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AMENABILITY OF ADMINISTRATIVE TRIBUNALS TO THE COURTS

By

FREDERICK G. MCKEAN

As to cases which the law seems unable to determine * * * the law appoints officials and leaves such matters to them to determine to the best of their judgment. — Aristotle.

From time immemorial many public officers have exercised licensing, rule-making, and adjudicatory powers over many kinds of human undertakings. And at all times much of the procedure by which governments are carried on has been administrative or executive. In pre-Parliamentary England there was a period when all the functions of the state were exercised by the King with the assistance of the Curia Regis, in the collection and management of the royal revenues, the administration of justice to suitors and the despatch of all public business.¹ But, as and when the English political system took a turn from feudalism towards constitutionalism, the dominant classes slowly but persistently directed their attention to the urgent need of apportioning governmental powers among responsible officials, and thus laid the foundation of modern administrative law. This was effected through various devices such as royal ordinances, royal instructions, orders in council, and eventually by means of acts of parliament.² The most famous administrative officials in the history of English Law and institutions are the justices of the peace originally known as "conservators of the peace." They are statutory officers possessed of no traditional or common law powers, as noted in that scholarly work, Jenks' Short History of the Common Law.³ Their duties have been numerous and diversified, from time to time, and at various periods have included such responsibilities as, settling questions

¹Hallam, *The Middle Ages*, chapter viii, part ii; McKean, *Canon Law in American Jurisdictions*, 39 *Dickinson Law Review* 75, 85 (1935).

²Among the institutions which originated within the Curia Regis, was that of equity, which in its early days of administrative power, invented the prerogative writs of common law. McKean, *Canon Law in American Jurisdictions*, 39 *Dickinson Law Review* 75, 85 (1935).

³2d. ed., 1922, p. 153.

of order, roads and bridges, prices and wages, the fixation of rates to be charged by common carriers, and the promotion of the welfare of the poor. Many public-spirited men, of whom I need only mention many-sided George Washington, have been valuable members of "the minor judiciary."

AUTHORITY

In our American system of jurisprudence, statutory limitations are largely questions of interpretation, while constitutional limitations are usually questions of power. In England the "High Court of Parliament" has absolute power. In American jurisdictions the sway of the legislative department of government is supreme, except insofar as it may be limited, restrained or controlled by organic law. On the general subject of power, Sir William Holdsworth's pointed observations may be quoted at this juncture. They are as follows: The existence or non-existence of a power or duty, is a matter of law and not of fact, and so must be determined by reference to some enactment or reported case.⁴ Similarly it is firmly established that the existence or non-existence of jurisdictional facts raises a question of law. It follows that an administrative conclusion which raises a question of legal power, is re-examinable by legal tribunals as a problem in the determination of jurisdictional facts; a proposition laid down by the Supreme Court of the United States in the case of *Interstate Commerce Commission v. Northern Pacific Ry. Co.*⁵ Furthermore, a decision by an American legislature or administrative body on a question of fact is not conclusive upon a court where the *power* of such legislative or administrative body is challenged.⁶ In other words, the power of an administrative body to act or not to act is a judicial question,⁷ and, all things considered, administrative tribunals are on the footing of courts of special jurisdiction. Hence their authority is not presumed but must be shown by those claiming rights under their acts; as was settled over a century ago in the case of *Lowrey v. Erwin*.⁸ Practically all administrative authority derives from statutory enactment;⁹ and it is elementary that a statute has three parts, viz. declaratory, directory and vindicatory. Standards and other limitations of administrative power are directory; and their fixation is legislative and non-delegable.¹⁰

⁴6 Halsbury, *Laws of England*, 379 (2d ed. 1932). *United States v. Joint Traffic Association*, 171 U. S. 505, 573 (1898). *accord.*

⁵216 U. S. 538 (1910).

⁶*Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920); *People ex rel. Consolidated Water Co. v. Maltbie*, 275 N. Y. 357 (1937).

⁷*Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U. S. 474 (1912).

⁸6 Robinson 192 (La. 1843).

⁹*People v. Public Service Commission*, 171 App. Div. 810 (N. Y. 1916); *Chippewa Power Co. v. Railroad Commission*, 188 Wis. 246, (1925).

¹⁰Compare: *Schecter Poultry Corp. v. United States*, 295 U. S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); *O'Neil v. Insurance Co.*, 166 U. S. 72 (1895); *Holgate Brothers Co. v. Bashore*, 331 Pa. 255 (1938).

STANDARDS

Subject to restrictions imposed by constitutional limitations, a legislature has power to determine how rights which it creates shall be enforced.¹¹ What is to be done, who must do it, and what is the scope of the authority delegated, are factors to be determined by the law-enacting power; and such statutory provisions do not amount to a shifting of responsibility by a legislative body, if it sets up reasonable and workable standards for the agency selected by it to carry out its commands.¹² This would be obvious if we paused to consider that an attempted delegation of power to make the law is unconstitutional, in that it necessarily involves discretion to decide what the law should be.¹³ Indeed, no American legislature, existing under a tripartite scheme of government such as that which obtains under our Federal constitution, has any authority to abdicate or transfer to any one, the primary functions with which it has been vested by fundamental law.¹⁴ The same principle obtains in England where "an extensive delegation of legislative power would not be tolerated."¹⁵ This non-delegability of primary or predominant legislative power and responsibility, was forcibly illustrated by the fate of the historic "Blue Eagle Statute."¹⁶ The basic principle of precluding legislative shifting of responsibility, just referred to, is an outstanding characteristic of common law jurisdictions. Indeed this fundamental doctrine of English law and its derivatives, is in marked contrast to that which prevailed in the ancient Roman imperial system wherein the Senate surrendered its legislative powers to the chief executive; a practice which gave rise to the celebrated maxim of the civil law, *Quod principi placuit legis habet vigorem*. At the same time it is worthy of observation that delegation by law-enacting bodies of such secondary powers as are subordinate or auxiliary is not opposed to the practice and spirit of our system of jurisprudence. Accordingly the Middle English prefix "quasi" (as if, or about) should always be implied when analyzing cases which employ the terms "legislative" or "judicial" in the course of discussing the legal powers of administrative bodies. The primary (hence not delegable) functions of legis-

¹¹*Switchmen's Union of North America v. National Mediation Board* 64 S. Ct. 195 (1943); *Commonwealth v. Stofchek*, 322 Pa. 513 (1936).

¹²*People v. Public Service Commission*, 171 App. Div., 810 (N. Y. 1916); *Swarthmore v. Public Service Commission*, 277 Pa. 472 (1923); *Citizens Passenger Ry. Co. v. Public Service Commission*, 271 Pa. 39 (1921); *Chippewa Power Co. v. Railroad Commission*, 188 Wis. 246 (1925).

¹³*Zakus v. United States*, 64 S. Ct. 660 (1944); *Bowles v. Willington*, 64 S. Ct. 641 (1944); *Nebbia v. New York*, 291 U. S. 502 (1934); *People v. Barnett*, 344 Ill. 627 (1931); *Rohrer v. Milk Control Board*, 322 Pa. 257 (1936); *Commonwealth v. Benn*, 284 Pa. 421 (1925).

¹⁴*Currip v. Wallace*, 306 U. S. 1 (1939); *State v. Great Northern Ry.*, 100 Minn. 445, 111 N. W. 289 (1907).

¹⁵Ilbert, *Legislative Methods and Forms*, 38 (1911).

¹⁶*Schechter Poultry Co. v. Ryan*, 293 U. S. 495 (1935).

lative power comprise law-making, policy-making and taxation;¹⁷ but law reports and textbooks, to say nothing of notes and articles in legal periodicals, show that it is not always easy to differentiate between legislative and administrative power. This difficulty has been well phrased by the Supreme Court of the United States, as follows:

"While administration and legislation are quite distinct powers the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law, and fix the legal principles which are to control in given cases, but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws and in an effort to detail and particularize, they would miss sufficiency both in provision and execution."¹⁸

The sum and substance of this is that administration consist in the application of legal principles to situations of pertinent facts. As previously noted, administrative functions are either quasi-legislative or quasi-judicial as occasion may arise for their application. The quasi-legislative function involves *intra vires* filling up of necessary details of the primary standards fixed by statutory enactment. This is best effected by prescribing administrative rules and regulations. On the other hand, the quasi-judicial function is adjudicatory in character, and has to do with such matters as applications for permits, licensing or the renewal or alteration of licenses, and, in general, administrative findings and decisions upon such non-governmental activities deemed to be impressed with a public interest, as may properly come before them in the performance of their official duties. It is important that the exercise of quasi-legislative functions be consistent with and not opposed to the requirements or policy of statutory authority. It is likewise of equal importance, that in the exercise of quasi-judicial functions, administrative bodies should meet the requirements of due process and avoid the evils of abuse of discretion. Very often the standards set by the legislature for the guidance of administrative bodies are set forth in exceedingly compressed phraseology, as in the concised terms, "fair and equitable", "public necessity and convenience", "just and reasonable."

ADMINISTRATIVE DISCRETION

The proposition that a court cannot assume to substitute its discretion or notions of wisdom and expediency for the discretion of administrative or legis-

¹⁷Panama Refining Co. v. Ryan, 293 U. S. 388 (1935); Monongahela Bridge Co. v. United States, 216 U. S. 177 (1920); State v. Travellers Ins. Co., 73 Conn. 255 (1900); State v. Young, 9 N. W. 737 (Minn. 1881); West Jersey & Seashore Ry. Co. v. Public Utility Board, 87 N. J. L. 170 (1915); Mundy v. Rahway, 43 N. J. L. 333 (1885); Wilson v. Philadelphia School District, 328 Pa. 225 (1937); Locke's Appeal, 72 Pa. 491 (1873); State v. Whitney, 196 Wis. 472, 505 (1928).

¹⁸Mutual Film Corp. v. Commission, 236 U. S. 230 (1915).

lative bodies, is almost elementary.¹⁹ As a corollary to this clear-cut legal principle, we find it authoritatively adjudged that an unabused exercise of administrative discretion in the discharge of lawfully delegated powers is deemed to be non-justiciable.²⁰ Further than this it would seem that the rule that questions of law arising in administrative proceedings are reviewable by the courts²¹ is a principle having a tendency to be found unworkable, and necessarily inapplicable, wherever the solution of such problems hinges upon the employment of technical knowledge or administrative discretion.²² *Cessante ratione legis, cessat ipsa lex.* It is almost a commonplace in the science of nomology, that law is not divisible into water-tight compartments. Take for example the numerous occasions where the student comes across a ruling case universally recognized as an authority for a variety of rules of law. On the other hand, consider how many legal principles graduate into each other and thus add to the complexity of jural problems. These observations seem particularly applicable to the subject-matter of this article. In dealing with questions of administrative discretion very helpful suggestions have been made by Dr. Fritz M. Marx, who sets forth that "administrative discretion operates solely within the framework of its authorization. Each administrative act to be lawful must maintain a discernible *nexus* with the general norm conferring the discretionary power. The existence of such a *nexus* is in itself a question of law. In this criterion alone lies the distinction between lawful exercise of discretionary power and arbitrariness."²³ The plain meaning of all this is that administrative discretion is not a subject of judicial control. In the lucid phraseology of the House of Lords, exercising a discretion upon considerations of policy and practical good sense, and of course with honesty, is acting administratively.²⁴

¹⁹*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 51 (1936); *Florida v. United States*, 292 U. S. 1 (1934); *Gas Company v. McCall*, 245 U. S. 345 (1917); *Wallace v. Feehan* 206 Ind. 522 (1934); *Campbell v. New York City*, 244 N. Y. 317 (1925).

For discussion of the analogous topic of political discretion, see: *Dodd, Judicially Non-enforceable Provisions of the Constitution*, 80 U. Pa. L. Rev. 54 (1931); *McKean, Border Lines of Judicial Power*, 48 Dickinson Law Rev. 1, 9 (1943).

²⁰*Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.* 289 U. S. 206 (1933); *Virginian Ry. v. United States*, 272 U. S. 658 (1926); *Gaines v. Thompson*, 7 Wall. 347 (U. S. 1868); *Water Works v. San Francisco*, 82 Calif. 286, 314 (1890); *Borgnis v. Falk*, 147 Wis. 327 (1910); *McKean*, op. cited supra, n. (20) pp. 1, 11, 19.

²¹*Sanford's Estate v. Commissioner of Internal Revenue*, 308 U. S. 39, 52 (1939); *Perkins v. Ely*, 307 U. S. 325 (1929). With reference to questions of law, it may be noted that it is customary for courts to regard blended questions of law and fact, as issues of fact. See: *Marqueza v. Frisbie*, 101 U. S. (1879); *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 693 (Eng. 1876); *Thomas v. The King* (1938) *The Argus Law Reports* 37 (Australia).

²²*Butte, Anaconda & Pacific Ry. Co. v. United States*, 290 U. S. 127 (1933); *Williams v. United States*, 281 U. S. 206 (1930); *United States v. Lane*, 250 U. S. 549 (1919); *Interstate Commerce Commission v. Union Pacific Ry. Co.*, 222 U. S. 541 (1912); *Provident Savings Life Assurance Soc. of New York v. Cutting*, 131 Mass. 261 (1902).

²³*Comparative Administrative Law*, 87 U. of Pa. L. Rev. 954, 961 (1939).

²⁴*Leeds v. Ryder*, (1907) A. C. 420, 423 (Eng. H. L.).

PROCEDURE

History teaches that the "law of the Land" of Magna Carta, no less than the "due process of law," of American constitutional law, contemplates administrative procedure as well as judicial procedure. It follows, of necessity, that the basic requirements of this due process of law or law of the land, is the effective restraint of governmental activity of all sorts and descriptions, whether legislative, executive, judicial or administrative, to a due observance of the fundamental rights of individual liberty and private property.²⁵ In the words of a great authority on the English law of his day, "Nothing better becomes authority than that it should live by the law."²⁶ It has been judicially determined, conformably to this ancient principle, that the decisions of executive or administrative officers, acting within the limits of powers expressly conferred upon them by law, are due process of law.²⁷ Furthermore, in the words of a famous exponent of American constitutional law, the learned Mr. Justice Cooley, "administrative process of the customary sort is as much due process of law as judicial process."²⁸ Procedure, the machinery of administrative activity rather than its product, may be either summary or audient. Wherever summary action is legitimately called for, by the nature of the subject-matter, no preliminary hearing before a particular board or official is requisite. This universally accepted principle of governmental procedure is obviously an outgrowth of the fundamental law of necessity, and is illustrative of the workings of the familiar maxim, *salus populi suprema lex*. It is especially applicable in cases of public jeopardy such as threatened plague, pestilence or famine, where speedy precautionary action is of the essence of urgent or invincible necessity. Likewise, though to a lesser degree of necessity, there is an imperative necessity for expeditious administration of the tax power, a function which is unquestionably of vital importance to the maintenance of governmental efficiency. Briefly stated official summary action is lawful when actuated by the requirements of urgent public need. It must not be overlooked however, that the legality of such drastic measures may be tested by subsequent judicial review.²⁹ But wherever timeliness is of the essence of efficient protection of a community against impending danger or apprehended disaster, such measures as may be taken for coping with imminent emergencies will be approved by the courts except for very cogent reasons. In their very nature administrative hearings are on a very different footing from that of summary proceedings. Whenever a legislature creates an administrative body to

²⁵Public Service Commission v. Great Northern Utilities Co., 289 U. S. 130 (1939); *Ownebet v. Morgan*, 256 U. S. 44, 110, 111 (1921).

²⁶Bracton, *De legibus*, xvi sec. 9.

²⁷*Yamataya v. Fisher*, 189 U. S. 86, 98 (1903).

²⁸*Weimer v. Bunbury*, 30 Mich. 201, 214 (1874).

²⁹*Cf. Phillips v. Collector of Internal Revenue*, 283 U. S. 589 (1931); *Murray v. Hoboken Land & Improvement Co.*, 18 How. 272, U. S. 306 (1885); *Attorney General v. Jochim*, 99 Mich. 358, 371 (1894); *The Generous*, 2 Dod. 323 (Eng. 1818); *McKean, The Law of Necessity*, 36 Dickinson Law Rev. 237 (1932).

apply the regulatory police powers of the state, care should be taken to enjoin upon such tribunal the observance of a certain course of procedure as well as proper rules of decision in the performance of its proper functions.⁸⁰ As repeatedly pointed out in the course of this article, delegation of primary legislative power is *ultra vires*. Moreover, if it appears, that the limits of authority are too broad, an attempted delegation of power to an administrative body would be treated as a nullity.⁸¹ The essential statutory limitations upon administrative authority should be such as assure official performance of delegated duties within "bounds that are consistent with the fundamentals of individual liberty and private property;"⁸² "conformable to the language of the statutes conferring power and responsibility;"⁸³ and observant of the requirements of fair dealing.⁸⁴ In other words, strike a just and lawful balance between public and private rights. At this point it is submitted that no orders, rules, regulations, adjudications or determinations promulgated by governmental authorities should be

1. Beyond the power constitutionally exercisable.
2. Out-side the limits prescribed by statute, or
3. Based upon a mistake of law.

It seems almost unnecessary to suggest that rules and regulations laid down by an administrative body should not only be consistent with the standards and requirements imposed by statutory enactment, but in addition, such rules and regulations should furnish an appropriate and efficient means of carrying out the policy of pertinent legislation. Wherever possible, such rules should resemble statutes in so far as they should be given a reasonable, fair and prospective interpretation; but this principle of interpretation is, as intimated, only presumptive in both cases.

In order to ensure the efficient and expeditious discharge by administrative boards and commissions of the important governmental duties delegated to them by legislative bodies, it is incumbent upon the latter to fix primary standards as a goal;⁸⁵ they may then, if they deem proper, confer upon the former, full power and authority to fill up the details by the formulation of useful rules and regulations.⁸⁶ While it is true that these powers are subject to abuse, the teachings of experience support the conclusion that it is advisable to leave something to the judgment and discretion of administrative officials by empowering them to accomplish in detail, that which is authorized or required by law expressed in

⁸⁰Wichita R. R. & Light Co. v. Public Utilities Commission, 260 U. S. 48 (1922); State v. Great Northern Ry., 100 Minn. 445, 111 N. W. 289 (1907).

⁸¹Holgate Bros. Co. v. Bashore, 331 Pa. 255 (1938).

⁸²Ownebey v. Morgan, 256 U. S. 94, 110, 111 (1921).

⁸³Board of Education v. Rice (1911) A. C. 179-L. J. K. B. 796.

⁸⁴Local Government Board v. Arlidge, (1915) A. C. 120-8 L. J. K. B. 72.

⁸⁵Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).

⁸⁶United States v. Shreveport Grain & Elevator Co., 287 U. S. 577 (1902).

general terms.³⁷ Such being the case, it is not at all surprising to read in the reports that authority delegated by statute to a board or commission to make rules and regulations in order to carry out the administrative purpose of an enactment, is not void as a vesting of legislative discretion.³⁸ Further than this, the general trend of the authorities is to the effect that wherever an administrative agency adopts a rule or regulation reasonably adapted to the enforcement of a statute, the administration of which has been entrusted to it, such mandates or precepts have the force and effect of law, if not in contravention of express statute, or violative of constitutional provision.³⁹ On the other hand, we should ever be mindful of "the ancient right unnoticed as the air we breathe," that such instructions are limited in their efficacy by the fundamental principle of Anglo-Saxon systems of jurisprudence, that the rights of man are to be determined by the law itself, "Not by the let or leave of bureaus." For it cannot be gainsaid that "arbitrary power and the rule of the Constitution cannot both exist," as was clearly shown by the United States Supreme Court in the case of *Jones v. Securities and Exchange Commission*.⁴⁰ In almost every paragraph of this article it may be observed that two questions present themselves as having a direct bearing upon the validity of administrative proceedings. The first of these deals with the legality of the power exercised. The second question is concerned with the requirements of due process. It is submitted that the reasonableness and appropriateness of the means employed to attain a governmental objective is an important factor in weighing questions of administrative due process. Oddly enough, it is sometimes found necessary for appellate courts to explain that official regulation by an administrative body does not amount to the general powers of ownership.⁴¹ Mistakes of such a character are ordinarily the outcome of inexperience rather than of highhandedness; and are seldom perpetrated by veteran civil servants. In general there are numerous governmental usages and practices so firmly established by common experience as to constitute due process of law, and be implied as such in American constitutions.⁴² This characteristic feature of American law is in line with an important canon of interpretation of the language of American constitutions to the effect that resort may be had to the common law of England, and its history, as aids to elucidation.⁴³

³⁷Red "C" Oil Manufacturing Co. v. Board of Agriculture, 222 U. S. 380 (1914); *Petition of State ex rel. Attorney General and others*, 220 Wis. 25 (1936).

³⁸*Manhattan General Equipment Co. v. Commission*, 297 U. S. 129 (1936); *First National Bank v. Attorney General*, 244 U. S. 416 (1918); *State v. Normland*, 76 N. H. 541 (1913).

³⁹*Maryland Casualty Co. v. United States*, 251 U. S. 342 (1926); *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, 234 U. S. 476 (1913); *Morrill v. Jones*, 106 U. S. 466 (1885).
⁴⁰298 U. S. 1 (1936).

⁴¹*State v. Public Service Commission*, 262 U. S. 276 (1923); *Public Utilities Commission v. Springfield Gas & Electric Co.*, 291 Ill. 209 (1920).

⁴²Ponderous text-books entitled "Due Process of Law," embody much valuable information on the validity of governmental usages.

⁴³*Ex parte Grossman*, 267 U. S. 87, 161 (1925); *Ex parte Swartwout*, 4 Cr. 93 (U. S. 1807); *Wulzen v. Board of Supervisors*, 101 Calif. 15 (1894), *semble*; *Jacksonville v. Bowden*, 67 Fla. 176 (1914), *semble*; *Attorney General v. Jochim*, 99 Mich. 368 (1894).

ORDERS AND ADJUDICATIONS

It is noticeable that the authority which administrative boards and commissions possess to make official rules and regulations, extends to the making of orders and adjudications. Specifically it is not a delegation of legislative powers, for a law-enacting body to vest an executive officer, an administrative board, commission or other governmental agency, with authority to find facts and make orders consistent with the statutory standards imposed by legislative enactment.⁴⁴ Conversely, it is logical and inevitable that an administrative order or adjudication out of harmony with statutory authority would be deemed a nullity. Legal standards must be observed, and should not be violated or neglected by irresponsible, arbitrary or capricious conduct on the part of any functionary in an English-speaking community. Reasonable application of delegated power should be the first consideration of administrative agencies. It is generally taken for granted that such is the case, consequently the familiar presumption that public officers, is in all likelihood conducive to the rule of the common law that an order of a board or commission is ordinarily dealt with as *prima facie* evidence that the proceedings resulting therein were conducted in accordance with law.⁴⁵ For the most part an administrative order has recognized finality.⁴⁶ Unless:

1. Issued beyond the limits of power which it could constitutionally exercise.⁴⁷
2. Overstepping the limits of statutory authority.⁴⁸
3. Lacking sufficient sustaining evidence.⁴⁹
4. Based upon a mistake of law.⁵⁰

Ideal administrative adjudication would be fair and reasonable; and not only rest upon lawful authority but in addition be supported by rational and credible evidence. At all times when the jurisdictional problem arises, whether a statute is intended to establish a rule of law, and thus define the duty of a tribunal, or is meant to limit its power, the solution of such difficulties is a matter of construction and common sense.⁵¹ It is interesting to note that the prerogative writs which have played an important part in the development of the common law of England, have been derived from administrative orders.⁵²

⁴⁴Coleman v. Miller, 307 U. S. 433 (1939); Holgate Bros. Co. v. Bashore, 331 Pa. 255 (1938); Rohrer v. Milk Control Board, 322 Pa. 257 (1930); Commonwealth v. Benn, 284 Pa. 421 (1925).

⁴⁵Scranton v. Public Service Commission, 80 Pa. Super. 549 (1923); Jenkins Township v. Public Service Commission, 65 Pa. Super. 122 (1916).

⁴⁶Federal Power Commission v. Natural Gas Pipeline Co., 575, 586 (1942).

⁴⁷St. Joseph's Stock Yard v. United States, 298 U. S. 38 (1936); Crowell v. Benson, 285 U. S. 22 (1932); Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920).

⁴⁸Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194 (1912).

⁴⁹Atchinson, Topeka & Santa Fe Ry. Co. v. Commerce Commission, 335 Ill. 624 (1929). Its investigation should not be too narrowly constrained by technical rules as to the admission of proof. Interstate Commerce Commission v. Baird, 194 U. S. 25 (1904).

⁵⁰Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541 (1922).

⁵¹Fauntleroy v. Lum, 210 U. S. 230 (1908).

⁵²Plucknet, A Concise History of the Common Law (2d ed.) 156 (1936).

EVIDENCE

It goes without saying that findings of fact are of great moment in administrative jurisprudence. Although a statute may make such findings by a board or other governmental agency conclusive,⁵³ a finding of fact where there is no competent legal evidence whatever to support it, is an error of law;⁵⁴ and such an error is in substance a denial of due process.⁵⁵ In general, findings of fact bear a close analogy to those of a chancellor (originally an administrative officer), in that they have the force and effect of a verdict, they should not be disturbed if there is adequate, competent evidence to support such conclusions of fact.⁵⁶ At the same time it must not be overlooked that conclusions bearing upon jurisdictional facts raise questions of law, and consequently may be re-examined by legal tribunals.⁵⁷

Caustic critics have characterized many rules of evidence of common law jurisdictions as "admirably adapted to the exclusion of truth." However this may be, it should be freely acknowledged that many rules of evidence are fundamentally adversary, and insofar as they are the peculiar product of the jury system may be regarded as inapplicable to the administrative process. Consequently it has been decided that administrative tribunals are not bound by the stringent rules of evidence which obtain between private parties such as strict correspondence between allegation and proof.⁵⁸ Nevertheless it should not be overlooked that "the rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power."⁵⁹ And furthermore substantial evidence does not support an administrative finding where the conclusion drawn therefrom is arbitrary or confiscatory.⁶⁰ A rational basis for a finding is substantial evidence;⁶¹ and if it is ample to sustain findings of fact, the latter are regarded as conclusive.⁶² In other words, "the factual approach" of non-judicial tribunals is not clogged by obstructive technicalities such as those illustrated in M. D. Post's "Strange Schemes of Randolph Mason." At the same time there is, and should be, no hesitation on the part of the courts to reverse administrative findings which are not sustained by substantial evidence.⁶³ And

⁵³*Poluskiewsz v. Philadelphia & Reading Coal & Iron Co.*, 257 Pa. 305 (1917).

⁵⁴*United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 289 (1924); *McCauley v. Imperial Woolen Co.*, 261 Pa. 312, 319 (1918).

⁵⁵*Northern Pacific Ry. Co. v. Department of Public Works*, 268 U. S. (1925).

⁵⁶*Compare: Louisville & Nashville Ry. Co.*, 245 U. S. 463 (1918).

⁵⁷*Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 518 (1910).

⁵⁸*Interstate Commerce Commission v. Baird*, note (49) *supra*.

⁵⁹*National Labor Relations Board v. Thompson Products Inc.*, 97 F (2d) 13, 15 (C. C. A. 6th 1938).

⁶⁰*Denver Union Stockyards Co. v. United States*, 304 U. S. 470 (1938); *St. Joseph's Stock Yards Co. v. United States*, 298 U. S. 38, 51 (1936).

⁶¹*United States v. Lowden*, 308 U. S. 225 (1939); *Rochester Telephone Co. v. United States*, 307 U. S. 125, 146; *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 28 (1934).

⁶²*Louisville & Nashville R. R. Co. v. United States*, 245 U. S. 463 (1918).

⁶³*National Labor Relations Board v. Waterman Steamship Corp.*, 319 U. S. 206 (1940); *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292 (1932).

in addition to the type of shortcoming just particularized, the failure or omission of an administrative agency to take into consideration factors and circumstances which a judicial tribunal conceives should be taken in to account and weighed with care, is in like manner regarded as legal error, and may lead to a reversal of an administrative order.⁶⁴ Further than this, it is almost elementary in American jurisprudence, that even a legislative body lacks constitutional power to make a determination by an administrative tribunal so decisive and conclusive as to bar an appropriate review by a judicial tribunal of a finding made without evidence to support it.⁶⁵ William Penn's maxim that power without justice is tyranny seems pointedly applicable in questions of administrative procedure. Accordingly, it is not to be overlooked that a refusal to receive important additional testimony offered without undue delay, is not only unreasonable and arbitrary, but in addition, a flagrant abuse of discretion.⁶⁶ Stated axiomatically, an administrative agency's conclusions of fact should not be reviewed by a court, except where such findings violate a law of the land. For the most part questions relating to the admissibility and weight of evidence in executive or administrative proceedings, should be measured by the standard requirements of constitutional law and usage, and not by blind adherence to precedents which have originated in cases of trial by jury. At this juncture, it may be considered worth while to remark, that it has not been found feasible, in the course of working on this article, to isolate or segregate the subject-matter of the several topics touched upon, so as to preclude frequent recurrence of accompanying, component, or modificatory principles, necessarily and almost unavoidably employed in the process of clarifying or completing a statement of propositions under discussion. For this reason there may be found in the course of this article many re-appearances of what a casual reader might consider uncalled for repetitious material. Returning to a consideration of the topic of evidence, it is manifest that much of the law on that subject, so far as it pertains to inquisitorial procedure, is mainly concerned with questions of its relevancy and materiality from the view-point of the legitimate requirements of delegated authority. In other words, "an official inquisition to compel disclosure of fact is not an end, but a means to an end, and it is a mere truism to say that the end must be a legitimate one to justify the means."⁶⁷ Ends or goals of attempted judicial or administrative inquisition which have been universally adjudged illegitimate in American jurisdictions, include

1. Compulsory self-accusation.⁶⁸

⁶⁴*Interstate Commerce Commission v. Railway Labor Executives' Association*, 315 U. S. 373 (1942); *Standard Oil Co. v. United States*, 283 U. S. 235 (1931); *Illinois Central Railway Co. et al. v. Interstate Commerce Commission*, 206 U. S. 441 (1907).

⁶⁵*Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920).

⁶⁶*Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197 (1938).

⁶⁷*Jones v. Securities and Exchange Commission*, 298 U. S., 1, 25-6 (1936).

⁶⁸United States Constitution, fifth Amendment; and, by necessary implication, Fourteenth

2. Unlawful searches and seizures.⁶⁹
3. Unlawful inquisitorial investigation, i. e. where the interests of justice do not require it.⁷⁰
4. Divulging of privileged communications; which is a very narrow field, in common law countries.⁷¹
5. Betrayal of secrets of state.⁷²
6. Unfair admission of hearsay.⁷³ McKelvey's masterly elucidation of the general rule against hearsay may be profitably quoted at this point. It is as follows:

Statements, oral or written, made by persons not parties to the suit, and not witnesses therein, are not admissible to prove the truth of the facts stated, except in two classes of cases:

- (a) Where they are rendered necessary by the difficulty of other proof.
 - (b) Where the circumstances under which they are made furnish some guaranty of their reliability, other than the mere fact of their having been made.
7. Findings made without affording adequate opportunity for a sufficient hearing.⁷⁴
 8. Arbitrary, oppressive or tyrannical control.⁷⁵

Stated affirmatively, whenever an administrative board or commission has accorded a fair hearing, has made proper findings of fact, and has met all applicable statutory requirements, the courts are powerless to intervene, in the absence of a clear showing showing that the limit of due process has been overstepped.⁷⁶ In a word, this resolves into two questions, existence of power and due process in its exercise. Ordinarily all that is required of administrative

Amendment, Section 1.

⁶⁹Federal Trade Commission v. American Tobacco Company, 264 U. S. (1924).

⁷⁰Huessener v. Fishel & Marks Co., 281 Pa. 535 (1924). This and similar legal errors could be avoided by scrupulously taking care to keep questionings within reasonable bounds as to time consumed and range of inquiry (See 2 Jones, Commentaries on Evidence, 2d ed.) p. 1087.

⁷¹5 Jones, Commentaries on Evidence (2d ed.) p. 4236.

⁷²Appeal of Hartranft, 85 Pa. 433 (1877).

⁷³Engelbretson v. Industrial Commission, 151 Pac. 421 (Calif. 1915); Baker v. Freed, 138 Pa. Super. 315 (1940).

⁷⁴Acker v. United States, 298 U. S. 426 (1936); Southern Ry. Co. v. Commission, 290 U. S. 190 (1933); Ballard v. Hunter, 204 U. S. 241 (1907).

⁷⁵West v. Chesapeake & Potomac Tel. Co., 295 U. S. 622 (1935); Public Service Commission v. Great Northern Utilities Co., 289 U. S. 130 (1933); Interstate Commerce Commission v. Louisville & Nashville Co., 227 U. S. 88 (1912); Carroll v. Knickerbocker Ice Co., 218 N. Y. 435 (1916); McCauley v. Imperial Woolen Co., 261 Pa. 312 (1918).

⁷⁶Federal Power Commission v. Natural Gas Co., 315 U. S. 575, 586 (1942); Sunshine Anthracite Co. v. Adkin, 310 U. S. 381 (1940); Florida v. United States, 292 U. S. 1, 12 (1934); Public Service Commission v. Great Northern Utilities Co., 289 U. S. 130 (1933); New York v. Public Commission, 245 U. S. 345 (1917).

agencies is competent and conscientious discharge of official duty. It is almost superfluous to observe, that in the absence of prejudicial error, findings made where there is sufficient competent testimony to support them in convincing fashion, will receive judicial approval.

PRECEDENTS

The old saying that "hard cases make bad law," which is at the basis of the familiar *stare decisis* maxim of the common law, does not apply to the decisions of administrative agencies. Such non-judicial tribunals, (whose orders have been described as in the nature of mandatory injunctions), are expected to decide cases on their merits; provided always that such decisions be liable to court review, in proper cases, where the scope of delegated authority and power, or the legality of exercise thereof be questioned. Or, as recently expressed by the United States Supreme Court, "Determination of what is 'fair and equitable' (in a statute) calls for the application of ethical standards to particular sets of facts. But these standards are not static. In evolving standards of fairness and equity a board or commission is not bound by any settled judicial precedents."⁷⁷ As a rule, "the function of an administrative body is to get something done. * * * It must seek a practical solution for one case rather than a rule for all cases."⁷⁸ Even handed justice and equity in the widest sense of the word is what is called for by these authorities. While courts of law may be held down to observance of the ancient rule that "the law will rather suffer a particular mischief than a general inconvenience;"⁷⁹ it is, as previously suggested, not incumbent upon non-judicial tribunals to feel themselves fettered by such a doctrine. On the contrary, in the words of the learned Alexander Stephens:

"The great object of Government should be * * * to secure the greatest possible good to every member of society, without INJURY to any. No ninety-nine persons, whatever, have any natural right to advance their interest or good, by inflicting an uncompensated injury to the hundredth, or in any other proportion."⁸⁰

IMPEDIMENTS TO INJECTING CONSTITUTIONAL ISSUES

Questions of constitutionality may be raised by parties in interest only;⁸¹ and even then only where essential to the determination of a case.⁸² Irrelevancies are not favored in British or American jurisdictions. Promptness in the assertion of constitutional rights is very important, for it is well settled that such rights

⁷⁷Securities & Exchange Commission v. Chenery Corporation, 318 U. S. 80, 89 (1943).

⁷⁸Dickinson, "Administrative Justice and the Supremacy of Law," 235 (1927).

⁷⁹Cox v. Rolt, 2 Wils. K. B. 253 (Eng. 1764).

⁸⁰16 American Bar Association Journal 331 (1930).

⁸¹State v. Becker, 328 Mo. 541 (1931).

⁸²McKean, Border Lines of Judicial Power, 48 Dickinson Law Review, (1943).

may be forfeited by failure to make timely assertion thereof before a tribunal having jurisdiction to determine them.⁸³ It may be recalled, parenthetically, that no board or other administrative tribunal is the final arbiter of its own jurisdiction.⁸⁴ To hold otherwise would be to violate the basic rule of Anglo-Saxon jurisprudence that questions of power are for the judiciary, and that any administrative conclusions as to jurisdictional facts may be examined by legal tribunals.⁸⁵ Another elementary principle of American and English law, sometimes overlooked or forgotten, is the important rule that an administrative body cannot lawfully add to or subtract from the terms of a legislative enactment under which it makes its rulings.⁸⁶

CONCLUSION

In closing this dissertation, attention is invited to the increasing number and growing importance of administrative agencies. The prestige and serviceability of these governmental instrumentalities largely depend upon the character and ability of their members; and it goes without saying that anything which has a tendency to impair the efficiency and weaken the *morale* of administrative officers, is a menace to the cause of good government. These almost platitudinous comments would be unnecessary, were it not obvious to the most casual student of partisan political expedients, that it sometimes comes to pass, that a chief executive contrives to gain control of appointive administrative boards and commissions, by procuring undated letters of resignation from his several nominees, as a condition precedent to their induction. This species of political *finesse* may be forestalled by legislation creating quasi-legislative or quasi-judicial agencies independent of executive control.⁸⁷

⁸³*Yakim v. United States*, 64 S. Ct. 660 (1944); *Southern Ry. Co. v. King*, 217 U. S. 524 (1910); *O'Neil v. State of Vermont*, 144 U. S. 323 (1892).

⁸⁴*Interstate Commerce Commission v. Humboldt Steamship Co.*, 147 U. S. 165 (1893).

⁸⁵*Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 518.

⁸⁶*United States v. Standard Brewery Inc.*, 251 U. S. 210, 220 (1920); *Mayo v. Western Union Telegraph Co.*, 112 N. Car. 343 (1893); *Bacon v. Boston & Maine R. R.*, 83 Vt. 421 (1910).

⁸⁷*Rathbun v. United States*, 295 U. S. 602 (1935).