenses

conditioned on the surrender of constitutional rights? Such a contention may seem to find support in the history of workmen's compensation legislation in which constitutional doubts were sought to be removed by recourse to a so-called "election" on the part of the employer to accept the new system with its attendant incidents in consideration of being relieved from the operation of other rules of law. Notwithstanding the coercive character of this "election," the expedient received the sanction of the Supreme Court (*Hawkins* v. *Bleakly*, 243 U.S. 210, 1916; *Booth Fisheries Co.* v. *Industrial Commission*, 271 U.S. 208, 1926).[2]

The availability of this undesirable method of evading the constitution has, however, become precarious since the decision of *Frost Trucking Co.* v. *Railroad Commission* (271 U.S. 583, 1926), in which the Supreme Court holds that if the legislature cannot compel a private carrier to become a common carrier, it cannot under the guise of regulation of highways permit the use of a highway to a private carrier only on condition that he submit to the obligations of a common carrier. "If the state may compel surrender of one constitutional right as a condition of its favor it may in like manner compel a surrender of all. It is inconceivable that guaranties imbedded in the constitution of the United States may thus be manipulated out of existence."

It may be added that, apart from workmen's compensation legislation, the method has not played a conspicuous part in the history of American legislation.[3]

An applicant for, or recipient of, what is in substance and reality a privilege or gratuity may, on the other hand, be required to assume

[2] The elective compensation laws offer different terms for administering justice according to whether a legislative scheme, concerning the validity of which doubts are felt, is accepted or not: there is discrimination against the recalcitrant employer by depriving him of defenses open to those who accept, and there is discrimination against the recalcitrant employee who refuses to give up his common law right of action, by leaving him subject to defenses from which another employee is relieved simply because he has offered to give up such right. This is hardly consistent with the equal protection of the laws.

An unqualified right to contract out may serve to obviate constitutional difficulties, so in the case of mechanics' lien legislation.

[3] As to making the privilege of using highways dependent upon agreeing to accept service upon the secretary of state as a substitute for personal service, see *Wuchter* v. *Pizzutti*, 276 U.S. 13, 1928.

The provision in 21 U.S.C. 156 that licenses issued to serum manufacturing establishments be issued on condition that the licensee permit inspection, instead of a provision

special obligations, as to the imposition of which there might be constitutional doubt. Thus land-grant railroads may be required to transport mails at rates fixed by Congress (see, e.g., 9 St. L. 466, Act of September 20, 1850, and 39 U.S.C. 536). The water power legislation of 1920 is based upon the assumption that this principle is available. The acts by which Congress consents to the construction of bridges over navigable waters, stipulate methods of charging which shall amortize the invested capital within a stated period. As an optional method the principle of amortization is also recognized in connection with the grant of terminable permits by cities for transportation on public streets (Illinois Laws, 1929, p. 271), although the City of Chicago did not avail itself of it. Amortization in connection with public utility rates involves difficult questions as to the reasonableness of charges, and its tentative recognition in connection with the grant of privilege is of interest.

Where grants made in the past have not created vested rights beyond the power of resumption, the recognition of monopoly rights in the use of public highways may make it possible to bargain for terms which not even a business affected with a public interest might otherwise be compellable to accept. Legislation to that effect is likely to be in the nature of an enabling act, merely outlining appropriate stipulations which will have to be effectuated by arrangements made from case to case.

The constitutional limitations upon the exercise of public power over private right are also inapplicable where the government deals with individuals in its proprietary capacity and on a contractual basis, its relations to private parties being then controlled by the laws of property and contract.[4] A policy which would be beyond the power of the legislature if imposed upon private individuals or corporations may thus be open to no objection if adopted by a government for the regulation of its own official services, and such a policy may com-

for a power of inspection, is perhaps due to a doubt as to a federal power to inspect manufacturing establishments. But a power to license should logically carry a power to inspect.

See M. H. Merrill, "Unconstitutional Conditions," 77 *University of Pennsylvania Law Review* 879.

[4] For possible restrictions on freedom of governmental action, see T. R. Powell, "Right to Work in the State," 16 *Columbia Law Review* 99.

mend itself for the moral effect that attends the recognition of some principle of action in a limited but conspicuous field of application. In the United States there is the additional advantage that under the constitution Congress may exert its power not only to use, but also to raise, funds over the entire range of the national welfare. Congress has thus given recognition to the eight-hour day by making it compulsory on all contractors upon public work of the United States (Acts of August 1, 1892, and of March 3, 1913). By analogy, new principles regarding the employment of labor were first introduced in France for all the public services which the government was able to control by executive decree, without the interposition of parliament (Decree of August 10, 1899; Pipkin, *Social Legislation,* p. 373).

§34. JURISDICTIONAL LIMITATIONS. Constitutional limitations are jurisdictional when they restrict the legislative powers of one area by reference to those of another, particularly where the one area includes the other or is included within it. They have to be considered in all federal organizations, but present a more difficult problem in the United States than elsewhere, partly because the grant of federal powers, owing to the early date of the enactment of the Federal Constitution, is more restricted, and partly because—perhaps for that reason—judicial construction has guarded it more jealously from encroachment on the part of the states.[5] The judicial decisions defining the respective spheres of state and nation have turned chiefly on the extent of taxing powers, and of powers of regulation in relation to interstate commerce. The final impulse to the national regulation of immigration and of railroad transportation was given by decisions denying the validity of state legislation (*Henderson* v. *Mayor,* 92 U.S. 259, 1875; *Wabash R. R.* v. *Illinois,* 118 U.S. 551, 1886).

Until the failure of the attempts of Congress to deal with child labor, the course of decisions had been such as to create the impres-

[5] In Germany, the federal power is less jealously guarded; see, e.g., the decision of the Supreme Administrative Court of Prussia assuming that a local police authority may validly issue an order to the Imperial Navy, in matters of purely local concern (34 O.V.G. 432).

Real estate belonging to the Reich is subject to local taxation. President Jackson in 1832 stated this to be the law in the United States, 2 *Pres. Mess.* 587.

sion that through the use of either the taxing power or the power to regulate commerce the nation might occupy much of the field that the constitution had apparently left to the states. By the two child labor decisions (*Hammer* v. *Dagenhart,* 247 U.S. 251, 1918, and *Bailey* v. *Drexel Furniture Company,* 259 U.S. 20, 1922),[6] the Supreme Court set the stamp of its disapproval upon the colorable type of legislation which is the inevitable by-product of the jurisdictional limitation, and which the states had repeatedly tried to work, only to be defeated by the Supreme Court.[7]

A controlling judicial power will be able to deal with many colorable evasions. Occasionally an effective legislative precautionary check may be available, as where exactions to cover cost of inspection or of other necessary safeguards are limited by percentages of value. See also the careful provisions of the United States Constitution regarding state inspection laws (1–10–2).

The rigid reciprocal exclusiveness of spheres which is peculiar to the American constitution and its interpretation, produces what has been aptly called a twilight zone of doubt as to powers, which, however, is darker for the states than for the nation. Notwithstanding the child labor decisions, the resources of national legislation both through the taxing power and through the power over commerce are ample and unexhausted. The Narcotic Drugs Act illustrates the extent to which the former has been carried, and the Grain Futures Act of 1922 shows what can be done in the way of defining interstate commerce,[8] and in the way of securing optional submission to federal regulation (system of "contract markets"); and it is by no means

[6] Compare with the second child labor case the Australian case of *King* v. *Barger,* 6 C.L.R. 41, p. 72, 1908; also 6 C.L.R. 111–135.

[7] See Freund, *Police Power,* §§64–85. For the use of colorable measures to evade treaty limitations on international trade restrictions, see Grunzel, *Economic Protectionism,* 179: administrative protection; 180: veterinary exclusions; 184: trade marks; 187: food products; 187: award of public contracts; 163: protectively adjusted freight rates.

[8] Definition of interstate commerce, 7 U.S.C. 3: "For the purposes of this chapter (but not in any wise limiting the definition of interstate commerce in the preceding section) a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the grain trade whereby grain and grain products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another, including in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for manufacture within the State and

certain that formulae may not be discoverable through which the competitive aspects of child labor employment may be subjected to national control. The possibilities of federal expansion outside of taxation and commerce have been little discussed but it deserves further consideration whether and to what extent the "full-faith-and-credit" clause of the constitution (4–1) is available to furnish a remedy for the difficulties arising from state jurisdictional limitations in the matter of marriage and divorce.[9]

For the overcoming of the handicaps of jurisdictional limitations, there have been discussed, or put into effect, with reference to state action in the United States, the methods of state compacts, of federal modification of the freedom of commerce, of uniform legislation, and for legislation in general, certain provisions for extraterritorial effect, for reciprocity, and for retaliation. These expedients should be briefly considered.

§35. Compacts between States. Compacts or agreements between the states are recognized by the Federal Constitution, which requires the consent of Congress for their validity. The provision, it will be noted, is phrased as a restrictive and not as an enabling clause. Whether a state, like a sovereign state in international law, can prospectively bind its legislative policy by compact, is a question which, in the absence of any attempt in that direction, has never been discussed; but it is possible that this cannot be done without a provision in the state constitution permitting the necessary surrender of legislative power. If the power were assumed to exist, would an agreement with a view, e.g., to identical child labor standards, be available for making these standards *ipso facto* operative as state law? Interna-

the shipment outside the State of the products resulting from such manufacture. Articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter. For the purpose of this section the word 'State' includes Territory, the District of Columbia, possession of the United States, and foreign nation."

Note also the following phrase used in a bill introduced into Congress: Any person, while engaged in commerce, or *in competition with other persons thus engaged,* who shall . . . (5 *American Bar Association Journal* 378).

[9] Stephen I. Langmaid, "Full Faith and Credit," 24 *Illinois Law Review* 383.

tional treaties setting legislative standards invariably are so phrased as to require domestic legislation for their effectuation, so that even the provision of the Federal Constitution making treaties part of the law of the land is inapplicable to treaties of this kind; and besides, the Federal Constitution lacks an analogous provision making the interstate compact the law of the agreeing states, or giving it an enforceable status in federal courts. Would the violation of a compact agreeing upon terms of legislation constitute a cause of action between the two states? And what kind of a judgment could be given in such a suit? These questions point to the necessity of state constitutional provisions in aid of state compacts, having for their object the contractual binding of regulative powers.[10]

The availability of the compact method is conditioned upon the possibility of crystallizing legislative ways and means into contractual or joint arrangements. Apart from its frequent employment for the adjustment of boundaries, it might be utilized for the joint establishment of institutions, for the administration of joint resources, for the elaboration of uniform standards, and for the furnishing of technical services on joint account and by joint official agencies. Even thus limited, the field is a wide one. There might be possibilities of effecting reforms in institutional management by developing specialized types through the joining of the resources of several states where one state by itself might not have sufficient financial strength for adequate specialization. The obstacles in the way of such coöperation are not legal, but political.

The most conspicuous application of the compact method in recent years, the creation of the Port of New York Authority, also illustrates the continuing dependence of the compact upon state legislation: the state legislatures of New York and of New Jersey reserve to themselves the power to approve plans, to concur in all rules, and to provide penalties; they limit the power to incur obligations to the appro-

[10] The difficulty here indicated does not arise where the result of the compact is to enlarge automatically the operation of an existing statute, making it possible to dispense with effectuating legislation. Treaty provisions giving the benefit of causes of action to non-nationals, or permitting foreign corporations to do business, or enabling aliens to take by descent or devise, are in point. The Federal Constitution (4–2–1) takes care of these situations to a considerable extent. An illustration appears to be furnished by section 7 of the Virginia-Kentucky compact of 1789, cited by Frankfurter and Landis, 34 *Yale Law Journal* 735.

priations made by the states, and limit the obligation to make such appropriations; and they give to the state governor a veto power over all the acts of the state-appointed commissioners. It thus appears that the parties to the compact realize that the joint agency cannot dispense with state authority where effectuating action involves the exercise of legislative authority (Laws of New York, 1921, ch. 154; Laws of New Jersey, 1921, ch. 151, 152).[11]

§36. FEDERAL CONCESSIONS TO STATE CONTROL OVER COMMERCE. Prior to the adoption of the Eighteenth Amendment, Congress, without directly undertaking the task of regulation, gave some aid to state control of the liquor traffic by withdrawing from liquor imported into a state the protection of the freedom of interstate commerce. The Wilson Act of 1890 (sustained in *Wilkerson* v. *Rahrer,* 140 U.S. 545, 1891) subjected liquor upon its arrival in a state to the laws of the state as though produced therein. The Webb-Kenyon Act of 1913 (sustained in *Distilling Co.* v. *West. Maryland R. Co.,* 242 U.S. 311, 1917) prohibited the interstate transportation of liquor into a state for use in violation of the laws of the state. The principle of the Webb-Kenyon law has since been applied to migratory birds (Act July 3, 1918, 16 U.S.C. 705), the principle of the Wilson law to oleomargarine (21 U.S.C. 25), dead animals (18 U.S.C. 395), and prison-made goods (Act of January 19, 1929).[12] It has also been proposed to aid the so-called Blue-Sky legislation of the states by making it unlawful to send by mail or otherwise any security (or advertising matter relating thereto) into any state in which the sale of the security is unlawful.

[11] See Frankfurter and Landis, "The Compact Clause of the Constitution," 34 *Yale Law Journal* 685.

"Report of Committee on Interstate Compacts to National Conference of Commissioners on Uniform State Laws," in *Handbook of National Conference and Proceedings of Thirty-first Annual Meeting, 1921,* pp. 297–367.

For a list of acts of Congress and joint resolutions consenting to compacts between states (fifty-five in number) see *Congressional Record,* March 2, 1931, p. 6827.

See also, Governor Smith's comment in 36 *New York State Department Reports* 487, April 6, 1927.

[12] The Prison-made Goods Act by its terms takes effect on January 29, 1934. As to its purpose and operation, see a letter from the authors of the bill to the President of the American Federation of Labor, printed in *Congressional Record* of February 28, 1931, p. 6634.

The Wilson-law type of federal legislation presupposes that the state law cannot be circumvented by mere shipment into the state, but that such shipment will be profitable only by further acts of disposition in the state, which can then be subjected to restrictions (labeling or licensing requirements), that will effectuate the policy of the state. If the mere receipt of matter sent from another state serves the desired purpose (as it does in the case of selling securities) prohibition of shipment into the state is called for, that is to say, the Webb-Kenyon-law type of legislation is appropriate. This, however, in its turn presupposes that the forbidden matter is clearly defined and ascertainable, so as not to impose an undue risk upon the sender. It is therefore difficult to extend the prohibition to securities, into the proper classification of which there enters an element of value depending upon the exercise of judgment.[13]

§37. UNIFORM STATE LAWS. Uniform legislation is being promoted by an organization known as the National Conference of Commissioners on Uniform State Laws, composed of commissioners appointed by the governors of the several states, the state commissions being in many states created by statute and therefore having an official status in their states, although the National Conference as such is a voluntary organization. The Conference frames laws which are recommended to the states for adoption as uniform laws. No special technique of legislation is involved, beyond an effort to set an example by careful deliberation and model draftsmanship. A notable success has been achieved in securing the adoption of a uniform negotiable instruments law by all the states and territories. It is interesting that the same subject was dealt with in the same manner (as was also the commercial law in its other aspects) by the German Federa-

[13] See *67th Congress 4th Session, Senate Hearings on H.R. 10598* regulating sale of securities, 1923, pp. 13, 14, as to difficulty of conditioning the exemption of securities on value percentages; e.g., that mortgage bonds shall be exempt if the amount does not exceed 60 per cent or 75 per cent of the value of the property by which they are secured.

As to the constitutionality of the application of the Webb-Kenyon-law principle to prison-made goods, see the briefs by Donald R. Richberg, Breed, Abbott, and Morgan, and Attorney-General A. C. Ottinger of New York, in *Congressional Record*, December 15, 1928, p. 675.

tion in the middle of the nineteenth century; but the new constitution of 1867–71 substituted adequate federal powers of legislation under which these measures were reënacted as national acts.[14]

[14] List of Uniform Laws adopted (*Proceedings of the Fortieth Annual Conference of Commissioners on Uniform State Laws, 1930*, p. 693):

NAME	YEAR OF APPROVAL	NUMBER OF JURISDICTIONS ENACTING
Acknowledgments Act	1892	9
Acknowledgments Act, Foreign	1914	8
Aeronautics Act	1922	21
Air Licensing Act	1930	2
Arbitration Act	1925	5
Bills of Lading Act	1909	29
Business Corporation Act	1928	3
Chattel Mortgage Act	1926	—
Child Labor Act	1930	1
Conditional Sales Act	1918	9
Criminal Extradition Act	1926	6
Declaratory Judgments Act	1922	15
Desertion and Non-Support Act	1910	18
Divorce Jurisdiction Act	1930	—
Extradition of Persons of Unsound Mind Act	1916	9
Federal Tax Lien Registration Act	1926	13
Fiduciaries Act	1922	15
Firearms Act	1930	1
Flag Act	1917	10
Foreign Depositions Act	1920	11
Fraudulent Conveyance Act	1918	15
Illegitimacy Act	1922	7
Interparty Agreement Act	1925	3
Joint Obligations Act	1925	4
Land Registration Act	1916	3
Limited Partnership Act	1916	17
Marriage and Marriage License Act	1911	2
Marriage Evasion Act	1912	5
Negotiable Instruments Act	1896	53
Partnership Act	1914	17
Proof of Statutes Act	1920	23
Public Utilities Act	1928	—
Real Estate Mortgage Act	1927	—
Reciprocal Transfer Tax Act	1928	15
Sale of Securities Act	1930	1
Sales Act	1906	31
Sales Act Amendments	1922	5
Stock Transfer Act	1909	21
Uniform Vehicle Code		
Act I. Motor Vehicle Registration Act	1926	5
Act II. Motor Vehicle Anti-Theft Act	1926	6
Act III. Motor Vehicle Operators' and Chauffeurs' License Act	1926	2
Act IV. Act Regulating Traffic on Highways	1926	15
Veterans' Guardianship Act	1928	29
Warehouse Receipts Act	1906	48
Warehouse Receipts Act Amendments	1922	10
Wills Act, Foreign Executed	1910	10
Wills Act, Foreign Probated	1915	6
Written Obligations Act	1925	2
Total—48		

NOTE: There were added in 1931 a Principal and Income Act, and an Act to Secure the Attendance of Witnesses from without the State in Criminal Cases.

§38. PROVISIONS FOR EXTRATERRITORIAL EFFECT; RECIPROCITY AND RETALIATION. Expedients to reach conditions outside of the enacting jurisdiction are not confined to states within a federation, but occasionally are also a feature of national laws. Reciprocity and retaliation, in particular, have been more conspicuous in national than in state legislation. Of other sporadic attempts, some are probably available only for national action, and others may be of doubtful status, whether state or national in scope. A few of these will be noted.

1. The so-called Webb-Pomerene Act (Export Associations Act) of April 10, 1918, permits under appropriate safeguards the formation of associations for export which are relieved with reference to export arrangements from the prohibitions of the Sherman Anti-Trust law. Section 4 of the act forbids these associations to practice unfair methods of competition though the acts occur outside of the territorial jurisdiction of the United States. Submission to the prohibition is, in effect, a condition attached to a special privilege.

2. Section 510 of the Tariff Act of 1922 provided that if any person "manufacturing, producing, selling, shipping, or consigning merchandise exported to the United States" (plainly referring to the exporter in a foreign country) fails to permit a duly accredited officer of the United States to inspect his books, etc., the Secretary of the Treasury shall prohibit importations into the United States by such person, and may instruct collectors to withhold delivery of merchandise produced, sold, or shipped by him. If the failure continues for a year, the merchandise may be treated as forfeited.

Congress in this way sought to compel persons abroad to submit to examination by American officials or agents.

In the corresponding section of the Tariff Act of 1930 (§511), the provision appears in altered form: "If any person *importing* merchandise into the United States, or dealing in *imported* merchandise fails," etc., continuing as in the act of 1922.

A person within the jurisdiction is thus substituted for the person outside of the jurisdiction as the subject of the examining power.

This attempt at extraterritorial exercise of power thus disappears from the statute book. There remains, however, the provision in section 402 of the Tariff Act of 1930 to the effect that in reappraisement proceedings an affidavit executed outside of the United States shall

not be admitted in evidence if executed by any person who fails to permit a Treasury attaché to inspect his books, papers, records, accounts, documents, or correspondence, pertaining to the value or classification of merchandise.

3. If a workmen's compensation law is so worded that the obligation of the employer is made a legal consequence or implication of every contract of employment, it may be contended that the contract is operative, wherever it is carried into effect, so that injuries suffered outside of the state become compensable. However, a strong argument may be made to the effect that if a contract with extraterritorial operation may be compelled, extraterritorial operation may as well be established directly, and if that is impossible, the fiction of a contract should not avail.[15]

Reciprocal legislation overcomes jurisdictional limitations in a very qualified manner. A state may secure for its legislative policy the recognition of another state by granting to the other state the advantage of the policy, to be enjoyed by the citizens of the latter in the granting state, upon condition of a corresponding reciprocal grant. This method is used in connection with conservation, recognition of professional qualifications, admission of corporations, and tax exemption. The only technical difficulty presented by this legislation is the possible necessity of delegating to an administrative official the power to determine the equivalence of a reciprocal provision of another state upon which the taking effect of the law may depend.

Thus the Copyright Act of 1909, granting the benefit of copyright protection to foreign persons on condition of reciprocity, provides (17 U.S.C. 8):

> The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States by proclamation made from time to time, as the purposes of this title may require.

[15] See E. Angell, "Recovery under Workmen's Compensation Acts for Injury Abroad," 31 *Harvard Law Review* 619; Bradbury, *Workmen's Compensation Law*, chap. 7; 139 *Law Times* 312; 79 *Central Law Journal* 73.

Extraterritorial effect of a purely factual character attaches to statutory provisions controlling trust investments. The provisions of the laws of Eastern states concerning permissible investments by savings banks and life insurance companies naturally influence the laws relating to municipal bond issues in other states. The English Trustee Act, 1900, §2 (63 & 64 Vict., c. 62) permits a trustee to invest in colonial stocks, with respect to which have been observed such conditions (if any) as the Treasury may by

Since reciprocity in many cases must mean substantial equivalence instead of precise identity of provision, it is obviously desirable not to have the ascertainment of its operation deferred until a case arises for judicial determination.

In connection with the admission of foreign corporations, and particularly as regards the imposition of fiscal burdens, we also find retaliatory clauses; see, e.g., Missouri Statutes, §7073;[16] *State* v. *American Insurance Co.*, 79 Ind. App. 88, 137 N.E. 338, 1922.

The operation of reciprocal and retaliatory legislation can best be studied in connection with the history of laws and treaties regarding foreign commerce. See "Reciprocity and Commercial Treaties," *U.S. Tariff Commission, 1919;* Tariff Act, 1930, §338.

§39. COÖRDINATION OF POWERS. While a state legislature has to adapt itself to the Federal Constitution, it normally controls the relation of state and local legislation. That relation presents itself to the courts as a question of construction and not of the validity of legislation, and to the legislature as a problem of coördination, in the solution of which judicial decisions furnish a valuable aid, although the mere avoidance of a judicially cognizable conflict is not necessarily the last word in coördination.

The cardinal principle in the grant of local powers is to make them subordinate to state law. The demand for home rule has occasionally produced clauses, and particularly clauses written into constitutions, ignoring this principle. Independence from state law may be legally

order notified in the *London Gazette* prescribe. In effect this is "prescribing" for colonial legislation.

[16] "Whenever the laws of any other state of the United States or of any foreign country shall require of or impose upon companies not organized under the laws of such state or country any further or greater licenses, fees, taxes, deposits or securities, statements or certificates of authority, or require any other duties or acts, or inflict any greater fines or penalties than are by the laws of Missouri imposed or inflicted upon or required of companies not organized under the laws of this state, then it shall be the duty of the superintendent of the insurance department of this state to require from every company of such other state or country, transacting or seeking to transact the business of insurance in this state, the payment of all licenses, fees, taxes, fines or penalties, and the making of all deposits of securities and statements, and the doing of all acts which, by the laws of the state or country in which said company was organized, are in excess of the licenses, fees, taxes, deposits, statements, fines, penalties, acts or duties required by the laws of this state of companies of other states."

manageable where it is confined to organization, to distribution of powers among official agencies, and tenure and compensation of officers and employees (so in article 179 of the proposed, but defeated, constitution of Illinois of 1922); but if such independence is sought to be extended to the possession and exercise of powers, it is certain to lead to confusion, since there is no clear boundary line between local and general, and all governmental functions overlap. The better legislative practice recognizes the principle.

The subordination of local to state law being conceded, it is legally an advantage rather than otherwise to phrase the grant of local powers in wide and general terms. This will appear later on in connection with the discussion of the availability of indefinite terms in statutes. The familiar issue between a general grant of local powers and a specific enumeration of powers presents a political and not a legal question.

Local governments are universally given powers of police regulation which touch fields occupied, or liable to be occupied, by state laws.

No difficulty will be presented by local regulations purely supplementary in character, in the sense that their violation is possible without a violation of the state law. An ordinance of an Indiana town requiring fence gates to be so arranged as to open inward was therefore properly sustained although a general law of the state made encroachments upon streets unlawful, and a statute prohibited expressly the duplication of state laws by city ordinances (*Rosedale* v. *Hanner,* 157 Ind. 390, 1901). The common type of such a supplementary regulation is a lower speed limit for a city than that prescribed by the state.

A state statute which makes a prohibition subject to exceptions, presents the problem whether the excepted field is left subject to local regulation, or is intended as an affirmative recognition of freedom or right. While this problem requires attention in any particular case, it seems impossible to suggest any general formula or general policy (see *Canton* v. *Nist,* 9 Oh. St. 439, 1859; *Ex parte Hong Shen,* 98 Cal. 681, 1893).

In the absence of an explicit rule against duplication, a fair construction of charter terms may often permit local action in a field also covered by state law, and a local power may seem exercisable without

direct conflict, as, e.g., where it deals only with matter of aggravation, or where (as is likely to be the case), it imposes lighter penalties. An incidental question, then, which has presented itself, is whether the same offense can be punished twice, and—apparently contrary to principle—has been answered in the affirmative. The explanation of this position is to be found in the occasional local practice of virtual tolerance disguised by penalties operating as license fees (*State* v. *Lee,* 29 Minn. 445, 1882; *State* v. *Wilcox,* 78 Kan. 597, 1908; *Rossi* v. *United States,* 49 Fed. 2d 1). But such a practice calls attention to an aspect of the matter, which from the legislative point of view should be decisive: an ordinance striking at something already prohibited by the state, but only when accompanied by aggravating circumstances, or dealing with the same thing by lighter penalties, sets a lower standard of conduct or performance; and this is demoralizing, since the enforcement of the higher state standard, particularly where it depends upon the aid of the local police, is rendered difficult, if not impossible. This consideration counts against a construction permitting duplication, and recommends express provisions against duplication, such as are found in the English Municipal Corporations Act, in Indiana, and perhaps in other jurisdictions.[17]

A new phase of the problem of coördination has appeared in consequence of recent state legislation (public utilities, food, etc.) administered by commissions vested with rule-making and other quasi-legislative powers. These may cover matter already in part preëmpted by local regulation. It seems normally inadmissible to hold (as was held in one case in Illinois) that the mere grant of the rule-making power supersedes local ordinances (*Atwood* v. *C. I. & W. R. Co.,* 316 Ill. 425, 1925), particularly since amendments will throw into confusion the question of implied abrogation dependent on dates of enactment (*Chicago* v. *Ice Cream Co.,* 252 Ill. 311, 1911). This is perhaps a case where concurrence of powers should be conceded so that the stronger prohibition prevails over the weaker. Where the interests represented by state commissions and local governing bodies, respectively, are not identical, but legitimately variant (occupation of streets for public utilities, etc.), there is need for some coördinating authority, which however does not appear to be easily fitted into the organization of

[17] For an opposite provision, permitting state offenses to be made also offenses against the city, see Mississippi Code, 1906, §3410.

American state governments (*Chicago Motor Coach Co.* v. *Chicago*, 337 Ill. 200, 1929).

"Concurrent" in the Eighteenth Amendment. Congress and the states are given concurrent power to enforce the prohibition article of the constitution. It has been repeatedly suggested that under a proper construction the task of enforcement should have been divided between national and state governments, each acting within its appropriate sphere. That the suggestion is not without force, appears from the attitude of the states toward imports of liquors; they leave this entire field to federal control; and should the state of New York have undertaken to deal with the problem of intoxicating liquors in foreign ships in the harbor of New York, the resulting embarrassments might well have led the Supreme Court to interpret "concurrent" power as qualified by the necessary respect due to reciprocal spheres of action.

However, practical considerations would prevent the argument working the other way. Concurrent in the sense of complementary power would presuppose a sense of obligation on the part of the states toward enforcement; and the repeal of the enforcement law of New York shows that such an obligation is not recognized. State inaction would infinitely multiply the difficulties of preventing importation, inasmuch as the inducements to import liquor would be so much stronger.

Concurrent action in the sense of interdependent coöperation requires appropriate administrative organization, by which national and state official action could be brought into organic contact. Such organization exists under the German constitution where imperial legislation in the most important fields depended entirely upon state administration; but it does not exist in the United States; it hardly even exists between state control and local authorities. In view of this state of things it does not seem that the framers of the Eighteenth Amendment could have understood "concurrent" otherwise than as "capable of being exerted by either government to the fullest extent."

The problem of coördination between federal and state legislation in the sense of the most effective coöperation between the two is a far-reaching one, which would have to be examined for each particular subject-matter of regulation on the basis of its constitutional and administrative possibilities.

§40. SEVERABILITY CLAUSES.[18] 1. A judicial decision declaring a provision of a statute unconstitutional does not necessarily affect other

[18] See *Proceedings of National Conference of Commissioners on Uniform State Laws*, 1928, p. 145.

provisions of the same statute. Whether or not it does, depends upon the severability of the invalid provision, and the question of severability will present itself to the court as one of construction, often involving considerable difficulty.

In view of this, it has become a legislative practice to declare in a statute that its provisions are intended to be severable. A conservative form of such a declaration (repeatedly used in Illinois) is to the effect that "the invalidity of any portion of this act shall in no way affect the validity of any other portion thereof which can be given effect without such invalid part."

A more emphatic form is the following (found in the National Prohibition Act): "If any provision of this act shall be held invalid, it shall not be construed to invalidate other provisions of the act."

Similar provisions, likewise leaving out any reference to inherent separability, are found in the Federal Reserve Act of 1913, the Migratory Bird Act, the Espionage Act, the Farm Loan Act, the Intermediate Credit Act, the Grain Standards Act, the Bills of Lading Act, the Tariff Act of 1922, and doubtless many others.

Some statutes add a declaration to this effect: "The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause, and phrase thereof irrespective of the fact that any one or more other sections, subsections, sentences, clauses, or phrases be declared unconstitutional" (California Securities Act; Illinois Real Estate Salesmen License Act); section 28 of the Kansas Industrial Court Act speaks of a conclusive presumption that the legislature would have passed the act without the invalid provision.

The conservative form of declaration first quoted seems superfluous since it merely expresses established doctrine, while the emphatic form may be ineffective, since the legislature cannot impose upon the court an unworkable rule of construction. As the Supreme Court said in *Dorchy* v. *Kansas,* 264 U.S. 286, 1923: "Section 28 of the act provides a rule of construction which may sometimes aid in determining that intent. But it is in aid merely, not an inexorable demand." The Kansas law provided for compulsory arbitration, and penalized provocation to a strike. The arbitration provision having been held invalid, the Kansas court, in view of the separability provision, held that the prohibition of the provocation to strike should stand (*State* v. *Howat.*

116 Kan. 412, 1924). If this shows the possible effectiveness of the clause, it also shows its possible undesirability.

The declaration may also be manifestly contrary to any sensible legislative intent: if an act specifically repeals an earlier act covering the same subject, and the vital provisions of the new act prove to be unconstitutional, should the repeal, which of course is severable as a matter of logic, stand? Clearly not. The declaration is perfunctory, and its precise implications are not likely to be scrutinized.

2. A particular provision, moreover, may be unconstitutional only in one of its aspects or applications, and in that case, the severability of application may present a problem even more difficult than the severability of the entire provision from the rest of the statute.

The Supreme Court of the United States has laid it down as a rule of construction, that where the valid and invalid are covered by the same words, the Court will not sever and uphold the valid. Particularly, if an act of Congress is in terms generally applicable, but can have validity only as applied to interstate and foreign commerce, it will be invalid in its entirety (*United States* v. *Reese,* 92 U.S. 214, 1876; *Trade-mark Cases,* 100 U.S. 82, 1879; *First Employer's Liability Case,* 207 U.S. 463, 1908).[19]

It is apparently this rule of construction which is sought to be met and overturned by the following provision, found in a number of acts of Congress: "If any provision of this act, *or the application thereof to any person or circumstances* is held invalid, the validity of the remainder of the act, *and of the application of such provision to other persons or circumstances,* shall not be affected thereby" (section 11 of Future Trading Act, 1921; see *Hill* v. *Wallace,* 259 U.S. 44, 1922; also Shipping Board Act, 1916, Grain Futures Act, 1922, Naval Stores Act, Air Commerce Act, Railway Labor Act, Tariff Act of 1930, and probably many others).

Such a clause, if given effect, might have turned the decisions before cited the other way, and might induce a court to give prospective, while refusing retrospective, application to a statute (*Blodgett* v. *Holden,* 275 U.S. 142, 1927). Where the rule of construction of the

[19] The separation is, however, made where a state tax is invalid to the extent of being a burden upon interstate commerce. *Ratterman* v. *Western Union Tel. Co.,* 127 U.S. 411, 1888.

Supreme Court is not as rigorously applied, the clause would be of limited value, and it does not appear to be common in state legislation.

Severance of application is a difficult and delicate matter: it is easy for a court to relieve from the operation of an act special or limited classes of cases, persons, or transactions which are not specifically excepted and cannot under the constitution be included, as, e.g., interstate commerce transactions in state statutes; and a positive rule to that effect is not required; but, notwithstanding the clause, it is very unlikely that the court will limit the application of the act to exceptional categories of persons or transactions that might be constitutionally covered, and relieve from the operation of the act the bulk of cases which the legislature intended, but under the constitution was powerless, to cover.

Severability clauses, it must be concluded, are of doubtful value; they illustrate the difficulty which a legislature finds in meddling with declaratory law.

PART III
PHRASEOLOGY AND TERMS

PRELIMINARY NOTE

The treatises that deal with the language of statutes are written for lawyers, and are therefore mainly concerned with the question what meaning will be given to words by courts, and particularly by courts of last resort. That is also the concern of the draftsman, but it is not his only concern. Legitimately, perhaps, his first concern is to find words that will prove acceptable to the legislature. The legislature itself must bear in mind the various classes of persons to whom the statute is addressed. They may respond with different interpretations, and the question is whose interpretation will count for most in determining the practical effectiveness of the law. The prospective construction by the Supreme Court will weigh relatively lightly in the balance, if administrative leniency, or the unwillingness of juries to convict, will prevent cases from reaching the court of last resort. The last interpretation is legally controlling, but the first interpretation often determines failure. Legislative language is a matter of "behaviorism" as much as a matter of logic.

CHAPTER VII

THE LANGUAGE OF LEGISLATION

A. LEGISLATIVE AND POLITICAL LANGUAGE

§41. American Political Documents. It is not proposed to draw a sharp line between legal and political documents in general. All law is political as compared with non-legal rules; and legislation is political as compared with judge-made law. Political action, on the other hand, like social action, may be either legal or non-legal, or a mixture of both; and while it may be futile to make the distinction in every case, it is instructive to note how the sense of the difference manifests itself in phraseology, and how different forms shade into one another.

Of great American political documents, Washington's Farewell Address is entirely without legal significance, whereas President Monroe's message outlining America's policy in the western hemisphere is generally accepted as a relevant factor in international law although it avoids the language of law. The Declaration of Independence is politically phrased, but the sentence "that these United Colonies are, and of right ought to be, free and independent states" makes it a legal act, though a legal act of a revolutionary character, that is to say, lacking a foundation of law, but being in itself the foundation of all American public law, and deriving its retroactive sanction from the eventual success of the Revolution, so that American courts justly date the beginning of independence from the Declaration, and not from the Treaty confirming it.[1]

The legal effect does not prevent the Declaration of Independence from being a document political in style and conception, whereas the Emancipation Proclamation was conceived as a legal act done in the exercise of the war power, and, barring a few solemn phrases, is legally framed; witness, particularly, the careful exemption of the pacified districts, which, in a political document, would have been as un-

[1] *Harcourt* v. *Gaillard*, 12 Wh. 523, 527, 1827.

A revolutionary act becomes a legal act if it is successful. Success may be a matter of time, but the time element when it has operated by thus sanctioning the extra-legal act may be discarded as a constituent factor, differing in this respect from the adverse possession which legalizes an unlawful entry, but only from the expiration of the statutory period.

suitable as a reference in the Declaration of Independence to the peculiar status of the colored race.

§42. British Constitutional Documents. The documents that are landmarks in English constitutional history were until the nineteenth century legal documents using predominantly legal language; the Great Charter of 1215, the Habeas Corpus Act of 1679, the Bill of Rights of 1689, the Act of Settlement of 1700; and for Great Britain alone the legal form has not been abandoned, witness the Parliament Act of 1911. The principle of parliamentary government, resting upon the responsibility of the Cabinet to the House of Commons, has never been formulated in any document.

The relations between Great Britain and the colonies were formerly also defined in legal documents, whether charters or statutes. Thus first the assertion, and then the relinquishment, of the right to tax, was expressed in acts of Parliament (6 Geo. III, c. 12, 1765; 18 Geo. III, c. 12, 1778).

The political document as a vital factor in constitutional relations made its appearance in connection with Canada. The Union Act of 1840 closely adhered in general form to the constitution act of 1791. The profound change in the status of the colony rested upon non-legal instructions and dispatches from the home government to the colonial governor. The following passages, the one taken from Lord John Russell's instructions to Lord Sydenham (1839), the other being the concluding paragraph of another dispatch, are characteristic:

> The importance of maintaining the utmost possible harmony between the policy of the legislature and of the executive government admits of no question; and it will of course be your anxious endeavor to call to your councils and employ in the public service those persons who, by their position and character, have obtained the general confidence and esteem of the inhabitants of the province.

> The governor must only oppose the wishes of the Assembly where the honor of the Crown or the interests of the Empire are deeply concerned; and the Assembly must be ready to modify some of its measures for the sake of harmony, and from a reverent attachment to the authority of Great Britain.

The new autonomy of the Dominions, removing practically every vestige of dependence, has so far[2] found its only authoritative expression in an informal statement issued by the Inter-imperial Relations Committee of the Imperial Conference of 1926, and published as a Command paper (Cd. 2768). The following three passages will show the manner of phrasing; the first, relating to status in general, formulating a political principle, and leaving legal implications undefined; the second, relating to dominion legislation, possessing almost legal definiteness without legal language; the third, relating to judicial appeal, being vague and diplomatic.

Status of Great Britain and Dominions:

Their position and mutual relations may be readily defined. They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

Operation of Dominion Legislation:

On this point we propose that it should be placed on record that, apart from provisions embodied in constitutions or in specific statutes expressly provided for reservation, it is recognized that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion.

Appeals to the Judicial Committee of the Privy Council:

Another matter which we discussed, in which a general constitutional principle was raised, concerned the conditions governing appeals from judgments in the Dominions to the Judicial Committee of the Privy Council. From these discussions it became clear that it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected. It was, however, generally recognised that where changes in the existing system were proposed which, while primarily affecting one part, raised issues in which other

[2] I.e., in the early part of 1931. See note 4, p. 164, and note 7, p. 168.

parts were also concerned, such changes ought only to be carried out after consultation and discussion.

The diplomatic treatment of the question of judicial appeal appears from the reference to consultation and discussion, avoiding the implication of determinative power, and recalls the use of analogous terms in the Covenant of the League of Nations; so, in connection with the undertaking to preserve territorial integrity and political independence against external aggression, the provision that in case of aggression the Council shall advise upon the means by which this obligation shall be fulfilled (art. 10), and the provision of article 19, that the Assembly may from time to time advise the reconsideration by members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

§43. Political Phrasing. What are the characteristics of the political language?

They may be summarized as follows: it is addressed to sentiment and understanding rather than to the sense of reason and logic; it disclaims literalness; it courts "marginal ambiguity" and prefers generalities that leave a loophole of escape; it deliberately avoids the implication of legal right or obligation; it may avoid the element of prospective obligation, being purely declaratory, and operative only *rebus sic stantibus*.

Political phrasing may be the result of inability to obtain agreement to a legal formula. It may also be deliberately preferred in order to avoid verbal controversy, and to place a relation upon the plane of continuing voluntary adjustment with the check of a previous formulated understanding as a substitute for legal phrasing. It cannot operate unless it can count on responsible leaders capable of effective negotiation. This condition being met, it may be a fair question, whether political formulation of a constitutional document is not equal, or in some respects superior, to legal formulation.[3]

[3] The following expresses the views of a British jurist as to a written constitution for the British Empire:

"Too great care, then, cannot be taken in providing that the federal compact shall

With the growing independence of the Dominions, it is very probable that politically worded principles will be progressively replaced by legally formulated provisions. See the account of the 1929 Conference on Dominion Legislation and Merchant Shipping Laws in 24 *American Political Science Review* 978–989. At the Imperial Conference of 1930, Prime Minister MacDonald is reported as having spoken of "applying and putting a definite content into the various phrases and declarations made by our predecessors in 1926 relating to the constitution and political relationship of the various Dominions." (*London Weekly Times,* November 13, 1930, p. 604.)[4]

In any event, the language of political documents reflects the conviction that political purposes may be served by fictions, or by half-

not be a legal document, subject to forensic interpretation and forensic dispute. On the contrary, it must be a diplomatic instrument, resting for its sanction on the common conviction of the whole people, and subject as regards disputed details to the give and take of diplomacy, and not to the special pleading and chicanery of courts of law. It follows as a corollary that no federal tribunal ought to exist. Logically, it is quite impossible to justify the existence of federal tribunals as impartial mediators between the local and the central authorities. If the local courts are too local, then by exact parity of reasoning, the federal courts are too central. If a supreme court is desired at all, as an institution interposed between the localities and the federation, it should evidently be neither local nor central. And this is impossible. Unless a foreign tribunal is invoked, it is obvious that any court which is not local must have a federal character. Nor is any such supreme common tribunal necessary. Its existence at once swamps the constitution in a sea of logic-chopping, disastrous to statesmanship. We get such phenomena as we observe with respectful astonishment in America, where it is held constitutional to interfere with miners and not with bakers—where it is constitutional to forbid a woman to work and unconstitutional to impose an income tax—where a bale of goods is under one system of law in the warehouse and under another in the shop: in short, such delightful perplexities as arise under our own Food and Drugs Acts and Workmen's Compensation Acts. These puerilities must at all costs be kept out of high politics." Baty, "Federalism," 39 *Law Magazine and Review* 311, 317, 319.

If to a foreign observer the refinements of distinction made in the interpretation of the Federal Constitution of the United States, particularly in the delimitation of state and federal powers in the matter of taxation and commerce, appear in one aspect as "puerile," he fails to realize the peculiar conditions under which the judicial process functions. On the other hand, it should be borne in mind that the British Empire documents of the last one hundred years have been in the nature of acts of surrender of power by the paramount sovereign, and that the recipients of a gift are not likely to scrutinize its terms too closely.

[4] In his Guildhall speech on November 10, 1930, Prime Minister MacDonald said: "1926 saw the declaration of equal status; 1930 is settling what those words mean in terms of legal and administrative changes." *London Daily Times,* November 11, 1930, p. 9.

The change came on December 15, 1931, through a "Statute of Westminster" enacted on that day, giving formal recognition and legal expression to the full legislative autonomy of the Dominions.

truths, or by silence, as well as by the truth. Thus it is not expedient to declare explicitly the status of the chief executive in a responsible cabinet government. Some aspects of law, particularly in its higher reaches, partake of the nature of politics in this respect; and political factors will also have to be considered when we compare legislative and judicial language.

§44. WRITTEN CONSTITUTIONS. The modern written constitution is both a political and a legal document, and in America the legal character is emphasized by the judicial enforceability of most of the provisions. Generally speaking, not only American, but also foreign constitutions, use more legal than political language. It does not disclaim legal obligation, does not court ambiguity, and is meant to be understood literally, although terms of wide implication may be inevitable or may be preferred. In formulating new propositions, the draftsman of an American constitution uses the terms that he would consider appropriate for a legal instrument which will have to undergo judicial construction.

The spirit of historical tradition, however, leads also to the perpetuation of older clauses that are very differently worded. This is particularly true of the guaranty of due process, to which the Fourteenth Amendment has added the equal protection of the laws, otherwise belonging rather to European than to American constitutional language. These terms are intelligible enough with reference to the administration of justice, or to political acts, whether executive or legislative, which disturb its even course. When applied to the regular exercise of legislative power, they are utterly devoid of any definite meaning, and no lawyer skilled in interpretation would have been able to forecast the development that American courts have given to these terms. Due process of law, and the equal protection of the laws, as well as the separation of powers, are political concepts, and it is the undertaking to deal with political language as if it were legal that sets its stamp upon the entire structure of American constitutional law, making it unamenable to the criteria which are applicable to law in general. When Napoleon declared that a constitution should be short and vague, he had a prophetic vision of the Fourteenth Amendment.

The present American usage appears to be to identify "legal" with "judicially enforceable," and to look upon a constitutional provision as political because it cannot be or will not be enforced by the courts. This would place in the same category the federal guaranty of a republican form of government in the states, and a direction in a state constitution to the legislature to reapportion the state every ten years. The terminology of the latter provision, however, is legal, while that of the former is political.

A striking appreciation of the difference between legal and political is found in connection with the French constitutions. The great Declaration of Rights of August, 1789, was incorporated by way of preamble in the constitutions of 1791, 1793, and 1848. The constitutions of 1852 and 1870 provided: "The constitution acknowledges, confirms, and guarantees the great principles proclaimed in 1789 and which form the basis of French public law." These constitutions were not alterable in the way of ordinary legislation. The present constitutional laws of 1875 do not contain either of these declarations. As a French writer puts it, the declaration of 1789 is regarded as a permanent heritage of the French people. (Esmein, *Droit Constitutionnel,* 1896, pp. 363–390.) Its status is now analogous to our Declaration of Independence.

§45. POLITICAL EXPRESSIONS ON THE PART OF THE LEGISLATURE. Even though a constitution be now a predominantly legal instrument, political thought and political forms of expression are not regarded as out of place in it. When a legislature acts politically, it ordinarily speaks through a resolution, a mode of expression serving this purpose among others, in accordance with parliamentary usage which varies somewhat in different states. A resolution is the form in which a constitutional amendment is proposed, and Congress has used it in declaring war and annexing territory.

There is, however, nothing rigid about the practice, and so loose a form of legislation as a rider to an appropriation act was used to define the relations of the United States to Cuba (so-called Platt Amendment, March 2, 1901, 31 St. L. 897).

In Canada the Legislative Assembly in 1840 formulated its under-

standing of the new responsible government in a set of resolutions, voted in response to the Union Act, the resolution thus serving the function of a constitutional document. The phraseology used was distinctly political: "constitutional influence over executive departments"; advisers to be "men possessed of the confidence of the representatives of the people"; imperial authority to be exercised "in the manner most consistent with the well understood wishes and interests of the people."[5]

In England the way for important acts of Parliament has been occasionally paved by resolutions stating their main provisions in a form believed to be suitable for debate; thus the Electoral Reform Bill of 1867, and the British North America Act of the same year. In 1917 Lord Milner proposed the same procedure for an imperial constitution (*London Weekly Times,* January 5, 1917). It is of interest to compare Lord Hugh Cecil's suggestion for the solution of the Irish problem in 1920 (*London Daily Times,* May 17, 1920, p. 10). In proposing a constituent assembly to formulate a bill, he added: "It is of the essence of my scheme that the Assembly should be required to formulate their plans as a bill; for plans which are simply stated in the form of propositions or resolutions often avoid without solving the real difficulties of the problem." This very neatly states the difference between legal and political. It remains true, however, that in politics the avoidance of a problem is often for the time being its only possible solution.[6]

A not uncommon form of introducing a political thought into legislation is the preamble. Formerly it used to be prefixed to English statutes almost as a matter of course, reciting in an unconvincing manner the evils to be cured. One of the last instances of the perfunctory preamble is found in the Married Women's Act of 1882. It is now apparently used only for definite purposes and sparingly. It is well suited to indicate in connection with a political measure, that the act which it introduces is part of a larger program; so in the Parlia-

[5] See IV *University of Chicago Decennial Publications* 270.

[6] In Germany, where bills are generally drafted by the government, it is or was a not uncommon practice for the Reichstag to request, by resolution, that the government prepare a bill in accordance with principles set forth in the resolution.

See also Holland, "The Process of Legislation," 11 *Law Magazine and Review* (4th series) 213, 228, 1886.

ment Act of 1911 and in the Government of India Act of 1919; in the latter it rises to a declaration of considerable dignity.[7]

In lieu of using a preamble, it is more customary in American legislation to incorporate a political declaration into the text of a statute. One of the most conspicuous illustrations is the pledge in favor of bimetallism, in the act of November 1, 1893 (now 31 U.S.C. 311), reinforced by a corresponding declaration in an act of March 14, 1900 (31 U.S.C. 313). A more guarded declaration in favor of a privately owned merchant marine is found in the Shipping Act of 1920 (46 U.S.C. 861). In state legislation the declaration of policy has been used to justify coöperative marketing acts, perhaps in view of the decision of the Supreme Court declaring the exemption of farmers from an anti-trust law to be unconstitutional (*Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 1902); so in the act of Illinois of June 21, 1923, §§1 and 5.[8]

Twice in the history of legislation we find declarations intended to meet conscientious objections to a legislative policy: the last section of the act 21 James I, c. 17, fixing a rate of interest, which provided that no words should be construed or expounded to allow the practice of usury in point of religion or conscience; and article 1588 of the German Code which in connection with the establishment of com-

[7] See 9 and 10 Geo. V, c. 101. It is of interest to note, by way of comparison, the omission of the preamble in the Irish Free State (Agreement) Act, 1922 (12 Geo. V, c. 4). The Government of Ireland Act, 1920, now applying only to northern Ireland, likewise lacks a preamble.

The preamble again plays a conspicuous part in the new "Statute of Westminster, 1931." The purpose and effect of the statute being to grant to the Dominions full legislative autonomy, the Crown becomes the sole remaining legal bond of the British Empire. The unity of the Empire thus depends upon uniformity in the devolution of the Crown. This is recognized by the second recital of the Preamble: "and whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the Throne or the Royal Style or Titles shall hereafter require the assent as well of the Parliaments of the Dominions as of the Parliament of the United Kingdom." The placing of this restriction in the preamble, as well as the phrasing: "it would be in accord with . . ." stamps the form of expression as political, although otherwise the language has legal definiteness.

[8] The incorporation of a declaration of policy into the text of a section of a statute is also found in England; see, e.g., Education Act, 1918, §1; Ministry of Health Act, 1919, §3.

pulsory civil marriage declares that ecclesiastical obligations are not touched by the act. In both cases the legal irrelevance of the declaration is undisguised.

On the other hand, the statement in section 6 of the Clayton Anti-Trust Act of October 15, 1914 (15 U.S.C. 17) that the labor of a human being is not a commodity or article of commerce, is open to the objection that it appears to be put forward as something of practical legal value, while it is hardly to be taken more seriously than the declaration in an act of Arkansas (1924, Act 6) that beauty is a property right.[9]

While a political declaration may be judicially considered for purposes of interpretation, its incorporation into a statute cannot make a non-legal proposition legal. As was said with reference to a statement in section 3 of the Grain Futures Act that transactions in grain involving the sale for future delivery are affected with a national public interest, whatever "national public interest" attaches to transactions known as "futures" rests wholly upon fact, and to no extent upon congressional fiat (*C. A. King & Co.* v. *Horton,* 116 Oh. 205, 156 N.E. 124, 1927).

B. LEGISLATIVE AND JUDICIAL LANGUAGE

§46. THE QUESTION OF LITERAL VALIDITY. So far as judicial decisions are accepted as a source of law—whether as strictly binding precedents or not—they present themselves in the familiar form of opinions: the facts of a controversy are stated, and reasons are given for deciding upon the facts for one party or the other. The reasons are stated in discursive or expository language, subject to and influenced by the consciousness that the sovereign authority which the court represents does not stand back of the reasons given, but only of the judgment rendered in the case. This judgment alone is in the form of a command, and if the reasons given support it, it is not fatal that in view of other conceivable facts, a narrower formulation would have

[9] The form of a statute lends itself to statements of any content. If an act declares a song to be a state song, or a flower to be a state flower, or the American language to be the official language of the state, the act is not unconstitutional, nor is it necessary to determine whether in form or substance it is legal, or political, or sentimental, or merely irrelevant.

been more appropriate. The judicial statement of the law has only essential, and not literal, validity.[10]

In a statute, on the other hand, we have a general rule in authentic and categorical form, back of which the sovereign authority stands; and while on its face it must be a rational rule, it need not state in terms its underlying reason or principle, and, as a consequence, its words control its meaning.[11]

In many respects the difference between judge-made and legislative law corresponds to the difference between principle and rule, if we take it to be characteristic of a principle that it falls deliberately short of perfect definiteness, or is subject to qualification, and characteristic of a rule that it at least aims to be definite. Normally in judge-made law the principle is explicit and the rule implicit, while the reverse is normally true of a statute. But a decision may also undertake to state a rule, and a statute may, if the legislature so desires, speak in the language of principle. When a constitution operates with such terms as due process or the equal protection of the law, it uses the language of principle if, indeed, such language should not be described as political rather than legal.

The difference in form between the judicial and the legislative statement of the law is readily understood when we consider the conditions in which each operates. A court has no choice with regard to the legal questions that come before it; it cannot refuse to deal with a legal problem necessarily involved in an issue because it is inoppor-

[10] W. G. Hammond in Appendix N to Lieber's *Hermeneutics*, p. 324 (quoted by Dickinson, *Administrative Justice*, p. 330): "The force of a precedent does not lie in the language of the judge deciding it. It is a commonplace of the bench that the authority of a case lies in the point decided, and not in the language of the judge; that it is the reason and spirit of the cases which form the law; that the law consists in the principles recognized by the cases, and not in the terms employed. No judge hesitates, even while following a precedent, to criticize the language in which it is stated, or to restate, in the form he deems more exact, the principle upon which the former decision rested."

[11] In *Commissioners* v. *Pemsel*, 1891 A.C. 531, 549, Lord Halsbury says: "Whatever the real fact may be, I think a Court of Law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes."

Even obvious errors are not corrected, where correction would mean a penalty or a tax: *U.S.* v. *Ten Cases of Shawls*, 2 Paine 162; *State* v. *Squibb*, 170 Ind. 488, 1908; *State* v. *Traylor*, 100 Miss. 544, 1911; *Re Schilling*, 53 Fed. 81, 1892. See *Hamilton* v. *Rathbone*, 175 U.S. 414, 421, 1899; *London & N. W. R. Co.* v. *Evans*, 1893, 1 Ch. 16, 27.

tune to have it raised or answered at that particular time. But while the substance of the task is irrecusable, the court is under no necessity and, by reason of the compulsion placed upon it, under no inducement, to do more than the case requires; and because decision does not require formulation of the rule, the court refrains from formulating, or if it formulates, does so without committing itself. In choosing the discursive form of statement, it follows the easier path and the path of wisdom and discretion.

Since, on the other hand, the legislature may refuse to deal with a problem that is inopportune, its action, and the extent of its action, is induced by political considerations. In accordance with established traditions, these considerations also compel the formulation of an explicit rule; the oracular and cryptic forms of legislative language not uncommon in early periods of legal history, would not be conformable to the parliamentary usages of a democracy. All modern legislation observes the practice of phrasing rules in explicit terms, although with varying degrees of particularity and precision.

The laying down in explicit terms of even a loosely worded principle may lift it to a status that it might not have in unwritten form. Due process and the equal protection of the laws are recognized as principles of legislation in England and the British Dominions as well as in America, and the British Privy Council passes, or used to pass, on the validity of colonial or dominion legislation. What is it that makes fundamental guaranties judicially enforceable in the United States, and not in the British Empire? The explicit statement of the principle in the written constitution. And in case of a general principle, the fact of articulation counts for more than the particular wording; the guaranty against denial of justice in the constitution of the old German (or Holy Roman) Empire tended to serve the same purpose as the due process guaranty of the Fourteenth Amendment.[12]

§47. QUALIFICATION OF LITERAL VALIDITY; RESTRICTIVE INTERPRETATION. While the proposition that the judicial statement of the law does not claim literal validity, is a simple and obvious one, it is not equally

[12] See Klueber, *Oeffentl. Recht,* 1840, §169, note c. Cramer, *Wetzlarer Nebenstunden,* Part 103, p. 403, 1770.

simple to lay down the corresponding or converse proposition that a statute has literal validity. If a statute uses indefinite terms, it is idle to speak of literalness. Assuming the terms to be reasonably definite, we may leave aside the cases in which obvious error in expression may be corrected by judicial construction.[13] But cognizance must be taken of the fact that an ordinary statute is not self-sufficient or isolated, but must be read together with other statutes and the entire body of the common law.

The consequence may be that a statute has a narrower than its literal meaning, the problem being a constantly recurring one in interpretation. Three conspicuous types may serve as illustrations:

1. Where a statute deals with the contractual relations of private parties, there is always the question whether or not it operates subject to contrary private disposition, unless the nature of the rule (form, capacity, etc.) makes it clear that it is of absolute operation.

In the German Civil Code we find the practice observed of explicitly indicating in connection with any particular subject-matter, what, if any, agreements are null and void as contrary to public policy, the silence of the code thus resolving legitimate doubts in favor of the yielding character of rules, that are generally within the sphere of contractual or proprietary disposition.[14] But English and American statutes are often, or even generally, silent on this point, and it then becomes a question of construction whether or not variability by agreement does not qualify the literal operation of the act.[15]

2. Under a literal construction, a statute would supersede all existing doctrines that would otherwise qualify its words. A law provides that an instrument shall be signed by the party to be bound thereby;

[13] Cases where error was corrected: *Yellow Cab Co.* v. *Industrial Commission*, 315 Ill. 235, 1925; Lewis-Sutherland, *Statutory Construction*, §413.

[14] See articles 476, 482, 492, 533, 540, 544, 619, 624, 637, 671, 701, 716, 723, 749, 762, 1136, 1202, 1229, 1294. Articles 1193 and 1214 are explicit as to the yielding character of the provision.

See *supra*, §2, as to article 103 of the French Code of Commerce.

[15] See Illinois Revised Statutes, Husband and Wife, §8: "Neither husband or wife shall be entitled to recover any compensation for any labor performed or services rendered for the other, whether in the management of property or otherwise."

This seems to be intended as a yielding, not as an absolute rule. A prohibitory statute would have been phrased differently: see, e.g., Mississippi Statutes, §2521: "Husband and wife shall not contract with each other. . . ."

For an express provision excluding contrary agreements, see the Federal Employer's Liability Act, 1908, §5.

may it be signed by his agent? The doubt is increased, if there are other statutes that refer explicitly to signatures by an agent. The problem is one of doctrinal law, which probably must be left to the courts, subject to legislative correction. When an English statute provided that failure to record a deed should invalidate it as against a subsequent purchaser, it was held, by reading the statute subject to an equitable doctrine, that a purchaser with notice was not protected against the unrecorded deed. In view of the fact that a subsequent statute made notice short of fraud irrelevant, as well as upon general considerations of policy, the construction appears doubtful; but it is significant that in America the requirement of good faith or lack of notice has generally been written into the recording acts.[16, 17]

3. It is a closely related question whether the letter of the law should not in appropriate cases be qualified by giving it a restricted scope. It is said that the Rule against Perpetuities, having reference only to the remoteness of vesting, does not (even if strictly construed) prevent the recognition of charitable trusts (Gray, *Rule Against Perpetuities,* §§589–591); but even if we look upon it as a rule against inalienability, we should have no difficulty in restricting its scope to gifts other than charitable. When the rule was made a statutory rule in New York and phrased as a rule against inalienability, it was held, after some hesitation, to have abrogated the law of charitable trusts, which was subsequently reinstated by legislation. Had the opposite view prevailed, it would have been a case of giving the words of a statute a restricted scope.[18]

[16] The so-called "Uniform Acts" which codify branches of the commercial law, incorporate qualifying doctrines of common law and equity by express referential provision. This, indeed, is safer than an attempt to deal directly with all qualifying matter. The Negotiable Instruments Act assumes that a note made by an infant is voidable; if it made full age a requirement of the valid making of a note, it might be contended (in analogy to statutes of wills) that the note of an infant is void, and not merely voidable.

[17] Like other rules of interpretation, that which reads into a statute qualifying doctrines, is of uncertain operation, since it is always open to a court to conclude that the legislature intended literal application. See *The Mostyn,* 1928 A.C. 57, where unqualified words of liability in a private act were held to mean absolute liability irrespective of negligence. Compare *River Wear Com.* v. *Adamson,* 1 Q.B.D. 546, 2 App. C. 743, 1877. See also *Ellerman Lines* v. *Murray,* 1931 A.C. 126, particularly the dissenting opinion of Lord Blanesburgh, who speaks of a "pregnant" section that does not carry its full meaning upon its face.

[18] It was a striking application of the doctrine of restricted scope, when the benefit of the Copyright Act of 1710 was confined to British authors (*Jefferys* v. *Boosey,* 4

In the three classes of cases mentioned, the legitimacy of a narrower than the literal meaning is unquestioned, and the necessity of the implication is almost inherent in the limitations of written expression; with this qualification, that it is somewhat doubtful at the present day whether equitable doctrines should be permitted to modify statutory rights.[19]

The striking cases, which are usually cited as examples of restrictive interpretation, are of a different kind: the case of the Contract Labor Law, which prohibited the bringing into the country of persons under contract to perform labor or service of any kind, carefully specifying certain exceptions, which was held by a unanimous court not to exclude from the country a minister of the church (*Holy Trinity Church* v. *U.S.*, 143 U.S. 457, 1892); or the case of a murderer attempting to have the benefit of a succession by reason of the death which his crime had caused. These are doubtful cases, and it is only a minority of courts that believe that the exception can be read into the statute (*Box* v. *Lanier*, 112 Tenn. 393, 1903; *Perry* v. *Strawbridge*, 209 Mo. 621, 1908).[20]

§48. THE QUESTION OF EXTENSIVE INTERPRETATION, AND ANALOGY. Variability by private party disposition, applicability of qualifying doctrines, and restriction of scope, may operate alike in giving the

H.L.C. 815, 1854; compare *Davidson* v. *Hill*, 1901, 2 K.B. 606, giving the benefit of the Fatal Accidents Act to foreigners).

[19] See *Edwards* v. *Edwards*, 1876, 2 Ch. D. 291, 297.

Thus a defective execution of a power of appointment is not aided where the execution is controlled by a statutory provision. *Tomlin* v. *Latter*, 1900, 1. Ch. 442.

The fullest expression in favor of permitting construction to be controlled by equity is found in a note to *Eyston* v. *Studd*, Plowden 465, 1574.

[20] In many cases, restriction is matter of common sense. A statute makes remarriage after divorce before expiration of the time for appeal void; it is held that if the party *entitled* to the appeal remarries before the time expires, he waives the appeal, and the marriage is valid. *Tillinghast* v. *Tillinghast*, 25 Fed. 2d 531, 1928.

It is curious to note in the Roman Twelve Tables (of the fifth century B.C.) the use of clauses apparently intended to meet a supposed peril of literal interpretation; so in the well-known provision permitting the creditors of an insolvent debtor to cut his body to pieces: "if they shall have cut more or less, it shall be without prejudice (*se fraude esto*)"; again, in the provision forbidding the disposal of dead bodies with the addition of gold: "but if teeth are joined with gold, and they shall bury or cremate him with it, it shall be without prejudice." In view of the lapidary style of the Twelve Tables these saving clauses are doubly significant.

words of a statute a more restricted than the literal meaning. Can a statute also be expanded beyond the meaning of its words? In this direction the principle of literalness has a stronger operation. Since a common law rule professes to derive its validity from the application of a principle, it is legitimate to carry the principle to other applications, thus making analogy a means of developing the common law. If a code claims to be self-sufficient, it is likewise forced to recognize analogy as a method of covering novel contingencies.[21] On the other hand, it is a recognized principle that a statute is not extended by analogy. It operates literally as against any attempt to make it cover cases not within the fair meaning of its terms. In this respect the rule of strict construction applies to other than penal statutes.[22]

Statutes occasionally provide that they are to be liberally construed, but it would be interesting to know whether any English or American statute provides that it may be extended by analogy. Express reference to another statute for analogous *application* is of course another matter. The German law of descent covers remoter degrees of descent by a summary clause involving the use of analogy (art. 1929). It falls just short of providing for extension by analogy; but even so the phrasing is exceptional in substituting implication for explicitness.

If a statutory benefit is such that it is to operate only selectively, it is hardly conceivable that the selection should be intended to be other than systematic. The principle of selection ought to be capable of being expressed in some appropriate formula. The invariable practice

[21] The German Civil Code does not expressly refer to analogy, the framers of the code considering this as superfluous (Motive I, p. 14). The Swiss Code (art. I) likewise does not mention analogy, but refers the judge, in the absence of an explicit rule, to custom or his own legislative sense, following approved doctrine and tradition—a rule which has been declared applicable to other laws (Decision of Federal Court 192, cited in 1 *Zeitschrift f. ausländ. und internation. Privatrecht* 339). In effect, this permits extension by analogy.

[22] The English Act of 1907 permitting a man to marry his deceased wife's sister was not applicable by analogy to the marriage of a deceased brother's widow. This required a separate act (1921).

2 U.S.C. 201–226 applies to contested elections for representative in Congress. Is it applicable to contested elections for senator?

See *Re Lowe*, 1929, 2 Ch. 210—a case of great hardship. The Court says: "I regret to say I have no doubt as to the conclusion I should come to in this case." See §110, *infra*.

See Roscoe Pound, "Spurious Interpretation," 7 *Columbia Law Review* 379; also Th. F. T. Plucknett, *Statutes and Their Interpretation in the First Half of the Fourteenth Century*, 1922.

is, however, to enumerate categories. A careful study of the categories will disclose the underlying principle; but great circumspection in drafting is required to guard against omissions. Why, then, is not recourse had to the safer and more convenient method of stating a formula by which the categories can be worked out? The problem is similar to that presented to a testator who desires to distribute fairly in view of possible contingencies. The method of the formula, or of reference to analogy, is contrary to professional tradition, although the complexity of explicit provisions will make it impossible for the testator to discover unintended omissions. Perhaps it is only the same professional conservatism which prevents a liberality of phrasing which is regarded as appropriate in instructions to a draftsman, and relied upon to give him adequate guidance.

Occasionally a court has found it possible to cure a defective elaboration of a scheme by liberal construction; so in the case of *Sturchler* v. *Sutherland,* 23 Fed. 2d 414, 1928, reversing the lower court 19 Fed. 2d 999. But as the decision of the lower court shows, such liberality cannot be relied upon.

Whether and how the analogy or formula method would work, would be capable of being determined only from case to case; but it is unwarranted to infer from its non-use that it would work in no case.

The prospect of literal construction is an important factor in legislative drafting. It must be doubted whether the principle can be held to be responsible for redundancy of language, which is due to excess of caution rather than to legitimate apprehension. On the other hand, the preference of negative to positive language is clearly justified by the smaller range of commitment that is implied in the former. The judicial statement of a rule in whatever form does not preclude necessary exceptions; in a legislative statement the negative form will automatically leave room for them.[23]

§49. RULES AND ORDERS. A rule, phrased in abstract terms, must on its face indicate that the general type of conditions set forth may be subjected, as a matter of general experience, to the provisions of the

[23] See §55, 5, *infra.*

rule; an order on the other hand if unaccompanied by reasons, may be colorless and neutral in this respect. A rule of a public board, requiring contractors to employ union labor has been held invalid (*Adams* v. *Brenan,* 177 Ill. 194, 1898); even a constant practice, followed from case to case, and within the limits of lawful discretion, of awarding contracts to contractors employing union labor, would be unassailable. As a consequence, a general rule laying special assessments on the basis of frontage may be held invalid, while an assessment similarly imposed with regard to a particular improvement may be sustained in deference to the exercise of the legislative judgment under the special circumstances (*Wight* v. *Davison,* 181 U.S. 371, 1901); compare in this respect *Johnson* v. *Rudolph,* 16 Fed. 2d 525, 1926, with *Connor* v. *Board Com. Logan Co.,* 12 Fed. 2d 789, 1926.

On the other hand, a general rule needs to be reasonable only as tested by the type of conditions to which it applies, and not as tested by each case that it covers. Uniformity of disposition, which is of the essence of generality, must ignore differences of individual equities. There is in this respect no difference between declaratory and regulative rules. The regulative rule is based upon the equity of the average case, and, for the sake of certain and uniform operation, is content to impose inequity upon the exceptional case. The declaratory rule stops the differentiation of type situations at a point which it regards as the limit of the practicable for legislative purposes. If, in either case, marginal ambiguity leaves room for construction, the construction will be based upon equities which the formulated rule has not explicitly taken care of; if, on the other hand, there is no marginal ambiguity, i.e., no room for construction, a rule may be applied though it works hardship in a particular case.

The hardship which an order, merely giving effect to a rule, may possibly inflict, is not legal injustice. A law operating with delegated powers may, however, be so phrased as to permit only orders which are reasonable as tested by each case, as where a railroad commission may, by orders issued in particular cases, enforce "reasonable" rates. In that event, the rate fixed for a particular road must be reasonable with reference to normal criteria applicable to its circumstances (economical financing and efficient management). But not only need the order not use language which on its face can be recognized as reason-

able (it must not of course, on the other hand, use language which on its face can be recognized as unreasonable), but it must not speak in merely generic terms, such as may be appropriate to a general rule. To issue an order to a carrier to the effect that he must charge a reasonable rate and no more, is to leave him just where he would be if no order had been issued. The legislative intent, in permitting an individual order, must have been to have commands sufficiently specific that disobedience can be punished without undue difficulty (see Henderson, *Federal Trade Commission,* pp. 72–77).

§50. NOTE ON INTERPRETATION (Extracts from an article by the author on the "Interpretation of Statutes," 65 *University of Pennsylvania Law Review* 207–231. They expand to some extent the foregoing observations).

Legislative interpretation. Continental jurists recognize the possibility of authentic interpretations by which the legislator declares the true meaning of a law by which courts are to be guided.[24] Such authentic interpretation has retroactive force (as a judicial interpretation has), and this was expressly declared in the original draft of the French Civil Code. It may be argued that so long as interpretation is made in good faith, its inevitable retroactive operation must be legitimate no matter from what source it comes, while, on the other hand, an abusive exercise of the power of interpretation is none the less unjust in its retroactive effect because it proceeds from a court. It is, however, acknowledged by continental jurists that, the power of authentic interpretation once recognized, its validity cannot depend upon the good faith of its exercise, and that retroactive legislation under the guise of authentic interpretation is valid simply because the sovereign power to legislate retroactively cannot be questioned. But all the arguments against retroactive legislation count in consequence against the power of authentic interpretation, which is in theory admissible only as an emergency power, and the practical examples of which are rare indeed. The French Act of June 21, 1843, on the form of notarial acts, referred to as an instance of authentic interpretation by French writers, was in the nature of a validating act, such as American legislative practice recognizes.[25] The real and permanent objection to authentic legislative interpretation is that interpretation is an incident to the application of the law, and that the judicial application of the laws should be independent. The

[24] Savigny, *System,* §32; Unger, *Austrian Private Law,* §14; Dernburg, *Prussian Private Law,* §17; Dernburg, *German Civil Law,* §6; Aubry and Rau, *Droit Français,* I, §30.

[25] *Goshen* v. *Stonington,* 4 Conn. 121, 1882.

universal recognition of the independence of the judiciary as essential to government by law, therefore, condemns the practice of legislative interpretation, and as a matter of fact it is exercised only in very exceptional cases.[26]

In the history of the English law explanatory acts are not unknown, so the Act of 1542 explaining the Statute of Wills of 1540, and the provisions in the Statute of Frauds and in the perpetuating Act of 1685, explaining the Intestate Estates Act of 1670; but modern-Anglo-American jurisprudence is opposed to legislative interpretation with retroactive effect. A legislative act declaring for the future the meaning of an older act is equivalent to an amendment of that act, and any interpretative act will be construed in this way, so the act of Congress of February 26, 1845,[27] passed to counteract the decision in *Cary* v. *Curtis*.[28] Pennsylvania declares a prospective legislative direction to construe a statute in a certain way to be an unauthorized exercise of judicial power by the legislature,[29] and while this is an extreme and untenable position, the decision is characteristic as an expression of the sentiment that even prospective legislation should not take the form of authentic interpretation, and that interpretation is an exclusively judicial function.

Executive and administrative interpretation. Where a statute depends for its execution and enforcement upon administrative action, executive interpretation is an important factor. For, although ultimate judicial interpretation may be independent, yet much of statutory execution never goes through the courts, and in the enforcement of criminal statutes a lenient attitude of law-enforcing authorities must as a rule be conclusive. German and French legislation is overlaid by executive instruction to an extent unknown in England and America, but even in our jurisprudence the opinions of law officers advising executive departments in many cases practically determine the operation of statutes.

But this is true only of public or criminal legislation. Generally speaking, private law operates without executive intervention. Instructions to courts were not unknown even in England at a time when governmental functions were not clearly differentiated, and some early English legislation (e.g., the statute *Circumspecte agatis*),[30] appears in the form of a royal instruction to justices. But in every modern constitutional govern-

[26] The latest instance of French authentic interpretation is the Act of April 13, 1908, reversing the judicial interpretation of the act regarding the separation of church and state of December 9, 1905; as to this, see Gaston Jeze in *Jahrbuch f. Oeffentl. Recht,* 1910, pp. 495–497.

[27] 5 Stat. L. 727.

[28] 3 How. 235, 1845. See *Arnson* v. *Murphy,* 109 U.S. 238, 1883, and *De Lima* v. *Bidwell,* 182 U.S. 1, pp. 174–180, 1901.

[29] *Titusville Ironworks* v. *Keystone Oil Co.,* 122 Pa. 627, 1888.

[30] 13 Ed. I, st. 4.

ment the principle of the independence of the judiciary forbids the intimation of any executive direction, and courts are subject to the departments of justice merely with reference to the purely administrative or executive side of their business. Executive interpretation may, therefore, be said to play no part whatever in the operation of private law.

Interpretation a question of law. The question of the interpretation of a statute is considered to be a question of law and not a question of fact. Even in a will, which is the act of an individual, it must often happen that actual intent is not predicable; still more commonly must this be true of a statute which is the act of two concurring bodies, each composed of many minds.[31] Were the legislator an individual, his intent would not be ascertainable by direct examination, as this is constitutionally inadmissible, and the practice of courts justly excludes resort to debates, the effect of which upon the final vote must be matter of speculation,[32] or even resort to the legislative history of one house, the proceedings of which are not necessarily known to the other house.[33]

The legislative intent by which the language of a statute is permitted to be controlled, is an inference from facts and conditions of which a court may take judicial notice as part of the public history of the times or of usages or understandings prevailing when the act was passed; thus in the *Income Tax* cases[34] the debates in the constitutional convention are freely referred to for the purpose of showing the meaning of direct tax and excise, but the subsequent debates in the state conventions and in *The Federalist* are equally referred to, showing that the reference is not for the purpose of proving that the framers of the constitution wanted particular words to be understood in a particular sense, but to prove what the accepted meaning of the words was at the time.

Legal rules of interpretation. While it is a matter of relative indifference and perhaps incapable of strictly logical determination whether we should treat interpretation as a question of law or of fact, it is of the utmost importance to inquire to what extent interpretation is governed by rules of law.

The usual aids to interpretation, notably the context of language and the history of law and legislation, are found in general rules of reason and logic which do not belong exclusively to legal science.

There are other rules of interpretation for which there are no precise

[31] Some questions which are relevant to the validity of a will cannot arise in a statute; so particularly there is nothing corresponding to the reality of the *animus testandi;* questions of seriousness of the transaction, of fraud or duress, may be eliminated, since the constitutional forms of legislative action cannot be drawn in question in these respects.

[32] *U.S.* v. *Wong Kim Ark,* 169 U.S. 649, 699, 1898.

[33] Craies, *Statute Law,* 122; *In Re Cooper,* 143 U.S. 472, 502, 1891.

[34] *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U.S. 429, 562–569, 1895.

parallels outside of the law. It is, thus, generally held, that where a statute is adopted from another state, it is adopted with the construction previously placed on it in that state.

Rules similarly precise and reliable are rare, if we except the ordinary canons applicable to the meaning of certain words (person, singular and plural, male gender) which are now commonly embodied in interpretation acts.

Strict and liberal construction. There are general principles necessarily more vague, which are nevertheless of the utmost value and importance, above all the rule that penal statutes are to be construed strictly, a rule sometimes criticized as inconsistent with the duty of fair interpretation,[35] but in reality not irreconcilable with that duty and practically indispensable.

The principle of strict construction is applied to other than penal statutes, so, to acts imposing taxes and to acts in derogation of the common law. When the English Act permitting the wife or husband of a person charged with certain specified offenses to be called as a witness either for the prosecution or defense and without the consent of the person charged, was construed as making the wife or husband competent but not compellable to testify,[36] the prevailing consideration was that nothing short of an absolutely explicit provision should be allowed to override an ancient common law privilege. But the principle should not apply where the policy of the statute is based upon a profound dissatisfaction with the policy of the common law, and in that case, express clauses superseding the usual principle of construction are now and then introduced.

Statutory rules of interpretation. Rules of interpretation are also fixed by statute, particularly by the general statutory construction acts of many states. The operation of these acts is necessarily qualified. As all statutes are read in connection with each other, every new statute may be presumed to have been enacted with reference to the interpretation or construction act, the application of which to the particular statute rests upon its voluntary acceptance by the legislature in passing the latter act. The interpretation act cannot be imposed by one legislature upon subsequent legislatures of precisely equal power against their will, and the will of a later legislature not to be bound by an interpretation act need not be explicitly expressed, but may be implied from circumstances. The operation of an interpretation act is, therefore, in itself, matter of construction.

Qualified force of rules of interpretation. And the same is true of every other rule or principle of interpretation or construction.[37] There is a sharp

[35] *U.S.* v. *Corbett,* 215 U.S. 233, 242, 1909.

[36] *Leach* v. *Rex,* 1912, A.C. 305.

[37] Even the rule that a statute adopted from another state is adopted with the construction previously put upon it in that state is not of unqualified operation. It does

difference in this respect between wills and statutes. With reference to wills there are yielding and absolute rules of construction; the latter would not yield to an apparent contrary intent of the testator, and the rule of *stare decisis* applies to such rules.[38] But no rule of statutory construction is a binding or absolute rule in that sense, and, except with reference to the same statute, there can be no application of the rule of *stare decisis*. A court of last resort has it always in its power to ignore rules of construction as being contrary to the implied intent of the legislature in a particular case, and from this point of view a question of interpretation is much more like a question of fact than like a question of law. It is this necessary qualification of rules of construction that makes the ordinary case law on statutory construction so unsatisfactory and inconclusive.

Rules of interpretation and judicial precedents and dicta. It is a mistake to treat statutory construction like other branches of the common law, as a body of doctrine to be gathered from particular precedents and judicial utterances; the only proper method of approaching the problem is the inductive one, gathering from the mass of decisions certain tendencies and seeking to determine whether some of these tendencies are strong enough to impose themselves upon courts by reason of inherent fitness and necessity. The rule of strict interpretation of penal statutes will from this point of view appear as a principle of far greater value than the rule that statutes in derogation of the common law should be strictly construed. And most of the current maxims stated in textbooks and judicial decisions are of little value. Modern codes have wisely refrained altogether from formulating general principles of construction.

Principle of literalness. The starting point in questions of construction must always be the principle of literalness, according to which the legislator is presumed to, as in fact he does, choose his words deliberately intending that every word shall have a binding effect.[39] Moreover, unless the statute is a pure statement of principle, its words will never be precisely co-extensive with its reason, for conventional limitations and definitions will take the place of flexible generic terms. If the period of limitations is ten years, a day less will not avail the possessor, and the closeness of the margin on the other side will not save the owner, whatever the particular circumstances may be; and if a will is required to be holograph the fact that a date is printed may be fatal to its validity.

In such a case a liberal construction may possibly aid a very slight defect

not apply where the act adopted is of a common type, variously construed in various states. *Valjago* v. *Carnegie Steel Co.*, 226 Pa. 514, 1910.

[38] *Ayton* v. *Ayton*, 1 Cox Ch. 327, 1787.

[39] *Market Co.* v. *Hoffman*, 101 U.S. 112, 115, 1879. Justice Strong quotes from Bacon's *Abridgement:* "A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."

by stretching or narrowing terms used by the legislator to the utmost, by declaring a departure to be irrelevant, or some particular requirement to be merely directory; thus in a holograph will, a printed date may possibly be ignored, in usury laws making 7 per cent *per annum* the maximum legal interest, a provision for semi-annual payment may be held admissible, and the maxim, *De minimis non curat lex,* may save trivial violations from criminal prosecution; but such relaxations do not amount to the acknowledgment of a principle that precise measures are to be construed as satisfied by substantial approximations, so that cases on the borderline should be judged according to the equities of the particular circumstances, or that a waiver of rights which arise from literal interpretation should be implied in equity. Certainly no such principle is recognized by the prevailing law.

Conceding, however, the principle of literalness, the question will arise how to deal with cases of variance between legislative expression and presumable legislative intent, cases of legislative inadvertence, looseness, or lack of foresight, with defects of expression, of thought, or of provision. Some typical instances will serve to illustrate these defects and the judicial practice with regard to them.

Verbal inaccuracies and defects of expression. An obvious clerical error can be corrected by construction, as, e.g., the reference to a wrong date,[40] or to a wrong chapter or section number of a statute when the intended reference is clear.[41] Certain defects of expression are so common that the judicial power with regard to them has become well established, particularly the word "and" in a disjunctive sense instead of the word "or."[42]

But even such errors may be fatal to a statute imposing a burden or a penalty. Cases may be cited where an obvious inaccuracy has been corrected with the result of sustaining a conviction;[43] but such cases are rare; the power to substitute "or" for "and" in a criminal case has been denied by a federal court,[44] and very striking instances are found of a refusal to give effect to obvious intent as against the faulty wording of a revenue or penal statute where the effect would be to the detriment of private liberty or property.

Thus a provision in an adulteration act "that no person either by his servant or agent, or as the servant or agent of another" shall sell, etc., is not permitted to be corrected by judicial interpretation so as to include a person selling as principal,[45] and where an act punishes the fraudulent

[40] English Postponement of Payments Act, 1914, referring to a proclamation of August 3, which was actually dated August 2.

[41] Lewis-Sutherland, *Statutory Construction,* §412.

[42] The form "and/or" is beginning to be introduced into statutes.

[43] "For every violation of the first *and* second sections of this act"—*People* v. *Sweetser,* 1 Dak. 295, 1876; see also *Haney* v. *State,* 34 Ark. 263, 1879.

[44] *U.S.* v. *Ten Cases of Shawls,* 2 Paine 162, Fed. Cases No. 16448.

[45] *State* v. *Squibb,* 170 Ind. 488, 84 N.E. 969, 1908.

removal of assets by specified officials or other employees of an establishment receiving on deposit the money of such (instead of "of other," or "of any") persons, it is applied in accordance with the obviously unintended narrow scope of its literal terms.[46] The definition of a common towel as one intended or available for common use by more than one person without being laundered after *such* use[47] could be given sense, if "each use" were substituted for "such use," but the statute being penal, it is extremely doubtful whether a court would make this correction. Clerical errors in the final draft of a customs tariff act have been acquiesced in by the Treasury Department, where the effect of the wrong placing of punctuation or parenthesis was to relieve the importer from a duty concededly intended to be imposed.[48] But the correction will be made if it will operate in mitigation of a penal statute, so where the amendment to an act forbidding the carrying of concealed weapons, by striking out too many words from the clause specifying the legitimate purposes, would on literal reading have left the statutory privilege of carrying weapons senseless.[49]

Defects of thought. It may be urged that a liberality of construction similar to that applied to plain verbal errors should be extended to obvious imperfections of thought, particularly such as represent familiar types of mental lapses. The point is controversial in the law of wills. If a testator gives to A for life, and if A die without children, then to B, the inference is almost irresistible that he meant to give to A's children if he should leave any. A mere negative by way of exception may perhaps legitimately support the implication of an opposite positive provision on failure of the excepted contingency, as a preference to the alternative of leaving a situation altogether unprovided for.

There are well-known English and American cases in which the obvious intent of the testator has been permitted to prevail in the absence of an expression of an intent, when according to strict rules of construction intestacy would result. The writer is not acquainted with any similar or analogous case in the construction of statutes (where the equivalent of resulting intestacy would be the continued application of common law rules), and the presumable scarcity of such cases, if any, attests the care which is after all devoted to the drafting of statutes.

Non-literal construction. Courts have not hesitated to supplement or vary the text of a statute where a literal reading would without any apparent reason have contravened settled principles. Several states have undertaken to transform an estate in fee tail into a life estate in the first taker

[46] *State* v. *Traylor,* Miss. 56 So. 521, 1911.
[47] Laws of Virginia, 1916, ch. 278.
[48] *Re Schilling,* 53 Fed. 81, 1892; Craies, *Statute Law,* p. 424.
[49] *Earhart* v. *State,* 67 Miss. 325, 1889.

with a remainder in fee simple to the succeeding tenant in tail. In the statutes the latter is described as the person to whom the estate would on the death of the first donee in tail first pass according to the course of the common law. By construction, the determination of the remainderman is controlled by the statute of descent, and not by the common law, in order to avoid the anomaly of reinstating the rule of primogeniture for that particular case.[50]

Restrictive interpretation. The power of non-literal construction has been chiefly urged for the purpose of reading into a statute unexpressed exceptions demanded by equity or by policy. It seems to have been believed at one time that statutes could be controlled by established doctrines of equity.[51] On this ground exceptions were read into the statute of frauds,[52] and the operation of registration or recording acts was qualified by the equitable doctrine of notice,[53] while in Virginia an early decision applied to the registration act of that state the maxim that equity will not relieve against a statute.[54] The judicial restriction of the statute of frauds has subsequently been criticized, and it has been said that the former judicial practice can no longer be justified now that statutes are enacted with a view to equitable as well as legal doctrines;[55] thus the defective execution of a power of appointment is not aided where the execution is controlled by a statutory provision.[56]

To support an implied exception on the grounds of policy, the policy ought to be one firmly established. The Federal Constitution extends the judicial power of the United States to all suits arising under the laws and constitution of the United States, while the Eleventh Amendment excepts from federal jurisdiction suits brought against a state by the citizen of another state. It was contended that a citizen might sue his own state on a cause arising under the laws and constitution of the United States, as a clear implication from these provisions. But the Supreme Court considered the principle of non-suability of the state so firmly established, that it would not permit its abrogation as a mere matter of inference, and an exception was therefore read into the original clause of the constitution.[57]

Perhaps the most striking instance of restrictive interpretation is found in connection with the Contract Labor Law of 1885. The act forbids the bringing into the country of persons under contract to perform labor or

[50] Kales, *Future Interests in Illinois*, §118.

[51] See W. H. Loyd, "The Equity of a Statute," 58 *University of Pennsylvania Law Review* 76.

[52] *Walker* v. *Walker*, 2 Atk. 98, 1740.

[53] *Le Neve* v. *Le Neve*, 1 Amb. 436, 1747.

[54] *Knight* v. *Triplet*, Jefferson (Va.) 71, 1740.

[55] *Edwards* v. *Edwards*, 1876, 2 Ch. D. 291, 297.

[56] *In Re Price*, 1900, 1 Ch. 442.

[57] *Hans* v. *Louisiana*, 134 U.S. 1, 1890.

service of any kind, carefully specifying certain exceptions. By unanimous decision it was held that a minister of the church was not within the spirit of the exclusion act, though not expressly excepted.[58] The decision made much of the power and duty of a court to interpret a statute according to its spirit and not according to its letter; but in view of the fact that the implied exception was in deference neither to an established policy nor to a strong equity it would be most unsafe to rely upon this decision as a precedent, and it is clear that a similar construction would have been impossible if the result would have been to impose a restriction or penalty instead of relieving therefrom.

The question of the judicial power of restrictive interpretation has been particularly discussed in the cases in which an inheritance or devise or dower or the amount of an insurance policy was claimed by one who had by murder caused the death which was the basis of the claim. The doctrine that a devisee is incapacitated by his crime from taking the devise was first propounded in New York,[59] but subsequently the court shifted its ground and declared that while the statute would have its operation in the first instance, the wrong would be corrected in equity by preventing the devisee from retaining the fruits of his crime.[60] Here then the court, after all, finally refused to read an unexpressed exception into a statute in order to carry into effect a theory of natural justice.

The question has since repeatedly come before American courts, and by a very decided preponderance of authority they have declared themselves to be without power to override a plain statutory rule in view of conditions not foreseen or provided for by the legislature.[61] A contrary view is taken in Tennessee,[62] and in Missouri.[63] In the latter case the power of restrictive interpretation, the judicial power to control the letter of the statute by the spirit of the law, is claimed very emphatically, but the decision merely serves to place in strong relief the general unwillingness of courts to assume a similar responsibility. Obviously, the controlling difference between this class of cases and the Trinity Church case[64] is that in the latter the effect of liberal construction was purely relieving and beneficial, while in the inheritance cases it would be to impose a forfeiture.

[58] *Holy Trinity Church* v. *U.S.*, 143 U.S. 457, 1892.

[59] *Riggs* v. *Palmer*, 115 N.Y. 506, 1889.

[60] *Ellerson* v. *Westcott*, 148 N.Y. 149, 1896.

[61] *Bruns* v. *Cope*, 182 Ind. 289, 1914; *Kuhn* v. *Kuhn*, 125 Iowa 449, 1904; *McAllister* v. *Fair*, 72 Kans. 533, 1906; *Shellenberger* v. *Ransom*, 41 Nebr. 631, 1894; changing 31 Nebr. 61; *Owens* v. *Owens*, 100 N.C. 240, 1889; *Deem* v. *Milliken*, 53 Oh. St. 668, 1895; *Carpenter's Estate*, 170 Pa. 203, 1895; *Eversole* v. *Eversole*, 169 Ky. 793, 185 S.W. 487, 1916.

[62] *Box* v. *Lanier*, 112 Tenn. 393, 1903, a case of an insurance policy, not of a statute.

[63] *Perry* v. *Strawbridge*, 209 Mo. 621, 1908.

[64] *Holy Trinity Church* v. *U.S.*, *supra*, note 58.

Extensive interpretation and analogy. Analogy is one of the main pillars of the common law. For it means after all merely that principles recognized in the administration of justice should be carried to their legitimate consequences wherever they are applicable. The rejection of an analogy means either a differentiation in principle (showing that the claim of analogy has no basis), or it stamps the rule of the common law which the court refuses to extend as one based upon authority only, and not on reason or principle.

Analogy may be said to enter into the application of statutes in so far as a statute leaves room for the operation of common law principles. It is true that where a statute extends a relation already subject to common law rules, there is no need to resort to analogy; thus it goes without saying that if a statute introduces adoption, the ordinary rules of the law of parent and child as to custody, services, and support apply, and if copyright or patent are recognized as species of property, they become subject to the law of wills and administration. But a real instance of analogy seems to be furnished where legislation introduces absolute divorce in addition to, or in place of, separation from bed and board; in that case it seems proper to accept by analogy the defences of condonation or recrimination, as has been done by American courts.

A problem closely allied to that of analogy is created by the fact that statutes may change common law relations so radically, that beyond the scope of the express statutory provision the continued application of the common law would be inconsistent with the spirit of the newly created relation. Thus married women's acts have rarely undertaken to deal comprehensively with the relation of husband and wife, as logically affected by making the married woman capable of holding property and contracting; they do not always speak of the relation of the husband to the wife's torts, of the estate by entirety, or other kindred matters. If the courts hold common law rules abrogated by the spirit of the new statute—and it should be observed that authority is much divided upon the point—they do not construe the meaning of the statute, but deal with the common law and with the controversial problem whether rules of the common law disappear where their reason no longer holds (*cessante ratione legis cessat lex ipsa*). On the basis of the altered relation a court may go so far as to eliminate an existing special rule of law, but it can hardly create new obligations not previously existing. Thus it has not been suggested that the new rights of a married woman impose upon her new duties of support, but correlative positive obligations of this kind can only be recognized if created by legislation.

The true problem of analogy may be stated this way: A statute has altered common law principles with reference to one relation; another relation not covered by the terms of the statute involves the same or similar

principles: can the new relation be said to be within the spirit though not within the letter of the statute? The principle of literalness stands in the way, or, to put it in another way, most statutes deal with principles only in the form of rules, and a principle is flexible while a rule is not. The law of prescription is in America common law and expresses a principle with regard to easements analogous to the principle involved in the statute of limitations which applies to corporeal hereditaments; the traditional period of the statute of limitations having been twenty years, such is also the common law period of prescription. If the period of limitation is by statute reduced to fifteen years, the courts correspondingly reduce the time for prescription.[65] But if the period of prescription is fixed by statute, as it is in England (1832), it does not alter automatically by a reduction of the period of the statute of limitations from twenty to twelve.[66]

It would probably be accepted as an undisputed proposition of English and American law that statutes are not extended by analogy. A statute of Massachusetts provides for the apportionment of income between a tenant for life and a remainderman;[67] the courts will not extend this rule so as to apportion between personal representatives and heirs—a relation closely analogous.[68] Courts would take the position that such extension was not interpretation but judicial legislation. Where extensive interpretation has been undertaken, it has taken the form of stretching the meaning of words. The Twelve Tables gave a cause of action for cutting down trees; this was interpreted as including vines: extensive interpretation, to be sure, but not application of a statute by analogy, which implies a much greater attitude of independence toward the written law than would have been thought possible in the early stages of the Roman Law. A Nebraska statute avoids testamentary gifts to subscribing witnesses (thereby saving the will); this was interpreted as meaning attesting witnesses, thus extending the application of the statute to nuncupative wills.[69] Some courts have accomplished the more difficult feat, in the same type of statute, of including under the term witness the husband or wife of the witness by reason of the unity of interest,[70] but other American courts have justly declared this to be impossible,[71] and the object was attained by an amendment of the statutes in question. When in Illinois the courts extended the absolute right of the widow to share in her deceased husband's estate beyond the terms of the statute, they relied less upon the construction of a particular statute

[65] *Tracy* v. *Atherton*, 36 Vt. 503, 1864.

[66] English act of 1874.

[67] Rev. L., ch. 141, §§24, 25 (Gen. L., ch. 197, §§26, 27).

[68] *Dexter* v. *Phillips*, 121 Mass. 178, 1876.

[69] *Godfrey* v. *Smith*, 73 Neb. 756, 1905.

[70] Decisions of Maine and New York, see *Winslow* v. *Kimball*, 25 Me. 493, 1846; *Jackson* v. *Woods*, 1 Johns. Cas. 163, 1709.

[71] *Sullivan* v. *Sullivan*, 106 Mass. 474, 1871; *Fisher* v. *Spence*, 150 Ill. 253, 1894.

than upon "a sort of common law" that had grown up in the state in harmony with an entire course of legislation.[72] It is characteristic that leading English and American treatises on statutory construction do not even refer in their indices to the term "analogy," and the few cases in which the terms of a statute have received an extended application beyond their possible literal meaning, are clearly exceptional or anomalous;[73] there is no doctrine in this respect comparable to the doctrine that implied exceptions may be made from a statute on the ground of equity or to harmonize it with common law principles. If certain old English statutes have been extended beyond their terms in ways which would now be thought impossible, this must be attributed to the fact that statutes at that time were occasionally drawn with great looseness, and the line between royal and legislative power not clearly observed, so that a specific authorization by Parliament served as a warrant for a general alteration of judicial practice.[74]

It has been said that the judge-made rule of law which creates a presumption of death from seven-year absence unaccounted for, can be traced to the establishment of such a presumption for specific cases by statute;[75] but according to common law doctrine this is not an extension of the application of a statute by construction, but a development of common law upon the model of legislation; just as the period of prescription follows the statute of limitations. In an early case indeed the seven-year statute was applied by analogy to persons "within the equity" though not within the strict letter of it.[76] This was true extension by analogy, but the case was almost within the letter of the statute.[77]

In certain cases it might be urged that an analogous extension of statutes is demanded in order to prevent fraud. The type of cases is that a statutory prohibition is circumvented by adopting an equivalent arrangement not covered by the terms of the statute. E.g., the law forbids a married woman to dispose by will of more than one-half of her personal prop-

[72] *Taylor's Will,* 55 Ill. 252, 1870.

[73] See Lewis-Sutherland, *Statutory Construction,* §§587–599.

[74] See Th. F. T. Plucknett, *Statutes and Their Interpretation in the First Half of the Fourteenth Century,* 1922.

[75] 19 Car. II, c. 6; Thayer's *Preliminary Treatise on Evidence,* pp. 319–324.

[76] *Holman* v. *Exton,* Carth. 246, 1692.

[77] The rule that statutes will not be extended by analogy was carried to an extreme and unreasonable length when it was held that an act providing that a child born to testator after the making of his will without providing for such child, should succeed to his intestate portion of his father's estate, could not be applied to the mother, after married women had been enabled to make wills. *Cotheal* v. *Cotheal,* 40 N.Y. 405, 1869. To construe father as meaning parent would have been within the legitimate bounds of judicial power, although the Court denied this. Two judges dissented, and the General Term had reached the opposite conclusion. See also *Roton's Will,* 95 S.C. 118, 78 S.E. 711, 1913 (widow including widower).

erty without her husband's consent;[78] the married woman makes a gift *mortis causa* of substantially all her personal property; this is held not to be within the prohibition of the statute.[79] A general doctrine making fraud upon statutory rights illegal would cover this point, and substantially would in many cases lead to an analogous extension of statutes; but there is no such doctrine known to our law, or in other words, it is considered legitimate to evade, if possible, the effect of a statute, by keeping outside of its terms, although what is done violates its spirit.[80] There is, thus, no question that an inheritance tax statute can be evaded by making gifts though in contemplation of death, if these are not covered explicitly. A considerable part of the art of drafting statutes consists in anticipating attempts at evasion and providing against them by sufficiently comprehensive language.

C. LEGISLATIVE STYLE

§51. VARIATIONS IN DEVELOPMENT. The style of legislation is largely controlled by usage and convention, and has varied greatly not only as between different countries, but also in different periods of the history of the same country. No greater contrast could be imagined than between the lapidary and archaic brevity of the laws of the Roman Republic, the cryptic form of the *Senatus Consultum* of the early Empire, and the fulsome rhetoric of the later Imperial constitutions. Rome may have taught the world juristic thinking, but she produced no models of legislative writing.

As regards English statutes, Reeves in his *History of the English Law* (II, 355, 356) remarks upon the looseness of the language of the legislation of Edward I. As long as statutes were written in Latin or in French, they were reasonably concise in expression, and the first acts written in English are not notably different in style. Reeves (IV, 412) undertakes to name the statute 21 Henry VIII, c. 5, as introducing the era of undue prolixity; however, chapter 4 of the same year, which authorizes qualifying executors to exercise powers of sale, is sufficiently involved, and should be compared with the condensed form of the same legislation in America. On the other hand, the obscure phrasing of 1 Richard III, c. 1, relating to uses, may be found reproduced almost verbatim in the Conveyancing Act of Illinois

[78] Massachusetts General Statutes, ch. 108, §9.

[79] *Marshall* v. *Berry*, 13 Allen 43, 1866.

[80] Craies, *Statute Law*, pp. 75–77.

(§2). The habit of extreme verbosity remained practically unchanged for three hundred years; it appears in the "Gin Act" of 1736 (9 Geo. II, c. 23), which was regarded as a model of explicitness; and in the first consolidation act which related to highways (13 Geo. III, c. 78, 1773) the first paragraph, providing for the appointment of surveyors, extends over three pages.

It may serve to explain the excessive length of acts, that parliamentary officials received their chief remuneration in fees chargeable on bills, and each separate function provided for entitled to a separate fee, though contained in one bill (J. K. Spencer, *Municipal Origins,* pp. 77–80). There was, however, also the idea, that the wording of statutes and of other legal documents should be so explicit as to require no adventitious aid to their understanding, so that even punctuation was dispensed with, often resulting in the very obscurity that was sought to be avoided.[81]

A change in style came over English legislation in the middle of the nineteenth century. It began with the adoption of more minute subdivisions whereby each constituent element of the statutory provision was distinctly presented to the eye. Sir Courtenay Ilbert says that the practice of subdividing sections was first introduced by Lord Thring in the Merchant Shipping Act of 1854, and it is interesting to note that Lord Thring states in his treatise on *Practical Legislation,* that the grouping in that act was adopted on the model of the code of New York.[82]

The admirable lucidity of French legislation dates back at least to the sixteenth century, contrasting favorably with the contemporaneous English style. The French style is particularly free from legalism: it may place at the head of an act a declaration political in form to express its general purpose, although perhaps devoid of strict legal

[81] From a parliamentary point of view, involved phraseology has this very serious aspect that it renders effective criticism very difficult, and thus places the legislature almost at the mercy of the draftsman.

As to punctuation, see *Hammock* v. *Loan & Trust Co.,* 105 U.S. 77, 84, 1881; *Seiler* v. *State,* 160 Ind. 605, 624, 1903; *Taylor* v. *Caribou,* 102 Me. 401, 406, 1907.

Chase's *Statutes of Ohio,* 1833, I, Preface, p. 7, states that many of the early laws had been engrossed without punctuation.

[82] This outward difference in form will appear by comparing the Companies' Directors Liability Act of 1890 as it was originally enacted with its present form as section 37 of the Companies Act of 1929.

meaning (section 1 of the Law of July 12, 1875: "Higher education is free," followed by twenty-four specific provisions qualifying that freedom); or it may use a brief inaccurately worded phrase in the confidence that it will not be misunderstood (School Law of March 15, 1850, §54: "There shall not be received in these schools pupils of the two sexes").

The conciseness of the modern German style is already found in the Prussian Code of 1794 and the Austrian Code of 1811. German legislation does not hesitate to employ "visualization" devices or short cuts, such as parenthetical references, which have not found admittance into English and American statutes. The same is true of the use of such more or less discursive expressions as "therefore," "in consequence," etc.

In American legislation a difference may be observed between codes or revisions and other statutes, which goes at least a hundred years back, and which is probably equivalent to the difference between official drafting and private members' or lawyers' drafting. The latter perpetuates in our statute books examples of prolixity almost rivaling the style of older English legislation. A glance at any code will disclose sections of disproportionate length, due to amendments lacking professional draftsmanship. See, e.g., New York Penal Code, §§345, 1425, No. 16, 1742.

The establishment of legislative drafting services has had a marked influence, particularly on the style of acts of Congress; it is only necessary to compare the original form of the Income Tax Act of 1913 with the revised revenue acts of more recent years.[83] Immigration and transportation legislation, on the other hand, show the unwieldy form of earlier years. For examples of the new style observed in acts of Congress, see the Employees Retirement Act, 5 U.S.C. 691–738 and the Employees Compensation Act, 5 U.S.C. 751–793.

Taking a general view of modern legislation, there is a tendency toward assimilation in style. Making allowance for considerable diversity as to what is to be regulated directly or to be delegated for admin-

[83] The Revenue Act of 1928 has explanatory phrases and stylistic expedients not otherwise common to American legislation. Note also the following peculiar provision: Section 2: The cross references in this title to other portions of the title, where the word "see" is used, are made only for convenience, and shall be given no legal effect.

istrative regulation, or to be left unregulated and governed by general principles, and also as to policies to be observed in regulation, the form and language of statutes of a foreign jurisdiction will appear familiar rather than unfamiliar. For illustration reference may be made to the aviation legislation of the years after 1920. The acts of the different countries differ greatly in detail; but barring those features which are influenced by local and constitutional conditions, even a lawyer, reading English, American, French, and German statutes, if they were all in English, might not be able to tell at a glance from which jurisdiction they respectively proceed.

Where there is virtually an official monopoly of legislative initiative, or otherwise an opportunity for unified stylistic control, it is possible to express desirable drafting practices in the form of instructions. The nature of these instructions will preclude their operating as mandatory rules, and American experience with constitutional style requirements should in any event bar any attempt to make validity dependent upon observance of mode of expression. But even if it is intended to frame purely directory instructions, it will be found that these must be confined to a few points readily understood and complied with. In its essence, legislative style must depend upon expert understanding and practice, and cannot be controlled by formulated rules.

Language difficulties may arise from parliamentary deliberations. A controversial bill, however carefully prepared prior to its introduction, is apt to be changed more or less during its course through the legislature, and the fact that amendments must often be hastily prepared in the stress of debate when it is impossible to estimate their precise bearing upon all parts of a complicated measure, may be a source of defects in expression against which it is difficult to guard. The difficulty is increased if amendments are out of order on the final reading of the bill.[84]

In England, the House of Lords serves as a revising body. When the National Insurance Bill came from the House of Commons to the House of Lords, over a hundred "perfecting" amendments had

[84] Standing Order No. 42 of the British House of Commons (1896): "Verbal amendments only can be made to a bill on the Third Reading."

See Resolution of Commissioners on Uniform State Laws, §52, *infra*, p. 200.

been added to it by the government, undoubtedly on the advice of the official draftsman.

The difficulty is somewhat obviated by liberal practices recognized on the continent of Europe.

According to a standard treatise on Swiss Federal Law (Salis II, p. 200), in 1881 the Swiss legislature in connection with the codification of the law of obligations placed in the journal a resolution to the effect that if after the adoption of the act, inaccuracies should appear with regard to points of drafting or form, the Federal Council should be authorized to correct them on its own authority. The author adds the following note: "It seems that the Federal Council adopts this course even without special authorization from the Federal Assembly before as well as after the publication of the law"; and he supports the statement by reference to a case in which the power was exercised.

In Germany, likewise, it is not an uncommon practice to authorize the government to republish, after amending legislation, the entire act in the form which it ought to have as modified by the amendments. The following quotation from an article on the Prussian Water Act of 1913 (a great consolidating measure) shows that here, too, there is a claim of independent authority: "It is of interest that the Act has quite a number of little stylistic variations from the bill as adopted by the Landtag. The Commission of the House had corrected the form of the Government Bill (in certain particulars) but had not carried this through consistently. The necessity of having the act uniform in its expression gives by a rule of unwritten law the government a power of necessary revision in the interest of uniformity" (18 *Deutsche Juristenzeitung* 952).

In Italy it seems to be regarded as more "constitutional" to have details of legislation settled by the government. When it was proposed that the legislature should enact an electoral reform law in all its details, a member of the opposition said in the course of the debate: "If the chamber authorizes the government to fix the terms of the act, there is at least a clear and definite responsibility for the correct performance of this function. Here, however, nobody will be really responsible; not the government, because the chamber has enacted the text of the law; not the chamber which votes for the act as a whole without the possibility of close scrutiny. . . . This innovation upon

our parliamentary usages constitutes a slippery and dangerous precedent; it would be preferable to hold fast to the fifty-year-old custom of leaving the harmonizing of different measures in a single act to the government acting under the usual guaranties." 30 *Archiv f. Oeffentl. Recht* 548. See also Lowell, *Governments and Parties in Europe,* I, 164.

The Spanish Civil Code was enacted by a similar procedure: the legislature, by an act of May 11, 1888, formulated twenty-seven propositions to serve as a basis, and directed the government to draw up a code accordingly. The law provided: "The Government is authorized to publish a civil code under the conditions and on the bases fixed by the present act. The drafting of this body of laws will be entrusted to the code commission, the civil law section of which will formulate the text. . . . The code having been published, the Government will render an account to the Cortes, indicating clearly the points in which it has modified, developed or altered in any respect whatever the text drafted by the commission, and the Code will not come into force or have any effect before the expiration of sixty days from the report of its publication to the Cortes." The code was promulgated July 24, 1889.[85]

§52. Note: Illustrations of Legislative Style

Senatus Consultum Vellejanum, 46 A. D., establishing the rule that women are incapable of entering into a contract of suretyship: "The Consuls Marcus Silanus and Vellejus Tutor having spoken of the obligations of women who bind themselves for others, what should be done about it, it was held on this matter: as regards suretyship and credits for others for whom women intercede, although it appears to have been adjudged before that this shall not be a cause of action or of liability, since it is not equitable that they should assume the functions of men and be involved in such obligations, the Senate is of the opinion that those to whom appeal shall be made at law concerning the matter will do rightly and properly if they see to it that in this matter the will of the Senate is observed."[86] (*Quod Marcus Silanus et Velleus Tutor consules verba fecerunt*

[85] F. S. Roman, *Estudios de Derecho Civil,* pp. 548–553; also C. S. Lobingier, "A Spanish Object-Lesson in Code-Making," 16 *Yale Law Journal* 411.

[86] The Senatus Consultum was always preceded by an address to the Senate (*oratio*), stating the substance of the recommendation; thus, in the rule establishing the inalienability of the ward's real estate, it is this address (*Oratio Severi,* Digest 27, 9: 1, 2) which has come down to us. It is characteristic that in connection with the S. C. Vellejanum only the somewhat cryptic response of the Senate should have been preserved.

de obligationibus feminarum, quae pro aliis reae fierent, quid de ea re fieri oportet, de ea re ita censuere: quod ad fidejussiones et mutui dationes pro aliis, quibus intercesserint feminae, pertinet, tametsi ante videtur ita jus dictum esse, ne eo nomine ab his petitio neve in eas actio detur, cum eas virilibus officis fungi et ejus generis obligationibus obstringi non sit aequum, arbitrari senatum recte atque ordine facturos ad quos de ea re in jure aditum erit, si dederint operam, ut in ea re senatus voluntas servetur. Digest 16, 1: 2, 1.)

Austrian Code, §1349, abrogation of the rule of the S. C. Vellejanum: "Any one, irrespective of sex, who has the free management of his property, may assume the obligations of others."

Codex 7, 25, 530 A. D., abolishing the naked legal title: "Expelling by this decision the farce of ancient subtlety, we will suffer no difference to exist between owners who have the bare title by the law of the Quirites or who have merely beneficial enjoyment, because we desire no distinction of this kind nor the word 'by the law of the Quirites,' because it does not differ from a riddle, nor is it seen or does it appear in reality, but it is an empty and superfluous word, by which the minds of youth, coming to the first law lectures, terrified from the very beginning, receive the useless dispositions of ancient law. But let every one be the fullest and lawful owner of his slave or of other things belonging to him." (*Antiquae subtilitatis ludibrium per hanc decisionem expellentes nullam esse differentiam patimur inter dominos apud quos vel nudum ex jure Quiritum vel tantummodo in bonis reperitur, quia nec hujusmodi esse volumus distinctionem nec ex jure Quiritum nomen, quod nihil aenigmate discrepat nec umquam videtur neque in rebus apparet, sed est vacuum et superfluum verbum, per quod animi juvenum, qui ad primam veniunt legum audientiam, perterriti ex primis eorum cunabilis inutiles legis antiquae dispositiones accipiunt. Sed sit plenissimus et legitimus quisque dominus sive servi sui sive aliarum rerum ad se pertinentium.*)

English statute (1 Rich. III, c. 1, 1483) having a similar purpose: "Every estate, feoffment, gift, release, grant, leases and confirmations of lands, tenements, rents, services, or hereditaments, made or had, or hereafter to be made or had by any person or persons being of full age, of whole mind, at large, and not in duress, to any person or persons; and all recoveries and executions had or made, shall be good and effectual to him to whom it is so made, had or given, and to all other to his use, against the seller, feoffor, donor, or grantor thereof, and against the sellers, feoffors, donors, or grantors, his or their heirs, claiming the same only as heir or heirs to the same sellers, feoffors, donors, or grantors, and every of them, and against

all other having or claiming any title or interest in the same, only to the use of the same seller, feoffor, donor, or grantor, sellers, feoffors, donors, or grantors, or his or their said heirs at the time of the bargain, sale, covenant, gift or grant made; saving to every person or persons such right, title, action, or interest, by reason of any gift in tail thereof made as they ought to have had, if this act had not been made."

This law has been reënacted almost verbatim for Illinois. See Conveyancing Act, §2.

How many lawyers in Illinois understand what it means, assuming it does have a meaning? And may one not suspect that it is its unintelligibility which has kept it in the statute-book?

English statute (21 Henry VIII, c. 4) permitting qualifying executor to act: "Where part of the executors named in any such testament of any such person so making or declaring any such will of any lands, tenements or other hereditaments, to be sold by his executors, after the death of any such testator, do refuse to take upon him or them the administration and charge of the same testament and last will wherein they be so named to be executors, and the residue of the same executors do accept and take upon them the cure and charge of the same testament and last will; that then all bargains and sales of such lands, tenements, or other hereditaments, so willed to be sold by the executors of any such testator, as well heretofore made, as hereafter to be made by him or them, only of the said executors that so doth accept, or that heretofore hath accepted and taken upon him or them any such cure or charge of administration of any such will or testament, shall be as good and as effectual in the law, as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, had joined with him or them in the making of the bargain and sale of such lands, tenements, or other hereditaments so willed to be sold by the executors of any such testator, which heretofore hath made or declared, or that hereafter shall make or declare any such will, of any such lands, tenements, or other hereditaments after his decease, to be sold by his executors."

Illinois Administration Act, §97, having a similar purpose: ". . . And where one or more executors shall fail or refuse to qualify, or depart this life before such sales are made, the survivor or survivors shall have the same power and their sales shall be as good and valid as if they all joined in such sales."

English statutes of the time of Henry VIII. The Statute of Uses of Henry VIII (1535) is marked by similar prolixity of language. Apparently that style commended itself to contemporaries, for this is the com-

ment made in Bacon's *Readings on the Statute of Uses:* "The most perfectly and exactly conceived and penned of any law in the book, induced with the most declaring and persuading preamble, consisting and standing upon the wisest and fittest ordinances, and qualified with the most foreseeing and circumspect savings and provisoes, and lastly, the best pondered in all the words and clauses of it of any statute that I find" (Holdsworth's *History,* IV, 467). Maitland (*Collected Papers,* I, 191) calls the statute a "marvelous monument of legislative futility."

That legislation of the time of Henry VIII could occasionally also indulge in looseness of language which would be impossible today, appears from the Statute of Wills, 1540, which speaks of Last Will and Testament in writing, *or otherwise by any act or acts lawfully executed in his life.* I have not found any explanation of the italicized words in four hundred years of comment upon the act.[87]

German law of the same period (Reichsabschied, 1529, p. 31): "If one dies intestate, and leaves no brother or sister, but children of brothers or sisters in unequal numbers, here the children of brothers or sisters shall inherit by heads and not by stocks, and be thus admitted to succeed to the deceased brother or sister of their fathers or mothers."

French law of the same period (Ordinance of Orleans, 1560): "Guardians and curators of minors shall be held as soon as they have inventoried the property belonging to their wards, to cause to be sold by authority of the court, the perishable personal property, and to invest in rents or land, by the advice of relatives and friends, the moneys derived therefrom as well as those which they find in cash, under penalty of paying in their proper names the profits of such moneys."

French Code Civil: "§2279. In matters of movables, possession is equivalent to title."

German Civil Code: "§929. For the transfer of ownership in a movable thing it is necessary, that the owner deliver the thing to the acquirer and both agree that the title shall pass. . . .

"§932. By an alienation made according to article 929 the acquirer becomes owner even though the thing does not belong to the alienor, unless he is not in good faith at the time that he would acquire ownership. . . ."

Commonwealth of Australia Customs Act (example of "short-cut"): "115. Goods subject to the control of the customs for exportation or re-

[87] Perhaps the following may be suggested: the purpose of the law was to permit the devise of lands; it was apparently not in the mind of the legislator to be rigorous as to form, which at that time was not required by the ecclesiastical law for testaments of personal property. Hence the loosest form of requirement, implying even the dispensing with writing, if "execution" could be conceived of as feasible without it.

moval coastwise shall be shipped either directly at a wharf or after conveyance to the ship in a licensed boat or lighter direct from a wharf.

"Penalty: one hundred pounds."

Often also in this form: "any person who . . . shall be guilty of an offense.

"Penalty: one hundred pounds."

Section 5 briefly explains the meaning of this penalty clause.[88]

Act of Congress, June 18, 1910, §10 (36 St. L. 549): ". . . shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine not exceeding five thousand dollars or imprisonment in the penitentiary for a term not exceeding two years, or both, in the discretion of the court: Provided, that the penalty of imprisonment shall not apply to artificial persons."[89]

For an exceptional concession to non-legal habits of expression in American legislation, see the Safety Rules for Navigation, 33 U.S.C. 61–351: "292: In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. (See also 212, 312, 369).

"341: Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching ship. If the bearing does not appreciably change such risk should be deemed to exist."

A striking example of plain and concise language is furnished by the London Naval Treaty of 1930. Generally speaking, the style of treaties is more businesslike than that of statutes.[89a]

EXAMPLES OF INSTRUCTIONS FOR DRAFTING

The following canons of style are expressed in instructions, which as such have no statutory force; but it is obvious that a general instruction given statutory form can likewise have only directory effect.[90]

[88] This appears to be a general practice in Colonial legislation; see Sir Alison Russell, *Legislative and Other Forms,* 1928, pp. 30, 31.

[89] One may conjecture that this phrasing was chosen to satisfy those who were insistent that "teeth should be put into the law," that the best possible had been done—a bit of humor, rather than a bit of pedantry.

[89a] For illustrations, see Manley O. Hudson, *International Legislation, A Collection of Texts of Multipartite International Instruments of General Interest.* 4 volumes, 1931.

[90] See 1 U.S.C. 24 (R.S. §10): "Each section shall be numbered, and shall contain, as nearly as may be, a single proposition of enactment."

Also, as bearing upon the language of appropriation acts, see 31 U.S.C. 623: "The Bureau of the Budget shall, as nearly as practicable, eliminate from all estimates unnecessary words and make uniform the language commonly used in expressing purposes or conditions of appropriations."

Drafting rules and suggestions of the National Conference of Commissioners on Uniform State Laws (prepared in accordance with resolutions adopted by the Conference at Saratoga in 1917, and amended by the Conference at Cleveland in 1918):

"1. *Title.*—The title of the uniform acts shall be: An act concerning (or relating to) . . . and to make uniform the law with reference thereto.

"2. *Numbering of sections.*—Sections shall be numbered by arabic figures, consecutively or progressively throughout the act. Schedules shall be numbered as sections.

"3. *Length of sections.*—(1) Long sections should be avoided. (2) Each proposition that is separable from other propositions should be placed in a separate section.

"4. *Detaching of clauses.*—Where one section covers a number of contingencies, alternatives, requirements or conditions, it is desirable to break up the section into detached paragraphs or lines distinguished by figures or letters.

"Illustration.—Section 1 of Uniform Negotiable Instruments Act:

"An instrument to be negotiable must conform to the following requirements:

"(1) It must be in writing and signed by the maker and drawer;

"(2) Must contain an unconditional promise or order to pay a sum certain in money;

"(3) Must be payable on demand, or at a fixed or determinable future time;

"(4) Must be payable to order or bearer; and

"(5) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

"5. *Definitions.*—Definitions should be placed at the beginning of the act, not at the end.

"6. *Language.*—a. Present tense: The present tense should be used for descriptive matter, or matter stating a legal effect; the word 'shall' should be reserved for requirements or prohibitions. b. Unnecessary words: The words 'said,' 'such,' 'aforesaid,' 'whatever,' etc., should as far as possible be avoided. c. Provided: The term 'provided that' should be avoided."

Disposition of questions of phraseology. At the Thirty-Seventh Annual Conference of the Commissioners on Uniform State Laws, held at Buffalo in 1927, the following resolution was recommended by the Executive Committee and adopted by the Conference:

"WHERE, in the consideration of a proposed uniform act a point of phraseology is raised, the committee in charge of the act and the objector being agreed as to the purpose to be accomplished, and the suggestion made by the objector is not accepted by the committee, and the objector does not yield, the question may be ordered by the chairman to be referred

for consultation between the committee and the objector and for further report, and if such further report is prevented by adjournment of the conference, for action by the Executive Committee."

Form of bills, German Reich, Gemeinsame Geschaeftsordnung der Reichsministerien (Joint Rules of Business of the Imperial Ministries), 1929:

"a. *Title.* §31. (1) The title of the act is to be as brief as possible. It is sufficient to state in the title the subject by way of caption. Avoid the word 'concerning.'
(2) If a law is altered or repealed, the title of the new law will refer to the old law only by name, omitting date and place of promulgation; in the text of the new law the altered or repealed provisions must be specified by reference to date and page of the official publication.
(3) In case of repeated alteration of a law it is advisable to entitle: 'Second amendment . . .' or 'Second law.' . . .

"d. *Similarity of form; Abbreviations.* Acts are to be divided into sections, subdivisions, and numbers. Larger acts may be separated into Parts, Divisions, Titles, Articles. Abbreviations (s., no.) follow the model of the Civil Code. Earlier laws are cited by full title, and date of promulgation and—in parenthesis—page of publication; date and page may be omitted in case of well known laws (Civil Code; Penal Code).

"e. *Clarity; Language.* §35. (1) Every law is to be written so that the leading thought is prominent, and no complicated inferences are necessary to recognize it. This applies to every particular provision.
(2) References shall, if possible, be avoided. Where they occur, they are to be so phrased that the reader may understand the principal point of the reference without looking it up, as by a parenthetical caption, so: "§. . . (duty to keep book of accounts)."
(3) Amending acts should be intelligible by their own text. In case of many alterations it is advisable either to enact new connected provisions and repeal the old ones, or to have a final provision authorizing the government to republish the law in its altered form and with continuing sequence of sections. Occasionally, the government should ask to be authorized 'to consolidate existing provisions, and to alter so far as necessary in order to unify, clarify, and adapt to changed conditions.'

"§36. (1) The language of the act shall be clear and easily intelligible to the layman. The active is to be preferred to the passive form.
(2) Some assurance of adequacy may be obtained by having the bill examined by the German Language Association, which is entitled only to reimbursement of actual expense, since it is subsidized by the Empire."

For observations concerning the style of the German Civil Code, see Planck's *Treatise,* Berlin, 1903 (Planck was the chief draftsman of the Code) Vol. I, pp. 22–30 (technical treatment of the material) pp. 47–51 (effect of phrasing upon burden of proof).

The conservative view as to innovations in style is well expressed in the following (Paul D. Cravath, in *Some Legal Phases of Corporate Financing,* p. 178): "I doubt not that the modern corporate mortgage and the modern reorganization agreement are needlessly long and needlessly complex, but the genius who has the combination of time, wisdom and experience materially to shorten and simplify, without weakening, them has not yet appeared. How difficult is the task is known to every experienced New York lawyer having occasion to pass upon a mortgage evolved by the wisest country lawyer or even by a leader of the New York Bar who has had the hardihood to discard precedent and attempt to draw a simple railroad mortgage or a simple plan of reorganization. I advise you to adhere to precedent and, in most cases, you will find the long reorganization agreement based on precedent much safer than the agreement half as long drawn by your neighbor who scorns precedent."

However, what is true of contracts is not necessarily true of statutes. A will has a closer analogy to a statute. As to wills, see "Suggestions for Shortening Settlements and Wills," by Sir Howard W. Elphinstone in 32 *Law Quarterly Review* 322, 1916, and 33 *ibid.* 87, 1917.

§53. Constitutional Style Requirements. More than half of the American state constitutions contain requirements relating to the form of statutes, chiefly with reference to title and the form of amending acts, which demand the attention of the draftsman. These provisions have given rise to a very large number of decisions which make up a substantial portion of the law usually contained in treatises and digests dealing with statutes and their construction. So far as the doubts and difficulties which give rise to litigation are easily avoidable, the draftsman is not greatly concerned with the controversial details of these cases. The number of decisions that will cause embarrassment is relatively small, and with reference to these it will be necessary to inquire whether the difficulty arises from the constitutional provision itself or from its judicial interpretation.

1. *Title of the act.* A typical provision is that of the Illinois constitution, art. 4, §13, to the effect that no act shall embrace more than one

subject and that shall be expressed in the title. In some states such a provision applies only to private and local acts; in other states certain kinds of statutes such as general appropriation acts or codifying or revising acts are expressly exempt from the requirement.

The cardinal rule of draftsmanship in view of the constitutional provision is brevity and avoidance of unnecessary matter. (Willard, *Legislative Handbook,* §§13, 14). A title which is more specific than necessary has the double disadvantage that it incurs the risk of not adequately covering some particular provision, and that it may fail to be sufficiently adequate to cover future amendments.

Thus the title, "An Act to regulate and limit the hours of employment of females in any mechanical establishment or factory or laundry in order to safeguard the health of such employees, to provide for its enforcement and a penalty for its violation," aside from superfluous matter contained therein, will manifestly become inadequate if an amending act extends the range of employments, and upon such an amendment it will be necessary also to amend the title of the original act. A brief title, such as "An act relating to the employment of females" would avoid this difficulty, and the addition of the words "in certain occupations" will at least be harmless (see *Shade* v. *Ashgrove Co.,* 93 Kans. 257, 1914).

There is ample precedent for the use of very brief titles of which the following are examples:

"An act relating to crimes and offenses" (sustained in *State* v. *Dickerson,* 139 La. 147, 1916);

"An act to regulate the civil service of cities" (Illinois, March 20, 1895);

"An act concerning corporations" (Illinois, April 18, 1872);

"An act in regard to wills" (Illinois, March 20, 1872);

"An act concerning land titles" (Illinois, May 1, 1897).

Instances could easily be multiplied from other states.

The impression that a reference to penalties in the title is required appears to be due to misapprehension; even in a state like Oklahoma, where titles of great length are customary, such reference has been held to be unnecessary (*Insurance Co.* v. *Welch,* 49 Okla. 643, 1916).

The natural desire to express in a title particular limitations of a general subject-matter with which alone the act proposes to deal will

possibility of extending by amendment the provisions of an act passed originally for the organization of manufacturing corporations so as to make the provisions available for the organization of mercantile corporations (*Eaton* v. *Walker,* 76 Mich. 579, 584, 1889). This should be held unobjectionable if the enlarging purpose is expressed in the title of the amending act and the amending act also changes the title of the original act so as to make it adequate for the enlarged content. The difficulty is avoided if the title to the original act refers to the subject matter in general without specifying restrictions, and the amending act merely lifts restrictions or admits new categories. It is a different question whether an act purporting to be an amending act may provide for matters totally separate and distinct from those dealt with in the original act, though falling under the same general title. Thus "An act concerning marriages" may confine itself to dealing with the form of celebration; is it, then, proper to designate a subsequent act dealing with disabilities to marry or with actions of annulment or with divorce as an amendment of the original act? There are conflicting decisions (see *Erickson* v. *Cass County,* 11 N. Dak. 494, 1903, and *State* v. *Smith,* 35 Minn. 257, 1886), but an independent act in such a case is more appropriate.

3. *Form of amending acts.* The typical constitutional requirement is to the effect that no law shall be amended by reference to its title only, but the section amended shall be inserted at length in the new act. This form of phrasing is somewhat peculiar; the purpose is to do away with amendments by way of adding, striking out, or substituting words or figures merely by reference to the text of the original act, as in the following: "That section 3921 of the Chicago Municipal Code of 1922, as printed, be and the same is hereby amended by striking out the figures '21' as the same appear in the fourth line of said section and by inserting in lieu thereof the figures '18.'" An amendatory act of this type conveys no meaning to one not having at hand the original act into which the new words or sentences are to be fitted. With the original act at hand, on the contrary, the change to be effected appears at a glance, whereas the printing, by way of amendment, of the new section as amended, will give its meaning, but without disclosing the change, which will appear only by a careful com-

parison of the new text with the old. In the volume of Session Laws both forms alike are unilluminating; and in a reprint of the original act as amended, the result will in both cases be the same. The constitutional requirement is therefore of the slightest value; and House rules of the legislature can easily take care of the entire matter.

The Supreme Court of Illinois has in several decisions construed the requirement as meaning that a change in a statute cannot be effected by an independent act, if an amendment is possible. An act of May 11, 1905, undertook to provide for the garnishment or attachment of the salary and wages of certain municipal officers and employees. The court said: "If the effect of the new act is to amend the general statutes of the State upon the subjects of attachment and garnishment by intermingling the provisions of the new act with the provisions of those statutes or by adding to those statutes new provisions, so as to create out of the general statutes heretofore in force upon the subject of attachment and garnishment and the new act a new law for the attachment and garnishment of the salaries and wages of the officers and employees of certain municipal corporations named in the title of the act, then the new act is clearly amendatory of the old statutes upon those subjects and in violation of said constitutional provision" (*Badenoch* v. *Chicago,* 222 Ill. 71, 1906). See also *O'Connell* v. *McClenathan,* 248 Ill. 350, 1911; *Brooks* v. *Hatch,* 261 Ill. 179, 1913. The whole matter is discussed in an article on "Supplemental Acts" in 8 *Illinois Law Review* 507. It is difficult to find the slightest warrant in the constitutional provision for the construction thus placed upon it. The constitutional convention of 1920–22 sought to set the matter clear by altering the provision so as to read that an act *expressly* amending an act shall set forth at length the section or sections as amended, thus leaving acts purporting to be independent entirely unaffected by the constitution; but the constitution failed of adoption. The decisions of the Supreme Court are not consistent with each other; but so long as those before cited stand the draftsman will in many cases have a difficult, if not insoluble, problem, and, from an excess of caution, may be induced to deal with a proposed change of law by way of amendment, where an independent supplemental act would in every way be more desirable. It is true that in the ma-

jority of cases one amended statute is preferable to two statutes supplementing each other; but it does not follow that there should be an absolute requirement on pain of nullity.

4. *Unity of subject.* The constitutional title provisions commonly include the requirement that no act shall embrace more than one subject. Liberally construed the requirement presents little difficulty, for the entire criminal law, or the entire law relating to cities, may constitute one subject. The English Act of 2 George II, c. 28 will illustrate the practice that it was intended to do away with: the binding together of entirely unrelated subjects, for tactical purposes—a practice occasionally indulged in by Congress. In some cases, very narrow views have been taken of what constitutes duplicity (*Sutter* v. *People's Gas Light and Coke Co.*, 284 Ill. 634, 1918; *Campe* v. *Cermak*, 330 Ill. 463, 1928; *Michaels* v. *Hill*, 328 Ill. 11, 1927; *People* v. *Quider*, 183 Mich. 82, 149 N.W. 1, 1914). On the other hand, we find the practice of amending the criminal code by dealing with a number of entirely unrelated offenses (Illinois Laws of 1919, p. 426); and, if certain special phases of some subject are singled out for legislative treatment, the unity of the act may be no more than nominal. In such cases the constitutional limitation or requirement will appear as one of extreme difficulty, as indeed any "unity" limitation must be in the nature of things, if its determination may be left open for some fortuitous collateral attack. Such a limitation is much more appropriate to be dealt with by parliamentary objection and ruling, than by legal or judicial argument.

This is, indeed, true of all constitutional style requirements: however desirable the object they aim to accomplish, they pursue the wrong method if they set up absolute rules that can be tested only after the bill has apparently become a law and gone into operation. It might be suggested that the constitution should provide a method of speedy and conclusive determination; but this would involve additional inquiries in testing the validity of a statute; pains would have to be taken to make the determination easily ascertainable, and this would be apt to result in a cumulation of formal requirements. Barring, perhaps, the enacting clause, the whole matter of style ought to be left to the legislature's own judgment and sense of responsibility,

even at the risk of occasional abuse (which even the constitutional provisions do not prevent); and it is significant that none of the older states, which dispensed with these provisions, have seen fit to introduce them into new constitutions adopted since the beginning of the century.

§54. NOTE: CANONS OF STYLE (part of a Report of a Special Committee on Legislative Drafting of the American Bar Association, made in 1914; see *Annual Report* of the Association for that year, p. 632). A considerable number of valuable hints regarding forms of statutory expression are given by Mr. Willard (for many years clerk of the legislature of Massachusetts) in his *Legislative Handbook*, 1890 (Houghton Mifflin and Company, Boston), now unfortunately out of print; by Lord Thring in his treatise on *Practical Legislation*, reprinted by Little, Brown and Company, in 1902, and by Sir Courtenay Ilbert in his book on *Legislative Methods and Forms*, (Oxford University Press).[91] The following rules are taken from these writers, the source being indicated in each case.

Arrangement and order of material (Ilbert, p. 244). The arrangement of a bill has to be considered both from the parliamentary and from the administrative point of view.

If the bill is a fighting bill the arrangement is of great political importance. The bill should be so framed that the main issues which its proposals raise are disentangled from subordinate issues, are placed in the forefront of the measure, and are arranged in such manner as to facilitate discussion in committee. Where the decision of an issue raised by one clause depends on the decision of an issue raised by another clause, the latter clause must come first. Care should also be taken that one clause does not raise incidentally an issue which can be more conveniently discussed in connection with a later clause. Subordinate matters should be dealt with in later parts of the bill. Matters of detail should be relegated to schedules or left to be provided for by rules.

So far as parliamentary exigencies will admit, the subject-matter of a bill should be arranged with reference to administrative convenience; in other words, its arrangement should be orderly and logical.

(Ilbert, p. 245.) Normal and general provisions should be placed first. Special, exceptional and local provisions should be placed toward the end.

(Ilbert, p. 245.) Temporary and transitional provisions should be placed at the end of the bill, because when they are spent they can be repealed without making gaps in the main body of the act.

[91] See now also Sir Alison Russell, *Legislative and Other Forms*, London, 1928. This book gives forms apparently in use in the British Colonies.

(Ilbert, p. 246.) As a general rule, it is convenient to lay down first the rules of law to be observed, and then to state the authorities by which they are to be administered and the procedure to be followed in administering them.

(Ilbert, p. 247.) Where the rule is to be subject to qualifications, exceptions, or restrictions, these should follow the statement of the rule. But it is often convenient to prefix to the rule words indicating that it is to be so qualified.[92]

Subdivisions (Ilbert, p. 245). The framework of a bill may be made more intelligible by dividing it into parts and by grouping clauses under italic headings. But excessive subdivision should be avoided. As a rule, a bill should not be divided into parts unless the subjects of the parts are so different that they might appropriately be embodied in separate acts. The division of an act into parts may affect its construction by indicating the scheme of arrangement.

(Ilbert, p. 246.) A long and complex clause should be cut up into subsections.

(Ilbert, p. 246.) Reference to another clause of the same bill by its number should, if possible, be avoided. The numbering of the clauses is always liable to be altered at the last moment by the addition, omission, or shifting of clauses, and there is often no time to make the consequential alterations of references.

Length of sections (Willard, §278). It is desirable to cut up the matter of enactment into short sections for several reasons: 1. The person preparing the statute will compel himself to detach and lay out clearly his ideas and finish up one thing at a time. 2. The sense of the statute will be more easily grasped if it is made easy to proceed step by step than if it is seemingly or actually made necessary to assimilate much matter at once. 3. Parts of the statute will be more easily referred to and designated in discussion. 4. The statute can be more easily amended in parts which may need amendment without disturbing other parts or reprinting long paragraphs.

Particular importance of short sections in certain states (Willard, §§279–280). It is particularly important to make the sections short in states where a section of law cannot be amended without reciting the sec-

[92] The special, local, and exceptional are sure to be in the minds of some legislators having particular interests at heart, and therefore the statement of some principle in unqualified form is apt to encounter opposition on the part of those who do not know that an exception is to follow later on. An oral explanation by the person in charge of the bill will not always be able to remove entirely the spirit of distrust or dislike engendered by the first impression. It may therefore be proper, though in a sense redundant, to qualify the general principle at once, by the addition of the words "except as hereinafter provided," or "subject to the qualifications contained in title . . ." (Note of Committee).

tion at length as amended. The states in which the recital of an amended section is constitutionally required are mentioned in another chapter (see §§163–214). In these states if a section covering a page or two pages, or more, is to be amended by changing one word anywhere in the section, the whole section must be given in the new act. It is therefore important in the first preparation of a statute to make sections short, and especially in the case of statutes which it is probable will be much amended.[93]

Illustration. As an example of a statute likely to be much amended, an act fixing the time of holding courts may be mentioned. In an Illinois statute of this character it is not thought necessary that the section should even embody an entire proposition of enactment or contain an entire sentence in itself. Section numbers are assigned to what are, grammatically considered, dependent clauses connected with a leading statement. This subdivision and assignment of a section to each county makes it possible to change the time of holding court in one county by an amendment in proper statutory form without disturbing or reënacting the law as to other counties. A few of the sections will illustrate the form of the whole law (see R.S., 1887, p. 417):

"§8. The law terms of the county court, except as otherwise hereinafter provided, shall commence on the second Monday of the months as follows, to wit. In the counties of—

"§9. Adams, on the first Monday of February, June, and October.

"§10. Alexander, on the first Monday of March, July, and November.

"§11. Bond, in March, January, June, and November.

"§12. Boone, in March, June, and December."

Length of sections reciting corporate powers (Willard, §281). In preparing city charters or in drawing a general law as to cities (or other municipalities of lower grade) it is not unusual to state the municipal powers in one long section with many subdivisions. In Indiana the court held that in order to change a clause or add a clause the whole section, however long, must be repeated in the amendatory act. In adopting this plan of subdividing statutes one legislature casts needless burdens upon future legislatures. The assignment of section numbers in the first instance is a matter within the control of the legislature passing the act and not governed by constitutional rules. In constructing these long enumerations of municipal powers a section number may be assigned to each subordinate paragraph, in addition (if desired) to its clause number. Or the

[93] This is not merely a matter of economy of space, but may become a point of parliamentary expediency. For in order to effect a slight and perhaps entirely non-contentious improvement, it becomes necessary to present for readoption other and perhaps highly controversial and delicate matter. This very undesirable effect will be avoided by confining as nearly as possible every section to one point (Note of Committee).

subordinate paragraphs instead of being numbered as subdivisions may be numbered solely as sections, like the subdivisions of the statute referred to in the preceding illustration.[94]

The detaching of clauses (Willard, §§285, 286, 287). There is a difficulty in the way of making sentences short in statutory expression which arises from the necessity of joining many predicates to one subject, or many subjects to one predicate or many dependent clauses of coördinate value to one leading statement. In such cases European statute-writers have resorted to the expedient of detaching these coördinate expressions by the manner of setting out the law on the written or printed page. The attempt is made by a system of paragraphing to more clearly indicate the equivalent value of what is coördinate, also to indicate what is dependent and upon what it depends, when the same end could not be reached by any system of mere punctuation, and when the matter could not be broken up into a number of separate sentences without much repetition. (See some of the European codes, as follows: Civilprozess-Ordnung für das deutsche Reich, §§36, 41, 67, 102, 107, 121, u.s.w.; Codice di Procedura Civile del Regno d'Italia, 21, 28, 31, 32, 34, etc.; Code [Français] de Procédure Civile, Arts. 3, 49, 50, 59, 61, etc.) The practice is followed by the English Parliament to a large extent, as may be seen by referring to the volumes of current legislation. It was adopted in New York codes and is used sparingly in general legislation in this country. Such an expedient as this has its occasional utility, but the use of it seems liable to be carried to excess.

Illustration. The following illustration of this detached form of statement is taken from the New York Penal Code:

"§635. A person who

"1. Displaces, removes, injures or destroys any rail, sleeper, switch, bridge, viaduct, culvert, embankment or structure, or any part thereof, attached, appertaining to or connected with any railway whether operated by steam or by horses; or

"2. Places any obstruction upon the track of any such railway; or

"3. Wilfully discharges a loaded fire-arm, or projects or throws a stone, or any other missile, at a railway train, or at a locomotive car or vehicle standing or moving upon a railway; or

"4. Wilfully displaces, removes, cuts, injures or destroys any wire, insulator, pole, car dynamo, motor, locomotive or any part thereof, attached, appertaining to or connected with any railway operated by electricity, or wilfully interferes with, or interrupts any motive power used in running said road, or wilfully places any such obstruction upon the track of any

[94] See the change made to this effect in Illinois in 1929 with regard to the powers of cities.

such railway, or wilfully discharges a loaded fire-arm, or projects or throws a stone, or any other missile at such a railway train, or locomotive, car, or vehicle standing or moving upon such railway—

"Is punishable as follows:

"1. If thereby the safety of any person is endangered, by imprisonment for not more than ten years;

"2. In every other case, by imprisonment for not more than three years, or by a fine of not more than two hundred and fifty dollars, or both." (As amended by Act of 1890, ch. 280.)[95]

An illustration of a statute to which this plan of detached statement might apparently have been applied with advantage, is as follows:

"§1. That if any person or persons shall deal, play at, or make any bet or wager of any kind, for money or anything representing money, or other thing of value, at any of the game or games called, designed or known as three card monte, strap or belt game, thimblerig . . . or any brace game or games of any character or description whatsoever, or any of the said games called by different names, or any game or games similar to those enumerated in this section, or called by different names, or any person or persons who play at, or conducts any game of cards, where marked cards are used, or who uses any box or device for any game of chance of any character or description with intent to deceive any person playing at such game or games, or any person who, in collusion with any other person, plays at, or induces another to play at, any game or games of chance, with intent to deceive or mislead any other person; or any person who conducts or deals at any game or games of chance where the percentage is greater in favor of the dealer than it appears to be on its face; or who conducts or deals at any cheating or fraudulent game of chance of any kind or description whatsoever; or who plays at or conducts any game of chance of any character where the dealer or person conducting such game has any secret or hidden or unfair means of playing or dealing, whereby the party who plays is deceived by such secret or hidden or unfair means, or shall induce

[95] In German legislation devices for making laws perspicuous are used with the utmost freedom: references to other acts or sections by a simple parenthetical citation using the current abbreviations; use of numbers and letters for enumeration and classification; in the case of figures, tabular statements, and explanatory headings for different divisions.

Thus the Prussian Income Tax act begins:

I. Taxability.

1. Subjective taxability.

§1. Liable to income tax are

1. Prussian subjects, excepting those

a. Who, without being domiciled in Prussia (§1, par. 2 of the Imperial Law for removal of double taxation, May 18, 1870, Statutes, p. 119) live or sojourn in another state or in a German colony (Note of Committee).

or solicit or attempt to induce or solicit, any person or persons whatever to make any bet or wager, or play at any such game or games, he is guilty of a felony."

Conciseness and redundancy (Ilbert, p. 247). The language of a bill should be precise, but not too technical. An act of Parliament has to be interpreted in cases of difficulty, by legal experts, but it must be passed by laymen, be administered by laymen, and operate on laymen. Therefore it should be expressed in language intelligible by the lay folk.

(Ilbert, p. 247.) More words should not be used than are necessary to make the meaning clear. Every superfluous word may raise a debate in Parliament and a discussion in court.

Unnecessary repetition of synonyms (Willard, §324). There is a fashion of introducing nouns, verbs, adjectives, and even conjunctions by pairs in statutory expression. The practice of using these combinations originally arose in part from a wish to be more elegant, and in part from imitation of the practice in drawing legal instruments where it was an object to the draftsman to multiply words. Where they now occur, they are used in general without deliberate choice. Their employment does not indicate that the person using them wishes to discriminate between the compound and the simple expression, but indicates that he is obeying precedent or instinctively adopting forms which have become traditional. One word may be made to do duty for two or three in the case of many of these expressions.

Unnecessary use of formal words (Willard, §350). An unnecessary use is made of the words "said" and "aforesaid." They are rarely essential to exactness of expression. In many of the cases where "said" is used the definite article will answer the purpose equally well. In other cases, its place may be supplied by another word, or it may be omitted altogether. Overuse of these terms reduces statutory expression to the level of the commonplace products of legal drudgery.

Pretentious or extravagant expression (Willard, §352). The legislator is tempted to make an extravagant use of broad-sounding words, multiplying the word "any" and adding "whatsoever" and "wheresoever" where a simpler expression would answer the purpose. The multiplication of these words serves in many cases only to give to the statute a pretentiousness of expression without increasing the breadth of its application. There need be no forced avoidance of the use of the word "any" where it is the natural expression, or of the other words where their use is needed to show a sweeping intent in a statute liable to receive strict construction. But it is a good plan after a statute is put in its first form to look it over and prune out the extravagances where they are perceived to be clearly such.

(Ilbert, p. 248.) Different words should not be used to express the same thing.

(Ilbert, p. 248.) The same words should not be used with different meanings.

(Ilbert, p. 248.) The use of "such" as a demonstrative equivalent to "the" or "that," is a departure from the English of ordinary life which seems unnecessary, and often causes confusion where the expression "such . . . as" has to be used in the same context.

(Ilbert, p. 248.) This is also true of the use of the expression "the same" when referring to an antecedent or to antecedents. This form of expression would be considered clumsy or archaic in ordinary English, and, as used in acts of Parliament, not infrequently slurs over a looseness of reference.

(Ilbert, p. 248.) The future conditional ("if he shall") should be avoided. The future shall is apt to be confused with the imperative.

(Ilbert, p. 248.) An act of Parliament should be treated as always speaking. The idea on which this rule is based is, according to Lord Bowen, that a code on some particular subject is being constructed, and so, when the present tense is used, it is used, not in relation to time, but as the present tense of logic.

Future tense forms (Willard, §354). The tendency of revisers and code writers who have made statutory expression a study has been to give up the use of the future tense and the future perfect tense in many instances where they were used by the old statute-writers. A more natural form of expression is adopted. Statutory propositions are stated more nearly in the language in which they would be stated by one who might undertake to expound their force in current speech. There appears to be no sacrifice of definiteness or of legal sufficiency in adopting the more natural expression. It is somewhat curious to note that, at the present day, when the attempt is made to pursue consistently the old form, there are occasional lapses to the less artificial usage. Only experts appear to be able to compose a long statute according to the old usage without once inserting a future or future perfect tense in the wrong place, or omitting it where it should be inserted.

(Ilbert, p. 247.) Enumeration of particulars should be avoided. It is almost impossible to make the enumeration exhaustive, and accidental omission may be construed as implying deliberate exclusion, in accordance with the maxim, *Expressio unius est exclusio alterius.*

Possible ambiguity of a general term after specific terms (Willard, §§312, 313, 314). An enumeration of special cases is liable to be construed as narrowing the application of a following sweeping term. Passages are not infrequently met with in statutes where several special terms are followed by a general one. It is rarely the purpose, in inserting the special enumeration, to narrow the application of the general term. The special cases are inserted because they present themselves to the mind of the legis-

lator preparing the bill and by the specific mention the application of the statute to them is thought to be more sure. It is sometimes the better plan to omit the specification of cases entirely. In other instances any undue inferences may be controlled by a statement at the end of the section to the effect that all cases included in the general term are embraced within its meaning whether "of the same sort" as the cases specified or not.

Lord Tenterden rendered in 1827 a decision which has encouraged attorneys many times since then to urge a doubt where the legislator would not naturally imagine there was room for one. He was construing (as Chief Justice of the King's Bench) a statute which said that "no tradesman, artificer, workman, laborer, or other person or persons, shall do or exercise any worldly labor, business or work of their ordinary callings upon the Lord's day." He decided that the words "other person or persons" cannot have been used in a sense large enough to include the owner and driver of a stage coach, because "where general words follow particular ones, the rule is to construe them as applicable to persons of the same sort." *Sandman* v. *Breach,* 7 Barnwall and Creswell 96, 99, 1827. Decisions scarcely less surprising have been rendered by American state courts. See, for example, *St. Louis* v. *Laughlin,* 49 Mo. 559, 1872; *State* v. *McGarry,* 21 Wis. 496, 1867.

The rule on this subject has been stated by a federal court, in construing a United States statute, as follows: "It is a well-settled rule of construction that 'where general words follow an enumeration of particular cases, such general words are held to apply only to cases of the same kind, as those which are expressly mentioned.' " *United States* v. *Irwin,* 5 McLean, U.S. Circuit Court, 178, 184, 1851. The rule as here stated was referred to, but apparently not disturbed, in *United States* v. *Mattock,* 2 Sawyer, U.S. Circuit Court, 148, 149, 1872.

Brevity in statutory expression (Willard, §323). Brevity is desirable in statutes where brevity can be secured without the sacrifice of what is more important; namely, full and adequate treatment of the subject-matter. Complaints of undue multiplication of clauses and sections are often made against statutes. Those who make them do not always bear in mind the multiplicity of unsolved questions which attach to every statute where the attempt is made to treat a complicated subject-matter by a few general statements. If length results from the attempt to solve in advance questions likely to arise in the interpretation of a statute, or to define official duty in contingencies where the official would otherwise be without direction, it is not objectionable. But unnecessary repetitions or multiplications of words, in the statement of what must be stated, are to be avoided. It is in the pruning out of these repetitions and the condensing of the expression in this respect that the effort to secure brevity is most free from objection.

Commencing sections with "That" (Willard, §§3–59). In the early history of national legislation Congress followed the practice of inserting enacting words in each section. This practice was discontinued in 1871. But it is still customary to introduce each section of an act with the conjunction "that." Sometimes in the subsequent framework of the section there is an adherence to the theory which calls for the use of the connective. To whatever lengths the section is drawn out—and the sections are often very long—it is made all one sentence without a period. More often when the section is long a period is inserted somewhere in the course of it, and what is thereafter enacted in the section is not connected with the enacting words. When the revision of the statutes of the United States was made (1873–1874) the revisers followed the same course pursued by revisers in the various states. In preparing the acts of Congress for insertion in the revision the introductory connectives were in all cases erased, even in the first section immediately after the enacting clause. Congress enacted this revision and appears thus, in a conspicuous instance, to have indicated that the old form of expression is not necessary.

Overuse of provisos (Willard, §360). Statutes are often disfigured by the multiplication of provisos at the end of sections. They are engrafted frequently in debate as a convenient and easy form of amendment. In the original preparation of a statute it is rarely necessary to resort to this form of expression. And in amendment the words "provided that" are often unnecessarily used or might be replaced by "but." The conspicuous words of exception are rarely necessary when the controlling statement is to be placed side by side with the statement which is to be controlled. If the section to which it is proposed to add a qualifying statement or proviso is already too long, the matter of the proviso may usually be embodied in a separate section or sections (to follow the sections which will govern) without any sacrifice of definiteness in its application.

Insertion of proviso in the body of sections (Willard, §363). The insertion of provisos in the body of sections may create confusion unless care is taken to show clearly where the proviso ends, and where the main statements of the section recommence. When the word "provided" appears in a section the first inference is that all the following matter is dependent upon it, or is included within the exception. It often is unnecessary to use the word where a clause is interpolated. Here, as in other cases, the conjunction "but" will usually answer the purpose equally well and will not confuse the construction.

Explanatory section (Willard, §§335, 336). Apart from the repetitions already mentioned other repetitions of series of words occur frequently in statutes. They are so various that they cannot be reduced to classes. The occasion for the repetition arises from the need of applying a law to a variety of cases or a variety of situations calling for similar treatment, but

which cannot be embraced in any one single term. In almost all acts where a recurring series of words is introduced the repetition may be saved by a specification or definition embodied in an explanatory section at the beginning or end of the act, stating that for the purposes of the act some one word or phrase shall embrace the whole series. It is not indispensable that the word chosen to stand for the series should by any natural interpretation of its meaning be understood to cover all the matters which it is artificially made to cover. The legislature has power to select one word or phrase as a symbol and make it do duty for several, just as it has power to say that the masculine pronoun shall include the feminine.

In a statute where it was desirable to apply the provisions of an act to lines of business which could not all be embraced in one general term, the word "manufacturer" was made to stand for all, by a section worded as follows: "The term manufacturer as applied to Sec. 1 and in Sec. 2 of this act, shall be held to mean any person who, as owner, manager, lessee, assignee, receiver, contractor, or who, as agent of any incorporated company, makes or causes to be made, any kinds of goods, or merchandise, or who owns, controls or operates any street railway, or laundrying establishment, or is engaged in the construction of buildings, bridges or structures or in loading or unloading vessels or cars, or moving heavy materials, or operating dangerous machinery or in the manufacture or use of explosives" (Ohio, Act of 1888, p. 100, §2).

In a statute relating to railroads many repetitions of the same series of words were saved by the following definitions: "The word 'owner' in these sections shall be held and considered as including any lessee, receiver, corporation, company or persons owning, operating or managing any railroad."

§55. CHOICE OF PHRASING AND OF TERMS. The problem of adequate phrasing is one that arises anew in every statute, and is so dependent upon the mastery of all the aspects of a particular subject-matter, that only few statements of general validity are possible.

The following observations point out typical difficulties and precautions, but the field is an inexhaustible one.

1. *Scope definitions.* Only the most elementary rules of law are so abstract as to present no problem of scope definition. So far as the common law rules involve concept categories, these are controlled by abstract criteria of conformity, so that definition means little more than the elimination of the non-conformable. In regulative legislation on the other hand, the delimitation of scope is an ever-present

problem. Both equitable and administrative considerations make it desirable to keep the application of penal provisions within bounds. The categories are usually those presented by physical conditions or by the social and economic organization of society, but these are rarely marked off from each other with absolute precision, and it may seem advisable to substitute for common designations of categories more abstract definitions. Marginal difficulties of differentiation will occur in either case, and will often raise jurisdictional questions.

A few legislative devices are available to overcome or reduce these difficulties in appropriate cases: thus categories may occasionally be made mere matter of administrative convenience, being made irrelevant for other purposes; or the legislature may make an administrative power of determination conclusive on questions of classification.[96]

The desirability of speedy determination is in proportion to the difficulty of delimitation. The requisite power should therefore be available where validity depends upon unity of subject-matter: limitation of corporate capacity to a single undertaking, or constitutional requirement that a statute be confined to one subject. In neither of the two cases, however, is the power found. Without it, and, perhaps, in any event, these "unit" limitations create almost insoluble problems of interpretation.[97]

[96] See §§96, 101, *infra;* also the following examples:

Making classification purely administrative: 17 U.S.C. 5 (copyright):

"The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: (follows enumeration of thirteen classes).

"The above specification shall not be held to limit the subject-matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title."

Example of power of administrative determination: 48 U.S.C. 233 (Alaska Fisheries):

". . . For the purposes of this section, the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination."

[97] Perhaps equally difficult with a "unit" limitation, is a limitation to "form" as distinguished from "substance," although form and substance are indispensable and valuable categories if not too closely pressed. Would it be possible to give a statutory power confined to matter of form, but not touching matter of substance? The task of interpretation would be a formidable one. But it would be a different matter to give the Supreme Court power to make rules of practice relating to form; for this might be sufficient practical guidance for the exercise of a power which would be incapable of being questioned judicially, because vested in the supreme judicial authority, and yet

Where limited or subordinate powers are in principle exercisable only in an equal or uniform manner, it may be desirable to temper the resulting rigidity by a power to classify. Care should then be taken to see that classification is systematic, and not a cover for preference or discrimination.[98] This result, likewise, is probably unattainable without administrative checking and controlling facilities. The problem has been adverted to before in discussing remedies for special legislation.[99]

2. *Qualifying language.* The temptation to qualify by cumulative terms, by adjectives, by elaboration, or by exception, is ever present. Every statute is a commitment, and the legislator desires not to commit himself too far. On the other hand, nearly every statute aims to accomplish a definite purpose, and the fear of misinterpretation will lead to an effort to clarify meaning and intent to the utmost.

It is necessary for the draftsman at the outset to realize that there are limitations inherent in language, which mere elaboration of phraseology cannot overcome. Two of these may be mentioned:

(a) Every common abstraction has its marginal uncertainty; care must therefore be taken that an additional abstraction by way of explanation does not add to the uncertainty, instead of diminishing it.

This is illustrated by the English law relating to wills: the Statute of Frauds required a will to be signed. "Sign" is a term of common certainty. A decision (probably ill-advised) held that the recital of the name at the beginning of the will (I, J. S....), constituted a signature (*Lemayne* v. *Stanley,* 3 Lev. 1, 1680). Thereupon the Wills Act of 1837 required the will to be "signed at the end." But "end" is even more ambiguous than "sign," and resulting doubts (*Smee* v. *Breyer,* 6 Moore P.C. 404, 1848) led to another explanatory statute (15 and 16 Vict., c. 24, 1852). Requiring the will to be signed "in such manner as to make it manifest that the name is intended as a signature" (Vir-

could be superseded at any time by statute, if it should be believed to trench on substantive right.

[98] *Garysburg Mfg. Co.* v. *Pender County,* 42 Fed. 2d 500, 1930, p. 504: "To classify taxation is to arrange it according to recognized and well known principles."

That this is not what classification means in practice, or, indeed, can practically mean, under present conditions, see S. E. Leland, *The Classified Property Tax in the United States,* 1928, *passim.*

[99] See §13, *supra.*

ginia Code, 1904, §2514) avoids at least the difficulty of cumulating abstract terms.

(b) An independent judiciary means some degree of independence of construction, and against definite tendencies of administration variant from standards of legislation, mere elaboration of language may avail but little.

From this point of view the following appear to be futile elaborations:

Illinois Criminal Code, §144: "In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given, and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder."

Code of Georgia, §3268: "The amount of intellect necessary to constitute testamentary capacity is that which is necessary to enable the party to have a decided and rational desire as to the disposition of his property. His desire must be decided, in distinction from the wavering, vacillating fancies of a distempered intellect. It must be rational, in distinction from the ravings of a madman, the silly pratings of an idiot, the childish whims of imbecility, or the excited vagaries of a drunkard."[100]

German Civil Code, §1568, permitting the divorce of a spouse ". . . who by a grave violation of marital duties or by dishonorable or immoral conduct has caused such a profound disruption of the marital relation that the other spouse cannot be expected to continue the marital life"; adding that gross ill-treatment constitutes a grave violation of marital duty.

3. *Qualifying terms in penal statutes.* It is inadvisable to use in the definition of an offense matter intended merely to be descriptive, since there is the possibility that it may be construed as qualifying

[100] The two foregoing definitions are obviously taken from non-legislative sources; but the ineptitude is more striking in a statute than it would be in a treatise, or in an instruction or opinion.

matter. Illustration: a Sunday law provides that no one shall disturb the peace of society by common labor on Sunday; or that no one shall engage on Sunday in common labor, to the disturbance of others. It has been held that all common labor is disturbing under the statutes (*Thompson* v. *Williams,* 58 N.H. 248, 1878; *McPherson* v. *Chebanse,* 114 Ill. 46, 1885). If this was the legislative intent, the qualifying matter should have been omitted.

The Criminal Code of Illinois (§156) speaks of a father *rudely and licentiously* cohabiting with his daughter; words purely descriptive and superfluous. If however the next section (§157) speaks of "persons within the degree of consanguinity . . . who shall lewdly and lasciviously cohabit with each other," it may be plausibly contended that first cousins living together as husband and wife are not covered by the term of the law.

4. *Qualifying terms in beneficial statutes.* The great majority of statutes may be classified as either beneficial or restrictive, according as the main legislative thought is aid or relief on the one hand, or repression of undesirable tendencies or the imposition of burdens on the other.

The difference is reflected in principles of interpretation, although it is obscured by the fact that courts are inclined to interpret strictly legislation that might be regarded as beneficial simply because it derogates from the common law.

It seems a sound rule that in beneficial statutes qualifying terms should not be introduced *currente calamo* without a clear realization of their effect, a realization which often can be aided by the draftsman at least temporarily phrasing the qualifying matter as a separate proposition.

The following will illustrate this observation:

The Fifteenth Amendment of the Federal Constitution provides: "The right of *citizens of the United States* to vote shall not be denied or abridged by the United States or by any State, on account of race, color, or previous condition of servitude." In view of the construction given to the phrase "privileges and immunities of citizens of the United States" in the *Slaughter House* cases (16 Wall. 36, 1872), it was possible to contend that the Fifteenth Amendment should not be applied to other than federal elections (*Myers* v. *Anderson,* 238 U.S.

368, 372, 373, 1915). "The right to vote" would have been clear and adequate. After the Fifteenth Amendment had been construed to apply to all elections, it was of course advisable to give the Nineteenth Amendment the same form, since a familiar phrasing has a better chance of being accepted.

The Illinois adoption statute provides that a person may adopt a child "not his own." As husband and wife can adopt only jointly, a man cannot adopt his stepchild, and this defect had to be cured by amendment (1917). Even after this amendment it is probable that a person cannot adopt his illegitimate child, although legitimation by marriage may have become impossible by the death of the mother. The addition of the words "not his own" serves no valuable purpose.

A statute is enacted to remove the incapacity of a married woman to contract. The statute speaks of a married woman contracting "otherwise than as an agent"—making it possible for a court to hold that a woman is not bound if she contracts in reality as an agent, though ostensibly as a principal (*Paquin* v. *Beauclerk*, 1906 A.C. 148). This was probably not intended by the legislature. Had the qualifying matter been handled as a separate clause, it would have been done by making the provision subject to the general principles of the law of agency, and it would readily have appeared that the qualification was superfluous.

5. *Negative and positive form.* Even a superficial examination of statutes will disclose a preference for negative terms—a practice due to caution.

If the Federal Constitution says: "No person shall be a senator who shall not . . .," the construction by the Senate that it may bar for other than the disqualifications mentioned, is not inconsistent with the letter of the constitution. The German constitution says: "Eligible to the office of President is every German who . . . ." Political considerations will determine whether exclusiveness or non-exclusiveness is preferable.

In an enabling provision the negative form will avoid the risk of extending removal of special disabilities to an enlargement of normal rights, although it is customary to insert saving words to that effect in any event (if otherwise lawful, if otherwise valid, etc.). Positive words are of course required if the purpose is to do more than remove

disabilities. Negative words are therefore not sufficient to create official powers or other special privileges, unless the positive authority is found in another statute or in the constitution. See 8 U.S.C. 31, 44; 28 U.S.C. 633; 33 U.S.C. 395.[101]

6. *Passive form.* The general instructions issued by the German government for the drafting of bills recommend the avoidance of the passive form.

In American legislation there is a special objection to the passive form in provisions involving the active exercise of official power, unless other provisions of the law clearly designate the competent authority; for administrative powers rest upon express and specific delegation. It might thus be meaningless to make a license revocable without saying by whom it may be revoked. At best it could only mean a revocation by a judicial proceeding.

This point is presented in the provision of the Federal Constitution (1–9–2) that the writ of *habeas corpus* shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it. The omission to provide by whom the suspension is to be made, raised a controversy during the Civil War, finally disposed of by congressional action.[102]

7. *Provision whether self-executing or not.* A legal effect may be stated as automatically operative or as dependent upon some act or declaration. If a provision is intended to have the most beneficial effect, a phrasing should be avoided which leaves it short of self-executing, or creates a doubt in that respect.

Ordinarily, however, there should be no difficulty about accompanying the declaration of the legal effect by an additional direction

[101] The Federal Constitution, in providing (1–10–3) that no state shall without the consent of Congress . . . enter into any agreement or compact with another state, does not bestow upon a state legislature capacity to surrender legislative powers which the state constitution intends to be unalienable. The provision presupposes contractual capacity (see §35, *supra*).

The consent of Congress is also required for the building of any bridge over navigable waters of the United States, although the bridge is not an interstate bridge. This might likewise seem to be merely the removal of a possible objection on the part of the United States, but bridge acts are phrased as positive authorizations, and there is no difference in form in this respect between an intrastate and an interstate bridge (*Congressional Record,* January 19, 1928, pp. 1798–1806).

See also *Jackson ex dem. Gouch* v. *Wood,* 12 Johns. 73, 1815.

[102] See Fisher, "Suspension of Habeas Corpus," 3 *Political Science Quarterly* 454.

that it be also expressed in some official or legal instrument. This matter will be discussed more fully further on (see §86, *infra*).

8. *Common types of ambiguity:* (a) "Shall" and "must."—One of the most striking cases of almost inevitable ambiguity is presented by the word "shall." In the German Civil Code a consistent distinction is made between *"muss"* and *"soll."* A non-compliance with a *"muss"* requirement invalidates, a non-compliance with a *"soll"* requirement does not, although there may, of course, be other sanctions. The English language lacks a similar facility of distinction, and there is no ready way of indicating whether a requirement is intended to be mandatory or merely directory.[103]

If the requirement relates to private action, it will ordinarily be ineffectual unless mandatory, and will therefore be so construed; in case of official action, however, the inherent guaranties of compliance are often sufficiently strong to dispense with a sanction of nullity which in the nature of things will prejudice private parties more than the offending official. The matter must however almost necessarily be left to judicial construction.

The use of "may" for "shall" is a different matter. As applied to a private individual "may" is naturally a permissive term. Provision for official action, on the other hand, even if intended as a duty, calls for the creation of the appropriate power, which is indicated by "may"; and in a great many cases, the power having been created to aid some other interest, its exercise becomes a duty by implication. "Shall" is thus included in "may."

(b) Ambiguity whether reference is to abstract categories or to concrete conditions.—The question arises where the law operates with such phrases as dangerous establishments, deadly or dangerous weapons, etc. But there is a reasonably safe rule of construction:

It is proper to assume reference to a condition, if the risk of determination from case to case can justly be thrown upon the individual, while the term should be construed as referring to a class where the individual's ordinary rights are encroached upon and he should therefore be relieved of the risk.

Applying this distinction, in the offense of an assault with a deadly weapon, the term deadly should present a question of fact; in the of-

[103] See §94, *infra*.

fense of carrying concealed deadly weapons the same term should present a question of law (*State* v. *Nelson,* 38 La. Ann. 942, 1886; *State* v. *Larkin,* 24 Mo. App. 410, 1887).

So as to plying a person with intoxicating liquor, and selling intoxicating liquor; leaving a dangerous place unguarded; and employing a minor upon dangerous machinery.

Where a statute requires physicians to report cases of any disease dangerous to the public health, consumption should be classified as dangerous or not dangerous, instead of leaving the question to a jury in the particular case, as was done in Michigan (*People* v. *Shurly,* 124 Mich. 645, 1900; 131 Mich. 177, 1902).

The reference must be to individual conditions and cannot be to a class when the term employed by the statute denotes what the law cannot recognize as a generic type; thus if children are forbidden to be employed in immoral exhibitions, for there can be no category of lawfully existing exhibitions that would fall under the head immoral. The same is true of the terms "obscene" and "criminal."

(c) Ambiguity in grant of official directing power.—Where a statute authorizes a board or commission to require the adoption of measures or improvements necessary or appropriate to remedy an obnoxious condition, two points are left in doubt: (i) did the legislature intend a power to make general regulations or orders for particular cases, or both? and (ii) was it intended that the question what is necessary should in the first instance be left to the judgment of the individual, or should at once be determined by methods prescribed by the order or regulation? It is possible to remove both doubts by specific language, but frequently that is not done, and the draftsman is not conscious of any ambiguity, the issue not having been presented to his mind.

(d) Ambiguities in connection with alternatives.—If there is a reference to an option in connection with the grant or reservation of a power, or in connection with a requirement, is the intention that the option be exercised, or that it be incorporated in the contemplated act and thus be kept open? So, if a statute requires a municipal bond to be made payable at the office of the local treasurer or at some designated place, or if the Federal Revenue Act (1926, §219, 1928, §166)

provides for the contingency, that the grantor of a trust has, at any time during the taxable year, the power to revest in himself title to any part of the corpus. It would seem that the alternative in such a case refers to the description of the power, and that the option need not be kept open in its exercise; however, under a liberal construction, there should be no objection to keeping the alternative open, if so desired.[104]

(e) Ambiguity of a non-typical character may be illustrated by reference to the English Evidence Act of 1898. The Act (§4) provides that "the wife or husband of a person charged . . . may be called as a witness either for the prosecution or defense, and without the consent of the person charged."

The non-admission of the testimony of one spouse for or against the other was at common law both a disability and a privilege. The phrasing of the statute ignored that distinction, and its wording was capable of being construed as doing away with both. It was so construed by the Court of Criminal Appeal. But the House of Lords held that, a privilege being involved, nothing short of a definite change of the law was sufficient to remove it. The words "may be called" removed the disability, but not the privilege (*Leach* v. *Rex,* 1912 A.C. 305).[105] Other statutes have avoided this ambiguity. The Prevention of Cruelty Act had said "competent but not compellable." The Evidence Act of 1851 had said "competent or compellable." The phrasing "shall not be incompetent," would likewise remove every question; however, it would have been equally ambiguous to say "it shall be no objection to the calling of a witness, etc."

9. *Language and burden of proof.* Professor Planck, in his treatise on the German Civil Code (of which he was reputed to have been the principal author) states a number of rules observed in its phraseology with a view to determining burden of proof: if a rule is followed by an exception or limitation, the latter must be proved by the one resisting the application; likewise if a qualification is introduced by "unless"; whereas the use of the words "if," "so far as," makes the rule dependent on facts to be proved by the one relying on the rule,

[104] See *Clapp* v. *Heiner,* 51 Fed. 2d 224, 1931.

[105] See also *King* v. *Lapworth,* 1931, 1 K.B. 117.

and the same is true if the "if" is followed in a subsequent part of the sentence by a "not" (in contradistinction to "unless"), citing numerous instances.

The soundness of this correspondence between phrasing and burden of proof has been questioned.[106]

The English Summary Jurisdiction Act of 1879 (§39, 2) provides: "Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, bye-law, regulation or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant."

The Indictment Act, 1915, Rule 5(2) has a similar provision.

The statutes of Massachusetts contain substantially the same rule: Gen. Laws, ch. 277, §37 as to indictments; ch. 278, §7, as to proof.

The National Prohibition Act (§32; 27 U.S.C. 49) provides that "it shall not be necessary in any affidavit, information, or indictment to . . . include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so."

The Prohibition Act of Illinois (§39) contains the same provision.

The provision in the English Summary Jurisdiction Act was apparently introduced to supersede the rule stated by Paley in his treatise on *Summary Convictions* (§7) that in trials before justices of the peace, as distinguished from trials in the superior courts, the burden of proving the non-existence of exemptions lay upon the prosecution, if the exemption is found in the main clause of the prohibition, while if stated by way of proviso in a separate clause, the burden of proving the exemption lay upon the defendant.

The rule that the indictment need not show non-exemption has been applied where the exemption is contained in a proviso, by the Supreme Court of the United States (*McKelvey* v. *U.S.*, 260 U.S. 353,

[106] See Josef Kohler, "Technik der Gesetzgebung," 96 *Archiv f. civil. Praxis* 345.

1922), while Illinois, notwithstanding the section referred to, requires the indictment to aver the non-existence of the exception, where the statute prohibits manufacture (etc.) "except as provided in this act" (*People* v. *Barnes,* 314 Ill. 140, 1924).

It is obvious that a rule requiring a pleading to aver non-existence of an exception, is easily complied with, whereas in the nature of things the proof of a negative may be so difficult as to make it a matter of common sense to throw the burden of proof upon the defendant. The distinction appears to have been recognized under the older liquor laws (Black, *Intoxicating Liquors,* §§448, 507).

That the manner of phrasing does not necessarily control the burden of proof, appears from the law of testamentary capacity. The English law formerly placed the disqualifying disability of mental unsoundness in a separate section, and now is silent with regard to it; yet the burden of proving sanity is throughout on the proponent; on the other hand, the Illinois statute says that every person of sound mind and memory may make a will; yet as soon as the witnesses have proved execution the burden of showing unsoundness shifts to the contestant. The opposite result would follow if the phrasing were controlling. See also *Moody* v. *State,* 17 Oh. St. 111, 1866; *Noecker* v. *People,* 91 Ill. 468, 1879.

So far as pleading is concerned, the rule distinguishing between exceptions attached to the prohibition, and exceptions made by way of proviso, may appear as technical; but the matter assumes a different aspect, when we distinguish between common legitimate practices placed under a license requirement, and normally illegitimate practices sanctioned under exceptional conditions; if it is made unlawful to practice medicine without a license, the legitimacy of medical practice is still the dominant thought, while the selling of narcotic drugs may well be considered as *prima facie* illegal, subject to stringent exceptions. It is only natural that this difference may appear in the phrasing of a statute, and may be recognized in requirements concerning the charging of an offense.

10. *Provability and ascertainability.* Attention should be called to an elementary principle of draftsmanship, observance of which cannot be secured by compliance with any general formula; namely, that prerequisites to statutory benefits should be such that they can be

proved without undue inconvenience, and that facts imposing disabilities or burdens should be such that they can be ascertained and avoided.

Until recently, the naturalization law required the prescribed five years' residence of the applicant in the United States to be proved by two credible citizens (section 4 of the Act of 1906)—a provision which, if it had been strictly administered, would have made proof in many cases impossible.[107] By act of March 2, 1929, it is made possible to adduce proof by two witnesses for each separate place of residence.

The problem of the ascertainability of incriminating facts is illustrated by acts which punish the selling of weapons to aliens; it is proper in such case to punish only "knowingly" selling. In certain cases, however, the legislative policy may be to throw the risk upon the offender (selling liquor to a minor; illicit relations with a woman under eighteen,[108] etc.).

[107] See *Re Reichenburg*, 238 Fed. 859, 1917.

[108] See *Skinner* v. *King*, 16 C.L.R. (Austr.) 336, 1913, for a legislative concession to ignorance.

CHAPTER VIII

DEFINITENESS OF TERMS

§56. Precisely Measured Terms. Precisely measured terms seek to eliminate the problem of marginal uncertainty. They are available where quality, which is the concern of equity and public policy, can be reduced to quantitative criteria. The advantage of a definite concept is accompanied by the advantage of proof: for ordinary perception, impression, or memory there is substituted something that is practically uncontradictable. This presupposes an apparatus of administrative verification; but that apparatus may also be called for at the opposite end of the scale where legislation operates with indefinite concepts.

In the history of legislation, the contrast between precisely measured and indefinite has had its most conspicuous illustration in customs tariff policies. Specific duties operate with definite terms, *ad valorem* duties, with the indefinite concept of value. England has always adhered to the specific system; in America the two methods are combined; and the very extensive use of *ad valorem* rates, notwithstanding the admittedly great difficulties of valuation, shows that the very rigidity of precise measurement involves inferior adaptability to varying conditions.

Apart from careful provisions for proof in appropriate cases (samples in triplicate in the case of inspection of foodstuffs, etc.), precision calls for adequate legislative expression. Thus a numerical term may be meaningless without a referential unit basis, such as time bases in case of salaries, or rates of interest, or a census basis in case of population. Numerical terms are in many cases also intended to operate only as limitations, i.e., as minima or maxima, and the inadvertent omission to express this ("no more than," "no less than") may produce untoward results, unless aided by judicial construction (see *Hopkins* v. *Scott,* 38 Neb. 661, 668, 1894). These are matters of ordinary care and attention, capable, if of common occurrence, of being aided by general interpretation acts. Occasionally, adequate expression becomes a matter of considerable complexity: 15 U.S.C. 206 (standard gauge for sheet and plate iron and steel), 46 U.S.C. 77

(rules for tonnage measurement), and the New York law for storage of explosives (Labor Law, §456: "quantity and distance table") may serve as illustrations.

Mechanical difficulties of carrying out standards of measurement are taken care of by so-called "tolerances" (15 U.S.C. 254).

Deviation from accuracy for the sake of uniformity is conspicuously illustrated in the establishment of the calendar year, and the substitution of standard for solar time.

A "tolerance" of a very special kind is recognized in a German decision which refuses to apply Sunday restrictions to the early hours after Saturday midnight on the ground that in popular consciousness these do not count as Sunday (Decision of April 24, 1911).

So far as there is a rule to the effect that the law does not take cognizance of the fractions of a day, it is in the nature of a tolerance. By an illogical application of this supposed rule, it is said that a person reaches the age of twenty-one years at the beginning of the day preceding his twenty-first birthday anniversary, and this has been accepted in the 1911 amendment (section 1) of the English Old Age Pensions Act of 1908, while it has been repudiated by the National Insurance Act of 1911 (§79).[1]

While the process of measurement eliminates arbitrariness, some arbitrariness is inseparable from the fixing upon some particular quantity rather than upon another. This arbitrariness, however, is greatly reduced, and in some cases perhaps altogether removed, by adherence to, or adoption of, customary or trade standards, and, if these are variable, by keeping below the best of voluntary standards (sterling gold or silver; rates of interest; hours of labor).

Arbitrariness is also greatly reduced by the establishment of quantitative provisions on a comprehensive scale and thereby ensuring to some extent the equity of relative proportion and equality.[2]

The equity problem in this respect is indicated by comparing the

[1] The anomalous rule may commend itself by the consideration that in practically every case a cutting down of the period of infancy promotes equity. It is at any rate significant that in the Roman law, where the privilege of minority is accorded only on equitable grounds appearing in the particular case, the period is computed *a momento in momentum* (Digest 4, 4:3, 3). As to the phrase "twenty-three years of age or under" see *Rex* v. *Chapman* (1931), 172 *Law Times* 113; 72 *Law Journal* 93; 95 *Justice of Peace* 503.

[2] See *supra*, §30, *Methods of rationalization*.

entire absence of precise standards in the measure of damages in civil suits, the system of flexible penalties in criminal law with the absence of provision for standardized administration, and the system of benefits measured by wages and by kind of injury in workmen's compensation laws.

The very precision of measured terms lends itself to special forms of evasion which have called for appropriate legislative counter measures:

If legislative favor is shown by reason of the smallness of a unit (relaxation of certain requirements in case of small mines; special rates of interest in case of small loans), care must be taken not to defeat the legislative policy by leaving the possibility of avoiding the larger unit by subdividing it into smaller units.

A policy of limiting employment by fixed hours has to meet possible attempts to evade, on the part of the employer, by special schemes of distribution of hours, on the part of the employee, by taking employment in different establishments. The result of these attempts has been a movement, which has been successful in the case of child labor, to transform the maximum day into a standard day.

The extent to which legislative precision may go in the case of a strong contest between conflicting interests is illustrated by the specification of the method of computing hours of labor in the British Coal Mines Regulation Act of 1908.

§57. INDEFINITE TERMS: IN GENERAL. Indefinite terms either profess on their face to make an appeal to judgment or to be matter of degree (reasonable, sufficient, suitable, necessary) or they contain an abnormally wide margin of uncertain or controversial application, controversial particularly because the provinces of legal and social restraint, of restraint and tolerance, or even the provinces of usefulness and harmfulness, are not clearly differentiated.

Their use indicates that conditions are too varied for a definite rule, or that the legislature is not certain as to its policy. From a tactical point of view they have the advantage of lending themselves to easy legislative expression without undue legislative commitment.

From the point of view of official administration and individual

application, indefiniteness has the double aspect of liberty and peril. Liberty may mean desirable latitude of choice, but also the temptation to take the benefit of the doubt; the peril lies in the risk of error and its attendant consequences.

It follows that in deciding upon the admissibility of indefinite terms, regard must be had to the circumstances under which, the persons by whom, and the sense of responsibility with which, the law will be applied, and to the consequences which an error will entail. Is there any risk of loss and on whom will it fall? Will it be the risk of a penalty? Of unsettling titles, securities, status rights, or public revenues? A risk of liability to damages or to equitable or administrative order or injunction? The risk that favorable official action will be denied? The risk that an administrative regulation or order will turn out to be invalid? Or will the risk be merely the disappointment of an expectation?

§58. INDEFINITE TERMS IN GRANTS OF OFFICIAL POWER. An official power granted in indefinite terms means a discretionary power. Official discretion may be objectionable from other points of view; but it does not make a statute unworkable. Where administrative discretion affects private rights, its legality or the legality of its exercise is subject to judicial review. An erroneous interpretation on the part of the official makes the exercise of the power invalid, without of its own force exposing the individual to penalty or liability and without disturbing or unsettling titles. The exercise of the power advises the individual specifically of what his course of action is expected to be, and it is not unfair to throw upon him the risk that attends noncompliance on his part, if he proposes to rely upon the invalidity of the official act. He has the chance of its being declared invalid; on the other hand, there is the chance that a liberal construction of power may be ultimately sustained by the court, with a consequent gain to public authority and to the public policy which it represents.

Indefinite terms in official powers should be compared with the same terms in directly operative statutes, in relation to the same subject-matter. Penal provisions of labor statutes operate unsatisfactorily

where duties are prescribed merely by reference to danger or injury, but there is no difficulty in authorizing labor officials to order the safeguarding of dangerous machinery or to withhold child labor certificates in case of occupations injurious to health or morals; if the discretion is objectionable for other reasons, it at least constitutes no technical defect (unless, indeed, a court sees in the discretion an unconstitutional delegation of power). It would never do, in authorizing the heir to convey the decedent's property free from any claim under an undiscovered will, to say that he may do so after a period of time described only as depending on circumstances, but it is possible to authorize a court to declare that there are no heirs and that consequently there is an escheat, after a period thus indicated (German Civil Code, §1964). While it would be impracticable to make the validity of adoption by deed dependent upon the interests of the child, that is a common provision where adoption can be effected only by order or consent of a court.

When Congress introduced the new and untried concept of unfair competition into the law, it declared unfair methods to be unlawful, but not punishable until specifically so declared by a commission order and until non-compliance with the order, with an opportunity to contest its validity in a court;[3] there is consequently no risk of penalty until the indefinite has been turned into something definite.

Even in grants of official power, however, indefinite terms are undesirable if they are of distinctly restrictive connotation, and the difference between the primary official and the ultimate judicial view of the proper degree of restriction results in the disappointment of legitimate interests or expectations.

To illustrate: the Cities Act of Illinois requires the levy of the amounts of appropriations by a tax levy ordinance "specifying *in detail* the purposes for which such appropriations are made and the sum or amount appropriated for each purpose respectively" (art. 8, §1). Tax levies have repeatedly been held invalid for lack of sufficient specification (*People* v. *F. & T. R. Co.*, 252 Ill. 372, 1911), and it would be an advantage if the statute itself specified more in detail its own requirements. Suppose a similarly worded requirement for

[3] See Henderson, *Federal Trade Commission*, p. 26.

the validity of a municipal bond issue; no bond issue would be possible except in pursuance of a previous judicial construction of the meaning of the requirement.

In the grant of discretionary powers, indefinite terms are an appropriate means of indicating the considerations which the legislature desires to see observed, legislation in this way operating by way of principle rather than by way of rule.

Conversely, where the language of principle is used, it may be inferred that the application of the law depends upon administrative action, as in 43 U.S.C. 372: "The right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

In German legislation the occasional use of loose terms not found in English or American statutes ("workshop which *as a rule* employs not less than ten persons") is to be accounted for by the habit of relying upon administrative instructions in the carrying out of all public welfare acts.

In the legislation of Congress we find indefinite or general terms used in prescribing the duties of an office (10 U.S.C. 34, 35, general staff; 5 U.S.C. 184, war council), in outlining a civil service classification (5 U.S.C. 663 compared with 673); in providing for grants in aid (23 U.S.C. 6, description of preferred projects); in indicating how rates are to be determined as compensation for service to the government (39 U.S.C. 543, railway mail), or for general carriers' services (49 U.S.C. 55); occasionally even for the exercise of the power of eminent domain (48 U.S.C. 1225, power of the government of the Philippine Islands to acquire lands held "in such large tracts or parcels and in such manner as in the opinion of the commission injuriously to affect the peace and welfare of the people of the Philippine Islands").

49 U.S.C. 55, passed in form of a resolution (Hoch-Smith Resolution of January 30, 1925), marks perhaps the line where the ordinary language of legislation is purposely discarded in favor of an expression of policy, possibly implying that the appeal is only to the administrative commission, without any thought of eventual judicial en-

forcement (so held in *Ann Arbor R. Co.* v. *U.S.*, 281 U.S. 658, 1930; see 42 *Harvard Law Review* 617; 16 *Cornell Law Quarterly* 339).

§59. INDEFINITE TERMS IN CIVIL REGULATION. a. *Indefinite terms in provisions for equitable relief.* While courts of equity do not exercise as broad a discretion as some administrative authorities, the operation of occasional indefinite terms, involving discretion, is similar.

The British Money Lenders' Act of 1900 authorizes a court to reopen a transaction and take an account where it is satisfied that charges are excessive, or that the transaction is harsh and unconscionable or otherwise such that a court of equity would give relief. This provision may be expected to operate without the generic description of the standard resulting in injustice.

The German Civil Code makes usurious transactions invalid and defines more carefully: transactions in which one party, exploiting the distress, improvidence, or inexperience of another, stipulates pecuniary benefits so much exceeding the consideration that according to the circumstances there is a striking disproportion between the two (§138). Perhaps this, too, falls short of the highest standard of certainty; but in the nature of things, the administration of the act will be on equitable principles.

Another illustration is furnished by a provision of the German Civil Code concerning easements (§1024). If an easement concurs with another easement in the same land so that both rights cannot be enjoyed or fully enjoyed together, and if they are of equal rank, each party may demand an adjustment of the exercise of the rights which reasonably satisfies the interests of all. The whole matter being left to equitable adjustment, flexible terms are properly used.

It is also to be noted that the federal anti-trust legislation, the terms of which lack the definiteness of ordinary criminal legislation, has operated in the main, and so far as monopolies have been concerned, entirely, through the provisions authorizing the government to proceed in equity. Without these provisions, which were due to an afterthought if not to an accident, the law might have fared no better than the anti-trust laws of the several states.

In the provisions of the German Civil Code concerning partnership, the right to withdraw an authority given or to terminate the relation without notice is conditioned upon the existence of reasons which the law simply describes as important (§§712, 725) and this has been criticized. However, there is here a privilege given to be exercised at peril, and operating by way of defense to an action. This does not seem to be contrary to proper drafting standards.

b. *Indefinite terms in civil liability.* Experience shows that the same terms that have been too indefinite for penal enforcement (such as "safe" or "sufficient"), present no difficulty in suits to enforce civil liability. Juries that will refuse to convict for a mistake may have no hesitation in giving a verdict for damages. Thus in the relation between railroad companies and the public, an undefined degree of duty of care (in this case a common-law, not a statutory, duty) has been construed as a duty of the highest possible care with practically every presumption against the railroad company.

The mining law of Illinois of 1911 required dusty haulage roads to be thoroughly sprinkled at regular intervals designated by the mine inspector, thus creating a specific duty. The fear was at once expressed that the question of the sufficient frequency of the sprinkling might be no longer left to the jury, and the liability of the operator thereby reduced (Thomas, "Changes in the Illinois Mining Law," 6 *Illinois Law Review* 395, 399, 1912), and at the next session of the legislature the law was amended by eliminating the reference to designation by the mine inspector.

The indefinite standard in imposing liability may be justified by the consideration that the privilege of carrying on an enterprise may be burdened with an absolute duty of ensuring safety (workmen's compensation acts, Prussian Railroad Law of 1838, aviation legislation); as compared with such absolute duty, the indefinite standard appears as a relaxation of liability. If, however, after the establishment of such an absolute liability, the violation of duties is to be visited with penalties or additional liabilities, these duties should be specific duties.[4]

Irrespective of statute, courts of equity have occasionally imposed upon trustees a civil liability for mere error of judgment—equivalent

[4] *American Woodenware Mfg. Co.* v. *Schorling,* 96 Oh. St. 305, 313, 117 N.E. 366, 369, 1917. See 30 *Yale Law Journal* 446.

to a rule operating with indefinite terms (*Dickinson, Appellant,* 152 Mass. 184, 25 N.E. 99, 1890). And the English Trustee Act of 1893 seems to recognize a liability for inadequacy of price obtained on a sale by a trustee. It is therefore significant that in 1896 a sweeping provision was enacted permitting a court to relieve a trustee where he has acted honestly and reasonably and ought fairly to be excused for the breach of the trust (Judicial Trustee Act, 1896, §3).[5]

c. *Indefiniteness and the security of titles.* The English Settled Land Act of 1882 (§4) requires that a sale made by a life tenant under the power given by the act must be made at the best price that can be reasonably obtained. Sales would become impossible in the absence of further provision, if their validity were made dependent upon compliance with this requirement; hence the further provision in section 54 that in favor of a purchaser in good faith the price paid is to be taken conclusively to be the best price obtainable. The statute is in harmony with doctrines established by courts of equity.

Uncertainty in rules affecting titles is contrary to elementary legal principles; the few cases in which it occurs or has occurred, are controversial or have been remedied by legislation:

It is sometimes said that a condition against alienation is valid provided it is reasonable. If there is any doubt as to reasonableness (and some doubt there will be in most cases), a purchase means the risk of a lawsuit, and there will be therefore no purchaser except after a court has pronounced upon reasonableness. Indefiniteness will therefore operate only by way of exercise of official power. The rule of reasonableness has been strongly criticized in England (*Re Rosher* L.R. 26 Ch. 801, 1884).

It was held in England that where a power was given to distribute property among children in such shares as the holder of the power should direct, each child should be entitled to a substantial share; an appointment to what was called an illusory share was invalid. The

[5] Under the New York stock corporation law (§58) directors (unless dissenting or non-participating) are made liable to the corporation and its creditors for any loss resulting from the declaration of a dividend, unless the value of assets remaining after its payment is at least equal to the aggregate amount of its debts and liabilities including its capital stock. This liability constitutes a risk possibly resulting from mere error of judgment. In 1930 it was proposed to amend the provision by making the judgment of the directors, exercised in good faith, conclusive as to the value of the assets; but the bill failed to become law.

doctrine was found so inconvenient that it was eventually provided by statute that in future no appointment might be objected to on the ground of its being illusory (Act of 1830). In America the doctrine has been likewise abolished by statute (Consol. Laws, N.Y. 1909, ch. 52, §158) or repudiated by the courts (*Hawthorn* v. *Ulrich,* 207 Ill. 430, 1904).

The doctrine of implied revocation of wills was finally worked out in England as meaning that revocation results from subsequent marriage and birth of issue if the testator failed to make substantial or adequate provision for the wife and issue—thus making revocation a matter of the greatest uncertainty. Again the legislature interfered and made the simple provision that every will should be revoked by the subsequent marriage of the testator (Wills Act of 1837).

§60. INDEFINITE TERMS IN PENAL PROVISIONS. The undesirability of declaring offenses in indefinite terms is generally recognized and the practice is discouraged by the risk that the statute may be declared void by reason of uncertainty (*U.S.* v. *Cohen Grocery Co.,* 255 U.S. 81, 1921).

The objection applies to the following terms: unreasonable, excessive; unfair, unjust, and probably also unlawful; unsafe, unwholesome, injurious (particularly by reference to public interest or detriment); to reference to tendencies; to such unclarified concepts as unprofessional or dishonorable conduct, or vicious habits; to prohibitions which lack adequate criteria, and to requirements which leave too much to private discretion.

A statute penalizing the giving or receiving or permitting of tips or gratuities (Iowa Code, §13328) is likely to be unenforceable for a number of reasons, but probably a "tip" is not a hopelessly indefinite concept; but if a statute, in an effort to frustrate evasion, declares that all charges made by the hotel (etc.) must be in good faith charges for the service which it renders, exclusive of the service which it furnishes through its employees, or defines a gratuity as something which is not a part of the regular charge, it overreaches itself by laying down unworkable criteria (Mississippi Statutes, ch. 136, repealed 1926).

a. *Indefinite terms in labor legislation.* The report of the Commis-

sioner of Labor of New York, of 1910, comments upon the unsatisfactory character of a number of the provisions of the labor law then in force: section 86, requiring "proper and sufficient ventilation" (compare the Illinois Act of 1909, §11, requiring five hundred cubic feet of air space for each person employed, with other specified particulars); section 81: all . . . machinery of every description shall be properly guarded (the common response to inquiries was that machinery was guarded as well as possible); section 80: all doors shall be so constructed as to open outwardly *where practicable* (of 1243 factories only 2½ per cent found it practicable to have their doors open outward; the reference to practicability was eliminated in 1913). An account of the labor law administration in New York said (7 *American Labor Legislation Review* 331): "The factory code contains extensive regulations concerning equipment and ventilation, safety of gangways, lighting, heat, accommodations for workers, condition of repair of tools and apparatus, and employment of women . . . but has proven extremely difficult to enforce because such indefinite terms as 'suitable,' 'sufficient,' and 'properly' are used repeatedly instead of definite standards."

Even though the terms are ultimately construed judicially, the first appeal is to the employer's discretion, and he is not likely to be convicted for what he may plead was an error of judgment.

The objection to such terms as "proper," "sufficient," "suitable" in penal statutes applies only where these words enter as material ingredients into the description of the offense. Where without them the requirement is fully intelligible, their addition is harmless, and may simply emphasize the inadmissibility of a purely literal and evasive compliance. Thus it does not weaken a statute requiring an elevator to be enclosed, to say: properly, or sufficiently, or securely enclosed. For the reason indicated the term "substantial" as used in statutes, is nearly always unobjectionable.

The New York Labor Law (§220) requires public contractors to pay their workmen the prevailing rate of wages for a day's work in the same trade or occupation in the locality where the work is carried on. It punishes violation, and requires the insertion of a stipulation in each contract that such wages will be paid. The Court of Appeals of New York, in sustaining the latter requirement, refused to

commit itself as to the validity of the penal provision (*Campbell* v. *New York*, 244 N.Y. 317, 155 N.E. 628, 1927). "Criteria of conduct, too indefinite and elastic to expose to punishment for crime, may yet be fixed and definite in such degree that they are not to be disregarded as wholly unintelligible when the question is one of the violation of a promise."[6]

Where the fixing of wages is a matter of official power, indefinite words expressing merely a principle are appropriate; so in the British Corn Production Act of 1917 (§5 [6]): "In fixing minimum rates . . . the Agricultural Wages Board shall, so far as practicable, secure for able-bodied men wages which, in the opinion of the Board, are adequate to promote efficiency and to enable a man in an ordinary case to maintain himself and his family in accordance with such standard of comfort as may be reasonable in relation to the nature of his occupation."

This phrasing would clearly not be appropriate even for insertion in a contract.

b. *Trade nuisances as criminal offenses.* The degree of offensiveness is necessarily a controlling factor, and to make it a matter of degree whether a valuable industry is legitimate or liable to be penalized, is so unsatisfactory a criterion as to lead inevitably to the substitution of more definite guidance by regulative legislation. The common type of legislation has been that of licensing offensive or dangerous trades, or assigning places where they may be carried on (England 1848, Massachusetts as early as 1785). The English Public Health Act deals with many things and conditions described as carried on or maintained "so as to be a nuisance," but with regard to many of these no penalty can be imposed under the act except for contravention of specific orders (§§91–98 of Act of 1875). The British Alkali Acts (1863–1906), although they do not dispense entirely with reference to "nuisance" or practicability (Act 1906, §§2, 3, 4), make an attempt to prescribe specifically the conditions with which highly offensive and yet essential industries must comply (condensation of muriatic acid gas to the extent of 95 per cent, each cubic foot of air escaping not to contain more than one-fifth of a gram of muriatic acid).

[6] Prevailing rate of wage law held unconstitutional in Illinois, *Mayhew* v. *Nelson*, 346 Ill. 381, 178 N.E. 921, 1931.

These acts expressly save any remedy by action, indictment, or otherwise, for what would be deemed a nuisance if it were not for the act (Alkali Act, §29; Public Health Act, §111). A standard English treatise on criminal law (Russell, *Crimes,* 8th ed., 1923, vol. II, p. 1691 *et seq.*)[7] also states the law of nuisance by reference to old decisions as if it were entirely unaffected by modern regulative legislation. But the necessary practical effect of regulation must be to supersede prior indefinite standards. In Oklahoma it is expressly provided (Rev. Laws, 1910, §4253) that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." This provision has been applied to a license granted by an administrative officer (*Dupont Powder Co.* v. *Dodson,* 49 Okl. 58, 1915).

c. *Indefinite terms in speed laws.* Motor vehicle legislation has given occasion for much discussion of the availability of generic terms, a debate in the British House of Commons upon the subject being particularly interesting (126 *Parliamentary Debates* [1903] 1487, 1507; 127 *ibid.* 413).

The former law of Illinois forbade under penalties the operation of an automobile "at a speed greater than is reasonable and proper having regard to the traffic and use of the way, or so as to endanger the life or limb or injure the property of any person."

A similar provision was declared void for uncertainty in Georgia (*Hayes* v. *State,* 11 Geo. App. 371, 75 S.E. 523, 1912) and West Virginia (*State* v. *Lantz,* 90 W. Va. 738, 111 S.E. 766, 1922), but was sustained in Ohio (*State* v. *Schaeffer,* 96 Oh. St. 215, 117 N.E. 220, 1917).

Later on it became the practice of penalizing reckless driving (defined by reference to wilful or wanton disregard of others, and the creation and likelihood of danger), and also requiring careful and prudent speed, having regard to conditions; and of specifying, in connection with the latter requirement, definite speed limits which are *prima facie* lawful and which it is *prima facie* unlawful to exceed—thus combining fixed and flexible criteria through the establishment of presumptions (Laws of Illinois and New York). England combined an absolute speed limit with a prohibition of reckless driving.

The new English Road Traffic Act of 1930, however, penalizes reckless and dangerous speed by reference to similar terms as those

[7] See my *Standards of American Legislation,* pp. 80–83.

formerly found in Illinois (section 22 of Act of 1919), and expressly discards definite speed limits for private vehicles of specified description. And the proposed Uniform Motor Vehicle Code likewise abrogates definite speed limits, merely declaring specified rates of speed *prima facie* lawful. It remains to be seen whether penalties can be enforced under such generic descriptions.

d. *Employment of Various Terms.* (1) Unreasonable; wilfully unreasonable. The Supreme Court has declared unconstitutional the provision of a Food Control Act which undertook to penalize unjust or unreasonable charges (*U.S.* v. *Cohen Grocery Co.*, 255 U.S. 81, 1921). The Interstate Commerce Act declares an unreasonable charge to be unlawful, but only a wilfully unreasonable charge to be punishable (49 U.S.C. 1 [5], and 10 [1]). If the restriction to wilful unreasonableness saves the constitutionality of the latter provision, it also restricts its application to cases in which the unreasonableness has first been declared by the commission, so that the indefiniteness of the standard has disappeared (*U.S.* v. *Pacific R. Co.*, 228 U.S. 87, 1913).

(2) Unfair. Unfair methods of competition are made unlawful by the Federal Trade Commission Act, but not made punishable until after administrative specification, prohibition, and violation of the prohibition;[8] "unfair terms" is used in some Blue-Sky laws (Kansas, Michigan, Ohio, Wisconsin); but the provisions are likewise operative only through administrative application, and the stipulation of unfair terms is not punishable *per se*:[9] "gross and exorbitant profits" is likewise used in a Blue-Sky law (Pennsylvania) but the provision likewise operates only through administrative application; "excessive profit" is used in the British Profiteering Act, 1919; it is not directly

[8] Similar prohibitions are made by the Tariff Acts; see Tariff Act, 1930, §337. As to Canadian legislation dealing with unfair prices for necessaries, and penalizing only disobedience to administrative orders, see *Proprietary, etc., Association* v. *Attorney-General*, 1931 A.C. 310, p. 321.

[9] A Senate bill in the 71st Congress (S. 1446) proposed to amend 18 U.S.C. 336 (section 213 of the Criminal Code), penalizing the use of the mails in connection with fraudulent devices by including in the forbidden matter any *unfair*, dishonest, or cheating gambling article, device or thing. The Post Office Committee recommended the striking out of the word "unfair" believing the term so general that it might be oppressively interpreted (*Senate Report 950, 71st Congress, 2d Session*, printed in *Congressional Record*, June 24, 1930, pp. 11696–7). But note the use of the term "unfair management" in 18 U.S.C. 113.

penalized, but only made the occasion for an administrative proceeding.

(3) Unlawful. Some of the criminal anarchy acts passed shortly after the war punish the advocacy of the reformation or overthrow, by violence or *any other unlawful means,* of the representative form of government. These particular words have not received any comment. They may raise the very difficult question whether the advocacy of the method of a general strike, or of "passive resistance" or "civil disobedience" would fall under the ban of the law.

"Unlawful" or "illegal" is, however, used, apparently without having presented difficulties, in various connections: unlawful assembly (attempting or threatening any unlawful act, New York); attempting to influence a voter by unlawful means (Kansas); duty to withhold a telegraphic message, if business is unlawful (New York Penal Code, §552); conspiracy to do an illegal act injurious to public trade (Illinois Criminal Code, §46, *People* v. *Glassberg,* 326 Ill. 379, 158 N.E. 103, 1927); inducing another to do unlawful injury (Minnesota, §10377).

In view of these provisions, the term cannot be held to be entirely unavailable.

"Violation of law" as a ground for revocation of a license, has been commented on by Patterson, *The Insurance Commissioner in the United States,* pp. 135–140. In this connection likewise the term offers difficulty.

(4) Unjust. This term is even less definite than "unlawful"; it is found in the Public Service Commission Law of New York (§49), made operative, however, only through administrative power. In section 2 of the Interstate Commerce Act the term "unjust discrimination" is applied to specified practices, qualified by reference to substantially similar circumstances and conditions; and it is only the wilful violation of the prohibition which is penalized (49 U.S.C. 2, 10).

(5) Unprofessional or dishonorable conduct. The terms are not found in penal statutes, but occur not uncommonly in medical practice or similar acts, constituting cause for the revocation of licenses. Courts are divided, but the more widely supported doctrine appears

to be that they are sufficiently definite for that purpose (Aigler, "Legislation in Vague Terms," 21 *Michigan Law Review* 831, 845).

In defining official relations and disciplinary measures, we find reference to wilful misconduct and vicious habits (5 U.S.C. 710). The New York Public Officers Law uses the term "sedition."

(6) Overvaluation. Wilful overvaluation is punished by the War Finance Corporation Act (15 U.S.C. 346).

A similar provision was introduced in the draft of the Uniform Business Corporation Law, and in the form "knowingly and wilfully grossly overvalue" won at one stage the approval of the National Conference. In the act, as finally recommended, it was, however, eliminated.

e. *Terms of tendency.* The creation of "offenses of tendency" has been criticized as liable to political abuse, and terms of tendency are conspicuous in statutes having political implications; outside of these they occur in acts which operate administratively (moving picture censorship).

Tendency statutes have been sustained (*People* v. *Most,* 128 N.Y. 108, 1891; *State* v. *Fox,* 71 Wash. 185, 1912), it being assumed that the unlawful tendency cannot be found in the producing of an inclination of third parties to commit a breach of the peace (*Beatty* v. *Gillbanks,* 9 Q.B.D. 308, 1882).

The words "designed or calculated to coerce the government (either directly or by inflicting hardship upon the community)" in characterizing an illegal strike are found in the British Trade Disputes and Trade Unions Act, 1927. Lack of definiteness was charged and, in a measure, admitted during the deliberations in Parliament; but no more satisfactory phrase was found (Editorial in *London Weekly Times,* June 9, 1927).

The Clayton Anti-Trust Act of 1914 forbids price discrimination "where the effect of discrimination may be to substantially lessen competition or tend to create a monopoly." An act of Minnesota against price discrimination originally contained a similar qualifying clause which was eliminated in 1923; thereupon the act was declared unconstitutional by the Supreme Court of the United States (*Fairmont Creamery Co.* v. *Minnesota,* 274 U.S. 1, 47 S. Ct. 506, 1927) "as the inhibition of the statute applies irrespective of motive."

The term "likely to become a public charge," as indicating a category for exclusion from the United States, is admittedly a difficult one; not only is it not a practicable term for penal legislation, but it is not used in specifying causes for deportation of aliens after admission. (See *Browne* v. *Zurbrick,* 45 Fed. 2d 931, 1930.)

Public detriment: injury to public health, to public morals, or to trade or commerce, is made the test of criminality in the conspiracy law of New York (Penal Law, §580; an early act of 1828).

The Australian Industries Preservation Act of 1906 spoke of restraint of trade to the detriment of the public. The High Court of Australia protested against being asked to say "what is the highest price at which coal could be sold without detriment to the public, with the result that if its *ex post facto* opinion should differ from that of the sellers they are liable to heavy penalties" (*Adelaide S.S. Co.* v. *Rex,* 15 C.L.R. 65, 97, 1912).

The difficulty of proving public detriment (see the New Zealand case of *Crown Milling Co.* v. *King,* 1927 A.C. 394) caused the words to be struck out by an amendment of 1910.

A committee of the American Bar Association in 1927 reported a suggestion that the Sherman Law be amended by requiring detriment to the public as an element of unlawful restraint of trade. It is not surprising that the committee did not commit itself to a recommendation of the amendment.

Again, the phrase has a different aspect in a grant of official power; so in the statutes of Minnesota (§10463), making consolidation of corporations lawful, if the Attorney General on hearing decides that the consolidation will not unreasonably restrain trade, and will not be detrimental to the public interest.

f. *Indefinite terms used by way of relaxation.* Where it is proposed to relax the severity of a penal provision, the description of the mitigating or exculpating conditions in indefinite terms does not encounter the difficulty of either injustice or unconstitutionality.

The common law operates with terms falling short of the ordinary certainty of the criminal law, when it reduces larceny to the lower grade of petty larceny by reference to the value of the thing stolen, and when it makes "night time" an ingredient in the definition of burglary. Statutes have rendered the time more definite. Statutes of

limitations make both the periods and the exceptions from the periods, definite; but it does not seem improper to except "any period during which by reason of some *manifest* impediment the accused shall not have been amenable to military justice" (10 U.S.C. 1510, Articles of War). A relaxation worded in indefinite terms means that the mitigation or non-application of the penalty is more or less at the discretion of the administering authority. By analogy, the rigor of a disabling statute may be relaxed in indefinite terms, so, where, in defining non-quota immigrants the law speaks of one previously lawfully admitted who is returning from a *temporary* visit abroad (8 U.S.C. 204). The provision is aided by an administrative regulation, which apparently leaves some additional latitude to a court (*United States ex rel Randazzo* v. *Tod*, 297 Fed. 214, 1924).

g. *Exceptions in indefinite terms.* The anti-trust acts of California and Colorado contain this exception: "No agreement, combination, or association shall be deemed to be unlawful or within the provisions of this act, the object or business of which are to conduct its operations at a reasonable profit, or to market at a reasonable profit those products which cannot otherwise be marketed."

The Supreme Court held that the exception rendered the prohibition so indefinite as to make the Colorado act unconstitutional (*Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 1927); it certainly indicated a lack of clear legislative purpose.

By way of comparison may be noted the exception in the Wisconsin act (133.04) that the act "shall not affect associations intended to legitimately promote the interests of trade, commerce, or manufacturing in this state"—words which may be construed as indicating objects not directly concerned with profits.

The words on the other hand of section 6 of the Clayton Anti-Trust Act of October 15, 1914, "nothing contained . . . shall be construed to forbid individual members of such [labor or agricultural] organizations from lawfully carrying out the legitimate objects thereof" appear to be so chosen as to grant nothing new by way of exception.

A reservation in favor of "legitimate" requirements in the International Opium Convention of 1912 was generally believed to reduce very greatly the value of any restriction, and the words were left out in the Geneva Convention of 1925.

No modern law on the subject of Sunday rest, framed independently of precedent would be satisfied with an exception of "works of charity and necessity"; compare the German law of June 1, 1891, and the French law of July 13, 1906.[10]

h. *Indefinite terms as factors in the transformation of law.* The foregoing observations presuppose a state of law in which individual cases are supposed to be subordinated to rule. It is possible to conceive of an administration of justice endeavoring to realize equity according to the conditions of particular cases. However, if such a purpose is entertained only in a qualified manner, and sought to be realized only by approximation, indefinite terms will be the appropriate vehicles of the individualizing policy. At present, more of this tendency is to be found in administrative powers than in powers of courts of equity. Perhaps it makes itself felt most conspicuously in connection with juvenile dependency and delinquency. We may expect further developments in the same direction in family law, in criminal law, and—to judge from new German legislation—in labor law. But such future possibilities do not invalidate conclusions drawn from the law as we find it at the present day.

§61. TERMS DESCRIPTIVE OF MALPRACTICES: IN GENERAL. The following terms suggest themselves, as inviting comparison with each other in point of definiteness and availability: adulteration; breach of peace; cruelty; coercion; conspiracy; corruption; debauchery; delinquency; depravity; disloyalty; disorderly conduct; exploitation; force and violence; fraud; immorality; indecency; infamy; inhumanity; intemperance; intimidation; lewdness; malice; monopoly; nuisance; obscenity; oppression; overvaluation; prejudice to public interest; price manipulation; profanity; profiteering; restraint of trade; sedition; speculation; threat; unfair competition; unjust discrimination; unprofessional conduct; usury.

[10] The indefinite terms "charity and necessity" are perhaps of value in permitting a progressive relaxation of the original severity of standards, so, e.g., in permitting recreational facilities. The policy of the London County Council, of permitting moving picture performances on Sundays was defeated by the enforcement of the act of 1781 (21 Geo. III, c. 49), specifically directed against opening places of public entertainment. It might have been more difficult to proceed under the Sunday law of 1677 (see *Rex* v. *London County Council*, 67 *Times Law Rep.* 227, 1931).

The terms, or the practices indicated by them, seem to be affected by some form of weakness from the point of view of criminal law: either the practices are too varied or elusive for precise specification; or the illegitimate cannot be reached without jeopardizing the legitimate, or without the risk of exposing to undesirable attack wide provinces of license and toleration; or the policy of the law is wavering between conflicting considerations of public welfare.

None of these terms, used without qualification, designate common law crimes even of the grade of misdemeanor, although fraud and nuisance constitute common law torts.[11]

Malice, fraud, force and violence, are recognized as constituent elements of specific common law offenses; breach of peace and disorderly conduct have a status in local by-laws and ordinances, and, in connection therewith, as grounds for arrest.

Some of the terms have made a sporadic appearance in statutes, particularly in connection with subjects outside of the ordinary criminal law, where legislative control has tended to expand by reason of circumstances or subject-matter: debauchery, delinquency, depravity, disloyalty, infamous or unprofessional conduct, manipulation, profiteering, speculation; others, such as exploitation, inhumanity, oppression, seem to have even less of a statutory status. The term "profiteering" occurs in the title of a British war-time act, although not in the body of the act, and at that time was not even found in Murray's Dictionary. None of the above terms have been either legislatively or judicially elaborated.[12]

[11] Wagers and games are not common law offenses, but contracts "by way of wagering or gaming" which in England were formerly held to be enforceable, were made null and void by statutes 8 & 9 Vict., c. 109, §18. They are also made unenforceable by the German Civil Code, §§762–764. Even for civil purposes the terms offer difficulties; see Williston on *Contracts*, §§1665–1681.

As to "fraud" and "fraudulent," see *People* v. *Mancuso*, 255 N.Y. 463, 175 N.E. 177, 1931, dissenting opinion of Kellogg, J.

[12] A study of the availability of such terms as manipulation, profiteering, and usury would require consideration of legislative attempts to deal with particular practices falling under these heads, either criminally (see, e.g., the French Penal Code, art. 419), or civilly (German Civil Code, §138, subd. 2) as well as of attempts to single out specific practices: the offenses of forestalling, regrating, and engrossing, abrogated in England by acts of 1772 and 1844 (see my *Police Power*, §§338, 339); the civil law rule against compound interest, the old German statutes against sales of growing crops, and the American statutes fixing rates of interest. The outlawing of specific practices, even if only by way of civil nullification, has often proved to be a mistaken policy; whereas equitable relief against unconscionable practices may encounter no difficulty.

Usury, which is now identified with definite limitations of the rate of interest, had formerly a generic status as an ecclesiastical offense.[13] Under the German law the definition of usury is likewise generic, but confined to credit transactions. More generally, but avoiding the term usury, the Civil Code annuls extortionate and exploiting stipulations (§138), and it has been suggested that the idea of exploitation might be applied to wage and other contracts. A mere civil sanction would not, however, remedy the supposed evils, and a criminal statute could not operate with the general language of the Civil Code.

In contrast with these undeveloped terms should be placed: adulteration; restraint of trade and monopoly; and immorality, indecency, and obscenity.

Adulteration has become one of the most carefully defined of new terms, the definitions and particularly also the specifications illustrating the great difficulty of drawing the line between legitimate and illegitimate practices. The word adulteration is confined to foods, drugs, and condiments. There is no corresponding word for inferior ingredients, imitations, and substitutes in manufactured articles which are now being dealt with as forms of unfair competition. The important point, however, is that even with regard to foods and drugs the term does not appear to have acquired a definite, independent meaning, but is generally used only in connection with other provisions which clarify its meaning.[14]

§62. RESTRAINT OF TRADE AND MONOPOLY. The Sherman Anti-Trust Act of 1890 uses the terms restraint of trade and monopoly without qualifications detracting from or adding to their intrinsic meaning. The idea that they should be read in the light of the "rule of reason" originated in the decision in the Standard Oil case in 1911 (221 U.S. 1). Ever since there has been a question whether or to what extent reasonableness constitutes a protection under the law in its penal aspects; the Supreme Court has merely decided that if the test of reasonable-

[13] The effect of the usury-concept upon the law down to 1700 has received elaborate treatment by Professor Wilhelm Endemann in his *Studien in der Romanisch-Kanonistischen Wirthschafts- und Rechtslehre*, 2 volumes, 1874 and 1883.

[14] Exceptions can probably be found; so in the Act of Congress of August 30, 1890, making it unlawful to import adulterated or unwholesome food, etc. At present (21 U.S.C. 18) the term serves only to define a power of the President to prohibit imports.

ness enters into the offense, the law is not thereby rendered unconstitutional (*Nash* v. *United States,* 229 U.S. 373, 1913).[15]

Perhaps a distinction must be made between monopoly and restraint of trade. Monopoly is a term that, as used in the act, has no meaning apart from matter of degree. Monopoly means the substantial, but not necessarily the entire, elimination of competition. At what point consolidation which is lawful becomes monopoly which is unlawful, can be determined only by a court. To inflict punishment for an error of judgment in this respect would be contrary to justice. As a matter of fact, in the great cases, in which monopoly was charged without additional practices constituting restraint of trade (Standard Oil, Tobacco, Harvester, Steel), the government proceeded in equity, and there is no case in which the monopolizing of an industry without aggravating and oppressive practices was dealt with by way of criminal punishment.

Restraint of trade has a common law meaning apart from unreasonableness: it means combinations between concerns or parties not forming a partnership or corporation, the object of which is to fix prices, limit output, or refrain from competition, the law recognizing as reasonable and lawful certain covenants restrictive of competition which are incidental to the sale of a business or to the entering into a contract of employment. The common law regards a restraint of trade in the sense indicated as illegal, though not as punishable. The Act of 1890 makes it also punishable, unless, indeed, the constituent element of unreasonableness is read into the law; and while there is some obscurity as to this, we know that the reasonableness of prices fixed does not prevent the combine from being punishable (*U.S.* v. *Trenton Potteries Co.,* 273 U.S. 392, 1927).

The difficulty of the concept of restraint of trade as one of criminal law lies in a number of factors: those engaged in a trade may combine not only for education, information, and advancement of standards, but also for the putting down of undesirable practices and trade abuses, and to draw the line in this respect between lawful and unlawful may be more difficult than to recognize criminality in the case

[15] See *Proprietary, etc. Association* v. *Attorney-General,* 1931 A.C. 310, p. 318, as to the terms undue and unreasonable in the Canadian law against combinations in restraint of trade.

of most other offenses. The difference is one of kind, and not of degree; but it is sufficiently near the difference between reasonable and unreasonable to have elicited statements from the Department of Justice that it will not stand in the way of associations serving beneficial ends. Here, too, in cases where governmental intervention would seem to be called for, it would be by an equitable and not by a criminal proceeding. In the second place, even where the object of the combination is plainly self-seeking, the principle of illegality cannot be carried through with consistency. Incongruously, the Sherman Act was applied to railroad rate agreements; but laborers' combinations for maintenance of wages stand outside of it; farmers' coöperatives and export associations had to be expressly legalized. The legitimacy of the practice of resale price maintenance is controverted. There is difficulty in applying the prohibition, where limitation of output is in the nature of conservation, as it is in oil production,[16] and it would be contrary to public interest to place agreements for rational forest exploitation under the ban of the law. But if a law declares a practice to be criminal, and cannot apply its policy with consistency, its moral effect is necessarily weakened. Moreover the practice, while condemned if applied within the country, is encouraged if it is directed against other countries (export trade associations), whereas national borderlines do not affect the moral aspect of other practices.

Finally, there are doubts whether regulation would not be better policy than prohibition, and whether prohibition is a sound economic policy under modern economic conditions—doubts that are strengthened by the refusal of other countries to adopt the policy of outright prohibition.

But while all these factors render criminal enforcement difficult, the belief that seemed justified after the failure of the most conspicuous

[16] See 131 *Commercial and Financial Chronicle* 3122, November 15, 1930. Mr. Donovan, who had been Assistant Attorney-General in charge of the enforcement of anti-trust laws, is quoted as declaring that the anti-trust laws would not place undue obstacles in the way of national programs to limit production, if the motives of the collaborators were kept away from price fixing or domination of supply by limited groups: "The legality of such a plan is dependent upon the existence of certain facts, such as production far in excess of normal and reasonable market requirement with resultant depression in price which threatens to destroy the investment in the industry, and the creation of excess stocks with economic waste and danger due to unnecessary storage above ground."

criminal cases (National Cash Register and Naval Stores), that the Sherman Act was criminally unenforceable, has been refuted by the continued application of the penal sections of the law in cases where restraint of trade is accompanied by circumstances of aggravation.

A close analysis of the practice of criminal prosecution might reveal as in course of development a distinct species of malpractice, perhaps appropriately designated as unfair or abusive restraint of trade, the element of unfairness or abuse qualifying to such an extent the otherwise vague economic criteria as to render the law capable of penal enforcement.

At present the injustice resulting from the indefiniteness of standards in the Sherman law is most apparent in its civil liability aspect. Particularly, if there is no ascertainable test to determine when the point of monopoly is reached, a law appears indefensible which permits any individual to come into court and demand threefold damages for the injury suffered by him through the expansion of a business to a point which may be lawful or unlawful according to an unpredictable future determination. The difficulty of establishing a proximate causal connection between monopoly on the one side and on the other side particular loss of trade or employment, has tempered this aspect of the law in its practical application.[17]

The Sherman law also shows that enforceability is not the only test to be applied even to a penal statute. Such a law may serve a purpose by merely existing and satisfying or placating public sentiment. If indefinite terms constitute legal weakness, their use may commend itself from a political point of view, and constitute an element of strength in making the law not only initially acceptable, but also long-lived and almost invulnerable.

§63. IMMORALITY, INDECENCY, OBSCENITY. Immoral does not appear to be a statutory term of common occurrence.[18]

It is found in connection with subjects where power is exercised on

[17] See, however, *Chattanooga Foundry* v. *City of Atlanta,* 203 U.S. 390, 1906.

[18] An act making it a misdemeanor to commit an act injurious to the public morals was declared unconstitutional, as being too indefinite, in Arkansas. *Ex parte Jackson,* 45 Ark. 158, 1885.

a wider basis than the ordinary criminal law: dance halls, motion pictures, delinquent children, trademarks.

The description of offenses barring aliens from admission by reference to moral turpitude has been criticized, and its elimination proposed (8 U.S.C. 136 [e]).

The terms "articles of an immoral nature" and "for immoral use" are used in the laws prohibiting importations (19 U.S.C. 135) and prohibiting circulation through the mails or in commerce (18 U.S.C. 396, 512). The Immigration Act of 1907 and the White Slave Act of 1910 speak of importing or transporting women for an immoral purpose.[19]

The primary reference in all these cases (except offenses involving moral turpitude) appears to be to sexual immorality and particularly to illicit sexual relations.

The term indecent is found either by itself or in conjunction with immoral or obscene. Both immoral and obscene might receive a more restricted interpretation by the addition of the words "and indecent." It is therefore interesting that the first federal obscenity law (1842) spoke of obscene and indecent.

The federal law prohibiting the circulation through the mails of publications of an indecent character (18 U.S.C. 334) was amended in 1908 by adding: "The term 'indecent' within the intendment of this section shall include matter of a character tending to incite arson, murder, or assassination."

The term "obscene," which has been a conspicuous one in legislation, is also used not only with principal reference to matters of sex, but also without specific reference to its physically offensive aspect.

Obscenity as a legal concept has received a great deal of judicial and literary discussion, which in the main also applies to immorality and indecency.[20]

Legislation does not appear to have hampered in any way scientific research, teaching, or publication through customary channels. Difficulties have arisen in connection with art and literature, and in connection with propaganda, social reform, and new social customs

[19] See *United States* v. *Bitty*, 208 U.S. 393, 1908.

[20] See Bibliography in M. L. Ernst and W. Seagle, *To the Pure*, New York, 1928.

(birth control, dress reform). Since the standards of art and literature vary widely from the standards observed in the ordinary walks of life, it is natural that there should be many borderline questions. The most serious problem arises with regard to social theories and practices which are in advance of accepted standards and encounter hostility.

How would existing difficulties be remedied by statutory changes?

It is impracticable to dispense with any legislation whatever, for that would simply result in the stretching of other available terms, such as nuisance or disorderly conduct, and produce another form of undesirable latitudinarianism. The necessity of repressing offensive manifestations of obscenity is obvious.

An attempt might be made to circumscribe with care the offense in such a way as not to touch legitimate freedom. The difficulty here is to respect the license of art to the extent of its actual toleration. Attempts made in German legislation do not invite imitation. In England it seemed desirable to deal more leniently with street solicitation which had been proceeded against as a form of indecency; it seemed inexpedient to give it positive immunity, and the discussion seemed to favor the introduction into the law of the term "importune," to be further defined (*Report of Street Offenses Committee, 1928*). It is doubtful whether qualifying terms would remedy the situation.

Could generic terms be replaced by singling out specific practices? There has been state legislation forbidding the exhibition of criminals, and motion picture control has specific prohibitions in the same direction. A Chicago ordinance suppresses museums of anatomy more specifically described (*Chicago* v. *Shaynin,* 258 Ill. 69, 1913). These are desirable specifications of indecency. Has it been equally desirable for Congress to legislate against anything designed, adapted, or intended for preventing conception? (18 U.S.C. 334; also New York Penal Law, §1142). In any event, no specific enumeration, however unobjectionable in itself, could possibly undertake to cover all objectionable practices that may call for repression.

As a matter of practical legislation, it would seem that consideration must be confined to the possible choice between making obscenity a crime or merely a matter of administrative repression. Administrative repression, particularly by way of censorship, is relieved

from the inherent checks of criminal prosecution, and while judicial control over censorship is not impossible, it has a narrower range than judicial control over a criminal prosecution.[21] Perhaps we must conclude that a criminal trial offers the best safeguards that it is possible for the law to give. There may be occasional injustice and hardship; but on the whole the administration of the existing and confessedly vague legal standards has not erred on the side of excessive strictness.

We are dealing here with one of the few cases in which indefiniteness in penal legislation appears to be inevitable, for the reason that it is the price paid for a large tolerance.

Should the legislature use terms, which in the mind of the general public are associated with one type of offense, to designate very different types of offenses? The use of a term in a novel manner in the title to an act will raise a question of constitutionality in many states, but apart from that, the matter is one of legislative discretion in the constitutional sense. Sound principles of legislation should, however, induce caution with reference to confusing canons of criminal law in the public mind. Legislative practice has sanctioned extensions which may appear to be intrinsically undesirable: the use of the term larceny to cover embezzlement, the use of the term rape to cover illicit relations without force where the female is under a designated age, the definition, above noted, of the term indecent, by the amendment of 1908, now in 18 U.S.C. 334, and perhaps others.

It was recently proposed in a bill introduced in New York to define prostitution as the act of the male as well as of the female where the female acts under conditions which are commonly regarded as making her a prostitute; incidentally, that would make the person patronizing the prostitute also a vagrant. In some states such a person may be held guilty of the offense of contributing to the delinquency of a minor; it might be interesting to inquire how far this latitudinarian practice has gone; it is not believed to be used extensively.

[21] See *Bainbridge* v. *Minneapolis,* 131 Minn. 195, 154 N.W. 964, 1915 (case of the moving picture, *Birth of a Nation*). The English Theatre Act of 1843 operates by a censorship guided only by the terms "good manners, decorum, or public peace." The censor formerly prohibited the representation on the stage of scriptural characters, so that Saint-Saens' *Samson and Delilah* could be given only in concert form; this ban was, however, removed in 1909. In 1923 Housman's *Bethlehem,* in which the Virgin Mary has a speaking part, was released; it is understood, however, that the performance of *Green Pastures* was not permitted. In 1909 a Parliamentary Committee recommended specification of the grounds of prohibition, including violation of the sentiment of religious reverence. Under which of the three methods would *Green Pastures* have the best chance: specification, the general terms of the Theatre Act administratively applied, or the same terms in the hands of a jury? It is obviously difficult to give a positive answer.

Legislative euphemism. The Illinois Criminal Code (§47) speaks of the "infamous crime against nature, with either man or beast," without further definition. Compare the more explicit language of 24 & 25 Vict., c. 100, §61, and the language in Stephens' *Digest of Criminal Law,* art. 168.

The Constitution of the United States does not use the terms "slave" or "slavery" when it recognizes the institution (1–9–1; 4–2–3) but only where it abolishes it (Thirteenth Amendment);[22] nor is the term used in the Fugitive Slave Acts of 1793 or 1850, although it is used in the Slave Trade Acts, where the institution is treated as outlawed.

[22] See also article VI of the Ordinance of 1787 for the Northwest Territory.

PART IV
THE TECHNIQUE OF PENAL REGULATION

CHAPTER IX

PUBLICITY AND CHECKING PROVISIONS

Publicity and checking provisions constitute formal regulation, the general nature of which has been discussed before.[1] Accompanied or unaccompanied by other substantive regulation, they are represented by one or more of the following requirements or methods: designations, marks, and signs; physical arrangements (time and place requirements, size or weight units, packages or containers;[2] private records or registration; notices, reports; public records or registration; administrative examining powers.

§64. Designations, Marks, and Signs. The following differences should be observed: prohibiting false designations; marking restrictions and privileges; and marking requirements.

The prohibition of false designations is concerned with malpractices, and is therefore not strictly speaking regulative. But statutory terminology may not always observe the difference: if an act provides that if an insecticide contains arsenic and the amount of arsenic is not stated on the label, it shall be deemed misbranded (7 U.S.C. 131), this amounts to regulation.

The substance of a marking restriction or privilege is that if a certain designation is used, a certain standard must be conformed to, e.g., that nothing shall be sold as cream that has not a stated percentage of solids, or that gold or silver shall not be marked sterling unless of a stated grade of fineness. Restrictions of this kind, intended to protect superior quality, stand in contrast to requirements applicable to inferior quality. If the standard set is not above recognized trade standards, this legislation hardly differs from the prohibition of misleading designations. See *Independent Packing Co.* v. *Houston,* 204 Fed. 120, 1913; *Armour* v. *State,* 159 Mich. 1, 1909.

As has been pointed out before,[3] the optional certification method

[1] See §20, *supra.*

[2] As to constitutional aspects, see my *Police Power,* §§273–275, also *Jay Burns Baking Co.* v. *Bryan,* 264 U.S. 504, 1924.

[3] See §26, *supra.*

of regulating professions operates through restricting the use of designations.

A required designation or mark may merely serve the purpose of identification, for public convenience (house numbers), or in aid of supervision and law enforcement. Statutory provisions will seek to prevent duplication, confusion, or concealment in connection with the choice or the placing of marks.[4]

If marking requirements serve the purpose of disclosing quality, they either do so impartially or by way of adverse discrimination. In the former case they apply to commodities without exempting competing articles or products (specified foods or drugs, feedstuffs, fertilizers); in the latter case they are confined to supposedly inferior products (imitations, substitutes) or things or practices not favored by the policy of the law. Requirements of the latter class are likely to meet resistance, and if they are designed to hinder inconvenient competition, they may be oppressive, and, if not unconstitutional, subject to strict judicial construction. The legislative intent must therefore be carefully and specifically expressed, going into detail as to size, material, location, etc. Oleomargarine legislation is typical.

In proper cases a uniform system of marking, with regard to national or even international conditions, may be valuable (recognition of U.S. Pharmacopeia in Drug Acts). On the other hand, concessions may be made to foreign requirements (21 U.S.C. 2, 74).

The importance attached by a legislature to marking requirements is shown by the following extract from the Conference Report on the Tariff bill of 1930 (*Congressional Record,* April 28, 1930, p. 8150; see Tariff Act, 1930, §304, superseding 19 U.S.C. 132, 133).

"On amendment no. 1114: The House bill required the marking of every imported article and its immediate container, and the package in

[4] Legal attitudes may be studied in connection with the regulation of names and incidental requirements. Note, e.g., the German legislation of the earlier nineteenth century requiring Jews to take family names. The common law permits assumption and change of name at the discretion of private parties; statutory provisions are not necessarily mandatory. Legislation is more elaborate regarding names of ships than regarding names of persons. The law of bearer securities deserves notice in this connection; see the provisions of the German Civil Code, §§793–808. At common law their issue and circulation (unless intended to serve as money) is free. For fiscal purposes, Italy at one time took steps to discourage bearer securities (see 111 *Commercial and Financial Chronicle* 2094, November 27, 1920).

which imported, and delegated to the Secretary of the Treasury authority to make such exceptions as he deemed advisable. The Senate amendment strikes out this general authority of the Secretary of the Treasury to make exceptions, and provides that the Secretary of the Treasury may except any article from the requirement of marking but only if the article is incapable of being marked, or cannot be marked without injury, or if the expense is economically prohibitive of importation, or if the marking of the immediate container will reasonably indicate the country of origin of the article. The amendment also restores the requirement of existing law that the marking shall be as nearly indelible and permanent as the nature of the article will permit. The House recedes with amendments providing that the Secretary of the Treasury may except an article from the marking requirements if *'he is satisfied that'*[5] the article is incapable of being marked, or cannot be marked without injury, or at an expense economically prohibitive, or that the marking of the immediate container will reasonably indicate the country of origin of the article."

The Report illustrates: first, the minuteness of legislative provision deemed necessary; second, the technical considerations involved in an apparently simple requirement; and, third, the necessary recourse to administrative authority and legislative differences of opinion as to its desirable extent.

A peculiar form of required marking of inferior quality is found in an amendment of section 8 of the Federal Food and Drug Act, enacted July 8, 1930: if canned food falls below a standard of quality promulgated by the Secretary of Agriculture, it must bear a statement prescribed by the Secretary indicating that it falls below such standard. As pointed out in the debate in Congress on the bill (*Congressional Record,* May 7, 1930, p. 8833, H.R. 730), the promulgated standard would be likely to be the lowest commercially acceptable standard, making the law applicable to only a small percentage of the product, which would be stigmatized but not outlawed. It was urged that it would be preferable to make applicable to canned food the optional comprehensive grading of raw fruit and vegetables provided for in the annual appropriation act for the Department of Agriculture, the certification of which is made *prima facie* evidence in the federal courts. It will be noted that the method adopted by the amendment differs from other marking requirements by way of adverse dis-

[5] These words are now in section 304 of Act of 1930.

crimination, which merely compel the setting forth of the true nature of the article, such as oleomargarine, renovated butter, or skimmed milk; for it requires the proclaiming in terms that the thing is of inferior quality, unless indeed a designation as "ungraded" would satisfy the act.[6] It resembles, but goes beyond, the requirement of Blue-Sky laws, that non-exempt or non-preferred securities be stamped "speculative."

A marking or labeling requirement operates more incisively than a requirement to register, for notice is in the former case conveyed more directly and generally. The English Business Names Registration Act of 1916 requires names to be registered where they are not the true names, or where there has been a change of name, and for failure to register deprives the defaulting party of his rights of action in connection with the business (section 8 of the act). The act also requires the true or former names to be printed on all trade circulars, business letters, etc., but for default in this respect only a fine is imposed, and proceedings can be instituted only by or with the consent of the Board of Trade (section 18 of the act). The more odious character of the requirement is offset by greater leniency in dealing with non-compliance.

Penal provisions. A marking requirement should be supported by penalties covering the following, in addition to the direct violation of, or non-compliance with, the statutory provision: violation of, or non-compliance with, administrative regulations; and the act, with intent to conceal the information intended by the law to be given, of defacing, destroying, removing, altering, covering, obscuring, or obliterating any required mark or label. See the provision of the Food Act, 21 U.S.C. 79. The Tariff Act, 1930, §304, provides for failure to mark only an additional duty and the withholding of delivery until marked.

§65. PRIVATE RECORDS AND REGISTERS. Foreign commercial codes have full provisions concerning books of account (German Code of Commerce, §§38–47), failure to comply with which may render bankruptcy fraudulent. There is no similar general obligation in American

[6] So in Wisconsin, 99.10.4.

legislation; but the Revenue Act of 1928 (§54) requires the keeping of such records as the Commissioner of Internal Revenue may prescribe, and Regulation 411 requires all taxable persons carrying on the business of producing or selling merchandise (except growing and selling products of the soil) to keep such permanent books of account or records including inventories as are necessary to establish gross income and deductions. A requirement so generally worded would not readily lend itself to penal enforcement.

Where records or registers are required to be kept in connection with specified classes of business or practices (e.g., employment of children or women), for the purpose of facilitating supervision, a statute in order to be enforceable must be more specific, either directly or by reference to administrative regulations, or by giving power to prescribe, if voluntary practice is found to convey inadequate information (Packers Act, 7 U.S.C. 221).

The following points and problems require attention: expressing both the obligation to keep records or registers, and the obligation to make entries; specifying matter to be entered; requirement that practice be in conformity to entries if entries relate to a plan of prospective action; question to what extent forms should be prescribed; obligation to produce record; power to inspect and take copies; evidential effect of entry or of failure to enter (British Factory Act, §129 [2][7]); guarding legitimate secrecy; provision as to preservation of records; the problem of incriminating records. For illustrations, see British Factory Act, 1901, §129; Illinois Pawnbrokers Act, 1909, §§5, 6.

Penalty provisions should cover the following (in addition to violation of specific requirements): false entries; mutilation, alteration, or falsification of accounts or records; removal from jurisdiction for other than specified purposes; violation of plan without notification. See Federal Trade Commission Act, §10.

In German legislation we find occasionally special consideration

[7] "Where any entry is required by this Act to be made in the general register, the entry made by the occupier of a factory or workshop or on his behalf shall, as against him, be admissible as prima facie evidence of the facts therein stated, and the failure to make any entry so required with respect to the observance of any provision of this Act shall be admissible as prima facie evidence that that provision has not been observed."

It is doubtful whether the latter presumption is a legitimate one; if not, it might be unconstitutional in America.

given to small concerns, if complex requirements would be beyond their capacity (Insurance Law, §53; Wine Law, §17).[8]

National uniformity may be secured by requiring administrative regulations to follow federal models (Maine, 1913, ch. 129, §11).

Requirement of keeping accounts. The requirement is confined in the main to public utilities, and since these are under the supervision of administrative commissions, the requirement is appropriately phrased as one to comply with regulations which the commission is authorized to make. See, e.g., the Illinois Public Utilities Act, §13. The Commission may then also be directed to consider any system of accounting established by any federal law, commission, or department, or by any national association of state commissioners (see Maine, 1913, ch. 129, §11).

The prohibition of the Interstate Commerce Act (§7) against keeping other accounts, records, or memoranda than those prescribed or approved by the Commission, has been copied into state laws. The alternative provision for approval makes it possible to conform to foreign law requirements, where business is done in foreign jurisdictions.

§66. NOTICE TO ADVERSE PARTIES. Provisions are of two kinds: either a party who is likely to incur, or who may have incurred, some liability, is given a right to notice in order that he may protect himself from avoidable or unjust claims; in that event failure to notify forfeits the claim, unless the statute otherwise provides in case there is no actual prejudice by reason of non-notification (Illinois Workmen's Compensation Act, §24). There is difficulty in declaring a forfeiture against an infant or incompetent party (see *McDonald* v. *Spring Valley*, 285 Ill. 52, 120 N.E. 476, 1818).

Or the party entitled to be notified is to be thereby enabled to assert rights of which he might otherwise be in ignorance. The requirement is more effective, but also more burdensome if it is im-

[8] The enforcement of even simple requirements may encounter difficulties. If there is a ten-hour day for women, and a standard day is impracticable, the law will depend upon the keeping of time books; but small concerns will be very apt to neglect observance. The problem appears to be almost insoluble.

posed irrespective of demand.[9] The statute should prescribe the form of notice which should always be required to be in writing,[10] or permit it to be prescribed by administrative regulation, and, if it is to be posted, should require it to be *kept* posted. It should indicate whether non-compliance entails (in an appropriate case) liability, or a penalty, or both.

An act of Illinois (1899, p. 139) declaring it to be a misrepresentation for any employer not to disclose the existence of a strike, lockout, or other labor trouble in any advertisement, proposal, or contract for the employment of workmen, was held to be invalid as class legislation (*Josma* v. *Western Steel Car Co.,* 249 Ill. 508, 1911). It is instructive to compare the manner in which the same problem was handled in New York (Laws, 1914, ch. 181): A statement concerning an existing labor difficulty may be filed at a public employment office by either employer or employee (or their representatives), which is communicated to the other side for reply, and is then, together with the reply, if any, exhibited in the office. This appears to be an effective method of guarding the interests concerned.

§67. Provisions Requiring Reports or Registration. Registration requirements differ from mere report or notification requirements by provision for the entry of matter reported or notified in a public register for general information.

What counts for purely penal purposes is the private act of notification or filing; but if registration is the prerequisite of validity or civil effect, a question will arise whether the individual must see to it at his peril that a public record is made and that it is correct—a matter of importance in the recording of conveyances (see *Nattinger* v. *Ware,* 41 Ill. 245, 1866).

[9] Section 77 of the Stock Corporation Law of New York requires financial statements to stockholders owning 3 per cent of the stock, on demand. It is said that a proposition to make the requirement absolute was disapproved by Governor Smith in 1927 (124 *Commercial and Financial Chronicle* 1928).

[10] Illinois Health Safety & Comfort Act, §31: The provisior. gives in full the form of the notice. The further provision that "in addition to English this notice shall be printed in such other languages as may be necessary to make it intelligible to employees" is obviously unenforceable without delegation of administrative power to specify particular languages for any given work place.

Provisions requiring reports will differ according as to whether the report relates to the conduct of some business (public utilities, banking, insurance) or to some particular occurrence (accident, disease, birth, death, marriage, etc.).

If the required report relates to a course of transactions, the requirement is likely to be ineffectual unless it is sufficiently specific. Items may be specified in the statute itself (quite commonly in great detail) or may be left to be specified or supplemented by the designated authority; if the latter, the statute should make it clear whether the requirement must be made generally applicable or may be varied with reference to particular concerns (Pennsylvania 1913, No. 854, art. 2, §1).

The report may be required to be "in form approved by" the authority (Massachusetts 1913, ch. 784, §3), or the form may be prescribed by law or administrative authority, and reports are often required to be made on furnished blanks. The report is often required to be verified.

Required notification of particular occurrences or facts: Since the forthcoming of information is apt to serve a more direct or vital public interest than a general business report, it must be the effort of the law to make the duty effective: by making its performance a condition precedent to the obtaining of necessary facilities (requiring notification of death before a burial permit can be obtained); by placing the duty upon those having the habit of official responsibility (marriage: celebrating official; birth or death: physician or hospital authorities); by furnishing special facilities (report blanks) or even special inducements (small fee to reporting physicians). The law should also avoid duplication of duties (obligation placed on a number of persons without indicating order of priority, or requiring reports to be made to more than one authority).

For a model as regards vital statistics, see *Proceedings of Fifteenth International Congress of Hygiene and Demography* (vol. 6, p. 18); a model state law for morbidity reports was recommended by the Eleventh Annual Conference of Federal and State Health Authorities, June 16, 1913 (see *Public Health Reports,* June 27, 1913).[11]

[11] If registration is to be effective for social purposes, its terms and categories should be based on scientific principles, and should be nationally, or even internationally, uni-

Registration requirements include provisions for declarations, records, and certificates.

Special penalties are required for false statements, and, if the occasion warrants, for the misuse of certificates.

It is not common to declare the civil effect of either registration or non-registration.

A general rule-making power in aid of the provisions of the law is valuable and usual.

If periodical renewal of registration is required, or a fee is to be charged, this should be expressed in the statute, and not be left to administrative regulation; so also if new registration is required in case of specified changes.

The law should make it clear how the duty to report is discharged (mail, registered mail, telephone, delivery at the public office) since there may be some doubt as to when and where a requirement of "filing" is satisfied (see *U.S.* v. *Lombardo,* 241 U.S. 73, 1916; *Otis Elev. Co.* v. *Long,* 238 Mass. 257, 130 N.E. 265, 1921).

The provision regarding presumption and burden of proof in 18 U.S.C. 402 (3) seems unusual, and of doubtful validity. The requirement of notification by registered mail, or of obtaining a receipt, serves to make the burden of proof, which is thrown upon the individual charged, less objectionable.

The difficulty of imposing a duty of report or registration upon private individuals, disconnected from the carrying on of some business, is illustrated in the proposed registration of aliens. While an earlier bill (1925, H.R. 5583) merely imposed a penalty for non-registration, a bill of 1930 (H.R. 9101) provided for deportation ("*may* be deported") in case of wilful failure or neglect to register for two consecutive years. What constitutes "wilfulness" in an act of omis-

form. From the point of view of legislative technique the question arises, whether the system of registration for purposes of information must conform to the system of legislation adopted for purposes of regulation or control. To a scientific system of crime reporting, the code classification of offenses may appear archaic; but in view of popular reactions to criminal legislation, or even as a matter of practical administration of criminal justice, established and historical categories, though recognized to be scientifically inferior or questionable, may for the time being be indispensable. If, then, practical cannot conform to scientific classification, the question is whether a separate and independent classification is possible for legislation pursuing only service purposes. A classification pursuing only such a purpose might be worked out by state compacts or international conventions.

sion?[12] Universal experience shows that individuals are apt to overlook such obligations in the absence of special arrangements or facilities. Deportation is a penalty out of all proportion to the delinquency, and there is the greatest danger that it would be enforced only for ulterior purposes. In Germany, where all strangers, citizens as well as aliens, are required to be registered, the duty of notification is placed upon the hotelkeeper or landlord. An English act for the registration of aliens, passed in 1836, 6 & 7 W. IV, c. 11, connected registration with arrival at a port; even so, the act ceased to be enforced and fell into desuetude, until it was repealed in 1905.

§68. EXAMINING POWERS.[13] Administrative powers in aid of publicity include inspection, search, and the right to demand reports, oral testimony, and documentary evidence.

The starting-point of all legislation is the absence in our law of any general executive authority to compel the giving of information. A statutory power to examine, or even to examine "by all reasonable ways and means in their power" (U.S.R.S., §2902), presupposes some power given in more specific terms; the possession of necessary funds merely enables an officer to procure information by the means open to a private individual, which is appropriately indicated by the term "investigate."

a. *Powers of inspection.*[14] The power is conspicuous in connection with the following subjects of legislation: public utilities; banks; insurance; health, safety, and comfort; institutions caring for incompetent persons; and revenue legislation.

The detail of legislation is concerned with the specification of powers and their prerequisites and limitations, and hardly reflects the important "service" side of inspection in advising and guarding against dangerous or undesirable practices.

A power of inspection may be appropriately qualified by reference to the purposes of the statute; if it is to be exercised only in view of

[12] See §76, *infra.*

[13] See Freund, *Administrative Powers over Persons and Property,* chap. IX, "Examining Powers."

[14] The "inspection laws" to which the United States Constitution refers (1–10–2) were in effect laws for the certification of commodities.

specific dangers, these should be referred to by reference to the reasonable belief of the officer (British Alkali Act, 1906, §12).

Provisions for inspection should cover: right of entry or access; in what officers or subordinates vested; time provisions; provision for judicial warrant in case of residence property; duty to exhibit badges or other evidence of authority; power to take along a peace officer, or, in appropriate cases, representatives of the parties in interest; duty to submit or afford facilities or assistance; right to take copies; right to take samples for analysis (as to special technique of this see New York Agricultural Law, §224; English Fertilizer Act, 1906, §§2, 3, 7, 8); fees, if any; certificates; penalties for refusing or obstructing access and for misuse of power or of badges, etc. Notice would often defeat the purposes of inspection; but there is no occasion for expressly dispensing with notice.

The effectiveness of inspection will depend upon the report made by the inspector to his official superior, and the report can be guided by the form prescribed for it; but this must practically be matter of administrative regulation. See *Report of Chicago Department of Health, 1911–1918,* p. 723.

Powers of search and seizure: Constitutional safeguards and limitations require observance. Provisions of prohibition laws are typical; the National Prohibition Law incorporates by reference title XI of the Espionage Act of June 15, 1917, in which the provision for receipt to be given in case of seizure is to be noted; see 18 U.S.C. 622. A statute is not apt to express itself one way or another as to the controverted rule of law concerning the use of unlawfully obtained testimony.[15]

b. *Power to require information.* A general power to obtain requisite information (Interstate Commerce Act, §12) is, as a compulsory power, of little value unless, as is regularly done, it is further specified. The specification takes the form of a power to question, or of a power to call for documents, or both. A power to demand reports, to be sufficiently specific for purposes of enforcement, must, it seems, be exercised in either of these forms (see section 6 [6] of the Federal Trade Commission Act).

[15] The author has expressed his views upon the subject in an address printed in the *Chicago Legal News,* vol. 56, pp. 211–215, January 24, 1924.

Statutory provisions should cover the following:

The statute should name the officials by whom the power may be exercised, particularly if it is to be vested also in subordinates, such as examiners.

If examination is to be under oath (which is the rule in American legislation), the statute should express this, and also whether the examining officer may administer the oath.

The statute should make it clear whether the power is to examine only those with regard to whom an administrative determination (license, or its refusal or revocation, order, assessment) is to be made, or also third persons. If it includes the latter, or if there is occasion to call for documents, a power to subpoena is necessary, which is usually vested in the nominal authority (issued by its clerk or secretary under the official seal), and not in the subordinate examining official.

The scope of the examining power is inherently limited if it is in aid of some other determinative (enabling or directing) power; but it becomes of great importance where an inquiry is made simply to elicit full information in matters not directly affecting an individual, or where the purpose is to ascertain whether charges can be preferred against some person. If the power of investigation is coextensive with the provisions of the act (New York Labor Law, §31; Illinois Public Utilities Act, §60), and an inquiry is instituted as to the general operation of the act, the scope of relevancy of questions may be correspondingly wide, although perhaps not as wide as where a legislative committee considers the advisability of new legislation; and the same is true where power is given to call for "documents relating to any matter under investigation." The limits of such a power are to be found only in the constitutional guaranty against unreasonable searches (*United States* v. *American Tobacco Company,* 264 U.S. 298, 1924), whereas it seems that a power to call for reports or returns (i.e., not documents already in existence) does not include power to require an expression upon matters of mere opinion (*Dyson* v. *Attorney-General,* 1912, 1 Ch. 158).

Is there need for statutory provision to make an examining power effective against recalcitrant or contumacious parties? The decision in *Missouri* v. *North,* 271 U.S. 40, 1926, has raised some question with regard to this, which requires clarification. It is hardly conceivable

that the absence of a power to compel testimony will prejudicially affect private rights, which are amply safeguarded by the fullest opportunity given to the individual to present such evidence as he can command without recourse to compulsion. It is the administrative authority which may stand in need of compulsion in order to make its examining power effective for its own purposes, and since there is neither common law process nor general statutory authority available for this purpose, the particular statute giving the examining power should contain requisite provision; but the statute need not, as a matter of due process, support the administrative authority in this way. Compulsion must be exercised through the courts, since an administrative authority cannot be vested with contempt powers (*Langenberg* v. *Decker,* 131 Ind. 471, 1892): either the refusal to answer is made a penal offense, or the administrative authority is given power to invoke the aid of a court for the requisite compulsory process (but not for conducting the examination). The provision of section 12 of the Interstate Commerce Act (49 U.S.C. 12 [2], [3]), which has been sustained by the Supreme Court (*Interstate Commerce Commission* v. *Brimson,* 154 U.S. 447, 1894), furnishes a convenient model.

§69. PROVISIONS CONCERNING ADVERSE PUBLICITY. Publicity requirements may have to be safeguarded in order not to violate constitutional rights and in order to respect legitimate claims to privacy or secrecy.

If the very object of the law is to break down specific forms of secrecy, the question of constitutionality goes to the entire act (e.g., required publication of membership lists of oath-bound associations, *New York* v. *Zimmerman,* 49 S. Ct. 61, 1928); more generally the claim to secrecy presents itself as an incidental matter or as a claim to exemption.

Trade secrets have received somewhat perfunctory legislative attention in the Federal Trade Commission Act (15 U.S.C. 46),[16] and in the Pure Food Law of 1906 (21 U.S.C. 10); the latter in a very incon-

[16] The law in authorizing the Commission to make public information obtained by it, if deemed expedient in the public interest, excepts trade secrets and the names of customers.

clusive fashion substantially establishes exemption by leaving the matter to administrative regulation.[17]

The Interstate Commerce Act contains a carefully formulated provision to guard the secrecy of information obtained by carriers from shippers (49 U.S.C. 15 [11]). A similar provision is found in the Shipping Act (46 U.S.C. 819).

Official secrecy. There are scattered provisions in federal and state statutes against the divulging of information officially obtained (e.g., 18 U.S.C. 214, 216; Illinois Public Utilities Act, §18), but there is no general penally sanctioned duty of official secrecy; and it might be difficult either to frame a general rule, or to give a general power to an official superior to impose duties in that respect upon subordinates.

Professional confidence. This matter is regulated by New York Civil Practice Act, §§351–354. Provisions occur which require physicians to give notice of certain diseases of which they obtain knowledge in the course of their practice (see *People* v. *Shurly,* 131 Mich. 177, 91 N.W. 139, 1902). As a rule such duties are imposed only where the danger of contagion is direct and public.

Protection from civil consequences. There are provisions to the effect that accident reports filed in compliance with law shall not be admissible in evidence in an action for damages based on the accident (Illinois Public Utilities Act, §56); also, more generally, that information obtained shall not be admitted in evidence or used in any proceeding except in proceedings provided for in the act (*ibid.,* §63). The latter provision would be appropriate in workmen's compensation statutes; however, the report requirement in Illinois lacks a protective clause (§30). Statutes which provide that an employer discharging an employee shall give him on demand a true statement in writing of the cause of the discharge, should also provide that the statement is privileged (in Texas held not privileged in the absence of such a provision in *St. L. & S. W. R. Co.* v. *Griffin,* 154 S.W. 583, 1913).

Protection from criminal consequences. The common law and constitutional guaranty against self-incrimination does not prohibit the

[17] The law provides that manufacturers of proprietary foods which contain no unwholesome ingredients shall not be required to disclose trade formulas except in so far as the act may require to secure freedom from adulteration or misbranding, and the Food Regulations require label statements for these foods only in so far as the Secretary of Agriculture may find it necessary.

putting of incriminating questions, but merely permits refusal to answer on claim of privilege.

In an administrative inquiry the public interest in obtaining information outweighs the public interest in punishment, and the effort of the statute will be to get rid of the privilege by eliminating the peril. The Interstate Commerce Act accordingly provided: The claim that any (such) testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The Supreme Court in the case of *Counselman* v. *Hitchcock,* 142 U.S. 547, 1892, held this provision inadequate for the reason that while the testimony itself could not be used against the testifying party in any criminal proceeding, yet it might lead to the discovery of other facts which without the use of the original testimony might be made the basis of a successful criminal prosecution. The clause was therefore changed by act of February 11, 1893 (49 U.S.C. 46) so as to protect the testifying person from subjection to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence before the Commission or in obedience to its subpoena. In the case of *Brown* v. *Walker,* 161 U.S. 591, 1896, this clause was held sufficient to overcome the constitutional privilege.

In accordance with the decision in *Hale* v. *Henkel,* 201 U.S. 43, 1906, holding that the privilege against self-crimination does not apply to a corporation (although the protection against unreasonable searches does), the act of 1893 was amended by act of June 30, 1906 (now 49 U.S.C. 48) providing that the immunity shall extend only to a natural person, who, in obedience to a subpoena gives testimony under oath or produces evidence, documentary or otherwise, under oath. This incidentally changes the protection of the act of 1893 by restricting it to evidence in obedience to a subpoena and to evidence given under oath, so that the compulsion, being wider than the immunity (unless the latter is aided by judicial construction) may again encroach upon the constitutional guaranty. The restrictions pointed out are also found in section 9 of the Federal Trade Commission Act (15 U.S.C. 49).

Since a standard clause still remains to be framed, it is proper to ask whether the immunity should be confined to natural persons. The theory of the restriction is that immunity is a concession to constitutional necessity, and intrinsically undesirable. But there is much more to commend the opposite view, that immunity promises more in the way of eliciting information than an attempt to overcome loyalty by compulsion. The provision of the English Income Tax Law (§144) forbidding one confidentially employed by the taxpayer to be examined reveals a better appreciation of the morale of the situation.

Incriminating reports. If a report requirement is not accompanied by an immunity clause, the effect of the constitutional protection against self-crimination is that the party required to report must excuse his failure to report by pleading his privilege; a mere failure to report without such excuse would not be protected by the constitution, and the report requirement might thus serve its purpose. It must be a question of construction whether a report requirement does or does not apply to unlawful transactions (as to "bootlegging," see *U.S.* v. *Katz,* 271 U.S. 354, 1926; *U.S.* v. *Sullivan,* 274 U.S. 259, 1927).

The anti-trust laws of a number of states provide for an annual inquiry of each corporation as to whether it has had any part in any trust or combination, requiring under penalty an answer on oath. The law of Illinois adds an immunity clause in approved form, so that a truthful report of violation of the law procures immunity (*People* v. *Butler Co.,* 201 Ill. 236, 1903). Without the immunity clause the requirement may be upheld as to corporations, if corporations are not within the constitutional protection. Applied to individuals, the requirement without an adequate immunity clause should be held unconstitutional under *Counselman* v. *Hitchcock,* 142 U.S. 547, 1892, since its only purpose would be to entrap a guilty party.

Even with an immunity clause a report requirement confined to illegal acts is an extraordinary exercise of legislative power. The obligation to register alien prostitutes kept or harbored in the United States with the Commissioner General of Immigration (18 U.S.C. 402 [2]) is of this character, and this perhaps accounts for the narrow construction of the term "filing" as meaning an act perfected in the District of Columbia, which permitted a defeat of a prosecution on the ground that it was brought where the accused resided and not

where the offense was committed (*U.S.* v. *Lombardo,* 241 U.S. 73, 1916). It deserves consideration whether there should not be a general rule forbidding punishment of a person by reason of anything truthfully disclosed by him in pursuance of an obligation imposed by law.

CHAPTER X

PROVISIONS CONCERNING LICENSES AND ORDERS

PRELIMINARY NOTE. Many phases of the operation of enabling and directing powers (licenses and orders) are discussed in my book on *Administrative Powers over Persons and Property*. The present chapter will consider in the main the requirements in the way of legislation that are involved in the use of these powers.[1]

Provisions for official certification are generally considered as adding to the burden of a mere publicity requirement, such as registration. They also place a greater responsibility upon the administration. From the point of view of the individual they involve the advantage of a certain degree of security; and, in addition, possibly a semblance of more of public approval or endorsement than the administrative act in reality implies. Undue advantage may be taken of this semblance; in the Blue-Sky laws great care is taken against certification, and any reference in circulars or advertisements to the successful passing of official scrutiny is forbidden. But a legislative safeguard of this kind is rare; and since in many cases the law demands the exhibition or posting of licenses, it is not easy to frame a general rule that would guard against abuses.[2]

§70. LICENSING PROVISIONS WITH REFERENCE TO DISCRETION. 1. *Nondiscretionary certification.* If the purpose is to eliminate discretion entirely, statements rather than facts should be made the basis of administrative action. This idea was systematically carried out in the New York Liquor Tax Act of 1896 (*Administrative Powers,* §234). The same method is observed in the provision for the registry of a vessel (46 U.S.C. 19): the statement is required to be under oath, and the penalty for false swearing is the forfeiture of the vessel (46 U.S.C. 21).

[1] The technique of certification and licensing provisions has been worked out with great care and on the basis of long experience in connection with a number of subjects. The English Licensing Act of 1910 may serve as a model of its kind, but different subjects call for different safeguards and facilities: intoxicating liquors, buildings and tenements, security issues, child labor, etc. Legislation concerning administrative orders is not nearly as well developed.

[2] The danger is not confined to license provisions. When bank deposit guaranty laws were in force, it is said that banks in the respective states advertised: "deposits guaranteed by the state"—an untrue statement. Adequate supervisory powers over banks might have taken care of that situation.

Where the law conditions the issue of a license or permit upon the existence of substantive requirements, and not upon formal statements reciting them, both the facts and the law must be found in favor of the applicant in order to entitle him to a license. If, however, an adverse administrative finding is as inconclusive upon the question of fact, as it always and necessarily is on the question of law, the determination is non-discretionary. Doubts as to whether the action is discretionary or non-discretionary will arise where the law uses terms involving expert judgment, such as safe, wholesome, sufficient, or necessary, and it will make a difference whether there is exclusive reliance upon such terms or whether they only qualify other and additional specifying matter. Much will depend upon the degree to which the subject to which the approval requirement relates is practically or technically standardized. If it is sufficiently standardized, a court may find it possible to use a mandamus for the purpose of controlling to a substantial degree the exercise of administrative power, and to the extent that it does, the power is treated as non-discretionary, or ministerial. This, the doctrinal, aspect of the matter is revealed in the numerous cases which constitute the law of mandamus, and the text of a statute will not explicitly affirm or deny the applicability of this remedy. Pragmatically, however, the legislature must take cognizance of the delay and expense of a mandamus proceeding, and of the fact that practically the range of power is greater if purely generic terms (safe, etc.) are used than if there are specific requirements. A legislative policy toward elimination or reduction of discretion will be therefore marked by substantive specific regulation, and every provision of this kind will serve *pro tanto* to reduce the effect of generic qualifying terms that are used in addition. The more specific the requirement, the less significance attaches to the additional adjectives safe, sufficient, or necessary.

Legislation for the licensing of insurance companies will illustrate the above observations (see *Administrative Powers,* chap. 19), and the following are instances of certification or authorization obtainable as a matter of right:

Act of Illinois to govern foreign fire (etc.) insurance companies, June 18, 1883: "It shall not be lawful . . . to act . . . without procuring from the auditor of public accounts a certificate of authority stat-

ing that such company has complied with all the requisitions of this act."

Illinois act to govern accident or life insurance companies, June 7, 1889, §5: "Whenever the corporators have fully organized such company, and the said company shall have deposited with the auditor the amount of the capital required in section 4, it shall become his duty to furnish the corporators with a certificate of deposit which, with the certified copy of said declaration previously received from the auditor, when filed for record in the office of the recorder of deeds in the county where such company is to be located, shall be the authority to commence business and issue policies."

Illinois Life Insurance Act, March 26, 1869, as amended May 31, 1911, §1b: "On the filing of such declaration as aforesaid, the Insurance Superintendent shall submit the same to the Attorney General for examination, and if found by him to be in accordance with the provisions of this Act, and not inconsistent with the laws and Constitution of this State and of the United States, he shall certify to the same, and deliver it back to the Insurance Superintendent, who shall cause said declaration, with the certificate of the Attorney General, to be recorded in a book to be kept for that purpose, and he shall furnish a certified copy of such declaration and certificate to the corporators."

Compare these two forms:

Massachusetts, General Laws, ch. 175, §70 (increase of capital): "If the commissioner finds that the increase is made in conformity to law, he shall endorse his approval . . ." Section 71 (reduction of capital): "If the commissioner finds that the reduction is made in conformity to law, *and that it will not be prejudicial to the public,* he shall endorse his approval thereon."

If specified facts are the basis of a license or permit, the legislature will not ordinarily prescribe the manner of finding them. An exception may be made where there is an apprehension that the law will be loosely or too liberally administered, and the law may then specify required evidence. The most conspicuous instance of this is found in provisions concerning age and school certificates of children employed in industry (New York Education Law, §631, subd. 12; English Factories Act, §64). See also the elaborate provisions regarding

entry of merchandise in the Tariff Act of 1922 (19 U.S.C. 345–352); Tariff Act of 1930, §484.

While legal proof of the existence of requirements is always sufficient to entitle to the license or permit it may be a question whether strict legal proof should always be insisted upon. In an *ex parte* proceeding administrative practice will tend to be liberal, and its favorable exercise is normally conclusive; consequently there is little need for legislative expression, unless there is a policy of strict proof requirement, and in connection therewith a provision for occasional relaxation (19 U.S.C. 346; now Tariff Act, 1930, §484).

A provision that action may be taken on evidence satisfactory to the official, means that he may be satisfied with less than legal proof (*Administrative Powers,* §40; note the German term, *Glaubhaftmachung*).

However, to permit *adverse* action on the basis of less than legal evidence, is equivalent to giving discretion of a pronounced and questionable type, and instances are correspondingly rare; the provision of the National Bank Act (12 U.S.C. 27) that the comptroller may withhold his certificate whenever he has reason to suppose that the shareholders have formed the association for any other than the legitimate objects contemplated by the act, is of this character. Less than legal evidence may of course be a sufficient basis to warrant merely the institution of proceedings by an administrative authority (Illinois Dentistry Act, §7).

2. *Unqualified or indefinite approval or consent power.* Since an administrative power to give or withhold consent, given without any qualifying limitation, has been questioned (and occasionally successfully questioned) as an unconstitutional delegation of legislative power, or as an arbitrary discretion in violation of the principle of the equal protection of the laws (the latter a federal ground of impeachment), this common form of permit requirement calls for some comment.

Statutes are apt to make administrative determinations a matter of bare authority where the legislative expectation is that in normal cases the exercise of the power will be favorable, but that occasionally there may be obvious ground of objection, making an administrative check

desirable. Provisions requiring official consent for change of name, or of location, or for the transfer of a license, are of this type. The law might make approval mandatory in the absence of reasonable objection (New York Civil Rights Law, §63), but the unqualified form appears to involve less of a commitment, and may, for that reason, be preferred. Where a provision is made subject to a time concession or requirement, the legislature may also wish to provide for one or more extensions of time; that requires administrative action, and it would be both difficult and superfluous to specify grounds of extension (see *Administrative Powers,* §49).

The absence of qualification permits very brief forms of expression; see, e.g., 46 U.S.C. 570: "shall procure the sanction of such officer"; or "an annual report, to the satisfaction of the Council of the League, will be made to the Council" (the regular form in the Mandate Instruments of the League of Nations. See Wright, *Mandates,* Appendix II).[3]

These minor consent requirements should be contrasted with dispensing powers relieving from the operation of some law, particularly where the legislature, in inaugurating a new policy, hesitates to put it into full effect. The validity of an unqualified or undefined dispensing power may be questioned (*People* v. *Klinck Packing Co.,* 214 N.Y. 121, 1915), but it will be observed that to declare it invalid will serve a purpose only if the effect is to leave the main provision of absolute operation. This, as a rule, will be contrary to the legislative intent; and to declare the main provision invalid will leave matters where they would be if the dispensing power were indiscriminately exercised.

An unqualified dispensing power is therefore apt to operate practically like a perfunctory consent requirement; and if the legislature

[3] Note also the brief phrase in the Federal Reserve Act (12 U.S.C. 357) giving to federal reserve banks power to establish rates of discount "subject to review and determination of the Federal Reserve Board." Can there be determination otherwise than by way of review? See action of Federal Reserve Board on September 6, 1927, and comment in 125 *Commercial and Financial Chronicle* 1407, September 10, 1927.

Administrative regulations may create the appearance of an exercise of substantial discretion, and yet fail to indicate any relevant considerations; so with reference to change of name or of location of a national bank subject to the comptroller's approval under 12 U.S.C. 30, the regulations say that the proposed change should be submitted to the comptroller for his consideration and for instructions.

wishes to guard the main policy, it will take care to qualify the dispensing power. Such a power tempers, in the Interstate Commerce Act, the long-and-short-haul provision, the prohibition of pooling, and the prohibition of ownership by a land carrier of a competing water carrier; also the rate restriction of the Merchant Marine Act of 1920, and certain citizenship requirements of the Seamen's Act of 1915; and all of these powers, except that regarding ownership of competing water carriers, are circumscribed by formal or procedural requirements. See *Administrative Powers,* §§67–71.

The unqualified or undefined form of approval requirement is also appropriate in those cases in which the legislature desires assurance that private action will be in accordance with some considered plan without being able or willing to prescribe what that plan shall be. Examples are furnished by the English Lunacy Acts, the Coal Mine Regulation laws, and the German Insurance laws. A provision for an official approval or veto power is almost a matter of course. Yet the liberality of legislative policy would be impaired if the official power were qualified, for qualification would mean regulation. The assumption in these cases is that the discretion, though substantial, is an expert discretion subject to inherent checks.

Provisions of the English Lunacy Act, 1890: §231 (5): Within three months from the date of the provisional certificate, the managing committee of the hospital shall frame regulations for the hospital, and shall submit the same to a Secretary of State for approval.

(6): Upon approval of the regulations by a Secretary of State, the Commissioners shall issue a complete certificate of registration . . .

§232 (1): The regulations for the time being in force shall be observed.

(2): Such regulations shall be printed and a copy thereof shall be sent to the Commissioners, and another copy hung up in the visitors' room in the hospital.

(3): If the regulations are not so sent and hung up, the superintendent shall be liable to a penalty not exceeding twenty pounds.

§237 (abstract): (1) The Lunacy Commissioners may require information as to the mode in which the regulations are carried out.

(2): If of opinion that the regulations are not properly carried out, they give notice of particulars, and require stated things to be done.

(3): If at expiration of six months they believe that the requirements of the notice have not been carried out they may with the consent of the Secretary of State issue a closing order.

(4): Keeping lunatics after the closing order has become effective is a misdemeanor.

(5): The closing order is preceded by a notice to show cause why the requirements of the notice have not been complied with.

Coal Mines Regulation Act, 1887: §51: There shall be established in every mine such rules (special rules), as, under the particular state and circumstances . . . appear best calculated to prevent dangerous accidents.

§52: The special rules within three months . . . to be transmitted to the inspector of the district for approval by a Secretary of State.

§53: The Secretary of State may, within forty days after the rules are received by the inspector, object to the rules and propose modifications. If the owner does not within twenty days object to the modifications, the rules as modified are established. If within twenty days he objects, the matter is referred to arbitration.

Acts of Virginia, 1920, ch. 297: Before the work is commenced . . . the public service corporation which proposes to cross the public road shall make written application to and submit to the board . . . plans, specifications, appliances, and methods of operation; and if the said plans and specifications are not accepted by the board . . . within sixty days after the same shall have been delivered to the clerk . . . the public service corporation may then proceed with the construction and operation of said crossing, under the plans and specifications, and with the appliances and methods so submitted. The board . . . may, however, within thirty days from the date of the submission of said plans and specifications, reject the same. (In that case there is provision for inquiry and determination by the state corporation commission.)

3. *Submission subject to disapproval* (*veto system*). This form is not common in American legislation; perhaps the most conspicuous instance of it is the provision of the Interstate Commerce Act (§15 [7]) as to new rates, regulations, or practices of common carriers which must be filed, and may be suspended by the Commission for a stated maximum period, pending a hearing and determination of lawfulness. The provision for thirty days' notice to be given by the carrier (§6 [3]) is equivalent to the time usually given for official disallowance; the provision for suspension, followed by hearing and determination, is more favorable than the common provision for outright disallowance, subject to such remedy as common law or statute may afford.

A number of sale of securities acts (Blue-Sky laws) have recently

introduced for certain preferred, but not altogether exempt, classes of securities a system of "registration by notification" (as distinguished from "registration by qualification"), which provides for filing, with a power in the administrative authority to make orders of suspension and of disallowance (Laws of Indiana, Minnesota, Utah, West Virginia; also the proposed Uniform Sale of Securities Act). If no period is set during which the right to act is suspended, this differs from the veto system. The filing is then a publicity requirement, and the subsequent disallowance (not limited in time), an exercise of a power of corrective intervention. In consequence, the filing requirement should be sufficiently definite not to carry any undue peril of inadvertent non-compliance, e.g., if securities subjected to this system are described by reference to value percentages, these should be ascertainable by prescribed methods of appraisal; and the subsequent disallowance should operate only prospectively, and not carry with it absolute rights of recovery or rescission on the part of previous purchasers, but leave them to ordinary remedies for fraud, if any.

The method of the Illinois Sale of Securities Act (§7b), whereby securities of a designated class may, by the consent of the Secretary of State, be sold upon the deposit of prescribed information, but subject to disallowance during a period stated or to be stated, may conceivably be attended with the embarrassment of retroactive operation, but since it is at the request of the issuer, it is perhaps for that reason also legitimately at his peril.

The veto power may be concurrent with a continuing power to issue corrective orders, so that the latter may be exercised notwithstanding a failure to disallow in the first instance, and this is expressed in the English Theatres Act, 1843 ("in case the Lord Chamberlain either before or after the expiration of said period of seven days shall disallow . . . it shall not be lawful . . .").

If the legality of action is made dependent upon the previous giving of notice to designated authorities, the individual should be given appropriate facilities to enable him to furnish proof of having given the notice, either by entitling him to an immediate receipt, or by provision for notice by registered mail.

4. *Provisions expressing or qualifying discretion.* The legislative intent as to bestowal of discretion may be indicated by explicit refer-

ence to discretion, or by expressing guiding considerations, or by provisions relating to the manner of reaching conclusions.

An express provision that grant or refusal of approval shall be in the sound discretion of an officer (New York Banking Law, §48) will prevent permissive terms from being construed as mandatory, and specified grounds of consideration from being construed as exclusive; but nature and degree of discretion will still depend upon other provisions or upon the subject matter. The words "in his discretion," added to "may," occur quite commonly, and have the same effect. The term "at pleasure" is found in connection with the power to revoke licenses, but should be avoided unless the license is in the nature of a purely temporary permit (see *Vincent* v. *Seattle,* 115 Wash. 475, 1921).

Statutory grounds of discretion have much greater effect in determining its scope than perfunctory phrases regarding the exercise of the power. It is not as easy to refuse a license where the law speaks of a person of good moral character as where it speaks of a person who commands the confidence of the community, and not as easy to refuse it for lack of personal qualification as for the absence of local need or lack of "convenience and necessity." Therefore a reference to public interest (advantage of, or detriment to the people), or to tendencies instead of present shortcomings, or to opinion instead of fact, involves a correspondingly wide discretion, and it is therefore important to note the constant practice of the German Trade Code of permitting licenses to be refused only upon the basis of *facts* showing unreliability.

The following types of legislative provisions with regard to guiding considerations may be distinguished: (1) Specified considerations are excluded; as, for instance, in the provision of the German Insurance Law that an application for authorization to organize is to be disposed of without reference to the question of local need. (2) Only specified considerations are permitted; for instance, a peddler may be refused the right to peddle printed matter only because it is morally or religiously (i.e., not politically) scandalous (German Trade Code, §55); note particularly the constant German practice of permitting licenses to be refused only upon the basis of *facts* showing unreliability, etc. (3) The permit may be refused only for specified reasons;

this likewise is a general German practice (see Insurance Law, §§50, 57); of course if one of the specified considerations is of great latitude, the restriction may become illusory. (4) Certain otherwise questionable considerations may be expressly permitted; for instance, permitting, in the grant or refusal of liquor licenses, the preponderant opinion of the community to be given some weight (see *Re Sparrow,* 138 Pa. 116, 1890). (5) Specified considerations are required to be taken into account without dictating the conclusions to be drawn from them; this is a constant English practice. (6) The thing is forbidden except in the absence of specified objections, and if they are absent, may be permitted as a matter of discretion; so the removal of the licensed retail sale of liquor to another place under the English Licensing Act.

The method of qualifying discretion by directing the consideration of specified factors permits legislation to operate with principles rather than rules, using flexible terms that would be inappropriate in a statute depending upon direct penal enforcement. It is thus a convenient way of declaring legislative policies, where precise rules are undiscoverable, as in the field of economic control. In American legislation, we therefore find this method conspicuous in the Interstate Commerce Act. Generally speaking, it is more common in England than in America.

§71. Provisions Relating to Procedure and to Incidental Matter. 1. *Notice and hearing* (see *Administrative Powers,* §55). The Transportation Act of 1920 prescribes hearing, notice and hearing, due showing, or rules as to hearing for the consent of the Interstate Commerce Commission to pooling, interlocking directorates, control acquisition, consolidation, extension, new construction, and abandonment; in the case of capital issues there is the optional alternative of investigation without hearing.

There are no similar provisions for hearing in connection with the license or consent requirements of the National Bank Act.

In the case of *Bratton* v. *Chandler,* 260 U.S. 110, 1922, the validity of an act requiring real estate brokers to be licensed was contested under the Fourteenth Amendment on the ground that refusal of a li-

cense was permitted without a hearing. The Court disposed of the objection by pointing out that the right to a hearing existed under the law, thus making it possible to infer, though not deciding, that absence of a hearing provision might have been fatal to the act.

To make a hearing in connection with the exercise of licensing powers a requirement of due process, would invalidate practically all American licensing legislation enacted since the beginning of the government. Three points should be noted: a license presupposes an application, and the applicant has thus an opportunity of presenting his case; if grant or refusal can constitutionally be made matter of free discretion, it follows that the exercise of discretion need not be conditioned on hearing argument or evidence; and, so far as action is non-discretionary, a mandamus proceeding will afford opportunity for a judicial inquiry into facts.

From the point of view of equity (instead of constitutional power) it may be urged: that the opportunity for presenting the applicant's case in his application should be supplemented by an opportunity of meeting new countervailing evidence which may be developed by or before the licensing authority—this being the contention made in the case of *Bratton* v. *Chandler;* that even if action is discretionary so that a resulting decision cannot be judicially controlled, there may be a duty to consider or not to consider factors on the basis of which the decision is to be reached, the non-discretionary element in discretionary determinations being recognized in the law of mandamus; that even though mandamus permits the presentation of all relevant facts and evidence, this is no reason why this presentation should not be made possible at an earlier and more effective stage; and that a court, while it may compel the consideration of relevant factors, can hardly control the weight to be given to them respectively, so that the applicant is debarred from the most adequate means of legitimately influencing the exercise of discretion.

These equities make a strong case for some notice and hearing requirement in connection with the exercise of a licensing power.

On the other hand, notice should be taken of the construction placed by the Supreme Court upon provisions permitting determinations only after a hearing.

"The provision for hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence is arbitrary action." *Chicago Junction Case,* 264 U.S. 258, 1924.

What does this mean if the determination involves discretion? The exercise of discretion is consistent with a duty to consider evidence and with a duty not to make an essential finding without supporting evidence, since facts will necessarily enter into any question of expediency; but a duty of deciding according to evidence plainly negatives discretion, the essence of which lies in the possibly controlling effect of imponderable factors which cannot be tied down to facts. A statutory duty to make a decision after a hearing according as the public interest may require, may enable a court to reverse a decision because relevant evidence was not heard, but not to compel a decision either way on the basis of record evidence. If only a positive decision one way or another will serve an applicant, a court cannot give him the needed relief.

If however the statute operates with terms less sweeping than "public interest," or if "public interest" can be identified with a definite factual situation, it is quite possible that a hearing requirement will turn matter of discretion into a question of fact.

A further point needs to be considered: a hearing requirement, as construed by the Supreme Court, will make the licensing authority a quasi-judicial body, and a judicial review will therefore not be a trial *de novo,* but merely a review of the record to determine that no error was committed. Ordinarily, if the exercise of the licensing power depends upon facts, and the administrative proceeding is entirely informal, the administrative determination is inconclusive, and, the power being treated as ministerial, a mandamus proceeding will give a trial *de novo.* This benefit of an independent judicial consideration of all the evidence, the applicant will lose, if the administrative decision is required to be the result of a formal hearing, so that review will be confined to the more restricted province of a certiorari.

The result will be, on equitable as well as on constitutional grounds, a rejection of the view that the exercise of the licensing power neces-

sarily demands notice and hearing. It has been pointed out, that in the vast majority of cases the formal proceeding involved in a hearing requirement will create delay and expense without corresponding benefit, even in cases of refusal, since most applications are adequately disposed of on the papers submitted.[4] The remedy of mandamus, now in most states a statutory remedy, gives adequate relief short of controlling the discretion of the administrative authority. If control of discretion is desired, the appropriate method is an administrative appeal. But in providing for either an administrative or a judicial appeal on questions of fact, care should be taken that the terms of the statute will not turn the original application into a formal proceeding, as, e.g., by making the decision in the first instance *prima facie* evidence of facts, or by making the appeal less than a trial *de novo*. At least this should not be done inadvertently, but only as a matter of deliberate policy.

The alternatives appear to be the following: no reference to hearing, and no provision for a remedy, relying upon the adequacy of mandamus; a hearing requirement, with the consequences above noted; an optional hearing provision ("with or without hearing") which permits the authority to make the proceeding formal; an investigation requirement, which seems to require a record, but without restriction to party evidence; a right given to the applicant to demand a hearing; a right of appeal, with a hearing before the appellate tribunal.

These alternatives leave aside special provisions for judicial review of purely corrective scope.

Provisions for notice of applications to be given, either publicly, or to designated parties, serve the purpose of eliciting objections, and may call for further provisions giving objectors a *locus standi* for contesting decisions; but such provisions must be adapted to the nature of each case.

A duty imposed upon the licensing authority to make rules or regulations for the disposition of applications, or a reference to decisions to be made under rules and regulations, has the merit of legislative simplicity, but leaves it doubtful whether either the making or the application or observance of these rules is mandatory.

[4] *Smith* v. *Foster*, 15 Fed. 2d 115, 1926.

2. *Grant or refusal* (see *Administrative Powers,* §54). The legislative intent in making a difference between grant and refusal is usually plain, as where a permit to carry weapons may be refused for reasons (New York) or may be granted for reasons (England); the effect may not always be equally clear. To illustrate: if there is a power, on hearing, to grant a license, if in the public interest, lack of supporting record evidence may invalidate a grant; whereas a refusal will stand, since a court cannot, without usurping the administrative function, say that the evidence demands a grant; if, on the other hand, there is a power, on hearing, to refuse a license, if contrary to the public interest, a refusal may be invalid for lack of supporting record evidence, while a grant must be conclusive.

Since delay in disposing of an application may be denial of justice (see *Smith* v. *Bell Telephone Co.,* 270 U.S. 587, 1926, and my *Administrative Powers,* p. 106), the legislature may desire to provide for that contingency. The New York Employment Agency Law requires acting upon the application within thirty days; in English acts we find the more effective provision that if the application is neither sanctioned nor disapproved within a stated period it shall be deemed a sanction (Town Clauses Act, 1847, §111; London Building Act, §§9, 10); while in France there is, with regard to the highest administrative tribunal, a general rule to the effect that if there has been a delay of more than four months without a decision having been rendered, parties in interest may treat their application as rejected and proceed before the Council of State (Act of July 17, 1900). The French rule commends itself for the reason that it does not call for positive action, and that it may serve the convenience of all parties alike to avoid the record of an adverse decision.[5]

3. *Provisions concerning applications.*[6] The briefest forms of approval requirements are silent on the manner of application, which is then matter of office routine. Elaborate licensing statutes usually

[5] The Revised Code of Montana of 1907 provides with regard to medical practice (§1588): "If the decision is not rendered within ten days the applicant is not subject to any penalty for practicing without a certificate during the time which elapses before the decision is made."

Such a provision is uncommon, and, perhaps, questionable.

[6] The Chicago Municipal Code of 1922 codifies the general provisions concerning licenses in chapter 44; see particularly sections 2414–2418 (application), 2420 (renewal), 2421 (change of location), 2426 (pro-rating).

contain provisions concerning applications, often in considerable detail.

The best legislative practice keeps apart substantive requirements, and requirements concerning statements. It is undesirable, although competent, to make a substantive requirement or limitation merely matter of inference from a requirement that something be stated in an application; for the same attention is not apt to be directed to formal as to substantive matter. The point is illustrated by the treatment of branch banking in the National Bank Law.[7]

A delegation of power to the licensing authority to prescribe the form of applications may have an effect on substantive rights. If such a power is given in a law governing the issue of securities (Blue-Sky law), the licensing authority may think it legitimate to require the filling out of a questionnaire for the purpose of eliciting information as to possible connection of the issuing firm with previous fraudulent transactions; but not only may disqualifications be created in this way which the statute itself would not have established, but actual injustice may be done. It should be remembered that applications are usually required to be made under oath. There is not likely to be any practical way for applicants to contest the legality of forms of applications. If, on the other hand, the statute not only is specific as to all substantive matter, but prescribes the form of applications with reasonable fulness, a further rule-making power can hardly prescribe more than purely formal detail. Important licensing provisions are apt to guard the matter of applications with care.

4. *Miscellaneous provisions: License fees.* Fees should be fixed by legislative authority directly, and such is the common practice.

The same is true of bonds that may be required in connection with licenses. See §§81 and 82, *infra.*

If the amount of the fee is considerable it may be proper to provide for (1) proportionate fees for fractions of years, (2) payment in instalments, (3) restoration of a proportionate amount in case the enjoyment or exercise of the license is cut short without fault of the licensee. See, e.g., New York Liquor Tax Law, 1896, §§12 and 25.

Duration and renewal. The duration of a license period, if limited, is always fixed in the statute; if, therefore, administrative convenience

[7] See §20, *supra.*

is served by having licenses expire on a uniform date, provision to that effect is necessary.

Limitation of license periods is a matter of legislative policy requiring careful considerations in connection with business and professional licenses: if annual licenses make revocation proceedings unnecessary, it should be considered, on the other hand, that a precarious tenure does not promote the morale of any business. (See my *Administrative Powers,* §56.)

In connection with special kinds of licenses (e.g., marriage licenses) it may be proper to fix a period within which the license must be acted upon.

If licenses are periodical (annual), renewal may properly be treated differently from an original grant; the provisions of the English Licensing Act of 1910 are instructive in this respect.

As to renewal of licenses combined with limitation of numbers, see my *Administrative Powers,* §56, note 12.

Exemptions from license requirements. It is usual and proper to exempt from the requirement of a license to do acts calling for a lower grade of qualification those licensed to practice under a higher grade of qualification; thus, a medical practitioner need not hold a chiropodist's license to treat a foot.

It may be proper to exempt from the license requirement a member of a copartnership, who does not engage in the skilled work calling for a license, so with regard to pharmacists (Mass. Rev. Laws, ch. 76, §18). In New York, a plumbers' registration requirement was with reference to such a member held unconstitutional (*Schaier* v. *Navarre Hotel Co.,* 182 N.Y. 83, 74 N.E. 561, 1905).

On the other hand, the provision should not be so framed as to make the licensing of one member of a firm sufficient for the entire firm, without providing that the unlicensed members shall not practice the technical side of the trade independently; a provision lacking this qualification was held unconstitutional in Ohio (*State* v. *Gardner,* 58 Oh. St. 599, 1896).

Administrative detail. The administration of licensing laws may be aided by provisions for records, posting, badges, etc., and here again a distinction should be made between matter of administrative con-

venience, and matter which also affects private right, and the latter should not be lightly left to administrative regulation. Different subject-matters will call for different treatment.[8]

Penalties. Licensing statutes are apt to provide as a basic proposition that acting without a license shall be unlawful; if so, a penalty for acting in violation of the statute is adequate. The phrase "acting without a license *duly obtained*" is hardly desirable, since under such a form procedural irregularities may affect the status of the licensee.

Special penalty provisions are likely to be required for making materially false statements in order to obtain a license; forging or altering a license; using a license for a purpose not permitted by law; refusing to exhibit the license when called for, etc.

If there is authority to annex conditions to licenses, the violation of conditions is not covered by general penalty provisions, and the question how to deal with such violations, should receive legislative attention (see 46 U.S.C. 839); it is by no means clear that penalization should be a matter of course, particularly if the consequence will be the judicial nullification of legal acts deviating from a condition. The provisions of the Transportation Act concerning security issues should be consulted (49 U.S.C. 20a, no. 11).

The Criminal Code of the United States penalizes by a general provision any false certification made by a government official (18 U.S.C. 195).

§72. PROVISIONS FOR REVOCATION OF LICENSES.[9] American legislation on this important subject is meager and haphazard. There is no consistent legislative policy in any one jurisdiction concerning revocability or non-revocability, grounds of revocation, character of the revoking body, or appeal. The laws are almost silent as to procedure to be observed in connection with revocation. There are few fields in which there is more room and need for doing constructive work in the

[8] For a very full provision concerning certificates, see 46 U.S.C. 399 (certificates of inspection for steam vessels); also the provisions concerning registry of ships, 46 U.S.C. 11–63.

[9] The revocation of professional licenses under the jurisdiction of the Illinois Department of Registration and Education is regulated by an act of 1927 constituting sections 60 (a) to 60 (l) of the State Civil Administrative Code. This constitutes a very acceptable mode of revocation procedure. See also my *Administrative Powers*, §§64–66.

way of building up correct principles of legislation. The work would involve the following considerations and questions:

1. What is the law in cases where powers of revocation are not expressly granted? In particular: may a condition of revocability be annexed to a license? is a license forfeited by violation of law? is there power to annul a license illegally obtained?

2. Should there not be a general provision for rescinding any license illegally obtained or granted, as distinguished from revoking licenses?

3. Is it desirable that a license should become *ipso facto* void as the legal consequence of some act or fact? What is the proper method of dealing with revocation as a consequence of judicial conviction?

4. Should the power of revocation be vested in a court or in an administrative authority? If the latter, how should it be constituted? Should the revoking body be the same as the licensing body? Can the judicial and administrative methods be advantageously combined by a liberal right to judicial review?

5. Should the power of revocation be conditioned upon a previous conviction in a court of justice? If not, what effect should judicial conviction or acquittal have upon revocation?

6. Should it ever be made mandatory to revoke a license? What would be the legal effect if the duty is not performed? If performed, what is the effect upon power to reissue the license?

7. Should other than criminal acts be made grounds of revocation? Can the power to revoke at pleasure be justified under any circumstances?

8. Should there be anything like a statute of limitations for the exercise of the power of revocation?

9. What procedural requirements should be expressed; what formal requirements in connection with the order of revocation?

10. What provision should there be for appeal?

§73. Provisions concerning Administrative Orders. The legislative technique of order-issuing or directing powers is not nearly as well developed as that of licensing powers, owing to the fact that their use as instruments of control in English and American legislation is of relatively recent date, and still quite sporadic. In New York the ad-

ministrative order was introduced into health legislation in 1867, and into the labor law in 1892, and at present it also forms part of the apparatus with which the tenement, banking, and farms and markets laws of that state operate; in all American states, however, it is most conspicuous in public utilities legislation, which has to a considerable extent followed the model of the Interstate Commerce Act. The provisions of the legislation of New York and of the United States, as well as of England, are set out in my book on *Administrative Powers* (particularly in chapter VIII); they reveal a striking lack of systematization, and at many points the law is left at loose ends; it would be difficult to point to model provisions that might serve as standards, similar to those which we find with regard to licensing powers.

Should a provision for notice and hearing be made in all cases a prerequisite for the issue of an administrative order? As a matter of constitutional law, such provision has been held unnecessary in New York for sanitary or safety orders, such summary orders being, however, inconclusive in enforcement proceedings (*People* v. *Board of Health of Yonkers,* 140 N.Y. 1, 1893; *Fire Department* v. *Gilmour,* 149 N.Y. 453, 1896); and absence of the provision is common in the laws of New York. If constitutionally sound, the substitution of an *ex post facto* day in court for a hearing in advance might still appear to involve possible hardship or injustice. Normally, however, an administrative order is not likely to be issued without ample notice and opportunity for remonstrance, and in practice the New York doctrine means principally that an order cannot be questioned by reason of procedural informality not going to the merits, and particularly not by reason of the fact that the authority relied upon his own knowledge and information.

A hearing requirement is now generally held to mean that an order must be supported by record evidence. The requirement is a common one in connection with public utility (rate and service) orders, although in a few cases the Interstate Commerce Act leaves the hearing to the discretion of the Commission (so in the case of car service orders); under such a requirement the proceeding for the order will assume a judicial character. It is therefore quite intelligible that a legislature will hesitate to make notice and hearing mandatory for every minor order in the interest of health and safety.

It might be suggested as a compromise arrangement that orders issued informally in the first instance should be made freely appealable, either to a court or to an administrative authority—granting in the appellate stage a fully safeguarded right to be heard and to hear the adverse evidence, and not treating the court merely as a tribunal for correcting vitiating error (see my *Administrative Powers,* §§79–81, 140–147);[10] but statutory appeal provisions are likewise sporadic. The Interstate Commerce Act provides for hearings before Divisions, and rehearings before the entire Commission; but the rehearings are in the discretion of the Commission. In view of the diversities of administrative organization, and of the different situations presented by different subject-matters, appeal provisions will be likely to vary from statute to statute.

An appeal provision affords the advantage that it can be made so as to be exclusive of other modes of contest. With such a provision, a provisional order can be made binding irrespective of whether it is justified on the merits or not; just as it is unlawful to violate an injunction or to escape from an arrest, although the party may be found to be entitled to a dissolution or a discharge. The law of New York in a number of cases authorizes the tagging or labeling or sealing of dangerous things (Farms and Markets Law, §49; Labor Law, §§256 [3], 297, 337, 359–362); since the exercise of this power is questioned by ignoring it, the removal of the tag is not unlawful, if eventually found to be not justified in fact; an appeal provision would make it proper to require that the tag be not tampered with until determination of the appeal.

The following points should receive legislative attention in connection with provision for orders:

1. In framing penalty provisions, care should be taken that administrative orders be covered, since the violation of an order is not a violation of law; statutes are not always carefully framed in this respect.

2. To make the violation of a lawful order a misdemeanor means

[10] In 1930 Parliament re-transferred the appeal from closing orders under the housing law from the Minister to a court (§22 of act), thus assuring a judicial procedure in place of the "bureaucratic" procedure which had been sanctioned in the Arlidge case (1915 A.C. 120), discussed in section 79 of my book. The analogy to the course of American customs legislation, lack of which was pointed out in section 81, thus becomes complete.

that violation is recognized as a mode of contesting the order. A penal provision is not necessary where non-compliance entails consequences having a sufficiently coercive operation, as, e.g., liability to have a license revoked, or the withholding of administrative facility, as in connection with imports or exports.

3. The statute may properly indicate that a proceeding for an order may be instituted on complaint or on the motion of the authority, and may give a *locus standi* to representative organizations not directly aggrieved by the condition to be remedied (see Interstate Commerce Act, 49 U.S.C. 13); to *require* a complaint would, in the case of labor legislation, often defeat the object of the statute. See *Administrative Powers,* §82.

4. A statute may authorize the setting of a time for complying with an order; it has been held that an unreasonable time limit renders an order void (*Bristol Corporation* v. *Sinnott,* 82 Justice Peace 9, 1917).

5. The statute should make it clear that orders may be made in terms sufficiently specific to afford guidance to the individual and to make it possible to hold him for non-compliance; statutory language is often ambiguous in this respect.

6. The former provision of the Interstate Commerce Act, that orders are to remain in effect for two years, having been dropped, it may be inferred that an absolute statutory time limit of duration was found inexpedient. It may, however, deserve consideration, whether there should not be power to issue orders with time limits annexed; so under the Public Service Commission Law of New York (§23) an order continues in force for a period therein designated unless earlier modified or abrogated. In many cases the nature of the subject-matter would make a time limit manifestly inappropriate, particularly if the order is of a negative or restraining character; but it should be observed that time limits in connection with orders are as favorable to private right as they are unfavorable in connection with licenses.[11]

[11] An elaborate provision for procedure in issuing orders is found in the charter of Greater New York (Laws, 1901, ch. 466, §1176); a brief provision, but elaborating the remedial feature, in the Wisconsin Industrial Commission Law (Wis. R.S. 101.11, 101.15).

It is uncommon to provide that an order, as distinguished from a regulation, shall have the effect of law, unless, indeed, the order is in the nature of special legislation. As to such a provision, see *Rex* v. *Minister of Health, Ex parte Yaffe,* 1931 A.C. 494, and my *Administrative Powers over Persons and Property,* p. 223.

§74. DOCTRINAL MATTER. A good deal of administrative law consists of doctrines and principles laid down by the courts concerning the operation of licenses and orders and the power to issue them. Naturally, a great many questions are controversial and unanswered: is a license conclusive of the existence of statutory prerequisites? does an irregular license vitiate acts done under it? who may act under a license and is it transferable? what is the effect of a condition attached to a license and of non-compliance with the condition?[12] what is the effect of a deviation from a plan approved?[13] is an order *res judicata* and to what extent?

Questions of this character are appropriately left to the courts as part of the unwritten law of administrative powers, and it would indeed be impossible to anticipate all the possible situations that may require to be dealt with. Nor is it in accordance with general legislative practice to incorporate in new legislation the results of judge-made law merely by way of confirmation or approval, unless legislation is of a codifying character and a point covered by judicial decision is strengthened by statutory recognition.

Legislation may be called for in two cases: where an adequate solution cannot be reasoned out, but requires regulative arrangement, and where a judicial doctrine is to be reversed or qualified; and frequently the two situations are combined. Conditions attached to licenses, the need for flexibility of plans, the employment of assistants in licensed callings, may thus call for legislative attention. Situations of this kind are often special, to be dealt with from case to case, as experience may indicate. After a large body of material shall have been accumulated, the possibility of generalization may emerge; but it would be difficult at present to frame standardized rules.

§75. REMEDIAL PROVISIONS IN CONNECTION WITH LICENSING AND ORDERS. Mandamus, certiorari, and injunction are available for relief against administrative error or illegality, and the legislature may consider them as adequate without further special provision. Some of the

[12] A comprehensive provision authorizing proceedings for the violation of the terms of a license is found in the U.S. Water Power Act, June 10, 1920 (16 U.S.C. 820).

[13] See 33 U.S.C. 491; New York Tenement Law, §120.

principal administrative statutes of New York are silent on the subject of remedies, and the Interstate Commerce Act recognizes relief by injunction only in a very indirect and incidental manner. In New York the liberalization of the writ of certiorari by the Code of Civil Procedure (now Civil Practice Act) has made it a fairly adequate remedy for orders issued on notice and hearing, but it is not equally available for informal orders. Under the Interstate Commerce Act, the remedial law in connection with the important licensing requirements of the Transportation Act of 1920 does not appear to be adequately taken care of by the equitable powers of the federal courts, or by the mandamus power of the Supreme Court of the District of Columbia, but injunction has served the purpose of needed relief against affirmative orders of the Commission. In a number of states the scope of certiorari is too narrow to furnish a satisfactory remedy against administrative orders. Even if it be conceded, that in view of their haphazard and unsystematic development, the remedies of common law and equity against administrative action and inaction have rendered good service, a more systematic and less technical provision for relief would be desirable. This might be a by-product of comprehensive procedural reform; but it will also result from a general adoption of the action for a declaratory judgment, accompanied by a more friendly attitude toward it on the part of the Supreme Court since, in view of the relative unimportance of consequential relief, it is capable of performing the function of injunction, mandamus, and certiorari equally.

In the absence of a comprehensive and generally available form of relief, it is always legitimate to ask whether provisions for licenses or orders should not be accompanied by appropriate remedial provisions. The Federal Trade Commission Act, the National Prohibition Act, state legislation for business and professional licenses, factory acts, and public utility acts furnish valuable precedents. Provisions of this character should indicate the scope of review, particularly as to findings of facts; details as to forms of petition, notices, suspensive effect, time limits, and final disposition will necessarily vary from case to case.

Where licensing or order-issuing or revoking powers of the character discussed in this chapter are vested in courts of justice, and the appropriate judicial proceedings cannot be brought under the head of

common law or equitable jurisdiction, it will be proper to inquire whether under general rules or provisions of law some mode of appellate review is available; otherwise one should be provided for in connection with the creation of the power.

CHAPTER XI

ENFORCEMENT PROVISIONS

PRELIMINARY NOTE. Enforcement, in case of non-compliance or resistance, normally involves judicial intervention. The operation of regulative statutes presupposes the existence of courts and a law of procedure that is generally applicable. So far as there are no generally applicable rules, a statute must make particular provision. It is proposed to deal here with certain topics, upon which general observations appear to be possible: placing responsibility for compliance; adverse presumptions; and special methods of enforcement.

It is impossible to exhaust the topic of enforcement provisions since it presents itself in too many aspects. If a statute undertakes to penalize price-discrimination (assuming that it can be done constitutionally), it will be more advantageous to prohibit paying a lower price (Nebraska law) in one locality than in another, than to prohibit paying a higher price (Minnesota law); for the prosecution will have to be brought in the locality where the offense is committed, and it will be difficult to procure witnesses in the place where the higher price is paid. Legislative expedients of this kind are incapable of generalization.

§76. THE PLACING OF RESPONSIBILITY; WILFULNESS; CONCURRENT ACTION; EXCULPATION; CUMULATION OF REQUIREMENTS. One feature which distinguishes penal regulation from ordinary criminal law is the difficulty of assigning responsibility for conceded offenses, owing to the fact that as a rule a number of persons are involved in the violation, and that not uncommonly the object of the protective policy is a willing victim or participant. Enforcement in case of crime means that the offender must be discovered; in a regulative law it means in addition that he must be singled out by the statute.

Moreover, the problem of responsibility is not the general social phenomenon of moral delinquency and guilt, but the practical problem of dealing with physical conditions and social or economic practices that are to be controlled. Persons count as representatives or agents in a situation. The question is: Who can most readily bring about the desired condition and can also be justly charged with default? who ought to be watchful and active? who is the first in order of time to combine the facility of ascertaining facts with the possession of controlling authority or influence?

All penal regulation is, and always has been, based upon the conviction that misconduct is more effectively met by prevention than by punishment, that conditions instead of acts should be the objective of remedial legislation. But just as, under prevailing concepts of law, it is more difficult to deal with criminality than with criminal acts, so it is a limitation flowing from the nature of law, that regulations can be judicially enforced only by proving, in accordance with the rules of criminal procedure, or at least subject to the constitutional guaranties in favor of the accused, specific acts of violation. A licensing system, with its administrative powers of refusal or of revocation, seeks to escape this limitation; but there will always be the inevitable tendency to associate disqualification with specific acts of misconduct and their proof.

Failure to specify responsible persons. Unspecified prohibitions by way of a sweeping negative (no one shall do, a thing shall not be done) are apt to become uncertain by reason of the verb used. Are such words as "sell," "employ," "practice," "keep and maintain," applicable to persons acting in a vicarious or subordinate capacity? If the law intends to cover servants, it will not rely upon latitudinarian judicial construction.[1]

In the case of requirements, the bare passive form (a thing shall be done) may, unless the incidence is absolutely clear, have the additional disadvantage, that it fails to create an individualized sense of responsibility for affirmative action.

Practically more important than the charging of the agent is the fastening of responsibility upon the principal where the act is directly done by a subordinate. A statute speaking of default of owner or agent was held to refer to personal default; where therefore the owner had employed a competent man with proper instructions, he was held exempt from fine, though he would have been civilly liable for damages.[2]

[1] *Com.* v. *Churchill,* 136 Mass. 148, 1883; *Com.* v. *Galligan,* 144 Mass. 171, 1887; *Brown* v. *Robinson,* 1 C.P. 264, 1824; *Turner* v. *Reynall,* 14 C.B.N.S. 328, 1863; *Hotchin* v. *Hindmarsh,* 2 Q.B. 181, 186, 187, 1891. As to express exemption of servants, see 23 Eliz., c. 8, 1581, §5: "So as they will confess the same."

[2] *Dickenson* v. *Fletcher,* L.R. 9 C.P. 2, 1873; a less liberal construction is, however, possible; see Black, *Intoxicating Liquor,* §§369, 371. In the case of a corporation, the corporate body is the principal, and not the superior officer; this applies also to a state: *Sherman* v. *United States,* 282 U.S. 25, 1930. As to violation by third parties, see *People* v. *Wiesenthal,* 248 N.Y. 200, 161 N.E. 470, 1928.

The words "permit," "suffer," "allow," applied to the principal, cannot be absolutely relied upon to charge the principal for the act of the agent, since they may be construed as meaning a positive and conscious attitude of toleration (Labatt, *Master and Servant,* p. 5727; compare *Bosley* v. *Davies,* 1 Q.B.D. 84, 1875, and *Redgate* v. *Haynes,* 1 Q.B.D. 89, 1876). In view of a more liberal construction, they may of course also be objected to as imposing an undue hardship upon the principal (198 *Parliamentary Debates* 819–838, 1908).

In cases of civil liability, the statute may rely upon the rule, *respondeat superior,* but must take cognizance of the difference between the employee and the independent contractor. It may therefore become important to guard against evasion of liability on the part of the employer through the device of employing irresponsible contractors or subcontractors. The working-out of this problem has become a feature of workmen's compensation laws. The provision of the British Workmen's Compensation Act, §6, is particularly full in this respect:

"(1) Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this Act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed.

"(4) This section shall not apply in any case where the accident occurred elsewhere than on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management."

The legislative desire to hold employers and principals has often been met by the plea of possible injustice, and, particularly in the early stages of a novel policy of regulation, the legislature is not unlikely to yield by making wilfulness an element of the statutory offense. Experience has shown that the requirement of wilfulness makes

a statute difficult to enforce, and the history of labor legislation shows the gradual elimination of the term. To avoid injustice, however, a number of statutes permit the employer to relieve himself by exculpating proof.

The first English Child Labor Act of 1802 (42 Geo. III, c. 73) spoke of children "employed or compelled to work," and punished those "wilfully acting contrary to or offending against" the statute. The act of 1833 (3 & 4 W. IV, c. 103) changed this to: "No child shall be allowed to work," punishing any one who "shall by himself or by his servant offend . . ."; but it allowed the employing master to relieve himself by charging a responsible subordinate; and made the parent of the child liable "unless it appear to the satisfaction of the judge that the employment was without the wilful default of the parent."

The English Coal Mines Regulation Act of 1887 holds the owner, agent, and manager, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the provisions of the act, and to prevent contravention or non-compliance (§9).

The first Women's Hours of Labor Act of Massachusetts, of 1874, imposed penalties upon those wilfully employing contrary to the act; in 1879 a brief act was passed (ch. 207), striking out the word "wilfully" wherever it occurred in the act of 1874.

The Massachusetts Child Labor Act of 1842, chapter 6, required knowing violation; in 1876 in chapter 52, the word "knowingly" was struck out; in 1894 exculpating proof was permitted.

There remain, however, a number of cases where the requirement of wilfulness is legitimate and proper: where a possibly innocent act becomes punishable only if done with a specific state of mind (wilfully hoarding; wilfully unreasonable charge; wilful non-support of a child), or where a fact difficult of ascertainment enters into the definition of an offense (selling weapons to aliens; employing women shortly before or after childbirth, "Labor Law Administration in New York," 7 *American Labor Legislation Review* 329). On the other hand, if the legislature seeks to mitigate the consequences of non-compliance with an affirmative duty by punishing only wilful failure or neglect to perform the duty, the qualification is likely to be either unmeaning or to nullify the obligation, according to the construction placed upon the term.[3]

[3] Compare, in the Federal Trade Commission Act, §10: "Any person, who shall willfully make, or cause to be made, any false entry . . ." (where the intent is not to

Where the violation of a statute involves reciprocal action on the part of two or more persons, as in the case of illegal employment or illegal sales, it is frequently the policy of the legislature to confine the penal consequences to one of the parties, or even to lay the duty or prohibition only upon him: so on the employer and not on the employee, the seller and not the purchaser.

Apart from possible technical considerations (testimony of accomplices), the controlling reason is that the statute is directed against the exploitation of improvidence or economic weakness, and that it is undesirable to multiply offenses and offenders, if the resulting gain is inconsiderable. From this point of view courts should also hesitate to treat purchasers and employees as aiders, abettors, or accessories—which technically they are (see *Fairburn* v. *Evans,* 1 K.B. 218, 1916; *Slater* v. *Evans,* 2 K.B. 403; but *Chivers* v. *Hand,* 31 *Times Law Rep.* 19, 1914; 80 *Justice of Peace* 97; 80 *Justice of Peace Rep.* 63), and accept the argument that failure of the legislature to penalize the purchaser or employee must be regarded as a deliberate negative, since otherwise they would undoubtedly have been expressly mentioned (*Com.* v. *Willard,* 22 Pick. 476, 1839; *United States* v. *Farrar,* 281 U.S. 624).

The exemption thus being a matter of policy, circumstances may call for the opposite rule. Congress has thought it proper to penalize the shipper as well as the carrier for unlawful practices in interstate commerce in which both are concerned.

Child labor acts may legitimately penalize the parent who consents to the illegal employment of his child (British Factory Act, 1901, §138).

It may also be proper to penalize a workman for removing safeguards from machines, etc. (Illinois Health Safety and Comfort Act, §§2, 6). The English Alkali Act (1906, §15) gives to the employer authority to promulgate shop rules subject to the approval of the competent authority and to impose fines for the violation of such rules.

Concurrence of independent agents. Special provision may be re-

penalize inadvertent falsity), with: "Who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries . . . ." In the latter connection the term "willfully" will not make it easier to enforce an inherently indefinite requirement. It is perhaps possible to judge the appropriateness of "wilful" as a qualification by asking whether the concept of attempt is logically applicable.

quired where the condition to be guarded or relieved against results from the separate action of several parties. Illustrations are furnished by trade nuisance acts (English Public Health Act, 1875, §255; Alkali Act, 1906, §23, subd. 1; as to common law see *Chipman* v. *Palmer,* 77 N.Y. 51, 1879; *Slater* v. *Mersereau,* 64 N.Y. 138, 1876; *Sadler* v. *Great Western R. Co.,* 1896, A.C. 450), and by occupational disease legislation.

The problem presented may be complex, and its solution may have to be adapted to the varying circumstances of different cases.

In statutes regulating hours of labor, provision may be appropriate regarding employment of the same person by different concerns. New York formerly provided (former Labor Law, §77, subd. 6) that if the aggregate time of employment exceeded the legal maximum, employment at night time was at the risk of the employer; but now there is only a provision for a limitation in the aggregate, and it is difficult to see how this is to be given effect (present Labor Law, §174, subd. 5). In the case of child labor laws the difficulty is practically avoided by the standard day, which fixes the beginning and the end of the permissible time of employment.

Guaranty clauses. Where the ordinary course of commercial transactions makes it difficult for dealers to guard against violations at the source, legislation may relieve them on condition of appropriate guaranties being furnished. Section 9 of the Federal Food and Drug Act furnishes a model. But this expedient is available only if the guarantor is within the enacting jurisdiction, and the clause in the federal act would not be appropriate, or would be effective only to a very limited extent, in a state statute. Legislation should also guard against the deceptive use of a guaranty clause to convey a false impression to the casual reader.

Cumulation of requirements. To place the duty of affirmative action upon a number of persons indiscriminately, is undesirable, even if it does not create conflict and confusion; for it multiplies burdens and weakens the sense of responsibility of each of the parties.

If a number of parties are named the order in which they are liable should be specified, and in appropriate cases there should be provision for notice, demand, and recourse.

If an administrative authority is charged with sending warning

notices, this should not mean a discretion in selecting parties, and the statute should make it clear whether the obligation depends upon the notice given (see Illinois Fire Escape Act, §3; *Arms* v. *Ayer,* 192 Ill. 601, 1901; Illinois Structural Work Act, §4).[4]

ILLUSTRATIVE PROVISIONS

1. *Comprehensive charging provisions* (Special Duty of Prevention).

British Coal Mines Regulation Act, 1887, §9: "If any person contravenes or fails to comply with or permits any person to contravene or fail to comply with, any provisions of this Act . . . he shall be guilty of an offense against this Act; and in the event of any contravention or non-compliance by any person whomsoever, the owner, agent and manager of the mine shall each be guilty of an offense . . . unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the provisions of this Act, to prevent the contravention or non-compliance."

2. *Provision for exculpation.*

British Factories and Workshops Act, 1901: "141.—(1) Where the occupier of a factory or workshop is charged with an offence against this Act, he shall be entitled, upon information duly laid by him, to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, the occupier of the factory or workshop proves to the satisfaction of the court—

"(a) that he has used due diligence to enforce the execution of this Act; and

"(b) that the said other person had committed the offence in question without his knowledge, consent or connivance,

"that other person shall be summarily convicted of the offence, and the occupier shall be exempt from any fine. The person so convicted shall, in

[4] As to apportionment of sanitary and safety regulations between owner, tenant, etc., see Theobald, *Law of Land,* p. 372; Lumley, *Public Health,* p. 189; *Mackey* v. *Monks,* 2 Ir. 200, 216, 1916; *Regina* v. *Bucknall,* 2 Ld. Raymond 204, 1702; *Dep't of Health* v. *Wendel,* 67 N.Y.S. 129, 1900; *Landgraf* v. *Kuh,* 188 Ill. 484, 1900; *Carrigan* v. *Stillwell,* 97 Maine 247, 1903; *Schott* v. *Harvey,* 105 Pa. 222, 1884; *Adams* v. *Inn Co.,* 117 Tenn. 470, 1906; Tiffany, *Landlord and Tenant,* §100; Labatt, *Master and Servant,* §1913; also Labor Law of New York, §316; 80 Ohio Laws 188; English Metropolis Building Act, 1894, §§152, 173; British Factory Act, 1901, §7 (4). The administrative aspects of the placing of responsibility, i.e., to whom police orders should be addressed, are fully discussed on the basis of German law by Walter Jellinek, *Gesetz und Gesetzesanwendung,* pp. 304–321.

the discretion of the court, be also liable to pay any costs incidental to the proceedings.

"(2) When it is made to appear to the satisfaction of an inspector at the time of discovering an offence—

"(a) that the occupier of the factory or workshop has used all due diligence to enforce the execution of this Act; and

"(b) by what person the offence has been committed; and

"(c) that it has been committed without the knowledge, consent or connivance of the occupier and in contravention of his orders, the inspector shall proceed against the person whom he believes to be the actual offender without first proceeding against the occupier of the factory or workshop."

German Trade Code, §151: "If in the exercise of a trade, police provisions have been violated by persons to whom the owner had entrusted the management or the supervision of the business or a part thereof, these persons are liable. The owner is likewise punishable if the violation occurred with his knowledge, or if he failed to exercise due care in supervising (if possible) the business or in selecting or supervising managers or foremen.

"If a license is subject to forfeiture as a consequence of the violation, the forfeiture takes place in case of a violation by a subordinate, if the violation occurred with the knowledge of the owner. Otherwise the owner is bound to discharge the subordinate, failing which the license will be forfeited."

3. *Apportionment of duties.*

British Factories and Workshops Act, 1901, §7 (4): "If the occupier of a factory or workshop alleges that the whole or part of the expenses of providing the means of ventilation required by this Act ought to be borne by the owner, he may, by complaint, apply to a court of summary jurisdiction, and that court may make such order concerning the expenses or their apportionment as appears to the court to be just and equitable under the circumstances of the case, regard being had to the terms of any contract between the parties."

Similar provision concerning bakehouses, adding: "or in the alternative the court may, at the request of the occupier, determine the lease." *Ibid.*, §101 (8).

Corresponding provision where primary duty is placed upon the owner (fire escapes). *Ibid.*, §14 (4).

4. *Concurrence of independent agents.*

Alkali, etc. Works Regulation Act, 1906, §23 (1): "Where a nuisance

arising from the discharge of any noxious or offensive gas or gases is wholly or partially caused by the acts or defaults of the owners of several works to which any of the provisions of this Act applies, any person injured by such nuisance may proceed against any one or more of such owners, and may recover damages from each owner made a defendant in proportion to the extent of the contribution of that defendant to the nuisance, notwithstanding that the act or default of that defendant would not separately have caused a nuisance."

Public Health Act, 1875, §255: "Where any nuisance under this act appears to be wholly or partially caused by the acts or defaults of two or more persons, it shall be lawful for the local authority or other complainant to institute proceedings against any one of such persons, or to include all or any two or more of such persons in one proceeding; and any one or more of such persons may be ordered to abate such nuisance, so far as the same appears to the court having cognizance of the case to be caused by his or their acts or defaults, or may be prohibited from continuing any acts or defaults which, in the opinion of such court, contribute to such nuisance, or may be fined or otherwise punished, notwithstanding that the acts or defaults of any one of such persons would not separately have caused a nuisance; and the costs may be distributed as to such court may appear fair and reasonable.

"Nothing in this section shall prevent persons proceeded against from recovering contribution in any case in which they would now be entitled to contribution by law."

British Workmen's Compensation Act, 1906, §8: "c. The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due:

"Provided that:

"iii. if the disease is of such a nature as to be contracted by a gradual process, any other employers, who during the said twelve months employed the workman in the employment to the nature of which the disease was due, shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation."

5. *Protection of dealer through guaranty procured from source of supply.*

United States Food Act, 1906, §9: "No dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by a wholesaler, jobber, manufacturer, or other party residing in the United

States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act."

§77. ADVERSE PRESUMPTIONS. A statute may undertake to facilitate enforcement by permitting the fact of violation to be inferred from some other established fact, not in itself made unlawful, subject to rebutting evidence showing that there has been no violation.

Such presumptions are found in fish and game laws, in laws relating to gambling, to intoxicating liquor and drugs, in child labor laws, and others.[5]

The common form of the provision is to make the "established" fact presumptive or *prima facie* evidence of the forbidden act. This form is perhaps intended to avoid the question whether, under American constitutions guaranteeing trial by jury, guilt can be *required* to be found (e.g., to be held and deemed . . . unless proof to the contrary, as in the Equipment article of the English Act of 1835). "In no condition of proof is it permissible to instruct a jury that it had become the duty of the defendant to establish his innocence to obtain an acquittal" (*Ezzard* v. *United States,* 7 Fed. 2d, 808, 811, 1925). However, the *permission* to infer guilt has likewise been found to be objectionable (*Bailey* v. *Alabama,* 219 U.S. 219, 235, 1911).

Such a presumption is held to be legitimate where the established act or fact raising the presumption is the normal indication of the unlawful act (*Adams* v. *New York,* 192 U.S. 585, 1904), but is unconstitutional where this relation between the established fact and the inferred fact is not apparent, or where it is unduly difficult to rebut the inference (*Bailey* v. *Alabama,* 219 U.S. 219, 1911; *Manley* v. *Georgia,*

[5] A notable application of the presumption is found in the so-called "equipment article" of the laws for the suppression of the slave trade, first, it seems, introduced by section 3 of the act of 1835 (5 & 6 W. IV, c. 60), carrying out the convention with France of the same year, article 6 of which contained the same provision. It is now found in section 4 of the Slave Trade Act of 1873. The American statutes, mainly enacted in 1818–1819 lack this provision; see R.S. §§5378, 5551–5569.

279 U.S. 1, 1929; compare *People* v. *Mancuso,* 255 N.Y. 463, 175 N.E. 177, 1931).

The older bastardy laws illustrate the inadmissible presumption: the provision of the Connecticut law of 1699 that concealing the death of an illegitimate child should be punished as murder, unless it was proved that the child was born dead; and the provision (based on widespread tradition, and still found in North Carolina and Tennessee), that the charge on oath by the mother shall be presumptive evidence of paternity.

It is perhaps one criterion of the admissibility of the adverse presumption, whether it is competent for the legislature to prohibit and penalize the act from which the presumption is drawn; thus a statute may forbid and punish the possession of game (*Smith* v. *State,* 155 Ind. 611, 1900), or of lottery books (*Ford* v. *State,* 85 Md. 465, 1897), or the presence of children in factories (English Act of 1833, §24), instead of making these presumptive evidence of offenses.

In order to avoid the constitutional question, it may be safer to deal directly with the "proximate" act or fact, than to treat it as *prima facie* evidence of an offense; but the legislature may hesitate to penalize a possibly innocent act.[6]

The Labor Law of New York (§144) provides that if a child apparently under seventeen years of age is employed without an employment certificate the commissioner may require the employer to cease employing the child or to file, within a stated time, evidence in prescribed form, of lawful age. Upon failure to furnish such evidence and continuance of employment, proof of demand and failure is made, in a prosecution, *prima facie* evidence of unlawful employment. Since continued employment might have been absolutely forbidden for lack of the required proof, the adverse presumption seems unobjectionable.

A provision of the former liquor law of New York authorizing the

[6] A bill in Massachusetts fixing an eight-hour day for public employees, but permitting an increase of hours if a Saturday half-holiday should be granted, made proof of work for more than eight hours a day *prima facie* evidence of the violation of the law. The Justices of the Supreme Court considered this an unconstitutional presumption (*Opinion of Justices,* 208 Mass. 619, 1911). It seems the bill might have safely provided that no work in excess of eight hours in any one day should be permitted except upon establishing by a prescribed mode of evidence that a Saturday half-holiday was granted.

revocation of a liquor tax certificate unless the holder files a verified answer to charges filed raising an issue to some material point, was declared unconstitutional (*Re Peck*, 167 N.Y. 391, 1901).

The former Fish and Game Law of Illinois of 1911, §4 (superseded by the revision of 1923) providing for condemnation of fishing devices seized, upon information filed, "and if no plea denying the information be filed therein, the court shall take the information as *prima facie* evidence to support a judgment herein," appears to be liable to a similar objection.

See also the comments of the Privy Council on section 15a of the Australian Industries Preservation Act providing that the averments of the prosecutor contained in the information shall be deemed to be proved in the absence of proof to the contrary: *Attorney General* v. *Adelaide S.S. Co.*, 1913 A.C. 781, 799; also 15 Com. L.R. 102.

In view of the New York decision, provisions should be noted which make administrative *ex parte* findings, declarations, and certificates presumptive evidence, either specifically in proceedings for penalties (46 U.S.C. 679, Act of 1803, applied in *Matthews* v. *Offley*, 3 Sumner 115, 1837), or generally (New York Public Health Law, §§6, 21 [b]).

A different situation is presented by the provision of the Interstate Commerce Act which makes the order of the Commission declaring a rate to be unreasonable, and the subsequent reparation order of the Commission, presumptive evidence in a subsequent action by the shipper against the carrier to recover for the overcharge (49 U.S.C. 16, par. 2, sustained in *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412, p. 430, 1915); for here the presumption arises, not from a charge, but from a finding in a proceeding to which the person to be held was a party.

The Agricultural Coöperative Act of February 18, 1922, which permits arrangements that might otherwise be regarded as forbidden by the Sherman Anti-Trust Law, authorizes the Secretary of Agriculture, if he has reason to believe that any association monopolizes or restrains trade so as to unduly enhance prices, to institute proceedings which may result in "cease and desist" orders; and in a judicial proceeding to enforce such order by permanent injunction or other appropriate remedy, the facts found by the Secretary are made *prima*

facie evidence. Here, it will be observed, the proceeding is entirely prospective, resembling that of the Federal Trade Commission, and has less effect than a "cease and desist" order of the latter which is binding upon the court, if there is evidence to support it. There seems to be less of an encroachment upon the province of the administration of justice, than in the action for reparation which is purely retrospective and for the sole benefit of the plaintiff.

Can these precedents be carried to the point of having a private claim by one person against another administratively investigated, and making the administrative determination *prima facie* evidence in a subsequent civil suit? This is what the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 551–568) purports to do. Under sections 6 and 7 (7 U.S.C. 556, 557) of the Act the Secretary of Agriculture investigates complaints of violations of the Act, determines the amount of damage, and issues a reparation order. If this is not complied with, the complainant may bring suit in a federal district court (he may also sue in a state court, but the provision for presumption does not apply to that case, for obvious constitutional reasons), and in such suit the finding and the orders of the Secretary are *prima facie* evidence of the facts therein stated, and the plaintiff is not liable for costs, but, on the contrary, is to be allowed an attorney's fee if he prevails. This is certainly different from giving *prima facie* evidence effect to an administrative finding of a fact which in the first instance involves the public interest; and it comes close to transferring the administration of justice from the judiciary to an administrative department.

There can be no objection, for the purpose of civil liability, of establishing a presumption of negligence from the failure to provide specified arrangements. This is less than the absolute requirement of such arrangements. It is also only the equivalent of such a requirement, if the failure is made conclusive evidence of negligence.

The value of an adverse presumption depends upon the facility with which the fact from which the inference is to be drawn can be proved. The section of the New York Penal Law relating to receiving stolen property (§1308) was amended in 1928 by making failure on the part of a dealer to make reasonable inquiry as to the legal right of a person selling stolen property presumptive evidence of knowl-

edge that it was stolen. If it is difficult to establish that the inquiry falls short of reasonableness, the presumption will give relatively little aid.

So also it is no equivalent for the equipment article of the slave trade acts, permitting an inference to be drawn from specified arrangements, if the law simply forbids equipping a vessel for the slave trade, since in that event the purpose has to be proved (U.S.R.S. §5378, Act, April 20, 1818).

It is impossible to make a reliable estimate of the extent to which legislation operates with adverse presumptions; the impression gained is that such use is on the whole moderate, and that there appears to be no justification, so far as American statutes are concerned, to speak of a "modern fashion to substitute presumptions for evidence" (*Queen* v. *Justices of Kent,* 24 Q.B.D. 181, 185, 1889).[7]

§78. PENALTY PROVISIONS. The violation of a statute is a misdemeanor at common law (Hawkins, *Pleas of the Crown,* II, 25, §4), as well as under the general provisions of some criminal codes. The latter should be scrutinized to see whether they cover non-compliance with a statutory duty as well as the doing of a prohibited act.[8] No such general provision is found in the criminal code of the United States, and as there are no common law offenses against the United States, the absence of a penalty in a federal statute cannot be supplied from general sources. This would also be true of the Eighteenth Amendment, if unsupported by legislation; but it may be that the violation of the Eighteenth Amendment would be a common law offense against the state.

It is not customary legislative practice to rely for penal enforcement upon common law sanctions, and the absence of a penalty from the main provision of a prohibitive statute is therefore likely to express a specific legislative intent in that respect (see as to the Webb-Kenyon

[7] For illustrations from American state legislation in 1927, see Joseph P. Chamberlain, "Presumptions as First Aid to the District Attorney," 14 *American Bar Association Journal* 287; also a Note in 28 *Columbia Law Review* 489.

[8] See Illinois Criminal Code II, §6; New York Penal Law, §29. See also *State* v. *Fletcher,* 5 N.H. 257, 1830; *Rosenbaum* v. *State,* 4 Ind. 599, 1853; *Cribb* v. *State,* 9 Fla. 409, 418, 1861; *State* v. *Parker,* 91 N.C. 650, 1884.

Law of March 1, 1913, *Adams Express Co.* v. *Commonwealth,* 154 Ky. 462, 1913; also 46 U.S.C. 531, R.S. §4391, and *The Cornelia Kingsland,* 25 Fed. 856, 1885).

A regulative statute is, however, apt to give rise to many situations in which contravention to legislative purposes may be expected, and where the contravention does not constitute a direct violation of the statute. Thus, if the statute operates through administrative orders, the violation of an order is not a violation of the statute, and it is doubtful whether it is punishable at common law.[9] In discussing the technique of provisions for publicity and for certification, attention has been called to necessary penalty clauses, and as regulation becomes more meticulous, considerable attention is required to make penalties cover all forms of evasion, obstruction, and misuse that the ingenuity of parties adversely affected may devise. It is simple enough to frame a comprehensive clause to apply to every specific prohibition or requirement; the difficulty lies in foreseeing collateral misconduct occasioned by situations and arrangements which are the by-product of the statute: offenses concerning statements, certificates, and other statutory facilities, or arising out of new private or official relations created by the statute. There is no one formula sufficiently comprehensive to cover all these offenses.

For a careful specification of offenses see the British Factory Act, 1901, §139, also §119; a brief enumeration of election law offenses is found in 48 U.S.C. 149.

The possible offenses for which the statute furnishes the occasion are generally in the nature of frauds, but often not covered by any of the provisions of criminal codes making specified forms of fraud, criminal offenses.

In view of the constant practice of requiring statutory declarations to be verified, the general criminal code definitions of perjury become important. Even if they cover every statutory oath, they would by reason of their severity be less effective than penalties prescribed for

[9] *R.* v. *Robinson,* 2 Burr. 800, 805, 1759; *R.* v. *Harris,* 4 T.R. 202, 1791. See *Health Department* v. *Knoll,* 70 N.Y. 530, 1877. The French Penal Code, §471, subd. 15, makes disobedience to any administrative rule or regulation lawfully made, a penal offense. As to the possible objection to penalizing orders of unknown content, see *Pierce* v. *Doolittle,* 130 Iowa 333, 1906, 6 L.R.A. (N.S.) 143. The alternative of giving administrative authorities power to affix penalties to orders or regulations will be more objectionable, and is contrary to legislative practice.

false statements, and such penalties may make the general criminal law inapplicable (Lewis-Sutherland, *Statutory Construction,* §253). Under the British Income Tax Act false statements are perjury only in Scotland and Ireland, while for England there is a special statutory penalty (§228).

A penalty provision may be attached to each requirement or prohibition or other clause calling for penal sanction; or all penalty provisions of a statute may be grouped together; or they may be segregated into a general penal code, as in the Penal Law of New York.

It has been intimated that where prohibition and penalty are in separate clauses, the former may be proceeded upon by indictment, while only an action for a penalty will lie where both are in one clause (*State* v. *Williams,* 7 Rob. La. 252, 268, 1844); but generally this rule is stated only with reference to placing the provision for a special mode of proceeding in the same or in a separate section (*State* v. *Bishop,* 7 Conn. 181, 1828; *Phillips* v. *State,* 19 Tex. 158, 1857).

§79. FINE; IMPRISONMENT; FORFEITURE. The common penal sanction of a regulative provision is a fine, or fine or imprisonment in the alternative.[10]

It is very exceptional to make imprisonment mandatory, and such a policy seems appropriate only for violations commonly reprobated as evincing moral obliquity, as in the case of election frauds under article VI of the Illinois Election Law of 1885. Experience in connection with early prohibition legislation showed that the requirement of prison sentences resulted in non-enforcement and had to be abandoned (Wines and Koren, *Liquor Problem in its Legislative Aspects,* pp. 14, 27). See also Willard's *Legislative Handbook,* §370: "Moderation in Penalties."

The history of liquor legislation shows the futility of seeking to make a policy more effective by drastic penalties, particularly by requiring imprisonment.

[10] No attempt is made in this treatise to discuss the general social aspects of minor penalties, and the reforms that have been discussed. Notice should be taken of legislation making fines payable in instalments, particularly in connection with provision for probation, as a means of avoiding the evils of short terms of imprisonment, which, as a matter of general law, may follow the non-payment of fines.

In 1867 Maine added imprisonment to fine, but in 1868 made imprisonment discretionary; again in 1891 illegal transportation of liquor was sought to be checked by adding imprisonment to fine, whereupon we are informed prosecutions virtually ceased, and again in 1892 imprisonment was made discretionary (Wines and Koren, *op. cit.*, p. 55).

It is equally uncommon to treat violations of regulative statutes as felonies, unless the offense is in the nature of an ordinary crime and of an aggravated character, as where an election fraud is committed by officials or relates to official acts (Illinois Election Law, art. VI, §§8, 9).[11] This rule has been extensively ignored in anti-trust legislation, but the federal act of 1890, otherwise sufficiently drastic in its penalty provisions, refused to follow state law precedents in this respect.

Pecuniary penalties are indiscriminately spoken of as fines or penalties, the common law distinctions between the two forms being generally ignored (see *People* v. *Craycroft*, 2 Cal. 243, 1852; *State* v. *Grove*, 77 Wis. 448, 1890; *State* v. *Ford*, 70 Mo. 469, 1879); and we also find the phrase that the offender shall forfeit a sum.

However, 39 U.S.C. 791, R.S. §4059, does recognize the distinction for violations of the postal laws, penalties and forfeiture going one half to the use of the informer, while fines are for the use of the Post Office Department.

Penalties are nearly always stated in a statute by reference to maximum amounts, less commonly, and particularly for repetition of offenses, with reference to minimum amounts. Possible technical difficulties as to the form of civilly suing for a penalty where the statutory amount is flexible are left to be determined by the courts (*Report American Bar Association, 1915*, pp. 571–573).

If it is intended to punish persistent violation by increased penalties, care should be taken to speak of [subsequent] convictions rather than offenses, and to make it clear whether the conviction must be for a violation of the same provision, or merely for any violation of the

[11] The Supreme Court of Kansas refused to give literal effect to the provision of an election law making every official violation of the law a felony (*State* v. *Bush*, 47 Kan. 201, 1891). The designation of an offense as a misdemeanor is misleading, if a punishment by imprisonment up to ten years at hard labor is permitted (Tariff Act, 1930, §305).

same statute. It may deserve consideration whether increase of penalty should be confined to repetition of the offense within a stated period.

Offense units. Statutes commonly prescribe penalties for "each" or "each and every" offense or violation. But such phrasing furnishes no certain measure of determining offense units (*Crepps* v. *Durden,* 2 Cowper 640, 1777; *Suydam* v. *Smith,* 52 N.Y. 383, 388, 1873; *Griffin* v. *Interurban Street R. Co.,* 179 N.Y. 438, 448, 1904; *Re Snow,* 120 U.S. 274, 1888; *Balt. Oh. R. Co.* v. *U.S.,* 220 U.S. 94, 1911; *Standard Oil Co.* v. *U.S.,* 164 Fed. 376, 1908). The more recent practice is to define offense units clearly by reference to days of continuance, or items of subject-matter. As a matter of mere phrasing this is more satisfactory; but it raises a grave question of policy as to undue multiplication of offenses and aggravation of penalties;[12] and cumulative penalties are uncollectable while the validity of a requirement or prohibition is being judicially contested.[13]

A well-known instance of cumulation was the fine of $29,000,000 against the Standard Oil Company, which was set aside on appeal (155 Fed. 305, 1907; 164 Fed. 378, 1908).

Forfeitures. The term "forfeit" is occasionally used in relation to sums of money as equivalent to fine or penalty, but more usually applies to property taken by the state from an offender or delinquent.

Property may be forfeited by reason of its illegal character or use (adulterated food, immoral or obscene articles or publications, unlawful weights or measures, gambling implements, narcotic drugs, stills, vehicles for unlawful transportation, etc.), or by reason of some default in reference to it (non-payment of public dues).

[12] If it is the legislative intention to destroy a business (narcotic drugs, bootlegging), the penalties can hardly be sufficiently severe; otherwise, if the business must be kept going and in a solvent condition, as in the case of railroads and other public utilities.

Occasionally we find provisions expressly directed against the undue cumulation of prosecutions and penalties, so 6 Geo. IV, c. 63, §8, and an early act of New York referred to in *Washburn* v. *M'Inroy,* 7 Johns. 134, 1810.

[13] *Mo. Pac. R. Co.* v. *Tucker,* 230 U.S. 340, 1913; *Wadley So. R. Co.* v. *Georgia,* 235 U.S. 651, 1915. "The injunction will be made *permanent as to the enforcement of any penalties accrued pendente lite,* and as to the enforcement of that provision of the order of December 11, 1923, fixing the measure of discount, and authorizing recovery of any differences between 31 cents and 28 cents net rate. As to the balance, injunction will be dissolved." *Un. Fuel Co.* v. *R. R. Comm.,* 13 Fed. 2d 510, p. 526, 1925.

See *Report American Bar Association, 1915,* pp. 576–583.

An extreme instance of forfeiture by way of penalty is furnished by section 6 of the Sherman Anti-Trust Act; but it does not appear that the section has been applied in practice.

Forfeiture has long been a feature of laws relating to shipping and to imports, enforcement proceedings being governed by admiralty practice, which is also made applicable to forfeitures under other federal statutes (26 U.S.C. 1185; 28:736; 15:6, 11; 19:187; 48:226, "Proceedings for such forfeiture shall be *in rem* under the rules of admiralty").[14]

Where state laws pronounce forfeitures, special provision may be necessary for appropriate proceedings (Illinois Prohibition Act, 1921, §§29–32).

A qualified form of forfeiture—though the term is not used—is found in connection with the enforcement of the prohibition law, in the provision which authorizes a court to order that a place or structure shall not be occupied or used for one year (27 U.S.C. 34)—a provision which is also a feature of laws for the abatement of houses of ill-fame (see §80, *infra*).

In the nature of a forfeiture is also the revocation of a license, the deportation of an alien, and any special disqualification imposed as the result of default or delinquency, so, e.g., the qualified marriage prohibitions declared against the guilty party in a divorce proceeding.[15]

Statutes may be found in which a forfeiture is pronounced as the automatic or *ipso facto* effect of default or illegality (so in the English Theatre Act and in the Petroleum Act with reference to licenses); but unless the forfeiture relates to a claim (in which case it operates by way of defense, as in 28 U.S.C. 279), such a provision is probably due to inadvertence, and an American court has refused to give effect to it (*State* v. *Green,* 112 Ind. 462, 1887). An instance of automatic forfeiture is found in 43 U.S.C. 970. In like manner, where statutes have declared lands forfeited for failure to list them for taxation, courts

[14] As to differences according to the provisions of various statutes, see *Richbourg Motor Co.* v. *United States,* 281 U.S. 528, 1930.

[15] In Illinois the prohibition against remarriage applied for one year to both parties; being thus unconnected with misconduct, it was not in the nature of a forfeiture. The law worked so badly that it was eventually repealed. Divorce Act, §1a, added 1905, repealed 1923.

have held that the requirement of some kind of notice or proceeding must be implied by construction, or that the statutory provision is void. See *King* v. *Mullins,* 171 U.S. 404, 1898.[16]

§80. SUMMARY ENFORCEMENT AND ENFORCEMENT THROUGH COURTS OF EQUITY. In the great majority of regulative statutes the regular method of prosecution is left to be determined by general laws of procedure. These often allow pecuniary penalties to be collected, in accordance with the common law, by civil action, and the special safeguards in favor of the accused do not necessarily apply in their entirety to actions for penalties or forfeitures (*United States* v. *Regan,* 232 U.S. 37, 1914; *United States* v. *Zucker,* 161 U.S. 475, 1896).

Summary proceedings are likely to be regulated by statutes relating to justices of the peace or local courts (for an early example, see Virginia Revised Code, 1819, I, 614, c. 169, §65).

Since the summary conviction requires only a complaint under oath and the judgment of the magistrate (after hearing the party charged), it substitutes the concurrence of two persons acting under oath for that of sixteen in a prosecution on information (complainant, magistrate, prosecuting official, court, and twelve jurors), and a correspondingly larger number (adding the majority of a grand jury) in a prosecution on indictment. The contempt proceeding is the type of a

[16] The common law of forfeiture for felony (abolished in 1870, 32 & 33 Vict., c. 23) presupposed conviction or attainder, but when forfeiture thus became effective, it related back to the time of the offense for the avoiding of all subsequent alienations of land (Hawkins, *Pleas of the Crown,* II, 645). The declaration of the nullity of all sales in the Federal Confiscation Act of July 17, 1862 (18 U.S.C. 2), must perhaps be understood in the same way; but careful legislation at the present time would undoubtedly provide for seizure or notice of *lis pendens* to warn and protect purchasers, in accordance with the common law practice with regard to chattels (Hawkins, *l.c.*).

The extreme application of the principle of forfeiture was found in the law of the Inquisition, modeled upon the Roman law of *crimen laesae majestatis:* as soon as the crime of heresy was committed (though not yet adjudicated), the heretic became incapable of conveying title and of incurring obligations. The harshness of the rule, as applied to a crime so much less notorious than treason and so susceptible of false accusation, was aggravated by the fact, that proceedings for heresy were allowed against the memory of the dead without any statute of limitations. Rights acquired from the heirs of the heretic were as insecure as those acquired from the heretic himself. It is said that it was customary in Florence to require of the seller of real estate security against possible future sentences of confiscation by the Inquisition; but the security of the third party was apt to be invalidated from the same cause (Lea, "Confiscation for Heresy," *English Historical Review,* 1887, p. 235).

summary proceeding. But the statutory summary proceeding is always subject to an appeal to a court acting with a jury.

In the federal statutes we find provisions for summary proceedings particularly in the title on Conservation (16 U.S.C. 129–131; 172–174, 376; trial by commissioner, with appeal to district court).

Without positive statutory authority, it has been recognized that the Attorney General, on behalf of the sovereign, may sue to restrain violation of law in at least three classes of cases: where some public property right is involved, where the offender is a corporation, and where the offense amounts to a public nuisance: *Attorney-General* v. *Great Northern R. Co.,* 1 Drew. & S. 154, 1860; *Attorney General* v. *Railroad Companies,* 35 Wis. 425, 1874; *Re Debs,* 158 U.S. 564, 1895; *Columbian Athletic Club* v. *State,* 143 Ind. 98, 1895. The authority to proceed in equity against nuisances was given to any local authority by the English Public Health Act of 1875 (§107).

A prohibition law of the state of Iowa declared places where intoxicating liquors were sold to be nuisances, and provided: "Any citizen of the county where such nuisance exists . . . may maintain an action in equity to abate and perpetually enjoin the same, and any person violating the terms of any injunction granted in such proceedings shall be punished as for contempt by a fine . . ." (Laws, 1884, ch. 143, §12).

It was contended that the summary contempt power violated the Fourteenth Amendment; but the constitutionality of the act was sustained by the Supreme Court of the United States in *Eilenbecker* v. *Plymouth Co.,* 134 U.S. 31, 1890.

The decision in the *Eilenbecker* case was rendered on March 3, 1890, and it is significant that on March 21, 1890, there first appeared among the bills then pending in Congress for the suppression of trusts and monopolies one containing a provision giving the courts equitable jurisdiction to restrain illegal combinations. This "jurisdiction to prevent or restrain violations of this act" was incorporated in section 4 of the Sherman Anti-Trust Act: the district attorneys, under the direction of the Attorney General, are to institute proceedings in equity, praying that such violations shall be enjoined or otherwise prohibited, and pending the petition and before final decree the court may issue temporary restraining orders.

The provision in section 5 authorizing the court to cause parties to be summoned whether they reside in the district or not, and authorizing the marshal to serve subpoenas in any district, calls attention to the fact that under the general law the territorial jurisdiction of a federal district court is more limited than that of a federal administrative commission (see also 46 U.S.C. 830).

In the case of the American Tobacco Co., 221 U.S. 106, 184, 1911, the Supreme Court, in sending the case back to the Circuit Court, had embodied in its mandate a contingent direction of a receivership and a forced sale, with a view to enabling the Circuit Court to induce the parties to agree to a drastic scheme of reorganization, which was eventually incorporated in its decree. At present, section 7 of the Federal Trade Commission Act authorizes the court, in any suit in equity under the anti-trust acts, to refer the suit to the Commission, as a master in chancery, to ascertain and report an appropriate form of decree, and section 6 authorizes the Commission to investigate the manner in which a decree has been or is being carried out, and, upon the application of the Attorney General to make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust acts. Administrative action is thus called to the aid of equitable enforcement.

The National Banking Act makes receivership and dissolution the statutory remedy not only for insolvency of national banks, but also for any practices in violation of the banking law (12 U.S.C. 93, 191). Receivership, on the other hand, is not a remedy recognized by the Interstate Commerce or Transportation Act.

Proceedings in equity for purposes of enforcement are also authorized by the Water Power Act of 1920 (§26; 16 U.S.C. 820), whereas the regulative acts placed under the administration of the Department of Agriculture rely for enforcement partly upon penalties, partly (so far as imports and exports are concerned) upon the power to withhold clearance or entry, which does not require judicial aid.

The National Prohibition Act declares structures or places where intoxicating liquor is illegally manufactured, sold, or kept, and the liquor and property used in maintaining the same, to be common nuisances, and permits prosecuting and enforcing officials to bring actions to enjoin any such nuisance, which are to be actions in equity.

Upon judgment ordering the nuisance to be abated, the court may order that the place or structure shall not be occupied or used for one year thereafter, but may permit such occupancy or use if a bond is given as provided by the act (27 U.S.C. 33, 34). The provision is in substance, but in briefer form, the same as that found in the Act of Congress of February 7, 1914, concerning houses of prostitution in the District of Columbia (38 St. L., p. 280)—one of the so-called red-light-injunction laws.

It is difficult to estimate to what extent proceedings in equity as a means of enforcing statutes are authorized by state legislation, and probably the practice varies; provisions to that effect are, e.g., much more common in Massachusetts than in Illinois. The Second Class Cities Law of New York (Laws, 1906, ch. 473), permits cities to restrain by injunction the violation of city and of health ordinances (§42).

Special statutory provision is necessary also to make administrative orders enforceable by actions to restrain violation or compel compliance, just as a provision is necessary to make them enforceable by penalties. Provisions to that effect are found in a number of important federal statutes, and probably in the public utility laws of many states.[17]

An administrative order is in itself somewhat in the nature of an equitable process, and, by reason of its quasi-legislative operation, is better adapted to giving specific content to generically worded provisions of a statute, than the order of a court of equity which presupposes a definite statutory duty; but the administrative order can be given compulsory effect only through a court, either by the imposition of a penalty, or by an enforcing decree or order which is backed by contempt process.

The statute authorizing the equitable remedy against the administrative order may also indicate whether and to what extent the court may review administrative findings of fact. The Interstate Commerce Act originally permitted unrestricted review, although it made the Commission findings *prima facie* evidence; the act as amended in

[17] Compliance with a statute or administrative order on the part of a corporation may also be authorized to be compelled through mandamus proceedings; 49 U.S.C. 19a (1), 20 (9), 49. Section 16 (2), speaking of "mandatory process," seems to contemplate an injunction.

1906 requires judicial enforcement if the order is regularly made and duly served (49 U.S.C. 16, subd. 12), and in practice this provision is therefore not used for review purposes; the Federal Trade Commission Act requires enforcement if the order is supported by testimony (15 U.S.C. 45), the Grain Futures Act, if it is supported by the weight of evidence (7 U.S.C. 9).

It is clearly desirable, in view of these variations, that the statute should be explicit as to the scope of review. If it is silent, it may be inferred from the decision in *Ma-King Products Company* v. *Blair,* 271 U.S. 479, 1926, that the court will not retry, but reverse for error only, if the order was based upon a formal hearing; but in the absence of a formal hearing, the proceeding in equity should be available for retrying the facts, in analogy to the New York doctrine regarding the reviewability of orders (*Fire Department* v. *Gilmour,* 149 N.Y. 453, 1896).

In the case of *Interstate Commerce Commission* v. *Brimson,* 154 U.S. 447, 1894, the point was made that a judicial proceeding to enforce an administrative order to give testimony was not an exercise of judicial power, since merely ancillary to the exercise of administrative power; but the Supreme Court pointed out that it was simply a more summary substitute for a prosecution for a penalty. It might indeed be desirable to have a general rule making statutory duties specifically enforceable by application to a court of competent jurisdiction; but no such general rule is available.

§81. Provisions To Induce Private Initiative. The general American rule is that in the absence of special provision prosecutions for fines and suits for penalties and forfeitures are brought on behalf and in the name of the government or state by the regular prosecuting officials. There are, however, probably in every state statutory provisions under which penalties for violation of ordinances are recovered by proceedings brought by the municipal corporation.

Private suits for the enforcement of penalties take one of three forms: informers' suits; actions for penalties by aggrieved parties; and actions for multiple damages.

Informers' suits. As a means of stimulating law enforcement, it was

a very common practice of English legislation to allow actions for penalties to be brought by common informers, suing wholly or partly for their own use (*"qui tam pro rege quam pro se ipso . . ."*; hence: *qui tam* actions). Leadam in his treatise on the Star Chamber states that the practice was said to have been introduced from France, but denies the correctness of the theory. That it was found in other European countries, appears from the Prussian Act of December 28, 1868, abolishing all informers' shares.

The first informer suing for the penalty acquired control of the cause of action, if he acted in good faith, thus excluding other informers, and also barring a remission of the penalty by the Crown (2 Inst. 200, 2 Blackst. 437, 3 Blackst. 160). The informer suing for his own benefit was not at common law a competent witness (Paley, *Summary Convictions,* ed. 1814, p. 26), and by statute the right of action was limited to one year (31 Eliz. 5; 4 Blackst. 308).

In the present English legislation informers' shares seem to be uncommon. Both the *Encyclopaedia of the Laws of England* and Halsbury's *Encyclopaedia* are practically without material. Lely's *Statutes,* title: "Penal Actions," gives only older acts, the last one being an act of the reign of Queen Victoria allowing the Crown to remit penalties (22 Vict. 32, 1859).

Provisions for informers' shares appear repeatedly in the U.S. Code, mainly in connection with older statutes, so in those relating to the slave trade (18 U.S.C. 423, 424, 429, 430, 431). It is not always clear whether the person giving the information is also intended to be the prosecuting party (31 U.S.C. 155; 33 U.S.C. 410; 46 U.S.C. 497; 33 U.S.C. 368: proceeded against by process by any person; 50 U.S.C. 215: filing information with an attorney of the United States; see also *Williams* v. *Wells Fargo & Co.,* 177 Fed. 352, 1910).[18] The clearest form seems to be: liable to a penalty . . . recoverable, one half to the use of the person prosecuting for the same, the other half to the use of the United States (46 U.S.C. 575).

Since a relatively large number of provisions are found in the chapters on Navigation and Shipping, notice should be taken of 18 U.S.C.

[18] One half to the person *making the complaint* does not mean that he is to control the prosecution (*Smith* v. *Look,* 108 Mass. 139, 1871); as to proceedings by indictment to collect a penalty, the informer being entitled to a share, see *Encyclopaedia of Pleading and Practice,* "Penal Actions," p. 270.

642 (R.S. §5294) which permits the Secretary of the Treasury to remit penalties in connection with vessels, unless the right has been judicially determined prior to application for remission.

The fullest provision is perhaps found with reference to false claims against the United States, R.S. §§3491, 3493, 31 U.S.C. 232, 234, the most comprehensive provision in connection with the postal laws (relating to all penalties and forfeitures as distinguished from fines) 39 U.S.C. 791, R.S. §4059.[19]

A conspicuous recent instance of an informer's action was that brought against a member of the British Government for illegally voting in a matter in which he had a pecuniary interest (*Forbes* v. *Samuel,* 1913, 3 K.B. 706). The suit was for £500 a day, altogether £17,500. It was brought under a statute of 1782, but it was found that that act had been superseded by an act of 1801 incorporating its provisions, and the plaintiff was not allowed to amend. In *Bird* v. *Samuel,* 30 *Times Law Rep.* 323, 1914, in an action arising under the same circumstances, judgment was given for the plaintiff for £13,000 and costs. Counsel stated "there was no doubt that a Bill of Indemnity would be introduced." If the act of 1801 has not been repealed since 1913, the non-repeal would be an interesting illustration of legislative inertia.

The Sunday Act of 1781, 21 Geo. III, c. 49, applicable to London, has also drastic penalties which may be sued for by informers. A suit was brought under this act, *Orpen* v. *Haymarket Capitol,* 47 *Times Law Rep.*

[19] To the effect that notwithstanding this provision, suits for penalties must be brought by the United States, in accordance with R.S. §919, 28 U.S.C. 732, see *Williams* v. *Wells Fargo & Co.,* 177 Fed. 352, 1910.

"Penalty of $100 for each offense, to be sued for in an action of debt," 46 U.S.C. 495, would not entitle an informer to sue.

For a full statement of the right of the informer to sue for a penalty, see United States Revised Statutes, §§3491, 3493:

"3491: Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

"3493: The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half of the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant . . . provided that such person shall be liable for all costs incurred by himself in the case, and shall have no claim thereof on the United States."

See 81 *Justice of Peace* 258 as to danger of collusive informers' suits and legislative provisions with reference thereto. See also *Encyclopaedia of Pleading and Practice,* "Penal Actions," p. 247.

575; 95 *Justice of Peace* 469. The penalty of £5,000 was remitted under the provisions of the Remission of Penalties Act, 1875 (*London Weekly Times,* July 30, 1931). In consequence of this action, Parliament passed an act, to be in force for one year, discharging proceedings previously brought, and prohibiting the institution of proceedings without the consent of the Attorney General (21 & 22 Geo. V, c. 52, October 7, 1931).

Informers' shares under the revenue laws were abolished by acts of June 6, 1872, 17 St. L. 256, for the internal revenue, and of June 22, 1874, 18 St. L. 186, for the customs revenue.

There appears to be one American statute, similar to the Prussian Act of 1868, doing away with all informers' shares: Acts of New Hampshire, 1899, ch. 31: "and all other statutory provisions whereby the complainant or the prosecutor is entitled to the whole or any part of the penalty imposed for the violation of any other provisions of the Public Statutes, or amendments thereto, are hereby repealed."

On the whole, informers' shares represent rather the survival of old than the thought of new legislation; if they appear now and then in recent statutes (e.g., in the flag laws enacted by a number of states), they seem to be due to inadvertence, or to the zeal of the draftsman outrunning his discretion. They ought to disappear from the statute books altogether. See Willard, *Legislative Handbook,* §§375, 376.

Rewards to informers. To be distinguished from informers' shares sued for by the informer are provisions for rewards to be given to informers. An early instance of this kind is found in the Sunday law of 1677 (29 Car. II, c. 7). Such rewards were allowed by the Act of June 22, 1874, abolishing informers' actions in the collection of customs (§6). The present acts, 8 U.S.C. 140 and 21 U.S.C. 183, are of this type, the authority to direct the payment being vested either in an administrative official or in the court. An extreme form of this legislation is found in the so-called tax ferret arrangements, under which persons discovering property that has escaped taxation are paid substantial shares of the taxes recovered.[20]

Shares to officials. The provision in 21 U.S.C. 183 that no payment for giving information shall be made to any officer or employee of the

[20] See Iowa Code Supplement, 1907, 1407 a to e; repealed and practice forbidden, Laws, 1911, ch. 66.

The provision in the act of 1874 that the claim to compensation must be established to the satisfaction of the court and that the court shall certify the value of the services

United States, calls attention to the formerly extensive practice of giving shares in amounts recovered to prosecuting officials or even judges. The decision in *Tumey* v. *Ohio,* 273 U.S. 510, 1927, has practically done away with this legislation so far as judges are concerned; but as regards prosecuting officials it appears to survive in a number of states. See, e.g., Illinois Railroad Commission Act, 1871, §18.[21]

Locus standi of non-official interveners in judicial or administrative proceedings. Different from the informer who is supposed to be actuated by motives of personal and private gain is the representative of some collective and therefore quasi-public interest, who is permitted to initiate, or to intervene in, enforcement proceedings. As instances may be mentioned: the New York statutes permitting proceedings to be brought by the Societies for the Prevention of Cruelty to Children, or to Animals; the provisions of the Interstate Commerce Act permitting action by trade associations (49 U.S.C. 13, subd. 1), and the provision of the Tariff Act (1930, §516) permitting American manufacturers, producers, and wholesalers to protest against and con-

to the Secretary of the Treasury was held unconstitutional by lower federal courts as imposing non-judicial functions upon the courts. *Ex parte Gans,* 17 Fed. 471, 1883; *Ex parte Riebeling,* 70 Fed. 310, 1895; *U.S.* v. *Queen,* 105 Fed. 269, 1900. The present statute, 19 U.S.C. 533, avoids this objectionable form.

See also Bolles, *Financial History of United States,* p. 427.

[21] Burke in his Speech on Conciliation with America said: "A court partaking in the fruits of its own condemnation is a robber." It is said that the Solicitor-General informed him that the grievance of the judges partaking of the profits of the seizure had been redressed by office. It is interesting to note that it was Burke who introduced the Act of 1782 sued on in *Forbes* v. *Samuel,* which gave to the informer the penalty of £500 a day imposed for illegal voting in Parliament; see 1913, 3 K.B. 730.

In the two perhaps most conspicuous American cases of cumulative fines, that of the Waters-Pierce Oil Company in Texas (107 Tex. 1, 1907, 212 U.S. 86, 1909) where the penalty amounted to $1,623,500, and that of the Fire Insurance Companies in Mississippi (*Aetna Ins. Co.* v. *Robertson,* 127 Miss. 440, 1921; 131 Miss. 343–510, 1922) in which the penalties aggregated eight million dollars, officials were entitled to shares. It is said that in Texas this share was eventually paid in silver dollars. In Mississippi the method of compensating officials was sought to be changed by initiative petition, but on a technical ground the initiative law was declared invalid. *Power* v. *Robertson,* 130 Miss. 188, 1922.

When recently the government of Brazil sought to impose a fine of one million dollars upon an American bank, it was said that one-third of it would go to Treasury officials. It was reported later on (*Chicago Tribune,* July 25, 1930) that the fine had been remitted by the decision of the Minister of Finance, with the approval of the President, and that no more than a few thousand dollars would be collected as penalty for failure to affix revenue stamps. If this result was brought about by diplomatic pressure, it would be a striking comment upon the relative position of the government of the United States toward foreign powers and toward the states.

test valuations and classifications.[22] While manufacturers are actuated by private advantage, the legislator identifies their interest with that of American industry, and the case is unlike that of the common informer. A law-enforcing organization permitted to collect penalties for the benefit of its treasury, under safeguards as to the appropriation of its fund for enforcement purposes might claim a status superior to the common informer; but there seem to be no statutes sanctioning such an arrangement, and the strong presumption would be against its desirability.

Penalties to parties aggrieved. Objections to informers' shares are not necessarily applicable to definite penalties recoverable by aggrieved parties, as liquidated damages. The most conspicuous instance of this is furnished in the Habeas Corpus Act of 1679, and analogous provisions are found in American statutes in favor of personal liberty (Illinois Habeas Corpus Act, §5, Illinois Criminal Code, §229, 8 U.S.C. 51).[23] Penalties recoverable against election officials were formerly not uncommon; they have disappeared from the laws of Illinois and Massachusetts. The occasionally undesirable effect of private penalties, even if in favor of parties technically aggrieved, is illustrated by the case of *The Charles Nelson,* 149 Fed. 846, 1906, arising under U.S.R.S. §4465, now 46 U.S.C. 452, where it was held that a court of admiralty had discretion to refuse to enforce it. On the other hand, they may be a more effective remedy against official misfeasance than either a purely criminal liability or a mere action for damages. The definite penalty does not, however, at present seem to be favored by legislation.

A special form of penalty payable to the aggrieved party is found in recent legislation to secure prompt payment of wages. If in contravention to the law, wages are withheld, the former employee is declared to be entitled to a day's wages for each day's default; or to such wages up to a maximum number of days (see Nevada, 1925, ch. 139). The equity of such provision should be carefully considered.

If a penalty is given to an aggrieved party, it should not be in a variable amount, or provision should be made for suing in such form

[22] See the observations of Senator Walsh of Massachusetts in criticism of this, and giving the history of legislation, in *Congressional Record,* October 7, 1929, pp. 4501–4505.

[23] They served an opposite purpose in the Fugitive Slave Act of 1850.

that the penalty can be fixed in the judgment or verdict; otherwise there will be the objection that the party, in bringing an action of debt for a definite sum, fixes the penalty in his own favor (*Cigar Makers' Internat. Union* v. *Goldberg,* 72 N.J.L. 214, 61 Atl. 457, 1905).

Multiple damages. Multiple (double or treble) damages are a form of private penalty.

They appear in English legislation in the Statute of Gloucester (1278, 2 Inst. 289), in the Statutes of Labourers (Reeves, *History of English Law,* II, 388), and in connection with the law of distress as late as 1689, 2 W. & M. St. 1, c. 5. Lely's *Practical Statutes* cites no later act.

We find them in actions against public officers in the Poor Law of Elizabeth, 43 Eliz., c. 2, and in another Elizabethan statute (29 Eliz., c. 4) in an action against sheriffs for extortion.

The Habeas Corpus Act of 1640 allowed treble damages; the Habeas Corpus Act of 1679 substituted a definite penalty of £500, but allowed treble costs; however, all multiple costs were abolished by 5 & 6 Vict., c. 97.

Multiple damages have not been abrogated in similar manner, perhaps because they are so uncommon; Tidd's *Practice* (979) discusses them only in connection with multiple costs. *Corpus Juris* cites only four English cases, one of which relates to forfeiture of duties to the Crown under an act of 1777 (*Attorney-General* v. *Hatton,* McClel. 214, 1824). The *Encyclopaedia of the Laws of England* and Halsbury's *Laws of England* are silent on the subject.

In America multiple damage provisions are found in a considerable number of states, in connection with waste, trespass, forcible entry and detainer, unlawful detainer, illegal distress, malicious prosecution, usury laws, etc. That they are not as antiquated as in England is shown by the fact that they are a feature of a number of anti-trust laws, including the Sherman Act, under which threefold damages were recovered in the well-known case of the Danbury Hatters (*Lawlor* v. *Loewe,* 235 U.S. 522, 1914). Courts have held that they are not within the constitutional provision which requires the proceeds of penalties to go to the public school fund (*Barnett* v. *Atlantic & Pacific R. Co.,* 68 Mo. 56, 1878; *Sutton* v. *Phillips,* 116 N.C. 502, 1895). In New Hampshire the statute of 1899 before cited, abrogating in-

formers' shares, has been held to have done away also with penal damages (*Moffie* v. *Slawsby*, 77 N.H. 555, 94 Atl. 193, 1915).

There seems to be little to commend the retention of the practice of multiple damages. No instance of the use of this form of penalization has been found in present-day German legislation.

Bonds as aids to enforcement. Provisions for statutory bonds are generally intended to secure fiscal or public claims under laws relating to customs or internal revenue or to accountability for public moneys. In the legislation of American states such bonds are now occasionally also used to ensure compliance with regulative statutes on the part of persons pursuing callings that involve obligations to private parties, of a quasi-fiduciary character, where the more elaborate régime of standardization and supervision, such as is applied to banks and insurance companies, is inappropriate or impracticable: employment agents, ticket agents, transmission of moneys, produce commission merchants. They also form a feature of statutes creating special forms of civil liability: bastardy acts, mechanics' lien acts, acts relating to logging, warehousemen, etc.

Statutes requiring bonds to be given usually specify directly or by reference to some standard the amount of the bond, its condition, the obligee, approval by a designated official, or acceptability of a surety company (as to making a corporate bond compulsory see *State* v. *Robins*, 71 Oh. St. 273, 73 N.E. 470, 1905), also indicating with whom the bond is to be filed, and who may sue upon it.

A provision leaving form or amount of the bond entirely discretionary with the official (as in section 5 of the National Prohibition Act, 27 U.S.C. 16) may, under decisions of state courts, be objectionable (*People* v. *Federal Surety Co.*, 336 Ill. 472, 168 N.E. 401, 1929).

In view of the fact that the liability of the surety for the satisfaction of judgments is one of the main advantages of the bond, a statute might well contain a provision upon the question whether the amount of the penalty is the measure of the damages recoverable against the surety. Statutes are not apt to be explicit on points like these, and bonding requirements are usually somewhat perfunctory. Legislation, to be adequate, should be based on the study of the case law of the particular jurisdiction, as it has developed in connection with special

topics (mechanics' liens, intoxicating liquors). It would then appear whether standard provisions can be formulated. Willard, *Legislative Handbook*, §§404–412; Jones, *Statute Law Making*, pp. 267–280.

§82. ADMINISTRATIVE AIDS TO ENFORCEMENT. In England, where proceedings by indictment or for summary conviction may be started and prosecuted by private persons, we find statutory provisions placing a check on indiscriminate prosecution by requiring the consent of specified officials (Attorney General, Board of Trade, Chief of Police, etc.). For a list of such provisions, see 77 *Justice of Peace* 205.

There is no occasion for similar provisions in the United States, where prosecuting officers have generally a monopoly of criminal prosecution, unless, indeed, it is desired to place a check upon these officers (see, e.g., 21 U.S.C. 11, §4 of Food and Drug Act).

The problem in the United States may be, how, in view of the official monopoly of prosecution, to overcome the possible inertia of state's or district attorneys.

A prosecuting officer is not expected to be active or vigilant in the repression or discovery of offenses. For dealing with ordinary crime, disorder, or breach of peace there is a separate organization (police and other local peace officers); but these peace officers have no time for, and generally no interest in, the enforcement of regulative statutes. These would generally be inoperative, if their enforcement were not entrusted to other officials created for that purpose.

In the absence of a distinct enforcing department, a statute may place an explicit duty upon the prosecuting officers. In connection with the Sherman Anti-Trust Act, the appropriation of funds leading to the administrative organization of a special division in the Department of Justice, was practically equivalent to the statutory creation of an enforcing department;[24] but the provisions of state anti-trust laws requiring the Attorney General or state's attorneys to prosecute have had probably little effect; and the same has probably been

[24] The appropriation act may then also place checks on prosecution, so under the appropriation acts for the Department of Justice by the provision that no part of the funds are to be used for proceeding against labor organizations.

true of a similar duty placed upon the secretary of state (Iowa, Missouri) or upon the sheriff (Kansas). Willard, *Legislative Handbook*, §§372–374.

Where a regulative statute is placed under the administration of a designated official or department, there will be a staff for obtaining information through inspection or complaints, evidence will be collected, and a preliminary case thus prepared will be laid before the official prosecuting attorney whose duty it is to institute and conduct criminal proceedings. The activities of the administrative official or department are properly designated by the terms "execute and enforce," or even by the term "prosecute," used in the sense in which we speak of a complaining witness as a prosecutor, or of malicious prosecution.

The essence of the power to execute and enforce is expressed in section 7 of the Railroad Commission Act of Illinois, 1873: "It shall be the duty of the railroad and warehouse commissioners to personally investigate and ascertain whether the provisions of this act are violated by any railroad corporation in this state, and to visit the various stations upon the line of each railroad for that purpose as often as practicable, and whenever the facts, in any manner ascertained by said commissioners, shall in their judgment warrant such prosecution, it shall be the duty of said commissioners to immediately cause suits to be commenced and prosecuted against any railroad corporation which may violate the provisions of this act."

A statute making it the duty of the prosecuting attorney to institute proceedings upon the request of the enforcing department is likely to be more effective than an explicit duty to prosecute without such request (Illinois Railroad Commission Act, 1871, §17). But a prosecuting attorney is in any event bound to act if a proper case is presented; on the other hand, he must judge whether the case presented is a proper case;[25] and if the statute intends to deprive him of the exercise of his legitimate judgment in this respect, it should realize that it can hardly compel him to prosecute effectively and successfully.

A legislature may also consider the expedient of placing penal proceedings in charge of the enforcing department acting through the department's own attorneys, and there have been provisions to that

[25] See 19 U.S.C. 510, 511.

effect; so Illinois Coal Mines Act, 1899, §33. But it has been said that very explicit provision is required to oust the regular prosecuting officer of his power to assume control if he desires to do so (*Reports of Attorney General of Illinois,* 1905–6, p. 307; 1908, pp. 230–232), and a question of legislative power may arise if he is a constitutional officer, unless the action is a civil one for penalties (Illinois Act, May 31, 1911, relating to insurance companies, §7). See Willard, *op. cit.,* §382.

Under former prohibition legislation, provision was made in some states for state-appointed prosecuting officials. In Maine (because the governor was allowed to *create* the office, *State* v. *Butler,* 105 Me. 91, 1909), and in North Dakota (on the ground of the constitutional right to local self-government, *Ex parte Corliss,* 16 N.D. 470, 114 N.W. 962, 1907) this was held to be unconstitutional, but the provision was upheld in Oklahoma (*Childs* v. *State,* 4 Okla. Crim. Repts. 474, 113 Pac. 545, 1910).

In New York the Executive Law 62 (2) allows the governor to direct the Attorney General to take charge of any case, whereupon the district attorney becomes subject to his direction. In Vermont the governor, in case of neglect of local prosecuting officers, may appoint legal voters as special prosecutors (Act 1884 No. 122; *In Re Snell,* 58 Vt. 207, 211, 1885).

The remissness of the local peace officers in enforcing special policies, particularly prohibitory liquor legislation, has led to the creation of state-appointed constables or commissioners; so in Maine and Massachusetts.[26]

Civil administrative enforcement. The value of a bond requirement as an aid to enforcement is enhanced if an administrative officer will assume the burden of suing on it. Provisions to that effect are found in the Illinois Farm Produce Commission Sale Act of 1919 (§3) and in the New York law regulating milk-gathering stations (Farms and Markets Law, §§252–253).[27] Without a bond requirement, the admin-

[26] Mass., 1871, ch. 394; 1875, ch. 15; Maine, 1905, ch. 92, §5; 1909, ch. 255 (*Gilmore* v. *Penobscot County,* 107 Me. 345, 78 Atl. 454, 1910; *Commonwealth* v. *Intoxicating Liquors,* 110 Mass. 172, 1872; also *State* v. *Becker,* 3 S.D. 29, 1892).

[27] *People* v. *Perretta,* 253 N.Y. 305, 171 N.E. 72, 1930; *People* v. *Beakes Dairy Co.,* 222 N.Y. 416, 119 N.E. 115, 1918. The statutes permit suits to be brought on claims, and to use the bond liability to enforce judgment; the action on the bond does not presuppose a prior reduction of the claim to judgment. It may be questioned whether the statutes have found their final form.

istrative power to sue on behalf of the party aggrieved is also found in the English Corn Production Act of 1917, §7.

Both the Illinois Produce Commission Act and the New York Farms and Markets Law also give power to the State Commissioner to conduct hearings and make findings as to defaults or practices complained of, but the adverse finding does not prejudice legal rights. The Perishable Agricultural Commodities Act of June 10, 1930, goes in this respect one step further: in a civil action brought on the default the adverse finding of the Secretary of Agriculture which results in a reparation order is made *prima facie* evidence, and the plaintiff if unsuccessful is not liable for costs, while if successful he is entitled to an attorney's fee. This act omits the bond requirement.

The provision for a reparation order and its *prima facie* evidence effect in a civil action is apparently modeled upon the Interstate Commerce Act, but the foundation of the reparation order in the Commerce Act is a finding as to rates, which is quasi-legislative or at least of public and prospective operation and effect, while in the Perishable Produce Act a purely civil controversy as to performance of a private contract is made administratively cognizable, and the normal exercise of the judicial power qualified by a shifting of burden of proof simply as a consequence of a preliminary transfer from judicial to administrative power. This constitutes a new departure in legislation, and might have far-reaching consequences on the administration of civil justice.

§83. ENFORCEMENT THROUGH PRIVATE CAUSE OF ACTION OR DEFENSE. Liability for tort and nullity of contracts or other legal acts may become important factors in inducing observance of statutory prohibitions and requirements. Non-compliance may create a cause of action for damages against the offender; or, where the offender has occasion to sue, may be relied upon as a defense, if compliance can be treated as a condition precedent to a cause of action, or non-compliance as a cause of forfeiture of a claim. The rules that apply in this respect form an important part of statute law in its judicial aspects. The legislature is frequently content to leave the matter, as being doctrinal or declaratory in character, in the hands of the courts, with-

out explicit provision, one way or another, as to the civil effects of non-compliance.[28]

Occasionally, an express provision merely states the law as it would be without the provision; more commonly the express provision serves the purpose of making a supposed lenient common law rule more stringent in the direction of liability or nullity; less commonly, it serves the purpose of mitigating a common law rule of liability or nullity.

a. *Express provisions for liability.* 46 U.S.C. 491 (R.S. §4493) is an example of a provision which seems to declare merely a general rule of law (failure to comply with statutes for safety of ships). On the other hand, analogous provisions in statutes for the protection of health and safety of employees, may be intended to supersede the doctrine of assumption of risk (Illinois Mining Law, 1911, §29; Structural Work Act, 1907, §9; Occupational Disease Act, 1911, §15). The liability provision of the Public Utilities Act of Illinois (§73) in terms permits exemplary damages in case of wilful violation, and the allowance of an attorney's fee. Liability provisions in anti-trust acts permit multiple damages (Sherman Act, §7), and, occasionally, the recovery back of moneys paid to those guilty of an illegal combination (Arkansas, Georgia, Indiana, Kansas, North Dakota, South Carolina, Tennessee). Similar provisions were found in the liquor statutes of Iowa, Michigan, and Rhode Island (Black, *Intoxicating Liquors,* §265).

In Rhode Island the statute took the form of providing that all

[28] As to liability as a consequence of non-compliance, see, among many other authorities, Thayer, "Public Wrong and Private Action," 27 *Harvard Law Review* 317, and the following cases: *Couch* v. *Steel,* 3 E. and B. 402, 1854; *Gorris* v. *Scott,* L.R. 9 Exch. 125, 1874; *Marino* v. *Lehmaier,* 173 N.Y. 530, 1903; *Leathers* v. *Tobacco Co.,* 144 N.C. 330, 340–351, 1907; *Narramore* v. *R. R. Co.,* 96 Fed. 298, 1899; *Brunnworth* v. *Kerens Coal Co.,* 260 Ill. 202, 207–215, 1913; *Atkinson* v. *New Castle Water Works,* 2 L.R. Exch. Div. 441, 1877; *Brown* v. *Shyne,* 242 N.Y. 176, 151 N.E. 197, 1926; *Gill* v. *Boston Store,* 337 Ill. 70, 168 N.E. 895, 1929.

As to nullity of contracts or forfeiture of cause of action as a consequence of non-compliance, see, among other decisions: *Shuman* v. *Shuman,* 27 Pa. St. 90, 1856; *Tucker* v. *Mowrey,* 12 Mich. 378, 1864; *Walhier* v. *Weber,* 142 Mich. 322, 1905; *Myers* v. *Meinrath,* 101 Mass. 366, 1869; *Johnston* v. *Dahlgren,* 166 N.Y. 354, 1901; *Miller* v. *Ammon,* 145 U.S. 421, 1892; *Rock Island, etc., Co.* v. *Wales Co.,* 112 Kan. 623, 112 Pac. 97, 1923; *White* v. *Lang,* 128 Mass. 598, 1880; *Connolly* v. *Union Sewer Pipe Co.,* 184 U.S. 540, 1901; *Wilder Mfg. Co.* v. *Corn Products Co.,* 236 U.S. 165, 1915.

payments or compensations for liquor sold in violation of law, whether in money, labor, or personal property, shall be held and considered as between the parties to such sale to have been received in violation of law, without consideration, and against equity and good conscience.

The opposite rule, generally applicable, is expressed in section 817 of the German Civil Code as follows:

"If something is given for a purpose which makes the acceptance contrary to some legal prohibition or to public policy, the person receiving it must restore it. But there is no right of recovery, if the giver is chargeable with the like offense, unless the giving consists merely in an obligation; a payment made in discharge of such obligation cannot be recovered."

b. *Express nullity or saving provisions.* An anti-trust statute would render void and unenforceable any agreement in restraint of trade covered by the intent and purpose of the act, even if there were no common law rule of illegality in the absence of a statute; does it also render void and unenforceable a contract entered into by a concern which constitutes an illegal combination, which contract would be lawful if entered into by another concern? The U.S. Supreme Court refuses to hold such a contract illegal: *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 1901; *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U.S. 165, 1915.

To counteract this lenient rule, a number of state anti-trust acts expressly deny the right of concerns violating the act to recover the price of merchandise sold, and—as stated before—some states will permit the purchaser to recover back the price paid for goods.[29]

But while express nullity provisions are not uncommon, they generally do not make new law; in other words, the general tendency of judicial construction is sufficiently stringent to accord with legislative policy; and judicial exceptions from the rule of nullity have not aroused sufficient adverse sentiment to call for contrary legislation.

The statutes requiring commission authorization for securities of public utilities present the problem of how to deal with unauthorized issues. The Transportation Act (49 U.S.C. 20a, subd. 11) makes these

[29] See *Mason* v. *Adone*, 30 Tex. Civ. App. 276, 70 S.W. 347, 1902. It is said that this was the only attempt to take advantage of the statutory provision for price recovery, and that the provision was later on repealed.

issues void, but makes the carrier (together with the directors, etc.) liable to a *bona fide* purchaser for damages, and permits the direct acquirer to rescind and recover the consideration. This is preferable to a simple declaration of nullity such as is found in state statutes (Illinois Public Utilities Act, §23).

Sunday laws having been interpreted as taking away a cause of action for injury suffered while driving on Sunday (see the criticism of the older law in *Bourne* v. *Whitman,* 209 Mass. 155, 95 N.E. 404, 1911), the legislature interposed by restoring the cause of action against the carrier. The provision was then generalized to the effect that the Sunday law shall not constitute a defense to an action for a tort or injury suffered by a person on the Lord's day (Gen. L., ch. 136, §20)—a provision also found in Maine (Laws, 1895, ch. 129, R.S. 1916, ch. 87, §137). Maine also provides (ch. 87, §137) that no person who receives a valuable consideration for a contract express or implied, made on the Lord's day, shall defend any action upon such contract on the ground that it was so made, until he restores such consideration.

Where regulative legislation represents controverted policies or involves difficult question of construction, liability or nullity as a consequence of violation may result in hardship or injustice. Penal enforcement can be tempered in administration, while private civil enforcement, which often serves no public purpose whatever, is beyond public control. To some extent the doubt as to the equity of private civil enforcement is reflected in judicial construction. But there are many cases in which the rule of liability or of nullity is firmly settled, so that adequate relief can come only through legislation. However, the legislature is little inclined to relax rules which seem to advance legislative policy; and where the policy is founded in an aroused public sentiment, civil and penal enforcement clauses are apt to be equally drastic.

§84. Comment on Enforcement Provisions. Enforcement clauses form a constant feature in the diversity of regulative legislation, and it is therefore surprising how little thought has been given to them either as to general principle or as to detail. In each particular statute

the administrative part is governed largely by precedent and receives scant consideration. Occasionally, enforcement becomes a major political issue, as in the Irish Crime Acts, or in the Fugitive Slave Law of 1850; or perhaps in the Civil Rights Acts of the Reconstruction period. The machinery then called into play: additional powers to executive and peace officers, and to magistrates, and changes in the law of procedure as to arrest, bail, habeas corpus, venue, and trial (in America largely checked by constitutional guaranties), bears the stamp of exceptional legislation, and is no contribution to normal jurisprudence.

Spasmodically, enforcement as a legislative problem arouses attention, and there is then talk about "putting teeth into the law." The result, as often as not, is the piling up of administrative powers and duties, and of drastic or even draconic penalties, without any realization of what their enforcement would mean, or that they are likely to remain unenforced. The anti-trust legislation of the latter part of the nineteenth century is typical—a striking exhibition of the futility of mere animosity and vindictiveness. The state statutes, although unrepealed, are almost forgotten; but sections 6 and 7 of the Sherman Act stand as monuments of the period, the threefold damage provision still of occasional and inequitable operation, the grotesque forfeiture clause a dead letter. Only the provision for enforcement by restraining orders stands as a permanent addition to the law.

In England the history of enforcement appears to be connected with the development of summary proceedings and jurisdiction. From such phrases as "punished at the will of the King" (1337, 11 Ed. III, 1477) or "punish by their discretion" (1511, 3 H. VIII, c. 14), legislation proceeds to the specification of procedure and penalties (see Paley, *Summary Convictions,* 1814, Introduction).[30] Vague threats of severe punishment are also common in German police legislation down to the eighteenth century.

A study of American enforcement clauses may gather much from the history of liquor legislation. The following indicates the course of development in Massachusetts: 1692, ch. 20: 40 shillings forfeited, one

[30] The history of enforcement in England is bound up with the office of the Justice of Peace. See the study of Charles A. Beard on the subject in volume 20 of *Columbia University Studies,* 1904; also B. H. Putnam, "Justices of Labourers in the Fourteenth Century," 21 *English Historical Review* 517, 1906.

half to the informer; 1694–95, ch. 190: placing in the stocks; 1695–96, ch. 13: whipping and forfeiture; 1721, ch. 1: whipping; 1816, ch. 112: revocation of license; 1850, ch. 232: upon third conviction, recognizance; 1853, ch. 215: common nuisance; civil damages; 1857, ch. 293: equitable jurisdiction; 1871, ch. 394: commonwealth constables (see Wines and Koren, *The Liquor Problem in its Legislative Aspects,* 1897).

With all its vagaries, liquor legislation has made a permanent contribution to the technique of law enforcement in the introduction of equitable jurisdiction, which, quite aside from the controverted problem of summary contempt power, has valuable features that are not likely to be discarded.

It is not creditable to American legislation that it clings to methods repudiated by other systems with which it should be compared, those of England, France, and Germany. Informers' shares, multiple penalties and damages, excessive forfeitures, treatment of public policy offenses as felonies, cannot stand examination either as to equity, enforceability, or the general morale of legislation.

Enforcement clauses labor under the disadvantage that they are placed at the end of a statute, at a point in legislative consideration when attention flags and debate is cut short. They are "technical matter" for which no one feels any particular responsibility, or at any rate not deemed worthy of prolonged or serious struggle.

This situation might be changed, if it were possible to standardize and codify enforcement clauses after the manner of a code of procedure. The problem would be both a technical and a political one. Can regulative legislation be treated as homogeneous to this extent, that the various situations calling for penalty provisions can be covered by adequate general formulas? Or, if this proves impracticable, can enforcing powers and penalties be standardized? There seems to be less doubt as to the feasibility of the latter course. If the former course is feasible, can legislatures be persuaded that it is safe and expedient? It is not easy to overcome what is in some respects a legitimate conservatism. With or without codification and standardization, the abrogation of undesirable enforcement methods is likely to be a slow process.

PART V

THE TECHNIQUE OF CIVIL REGULATION

CHAPTER XII

PREREQUISITES TO THE VALIDITY OF ACTS

§85. Formal and Factual Requirements. The characteristic of a civil regulation is that it is enacted to safeguard public or private interests that are liable to be adversely affected by legal acts or the creation of rights. It provides that in order to make an act valid or to create a right or corresponding obligation, prescribed conditions must exist or prescribed formal requirements must be observed, or both. Without these, the intended legal act is defective, and the purpose of the parties, which is to obtain legal protection, fails. The public gain is supposed to lie in the escape from ill-considered or ill-advised commitments, or in relieving the administration of justice from the unreliability of oral proof. The regulation is civil because it requires no penalty as an inducement to observance, in contrast to a penal regulation, which is called into play where the action to be restrained accomplishes its purpose irrespective of its legal character, so that the mere failure to obtain legal protection would not be an adequate deterrent from non-compliance.

Apart from official coöperation and the consequent creation of official power, the following principal points require legislative attention:

1. *Acts, whether formal or informal.* The general question whether form or informality should be preferred is one of legislative policy and not of drafting. A full discussion is found in the annotations (*Motive*) to the first draft of the German Civil Code (I, 179), where the conclusion was in favor of informality, subject to relatively few exceptions. In Anglo-American law the transfer of real estate has always been formal; for specified contracts and for wills the statute of frauds established the policy of requiring form;[1] for marriages the common law of nearly all American states preferred informality, and statutes have hesitated to make formal requirements mandatory. Public acts are nearly always required to be formal.[2]

[1] This policy has been much questioned as regards the requirement of a writing for the sale of goods above a specified value; see the observations of Justice Stephen in 1 *Law Quarterly Review* 7, and the changes made by American legislation.

[2] Compare *Hoke* v. *Field*, 10 Bush (Ky.) 144, 1873, with *People* v. *Murray*, 70 N.Y. 521, 1877, as to the rule of law where the statute is not explicit; see, also, *Commonwealth* v. *St. John*, 261 Mass. 510, 159 N.E. 599, 1928 (unsigned proclamation). A

It is a fixed principle of legislation not to prescribe precise words to be used for the accomplishment of any legal result (contrary to rules of pleading in ancient laws); the form of the enacting clause in statutes is a notable exception. Absolute uniformity, on the other hand, may be a requirement serving practical purposes; so in the form of ballots in the so-called Australian ballot system.

2. *Writing and signature.* A few points require attention: Should writing be satisfied by printing? Should a signature be required? Is it wise to require the signature to be in a particular place? Should a signature be allowed to be made through an agent? Where an act is required to be in writing, must auxiliary acts (e.g., the appointment of an agent) likewise be in writing?

Some of these points can be, and have been, taken care of by general statutes; upon others, the history of legislation and of its judicial construction is instructive (German Civil Code, §§126, 127, 167, 182; 9 Geo. IV, c. 14, §1; *Hyde* v. *Johnson,* 2 Bing. N.C. 776, 1836; and 19 & 20 Vict., c. 97, §13; *Finnegan* v. *Lucey,* 157 Mass. 439, 1892; Indiana Annot. Statutes, §240, subd. 10).

3. *Allowing matter of record to be affected by factual or parol proof matter.* The history of the attestation requirement in connection with the making of wills seems to establish as a principle of drafting that it is undesirable to qualify formal matter that can be verified by record evidence by other formal matter that rests upon the memory of witnesses. The rule that the witnesses must not merely sign (a matter of record) but must sign in the presence of the testator (a matter "in pais"), has nullified many wills, and would have nullified more, if the truth in every case were pressed or could be ascertained. No convincing or even sensible reason has ever been advanced for the requirement, which should be contrasted with the failure to require that the testator sign in the presence of the witnesses (the law is satisfied by his merely acknowledging his signature in their presence). The perpetuation of the rule and its adoption in practically all English speaking jurisdictions demonstrates the inclination to accept without questioning what has once succeeded in establishing itself as law. Of course, the continued presence of all the parties during the execution

cursory examination of Illinois statutes shows the common practice of speaking of orders, etc., *"in writing."*

of the will adds to the solemnity of the instrument, but our law does not require it; where it is required, as in the notarial execution of a will in continental law, the law also secures ample record evidence in the formalities of the notarial protocol, which the habit and tradition of regularity connected with the position of the notary public in Europe renders practically unimpeachable.

It is a simple matter to avoid the superimposing of formal parol matter upon formal matter of record; but it is not as easy to avoid the impairment of record matter by matter of parol proof which is of a substantive character, representing inherent equities, such as mental competency, disinterestedness, or absence of fraud. All the more significant is the course of legislation which has been to reduce or counteract the effect of these equities; so, for instance, the provision of the English Wills Act of 1837, that no will shall be invalidated by the incompetency of witnesses, beyond nullifying gifts to the witness.

The history of recording legislation in England (different from that in the United States) shows a tendency not to permit the priority of record to be nullified by proof of notice;[3] and this principle has been carried into full effect by the modern so-called Torrens legislation for the registration of land titles, which is based upon the theory that matter of record must be given absolute reliability, to which every claim not established by like record is subordinated. Elaborate provisions are required to carry this policy into effect, seeking to bring equities resting upon heirship, marriage, infancy, or possession, into harmony with the system, or rendering them of no effect as regards the record title.[4] The drafting of such a statute requires the aid of the expert in the law of real estate.

§86. Official Coöperation as a Form Requirement; Self-Executing and Non-Self-Executing Provisions. The three principal forms

[3] As to the possible effect of protecting the prior record only in favor of the purchaser without notice, see *Bayles* v. *Young*, 51 Ill. 127, 1869; *Carr* v. *Brennan*, 166 Ill. 108, 1897. For a list of the risks against which the American recording system fails to give protection, see 12 *Michigan Law Review* 379, 389–392.

[4] American Torrens acts assume that the registry system is inconsistent with title by adverse possession, and therefore eliminate it entirely. That a qualified recognition of adverse possession is possible, is demonstrated by section 12 of the English Land Transfer Act of 1897, and by sections 900 and 927 of the German Civil Code.

of the private law: the transfer of land, the will, and marriage, evince the same tendency to make official intervention at some stage legally or practically indispensable. The deed is precarious without a record, the will has become ineffectual without probate, and a marriage is practically impossible, though valid, without a license. The official act secures either publicity, or check and control, or both combined. In some respects, the attitude toward official coöperation involves long-established traditions, as in the case of the notarial system, or touches fundamental legal policies, as in the case of the compulsory civil marriage. Important drafting problems are presented in the choice of the proper official agency, the safeguards to be required, the use of administrative or of judicial proceedings to effect the desired purpose, and the effect to be attributed to the official act. The latter will be considered first.

Does an enactment by its own force create rights or obligations, or does it contemplate for its operation the interposition of further official action? In the former case we speak of self-executing provisions. The case of *Freudenberg* v. *Porter,* 1915, 1 K.B. 857, presents the problem in an unusual form but in a striking manner. The Regulations respecting Laws and Customs of War on Land, which formed part of the Hague Convention of 1907 provide in article 23 that it is particularly forbidden: "(h) To declare abolished, suspended or inadmissible the right of the subjects of the hostile party to institute legal proceedings." The English court held that the article can have no application to a country in which as in England the common law bars the right, so that there is no occasion for any declaration, but applies only to the exercise of belligerent power in occupied enemy country. The clause next following: "A belligerent is likewise forbidden to compel the subjects of the hostile party to take part in the operations of war directed against their own country," would illustrate the self-executing form, to which the decision of *Freudenberg* v. *Porter* would probably not apply, and which would therefore be in force in England.[5]

[5] It is assumed that the Hague Convention would have effect in England without being made law by an act of Parliament. In the United States the operation of a ratified treaty as law is clear under article 6 of the constitution; in England there is some doubt. See C. M. Picciotto, *Relation of International Law to the Law of England and of the United States,* pp. 72–74. See, also, *Robertson* v. *General Electric Co.,* 32 Fed. 2d 495, 500, 1929 (also 21 Fed. 2d 214, and 25 Fed. 2d 146).

It is said that the "most favored nation" clause in commercial treaties, now automatic in operation, formerly only gave the right to demand corresponding changes, which would become effective only upon enactment of the appropriate legislation.

The question: self-executing or not, arises both in connection with constitutional and with statutory provisions.

a. In a constitution, a clause which is not self-executing, is merely directory to the legislature, hence judicially unenforceable, and even in systems where a constitution operates only politically, is of less value than an immediately effective provision.

The wording may be ambiguous, as in the clause of the constitution of Maryland (III, 43): "The property of the wife shall be protected from the debts of the husband," which was held to be self-executing (*Clark* v. *Wootton,* 63 Md. 113, 1884); a corresponding clause in Oregon (XV, 5) was worded so as to be clearly self-executing; in West Virginia (VI, 49) so as to be clearly non-self-executing.[6]

The statement that prohibitory constitutional clauses are self-executing, frequently means that a provision may invalidate legislation, but a provision prohibitory in some aspects may require legislation, in order to produce a positive result, so in the matter of taxation (*Laub* v. *Furnas Co.,* 104 Neb. 402, 177 N.W. 749, 1920; *Leser* v. *Lowenstein,*

[6] As to constitutional provision regarding liability of stockholders, see *Woodworth* v. *Bowles,* 61 Kan. 569, 574, 1900 (held non-self-executing), and Thompson on *Corporations,* 1895, §§3003, 3004.

Compare the provision in the constitution of Pennsylvania of 1838: "Every corporate charter shall contain a clause reserving to the legislature the power to revoke and alter," with the provision in the constitution of 1857 reserving the power to the legislature directly.

The amended constitution of Ohio provides (art. 18, §3): "Municipalities shall have authority to exercise all powers of local self-government, and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws."

"§7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

The Supreme Court held that the powers of local self-government are not conferred upon existing city councils, but are effective only through charters adopted for the purpose. *State* v. *Lynch,* 88 Oh. St. 71, 1913.

See also *Thiel* v. *Philadelphia,* 245 Pa. 406, 1914, holding that where a law provides that in cities of the first class there shall be attached to the Department of Public Health and Charities a division of Housing and Sanitation, the law cannot be operative without an ordinance being enacted by the city council for the purpose of establishing such a division.

129 Md. 244, 98 A. 712, 1916). The matter has assumed considerable importance in recent provisions for initiative and referendum and for home rule, where the effort is to make the guaranty self-executing,[7] but is not always attended with success. A combination of self-executing (for the state) and non-self-executing (for municipalities) provisions is found in Nevada.[8]

Occasionally, the self-executing prohibitory provision may serve to compel compliance with a non-self-executing obligation, so where the constitution of Kentucky (art. 166) leaves special incorporation laws in force until a general law shall be enacted, but not longer than four years.

For practical purposes a constitutional provision may be regarded as self-executing, though depending on legislative aid, if that aid is given by existing general law. Thus a constitutional referendum presupposes the existence of election laws. A reference by the constitution to effectuating legislative action will be harmless if it merely expresses what would in any event be implied. Care should, however, be taken to avoid the appearance that the constitution empowers the legislature to add statutory to the constitutional requirements, as, e.g., where the constitution requires constitutional amendments to be submitted to popular vote "in such manner as may be prescribed by law." Judicial construction should then see to it that the legislative action shall not make the observance of inherently non-essential requirements essential to the validity of the popular vote.

b. In statutory legislation the question as to the function of the official act is whether it is to be a facility or a requirement, and if a requirement, whether directory, or mandatory in the sense of being a condition precedent to the existence of rights or the validity of acts. The following are typical cases:

(1) The law provides for registration or some analogous act: doubts may be removed by an explicit provision, as in case of conveyances, where non-registration makes them void only as to purchasers without notice, or as to purchasers, or as to creditors; or the general context of the law coupled with its general policy, may make it clear that non-registration does not affect validity, as in case of mar-

[7] *Thompson* v. *Vaughan*, 192 Mich. 512, 159 N.W. 65, 1916.

[8] *State* v. *Brodigan*, 37 Nev. 37, 138 Pac. 914, 1914.

riage. The history of the law may create doubts which make clear provision desirable, as in the case of the probate of a will. In copyright law, the development has been to make registration non-essential; or to make it a condition precedent merely for the bringing of the action, and not for the existence of the cause of action (17 U.S.C. 12), while the law is otherwise as to patents.

The English Legitimacy Act of 1926, following the laws of other jurisdictions in this respect, gives the marriage of the parents of an illegitimate child the *ipso facto* effect of legitimating the child, making separate provision for re-registration. This is a case where possible doubts and difficulties of proof or disproof might give plausible justification for insistence upon official authentication; and the allowance of automatic effect strikingly marks a legislative policy in favor of the result to be achieved. The separate provision for registration operates as a mere facility.

(2) The law desires to aid enforcement by administrative regulations or orders: is it also the legislative intent that the provision shall be inoperative without administrative action? The former Labor Law of New York provided with regard to certain permits: "the permit shall be kept posted in such place in the factory as the commissioner may prescribe." A proposed re-codification substituted: shall be kept posted in a conspicuous place. The addition of the words: "subject to the order, if any, of the commissioner, prescribing a particular place of posting" would combine the advantages of both methods.

"Subject to a right of appeal, under regulations to be made by the Secretary of Commerce" (46 U.S.C. 222) conditions the right on the making of regulations if "under" is equivalent to "in accordance with"; "subject to regulations" or "under regulations, if any" would remove the doubt.

(3) A statute, in providing for public acts of grant or license, may purport to create rights immediately, or to operate only through administrative effectuation. The Swamp-Land Grant Act of 1850 (R.S. §2479, 43 U.S.C. 982) was of the former type, as are also the grants of rights of way for public roads (43 U.S.C. 932, R.S. §2477) and for railroads (43 U.S.C. 934, Act of March 3, 1875); the Desert-Land Grant Act of August 18, 1894, gives authority to the Secretary of the Interior with the approval of the President to make donations, grants,

and patents (43 U.S.C. 641). A self-executing grant is probably exceptional.

(4) A statute intends to impose conditions or restrictions in connection with licenses or grants. Compare the following forms: "shall be entitled to a patent, which patent shall contain a reservation" (30 U.S.C. 121–123); or, "the Secretary shall reserve the authority and shall insert in any permit . . . appropriate provisions for its cancellation" (30 U.S.C. 144); or, "the Secretary is authorized and directed to incorporate in every lease a provision reserving to the President the right to regulate the price" (30 U.S.C. 152)—with the following: "land . . . may at any time . . . be withdrawn. . . . Every lease shall contain a provision to that effect" (48 U.S.C. 665); or, "all water licenses shall be deemed subject to the condition, whether or not stipulated in the license" (48 U.S.C. 715 [2]); or, "all permits and leases of lands containing oil or gas shall be subject to the condition" (30 U.S.C. 225).

The non-self-executing form is appropriate where the legislative provision is without specific content, as, e.g., "Each lease shall contain provisions deemed necessary for the protection of the interests of the United States" (30 U.S.C. 146); otherwise the self-executing form will normally be the proper one.

The situations in which the choice between self-executing and non-self-executing provisions is presented vary too much to permit very general statements,[9] and due attention will in most cases indicate the appropriate solution, although what is legally appropriate is not always politically expedient. It may be laid down as a principle of legislation that no forfeiture should be made self-executing in such a manner as to result from mere acts or omissions. This principle has been discussed before, and anomalous exceptions have been pointed out (§79). Perhaps it does not apply to forfeiture of official status as

[9] The Oregon Code of Civil Procedure provided, §495: "Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall in all such cases, be entitled to the one undivided one third part . . . of the real estate owned by the other . . .; and it shall be the duty of the court in all such cases to enter a decree in accordance with this provision."

It was held that where the decree was silent on the subject, no property was acquired by the successful party. *Bamford* v. *Bamford*, 4 Oreg. 30, 36, 1873. See *Barrett* v. *Failing*, 111 U.S. 523, 1883.

it applies to forfeiture of private rights; in any event, *ipso facto* vacation of office seems to be not uncommon.

Where a statute creates an office, the somewhat clumsy form: "There is hereby created . . ." (Act of Congress of March 4, 1913, creating the Department of Labor), should be contrasted with the form in which authority is given to appoint to a new office (English Ministry of Transport Act, 1919): "It shall be lawful for His Majesty to appoint a Minister of Transport . . ." The first form is self-executing. The self-executing form has the advantage that as a matter of law the office exists when the act takes effect. If the general appointing power is vested in the Chief Executive acting with the advice and consent of the Senate, and upon the effective date of the act (e.g., in Illinois normally on July 1) the legislature has adjourned, the governor may appoint under general constitutional provision as in case of a vacancy.[10]

§87. Vesting Provisions: The Need of Explicit Provision. In the American constitutional system, differing in this respect from European systems, there is no inherent power in any administrative official. Moreover, the administrative disintegration of American state governments, at least prior to the enactment of the so-called civil administrative codes, also results or resulted in the absence of generally available provisions for supervision, direction, or coördination, which are characteristic of the framework of a hierarchical organization, like that of the federal administration, and of state governments under recent reorganizations.

Every statutory provision involving the exercise of official power must therefore either make sure that the requisite power exists under other applicable legislation, or must take care to vest the appropriate power, and to vest it adequately.

The following applications illustrate the principle:

1. A power of official action granted in passive form, without saying or implying by whom it is to be exercised, is defective unless it is construed to be exercisable by the legislature or by a court.

[10] Explicit provision to that effect is found in section 12 of the Civil Administrative Code of Illinois.

Thus the provision of the constitution (1–9–2): "The writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it," is inadequate as a grant of power to the executive, and therefore gave rise to controversy during the Civil War (Fisher, "Suspension of Habeas Corpus," 3 *Political Science Quarterly* 454).

It has been held to be meaningless to create a duty to install "approved" block systems, without adding, by whom approved (*Railroad Commission* v. *Grand Trunk R. Co.*, 179 Ind. 255, 100 N.E. 852, 1913).

2. A power to inquire, ascertain, etc., is a power to use available funds for the purpose in the same manner as a private person may do (the term "investigate" is more appropriate and appears to be used in this sense in the Interstate Commerce Act), but not a power to compel testimony, and the words "by all lawful means" or "by all reasonable ways and means in his power" (U.S.R.S. §2902) would not add to the power; hence the invariable practice to confer power expressly to subpoena, swear, and examine witnesses (inherent in a court of justice); and that power, as shown before (see §68, *supra*) must, in appropriate cases, be made effective by provision for judicial aid in case of disobedience.[11]

3. A mere reference to a power is properly construed to be a reference to an existing power, and not as a creation of the power by virtue of the reference. If 40 U.S.C. 301 gives to the Solicitor of the Treasury charge of the sale and disposal of lands assigned to the United States in payment of debts, we look for some provision authorizing such sale, and find it in 40 U.S.C. 302.

If a statute provides that "the state board of control shall have powers of legal guardianship over the persons of all children who may be committed by courts of competent jurisdiction to the care of the board or to institutions under its management," the power to commit should be gathered from existing statutes, and not be enlarged by this provision (Minnesota, 1917, ch. 194).[12]

[11] Can a general power to make rules and regulations for the enforcement of the provisions of an act (see, e.g., 8 U.S.C. 102, 222) serve as a legal basis for the administrative creation of powers not otherwise specified by law? The question might apply to the preliminary examinations in deportation cases which have no express statutory warrant; but it is significant that they are not even authorized by general rule.

[12] However, the statutory provision that the court shall have power to make such

A reference to "courts of competent jurisdiction" is proper and usual, since the jurisdiction of courts is conferred by general laws, while a reference to "competent (administrative) authorities," would in most cases be meaningless in an American statute.[13]

Occasionally, explicitness may appear to be carried to needless length. Thus where an individual is authorized to apply for a certificate from an inspector, a statute is apt to add that the inspector shall have the power and be under a duty to give the certificate; is this necessary? Perhaps not, but the more cautious legislative practice will favor the express provision; see, e.g., section 6 of the Illinois Warehouse Act of 1871 as amended in 1897.[14]

If, on the other hand, an official is authorized to order, the explicit expression of the duty to comply makes the duty a statutory duty, and makes a general provision penalizing the violation of the statute applicable, where otherwise a special penalty for violating orders would be necessary.[15]

4. Description of powers. The science of public administration recognizes many kinds and degrees of functional differentiation in the

order as it may think fit to secure that the child be brought up in the religion in which the parent has a legal right to require that the child should be brought up (§4 of English Custody of Children Act, 1891), was relied upon in *Re Carroll,* 1931, 1 K.B. 317, as recognizing (though not as conferring) the right of the parent to control the religious bringing-up of the child.

[13] Department of Agriculture Appropriation Act, May 27, 1930 (Packers and Stockyards Act): "Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary of Agriculture or *a court of competent jurisdiction.*"

This obviously does not confer jurisdiction, but assumes that it belongs to a court of equity on general principles.

[14] Of the same character is section 32 (1) of the English Electricity Supply Act, 1919: Where an "authority" is authorized to enter into an agreement with undertakers, it is lawful for the undertakers to enter into and carry into effect such agreement.

[15] A power to order, without provision for penalizing non-compliance with the order, is defective; the same would be true of a bare power to prohibit. A mere power to "disapprove" must be presumed to have been intended to be inconclusive or of moral effect only. Laws, New York, 1930, ch. 760, §3; see 25 *American Political Science Review* 107.

See also section 52e of the former Labor Law of New York (Laws, 1915, ch. 674), dropped from the present law, probably because of little value.

Is a provision penalizing disobedience to an administrative order or obstruction of an administrative act sufficient as a legislative recognition of the power to order or to act? Even if the question can be answered in the affirmative, the doubt should be avoided. See British Coal Mines Act, 1911, §94.

organization of public powers: policy-determining and policy-executing; supervisory and advisory; determinative and disposing; executive, secretarial, technical, clerical, manual, etc.—differences for which no definite terminology has as yet been established.[16] It is doubtful whether adequate statutory formulae are at present available to indicate the differential features of these functions otherwise than by using such common descriptive terms as president, chairman, secretary, clerk, treasurer, etc., or by specifying particular powers and duties. In course of time it may become possible to associate with a given term a reasonably well-defined range of functions; thus it will be interesting to observe whether in connection with the office or place of city-manager the term "administrative" will emerge with a definite connotation.[17] If a statute can leave details of organization entirely to executive direction or to self-governmental rules, the whole difficulty is to that extent avoided.

§88. COMMON PROVISIONS IN CONNECTION WITH ORGANIZATION OF OFFICE. The following points require attention:

1. Creation of the office. There is no uniform practice. The provision for creating the office may be incorporated with the provision for filling it by appointment (or election); or the two may be separated.

Care should be taken to make the provision for filling the office a continuing one, to be exercised from time to time.

The phrase now frequently found: "There is hereby created the office of . . ." must be due to a desire to leave no doubt that the statute is meant to be self-executing.

2. Provision for appointment. There are often constitutional pro-

[16] L. D. White, *Public Administration*, chap. VII.

[17] In the legislation of Congress, the term "administrative" is used in the Salary Classification Act (5 U.S.C. 673) and elsewhere (e.g., 8 U.S.C. 108), but without apparently attaching to it any definite or uniform meaning.

Generally speaking, it is probably true that every grant of official power has unexpressed administrative implications, sometimes a matter of course and legally irrelevant, sometimes a matter of practical necessity, and in that event exercised in practice, although of doubtful legal status. Practices of police or inspection officers, or of committing magistrates, deserve examination in this respect. See the *Report on Enforcement of Deportation Laws by the National Commission on Law Observance and Enforcement*, Washington, 1931.

visions to be considered. A delegated power of appointment should be phrased as a continuing power. Provision for subordinates may advantageously be left to appropriation acts.

3. Provision for vacancies. The need exists in cases of offices held for definite terms, and for some cases it may be met by constitutional provision. It would be desirable to have a general statute on the subject for which the Public Officers Law of New York (§§37, 39–42) furnishes a precedent.

4. Provision for disability. The Federal Constitution speaks in connection with the President of "inability to discharge the powers and duties of his office," but fails to define what constitutes such inability, or who is to determine it. In England difficulties have arisen as to how to deal with incapacity of the king (Anson, *Law and Custom of the Constitution,* chap. IV, §5). The matter ought to be dealt with by general law, and constitutional provisions should be construed as governed by or subject to such general legislation.[18]

5. Provision for disqualification. The following questions require attention:

(a) Does the disqualification relate to the time when the officer is appointed or elected, or to the time when he enters upon his office?

The words "eligible" or "ineligible" are ambiguous as to the time to which they relate.

In Illinois, the constitutional provision that the secretary of state (among others) shall not be eligible to any other office during the period for which he shall have been elected, is practically construed as not preventing the secretary of state from being elected governor during his term of office, since he assumes the latter office only upon the expiration of his term; and the history of the provision supports this construction.

It is a simple matter to place the legislative intent beyond doubt.

(b) How does the disqualification or incompatibility operate?

It should be made clear whether, in case of two incompatible offices, the appointment or election is invalid, or whether it operates to vacate the office first held. The latter is necessarily the case where a state

[18] However, prevailing principles of constitutional construction are not in accordance with this suggestion.

makes a state office incompatible with a federal office. The common law rule disqualifying judicial officers from acting in cases in which they are interested does not seem to apply to administrative officials (*Davidson* v. *Whitehill,* 87 Vt. 499, 89 Atl. 108, 1914).[19] It would therefore be valuable to have a general disqualifying statute, providing also for a substitutional acting power in cases where that is necessary.

6. Provisions concerning terms of office. As to holding over and terms to fill vacancies, see New York Public Officers Law, §§5, 38; also *People* v. *Sweitzer,* 280 Illinois 436, 1917.

In view of the common practice of having the terms of members of a board expire successively, the cumbersome phrasing of these provisions should be replaced by a brief form; see, e.g., New York, 1914, ch. 41, §60; Illinois Workmen's Compensation Act, §13; 20 U.S.C. 17, 132; N.Y.L. 1915, ch. 381, §212.

7. Provisions for removal. The following points require attention:

(a) Is a positive provision necessary, or is the matter taken care of by the constitution or by implication?

(b) If there is a constitutional provision is there room for further statutory regulation? See New York Public Officers Law, §34.

(c) Care should be taken not to supersede civil service laws.

(d) The meaning of such phrases as "for cause," "on condition," should be considered.

(e) It may be proper to provide for suspension as well as for removal.

Much of the law of removal is capable of being codified by a general statute; see New York Public Officers Law, §§34–37.[20]

8. Provision for official bonds. For disposition of commonly arising legal questions, the following precedents may be consulted:

[19] Note the testimony of the English Attorney General before a Parliamentary Select Committee on Public Prosecutions, in 1855 (*Evidence,* p. 6):

"87. Has it never occurred to you to consider the anomalous position of the Attorney General when he appears to defend a case in which, strictly speaking, he has the power of stopping prosecution altogether?—That is no doubt a very anomalous position.

"88. Is it not contrary to all system?—It is contrary to one's abstract notions of principle, but it does not lead to any practical mischief.

"89. Did not this happen the other day, in the case of a gentleman who was accused of forging a document; was not the Attorney General his counsel?—Yes."

[20] See *Re Richardson; Connolly* v. *Scudder,* 247 N.Y. 401, 160 N.E. 655, 1928.

United States Code, Title 6; New York Public Officers Law, §§11, 12, 20; New York Civil Practice Act, §§148–162. See also Willard's *Legislative Handbook*, §§404–412; Jones, *Statute Law Making*, pp. 267–280.

§89. The Vesting of Power in a Bureaucratic Organization. It is characteristic of a bureaucratic or departmental organization of office that when the law vests powers, it takes cognizance only of the head or chief in whom all authority is nominally vested, ignoring the staff of subordinates who act in his name and who are covered by his responsibility. For subsidiary acts of authority (entry, swearing, taking testimony) the statute may content itself with a delegation in general terms (to inspectors, examiners, etc.),[21] or—less commonly—may permit delegation by the chief. For mere preparatory acts, which become valid and binding only by being formally made the acts of the responsible officer, an authority to employ is sufficient, and an appropriation act is the proper channel for conveying this authority. The organization of the bureaucratic staff for action need not be matter of statutory concern, but may be left to the chief of the office. Statutory provision means either independent authority (compare the Board of Tax Appeals with the Committee on Review and Appeal in the office of the Commissioner of Internal Revenue), or the creation of special safeguards (local inquiry under the English Housing Act; see *Local Government Board* v. *Arlidge*, 1915, A.C. 120).

Details concerning the employment and status of subordinates are now often regulated by civil service laws. In view of these, an express power to employ subordinates contained in a later statute may possibly be construed as superseding the checks of the merit system, and if there is such a risk, the statute either should be silent as to employment of subordinates (leaving this to the appropriation act), or should contain an express reference to civil service laws. A very gen-

[21] An exceptionally brief form is found in 5 U.S.C. 300: "For the detection and prosecution of crimes against the United States, and for the acquisition, collection, classification, and preservation of criminal identification records, and their exchange with the officials of states, cities, and other institutions, the Attorney-General is authorized to appoint officials *who shall be vested with the authority necessary for the execution of such duties.*"

eral authority such as that given by 5 U.S.C. 43 (R.S. §169) would of course leave no doubt in that respect.

The legislative simplicity of bureaucratic organization extends to the creation of local subdivisions. A typical illustration may be found in the provisions for land districts in the administration of the public land laws of the United States (43 U.S.C. 121–130). Even briefer is the provision for customs-collection districts (19 U.S.C. 1, 2).

Even in a bureaucratic system the simplicity of vesting applies only to the relations within the organization, and not necessarily to the relation of the office to those having occasion to deal with it. In that respect the possible difference between the bureaucratic and the self-governmental organization lies in the possession of habits and traditions constituting a "course of office," which may lead the legislature to place reliance on administrative rules and regulations. There is, however, no hard and fast line of distinction in that respect, and where a public service vitally affects private interests, the legislature is apt to see to it that material details are set down in explicit provisions.

The statutory regulation of a complex administrative system is apt in course of time to produce necessary and adequate adjustments of official machinery and power relations. New legislation should not inadvertently disturb this adjustment by unyielding provisions. To illustrate: the Land Laws of the United States provide for the return of proofs of entries by the Register to the General Land Office (R.S. §2795, 43 U.S.C. 163). A proposed act of 1877 giving certain facilities in the matter of entries required the proofs to be filed in the Register's office. President Grant vetoed the bill for its failure to provide for transmission of the papers to the Land Office, and recommended that the provision for filing, being covered by general law, be dropped, which was apparently done. See R.S. §2291, 43 U.S.C. 231; 7 *Pres. Mess.* 429.

§90. THE VESTING OF POWER IN A BODY OF PERSONS. Power may be vested either in a definite number of persons acting as a board, or in an indefinite number constituting the people of a district or the members of an interest-group.

There is something like a common law governing the action of a board, and of an indefinite number of persons gathered together as a meeting or assembly (see Kyd on *Corporations*); but an explicit provision as to what constitutes a quorum is always desirable; and while a body may be given power to make its own rules, provision may be desirable to set it going and keep it going.

The First Schedule of the English Public Health Act of 1875 furnishes a carefully worked out model applicable to official boards.

The type of the larger body is the legislative assembly, which, subject to a few constitutional or (in case of a municipal legislative body) statutory provisions, is generally given power to make its own rules, and has the tradition of parliamentary law and custom at its disposal. The other type of the larger body, the general meeting of members of a corporation, has few if any parallels in public law. The increased difficulty of technique is illustrated by the provisions for advance notice of questions to be acted on at the meeting.[22] The requirement is usually so framed as to permit no amendment; and a power of amendment would have to be carefully circumscribed to be guarded from abuse. The matter would have received attention if anything like a general meeting were a factor of importance in public legislation.

Where a body of people, not individually determined and not in meeting assembled, are to be given power to express their will, no common law is available, and the complexity of required steps calls for meticulous provisions. The election laws for recurrent political elections are the result of long legislative evolution, and in appropriate cases they may be incorporated by reference; but they may not be adequate to cover voting on propositions as distinguished from voting for candidates, and a special technique in that respect has been developed, first in connection with the incorporation of local areas for self-government, and more recently in connection with the referendum and the initiative.

Unless models that have approved themselves by experience are followed, defects in the mechanism are apt to occur. It is said that some early irrigation district laws combined with the submission of

[22] Thompson on *Corporations*, 3d ed., §§924–931, 1116, 1241; English Companies Act, 1929, First Schedule, §42.

the question of organization, the election of the first directors, amounting (in the absence of careful but probably confusing provision for double voting) to a qualified disfranchisement, and plainly due to inadvertence.

The movement for popular control of legislation through the referendum and the initiative has of necessity sought expression in constitutional provisions, and the effort has been to make these provisions adequate and self-executing, in order that their effect might not depend upon legislative good will by way of supplementation. The constitutional clauses are therefore instructive upon the technique of vesting provisions.

The constitution of Oregon covers the following points, which seem essential to make the popular right operative: the percentage of voters required for a petition; the basis of computation of voters; with whom the petition is to be filed; the time for filing the petition; that the petition (in case of the initiative) must contain the full text of the measure; the time of the election; the applicability of general laws (until special legislative provision) to the submission to the people.

Provisions for an enacting clause, and as to when the initiative law is to take effect, which are also found in the constitution, are not legally indispensable; provisions restrictive of the right, however necessary from a political point of view, lie outside of the range of technical prerequisites.

It is assumed that the expense of the election is covered by general laws—a matter of importance in view of the fact that in the absence of a special provision for form of ballot, an initiative ballot would have to carry the full text of the measure.[23] Perhaps it is a difficulty of this kind which accounts for the statement that on close examination no constitutional provision for initiative and referendum will be found to be absolutely self-executing.

The bare necessities in the way of effectuating provisions will, of course, leave problems for administrative or judicial disposition, the solution of which might be aided by additional constitutional provision, so particularly the matter of identification and certification of

[23] As to the term "description" see *Opinion of Justices* (Mass.), 171 N.E. 294, 1930.

signatures to petitions. More recent constitutions deal with this matter, as also with the contingency of desired amendments, or conflicting proposals (see constitution of Massachusetts, articles 89–92, 99). The provision in Massachusetts for preliminary filing of propositions to be examined before petitions are circulated, may also, while adding to the machinery, facilitate the process. The legal minimum of provisions for the exercise of powers is not the optimum; but if the legislature finds that its inaction will not balk the exercise of direct legislative power, it is very likely to provide added statutory facilities that may be needed.

§91. Provisions to Negative Restrictive Implications. Statutory powers are not exercisable with the same freedom as private rights.[24] The latter are exhausted only by full alienation, so that the holder may qualify his acts by conditions and limitations, provided he does not violate certain well-defined rules of public policy; he may delegate, release, surrender, and bind by contract. Powers being fiduciary in character, doubts may arise in any case whether any but the plainly and necessarily intended act of exercise is legitimate. Positive provisions may therefore be desirable to negative restrictive implications, where these are likely to create inconvenience. Whether such relaxation is desirable, depends upon the objects of the power and the probable contingencies under which it will be exercised, and wide generalizations are impracticable. But it is of interest to note the principal questions that may require attention, and occasional statutory provisions.

1. *Does the specification of one power imply the denial of others?* There is no hard and fast rule one way or another, but the presumption should be rather against the denial. An express provision negativing the restriction is found in a number of English statutes, but does not appear to be as common in America.

[24] A question may also arise as to the proper place of action. If a statute designates a place of office it is generally assumed that official acts must be done at that place, unless circumstances require or permit a different rule (e.g., powers of inspection). As to the place of performing executive acts, see President Grant's message to Congress, May 4, 1876, 7 *Pres. Mess.* 361–366.

The following statutory provisions are in point: English Public Health Act, 1875, §341;[25] Railway and Canal Traffic Act, 1888, §52; English Settled Land Act, 1882, §56: ". . . the powers given by this Act are cumulative."

2. *Is the power a continuing one?* It is common legislative practice to remove doubts by appropriate language: "from time to time," "make, repeal and alter," "adopt and change a seal," etc. The presumption should be against exhaustion by one act, unless repeated exercise would defeat the object of the power. Thus a power to extend time is presumably exercisable only once. It may be proper to express in a particular act a rule that powers shall be exercisable from time to time (English Settled Land Act, 1882, §55); but in a general statutory interpretation act such a rule would seem to be improper.

3. *Is a power to act subject to the privilege of cancelling or withdrawing the act?* If a power of regulation is a continuing one, it is implied that a regulation may be revoked; but a power of appointment may be continuing, i.e., exercisable whenever occasion offers, without implying a power of removal. The same is true of a licensing power. A power to make orders, if exercisable from time to time, may imply the power to supersede the order; but this would be subject to accrued rights in appropriate cases. This raises a question of doctrinal law, which probably can be handled better by judicial construction than by legislative provision.

It might be desirable to have a general rule for the cancellation of official acts where a power has been erroneously or illegally exercised; but such cancellation should be permitted only through appropriate judicial proceedings, and perhaps such proceedings are within the province of general equity jurisdiction. An administrative power of cancellation should be granted only in exceptional cases, certainly not by a general rule.

It is very doubtful whether the grant of power to a municipal corporation to assume or exercise some function carries with it the power to abandon it and for that purpose to exercise powers correlative to those expressly granted; e.g., whether the power to purchase land im-

[25] "All powers given by this Act shall be deemed to be in addition to and not in derogation of any other powers conferred by act of Parliament, law or custom, and such other powers may be exercised in the same manner as if this Act had not been passed."

plies the power to sell, whether the power to undertake some public utility implies the power to abandon and alienate it. A careful legislative scheme will set this doubt at rest (54 & 55 Vict., c. 22, power to establish museum; power after seven years to abandon subject to consent, etc.); but it is impracticable to establish general presumptions.[26]

4. *Withdrawal in case of concurrent action.* If the law requires the petition or consent of a number of parties, is it competent for one who has signified consent to withdraw it before the concurrence of the required number has been obtained?

Conspicuous in this respect is the consent of states to federal constitutional amendments: such consents have been withdrawn, but without affecting the final result, so that it has not become necessary to decide the question (Miller, *Constitution of the United States,* pp. 654, 655).

A petition has been compared to a complaint in an action with regard to which non-suit is permitted until the case goes to a jury (*Webster* v. *Bridgewater,* 63 N.H. 296, 1884); it is also possible to invoke the analogy of the parliamentary right to change a vote until the result is announced. In connection with highway proceedings, it has been held that petitioners may withdraw their names until the petition has been acted upon: Elliott on *Roads,* §332; *People ex rel. Irwin* v. *Sawyer,* 52 N.Y. 296, 1873; *Webster* v. *Bridgewater,* 63 N.H. 296, 1884; *Littell* v. *Board Supervisors,* 198 Ill. 205, 1902; *Mack* v. *Drainage District,* 216 Ill. 56, 1905. See also *Sloan* v. *Walsh,* 245 N.Y. 208. In Illinois, the statute was changed so as to deny the right of withdrawal; but the amendment was strictly construed: *Boston* v. *Drainage District,* 244 Ill. 577, 1910.

It deserves consideration whether a general rule of interpretation would not be appropriate, recognizing a right to withdraw before the required number of assents has been obtained.

5. *Qualifying the exercise of a power by conditions, limitations, or reservations.* If it is reasonable to permit the withdrawal of a consent, until the consent has become operative by concurrence of the required

[26] See McQuillin, *Municipal Corporations,* §§1140–1152. Also the discussion in *Congressional Record,* June 23, 1930, pp. 11921–11922, on the amendment of section 11 of the Federal Reserve Act (12 U.S.C. 248), permitting a national bank to surrender its right to exercise the power to act as trustee.

number, does it follow logically that consent may be conditioned upon the obtaining of the requisite concurrences within a given time? And, going one step further, may a power to submit for consent be equally conditioned? The Supreme Court has expressed the opinion that Congress may do this in submitting a proposed constitutional amendment to the states: *Dillon* v. *Gloss,* 256 U.S. 368, 1921. However, Congress, in submitting the Eighteenth Amendment, did not claim to exercise such a power; on the contrary, on the theory that it did not possess the power, it wrote into the text of the amendment itself a resolutive condition that it should be inoperative unless ratified within seven years, instead of annexing this condition to the submitting resolution. The Supreme Court decided the case of *Dillon* v. *Gloss* as though Congress had undertaken to qualify its submission by a time limitation—the very thing that Congress took care to avoid. Notwithstanding this, the decision is valuable as a support of the liberal view that the exercise of a power may be conditioned by reasonable time limitations.[27]

It is significant of the conservative spirit of our public law, that pending proposals to amend the amending clause of the constitution do not give Congress power to submit with a time limit, but attach a time limit to every submission, i.e., do not permit the qualified exercise of the power, but make a qualified grant of power.

Apart from a possible exception for the regulation of concurrent action, there ought to be no general statutory recognition of the validity of conditions, limitations, or reservations qualifying the exercise of statutory powers. The authority thus to qualify must be matter of consideration from case to case.[28]

6. *Anticipation.* May the exercise of a power be anticipated before its occasion arises, by a general consent, by release, or by contract? In connection with testamentary powers of appointment, which present an analogy in the common law, the English courts have developed a doctrine of releasability, which though strongly criticized, has received legislative recognition (Conveyancing and Law of Property

[27] For a fuller discussion of *Dillon* v. *Gloss,* see my note in 7 *American Bar Association Journal* 656.

[28] The subject of conditions annexed to licenses is discussed in my *Administrative Powers over Persons and Property,* §§59–63.

Act, 1881, §52). On the other hand, if the wife's inchoate dower may be looked upon as substantially a consent power, the rule that a wife cannot release her dower in advance by a general act, except in specific ways sanctioned by positive law (jointure, antenuptial agreement) bears out the general principle of non-anticipation.

As a general principle, non-anticipation is the only safe rule. Questions of construction may present themselves under particular statutes.[29] And it may also be appropriate for the legislature in particular statutes to relax or negative the general principle, in accordance with considerations of public policy. Illustrations are given in a note.[30]

7. *Delegation.* There is the same objection to delegation as to anticipation: it prevents, so far as the depositary of the power is concerned, consideration of operative conditions when and as they arise. However, it is the very nature of a bureaucratic organization, that statutory powers are vested in the head of an office, with the realization that it is physically impossible for him to take personal cognizance of the great mass of business that requires disposition. The understanding is therefore that a nominal exercise of power on the part of the depositary is all that the law contemplates; by this nominal action the officer assumes responsibility for all preparatory work done by subordinates, and their responsibility to him is supposed to ensure conscientious and well-substantiated information and advice. Express statutory provision recognizing this arrangement is unnecessary; it is implied in the organization of the office and the appropriations for the staff personnel.

It is otherwise as to delegation of the formal exercise of power. This requires express statutory provision, which may be looked for in the act organizing the office. The law may create, or authorize the ap-

[29] See *People* v. *Central Illinois Public Service Company,* 328 Ill. 440, 159 N.E. 797, 1928, to the effect that the power to vote increased taxes can be exercised only from year to year.

[30] Illustrations of general consent:

Act of Congress, March 1, 1911, ch. 186, §1: "The consent of the Congress of the United States is hereby given to each of the several States of the Union to enter into any agreement or compact, not in conflict with any other State or States for the purpose of conserving the forests and the water supply of the States entering into such agreement or compact."

English Settled Land Act, 1884, §5: "The notice required by sec. 45 of the Act of 1882 of intention to make a sale, exchange, partition, or lease, may be notice of a general intention in that behalf."

pointment of deputies, and in case of a board or commission, may authorize action through divisions, committees, or members. As between the chief executive and heads of departments, delegation may be supported by long-established practice; but more commonly a court will rely upon the interpretation of statutes when it recognizes the validity of delegation.[31]

§92. JUDICIAL PROCEEDINGS AS A FORMAL REQUIREMENT. If legal acts assume the form of judicial proceedings (adoption, probate, administration of decedents' or insolvent estates, sale of infants' or settled estates, naturalization, formation of drainage districts, compulsory joint improvements), the problem of vesting adequate powers is simplified by the fact that under general and permanent laws, courts are available, which have a settled course of procedure and the powers that are necessary to make their jurisdiction effective. Many of the rules which govern judicial enforcement and relief in general are also applicable to special judicial proceedings.

It is, however, also true that local differences of practice and procedure require more careful observance of peculiarities of state law than is necessary in the case of administrative proceedings, which, generally speaking, have much less crystallized into settled forms. The question of appellate review may thus require consideration.

Judicial proceedings are used in our law for the establishment or liquidation of legal relations, not to induce caution or establish authenticity (since prescribed formalities, with administrative coöperation, if necessary, are adequate for that purpose), but by reason of the failure or unavailability of voluntary action or agreement. Voluntary action fails either by reason of resistance (e.g., compulsory joint improvements), or by reason of disability (e.g., sale of infants' real estate), or by reason of the fact that the relation is one normally withdrawn from private control (e.g., adoption).

If, then, equity demands compulsion or relief, it is in accordance

[31] *Wilcox* v. *Jackson*, 13 Pet. 498, 1839; *United States* v. *Weeks*, 259 U.S. 326, 1922; *Crane* v. *Nichols*, 1 Fed. 2d 33, 1924; see my *Administrative Powers over Persons and Property*, §18.

with public policy, that a case be established by an authoritative determination; and a judicial proceeding is commonly considered the most appropriate for that purpose.

The underlying equity may be an absolute right, or a right conditioned upon criteria sufficiently definite to be stated in general and abstract form, or it may depend wholly or in part upon circumstances that are incapable of general abstract definition and must be established from case to case.

The absolute right is illustrated by the right of the tenant in common to demand partition, the generally conditioned right by the German provision (B.G.B. §2121) that a life tenant may ask the concurrence of the remainderman if due management requires the disposition of the corpus, the individually conditioned right by a statutory provision for a compulsory joint improvement. The first two rights are capable of being formulated as substantive rights, but not the third one. Thus if the right to adopt were recognized as a right entirely dependent on agreement between the natural and the adopting parent, or circumscribed only by specified conditions, it would be possible to declare the right as one antecedent to the judicial proceeding and merely enforceable by it; whereas, if adoption is conditioned upon "the best interests of the child," there is in reality no right until an appropriate judicial finding is made, and appropriately the law does not speak of a substantive right, but of a right to institute an adoption proceeding.

In American legislative practice even the absolute right is formulated as a right to demand judicial action.[32] Intrinsically a matter of indifference, the practice involves the temptation to the legislator to assume that conditions warranting relief need not be scrutinized, and incidentally thereby to give apparent sanction to demands that cannot be supported as a matter of equity.

This may be illustrated by the law concerning the compulsory sale of property held under limitations of successive interests. In the relation between life tenant and remainderman the interest of the former may be adverse to the latter: small income, but chances of rise in

[32] Illinois Revised Statutes, chap. "Partition," §1: "may compel a partition by bill in chancery or by petition."

value, or large income, but prospect of depreciation or depletion. A desire to sell against the will of the other party may therefore mean a desire to change the interests bestowed by the original gift. American courts—but apparently without a clear realization of the reason—have declared statutes unconstitutional which permitted a life tenant to petition for a sale of the property as against a *sui juris* remainderman (*Brevoort* v. *Grace,* 53 N.Y. 245, 1873; *Gossom* v. *McFerran,* 79 Ky. 236, 1881; *Curtis* v. *Hiden,* 117 Va. 289, 1915; *Watkins* v. *Ford,* 123 Va. 268, 1918); and in New York, the legislation was, until an amendment of 1907, so framed that an order of sale bound only parties under disability or not in being, and others who consented, or who being parties did not appear or object (Real Property Law, §107, formerly 87). Yet, conceivably, a claim that property split up between life estate and remainder ought to be sold for the benefit of either party, may well be founded in equity, particularly where by reason of a change in circumstances an originally normal proportion between income and capital value, has become abnormal and unjust to one of the parties, while a just proportion might be restored by conversion into trust securities—just as personal property is thus regularly converted in the absence of a testamentary direction to the contrary. If legislation undertook to formulate the substantive rights between life tenant and remainderman, these considerations would hardly be overlooked; but if a statute provides for a judicial proceeding in the first instance, there is a strong temptation to indicate the grounds justifying the sale in a very general manner, giving color to the contention that equities may be shifted instead of being conserved. See Illinois Chancery Act, §50; Massachusetts General Laws 183, §49; New York Real Property Law, §§67–71, 105, 107.

If it is considered legitimate to remit the right to relief to an undefined judicial discretion—as in the case of adoption, or if according to the nature of the case the ultimate right depends upon concrete conditions that cannot be abstractly predetermined—as in the case of drainage or irrigation, the method of formulating the whole matter in procedural terms is of course not only convenient, but entirely appropriate.

In a special judicial proceeding it is possible to distinguish, in the conditions entitling to relief, jurisdictional prerequisites from matter

submitted to the jurisdiction of the court. The latter are concluded by the decree of the court while the former are not. An adoption decree is thus conclusive as to the best interests of the child, but if the child was of full age, and the law permits only adoption of minors, the decree is void (*Bartholow* v. *Davies,* 276 Ill. 505, 1917). If a condition is a jurisdictional prerequisite, it must appear upon the face of the record, and if the statute requires specified allegations, recitals, or findings, these are likewise essential (*Rex* v. *Crooke,* 1 Cowper 26, 29). The rule is important in view of the legislative practice of prescribing the details of special proceedings, and of not infrequently expressing substantive matter by way of specifying the contents of petitions or orders. Insistence upon specified allegations, inquiries, and findings is supposed to reduce the risk of perfunctory or unguarded judicial action. In the absence, then, of an express provision declaring defect of form irrelevant where facts actually exist (California Code Civil Procedure, §1300 with regard to probate), the proceeding will be fatally defective unless it shows on its face that jurisdictional prerequisites have been complied with.[33]

The difference between jurisdictional prerequisite and matter submitted to jurisdiction is, however, not always clearly marked in the phrasing of the statute, and it is within the power of judicial construction, when a special proceeding is collaterally attacked, to treat statutory requirements as not within the strict rule, and as concluded by a decree, if the record itself does not disclose non-compliance with the statute.[34]

Equally important, however, with the rule that jurisdictional prerequisites must appear on the face of the proceeding is its reverse side,

[33] Where the statute requires the petition for adoption to show the residence of the father, and it is merely alleged that he resides in the state of Michigan, the decree was held open to collateral attack. *Hook* v. *Wright,* 329 Ill. 299, 160 N.E. 579, 1928.

As to the difference between courts of general jurisdiction and courts of special jurisdiction in this respect, see *People* v. *Miller,* 339 Ill. 573, 171 N.E. 672, 1930. Even in a court of general jurisdiction, a proceeding outside of that general jurisdiction must be strictly pursued (*Hook* v. *Wright, supra*). Consequently, the distinction between general and special jurisdiction is often difficult to draw.

[34] The Illinois Adoption Act provides for a petition to the court of the county in which the petitioner resides. This might be held to be jurisdictional; but since the statute does not in terms require the petition to show the residence of the petitioner, a decree not showing non-residence was held conclusive as against collateral attack (*Barnard* v. *Barnard,* 119 Ill. 92, 1886). It did not appear that the petitioner was not a resident.

namely, that where proceedings show on their face existence of jurisdictional facts, and compliance with procedural safeguards, they are not subject to collateral attack (*Florentine* v. *Barton,* 2 Wall. 210, 1864; Van Fleet, *Collateral Attack, passim*).[35]

If occasionally a special proceeding is invalidated by jurisdictional defects, it must also happen, and perhaps more commonly, that substantial defects are covered up by a proceeding and decree observing every requirement of form.

This stressing of formal regularity in special proceedings has a close connection with the very nature of the judicial process. A court is not in the habit of questioning the correctness of matter on which the parties before it agree, and it is not equipped for independent inquiry on its own initiative. This judicial habit is carried into the exercise of non-contentious or "voluntary" jurisdiction, where the basis of its justification often fails. While occasionally, as in adoption proceedings, a judge may be personally watchful, we have no courts so organized that the judge gives his undivided attention to non-litigated matters and assumes responsibility for the substantial correctness of formally regular matter that is not actively disputed.

In the law of naturalization the function of scrutiny has been developed only recently, through the organization of a governmental office preparing cases for the courts. Compulsory reference to social welfare boards is advocated as a means of checking the administration of adoption laws; and in several jurisdictions (New York, Nevada, Oklahoma) the organization of drainage or irrigation districts is no longer a judicial, but an administrative proceeding, as it is in England and in other European countries. The verification of non-litigated facts can be entrusted to an administrative department, because a staff can be entrusted with independent inquiries, being responsible to a chief who in turn assumes responsibility for their findings. It thus appears that the whole subject of special judicial proceedings involves questions of organization, which transcend the province of legislative drafting.

[35] In the case of *Bartholow* v. *Davies,* 276 Ill. 505, 1917, *supra,* the adoption proceeding showed that the adopted person was of age; had there been an allegation and finding of minority, the decree would probably not have been open to collateral attack.

CHAPTER XIII

THE PROBLEM OF DEFECT AND ERROR IN THE APPLICATION OF CIVIL REGULATIONS

§93. In General. A civil regulation involves the risk of its non-observance by reason of ignorance, error, or inadvertence, and of the consequent invalidity of a contemplated legal act. The risk of invalidity is the strongest sanction of the regulation; but invalidity, with the semblance of a legal relation and without its reality, creates confusion, and often prejudice to innocent parties. Hence arises a distinct legal problem directed to the mitigation of this peril.

The weakness of civil regulation from the point of view of undue peril of error is partly due to defects in drafting, and partly to a vicious circle in the matter of organization, which substitutes elaborate safeguards for confidence, and checks these safeguards only by the hazard of disappointed expectations. Non-observance of safeguards entails no personal responsibility; most often it is due to ignorance (often, in view of legal doubts and difficulties, pardonable ignorance); if non-observance is deliberate, it is still not necessarily corrupt. The hazard of corrupt connivance is of course not met by nullification of the act, and while criminal codes may cover it in a perfunctory manner, it is obviously not a conspicuous factor in legislative regulation.

The problem of mitigating the peril of invalidity is dealt with in a number of different ways: treating provisions as non-mandatory, recognition of part effects, utilization of doctrines of the protection of *bona fide* purchasers, protection against collateral attack, and protection of *de facto* conditions, presumptions of regularity, and explicit validating or curative provisions.

The variety of saving doctrines and saving provisions is illustrated by the law relating to the marriage contract. Something like a *de facto* or possessory status of marriage was apparently recognized in the earlier canon law (Pollock and Maitland, *History,* II, 378–382), and now appears in the statutes of several states, which declare the issue of a void marriage to be legitimate; the habit and repute of marriage creates a presumption of lawful marriage, which in many cases ren-

ders defects practically irrelevant; statutory requirements of license, parental consent, or even celebration, are or have been considered as not essential to the validity of a marriage; the law may treat lack of age or mental capacity as making marriage merely voidable at the option of the prejudiced party; the law may declare certain other defects (close relationship) as available for invalidation only by direct attack (canon law doctrine of voidability), and perhaps in addition as cured by death; the law may declare that certain objections may not be raised after the lapse of a stated time (Wisconsin Marriage Law); the law may expressly declare that certain irregularities shall not affect the validity of the marriage (authority of celebrating official, etc.). Thus, in one way or another, the non-observance of legal requirements fails to have the effect that strict construction might accord to it.

The law of marriage is perhaps not typical in this respect, since legislatures as well as courts are strongly impressed with the dual and conflicting claims of form and faith. The legislator is not apt to reinforce prescribed formal prerequisites by adding that only thus, *and not otherwise,* a marriage shall take effect—superadded words, which compelled the Supreme Court to construe relatively minor statutory detail as mandatory and essential to the naturalization of an alien (*U.S.* v. *Maney,* 278 U.S. 17, 49 S. Ct. 15, 1928). Ordinarily, the legislator is apt to believe that what he prescribes is a minimum in the way of desirable safeguards, and he is not likely to go on the assumption that the highest standard of precaution in voluntary practice furnishes a criterion for a prescribed statutory standard. If, from an abundance of care, wills are signed on every page, that is no reason why this should be required by law. It is a distinct anomaly, if we find a statute requiring testamentary witnesses to sign in the presence of each other (Utah Comp. L. 1917, §6315), in addition to the sufficiently perplexing requirement of the Statute of Frauds, that they must sign in the presence of the testator. Good legislative drafting will make use of saving provisions if they can serve a valuable purpose; but will endeavor to make them superfluous by holding requirements down to a minimum.

It is proposed to explain briefly the operation of the various types of saving devices, and to cite instances in which they have been used. They will be discussed under the following heads: (1) non-mandatory provisions; (2) powers to relieve from error; (3) provisions declaring irrelevancy of specified errors; (4) partial or contingent validity; (5) protection of purchasers; (6) protection from collateral

attack; (7) protection of *de facto* conditions; (8) presumptions of regularity; (9) conclusive administrative determination; (10) conclusive judicial determination; (11) validation by lapse of time; (12) validating legislation.

Judicial doctrine and legislative provision. In measuring the parts played by legislative provisions and judicial decisions respectively in dealing with the inherent and inevitable conflict between the required observance of civil regulation, and the claims of faith that has been placed in the semblance of legal relations, judicial doctrines lend themselves more easily to a comprehensive survey, not only because they are accessible in Digests, but because they present themselves as reasoned doctrines, whereas legislative provisions are nowhere collected and do not profess to pursue a consistent plan or to give an authoritative articulation of an underlying theory. But it is also true, on the one hand, that a decision which merely construes a statute may represent no doctrine, and on the other hand, occasionally that what pretends to be a doctrine, may on examination turn out to be merely statutory construction. Judicial construction can often be depended upon to avoid a literal effect being given to provisions where the result would be in plain contravention to common sense. An illustration is furnished by U.S.R.S. §5200 (12 U.S.C. 84), which provides that the total liability to a national bank of any one person or corporation shall not at any time exceed ten per cent of its capital stock. It goes without saying that the borrower cannot rely on this provision to resist payment of a loan (*Gold Mining Co.* v. *Rocky Mountain National Bank*, 96 U.S. 640, 1877). While the wording is somewhat unguarded, it presents no serious risk of misconstruction. See also *Bowditch* v. *N.E. Life Ins. Co.*, 141 Mass. 292, 1886.

It will be observed all through the present chapter that as between judicial doctrine and legislative provision, the latter plays a secondary part. The chapter illustrates the general legislative reluctance to meddle with legal principle which is capable of being left to judicial development. All the more significant are the instances of legislative intervention and particularly the cases where regulation has been elaborated with a special view to reducing or altogether removing the hazard of defect and error.

§94. Non-Mandatory Provisions. The terms mandatory and directory are commonly used by courts in the construction of statutes but are rarely used in statutory language; occasionally they occur in constitutions. Thus the constitution of Georgia of 1868 (3-6-3), in making a provision for the form of amending acts, added: "But this clause

shall be construed as directory only to the General Assembly"; and the constitution of California says (I, 22): "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."[1] In neither case can the explicit declaration be regarded as well advised; for it is equally futile to proclaim legal ineffectiveness, and to proclaim an effect which in the nature of the case may not be enforceable.

"Directory" may mean either that a provision will not be enforced at all, or that disregard of it will not be permitted to vitiate the main legal act to which it is incidental.

a. *Directory in the sense of non-vitiating.* The type of a provision non-mandatory in the sense that disregard has no vitiating effect, is the requirement that an official act be performed within a certain time, if the object of the requirement is to benefit those who might be prejudiced by delay; if the delay were fatal the law would defeat its own end. If, on the other hand, the exercise of a power is in the nature of a privilege, or adverse to other rights or powers, the observance of a time limitation is of the essence of the power, and mandatory, and this is also true of the time set for giving notice of contemplated action (*Seidl* v. *Zauner,* 247 N.Y. 17, 159 N.E. 707, 1928).

The general statement has been made that nullity will not be pronounced for a deviation from "regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected" (*French* v. *Edwards,* 13 Wall. 506, 511, 1871). A requirement that a public contract be executed in duplicate may serve as an example (*Saleno* v. *Neosho,* 127 Mo. 627, 1895).

An examination of the great mass of formal detail that is prescribed in connection with the regulation of all kinds of official powers will, however, necessarily leave many doubts as to the application of this rule. Thus U.S.R.S. §3744 (now 41 U.S.C. 16) makes it the duty of the Secretaries of War, the Navy, and the Interior to cause and require every contract made by them or by officers under them on behalf of the government to be reduced to writing and signed by the

[1] A constitutional provision may also be properly described as mandatory, although the sanction of nullity is by its nature inapplicable, to distinguish it from one conferring discretion, so, e.g., a duty imposed upon the legislature to reapportion the state.

contracting parties with their names at the end thereof, copies to be filed as prescribed, and all papers to be attached together by ribbon and seal, etc. The entire section would create in the mind of any lawyer reading it the impression that its provisions are directory; but non-compliance was at an early date held to nullify any contract not signed, on behalf of the government, as against the other contracting party (*Clark* v. *U.S.*, 95 U.S. 539, 1877; see *U.S.* v. *N. Y. & P. R. S. S. Co.*, 239 U.S. 88, 1915).

A requirement, on the other hand, that a municipal authority obtain a surveyor's estimate before making a contract, has every appearance of being mandatory; yet an English court has construed it as directory (*Nowell* v. *Worcester*, 9 Exch. 456, 1854).

Where manifest equity dictates that a party shall not be prejudicially affected by the non-observance of provisions, compliance with which is entirely beyond his cognizance and control, there will ordinarily be no serious question of construction, as, e.g., where the statute requires a celebrating official to see that a marriage is entered in a public register; nor will a party be permitted to evade an obligation on the ground that a rule established only for administrative convenience has been violated, as, e.g., with regard to the make-up of assessment rolls (Decennial Digest Taxation, §§412, 431, California Political Code, §3885).

Beyond such simple cases the formulation of a reliable rule of construction is almost impossible. In cases of doubt the possibility that a provision may be given mandatory effect must be reckoned with. The liberal construction of marriage statutes is a matter by itself, explained on grounds of historical development and of public policy, and from which no general conclusions must be drawn (Bishop, *Marriage*, I, §§423–426).[2] More instructive would be the construction placed upon election laws, revenue laws, and laws for public improvements, but the drawing of inferences belongs to a treatise on statutory construction.[3]

[2] In construing statutes dealing with celebration of marriages as non-mandatory, reliance has been placed by some courts on the use by the legislature of merely affirmative language, without adding words of prohibition or invalidity. See as to the possibly weaker effect of affirmative language, *Coke on Littleton*, 115a, quoted by Roscoe Pound, "Common Law and Legislation," 21 *Harvard Law Review* 383, 397.

[3] As to corporation laws, see E. H. Warren, "Collateral Attack on Incorporation,"

The legislative draftsman has no ready way of indicating the non-mandatory character of a provision (there being no English equivalent for the German *"soll"* which generally serves this purpose). Unless in appropriate cases he is justified in relying upon non-mandatory construction, he must, if the question is present to his mind and if he deems it of sufficient importance, have recourse to express saving provisions. As a matter of constitutional law, legislative requirements intended to aid the effectuation of constitutional mandates should be held to be directory, in so far as their purpose is to create facilities not absolutely essential to make the mandate effective. The principle that constitutional provisions shall as far as possible be construed to be self-executing, will incline the courts to construe facilitating legislative provisions as non-mandatory; but a doubt may arise in that respect if the constitution explicitly refers to supplementary legislative action. The terms of such reference should therefore be very guarded.[4]

b. *Directory in the sense of unenforceable.* (1) Constitutional provisions.[5] The difference between directory and mandatory does not exist in a constitution which lacks the sanction of judicial enforcement; but in American constitutions it is of importance. A clause operating by way of prohibition is mandatory; and there are relatively few clauses which cannot be given such effect; if, e.g., the legislature is directed to pass general incorporation laws, it is possible to add that special charters shall be forbidden, or even that existing special charters shall expire after a stated time (Kentucky, 166). Apart from such indirect coercion, if a policy involves complicated legislative provisions, a constitution can hardly do more than inculcate it in general terms, and the provision will be merely directory to the legis-

20 *Harvard Law Review* 456, 21 *ibid.* 305; Cook on *Corporations,* 6th ed., §§231–234; as to election laws, Lewis-Sutherland, *Statutory Construction,* §622. Provisions of platting acts penalizing the selling or offering for sale of a lot in a town before the plat has been made out, acknowledged and deposited, do not invalidate a sale for non-compliance: *Bemis* v. *Becker,* 1 Kans. 226, 249, 250, 1862; also *Mason* v. *Pitt,* 21 Mo. 391, 1855; *Strong* v. *Darling,* 9 Oh. 201, 1839.

[4] The amending article of the constitution of Illinois (art. 14, §2) says amendments shall be submitted to the electors ". . . in such manner as may be prescribed by law." Only a few other states appear to have this qualification. It does not appear from Dodd's treatise on the *Revision and Amendment of State Constitutions* whether a legislative requirement would be construed as mandatory or directory.

[5] W. F. Dodd, "Judicially Non-Enforcible Provisions of Constitutions," 80 *University of Pennsylvania Law Review* 54, 1931.

lature. The immediate gain will be to place a policy on record, and this may be of practical importance where public policy is a factor in judicial decision or construction; in many cases also the constitutional mandate may have sufficient political strength to induce legislative action.[6]

(2) Statutory provisions. A directory, non-enforceable, provision has occasionally a legitimate place in a statute. Not infrequently statutes indicate the forms of legal acts or documents by incorporating a sample form in the text of the law. This is generally intended as a direction as well as an authorization, but it is invariably added that the form shall be "in substance" as printed. The clear intent is that a deviation shall not be fatal.

Of greater practical importance is the directory provision where the legislative purpose will be accomplished as well by political pressure as by legal coercion. It is not uncommonly desired to have administrative boards so constituted as not to identify them with party government. The common practice is to provide that not more than so many members shall be members of the same party. This is supposed to be mandatory, although its enforceability is questionable. However, the executive regularly conforms to the provision, with the effect that he inquires into party affiliation, and the board becomes a bipartisan instead of a non-partisan board. Perhaps such is the intent. But if a non-partisan board is desired, it would be more effective to provide that appointments shall be made without regard to party affiliation. Ordinarily, the executive would be just as ready to conform to a provision of this type, as to one that might be judicially enforceable.[7]

Under the Constitution of the United States appointments to office can be made only in a few specified ways. The federal administration therefore cannot utilize a system of elected representatives. In the Farm Surplus Control bill of 1928 which was vetoed, it was proposed to confine the President in his selection of the members of the Farm Board to nominees of farmers' organizations. The Attorney General expressed the opinion that this method was unconstitutional, and the provision was dropped from the Marketing Act of 1929. The purpose

[6] See *supra*, §86, *Self-executing provisions*.

[7] See *Ingard* v. *Barker*, 27 Idaho 124, 1915.

of Congress could have been accomplished by simply expressing in appropriate form its sense that the President should appoint in this way; and while conceivably the President might have stood on his prerogative, the legislative policy would at least have been placed on record. The directory provision as a political form of expression is not common in American legislation; but if it were entirely improper, the objection would also apply to the usual provision for non-partisan boards, which is probably judicially unenforceable.[8]

§95. POWERS TO RELIEVE FROM ERROR.[9] These form a conspicuous feature of procedural reform legislation or of Rules of Court authorized by practice acts. The following may serve as illustrations.

1. English Supreme Court Rules (O. 70 R. 1): "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit."

2. New York Civil Practice Act, §105: "At any stage of any action, special proceeding or appeal, a mistake, omission, irregularity or defect may be corrected or supplied, as the case may be, in the discretion of the court, with or without terms, or if a substantial right of any party shall not be thereby prejudiced, such mistake, omission,

[8] Instance of a directory provision: "In making the designation of persons to act for the several professions, trades and occupations, the director shall give due consideration to recommendations by members of the respective professions, trades and occupations and by organizations therein." Illinois Administrative Code, §60.

[9] There are also instances in legislation of powers to relieve from legislative error; these take the form of powers to vary statutory provisions. Perhaps the most conspicuous illustration is the carefully framed so-called flexible provision of the tariff acts (Tariff Act, 1930, §336). In state legislation the most familiar example of the power to vary is found in connection with zoning: "Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, the board of appeals shall have the power in passing upon appeals, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures, or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done." Illinois Act, June 28, 1921, amended June 20, 1923, §3.

irregularity or defect must be disregarded." (More liberally worded than former Code of Civil Procedure, §723.)

3. Rule of the Supreme Court of New Jersey: "These rules shall be considered as general rules for the government of the court and the conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice." Practice Act, 1912, ch. 231, Schedule A, I, rule 5.

The English Settled Estates Act of 1877 gives to the court a remarkable power to deal with a situation in which the act normally requires the consent or concurrence of interested parties which is not forthcoming or is unobtainable. Notice is to be given in such manner as the court directs, requiring that the parties within a specified time either assent or dissent or submit their rights to the court, silence being construed as submission. The notice may be dispensed with, and the rights deemed submitted to the court, if a party cannot be found, or his existence is uncertain, or the expense of notice disproportionate, particularly where the interest is small or remote or similar to others represented in court. The court may make its order without consent, but shall have regard to the number dissenting or submitting their interests and to the interests which they represent, and the court may also make the order subject to the rights of those refusing their consent. See sections 26 to 29 of the act. In view of constitutional difficulties, this power is perhaps not a safe model for American legislation.

The General Municipal Law of New York (art. 2A) permits judicial proceedings for the purpose of legalizing and confirming bonds, as the result of which the court may confirm if it finds substantial compliance, notwithstanding technical or formal irregularities. The statute is more fully noted in another connection.[10]

Provisions permitting administrative authorities to relieve from error appear to be uncommon, if they exist at all; perhaps the so-called Dent Act of March 2, 1919 (40 St. L. 1272), authorizing the Secretary of War to recognize contracts defective in form, was of that charac-

[10] See §105, *infra*.

ter; but it was of purely temporary operation. The conclusive administrative determination (see §101, *infra*) is not intended as a power to relieve from error, although it may have that effect.

§96. PROVISIONS DECLARING IRRELEVANCY OF SPECIFIED ERRORS.[11] While these provisions represent a desirable legislative policy, it is perhaps impossible to do more than give illustrations, which in their turn may suggest analogous applications or extensions.

1. Error as between two provisions ignored, where the legal result is the same. The British Children's Act of 1908 contains separate provisions for children and for young persons. But in so far as the provisions applying to both are the same, it shall not be fatal if an offense with reference to a child is charged as having been committed with reference to a young person, or vice versa (§123 of Act).[12]

2. Errors in preliminaries not permitted to affect the final act. The marriage law of Wisconsin, enacted in 1917 (following in substance the Uniform Marriage Law recommended by the National Conference of Commissioners on Uniform State Laws) provides against nullity of marriages in substance as follows:

(1) No marriage to be void by reason of want of authority or jurisdiction in the officiating person, if consummated with belief of parties or either of them that they were lawfully married (2339n—22).

(2) Not to be void by reason of license having been issued without required parent's or guardian's consent;
or by a county clerk not having jurisdiction,
or by reason of any omission, informality, or irregularity of form in application or in license itself,
or by reason of incompetency of the witnesses,
or because solemnized in other than the prescribed county,
or because solemnized more than thirty days after the date of the license,
if in other respects lawful and consummated in belief of parties or either of them that they were lawfully joined (2339n—23).

Moreover, if the marriage was celebrated in due form, and the parties

[11] See also *supra*, §55, subd. 1.

[12] It should be noted that a procedural requirement, even when it belongs to the enforcement of a penal statute, is in the nature of a civil regulation.

immediately thereafter assumed the habit and repute of husband and wife, and have continued the same uninterruptedly for one year or until death of either, it shall be deemed that a license has been issued (2339n—23).

With regard to wills, section 14 of the English Wills Act provides: "If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid." (Section 15 nullifies gifts to attesting witnesses.)

The German Voluntary Jurisdiction Act has a general provision to the effect that judicial acts are not ineffective by reason of lack of territorial jurisdiction or of the disability of a judge (§7).

It also provides (§32) that if a judicial proceeding confers legal capacity upon a person, then, if the court had jurisdiction over the subject-matter, although the order was unjustified, the validity of acts done under the order shall not be affected.[13]

§97. PARTIAL OR CONTINGENT INVALIDITY. The provision of section 15 of the English Wills Act, annulling gifts to attesting witnesses, which is also generally found in American statutes, illustrates a par-

[13] A combination of declaration of irrelevancy with official power to correct defects is found in section 191 of the Revenue Act of Illinois: "In all judicial proceedings of any kind, for the collection of taxes and special assessments, all amendments may be made which, by law, could be made in any personal action pending in such court, and no assessment of property or charge for any of said taxes shall be considered illegal on account of any irregularity in the tax lists or assessment rolls, or on account of the assessment rolls or tax lists not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax list without name, or in any other name than that of the rightful owner; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof; and any irregularity or informality in the assessment rolls or tax lists, or in any of the proceedings connected with the assessment or levy of such taxes, or any omission or defective act of any officer or officers connected with the assessment or levying of such taxes, may be, in the discretion of the court, corrected, supplied and made to conform to law by the court, or by the person (in the presence of the court) from whose neglect or default the same was occasioned."

tial saving effect which the courts were unable to reach by judicial construction.

The constitution of Illinois, like many others, contains a provision to the effect that every act of the legislature shall contain but one subject which shall be expressed in the title. Suppose an act to contain provisions not covered by the title (e.g., an act for the licensing of the sale of intoxicating liquors also punishing drunkenness), the strict consequence would be to invalidate the act altogether. The constitution of Illinois adds "but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." But it is difficult to generalize the principle involved in this obvious saving clause, which in any event ought to be supplied by judicial construction. However, see Lewis-Sutherland, *Statutory Construction,* §144.

Occasionally, it may be possible to formulate a rule of very general scope that may save the valid aspects of an invalid act, so where the German Code provides (art. 140) that "if a void act meets the requirements of another act, the latter has effect, if in accordance with the presumable intent of the parties, had they known of the nullity." This is the same principle on which a deed without a seal may be treated as a contract to convey property.

There is on the other hand no general rule available to deal with the not uncommon case of powers that are quantitatively limited and are exercised beyond the limit, giving parties who would be prejudiced by total invalidity the option of treating the act as invalid to the extent of the excess only. The difficulty is illustrated by municipal bonds or obligations for excessive amounts, or for longer than lawful periods, or at a higher than the permissible rate of interest. The judicial decisions are irreconcilable (Gray, *Limitations on Taxing Power,* §§2032, 2163–2169). It is difficult to see the objection to a general saving provision.[14]

A saving operation by way of merely contingent invalidity may result from the appropriate phrasing of a particular provision, but can hardly be stated as a general rule. Compare, e.g., the judicial and the

[14] The provision in section 12 of the General Municipal Law of New York does not meet the difficulty. It deals only with variances in the maturity of bonds not exceeding 60 days, and declares that these shall not affect the validity of the bond.

legislative formulation of the rule against perpetuities. The common law rule, as evolved by case law, is to the effect that any limitation is void from the beginning if by any possibility it may result in postponing the vesting of a future interest to a point of time later than the expiration of the longest permissible period. The legislatively formulated rule of the German Civil Code is to the effect that the limitation merely becomes inoperative if in the course of events it turns out that it transcends the permissible period. The German rule would have saved the great majority of the wills and settlements that in England and America have been declared invalid as violating the rule. An English or American testator can by appropriate provision bring it about that his limitation will be judged in accordance with the German rule, which shows that the latter does not conflict with any public policy.[15] It is merely a matter of choosing, by appropriate terms, between the two alternatives of a legal rule producing a gratuitously destructive effect, and a legal rule which, while serving public policy equally well, will save legitimate purposes and interests. But it is doubtful whether the principle underlying the better phrasing can be expressed in a generally applicable formula. All these provisions express the Latin maxim: *valeat quantum valere potest* or *valeat quantum valere debet;* but a good maxim is not often usable as an adequate legislative proposition.

§98. The Protection of Purchasers. If an owner of real and personal property dies, apparently intestate, but leaving a will which for years remains undiscovered, the discovery and establishment of the will at any time within the period before which adverse possession ripens into ownership (normally twenty years) will unsettle the title to real estate, no matter through how many *bona fide* purchasers it may have passed; on the other hand, the grant of letters of administration will afford perfect protection to those buying of the administrator or paying to him debts owing to the estate, although the letters upon which reliance had been placed are subsequently revoked; the newly appointed representative is remitted to his remedy

[15] See 33 *Harvard Law Review* 535.

against those who are equitably bound to account for what they have received without consideration.

The institution of the official conduit of title (executor or administrator) operates to reduce the interests of legatees and next of kin to equitable claims which do not prevail against *bona fide* purchasers.

The English Land Transfer Act of 1897 assimilates transmission *mortis causa* of real estate to that of personal property by providing that real estate shall vest in the personal representatives as if it were a chattel real.

The substitution of rights *in personam* for rights *in rem* is also the system of transmission *mortis causa* of the German Code. Whether by will or intestacy, the property vests as a unit in the heir, and legacies have only the legal status of claims against him. The institution of the heirship certificate operates very much like our letters testamentary or of administration, making apparent heirship conclusive in favor of those dealing on the faith of the certificate (B.G.B., §§2147, 2366).

The difference between the right *in rem* and the right *in personam* is also illustrated in the law regarding pretermitted heirs.

American statutes give intestate rights to children born after the making of a will and not provided for in it. In New York such a child "shall succeed to the same portion of the parent's real and personal estate as would have descended or been distributed to such child if such parent had died intestate and shall be entitled to recover the same portion from the devisees and legatees in proportion to and out of the parts devised and bequeathed to them by will" (Decedent's Estate Law, §28). In Illinois in such a case devises and legacies shall be abated in equal proportions to raise a portion for each child (Descent, §10). On the other hand, the German Code (§2303) provides that an excluded descendant "may demand of the heir his duty portion." The duty portion consists in one-half of the *value* of the intestate portion.

The difference between the American and German phrasing appears if there is a power of sale given to the executor with regard to land. In New York and Illinois the intestate right overrides the power of sale, embarrassing the transfer of land, while in Germany the power is not affected. Again the difference between rights *in per-*

sonam and rights *in rem* operates in favor of the unimpeded transmission of titles.

With the law of *mortis causa* succession may be compared the course of legislation pursued with regard to limited, future, and equitable interests in property. The difference between real and personal property here operates in two ways: first, if the property is settled by will, the executor's power of sale may override a trust or a limitation of personalty; and second, a limitation of personalty will practically always be equitable, while a limitation of real property may be either legal or equitable. In an equitable limitation the doctrine of the protection of *bona fide* purchasers applies; but this doctrine is offset by the doctrine of notice to such an extent, that, except for negotiable securities, and except for the greater frequency of powers of sale given to trustees with reference to personalty, the obstacles that impede the free transmission of land, may also apply to the alienation of personal chattels.

The effort of legislation has been to extend the doctrine of the protection of *bona fide* purchasers partly by reducing the operation of the doctrine of notice, partly by reducing legal rights to equities, and partly by statutory powers of sale.[16] The Merchant Shipping Act of 1854 (§43, now 1894, §56) introduced the clause, that no notice of any trust, express or implied, should be entered in the register book or be receivable by the registrar; and the same provision was placed in the Companies Act of 1862 (§30, now 1929, §101). Statutory powers of sale were the conspicuous feature of the Settled Land Act of 1882; and the Property Act of 1925 reduces all future interests to equitable claims, and systematically "keeps trusts off the title" (Underhill, *New Law of Property Act,* pp. 78–93: "The Curtain Clauses"; Topham, *Real Property,* pp. 81–83; Cheshire, *Modern Real Property,* p. 94: "Extension of the 'Curtain' Principle"). By a series of complicated provisions, the protection of purchasers has been given a meaning which it never had in equity.

[16] As regards the effect of notice upon title, see *Le Neve* v. *Le Neve,* 3 Atk. 646, 1 Ves. 64, 1747, and the adverse criticism of that case by Hargrave and Butler in their note 249 XI to *Coke on Littleton,* §504; also their reference to the contrary ruling in France. English Recording Acts have reduced the effects of notice (Yorkshire Act, 1884, §14; 1885, §4), while American Recording Acts expressly confine the benefit of the prior record to purchasers *without notice.*

Neither in the matter of the transfer of the decedent's real estate, nor in the treatment of settled interests, has the development of English law been fully paralleled in America. Real estate still goes directly to the heir or devisee, with the resulting inconveniences that have been noted. The legislative policy of "keeping trusts off the title" is not nearly as pronounced in America as in England. A provision that corporations need not see to the execution of any trust with respect to their shares and need not ascertain whether a transfer of shares is authorized under any trust was introduced into the law of Illinois in 1921 (§29). It is not as strong as the corresponding English provision, and there are many American corporation statutes in which it is not to be found. And there is nothing in any American state like the systematic English plan of the new Property Act of securing at all times clear channels of transmission of titles to land.[17]

§99. PROTECTION FROM COLLATERAL ATTACK. In the canon law doctrine of marriage, voidability meant, not, as now, valid at the option of the aggrieved party, but impeachable only by a direct proceeding brought for that purpose. Any one might bring the impeaching action, but since ecclesiastical jurisdiction was exercised only *pro salute animae,* it had to be brought while the parties were living, and after the death of either party a common law court would not permit "the issue to be bastardized" by reason of a canonical disability. The legitimacy of the issue of a marriage between a man and his deceased wife's sister was thus safe after the death of one of the parents, if the marriage had not been previously annulled.[18] The Marriage Act of 1835 (5 & 6 W. IV, c. 54) made marriages within the prohibited degrees void, the effect of legislation being thus to destroy the benefit

[17] With regard to the protection of purchasers, see also the provisions of the German Code concerning the sale of a pledge by the creditor, §§1228–1243.

[18] When, in 1907, the marriage of a man with his deceased wife's sister was legalized, a correspondent of the *London Times* told of an old practice which he said had existed prior to 1835. If a man desired to marry his deceased wife's sister, he arranged with a friend to start an action for annulment after the marriage. One action pending was, according to the practice of the ecclesiastical court, a bar to others. This friendly suit was not pressed, but was kept alive while the parties lived, and abated upon the death of the spouse first dying when the validating purpose was accomplished.

of the canon law doctrine. The same is true of American legislation. In Germany, on the other hand, the protection against collateral attack is extended to all regularly celebrated marriages, including those that are bigamous (B.G.B., §1329); but it does not appear that direct annulment proceedings cannot be instituted after death.

The effect of a successful annulment proceeding would in the English ecclesiastical law have made the issue illegitimate; in Germany legitimacy is secured by another provision.

As a curative for irregularities in the course of official or special judicial proceedings, the rule against collateral attack is of wide, though uncertain, operation. In specific cases, it may be possible and advantageous to give it legislative expression, but, generally speaking, it must function as a judicial doctrine, and, in a good many cases, as a matter of statutory construction.

The observation may be illustrated by reference to the law of naturalization. Until 1906 there was no statutory provision for direct attack; the more recent development of the law has been to permit appeal both by the individual and the government, and also to provide for cancellation proceedings by the government. In the case of *United States* v. *Maney,* 278 U.S. 17, 1928, it was held that a formal defect in the proceedings was not cured by the decree, but available to the government in a proceeding to cancel. Though not as direct as an appeal, the cancellation proceeding must be held to be a direct attack. Could the defect have been relied upon in a clearly collateral proceeding, as, e.g., in an election contest where citizenship was in issue? Would the defect be of the same character as if a person of Mongolian race had been naturalized? The question may be left unanswered.[19] But it is extremely unlikely that Congress could be induced to make explicit provision that naturalization shall not be questioned except in a direct proceeding. The cases in which this will be done must be exceptional. Marriage is such an exceptional case. Possibly a legislature might provide that the ultra vires acquisition of

[19] *Re Yamashita,* 30 Wash. 234, 1902: Mongolian refused admission to bar, although naturalized, naturalization treated as void. Report of case in 94 Am. St. R. 860 and 59 L.R.A. 671, shows no annotation of other cases in point. In *Mills* v. *McCabe,* 44 Ill. 194, 1867, the naturalization by the Marine Court of the City of New York was treated as void, on the ground of its not being a court of record.

property by a corporation shall not be questioned except by the state. But the strong inclination will always be to leave matter of this kind to the courts.

The saving from collateral attack is illustrated by section 14 of the Local Improvement Act of Illinois. While the law requires a copy of the authorizing ordinance to be filed with the petition for the improvement, it also provides that the failure to file shall not affect the jurisdiction of the court. But at any time before the report of the commissioners is filed, any person whose land is to be taken or assessed may, in case of failure to file, move that the entire proceeding be dismissed. The saving might be even more liberal; but even as it stands, it appears to be exceptional.

§100. PROTECTION OF DE FACTO CONDITIONS. The law of *de facto* officers (a possessory doctrine) protects the rights of third parties, where acts have been done under color of official title, and makes it possible in public law to ignore, in judging the validity of acts, irregularities connected with appointment or election to office. While of narrower scope than the doctrine of *de facto* government in international law, and though qualified by the peculiar rule that a *de facto* officer presupposes a *de jure* office, it is of wider and more beneficial operation than probably any other curative doctrine known to the law, and applicable to the entire range of administrative power legislation.[20]

There is no general common law doctrine of a *de facto* marriage; and we have to look to specific statutory provisions to validate specific aspects of an invalid marriage. Thus in about half a dozen states there are statutes declaring the issue of a void marriage to be legitimate (so also the German Code, §699), but there is no common law doctrine available to produce this equitable result. The French Civil Code (arts. 201, 202) recognizes a putative marriage in favor of parties that are in good faith, and also of children, and the provision has been

[20] The doctrine of a *de facto* corporation is of less importance. The law does not recognize a *de facto* highway by that term; municipal liability for defects in ways maintained and used as such is predicated on the theory of estoppel (McQuillin, *Municipal Corporations*, §2733). For the purpose of reaching certain offenses the law, by speaking of public places instead of streets or highways, may recognize *de facto* conditions. In a few states, defects in highway proceedings are cured by a brief period of public use.

copied into the Civil Code of Quebec (*Berthiaume* v. *Dastous,* 1930 A.C. 79; Josserand, *Droit Civil,* pp. 858–865).

§101. PRESUMPTIONS OF REGULARITY. An illustration of a common law presumption is furnished by that in favor of a valid marriage status arising from habit and repute. As it may be impossible to prove irregularities or defects in the formation of the marriage contract, this presumption must occasionally have the effect of curing defects, and will generally be sufficient to prevent the collateral impeachment of a marriage.

It is not uncommonly said that there is a general presumption of regularity in favor of official acts, but if so, it is too uncertain to be reliable. Wigmore in his *Treatise on Evidence,* §2534, says: "This [presumption] is more often mentioned than enforced; and its scope as a real presumption is indefinite and hardly capable of reduction to rules." In creating statutory presumptions, care should be taken not to nullify statutory safeguards by placing upon a party adversely affected by the act to which they apply a burden of proof which it is difficult to meet;[21] on the other hand certain common presumptions are safe and valuable. Among these are:

a presumption that certified copies or printed books are correct copies of originals;

a presumption in favor of the genuineness of an act purporting to be official; the direction of American statutes that courts take official notice of official seals (Illinois Public Utilities Act, §6) operates in the same way;

a provision making reputation *prima facie* evidence of official status (British Income Tax Act, 1918, §233);

a provision that a statutory register shall be *prima facie* evidence of

[21] The provision of section 94 of the Roads and Bridges Act of Illinois, to the effect that the records of the town clerk relating to the establishment, etc., of a highway, shall be *prima facie* evidence that all the necessary antecedent provisions have been complied with and that the action of the commissioners or other persons and officers, in regard thereto, was regular in all respects, may have the effect of throwing an unjustifiable burden of proof upon a land owner. See, also, a similar provision as to *prima facie* evidence of compliance with all the preliminary requirements of the law, in section 9 of the Local Improvement Act of Illinois, and the construction of the provision in *Village of Bellwood* v. *Galt,* 321 Ill. 504, 152 N.E. 591, 1926.

matters directed or authorized to be inserted therein (British Companies Act, 1929, §102); see Wigmore on *Evidence,* §§1639–1651;

a presumption that official meetings have been duly called and regularly held (New York Public Health Act, §2c);

a presumption in favor of the correctness of the minutes of the proceeding of an official board (English Public Health Act, 1875, Schedule 1, §§1, 10);

a presumption in favor of the regularity of official action, arising from an official certification, where there is no direct adverse effect on private rights, as, e.g., in favor of the regular passage of an ordinance; see Illinois City Act, art. 6, §11; McQuillin, *Municipal Ordinances,* §§382–390.

Official certification of an act done may also be made conclusive evidence that the act was done (British New Ministries Act, 1916, §11 [3]).

Ordinarily, a conclusive presumption is merely a way of stating a substantive rule of law; thus, the attaching of a conclusive presumption to an act after the lapse of a specified time is equivalent to declaring that the lapse of time may have a legal effect in altering rights.

If a presumption of regularity of official action involves at the same time a presumption of private default or delinquency, a different question arises (see §77, *supra*); if the presumption is confined to steps that the legislature might in the first instance have dispensed with, the presumption is at least constitutionally unobjectionable. Such presumptions are common features of statutes relating to tax deeds. See Blackwell, *Tax Titles,* §§1140–1172; Revenue Act of Illinois, §224.

§102. CONCLUSIVE ADMINISTRATIVE DETERMINATIONS. The statement that error in the application of a civil regulation may vitiate a legal act refers to an error which is ascertained, and, on a proper contest, adjudicated. Conversely, the statement that compliance with regulation effectuates the legal act, means in case of a contest, compliance which is duly established. Where criteria of compliance are controversial, and particularly where they rest in variable judgment, ascertainment is as important as fact. And legal security of the act is pro-

moted if ascertainment at as early a stage as possible can place the fact beyond controversy. This consideration underlies the expedient of conclusive determination in connection with civil regulation.

As regards conclusive administrative determination, the question may be put this way: If a civil regulation operates with administratively applied safeguards, is it possible and legitimate to avoid the peril of a frequently delayed and fortuitous judicial nullification by appropriate facilities for administrative verification of compliance with these safeguards? Assuming constitutionality, can the benefit of speed and informality of administrative scrutiny and confirmation be had without sacrificing the guaranties of reliability and impartiality which are supposed to be inherent in the judicial process?[22]

Administrative powers to check and certify statutory prerequisites of private or official action are common (see *Provisions Concerning Licenses and Orders,* chap. X, *supra*); their purpose is to prevent irregularity, not to cure it. Practically, however, they have a curative operation, if the determination is in favor of regularity, and if there is no adverse interest that will undertake to question the correctness of the determination. Normally there is no such adverse interest if the determination is against the government and in favor of private parties. The administrative audit of a warrant for payment of public moneys is typical of this form of administrative determination which is practically conclusive; it is, however, conclusive because not attacked, not conclusive against attack.

Administrative conclusiveness ordinarily means either discretionary instead of regulated power, or it means an authority granted, not on the basis of a condition objectively existing, but on the basis of a condition found by the official to exist, or existing in his opinion. A very slight turn of phrasing will bring about the change from a jurisdictional prerequisite to a matter submitted to jurisdiction; but the grant of such power means that the legislature does not intend civil regulation in the sense of safeguarding rights, but intends to give a direction to the official which is to guide his own sense of responsi-

[22] It is, of course, a very different matter to make an administrative determination conclusive in favor of one relying upon it so as to protect him from prosecution or forfeiture. This, in effect, waives only a penal regulation. See New York Tenement House Law, §120.

bility. This may be appropriate where the contemplated action relates to the government's own business or where action is inconclusive or provisional, or is matter of grace or privilege rather than matter of right, or where power is vested in the chief executive. It differs from, but shades into, the power of conclusive determination which is intended to mitigate the peril of civil regulation without superseding its safeguards.

There are cases in which in the very nature of things even an administrative determination should be given conclusive effect. If the validity of an act depends upon a vote in its favor, and if either the vote is *viva voce,* or if, in case of voting by ballot, there is no provision for preservation of ballots, the ascertainment of the result of the vote must be immediate and final. Again, if the law sets a limit to an aggregate of obligations, equity requires that one extending credit should be able to rely upon such methods of ascertaining the amount of outstanding obligations as are available. The doctrine of estoppel by recital in municipal bonds is sound enough so far as it is confined to these two types of determinations (*Coloma* v. *Eaves,* 92 U.S. 485, 1875; *Gunnison Co.* v. *Rollins,* 173 U.S. 255, 1899).

So far as the recital relates to the declaration of a favorable vote, it is in the nature of a conclusive determination; so far as the recital relates to the amount of outstanding indebtedness, it is in the nature of an estoppel. The equitable considerations which demand an estoppel, apply equally whether the limitation of indebtedness is statutory or constitutional, and the express recognition of the binding effect of this particular recital in the New York Bond Validating Act of 1929 seems justifiable.

The principle of estoppel also applies to the record of the action of official and corporate bodies upon which the validity of bonds depends. The record may be subject to correction by appropriate proceedings; but not as against one who has parted with value in reliance upon its correctness (*Bissell* v. *Jeffersonville,* 24 How. 287, 1860). The reliance must have been upon the record as supporting the regularity of the proceedings; there is no equity in relying upon a record showing irregularity.

It will be noted that the "estoppel" principle operates with particular force in connection with factual requirements which do not easily lend themselves to transformation into pure record matter, as statutory form requirements do. Considering that factual requirements are supposed to be of greater intrinsic importance than form requirements, it follows that the more important requirement stands in greater need of summary de-

termination than the less important requirement; or, in other words, the possibility or desirability of a permanent check upon the observance of a civil regulation is in inverse proportion to its importance. So, in case of an adoption, the ascertainment of the observance of requirements as to notice may be kept open indefinitely, but the "best interest" of the child must be determined at once.

However, no uniform rule can be laid down in this respect, and it will require the study of different types of regulations to judge whether and to what extent factual conditions are speedily determined or remain open to scrutiny. The injunction of the marriage service, that objectors shall speak then and there or hold their peace ever after, does not express the actual state of the law, under which nullity by reason of impediments may be asserted without any statute of limitations. In the law of wills, the defects of mental incapacity, fraud, duress, and undue influence are cured by probate, but not the violation of the Rule against Perpetuities. In the provisions concerning municipal bond issues the only substantive prerequisite relates to the amount of indebtedness which, as has been seen, is subject to the principle of estoppel; it is generally deemed impracticable to condition the validity of bonds upon classes or merits of purposes, which are consequently determined with conclusiveness by legislative or popular action; and it is only the form of this action—a matter of secondary importance—which is made essential to the validity of the bond issue.

Carried beyond its original narrow range, the estoppel doctrine is of doubtful validity, and its rationale fails altogether where relevant facts contradicting the recital are required by law to be made matter of record; and this has been recognized by the Supreme Court (*Sutliff* v. *Lake County Commissioners,* 147 U.S. 230, 1893).

The practice of inserting recitals in municipal bonds beyond the limits indicated, which appears to be common, must therefore be regarded as of doubtful utility, except as it is supported by express legislative sanction.[23]

A sweeping recital provision is found in section 115 of the General City Law of New York (added by chap. 598 of Laws of 1929):

"Any bond reciting that it is issued or validated pursuant to this article as provided in such ordinance, may contain any other special or general

[23] See the form in use in bonds of the City of Chicago: "It is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuing of this bond have been done, happened and been performed in regular and due form as required by law, and that the total indebtedness of the City of Chicago including this bond does not exceed the statutory or constitutional limitations." *Council Proceedings,* March 9, 1927, p. 5669.

recitals of acts, conditions and things which may affect its validity, including the recital that such bond, together with all other indebtedness of such city, does not exceed the constitutional limitation of indebtedness, and any such recital shall bind such city and may not thereafter, and after such bond shall have been purchased in good faith and for fair value by any person, be questioned by the city or by any taxpayer thereof in any court."

But the good sense of a sweeping provision of this kind must be open to serious doubt; for there is no purpose in prescribing elaborate safeguards for the issuance of municipal bonds, if the municipal authorities who are to be checked by the safeguards can also make a conclusive declaration that the safeguards have been complied with. It is contrary to principle that checking and checked authority should be identical; in that event there is need of an additional safeguard. If the Stock Corporation Law of New York (§17) makes the certificate of corporate officers that a mortgage has been duly consented to by stockholders, conclusive in favor of *bona fide* purchasers, it may be assumed that officers making a false certificate would be liable to stockholders; but there would be no civil liability on the part of municipal officers for a merely erroneous bond recital, and a civil remedy for a wilfully false recital, if it exists in theory, would in practice be illusory.

With the recital in a bond which comes from the issuing authority should be compared the certification by a superior authority; in England the sanction of a central government department given in respect of any securities is made conclusive evidence that the local authority had power to issue the same and that the same have been duly issued and are as to form and otherwise in conformity with law (English Local Loans Act, 1875, §26).[24] In consequence of this simple provision the enormous body of case law which in America makes municipal bonds a legal specialty, is non-existent in England—a striking example of the economy of civil regulation.

Of American states, Oklahoma has a conclusive-effect sanction of public securities by a central state authority (the Attorney General acting as Bond Commissioner). The Attorney General also prescribes the method of procedure to be observed in issuing bonds. The bond approved and certified by him becomes incontestable unless suit is

[24] See also Land Drainage Act, 1861, §§13, 65; Small Holdings Act, 1908, §39 (3).

brought within thirty days from approval. Without the certificate, the bond is invalid (Compiled Statutes, 4283–4285).

This difference should be observed between the English and the Oklahoma method of superior administrative approval and consequent advance validation of municipal bond issues: England vests the power in a government department which keeps a constant eye on local governments; Oklahoma gives the power to a law officer. The law officer will be likely to scrutinize the observance of legal formalities, and for such matters as the aggregate amount of outstanding indebtedness he will have to take the word of the fiscal officers of the municipality; whereas the English ministry will have adequate channels of information as to the fiscal status of the community. The scrutiny underlying the approval will therefore, as to the factual prerequisites of the bond issue, be very much more real in England than in Oklahoma.

There are also laws providing for the registration of bonds with the fiscal officer of the state, upon the basis of statements by municipal authorities, and for a certificate of such registration on the bond, but without a conclusive-effect provision (Illinois act regarding railroad improvement aid bonds, 1865, 1879, §4; *German Savings Bank* v. *Franklin Co.,* 128 U.S. 526, 1888). In appropriate cases these have the benefit of the doctrine of estoppel by recital (*Cairo* v. *Zane,* 149 U.S. 122, 1893).

An act of Pennsylvania, 1927 (No. 65), requires notice of all proposed municipal bond issues to the Department of Public Affairs, which examines the proceedings and facts upon which the issue is based, and certifies its approval or disapproval; in case of disapproval the bonds may not be issued unless corrections approved by the department are made. Bonds issued in contravention to the act are invalid, but approvals or disapprovals are merely made public records, certified copies of which are admissible in evidence, and the act does not contain any conclusive-effect provision.[25]

The Transportation Act of 1920 (49 U.S.C. 20a) makes issues of securities of carriers dependent upon the authorization of the Interstate Commerce Commission, and specifies a number of requirements in connection therewith. It contains this provision: "No security is-

[25] See also New Mexico Statutes Annotated 1929, 73: 501–508 (Laws, 1925, ch. 20). Certification makes available for legal investment; but there is no conclusive-effect provision.

sued or obligation assumed in accordance with all the terms and conditions of such an order of authorization . . . shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization." This amounts to partial, but not total validation; for there is no conclusive declaration as to the validity of the bond, which has to be examined as to its conformity with the terms of the order of authorization.

Two other types of conclusive administrative determination may be illustrated from British legislation.

The Companies (Consolidation) Act, 1929, §15, provides:

"(1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under this act . . ."

adding as another evidential provision:

"(2) A statutory declaration by a solicitor of the Supreme Court . . . engaged in the formation of the company, or by a person named in the articles as a director or secretary of the company, of compliance with all or any of the said requirements shall be produced to the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance."

The value of such a provision is readily apparent, if conclusive effect is confined to a favorable determination, and does not extend to an official determination adverse to a claim of private or statutory right.

The British Income Tax Act, 1918, provides in section 97 (4):

"If (a) a doubt arises as to the parish in which a person ought to be assessed and charged to tax; or

"(b) a person has been or is liable to be assessed and charged to tax in two or more parishes,

"the Commissioners of Inland Revenue may order that any such person shall be assessed and charged in such parish as appears to them to be proper, and he shall be assessed and charged accordingly."

A similar power of conclusive determination applicable to questions of locality is found in the War Charities Act, 1916 (6 & 7 Geo. V, c. 43, 2 subd. 2). Section 10 of the latter act, after defining a war

charity, provides that any question whether a charity is a war charity shall be finally determined by the charity commissioners.[26]

Conclusiveness as to classification—a specially serviceable type—is also illustrated by section 113 of the Coal Mines Act, 1911: "If any question arises (otherwise than in legal proceedings) whether a mine is a mine to which this Act or the Metalliferous Mines Regulation Acts, 1872 and 1875, apply, the question shall be referred to the Secretary of State, whose decision thereon shall be final." The exception as to legal proceedings prevents this power from having any effect on penalties.

A Prussian act for the taxation of department stores (of July 18, 1900) gave to the minister or to an authority designated by him power to determine conclusively the classification of goods (§6 of act); this would not be conformable to American legislative practice.

It would be manifestly impossible to devise any abstract formula that could be written into a general law, subjecting civil regulations to administrative powers of conclusive determination; nor would it be possible to state in form of a general principle under what circumstances such powers can be advantageously used. That occasionally they can be given fairly wide scope, appears from the provisions in England and the state of Oklahoma concerning bond issues. Some of the instances that have been cited may be capable of being given analogous application or extension. It is quite likely that the expedient may be given further development than it has received in the past; it deserves the attention of the legislative draftsman.

§103. Conclusive Judicial Determinations; Conclusiveness of Probate. The use of judicial proceedings for validating legal acts is illustrated in the law of probate, in the system of land title registration and in connection with municipal corporate acts.[27]

[26] Upon the analogous question whether a testator can provide in his will for the speedy determination of controverted questions, see *Re Raven*, 84 L. J. Ch. 489, 1915.

[27] Occasional perfunctory provisions that a judgment shall be conclusive that all prior proceedings were regular and according to law (Illinois Drainage Act, 1879, §34½), or that a judgment shall be conclusive evidence of the regularity and validity in all collateral proceedings (Illinois Revenue Act, §224) may be adequate to cure irregularities that could have been taken advantage of at a prior stage. See §§95 and 96, *supra*.

The common law courts would not take cognizance of a will of personal property until the ecclesiastical court had admitted it to probate. This admission was ordinarily a simple *ex parte* proceeding and as such lacked conclusiveness. Upon a citation to revoke the letters granted, another proceeding of a more solemn character in which all parties in interest were given an opportunity to be heard, might at any time be instituted, and it was only the decree granted in the solemn form of probate that was made conclusive. The time within which a common might be superseded by a solemn probate was thirty years, i.e., practically unlimited. In America the tendency has been to reduce the period, and in the history of the legislation of Illinois (derived from Virginia and Kentucky) we can trace a gradual reduction to seven years, to five years, to three years, to two years, and to one year. The final brevity of period has, however, been offset by superseding the common form altogether by the solemn form of proceeding, so that the one-year period practically amounts to merely a period for a right of appeal.

The conclusiveness of the probate relates to the regularity of the execution of the will and the genuineness of its contents. Neither the validity of the contents nor the construction of the provisions is covered by the decree. Such questions as that of capacity, freedom from fraud and undue influence, competency of witnesses, forgery and interlineations, and reality of testamentary intent are settled finally and beyond further controversy, and even under the older law it was within the power of those interested in the estate, by summoning adverse parties in interest, to produce that result by at once resorting to solemn proceedings.

The soundness of the principle of contemporaneous adjudication which underlies the law of probate is demonstrated by its very general extension to wills of real estate which by the common law stood entirely outside of the jurisdiction of the ecclesiastical courts. In England the Probate Act of 1857 made probate possible for wills of real estate if they also applied to personal property, that is to say, the vast majority of wills (see 20 & 21 Vict., c. 77, §§61, 62). The applicability of probate to wills of real estate has been the rule in practically all the American states almost from the beginning (Woerner, *Ameri-*

can Law of Administration, §215). The law of New York has been peculiar and its development is instructive. Until 1910 a decree admitting to probate a will of personal property was conclusive as to execution and competency, and to a limited extent (if expressly made an issue and then only as to parties cited) as to validity, construction, or effect of disposition (see §§ 2626, 2623, 2624, Code Civil Procedure), while a decree admitting to probate a will of real property established all matters passed upon presumptively only (§2627). In 1910 sections 2626 and 2627 were repealed and section 2625 amended to read: "A decree admitting a will of real or personal property, or both, to probate is conclusive as an adjudication of the validity of the will, and of the question determined under section 2624 (validity, construction, or effect of disposition of personal property), except as in this chapter otherwise provided."[28] The principle of contemporaneous conclusive adjudication of the formal correctness of the will thus has been finally recognized in New York without making any exception as to real estate.

It may be asked: If conclusive adjudication by probate is desirable, why should the benefit not be extended by permitting a testator to have the validity of his testamentary disposition, so far as capacity and execution are concerned, conclusively established during his lifetime?

Michigan attempted to accomplish this object in 1883 (Act No. 25). The provisions of the act were as follows: A testator may petition the probate judge to admit his will; the petition shall state that the will has been duly executed without fear, etc., with a knowledge of its contents, and that testator is of sound mind; it shall state the name and address of every person who at the time of making the petition would be interested in the estate as an heir, if the maker should die at that time, and may contain other names as specified. The judge appoints a hearing and issues citations to the parties named. Guardians are appointed for minors. At the hearing the judge examines into the matters alleged and into the testamentary capacity, and examines witnesses. If the allegations are true and the testator has full testamentary capacity, a decree is attached to the will that testator has full capacity and that the will is well executed without fear, etc. The decree is to have the same effect as if made after death, and the will is not to be set aside on the ground of insanity, want of testa-

[28] The form and content of the sections have since been somewhat altered; see Surrogate's Court Act, §§144, 145; but the substance of the development appears to remain as above stated.

mentary capacity, fear, undue influence, etc. Appeal is allowed as from the probate of a will. And nothing in the act is to prevent the revocation of the will.

This act was declared unconstitutional on the ground that the probate of the revocable will of a living person does not constitute an exercise of judicial power (*Lloyd* v. *Wayne County Court,* 56 Mich. 236, 1885). It may be conceded that the proceeding is probably not within the terms of the declaratory judgment laws as they are now commonly advocated. Still the decision in Michigan need not be accepted as the last word against the possibility of a judicial determination of the valid execution of a will during the lifetime of the testator.

That there is no equitable cause of action to compel cancellation during lifetime of testator on ground of incapacity, see *Pond* v. *Faust,* 90 Wash. 117, 155 Pac. 776, 1916.

There is nothing in the Civil Law that corresponds to the advantage of the probate proceeding. The new Swiss Code secures a similar benefit by limiting the right to attack a will by reason of defect in execution or capacity to one year, but conditions this limitation upon the good faith of the defendant and upon knowledge on the part of the plaintiff of defendant's possession and of his own better right (art. 600). In the absence of such a special provision in the German Civil Code,[29] the ordinary statute of limitation applies, and formal defects in testamentary dispositions can therefore be taken advantage of for the full period of thirty years.

§104. CONCLUSIVENESS OF LAND TITLE REGISTRATION. Courts of equity recognize the right of an owner to have the validity of his title adjudicated, but only where the title is drawn in doubt by some particular claim or color of objection (bill to quiet title; action to show cause why claimant should not sue to try title; see Pomeroy, *Equity,* §735) and similar proceedings are in some cases expressly authorized by statute (see, e.g., Pennsylvania Act, May 25, 1893, for rule to compel bringing of ejectment; Maine, 1907, ch. 62, apprehended claim of easement). Actions of this kind serve to establish a right only with regard to particular claims of named persons, and that is also the

[29] A one year's statute of limitations applies only to error, fraud, and duress (B.G.B. 2078–2083).

scope of legislation or proposed legislation permitting actions for declaratory judgments.

However, a proceeding to establish a title conclusively against every possible adverse claim is the initial step in putting into operation, with regard to some particular piece of land, the so-called Torrens system of registration of land titles. It would have been possible to apply the system only prospectively to future transfers and leave titles encumbered with all claims and questions outstanding at the time of initial registration, to be eventually made clear through the disappearance of old adverse rights by lapse of time. In England this is one of the optional methods of working the system. But where, as in America, the system operates only through voluntary adoption, the merely eventual prospect of perfect operation after a period of twenty years would not have held out sufficient inducement to owners to bring their lands under the act. Hence the provision for a clear initial title, to be secured by what is in its nature a validating proceeding, and the constitutionality of which has been sustained by American courts.[30]

But the system of land title registration demands conclusiveness for every subsequent transfer as well as at the start. Its principle is twofold: no rights in land except by act of record, and the act of record conclusive evidence of the right. The working out of the first phase of the principle belongs to the general technique of formal requirements; the problem of making the act of record conclusive of the right falls within the present inquiry. The conclusive operation of the probate (if the general law provides for it) serves the purposes of the Torrens system perfectly; and where the property passes through intestacy, an analogous conclusive establishment of heirship must be provided for, unless the title is made to devolve upon an administrator as in case of personal property. But what is possible for devolution by death, is not practicable for ordinary transfers. A death is an extraordinary occurrence in the history of a title, and may not happen oftener on an average than once in a generation. It would defeat the system, the main recommendation of which is cheap and expeditious trans-

[30] *People* v. *Simon*, 176 Ill. 165, 1898; *Tyler* v. *Judges of Court of Registration*, 175 Mass. 71, 1900; *Eliason* v. *Wilborn*, 281 U.S. 457, 50 S. Ct. 382, 1930.

fer, to demand a validating judicial proceeding for each act of conveyance or encumbrance. It is possible to vest the management of the system in a court as a matter of form,[31] but ordinary transfers on the register and corresponding new certificates of title cannot in their essence be otherwise than administrative acts, the conclusiveness of which must be justified by the guaranties of correctness inherent in the safeguards of the system and strengthened, if necessary, by other expedients, such as indemnification out of an assurance fund. The validating judicial proceeding has thus, in connection with the system, only a restricted operation.

§105. CONCLUSIVE ADJUDICATION OF VALIDITY OF ADMINISTRATIVE ACTS AND PROCEEDINGS. The use of the judicial proceeding for validating purposes assumes a different aspect in the forms in which it has been applied to municipal bond issues and similar administrative proceedings.

Three main types may be distinguished:

1. The Code of Georgia of 1926 (§§445–460) requires municipal officers to notify the solicitor general of the circuit within six months after an election upon a bond issue. Within twenty days after being notified the solicitor files a petition in the Superior Court against the municipality for an order to show cause why the issue should not be validated. The court hears and determines all questions of law and fact; and if it finds in favor of the issue, makes an order to that effect. Any resident of the municipality may become a party and may except to the order. If no exceptions are taken, or if the order is affirmed by the Supreme Court, the judgment is forever conclusive on the validity of the bonds.

2. The second type is represented by the General Municipal Law of New York (art. 2A; Laws, 1911, ch. 769). The law authorizes a proceeding for the purpose of legalizing and confirming bonds both prior to and after their issue. If prior to the issue, the proceeding is instituted by the municipality or its officers; if after the issue, either by the municipality or by a taxpayer or bondholder.

The petition states particulars as to the bonds and the proceedings

[31] Massachusetts General Laws, ch. 185, §§6, 10–12.

prior to their issue. The court is asked to determine whether there has been a substantial compliance with the statute, and the petition may state any particulars in which the statute has not been complied with.

There is provision for publication of notice, and in specified cases, of service of notice.

A hearing is had, and a referee may be appointed to take testimony.

If the court finds that the statute was substantially complied with, it may legalize and confirm the acts in question as though the statute had been strictly complied with. Substantial compliance may be found, if the statute authorized the aggregate amount of bonds, if the proposition was adopted at the election or by the required vote at the meeting of the body to which it was submitted, if the bonds were sold at not less than par and at a rate of interest not greater than permitted by statute, notwithstanding any irregularity or technicality in the form of proposition, or in notice of election or meeting, or in time and manner of service, or in the conduct of election or meeting, or in the time of submission, or in the manner of issuance or sale, or in the time or times of payment, or notwithstanding any other technical or formal irregularity of like nature in such proceedings.

An appeal may be taken to the Appellate Division of the Supreme Court.

After the confirming order has become final, the proceeding prior to issue and sale, or the proceeding for the issue and sale, of the bonds, shall not thereafter be questioned by reason of any defect or irregularity (see *Re Common Council of Lackawanna,* 143 N.Y.S. 198, 1913).

The judicial proceeding is thus made explicitly the means of curing insubstantial irregularities; the law is not clear as to the effect of proceedings in which substantial defects are not brought to the notice of the court; if these are not concluded by the judgment, the proceeding is not in the full sense a validating one.

3. A third type is represented by article 7 of the General City Law of New York (added by chapter 598 of the Laws of 1929):

A city may elect to issue bonds under this article by an ordinance stating such election, stating ten other specified items (amount, purpose, estimated life of object, maturities, rate of interest, recital of compliance with conditions precedent, designation of issuing officers,

reference to conclusive recital, proposed tax levy, method of sale of bonds), and stating that the validity of the bonds may be contested (except on the ground that they are issued in violation of the constitution) only in a proceeding commenced on or before a named date which shall not be less than twenty days after publication and/or posting or in a proceeding commenced after such date but at least two days prior to the delivery of the bonds. If the ordinance is published and/or posted as prescribed, the validity of the bonds shall not be questioned in any court in respect to any matter appearing in the ordinance or because of any omission or irregularity in complying with any statute, except as provided in the ordinance.

A city may also use the article for the purpose of validating bonds authorized under any other law, in which case the elaborate recital requirements apparently do not apply; and it seems that these recital requirements, even where they apply, are made non-mandatory, and also incontestable by virtue of general recitals, under other provisions of the act.

If the specific recital requirements were mandatory, the peril of invalidity resulting from their non-observance would not of course be lifted by an adjudication in proceedings to which they would be jurisdictional prerequisites.

Of the same type is Louisiana Constitution, 1921, article 14, section 14, which prescribes at length the purposes and conditions of bond issues, and provides in a concluding paragraph:

"(n) For a period of sixty (60) days from the date of promulgation of the result of any election held under the provisions of this section, any person in interest shall have the right to contest the legality of such election, the bond issue provided for, or the tax authorized, for any cause; after which time no one shall have any cause or right of action to contest the regularity, formality, or legality of said election, tax provision, or bond authorization, for any cause whatsoever. If the validity of any election, special tax, or bond issue authorized or provided for, held under the provisions of this section, is not raised within the sixty (60) days herein prescribed, the authority to issue the bonds, the legality thereof and the taxes necessary to pay the same shall be conclusively presumed, and no court shall have authority to inquire into such matters. The provisions of this section shall not apply to the City of New Orleans."

Under this third type, then, the *failure* to institute proceedings validates, but in New York validates only to the extent of making prescribed recitals conclusive of the facts recited, while in Louisiana the validation is unqualified.

To summarize the effect of the three types: in the first, the validating proceeding is automatically instituted, and is in the hands of an officer independent of the municipality; in the second type, the proceeding may, but need not, be brought, and validation results only from the bringing of the proceeding; in the third type validation results from the failure to bring the proceeding.

If there are actually controverted questions involved in a bond issue, all three types afford a chance for their judicial consideration and determination, and in the first two types there is an actual determination; in the first type the proceeding is in the hands of an independent and supposedly disinterested official. In all three cases the suit is likely to be a friendly one, and an adverse determination may result only from the intervention of a taxpayer. It is thus possible that irregularities and defects that should be remedied are sanctioned by the *pro forma* judgment of a court.

If there are questions not brought to the notice of the municipal authorities or others or not raised in court the judicial proceeding, perfunctory as it is, will not be apt to discover them, nor, in the third type, will a suit be apt to be brought, and any irregularities are pretty certain to be cured.

Under the circumstances, the judicial proceeding while removing the fatefulness of error, does so by jeopardizing intended safeguards. This can be hardly otherwise, if the proceeding elicits no adverse interests. The proceeding does not function like the scrutiny of a central government department. It hardly differs in effect from the method of making recitals conclusive. The difficulty is that which has been pointed out before as inherent in judicial proceedings which are incapable of acting as a true check where the alertness of adverse interests cannot be relied upon to raise objections.

What the legislature does, is (to use a homely metaphor) to enable the municipality to pull itself out of the mire by its own bootstraps—a trick which the magic of legislation is capable of performing.

§106. VALIDATION BY LAPSE OF TIME. Validation by lapse of time extends the principle of the protection given to possessory and *de facto* conditions; the latter operates only relatively or subject to qualifications, while lapse of time may operate as the creation of a new title. Statutes of limitation making title to property by adverse possession furnish the most familiar illustration of this type of validation. By analogy, courts have recognized the creation of easements by prescription, and this applies to highways, so that defective statutory proceedings are cured by the lapse of twenty years. A much shorter period might be appropriate, where the constitution of some statutory proceeding furnishes "color of title," and we find that Wisconsin under such circumstances fixes a period of five years to make a legal highway (Statutes 80.63).

In connection with special judicial proceedings, we occasionally find provisions which forbid the questioning of a decree or judgment after a brief stated period has elapsed from the time it was rendered. As compared with a conclusive adjudication, this is a modifying provision in the nature of an additional requirement; but as compared with the judicial proceeding which is open to collateral attack by reason of a wide range of jurisdictional defects, it constitutes validation by lapse of time, analogous to a statute of limitations, but requiring the foundation of a judicial decree. Such provisions are found in connection with proceedings for the sale of real estate of infants (Iowa Code, 12596), and formerly existed in connection with the organization of irrigation districts in Colorado (Statutes, 1908, §3453) and Wyoming (Statutes, 1910, §842).

In some states a similar time limitation validates official deeds of lands sold for taxes (New York Tax Law, §131;[32] Michigan Tax Law, §73).

The most conspicuous application of this expedient has been made in the statutes establishing the system of registration of land titles: when a decree has been entered bringing the land under the act and permitting the registration of the title, a limited period (in Illinois two years, Act of 1897, §26) is given for contesting the decree, and thereafter it becomes incontestable. While the validity of this particular phase of the acts may not have been directly drawn in ques-

[32] See *Bryan* v. *McGurk*, 200 N.Y. 332, 1911.

tion, the period of two years does not seem to be unreasonably short (*Corpus Juris,* "Constitutional Law," §574), it being assumed that the statute of limitations operates in aid of some possessory or *de facto* condition created or affirmed by the judicial proceeding (*Groesbeck* v. *Seeley,* 13 Mich. 329, 1865).

The remedial expedient of a time limitation for attacks might be advantageously applied to the constitutional provisions requiring certain forms to be observed in the enactment of statutes. As regards procedural requirements, the doctrine that the enrolled bill signed by the presiding officers of the two houses forecloses judicial inquiry into alleged irregularities in the process of enactment, represents the principle of conclusive contemporaneous determination; but this doctrine is not applicable to requirements concerning title or form of amending acts. These imperil the validity of legislation without adequate corresponding benefit. Conceivably there might be a contemporaneous adjudication by a committee (see Constitution of Mississippi, §71) or by officials designated by the constitution; but a provision of this kind would be likely to operate only with regard to points explicitly made prior to enactment, and would necessitate a scrutiny of the regularity of the adjudication as part of the examination of the validity of the statute. However, since the main object of these requirements is to protect the enacting legislature from being overreached by trick and surprise, every object would be accomplished if the right to attack a statute by reason of formal defect were limited to a period of a few months. There would have to be an additional provision permitting a proceeding to impeach the statute, both because the point might not arise within the stated period as an incidental issue to ordinary litigation, and because it is doubtful whether on general principles a direct proceeding to impeach a statute is admissible (*Muskrat* v. *United States,* 219 U.S. 346, 1911). That doubt would be removed by explicit constitutional authorization.

A constitutional requirement is beyond legislative remedy; and framers of a constitution, when asked to consider a constitutional remedy, might well conclude that the requirement itself constitutes civil regulation of the most undesirable type. States that dispense with these provisions appear to suffer no inconvenience therefrom, practices voluntarily observed accomplishing the same purposes.

§107. VALIDATING ACTS. Where curative doctrines and other expedients fail, recourse to the legislature remains as a last resort, in order

to remove the consequence of error in the application of a civil regulation.

Under constitutional limitations, validating legislation must be handled with care; and much of early American constitutional law turned on the validity or invalidity of relief granted by special acts of legislative intervention. Special or private relief acts are now forbidden by a number of constitutions; but ordinarily no difficulty is found in phrasing a relief measure, adapted to a particular case, in terms which appear to be generally applicable.

Without going into the detail of constitutional doctrines, it seems to be established that a validating act must not divest vested rights, must not disturb a judgment, and must not seek to supply the defect of a constitutionally required jurisdictional prerequisite, these three conditions being closely allied to each other. Thus irregularity of a will cannot be cured after death, because then the equities of intestate heirs have attached (*Alter's Appeal,* 67 Pa. St. 341, 1871); a tax levy cannot be validated after it has been declared invalid by the judgment of a court (compare *C. and E. I. R. Co.* v. *People,* 219 Ill. 408, 1906, with *People* v. *Wis. C. R. Co.,* 219 Ill. 94, 1905), and an assessment cannot be validated, if it lacked essential prerequisites (*Cromwell* v. *MacLean,* 123 N.Y. 474, 1890; see discussion of entire problem in *Spencer* v. *Merchant,* 125 U.S. 345, 1888; also *Graham* v. *Goodcell,* 282 U.S. 409, 1931). But little is gained by such general statements, and the line between what is legitimate and illegitimate in retrospective operation, both as a matter of construction and as a matter of constitutionality, is often very closely drawn.

Perhaps the validating acts of most general interest have been those relating to defective marriages, and defective acknowledgments of deeds; but most of current validating statutes relate to public proceedings of one kind or another. The indices of the Session Laws of Illinois show for recent years the following number of validating acts: 1921: 13; 1923: 22; 1925: 9; 1927: 19; 1929: 15. The subjects covered are bond issues, tax levies, acts and proceedings of private and public corporations, organization of districts, acknowledgments, and marriages.

CHAPTER XIV

PROVISIONS REGULATING THE APPLICATION AND EFFECT OF STATUTES

As a legal act, a statute has its limitations of place and time, and must adjust itself to the operation of other statutes and to existing law. The relevant rules are in the main rules of unwritten law, declaratory in character. They include the entire doctrine of what is known as the conflict of laws, called into being by the divergences of local or regional *"statuta"* at a period when the unwritten common law of continental Europe was practically one. Aside from the conflict of laws, the principles controlling the force and effect of statutes are generally dealt with in treatises on statutory construction. It is proposed to consider here explicit provisions introduced into statutes for the purpose of removing doubts as to application and effect, and, occasionally, of altering common law rules that have been found inconvenient.

§108. Provisions as to Time of Taking Effect. 1. *Absence of provision.* In the absence of any express provision, by constitution or by general statute, or in the particular act, an act takes effect immediately.

"Immediately" means the time when the last constitutionally required step in the process of enactment is complete, normally when the executive has affixed his signature; a statutory provision for deposit with the Secretary of State (U.S.R.S. §204, 5 U.S.C. 159) does not postpone the taking effect.

The constitution requires no record of the time of signature to be made; and thus the perfection of the most important of legal acts may be matter of parol evidence (*Gardner* v. *Collector,* 6 Wall. 499, 1867); the same is true of the receipt by the President of a bill which he allows to become law without his signature.

Willard in his *Legislative Handbook* (§133) suggests the desirability of legal provision for record evidence of the exact time of the completion of the process of enactment, and the Legislative Law of New York (§41) makes the governor's certificate evidence.

U.S.R.S. §205 (5 U.S.C. 160) requires the Secretary of State to publish a constitutional amendment when he receives official notice of its adoption, certifying the states adopting it, and that it has become part of the

constitution. The Eighteenth Amendment was thus proclaimed, but without specifying when the approval by the last of the thirty-six required legislatures had become perfect. Since prohibition became operative after one year from ratification, the precise date, should it become relevant, would have to be ascertained by consulting the journals of the legislature of the last ratifying state. The Secretary of State proclaimed that the amendment had become a part of the constitution, but without stating the particular time.

The Supreme Court has also held that it may consider the particular time of the day when the law takes effect (*Burgess* v. *Salmon,* 97 U.S. 381, 1878). In the case cited, it was conceded that the bill was not signed until the afternoon, and a penalty was involved. If the executive merely affixes the date, proof of the particular time may be difficult or impossible, and it may have to be held to have been in force the entire day.[1] President Taft in signing the Tariff Act of 1909, indicated hour and minute, and that has since become the custom in connection with tariff acts;[2] but in the case of tariff acts it is an idle gesture, since these now always provide that they shall take effect the day following the passage of the act. A general statutory rule to that effect, to be read into any statute in the absence of a contrary provision, would be desirable.

2. *Constitutional provision for taking effect.* The constitutional provision which is found in a number of states, is illustrated by article 4, section 13, of the Constitution of Illinois:

> "No act of the general assembly shall take effect until the first day of July next after its passage, unless, in case of emergency (which emergency shall be expressed in the preamble or the body of the act) the general assembly shall, by a vote of two-thirds of all the members elected to each house otherwise direct."

The phrasing "not . . . until" is properly construed as meaning that in the absence of postponement the act takes effect on the date indicated, and has the advantage of permitting postponement of the effective date.

The requirement that the emergency must be stated in the preamble or body of the bill, instead of by joint resolution, may raise

[1] *Arnold* v. *U.S.,* 9 Cranch 104, 119, 1815.

[2] The hour was also given in the Revenue Act of 1928; see *Graham* v. *Goodcell,* 282 U.S. 409, 1931.

some difficulty of handling the situation where the two houses disagree as to the emergency provision, but the difficulty does not appear to have given rise to judicial decision.

In some states bills are passed as emergency measures with a frequency which casts doubts on the genuineness of the emergency (Oklahoma, Texas); this is impossible, or at least made more difficult, where, as in Illinois, the courts refuse to accept a merely perfunctory recital as a compliance with the constitution (*Graham* v. *Dye,* 308 Ill. 283, 1923).

3. *Statutory provision.* In the absence of a constitutional provision, a general statute in the nature of an interpretation act may establish an effective date, so section 43 of the General Legislative Law of New York, which fixes the twentieth day after the bill has become a law. Such a statute yields to an express provision in the particular act, and in New York the clause: "This act shall take effect immediately" is common.

A reference in the act to the time of its passage may be construed as a reference to its effective date (*State* v. *Pinson,* 76 W. Va. 572, 1915; see Willard, *Legislative Handbook,* §130).

4. *Effective date postponed.* The effect of an act upon existing conditions may make it desirable to give time for preparation and to postpone the effective date; thus the German Civil Code of 1896 was made to take effect on January 1, 1900, the English Law of Property Act of April 9, 1925, was made effective on January 1, 1926, and the practice was observed in American workmen's compensation acts. Or different dates may be fixed for the operation of the act upon individuals, and for the exercise of administrative powers, see, e.g., the Workmen's Compensation Act of Massachusetts, Laws of 1911, part V, §6.

5. *Leaving effective date to executive determination.* British statutes speak of an "appointed day," on which the act shall come into operation; the day being fixed by Order in Council, so the Government of India Act, 1919, §47, and the Government of Ireland Act, 1920, §73. The practice is not common in the United States where it would raise a constitutional question. Where it does occur, as in the act of August 19, 1890, concerning collisions at sea (26 St. L. 320: "This act shall take effect at a time to be fixed by the President by proclamation is-

sued for that purpose"), it might be surmised that it was the intention to permit the President to ascertain the existence of facts, as, e.g., the action of other nations, which would bring the delegation within the principle of *Field* v. *Clark* (143 U.S. 649, 678, 1892); but the presidential proclamation (9 *Pres. Mess.* 500, 761) contains no evidence of this.

6. *Provision for promulgation and publication.* The French Constitutional Act of February 27, 1875, provides in article 3: "The President . . . shall promulgate the laws when they have been voted by the two chambers."

The German Constitution of 1871 provided: Art. 5. "The Imperial legislative power is exercised by the Bundesrat and the Reichstag. The concurrence of majority resolutions of both bodies is required and sufficient for a law"; Art. 17. "The Emperor authenticates and promulgates the Imperial laws"; Art. 2. "The laws of the Empire receive their binding force by promulgation in the name of the Empire through the medium of an Imperial Gazette."

Promulgation, an executive act, is thus made an essential element in the perfection of a statute—contrary to English and American law.

While promulgation is made a duty, the Executive, in the absence of a time provision, has it in his power to postpone operation by delayed promulgation, and this has occasionally happened.[3]

The present German Constitution provides: Art. 70. "The President shall authenticate constitutionally passed laws and promulgate them *within a month* in the Imperial Gazette."

The general practice of English and American law dispenses with promulgation as a condition of validity.[4] The doctrine was even applied to a proclamation (four justices dissenting), but in a case in which effectiveness prior to publication operated beneficially (*Lapeyre* v. *United States,* 17 Wall. 191, 1872). How the courts would deal

[3] In a report of the 1907 session of the Prussian legislature I find nine cases of laws passed, but at the time of the report not yet promulgated. The German statesman Delbrueck in his *Recollections* (II, 341) gives an interesting illustration of delayed promulgation to serve a definite purpose.

[4] As to the equity of this, see the old treatise *Doctor and Student,* p. 303, ed. 1687. Where the statute could not possibly have been known to defendant, a pardon was recommended. *Bailey's Case,* Russell & Ryan, p. 1, 1800. Notification of the repeal by Order in Council of a colonial act was held necessary in *Albertson* v. *Robeson,* 1 Dall. 9, 1764.

with a case in which the application of a statute which could not possibly have been known would work injustice, and the pardoning power was inapplicable, must be left to conjecture.

Some American constitutions provide for publication (Indiana, Kansas, Louisiana, Utah, Wisconsin). The constitutional provisions, before referred to, for postponed effect, may in part serve the purpose of making it possible for the statute to become known; and in Iowa the provision for emergency takes the form of a provision for publication. The usual statutory provisions for the publication of session laws by the secretary of state become practically operative only a considerable period after the statutes have become effective. Acts of Congress are speedily obtainable through official channels, and similar arrangements exist in New York. Otherwise the public press must be depended on for public notice; and interested parties may of course examine any act from the legislative records.

§109. REPEAL PROVISIONS. The common clause, "all acts or parts of acts inconsistent with this act are repealed," expresses merely what would be law without the clause (*People* v. *City of Rock Island,* 271 Ill. 412, 111 N.E. 291, 1916).

If it is construed as showing an intent not to repeal prior acts not inconsistent (Lewis-Sutherland on *Statutory Construction,* §§256, 272), it may be valuable by way of saving prior special acts, as to which there may otherwise be a doubt (*McKenna* v. *Edmundstone,* 91 N.Y. 231, 1883), although the presumption should be against their repeal. It is simple enough to say, "all acts or parts of acts, general or special . . ." if such is the intent.

The statement, "all and every act and acts, clause and clauses of acts, containing anything within the purview of this act, shall be, and the same are hereby repealed" (Virginia Collected Acts of 1803, p. 245) may overshoot the mark.

Any general repealing clause may give rise to doubts, and should in appropriate cases be supplemented by naming specific acts which it is intended to supersede.

Repeal of repealing act. There is supposed to be a common law rule to the effect that the repeal of a repealing act revives the original act.

The opposite rule, which is more in accordance with presumable legislative intent, is expressed in the statutory construction act of Illinois as follows:

"No act or part of an act repealed by the General Assembly shall be deemed to be revived by the repeal of the repealing act." (Illinois Revised Statutes, ch. 131, §3.)

To the same effect is section 11 (1) of the English Interpretation Act, 1889.

Saving provisions in connection with repeals. They are of a transitional character. They are in part called for by the theory that the abrogation of a law defeats acts and proceedings authorized by that law, though originating in a state of facts arising while the law was in force.

The saving provision is particularly important for all penal consequences of the repealed act, since penal provisions of a new act have no retroactive effect.[5] Saving provisions may be enacted generally for all statutory repeals, as in U.S.R.S. §13 (1 U.S.C. 29):

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

A very full saving provision of general application is found in the Statutory Construction Act of Illinois (ch. 131, §4):

1. It applies to former laws, whether such former law is expressly repealed or not.

2. It makes the repeal inoperative as to any offense committed against the former law, as to acts done under it, as to penalties, or forfeitures incurred under it, as to rights accrued under it, or as to claims arising under it.

3. It provides, however, that so far as practicable, proceedings taken after the new act takes effect shall conform to the laws in force at the time such proceeding is had.

[5] See *Belleville, etc. R. Co.*, v. *Gregory*, 15 Ill. 20, 27, 1853, as to the result of the absence of a saving provision.

4. If the new law mitigates penalties, then, with the consent of the party affected, the mitigated penalty may be applied to any judgment pronounced after the new law takes effect.

Where an amending act repeals the amended act, the following provision is of value:

"Where a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form, but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment." North Carolina R.S. 1905, §2832; substantially the same, California Political Code, §325.

Saving provisions for revoking powers. Where one licensing act is superseded by another licensing act, and there is a power to revoke licenses, there is some danger that the power to revoke may be granted by the new act by reference to the licenses granted under it, so that licenses continuing in force under the old act are no longer subject to any power of revocation (*State Bd. of Health* v. *Ross,* 191 Ill. 87, 1901).

The result can be avoided by care in drafting the power of revocation under the new act so as to make it applicable to licenses whether granted under the new or under a former act (see section 39 of Illinois Medical Practice Act).

It is difficult to frame a general saving provision applicable to this situation.

Where one organic act, under which many powers have been exercised, is superseded by another organic act, saving and similar provisions have to be quite elaborate. Typical in this respect are the so-called Schedules of American state constitutions. In English legislation the Local Government Act of 1888 may serve as a model (§§122–124, 126).[6]

[6] See also Schedule IX of the Local Government Act, 1929.

It is doubtful whether a general formula can be devised to cover the varying situations. Extreme caution is called for to guard against unintended effects of perfunctory or unqualified repealing clauses. A bill intended to reorganize the federal service dealing with unemployment provided: "The employment service now existing in the Department of Labor is hereby abolished" (71st Congress S. 3060). The President, in vetoing the bill, maintained that this provision would disrupt the service pending the putting

Saving provisions in connection with particular repeals. Where there is a general statute establishing a saving provision for every repealing act and there is also an express saving provision in connection with some particular repealing act, which latter saving provision is of narrower scope, a question may arise whether the larger general saving applies. The Supreme Court of the United States has held that the larger general saving does apply (*Great Northern R. Co.* v. *U.S.*, 208 U.S. 452, 1908).

Repeal provisions in statutory revisions. These present a particular and difficult problem.

The problem may be handled by expressly repealing specified statutes. This was done by the Revision in New York in 1828, and by the Revision in Illinois in 1874, and by the Revision in Massachusetts in 1902.

The Revised Statutes of the United States contain a carefully phrased generic repealing provision (§5596), which may be summarized as follows:

1. Where the revisers have dealt with any previous act, that act is repealed, although only a portion is taken into the revision.

2. This rule does not apply where the revision has taken over permanent provisions contained in local or special acts; the local or special provisions retain what force they still have.

3. Where some act is not touched at all by revisers, it is not affected by revision.

This seems to express a sound general rule.

It will be noted that any express provision as to repealing effect can operate only by way of negativing the continued existence of other acts. It is theoretically possible to provide expressly that certain acts shall not be repealed, and such a saving provision of a general character is established by section 5596 of U.S.R.S. But apart from a general revision, it is manifestly difficult if not impossible for a statute to proclaim that it does not intend to affect or supersede any existing law whatever, or any existing laws other than such as are specified. Such a provision might result in contradiction and confusion; so that

into effect of a new organization. The author of the bill denied this; but a clear saving or transitory provision would have removed the doubt. Upon the merits of the objection, see Joseph P. Chamberlain's article in 21 *American Labor Legislation Review* 92.

courts would have to ignore it. To a great extent the effect of a statute on other statutes must always be matter of judicial construction.

§110. Provisions Qualifying the Rule of Prospective Operation.[7] The prospective operation of statutes represents a general, but not an unyielding, principle of jurisprudence. Retrospective operation may be expressly provided for, or may be in accordance with plain legislative intent, either by reason of manifest equity, or of overriding public policy. In America, the question of possible retrospective operation must be considered in the light of constitutional limitations. In a few states retrospective legislation is forbidden in terms, and the construction of these provisions is matter of state law. But all states are subject to the provisions of the Federal Constitution prohibiting *ex post facto* laws (applicable to penal legislation) and laws impairing the obligation of contracts; the prohibition of *ex post facto* laws applies also to acts of Congress, and the guaranty of due process, which likewise applies to acts of Congress, is sufficient, in many cases, to prevent the impairment of contracts. It belongs to a treatise on constitutional law to ascertain the present status of the contract and of the *ex post facto* clauses of the Federal Constitution.[8] Barring one decision (*Hawker* v. *New York,* 170 U.S. 189, 1898), the *ex post facto* clause has been applied to the full extent of its possible implications; but the extent to which existing contractual arrangements or other vested rights are protected from the exercise of a continuing regulative power, is very difficult to define. It is quite intelligible that contracts should not be allowed to stand if they are made to defeat an anticipated change of public policy, or even if they turn out to be in conflict with an urgent and overriding public policy, but the decision in *L. & N. R. Co.* v. *Mottley,* 219 U.S. 467, 1911, which nullified a contract for free railroad transportation in compensation for an accident, made long before such transportation was prohibited by Congress, does not fall within these exceptions.

The attempt on the part of private parties to evade impending

[7] See Affolter, *Intertemporales Privatrecht;* Traeger, "Zeitl. Herrschaft des Strafgesetzes," *Vergl. Darstellung des deutschen und ausländ. Strafrechts,* Allg. Teil VI, 317.

[8] I have discussed the subject of vested rights in my *Police Power,* 1904, §§504–602.

changes in the law is sought to be met by legislative provision in connection with English statutes.

It is the practice of the British House of Commons, in connection with revenue acts increasing taxes or customs duties, to provide, by resolution passed for that purpose, that the act when passed shall have retroactive effect as of the day of the introduction of the bill. The act, when passed, is framed accordingly, e.g., Finance Act of July 22, 1902, "that there shall, as from *April 15,* 1902, be levied," etc.

It was held in *Bowles* v. *Bank of England,* 1913, 1 Ch. 57, that until validated by the act, the resolution by itself could not have effect, since it would in effect be a levying of taxes otherwise than by act of Parliament; and, in consequence a statute was passed (3 Geo. V, c. 3, 1913), giving such resolutions statutory effect, and carefully regulating and qualifying the exercise of the power.

The same practice exists in Germany (motion presented to Reichstag, November 27, 1902) and in Switzerland (II Salis 196), and was suggested to the Ways and Means Committee of the House of Representatives by Professor Taussig in 1918 (*Official Bulletin,* July 16, 1918).

The clause is known in England as a "padlock clause." The padlock clause also appears twice in the Port of London Authority Act of 1908, as a check upon "eleventh-hour" acts of companies that were about to lose their independent existence: if the Port Authority think that any contract made subsequently to the date of the introduction of the bill was not reasonably necessary in the ordinary course of business, they may give notice to that effect, and the matter is referred for determination to an arbitrator appointed by the Board of Trade (§53); and a similar provision is made (§60, subd. 12) with regard to appointments to office and alterations in salaries.

In America fraudulently anticipatory arrangements of this kind have been held illegal, even in the absence of invalidating statutory provisions. *Hendrickson* v. *New York,* 160 N.Y. 144, 1899; *Dunne* v. *Rock Island,* 283 Ill. 628, 1918.

It is extremely difficult to frame a legislative provision, applicable to statutes in general, defining the conditions under which a new law may or may not be retroactively applied.

The Introduction to the Prussian Code of 1794 provides in section 16:

"Where a new form is prescribed for a legal act, and this form is required to be observed for all acts that are capable of being altered [a change in the law regarding the execution of a will would be an illustration], a sufficient time must be left for such operation."

This may be considered as going beyond the scope of an interpretation act, and as prescribing—in the didactic manner of the Prussian Code—a rule to be observed by the legislator. If so, it constitutes a sound rule of legislative drafting, but does not constitute a mandatory legislative act.

The section next following of the Prussian Code (§17), which provides that acts preceding a change of law, invalid under the law in force when they were made by reason of defect of form, shall be valid if they comply with the form prescribed when the cause of action arises, is expressly made inapplicable to contracts. It would apply to wills; but is a doubtful rule, illustrating the difficulty of undue generalization.

If the formulation of a general principle is put aside as impracticable, the question is whether particular statutes should be explicit as to their operation upon preëxisting conditions or relations. The practice varies greatly. It is generally quite a simple matter to indicate by a very few words a legislative intent to give a provision purely prospective operation; and while their omission should not be given undue weight, a court may well be justified in applying a beneficial statute broadly, if non-application to existing conditions is not supported by strong equities. The act of Illinois of 1921, doing away with the destructibility of contingent remainders, was held applicable to remainders created before, but sought to be destroyed after the act (*Jennings* v. *Capen,* 321 Ill. 291, 151 N.E. 900, 1926); the corresponding provision of the English Real Property Act of 1845 (§8) was expressly worded to the same effect. The first general Married Women's Act of Illinois (1860) carefully distinguished between existing and future marriages, so far as the rights of the husband were considered as vested rights or as mere expectancies; but the Revision of 1872 was silent, being clearly intended to apply to all marriages. The first Eng-

lish Divorce Act of 1857 was likewise silent as to its operation, but no question appears to have been raised concerning its applicability to then existing marriages. The advantage of lack of explicit provision is that a court may construe in accordance with a preponderance of equities; in some cases there may be a slight peril that a court may find in the non-exemption of existing conditions a ground for declaring the entire act unconstitutional; but ordinarily conservative construction can save vested rights.

A special problem arises where an act has for its main purpose or for one of its main purposes the validation of illegal relations or the alteration of an existing status, and desires to accomplish the purpose without disturbing vested equities. Examples are furnished by the English Deceased Wife's Sister Act of 1907 (7 Ed. VII, c. 47) and the Legitimacy Act of 1926 (16 & 17 Geo. V, c. 60), both of which were intended to have retroactive effect. In both acts the reservations from retroactive operation were worked out with considerable care. The Legitimacy Act undertook to legitimate as of the date of the act a child whose parents had intermarried after his birth, before the act went into operation. It also contained a provision in favor of the issue of one predeceasing the marriage of his parents, but under the wording of the act, this applied only to death after the date of the act. A case arose in which a woman who had two illegitimate children, a son and a daughter, married the father in 1905. One of the children died in 1919 leaving issue. The mother died intestate in 1928. By the act of 1926 the daughter became legitimate upon the passage of the act, but not the issue of the son, and the issue consequently failed to inherit (*Re Lowe,* 1929, 2 Ch. 210). Under any system of enumeration of categories a special contingency like this, although plainly within the general "equity" of the act, and not touching vested rights, was likely to pass unnoticed. The question is whether an inclusive principle could not have been formulated that would have covered all contingencies within the general intent of the legislator. The question is more easily put than answered. But it deserves at least consideration whether it would not have been possible to use a very general phrase for intestacies arising after the act, just as a general phrase was used for leaving unaffected any disposition coming into

operation, or rights under the intestacy of a person dying, before the commencement of the act.

§111. THE ENTIRE BODY OF STATUTE LAW AS A SUBJECT OF LEGISLATION. Where the legislative activity of the state is regular and abundant, the accumulating mass of statute law constitutes a problem for courts, administrative officials, and lawyers. The actual state of the written law may become difficult to ascertain by reason of inaccessibility and of doubts as to the effect of later upon earlier statutes. The difficulty made itself felt in Rome after Imperial legislation in the form of edicts and rescripts had become common, and led to a number of compilations called *codices,* the best known of which are the *Codex Theodosianus* of 429, and the Codex of Justinian's *Corpus Juris*—both of them official enactments. It will be noted that the term "code" is thus applied to what we now call a statutory revision, and not to an authentic written formulation of unwritten law.

England, France, and Germany (and the same is probably true of most of the other European states) do not possess official statutory revisions. One is being planned for the Imperial German statutes which cover a period of only a little more than sixty years, beginning with the establishment of the North German Federation in 1867. The task of revision becomes one of almost prohibitive difficulty where legislation reaches as far back as it does in England, France, or Prussia. In England, Parliament has undertaken to enact from time to time comprehensive repealing acts, and the entire effort at consolidation and clarification has been described by Sir Courtenay Ilbert in his book on *Legislative Methods and Forms* (chaps. 2 and 7); but an official restatement of the entire statute law in force does not appear to be considered as a practical possibility. General reliance appears to be placed in the various European countries on private collections, of which Halsbury's *Complete Statutes of England* (20 vols., 1929–1930) is a good example. They serve the practical purposes of administrators and of the legal profession, even though without a claim to be recognized as authentic.

In America recourse is likewise had to a large extent to private

compilations of statute law. Pennsylvania never has had any other. But even in states where official revisions exist, these, unless renewed at short intervals, must be supplemented by private publications. In Illinois, the Revised Statutes date of 1874; and the present biennial volumes going by that name are to the extent of at least three-fourths of their contents additions to the original text made upon private responsibility, as a form of editing the permanent provisions of the statutes enacted since 1874. For nearly fifty years, from 1878 to 1926, the situation with regard to the federal statutes was similar, the official Revised Statutes representing only a fragment of the existing statute law, and being in part superseded by later statutes, and the legal profession during the latter part of the period relying largely upon two private collections, the Compiled Statutes, and the Federal Statutes Annotated. It is a very recent development, in which Wisconsin has taken the lead, by which through appropriate official action, new statutes are fitted into an official revision, so that the latter is kept up to date.

From a very early date American statute law has been officially revised from time to time. It is possible to distinguish two main types of official revision which may be respectively designated (although the terms are not officially used) as authorized and enacted revisions. A revision is merely authorized where the legislature directs the work to be done by commissioners or designated officials, the product to be submitted to the Attorney General or to the Judges of the Supreme Court, and upon their approval to be recognized by the courts as correctly representing the statute law of the state unless the contrary is proved.[9] In the enacted revision we may again distinguish various forms: that observed at present in Massachusetts (also in the United States Revised Statutes of 1874), whereby the entire body of the revised statute law is formally enacted as one act, being preceded or in-

[9] In 1921 a statute of Illinois purported to authorize a publishing firm to compile and publish the statutes. The publication was to be submitted to the Attorney General for approval, and upon such approval the publishers were to furnish a designated number of free copies to the state. The statute did not undertake to invest the publication with any authoritative character. Notwithstanding this, it was held to confer a special privilege; and being also held to be in contravention to a constitutional provision concerning the printing of laws, it was held unconstitutional (*Callaghan* v. *Smith*, 304 Ill. 532, 1922).

troduced by a regular enacting clause; that observed in New York in 1829, and again in 1909, and in Illinois in 1872–74, whereby the revision assumes the form of a number of parts or chapters, each enacted as a separate statute; and that observed in Georgia, Utah, and Missouri, whereby the revision, prepared by a commission, is given statutory force by a brief enacting statute referring to the work of the commission and adopting it, analogous to the incorporation by reference in a last will and testament—a method sustained as not violating the constitutional requirements as to the enactment of statutes in *Central of Georgia R. Co.* v. *State,* 104 Ga. 831, 1898.

Considerable difficulty may be experienced as to the repealing effect of later upon earlier acts. Only an enacted revision can determine this conclusively; but even in an enacted revision a generally worded repealing clause may leave doubts in that respect, since necessarily certain classes of statutes that are not revised are not intended to be repealed (e.g., special, local, and temporary acts), and a specific repealing act, such as is found in the Illinois Revised Statutes of 1874, may therefore be of value.

While an enacted revision is more reliable than either a private revision or a merely authorized revision, it is for that reason also very much more of a legislative commitment, since it may by inadvertence effect changes in the law which the legislature does not intend. It is very significant that Congress in 1926 in the act "to consolidate, codify, and set forth the general and permanent laws of the United States in force December, 1925" preferred to invest the United States Code only with *prima facie* validity. Moreover, for keeping the consolidation up to date, Congress relies upon the coöperation of private publishers (see agreement with West Publishing Co. and the Edward Thompson Co., *House Document 143, 71st Congress 2d Session; Congressional Record,* March 2, 1931, p. 6817).

An enacted revision may at the same time serve the purpose of law reform. The changes in substantive law made by the New York revisers in 1829 are well known, and important changes were also made in connection with the Illinois Revision of 1872–74. Such, however, was not the character of the Revision of the Federal Statutes in 1874; and Massachusetts, in connection with the periodical revisions of the

statute law, pursues a very conservative policy with regard to substantive changes (Resolves of Massachusetts, 1916, ch. 43).[10] A combination of a revision with law reform is a formidable undertaking upon which a legislature may well hesitate to embark.

However, the possibility of correcting obvious errors or of eliminating conceded anomalies is a distinct advantage of the enacted revision, and might turn the balance of considerations in its favor, assuming it to be possible to prevent major and unintended changes from being procured under the guise of the correction of errors.

If there is no intent to make substantive changes, the legislature may well prefer an authorized to an enacted revision, and may indeed legitimately prefer to leave the work of compilation to private enterprise. Unless the Wisconsin plan of keeping an official revision constantly up to date is adopted, the work of consolidation will in the intervals between official revisions necessarily either fall into private hands or remain undone. The relative merits of the different methods of revision must perhaps be left to be determined in accordance with the varying circumstances of place and time.[11]

[10] The legislature adopted a rule that a four-fifths vote should be required for a substantive change in the law. See *Commonwealth* v. *N. Y. Central R. Co.*, 206 Mass. 417, 420, 1910.

[11] See A. P. Walker, "Mechanics of Code Revision," 20 *Virginia Law Register* 12; F. Dumont Smith, "Dealing with Overgrowth of Statute Law," 10 *American Bar Association Journal* 41; Lee and Beaman, "Legal Status of the New Federal Code," 12 *American Bar Association Journal* 833. As to revisions in Massachusetts: 13 *American Jurist* 344; 15 *ibid.* 294; 1 *Massachusetts Law Quarterly* 141.

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