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Administrative Decisions and Court Review Thereof, in California

D. O. McGovney

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I

ADMINISTRATIVE ADJUDICATION

THE POLITICAL MAXIM that to avoid tyranny the executive, the legislative and the judicial functions of government should be lodged in separate hands, so persuasively publicized by Montesquieu in the middle of the eighteenth century, has been accepted either expressly or by implication as a fundamental in every American constitution. Americans today do not doubt its soundness as a broad general principle. When a statute which violates the principle is challenged in appropriate judicial proceedings, it is undoubtedly the duty of the court to hold it unconstitutional and inoperative. The rub comes, however, in ascertaining the true scope or meaning of the principle.

The Massachusetts Constitution adopted in 1780 expresses the principle with an appearance of exactitude:

"In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."[1]

The Constitution of California adopted ninety-nine years later declares:

"The powers of the government of the State of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted."[2]

*Professor of Administrative and Constitutional Law, University of California; A.B., Indiana University; M.A., Harvard University; LL.B., Columbia University. Author of CASES ON CONSTITUTIONAL LAW (2d ed. 1935), MATERIALS FOR THE STUDY OF ADMINISTRATIVE LAW (1940), and of articles in legal periodicals.

[1] Part the First, art. XXX.

[2] Art. III, § 1.

Neither of these constitutions purports to define executive powers, judicial powers or legislative powers. Indeed the California Constitution frankly admits lack of definition by using the words "powers *properly* belonging to one of these departments."

If these broadly stated maxims of American constitutions had been construed as requiring every official act, official function or phase of official activity to be classified as belonging to a single one of the three categories and assigned exclusively to an officer or group of officials of the department that is tagged with the name of that category, thousands of statutes now in force and of unquestioned validity would be unconstitutional. If, I say, it is always unconstitutional to vest in an officer of one of the three departments the doing of any part of the activity or function that has been done traditionally by officers in another of the three, government becomes practically impossible. Let me illustrate concretely. Courts, time out of mind and inescapably, have decided disputed issues of fact. No one would deny that the decision of disputed issues of fact is a judicial function. Does it follow that it is unconstitutional for the legislature to vest in an administrative officer the decision of disputed issues of fact? Would the statute be more clearly unconstitutional if it made the officer's decision of a disputed question of fact final? The reasoning of the Supreme Court of California in its recent opinion in *Drummey v. State Board of Funeral Directors and Embalmers*[3] assumes the answer to the last question to be, yes! The opinion discusses the statutory powers of the State Board of Funeral Directors and Embalmers. The statute authorized the Board to suspend or revoke the license of any person engaged in either of the callings mentioned, "after proper hearing", if it found him guilty of certain specified misconduct.

The court said:

"We are here dealing with a statute which confers certain fact-finding powers on the board, with no indication that the legislature intended the facts so found to be binding on the courts, and, upon acertaining the facts, the board is authorized to cancel or suspend the license theretofore possessed by the person charged.... If it should be held that the board's action in canceling or suspending an existing license is binding on the courts, if such action is predicated on conflicting evidence, we would be necessarily holding that such board is exercising at least *quasi*-judicial powers. It is the essence of judicial action that finality is given to findings based on

[3] (1939) 13 Cal. (2d) 75, 87 P. (2d) 848.

conflicting evidence. If the statute be so construed it would violate the state Constitution."[4]

The court makes clear that it is speaking only of administrative boards or officers whose authority is state-wide. It has a different doctrine, as we shall see, with respect to boards or officers whose authority is local, that is, confined to a city or county. The court says that vesting finality of fact finding in an administrative board of state-wide authority violates article VI, section 1 of the California Constitution which vests "the judicial power of the State" in specified "courts"—"a supreme court, district courts of appeal, superior courts." The argument is that finality of decision of disputed issues of fact is a judicial function, a part of the "judicial power" vested by the constitution in named courts, and therefore the legislature cannot vest it elsewhere. Article VI, section 1, thus presents the very same problem as the separation of powers principle declared in article III. The question recurs, does this vesting of "judicial power" in specified courts mean that the legislature cannot authorize any other officer to do anything that is like any part of what the courts do in exercising "judicial power"? If the answer is yes, the court's reasoning extends to fact finding without finality as well as to fact finding with finality. A trial court is undoubtedly exercising a judicial function when it makes a finding of fact on conflicting evidence even where its finding is not final but is subject to complete review in an appellate court. From this reasoning it would follow that the numerous instances in which the statutes of the state vest fact-finding power in administrative boards or officers of state-wide authority, with varying degrees of finality, are all unconstitutional. Decision of disputed issues of fact, so-called fact finding, is an absolute essential in almost every one of the great variety of administrative activities authorized by the statutes of this state.

It is true that the court did not *hold* that the statute which authorized the Board to decide issues of fact arising in the exercising of its licensing powers was unconstitutional, but it laid down the quoted dictum as its major premise in arriving at what it did decide. The thought expressed in the dictum seems to be at the bottom of the court's reasoning in this and other recent opinions which have thrown confusion into the law of the state with respect to court review of the decisions of administrative officers.

[4] *Ibid.* at 84, 87 P. (2d) at 853.

Let us take a step further. In *Standard Oil Co. of California v. State Board of Equalization*[5] the company petitioned the California Supreme Court to review by certiorari a decision of the Board of Equalization. The Retail Sales Tax Act levies a percentage tax on the gross proceeds of retail sales made in the state. The statute authorized the Board to give a hearing to any taxpayer suspected of omitting from his return any part of his taxable sales, and upon its finding of a shortage, to levy an additional assessment. In such a proceeding against the Standard Oil Company of California the only issue raised at the Board's hearing was whether certain sales of products which the buyer intended to ship out of the state were so transacted as to make them interstate commerce sales, and therefore immune from the tax, both by express provision of the statute and by the Commerce Clause of the National Constitution. The Board decided this difficult question of law against the company and the latter sought a review of this decision in the state supreme court by writ of certiorari, a procedure expressly authorized by the statute. The court held that the statute, so far as it authorized this review in the supreme court by certiorari, was unconstitutional, and declined to review the Board's decision. The supreme court said that article VI, section 1 of the constitution, in giving it jurisdiction to issue the writ of certiorari, meant certiorari of the scope it was regarded as having in California in 1879 when the constitution was adopted. This, it said, was disclosed by section 1068 of the Code of Civil Procedure of 1872, which limited the use of this writ to reviewing decisions of "an inferior tribunal, Board, or officer, exercising *judicial functions*."[6] Now, said the court, article VI, section 1 vests the "judicial power" of the state in certain named courts, and the Board of Equalization is not one of them—indeed it is not a court at all—therefore, the Retail Sales Tax Act is unconstitutional if it vests a judicial function in the Board, therefore we cannot *call* the function vested in the Board a judicial function, and therefore we cannot review its decision by writ of certiorari. *Q.E.D.*

The court said:

"Concisely stated, our conclusion that we are without authority or jurisdiction to entertain this proceeding or to issue the writ here sought, is based upon the established premises that a writ of *certiorari*, commonly referred to as a writ of review, will lie only to review the exercise of judicial

[5] (1936) 6 Cal. (2d) 557, 59 P. (2d) 119.

[6] Italics added.

functions (sec. 1068, Code Civ. Proc.) and that the legislature is without power, in the absence of constitutional provision authorizing the same, to confer judicial functions upon a state-wide administrative agency of the character of the respondent."[7]

At the end of its opinion the court reiterates this point of view by saying:

"To hold that judicial power has been conferred upon the respondent board would be tantamount to holding such attempted grant unconstitutional to that extent. We think it was not intended by the legislature to confer any judicial power on the respondent board and it necessarily follows that this proceedings for a writ of review lacks one of the elements essential to its proper determination."[8]

The court did not stop to analyze the functions which the statute had conferred on the Board. It said, mechanically, that since the constitution, as we interpret it, forbids the legislature to confer "judicial functions" on the Board, its functions, whatever they are, are not "judicial functions". Judge Raymond E. Peters, speaking extra-judicially, has stated that this "reasoning ... is impregnable as an academic proposition."[9] Not so in any academy I know of! If it is a rule of the household that Georgie shall have all the white marbles and Jimmie all the black ones, it does not follow as a logical necessity that a marble Jimmie has got hold of is a black marble. To say so is not to reason at all. It is more charitable to believe that the court saw that the function the Board had exercised, the decision of a disputed question of law, was a judicial function, because if it is not, it would be difficult to find one that is. The court thought it was under a constitutional compulsion, however, to *say* that the function in question was not judicial. Implicit in the court's statement is a premise that it would be unconstitutional to vest in an administrative officer or board of state-wide authority the decision of a disputed question of law.

This fundamental premise which drives the court to its conclusion, if sound, would be more fatal to the administrative machinery of the state than is the court's declaration that finality in fact finding cannot be vested in administrative boards or officers of state-wide authority. Administrative officers can function even though their fact

[7] *Supra* note 5, at 559, 59 P. (2d) at 119.

[8] *Ibid.* at 565, 59 P. (2d) at 122.

[9] *Review of Administrative Board Rulings Limited to Writ of Mandate* (1939) 14 CAL. ST. BAR J. 313, 314.

finding is not final, but they cannot function without deciding questions of law. Take, for example, the many, many statutes that vest licensing powers in administrative officers. These statutes usually prescribe the qualifications or conditions which entitle an applicant to a license. A duty is imposed to grant a license if on the law and the facts the applicant is entitled to it, and to refuse it if he is not. Inescapably the licensing authority must interpret the statute to determine the statutory requirements. In doing so it obviously decides issues of law and these may be contested issues. Inescapably also, the licensing authority must decide issues of fact, weighing the evidence to determine whether the facts are established that satisfy the statutory requirements. If the supreme court's dicta are a sound interpretation of the constitution, all these license statutes are unconstitutional, for they vest power and duty in non-judicial officers to decide questions of law and fact. Consider the alternatives if these statutes were unconstitutional. Either all powers to grant, refuse, revoke, or suspend licenses must be vested in courts, or when vested in administrative officers, these officers must be authorized to grant, refuse, revoke or suspend licenses at their mere whim or personal pleasure unrestrained by law or fact.[10] In short, administrative licensing officers must be made arbitrary dictators in California, for if they are to make their decisions in accordance with the law and the facts, they are unconstitutionally exercising judicial functions! Not only do tax assessing officers and officers exercising licensing power have to decide questions of law and fact as a basis for their official action but so do others exercising many other kinds of authority.

Take two minor instances found in the Agricultural Code. A state bee inspector may inspect any apiary and if he finds any colony "diseased", that is, having any of the diseases condemned by the statute, he may order the owner to eradicate the disease. The owner may appeal to the director of agriculture for a laboratory diagnosis, and "the written determination setting forth the findings of such diagnosis is final proof of the nature of the disease.[11] This is adjudication of the disputed issue of fact in the best manner, that is, by

[10] Statutes resorting to the second alternative above, vesting such arbitrary dictatorial power, have sometimes been sustained with respect to licensing of "bad businesses", such as selling intoxicants or conducting public dance halls, but are condemned when applied to licensing of "useful" business occupations, or callings, as arbitrary and a denial of due process of law. Numerous cases on this question are collected in Notes (1921) 12 A.L.R. 1435; (1928) 54 A.L.R. 1104; (1934) 92 A.L.R. 400.

[11] CAL. AGRIC. CODE §§ 277, 280.

impartial experts. Moreover, the inspector and the director must decide the issue of law, if it is raised, whether a disease found is one that the law requires the owner to eradicate.

An extreme example of administrative adjudication is that provided for the destruction of plants being shipped into the state that are found infected with any plant "pest" as that is defined by statute. "When any shipment of plants brought into this State is found infested . . . the shipment shall be immediately destroyed by . . . the officer inspecting the same, at the expense of the owner or bailee thereof . . ." unless (1) the nature of the pest is such that the plants may be shipped back out of the state without injury to agriculture in this state, or (2) the pest may be eradicated by treatment without harming agriculture in this state.[12] Here an inspector adjudicates on the "real evidence" that he observes by inspection. In some cases he may act without notice to the owner, without giving him a hearing, and yet it is well established that this is due process of law in the circumstances.[13] The inspector not only renders judgment on the law and the facts but he executes his own judgment. However summary this procedure, it is the same kind of adjudication as that made by a judge who inflicts a contempt penalty on a person whose disorderly conduct in the courtroom has disturbed the proceedings of the court. The judge may act upon the evidence perceived by his own senses, and without hearing or argument. The one is an adjudication on the law and the facts as well as is the other.

A day spent in roaming through the statutes would disclose powers vested in administrative officers that upon analysis are plainly adjudicating powers in number and variety to astonish one who has never interested himself in such phenomena. In some instances a board or officer is required by statute to give a formal hearing, with power to subpoena witnesses, the parties to be represented by counsel, with right to cross-examine witnesses, in fact, all the machinery of adversary judicial procedure, the upshot being an administrative judgment, commonly called an administrative order. In essence these are just more formal adjudications of law and fact than are the instances of summary procedure given above.

It is commonplace to say that instances of giving such powers to

[12] *Ibid.* § 115.

[13] Lawton v. Steele (1894) 152 U. S. 133; North American Cold Storage Co. v. Chicago (1908) 211 U. S. 306; and other cases collected in McGovney, Cases on Constitutional Law (2d ed. 1935) 1033-1040 and notes.

administrative officers have multiplied with increasing rapidity during the last sixty years. The simplest American government of the eighteenth century, however, necessarily did so to some extent. One illustration should suffice. Eighteenth century governments levied taxes. In case of an *ad valorem* tax, a percentage of value, the ascertaining of value was usually a function of administrative officers. These officers decided all disputed issues of fact. Moreover, the Supreme Court of the United States long ago held that due process of law was accorded by a statute which made the administrative assessment of value absolutely final, unreviewable by any judicial proceeding, provided the taxpayer was given an opportunity to be heard by the administrative officers.[14] Suppose that the tax levied was specific. Levy of a specific tax seems at first thought almost mechanical or automatic. Suppose it was a tax of one dollar on every head of cattle. Issues of fact arose. How many cattle had Smith? Issues of law arose. Was Smith the owner of the black bull? This might have turned on a question of law, simple or difficult, the law of gifts *inter vivos,* the law of wills, or the law of sales, dependent upon how Smith was supposed to have acquired title to the bull.

Thus, in the simple governments of the eighteenth century, administrative adjudication of law and fact was inevitable. How can these actual facts of governmental practice be squared with the principle of separation of powers? Obviously they cannot be if that principle means that administrative officers may not be authorized to perform any of the operations that courts traditionally have performed. Something, obviously, is wrong with an interpretation that reads into a constitution a prohibition of an inveterate and inescapable practice of government. Whatever the words of a constitution, they could not have been intended to produce such a result.

The earliest and most authoritative exposition of the meaning of the principle of separation of powers is that of James Madison in *The Federalist* (1788). Madison discussed the principle as it was expressed in several of the state constitutions of his day and defended the Constitution of the United States against the charge that it did not fully comply with the principle. He said, the principle requires no more than that "the *whole* power of one department" shall not be exercised "by the same hands which possess the *whole* power of

[14] State Railroad Tax Cases (1875) 92 U. S. 575, 616; Davidson v. New Orleans (1877) 96 U. S. 97.

another department."[15] The Constitution of the United States gives the executive a qualified veto over the legislature, as much a legislative function as is the "negative" each branch of the legislature has over the other, as it was commonly expressed in the eighteenth century. So the executive participates in law making by negotiating treaties that become the law of the land when ratified by one branch of the legislature. Madison might have referred to the power given courts to make law. A court may reverse today what yesterday it held the law to be. Obviously it has a power to make and unmake law.[16] The abstraction that a court only declares what the law is flies in the face of reality. The Constitution makes one branch of the legislature a court to try impeachment of officers, and the other branch the prosecutor, though prosecution in other cases is vested by Congress in the Attorney General and his subordinates, all in the executive department. The Constitution expressly recognizes that the function of appointment to office is not exclusively a function of a single department. Congress is authorized to vest the appointment of "inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments,"[17] while one branch of the legislature participates with the executive in the appointment of superior officers.

Madison said that these provisions were not *exceptions* inconsistent with the principle of separation of powers, but that they were thoroughly consistent with that principle,[18] which does not forbid partial overlapping and allows one department to have a check upon another, and permits other inter-relations and cooperations between departments.[19]

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[15] THE FEDERALIST, No. XLVII.

[16] "To make a rule of conduct applicable to an individual who but for such action would be free from it is to legislate—yet it is what the judges do whenever they determine which of two competing principles of policy shall prevail." Holmes, J., dissenting opinion in Springer v. Government of the Philippine Islands (1928) 277 U. S. 189, 210. See GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1921) *passim*.

[17] U. S. CONST. Art. II, § 2.

[18] "What I have wished to evince is, that the charge brought against the proposed Constitution, of violating the sacred maxim of free government, is warranted neither by the real meaning annexed to that maxim by its author, nor by the sense it has hitherto been understood in America." THE FEDERALIST, No. XLVII.

[19] "... unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." *Ibid.* No. XLVIII.

"... by so contriving the interior structure of the government as that its several

More than a century after Madison, legal scholars summed up as follows:

"That doctrine embodies cautions against tyranny in government through undue concentration of power. The environment of the Constitution, the debates at Philadelphia, the writings in support of the adoption of the Constitution, unite in proof that the true meaning which lies behind 'the separation of powers' is fear of the absorption of one of the three branches of government by another. As a principle of statesmanship the practical demands of government preclude its doctrinaire application. The latitude with which the doctrine must be observed in a work-a-day world was steadily insisted upon by those shrewd men of the world who framed the Constitution and by the statesman who became the great Chief Justice. . . .

"In a word, we are dealing with what Sir Henry Maine, following Madison, calls a 'political doctrine,' and not a technical rule of law. Nor has it been treated by the Supreme Conrt as a technical legal doctrine. From the beginning that Court has refused to draw abstract, analytical lines of separation and has recognized necessary areas of interaction."[20]

In 1825 the Supreme Court in an opinion by Chief Justice Marshall[21] discussed the validity of two acts of Congress. One vested in the federal courts power to make rules governing practice in the courts. The other vested in the courts power to make rules governing the execution of judgments. Each, said Marshall, is a "delegation of legislative power".[22] "It will not be contended," said he, "that these things might not be done by the legislature, without the intervention of the courts;"[23] yet Congress could constitutionally authorize the courts to do them.

"It will not be contended, that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[24]

Marshall found this latitude in a Constitution that in all respects material to this discussion parallels the constitution of California.

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constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." Hamilton or Madison, *ibid.* No. LI.

[20] Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers* (1924) 37 HARV. L. REV. 1010, 1012, 1014.

[21] Wayman v. Southard (1825) 23 U. S. (10 Wheat.) 1.

[22] *Ibid.* at 47.

[23] *Ibid.* at 43.

[24] *Ibid.* at 42.

The principle of separation of powers is expressly declared in the latter, and exists in the former by Supreme Court interpretation, with equal vigor in the sense that any statute vesting powers inconsistently with the principle is unconstitutional.[25] The one vests "all legislative powers herein granted" in the Congress; the other vests "the legislative power of this State" in the legislature. The one vests "the judicial power of the United States" in courts; the other vests "the judicial power of the state [partly] in the Senate, sitting as a court of impeachment," and the remainder in courts.[26]

The opinion of the United States Supreme Court, quoted above, was the beginning of a long line of decisions establishing the rule that Congress may delegate a part of its legislative power to others, including executive or administrative officers. Perhaps the clearest case is *United States v. Grimaud*.[27] Congress authorized the Secretary of Agriculture to make rules and regulations to preserve from destruction the forests on public lands of the United States. Congress declared in the statute that violation of a rule or regulation made by the Secretary should be a criminal offense. The Secretary made a rule restricting the grazing of sheep in the Sierra Forest Reserve. Grimaud was prosecuted and convicted of violating this rule. The United States Supreme Court sustained the conviction. The regulation made by the Secretary had the same force of law as if his sheep-grazing rule had been expressed in a criminal statute, but obviously it was not expressed there. The statute had merely declared a policy against acts injurious to the forests. No criminal prosecution could have been based upon a statute so vaguely defining the criminal act.[28] The specific definition was found in the regulation. The Supreme Court concedes this to be a delegation of part of the legislative power of Congress. The concession was forced by the obvious fact that Congress itself might have made the sheep-grazing rule. Such delegations are held constitutional because by them Congress relinquishes only a part of its power, the Court holding that to be valid a statute making such a delegation must declare a policy or a principle and restrict its delegate to making specific rules consistent with and in furtherance of the policy so declared.[29] The legislative function is thus shared

[25] Kilbourn v. Thompson (1880) 103 U. S. 168.

[26] CAL. CONST. art. VI, § 1.

[27] (1911) 220 U. S. 506.

[28] United States v. Cohen Grocery Co. (1921) 255 U. S. 81; Connally v. General Const. Co. (1926) 269 U. S. 385.

[29] For fuller discussion of delegation of legislative power to the president or to administrative officers see Note (1936) 24 CALIF. L. REV. 184.

between Congress and the administrative officer to whom Congress has delegated a part. The Supreme Court of California concedes that the principle of *United States v. Grimaud* applies to the constitution of California.[30] Notwithstanding that the constitution vests "the legislative power of this State" in the legislature, administrative officers may be delegated a power of subordinate legislation—a power to make regulations that have the full force of statutes. Yet the court seems to think that because article VI vests "the judicial power of the State" in courts no part of it may be vested by the legislature in administrative officers.

That Congress may vest parts of the *judicial function* in executive or administrative officers was also long ago established by Supreme Court decisions. The leading case, though not the earliest,[31] was decided in 1855.[32] Congress had established[33] a procedure whereby, in case a United States revenue collector was suspected of delinquency in his accounts, accounting officers of the Treasury might determine the fact and amount of the delinquency, and acting upon their finding an officer in the Treasury, an "agent of the Treasury" designated by the president for such duty, might issue a warrant to a marshall of the United States to seize and sell private property of the delinquent and from the proceeds of the sale pay the delinquent sum into the Treasury. Was this procedure the due process of law required by Amendment V? Was giving this adjudicating power to administrative officers consistent with Article III which vests "the judicial Power of the United States" in courts? The Court answered yes to both questions and held a sale of a collector's land made under this procedure to be a valid sale. Article III declares, "The judicial Power shall extend . . . to Controversies to which the United States shall be a Party. . . ." The Court recognized that this controversy between the United States and the collector fell squarely within those words. "We do not doubt the power of congress," said the Court, "to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted."[34] Indeed, the Court pointed out that the statute provided that after a warrant issued, a collector might apply to a district court and, if he gave bond to secure

[30] *In re* Potter (1913) 164 Cal. 735, 740, 130 Pac. 721, 723.

[31] See Cary v. Curtis (1845) 44 U. S. (3 How.) 236.

[32] Murray's Lessee v. Hoboken Land & Improvement Co. (1855) 59 U. S. (18 How.) 272.

[33] Act of May 15, 1820, 3 STAT. 592.

[34] *Supra* note 32, at 281.

payment of any delinquency, the court might stay execution of the warrant and redetermine the whole matter. In the instant case the collector had not applied to the district court and the decision of the administrative officers was final. Since the Supreme Court has consistently held that what it regards as non-judicial functions cannot be vested in the courts mentioned in Article III of the Constitution,[35] when the Court in the instant case said that Congress might have vested the decision of such controversies in a court, it obviously thought that the decision of them was a judicial function. The Court said:

"That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. . . . But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact."[36]

The last sentence is a bit lame. In the light of the reasoning throughout the opinion, that sentence should have read: While the decision of issues of law and fact is a judicial function when confided to courts, it is not so exclusively so that it may not be confided to administrative officers. This interpretation reconciles the passage with the further statement in the opinion that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper"[37]—that is, Congress may, if it pleases, vest the decision of such matters in administrative officers.

While the statute just discussed vested in administrative officers decision of disputed issues of fact, and necessarily of all issues of law that might arise, it did not make their decision of either final, for in the judicial review authorized it seems that the court was to try the issues of fact *de novo*,[38] as well as to revise the administrative decision on questions of law.

[35] Gordon v. United States (1864) 69 U. S. (2 Wall.) 561, and opinion by Taney, C. J. in (1885) 117 U. S. 697; Federal Radio Comm. v. General Elec. Co. (1930) 281 U. S. 464; and see the notes to Hayburn's Case (1792) 2 U. S. (2 Dall.) 409.

[36] *Supra* note 32, at 280.

[37] *Ibid.* at 284.

[38] See the proceedings recounted in United States v. Nourse (1832) 31 U. S. (6 Pet.) 470. It may be noted that this procedure established by the Act of 1820 is still in the statutes, but that the provision for judicial review has disappeared. 13 STAT. (1864) 223, 237, 26 U. S. C. (1934) §§ 1765-1768.

Acts of Congress have been sustained, however, that make administrative decisions of issues of fact affecting the most vital of human interests absolutely final, not subject to redetermination by courts. One of the strongest examples is the statute sustained in *United States v. Ju Toy*.[39] The statute provided that any alien having any one of numerous specified disqualifications should be ineligible to enter the United States. Conversely, any alien who satisfied all statutory requirements had a statutory privilege of entry. The statute vested the adjudication of all contested issues, with respect to eligibility to enter, in "immigration or customs officers" and declared their decision to be final unless on appeal to the Secretary of Commerce and Labor[40] it was reversed. Ju Toy contended that he was born in the United States. If that was the fact, he was a citizen and the alien exclusion law had no application to him. The immigration officers found against him on this issue of fact, and the Secretary affirmed the decision. The evidence was at least conflicting, for when Ju Toy got before a United States district court by writ of habeas corpus, that court decided that Ju Toy had been born in the United States. On appeal by the goverument to a circuit court of appeals, that court certified a question to the Supreme Court—was the district court right in retrying the issue? The Supreme Court answered no. It held that the decision of the Secretary was final and binding upon all courts.

Subsequently the Supreme Court has held that while the district court in these immigration cases cannot reweigh the evidence to determine its preponderance, it may look into the record of the administrative hearing, and if it finds no evidence therein to support the finding or a woeful lack of evidence to support the finding, it may then, but only then, disregard the administrative decision. All other issues of fact in immigration cases fall within the same rule. Obviously, if an issue of fact upon which so vital a matter as citizen-

[39] (1905) 198 U. S. 253.

[40] Under an act of August 18, 1894, 28 STAT. 372, 390, the appellate authority was the Secretary of the Treasury who then administered the immigration laws. An act of February 14, 1903, 32 STAT. 825, transferred these functions to the Secretary of Commerce and Labor; an act of March 4, 1913, 37 STAT. 736, transferred them to the Secretary of Labor; and since June 4, 1940, the immigration service has been under the Attorney General and he is the appellate tribunal. Reorganization Plan No. V, transmitted by the President to Congress May 22, 1940, 5 FED. REG. (1940) 2223.

The tribunal of first instance in *exclusion* cases is now a "board of special inquiry" consisting of three immigration inspectors whose decision "is final unless reversed by the Attorney General on an appeal." 39 STAT. (1917) 874, 887, 8 U. S. C. (1934) § 153.

ship depends, may be conclusively decided by administrative officers, it follows that where the person seeking entry is indisputably an alien, all issues of fact with respect to his qualifications for entry may likewise be so decided, and many cases so hold.[41]

By this procedure important issues of fact may be decided against aliens and against persons who in truth may be citizens, yet this is due process of law as to them. "Due process is not necessarily judicial process," says the Supreme Court.[42]

It is more significant to note, however, that all these immigration cases are cases arising under a law of the United States, and Article III of the Constitution says: "The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States. . . ." Undoubtedly Congress could vest in the courts the decision of issues of fact in these cases, and the courts now review and redecide the issues of law arising in them.[43] It is clearly a judicial function to decide an issue of fact or one of law arising under a law of the United States, yet Congress may vest the decision of either in administrative officers and give finality to their decision of the former. Congress may do so not only with respect to personal rights as in the instance just discussed but also with respect to property rights even in administering a rule of the Constitution intended to safeguard such rights. Amendment V declares, ". . . nor shall private property be taken for public use, without just compensation." When private property is expropriated, the justness of the compensation turns on the amount of that compensation, an issue of fact. The Supreme Court holds that Congress may authorize administrative officers to decide this issue with finality.[44] In this there is neither denial of due process of law, nor an unconstitutional vesting of judicial power in administrative officers, even though the Constitution says that the judicial power extends to "all cases, in Law and Equity, arising under this Constitution"—and Congress may, if it chooses, vest the deter-

[41] See, for examples, Nishimura Ekiu v. United States (1892) 142 U. S. 651; Lem Moon Sing v. United States (1895) 158 U. S. 538.

[42] Reetz v. Michigan (1903) 188 U. S. 505, 507.

[43] Gegiow v. Uhl (1915) 239 U. S. 3; Cheung Sum Shee v. Nagle (1925) 268 U. S. 336; Chang Chan v. Nagle (1925) 268 U. S. 346; Nagle v. Loi Hoa (1928) 275 U. S. 475.

[44] Shoemaker v. United States (1893) 147 U. S. 282; Bauman v. Ross (1897) 167 U. S. 548, 593. So while the Fourteenth Amendment as interpreted by the Supreme Court requires a state to pay just compensation when it takes private property for public use, nothing in the Federal Constitution prevents a state from vesting in administrative officers the determination of the amount of compensation. Long Island Water Supply Co. v. Brooklyn (1897) 166 U. S. 685, 695; Crane v. Hahlo (1922) 258 U. S. 142.

mination of just compensation in the courts. Likewise Congress in levying *ad valorem* taxes, for example, *ad valorem* customs duties, may give finality to administrative determinations of value, the vital issue in fixing the amount of the tax.[45]

One further example, out of many possible ones, of vesting a part of the judicial function in administrative officers, will be given. The reader may have noted that the Supreme Court in the passage quoted above[46] from *Murray v. Hoboken Land Co.*, stated that the decision of "matters involving public rights" while judicial was not exclusively so. There, it was the United States against a revenue collector alleged to be delinquent. So in *Ju Toy's* case the issue was between the government and a person desiring to come into the country. So in the condemnation case it was the government against the property owner—all "matters involving public rights" on one side at least. But how about cases involving rights exclusively between two private persons? Surely these are traditionally of judicial cognizance. Nevertheless, the United States Supreme Court holds that they are not exclusively so and Congress may vest the adjudication of such issues in administrative officers. This is the great point decided in *Crowell v. Benson.*[47] Congress enacted a workmen's compensation law for a class of maritime workers, namely, longshoremen and harbor workers, with respect to their injury or death by industrial accident on navigable waters of the United States.[48] Except that this statute applied to a limited class of workers whose employment is within the regulatory powers of Congress, it was in all respects similar to many state workmen's compensation laws. It imposed liability upon the employer, with or without fault on his part, to compensate his employees or their dependents for injuries arising out of and occurring in the course of employment at prescribed schedules of compensation. Prior to this statute the relation of employer to employee with respect to injuries of the latter occurring on navigable waters was governed by the admiralty law and the adjudication of liability was vested in the federal courts. A major question in *Crowell v. Benson* was this, could Congress validly vest the adjudication of liability under its new rules of substantive law in federal administra-

[45] Hilton v. Merritt (1884) 110 U. S. 97, 107; Passavant v. United States (1893) 148 U. S. 214, 219.

[46] See text to note 37, *supra*.

[47] (1932) 285 U. S. 22.

[48] The Longshoremen's and Harbor Workers' Compensation Act, act of March 4, 1927, 44 STAT. 1424, 33 U. S. C. (1934) §§ 901-950.

tive officers? The Constitution clearly declares, "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction. . . ."[49] (1) Did the statute unconstitutionally oust the courts of a part of this judicial power? (2) Is administrative adjudication of rights between private persons due process of law?

The Court construed the statute as intending that the administrative adjudicator's[50] decision of substantially all issues of fact should be final, not reviewable by any court except for that minimum of judicial review which permits a court to inquire whether there is any substantial evidence to support the administrative finding. And the Court held that vesting this part of the judicial power in administrative officers did not violate the Constitution in any respect. Implied in this decision is also a holding that the administrative adjudicator was constitutionally authorized to decide in the first instance all issues of law arising in any case. Otherwise he could not make an award where issues of law are raised. But the statute expressly provided for judicial review of his decisions of questions of law. It provided that if a compensation award was "not in accordance with law" a federal district court might set it aside in injunction proceedings. Chief Justice Hughes, delivering the opinion of the Court, said:

". . . the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function. . . ."[51]

There at last, perhaps, we have the thought that reconciles with the Constitution the numerous instances in which Congress has vested administrative officers with power to adjudicate disputed issues of fact and law. Perhaps finality in decision of questions of law is the only exclusively judicial function. This is in accord with the old fashioned generality that the legislature makes the law, the executive enforces the law, and the judiciary declares what the law is. Finality of fact finding has never been exclusively a function of judges. For centuries in criminal prosecutions and in civil actions at law, a jury composed of laymen decided all issues of fact. While the judge might set aside a verdict and grant a new trial for what he thought was a

[49] U. S. CONST. Art. III, § 2.

[50] The adjudicating tribunal in each case is a single administrative officer, a Deputy Commissioner, that is, a deputy of the United States Employees' Compensation Commission, a commission that had been previously established to adjudicate compensation claims of federal government employees, to which this additional function was given. There is no appeal from the deputy to the Commission.

[51] Crowell v. Benson, *supra* note 47, at 54.

clearly erroneous finding of the facts, he could not determine the facts himself. He might grant new trial after new trial but in the end he had to take the facts to be what a jury of laymen said they were. Moreover, judges had no power whatever to set aside a verdict of not guilty, at least not where the crime charged was punishable by death, dismemberment or imprisonment,[52] and even "after a conviction, the English practice allowed no new trial in capital cases."[53] In these latter instances where the judge could not set aside a verdict even for error of law, it follows, realistically speaking, that the lay jury had the power of final decision of all issues of law as well as of fact.

Compare the decision of the United States Supreme Court in *Crowell v. Benson,* that Congress may constitutionally vest in administrative officers adjudication of claims arising under a workmen's compensation law, with the oft repeated dictum of the California Supreme Court that the California legislature could not have done so without the constitutional amendments of 1911 and 1918 expressly authorizing the legislature to vest adjudication of such claims in an industrial accident board or commission. Without those amendments the provisions of the California Constitution affecting the question do not differ from the provisions of the Constitution to which Congress is subject.

The Interstate Commerce Commission was also created by Congress without specific authorization in the Constitution. It has a mixture of functions, duplicating in its field every kind of function possessed by the Railroad Commission of California. Yet it is another repeated dictum of the Supreme Court of California that it took a special constitutional amendment to create the Railroad Commission with the functions it now has.

In one of its recent opinions the California court says:

"The theory of the Tulare[54] and Standard Oil[55] cases is that, if the legislature attempted to confer judicial or *quasi*-judicial power on statewide administrative boards, the statutes would be unconstitutional as in violation of section 1 of Article VI of the state Constitution, which vests the entire judicial power of the state in the courts, except as to local boards, and the railroad and industrial accident commissions, which are governed by special constitutional provisions."[56]

[52] THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898) 175-178.

[53] *Ibid.* at 178.

[54] Tulare Water Co. v. State Water Comm. (1921) 187 Cal. 533, 202 Pac. 874.

[55] Standard Oil Co. of Calif. v. State Board of Equalization, *supra* note 5.

[56] Drummey v. State Board of Funeral Directors & Embalmers, *supra* note 3, at 81, 87 P. (2d) at 852.

It may well be that in 1911 the Hiram Johnson new deal was justified in obtaining constitutional authorization for those two commissions. Notwithstanding that Congress had created the Interstate Commerce Commission in 1887 and other states in 1911 were creating workmen's compensation commissions solely by legislative act,[57] there was then fear of reactionary constitutional interpretation in some states.

This fear may even have been justified in California at that time.[58] Now, after the illuminating opinion of Chief Justice Hughes in *Crowell v. Benson* clarifying what had been implicit in previous decisions, many of them prior to 1911, it would seem easier for other courts to broaden their vision. True, the Supreme Court of California is the final interpreter of the California Constitution but great power should be tempered by broad-mindedness, remembering the admonition of Marshall that it is a constitution that is being interpreted.

Seven years after *Crowell v. Benson,* the Supreme Court of California in the *Drummey* case,[59] as we have seen, was discussing a statute which authorized an administrative board to revoke professional licenses for specified causes. It said that if the statute gave finality to the board's decision of questions of fact it would be unconstitutional. Even if the statute permitted a limited court review, limited to setting aside the administrative decision if the court found that there was no substantial evidence to support it, still the statute would be unconstitutional. To be constitutional, said the court, the statute must leave it open to a court to redecide the issue of fact in accordance with its view of the preponderance of the evidence.[60] The many decisions of the Supreme Court of the United States holding that the findings of fact of federal administrative tribunals are binding on a reviewing court if based upon conflicting evidence had no weight, as if judicial thinking in California should be something apart, and peculiar. "It is the essence of judicial action," said the California court, "that finality is given to findings based on conflicting evidence."[61] This seems to mean that only courts may be permitted to

[57] See Borgnis v. The Falk Co. (1911) 147 Wis. 327, 133 N. W. 209, sustaining the power of the Wisconsin legislature to create an industrial accident commission under a constitution not materially different from that of California.

[58] See Pacific Coast Casualty Co. v. Pillsbury (1915) 171 Cal. 319, 322, 153 Pac. 24, 26; Western Metal Supply Co. v. Pillsbury (1916) 172 Cal. 407, 412-13, 156 Pac. 491, 494.

[59] *Supra* note 3.

[60] *Ibid.* at 84-85, 87 P. (2d) at 853.

[61] *Ibid.* at 84, 87 P. (2d) at 853.

make non-reviewable errors as to the weight of evidence. To give even limited finality to fact decisions of administrative officers would be giving them this "essence of judicial action"!

More remarkable is the court's next statement:

"Moreover, for a purely administrative board to deprive a person of an existing valuable privilege without the opportunity of having the finality of such action passed upon by a court of law, would probably violate the due process clause of the federal Constitution."[62]

A few of the many decisions of the United States Supreme Court to the contrary have been discussed above.

With this constitutional doctrine as a major premise, the California court was driven, so it thought, to the conclusion that where a professional license is revoked by a duly authorized administrative board after a hearing and a finding of the existence of a statutory cause for revocation, the licensee is entitled to a retrial of that issue of fact in a court. The court held that in the absence of any express statutory procedure for judicial review, the licensee was entitled to get it by applying to a superior court for a writ of mandate (mandamus) to be directed to the board ordering it to restore the license, which the court should issue if after reweighing the evidence the court found that it preponderated against the existence of the ground for revocation. In this case the parties had agreed to try the case on the record of the evidence taken at the board's hearing. The court seemed somewhat troubled by the idea that this made the board's action merely waste motion and thought it saved that action from coming wholly to naught by saying, "The findings of the board come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence."[63]

Just how the trial court is to reconcile this "strong presumption" with the injunction that it "must weigh the evidence, and exercise its independent judgment on the facts,"[64] is not clear. Perhaps the trial judge is to get out his scales and although there is an ounce of evidence, or a pound or so, against the board's finding, still the judge is to sustain it. But the trial judge is cautioned that a conflict in the evidence is not enough; nor is it enough that there is substantial evidence supporting the finding. If there is any difference between

[62] *Ibid.*

[63] *Ibid.* at 85, 87 P. (2d) at 854.

[64] *Ibid.* at 84, 87 P. (2d) at 853.

this "strong presumption" idea and the rejected substantial evidence rule, we shall have to invent and equip judges with new instruments to weigh the imponderable.

The District Court of Appeals for the Fourth District deduced from the above decision that a licensee in such a mandamus proceeding in the superior court has a right to demand a trial *de novo*, that is, a complete retrial of the issue by the court upon evidence taken before the court.[65]

Unless the licensee consents to submit the case on the record of evidence taken by the board, that record goes for naught. The board is even denied the status of a trial examiner to gather evidence upon which the court can act. All that is left of the administrative decision is the "strong presumption" of its correctness. In the trial does this presumption flit from the case as soon as the licensee introduces any evidence against the board's decision, or remain in the case to perplex the judge who is commanded to weigh the evidence and exercise his independent judgment?

The district court of appeals was right in its inference that the supreme court intended that in license revocation cases the licensee was entitled to trial *de novo* by mandamus proceedings in the superior court.[66] The supreme court has made it clear, also, that it understands exactly what a trial *de novo* is. "It is in no sense a review of the hearing previously held, but is a complete trial of the controversy, the same as if no previous hearing had ever been held. . . . A hearing *de novo* therefore is nothing more nor less than a trial of the controverted matter by the court in which it is held."[67]

The court becomes the decider and the administrative adjudication is reduced to the vanishing point. The California court was so dominated by its notion that a trial *de novo* was necessary that it said, the legislature having failed to provide it, "mandate is the only possible remedy available"[68] to secure it. Shortly thereafter the court confessed that by that decision it "authorized an extension of the traditional functions of a proceeding in *mandamus* in the superior court."[69] Indeed, judicial decisions are numerous holding that man-

[65] Laisne v. California State Board of Optometry (1940) 101 Cal. App. Dec. 337, 101 P. (2d) 787, *reh'g*, 101 Cal. App. Dec. 589, 102 P. (2d) 538, Sup. Ct. *hearing granted*, June 17, 1940.

[66] See the remarks in McDonough v. Goodcell (1939) 13 Cal. (2d) 741, 752-3, 91 P. (2d) 1035, 1041.

[67] Collier & Wallis, Ltd. v. Astor (1937) 9 Cal. (2d) 202, 205, 70 P. (2d) 171, 173.

[68] Drummey v. State Board of Funeral Directors & Embalmers, *supra* note 3, at 82, 87 P. (2d) at 852.

[69] McDonough v. Goodcell, *supra* note 66, at 752, 91 P. (2d) 1041.

damus does not lie to control the decision of any officer or tribunal authorized to decide issues of law or fact. The most, it is said, that a court can do by mandamus is to order such an officer or board to act but not to dictate what result or decision it shall arrive at. That proposition is not limited to instances of administrative discretion but applies equally to decisional authority to be exercised in accordance with the law and the facts. In the *Standard Oil Company* case[70] the court said that the writ of certiorari mentioned in the constitution of 1879 must be given its 1879 meaning and therefore could not be stretched to other uses. How about *mandamus* also mentioned in the constitution of 1879?

We come now to the partial retreat of the California court three months later in *McDonough v. Goodcell.*[71] There is held that where administrative refusal to grant, as distinguished from revocation of, a license is reviewed by mandamus, the court should accept the officer's fact finding as final if there is any evidence in the administrative record to support it, and that his decision could be set aside ouly if that elusive thing "abuse of discretion" was shown. It said that the exception it had made in the *Drummey* case with respect to the traditional scope of mandamus was "not to be applicable otherwise."[72]

The court purported to distinguish the two cases on the ground that the statute in the *McDonough* case had given the licensing officer a "discretion", and that "discretion" is not controllable by mandamus.

The word "discretion", it is true, is used with various meanings. Its most distinctive use is with respect to an authority to decide in accordance with the decider's personal opinion of expediency or policy, unguided or uncontrolled by standards or rules of law. Such a discretion is vested by a statute which forbids the doing of some act without first obtaining a permit from an administrative officer, without prescribing any standard or rule in accordance with which the officer is to decide. The statute for the granting of licenses to conduct a bail bond business, considered in the *McDonough* case, was not of that character. The statute required[73] the Insurance Com-

[70] *Supra* note 5.

[71] *Supra* note 66.

[72] *Ibid.* at 753, 91 P. (2d) at 1042.

[73] The statute says the Commissioner "may", but clearly means "shall", grant a license to anyone who meets the statutory requirements. Cal. Stats. 1937, pp. 1797, 1798, CAL. INS. CODE § 1830.24.

missioner to grant a license on "proof that the applicant is a fit and proper person to engage in such business". The Commissioner is to weigh the evidence and decide whether the applicant has the statutory requirements. In this case the Commissioner decided on conflicting evidence, that is, he decided a contested issue of fact. He did exactly what a court would do if this licensing power were vested in it. Exactly such licensing powers have been vested in and exercised by courts.[74]

The idea that under the constitution of California administrative officers may not be authorized to do any part of what courts may do fades away. Here the administrative decision of a disputed issue of fact was final for lack of any available procedure for judicial review.

The court did not verbally concede that the statute vested in the commissioner a part of the judicial function. It said, "There can be no doubt of the power of the legislature to confer upon such an administrative officer the authority to ascertain the prerequisite facts."[75] In quoting from another opinion,[76] the court stated that such officers " 'cannot and do not declare the law but perform the whole duty of ascertainment'."[77] Apparently administrative officers "ascertain" facts, while courts decide issues of fact! Just what is meant by saying that they "cannot and do not declare the law"? In the instant case if an issue of law had been raised before the Commissioner when he was adjudicating the application for a license, he could not have escaped deciding it—rightly or wrongly. If the court meant that administrative officers do not declare the law *with finality* the statement would be true. When a judge gives a judgment without writing an explanatory opinion he implicitly declares what the law is. His silence is an affirmation that the law is such as to require that judgment. So it is with an administrative officer. His every decision is an implicit declaration of what the law is.

"Numerous instances," says the court, "may be noted where the legislature has vested discretion in an administrative board or officer to ascertain the facts and in accordance with those facts, to grant or deny a permit to engage in a business. . . ."[78] Many California decisions sustaining such grants are cited. These cases sustained statutes

[74] Cases collected in HALL, CASES ON CONSTITUTIONAL LAW (1913) 84, n. 1. Observe the last sentence of the cited note.

[75] McDonough v. Goodcell, *supra* note 66, at 746, 91 P. (2d) at 1039.

[76] Whitten v. California State Board of Optometry (1937) 8 Cal. (2d) 444, 65 P. (2d) 1296.

[77] McDonough v. Goodcell, *supra* note 66, at 746, 91 P. (2d) at 1039.

[78] *Ibid.* at 747, 91 P. (2d) at 1039.

which conferred on administrative officers decisional power, but always power to decide in accordance with standards prescribed in the statutes, the court repeatedly saying that if the statutes prescribed no standards to control the decision they would be unconstitutional attempts to vest arbitrary power.

The statute in the instant case declared a rule of substantive law. The rule was that an applicant who is "a fit and proper person to engage in such business" is entitled to a license. This statutory criterion or standard of eligibility to engage in the business allows the adjudicator no more room for personal caprice or discretion in its strict sense than do many rules of law which courts daily administer, for example, the law of liability in tort actions for compensation for injuries resulting from the defendant's negligence which is defined by the courts as "lack of reasonable care in the circumstances". Yet we do not doubt that it is the duty of the court to decide in accordance with this rule, or more correctly, this standard prescribed by the law.

The naturalization law of the United States makes an alien eligible to a certificate of citizenship if, among other requirements, he satisfies a court that for five years "he has behaved as a man of good moral character", that he is "attached to the principles of the Constitution of the United States", and that he is "well disposed to the good order and happiness of the same". The propriety of vesting the administration of this statute in courts was questioned. The Supreme Court of the United States answered: ". . . there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate. . . . In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor."[79]

So in the instant case, when McDonough applied to the Insurance Commissioner for a license the Commissioner was to decide according to the law and the evidence and exercise "judicial judgment". This is true regardless of whether his decision was final on issues either of fact or law.

True, statutory standards subject to which administrative officers are to make their decisions vary from statute to statute and sometimes the standard prescribed is quite definite, sometimes less so, allowing in the latter case a good deal of freedom in interpretation and application. It is commonly said that the less definite the

[79] Tutun v. United States (1926) 270 U. S. 568, 578.

standard, the greater the range of *discretion*, but the discretion meant here is the very same discretion that a court has in applying like indefinite standards which abound in the law administered by courts. When a judge exercises such discretion, we still say that his function is to decide according to the law and the evidence.

Until the judicial mind in California gives up the notion that parts of the judicial function cannot be vested in administrative officers having state-wide authority, sporadic abberrations in judicial decision may be expected, and the courts will remain under the embarrassment of using weasel words like "ascertainment" and "discretion" to conceal actualities.

That the court is operating under embarrassment appears in its distinction between administrative revocation of a license and administrative refusal to grant a license. Some rule of some constitution, it says, requires trial *de novo* in a court of the former but allows the latter to stand if "abuse of discretion" is not shown and there is substantial evidence to support the finding. In the *McDonough* case, as the applicant for a license had been engaged in the business for thirty years, the refusal of a license cut him off from this long established business, just as much as did the revocation of the embalmer's license in the *Drummey* case. The two interests are too closely alike not to be equally protected by the same rule of the constitution, if there is one. If there is none, the court should have expressly overruled the *Drummey* case.

Instead, it there tells us, "The ruling in the Drummey Case . . . was brought about by recent holdings of the Supreme Court of the United States in *St. Joseph Stock Yards Co. v. United States*,"[80] which "appeared to make it mandatory" to arrive at that ruling.[81] In the *Drummey* case itself the *St. Joseph Stock Yards Co.* case was cited more confidently, and reference was also made to *Ohio Valley Water Co. v. Ben Avon Borough*[82] and *Crowell v. Benson*.[83] The court seemed to think that these cases established that in *all* cases where it is claimed that a *constitutional* right, as distinguished from a statutory or other legal right, is violated and the existence of this alleged constitutional right depends upon an issue of fact, the claimant is entitled to a trial *de novo* of that issue in a court.

The issue in the *Stockyards* case was this: Acting under statutory

[80] (1936) 298 U. S. 38.

[81] McDonough v. Goodcell, *supra* note 66, at 752, 91 P. (2d) at 1042.

[82] (1920) 253 U. S. 287.

[83] *Supra* note 47.

authority the Secretary of Agriculture after full hearing had made an order prescribing a schedule of rates for the stockyards. The stockyard company filed a bill in a United States district court alleging that the prescribed rates were confiscatory and asking that enforcement of the order be enjoined. Congress authorizes such a proceeding in the district court to set aside an order of the Secretary but does not prescribe the scope of review to be given by the court. The case was submitted to the court on the record of evidence taken in the administrative hearing. From a dismissal of the bill an appeal was taken to the Supreme Court. The question there was, should the district court in such a case reweigh the evidence in the record and make an independent determination of the issues of fact bearing upon the alleged confiscatory effect of the prescribed schedule. The Supreme Court held that such was the duty of the district court.

The Court emphasized that the Secretary was exercising a delegated *legislative* function, the fixing of rates. The Constitution, as interpreted by it, protects utilities from being required to serve at rates that do not yield a fair return on the value of their property, that is, so-called confiscatory rates. It said that if a legislature itself by statute had fixed the rates, any finding or declaration of the legislature that the rates were non-confiscatory would not bind the courts, and the findings of an agent to whom Congress had delegated this legislative function stood no higher. It was with respect to this legislative rate-making function that the court held that there must be "an independent judicial judgment upon the facts where confiscation is alleged".[84]

In the opinion there was no general declaration that in every instance in which a constitutional right is put in possible jeopardy by an administrative decision of a question of fact, there must be an independent review of that issue in a court. The decision merely applied to federal rate regulation the doctrine which the Court had laid down for state rate regulation in *Ohio Valley Water Co. v. Ben Avon Borough*[85] sixteen years before. In the earlier case the Court was dealing with a rate order of a state public utility commission. Its holding was thus summed up:

"The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. . . . In all such cases, if the owner claims confiscation of his property will result, the State must provide

[84] 298 U. S. at 52.

[85] *Supra* note 82.

a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."[86]

Note also that the two cases just discussed dealt not with a board or officer exercising an adjudicating function such as was before the court in the *Drummey* case, but with exercise of a delegated legislative function. The Supreme Court of California had pointed out this last distinction in 1936 and made it the basis of a very important decision.[87] Where a city acquires the plant of a private utility company in a condemnation proceeding before the State Railroad Commission, it is the duty of the Commission to fix the just compensation that the state and federal constitutions require to be paid where private property is taken for public use. The Railroad Commission's decisions are reviewable exclusively in the state supreme court. Must that court reweigh the evidence and make an independent determination of what is just compensation? The California Supreme Court held no. It said, in effect, that the Commission was here exercising an adjudicating function, assessing the damages or compensation for the taking, not exercising its legislative function of rate making, and that the rule of the *Ben Avon Borough* case had no application. The court held that it was still free to apply its established rule that it would not disturb the award of the Commission if there was any substantial evidence in the record to sustain it. Whether the utility got the just compensation it was entitled to as of constitutional right was an issue of fact, but it got no trial *de novo*, not even a reweighing by the court of the evidence in the record. It is true that the court fortified this result by saying, ". . . the commission is set up constitutionally as a special judicial tribunal to hear and determine the question of values submitted to it."[88]

Had the court called the Railroad Commission an administrative body vested with power to adjudicate just compensation, it still could have reached the result it did on the authority of several United States Supreme Court decisions which that Court has shown no signs of overruling.[89] The California Supreme Court did not cite the *St. Joseph Stock Yards* case which had been decided five weeks before,

[86] *Ibid.* at 289.

[87] Southern Cal. Edison Co. v. Railroad Comm. (1936) 6 Cal. (2d) 737, 59 P. (2d) 808.

[88] *Ibid.* at 749, 59 P. (2d) at 813.

[89] These cases are cited *supra* note 44.

but it is evident that that case was distinguishable on the same ground as was given with respect to the *Ben Avon Borough* case.

The United States Supreme Court has exempted one other particular fact issue from final determination by administrative officers. The statutes of the United States make resident aliens deportable for many enumerated causes. Adjudication of cases arising under these statutes is vested in the Attorney General, formerly in the Secretary of Labor. The Supreme Court long ago established the rule that a federal court reviewing the Secretary's decisions should not disturb his findings of fact if there is any evidence to support them. In 1922 it made an exception of one particular issue of fact, and stopped there, preserving its old rule for all other issues of fact. The exception is that when a person tried as an alien on a deportation charge, by this administrative adjudicator, claims citizenship, he is entitled to a retrial in a court of the issues of fact bearing upon this claim.[90] The Court did not say that a constitutional right was at stake. The reason assigned was that the statute gave the Secretary jurisdiction to deport aliens only, and that an erroneous decision on the evidence offered to prove facts establishing citizenship might result in deportation of a citizen severing him from "all that makes life worth living." Due process of law, said the Court, requires that a jurisdictional fact pregnant with the possibility of this serious result be given independent determination by a court. Of course, deporting long resident aliens may sever them from the same thing, but it is still the law that where alienage is not disputed, all findings of fact against the deportee are final if supported by any evidence.

Thus another sporadic exception to conclusive administrative fact finding was established. That this exception is a very narrow one is shown by the fact that after the decision just stated, the Supreme Court had an opportunity to overrule its decision in *United States v. Ju Toy*[91] but re-affirmed and followed it.[92] The result is that if a person who is out of the United States seeking to enter claims that the evidence proves facts establishing that he is a citizen, he is *not* entitled to a judicial reweighing of the evidence; but if he is in the United States and resists deportation on the same evidence, he is entitled to a judicial trial.[93] Thus, an erroneous administrative deci-

[90] Ng Fung Ho v. White (1922) 259 U. S. 276.

[91] See the text to note 39, *supra.*

[92] Quon Quon Poy v. Johnson (1927) 273 U. S. 352.

[93] The lower federal courts have interpreted this to mean that a claimant of citizenship in a deportation case is entitled to trial *de novo* on that issue. Chin Hoy v.

sion that might result in keeping a citizen out of the country stands on a different footing from one that might result in putting him out.

We come again to *Crowell v. Benson*.[94] Above I pointed out that the Supreme Court of the United States held in that case that Congress had power to enact a workmen's compensation law applicable to a class of maritime workers and vest the adjudication of claims arising under it in administrative officers, and give finality to their decision on *substantially* every issue of fact. At the same time the Court excepted two particular fact issues, one by dictum, the other by actual decision. The dictum was that where a claim was contested on the ground that the accident causing injury did not in fact occur on navigable water, the employer was entitled to a judicial trial *de novo* of that issue.

The Court relied somewhat on the jurisdictional fact idea, developed in the deportation case just discussed, saying that the statute gave the administrative officers jurisdiction only with respect to claims arising out of injuries received on navigable waters. It added, however, that this issue was jurisdictional in a further sense. It went to the jurisdiction of *Congress* to make the law applicable to the injury, since Congress has only enumerated powers to act in specified fields, such as the fields covered by the admiralty law, or the fields embraced by the concepts, interstate and foreign commerce. Here the power exercised by Congress was in the field of admiralty, that is, occurrences on navigable water. An administrative decision that an accident occurred on navigable waters when in fact it had occurred elsewhere would stretch the compensation act to injuries not within the constitutional powers of Congress. To avoid such a possibility, said the Court, there must be independent judicial review of that fact issue.

The actual decision of the Court was that where the defendant in a compensation claim contends that he is not in fact the employer of the claimant, he is entitled to an independent determination of that fact issue by a court. The reasoning was the same. This issue, said the Court, was also jurisdictional in the same two senses. The statute, said the Court, gave jurisdiction to claims of employees, and no others. If the claimant was not an employee of the defendant the

United States (C. C. A. 6th, 1923) 293 Fed. 750; Chin Lund v. United States (C. C. A. 6th, 1925) 9 F. (2d) 283. But the courts have held that he is not entitled to a jury trial. Gee Wah Lee v. United States (C. C. A. 5th, 1928) 25 F. (2d) 107.

[94] *Supra* note 47.

statutory jurisdiction of the adjudicator did not extend to the claim. Secondly, this statute imposed liability on the employer with respect to injuries occurring without his fault. The Fifth Amendment, said the Court, forbids Congress to impose liability regardless of fault except where there exists a relation between the parties that justifies it. The relationship of employer and employee does justify, and perhaps some others do, but where it is the employment relation that is the ground of justification, as in this statute, an erroneous weighing of the evidence with respect to the existence of that relation might result in applying that rule of liability where Congress could not constitutionally impose it. Consequently, thought the Court, only courts may be trusted not to decide that issue erroneously.

The compensation statute expressly provided that either party aggrieved by a compensation award might apply to a United States district court for an injunction setting aside the award if it was "not in accordance with law". The Supreme Court construed this to mean that while the district court might review any alleged error of law, it could not reweigh the evidence on any issue of fact, except the two exceptional facts just discussed. As to those two issues, (1) did the injury take place on navigable water, and (2) was the claimant in fact an employee of the defendant, the employer was entitled not merely to judicial reweighing of the evidence but he was entitled to a trial *de novo* of those two issues in the district court.

It was in this connection that the Court said that federal administrative officers cannot be authorized to make "final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend".[95]

The Court further said:

> "We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."[96]

This rule of the Constitution the Court found in Article III, assuming that if the federal courts were deprived of the decision of these two issues they would be ousted from a part of the judicial power therein mentioned. The Court did not say that due process of law required that such issues be decided in a court. The first thing the California court should have noticed is that *Crowell v. Benson*

[95] Crowell v. Benson, *supra* note 47, at 56.

[96] *Ibid.* at 64.

imposed no rule with respect to the relation between state courts and state administrative agencies. At most it was an interpretation of the judiciary Article of the Federal Constitution which the California court might, if it chose, apply by analogy to the interpretation of article VI of the California Constitution. It contained nothing that was "mandatory" on the state court.

The Supreme Court of California may have been intrigued by the generality that facts upon which constitutional rights depend must be found by the courts. But the Supreme Court of the United States has not yet established that as a generality in federal jurisprudence. Witness its decisions to the contrary, some cited above,[97] others cited by Justice Brandeis in his dissent.[98] Several decisions of the Supreme Court of California deny the existence of this supposed generality.[99] Why was this generality supposed to be applicable in the *Drummey* case and not in the *McDonough* case? The court conceded that the legislature had power to provide for the revocation of a business license for just causes, for the causes specified in the statute, in the one case, and in the other, that licenses to engage in a business could be denied for just causes, the causes specified in the statute. It can be speciously reasoned in either case that if an administrative officer's decision is erroneous, there is a possibility that a license is revoked or the grant of it refused for some cause which could not constitutionally be made a ground for such action. If the protection of constitutional rights requires a judicial trial *de novo* in the one case, why does it not require it in the other? Besides, an erroneous decision by a court would produce the same direful result.

[97] *Supra* note 44.

[98] See the excellent discussion by Felix S. Wahrhaftig, Note (1933) 21 CALIF. L. REV. 266.

[99] Southern Cal. Edison Co. v. Railroad Comm., *supra* note 87, where it was held that the Railroad Commission's finding of just compensation in eminent domain condemnation is binding on the reviewing court if there is any substantial evidence to support it. Another line of cases establishes that if the Railroad Commission finds on the evidence, for example, that a man who is supplying his neighbors with water has held himself out as doing so on a public utility basis, and on that finding regulates his rates, the court will not disturb the Commission's finding if there is any substantial evidence to support it. Here the fact issue is "jurisdictional" as well as one on which constitutional rights depend, for clearly there are constitutional limitations upon rate regulation of private business. Traber v. Railroad Comm. (1920) 183 Cal. 304, 191 Pac. 366; Van Hoosear v. Railroad Comm. (1920) 184 Cal. 553, 194 Pac. 1003; McCullagh v. Railroad Comm. (1922) 190 Cal. 13, 210 Pac. 264; Richardson v. Railroad Comm. (1923) 191 Cal. 716, 218 Pac. 418; Klatt v. Railroad Comm. (1923) 192 Cal. 689, 221 Pac. 926. See *infra* note 108.

To hold that trial *de novo* is essential in either situation is very strange in view of many decisions upholding finality of administrative decisions affecting more substantial rights. It should be remembered that in *Crowell v. Benson* it was said that the administrative officer's findings on all other fact issues, other than the two exceptions, were final. Chief Justice Hughes said this was true with respect to "questions of fact as to the circumstances, nature, extent and consequences of the injuries sustained by the employee".[100]

"And this finality," said the Chief Justice, "may also be regarded as extending to the determination of the question of fact whether the injury 'was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.' While the exclusion of compensation in such cases is found in what are called 'coverage' provisions of the Act (§ 3), the question of fact still belongs to the contemplated routine of administration, for the case is one of employment within the scope of the Act and the cause of the injury sustained by the employee as well as its character and effect must be ascertained in applying the provisions for compensation. The use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and that findings are based upon evidence, falls easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments."[101]

This general rule of finality of the administrative adjudicator's decisions on disputed issues of fact, other than the two excepted issues, has been affirmed in several subsequent decisions.[102] Common sense tells us that a defendant in a workman's compensation case has but one interest—protecting his pocketbook, or shall I say his bank account. The issues of fact which the officer may decide with finality determine whether he shall pay a small sum or a greater sum up to the maximum compensation of $7,500 according to the statutory schedules. The Court says there need be no judicial review of the evidence on these issues. On one issue which also affects his bank account, namely, was he in fact an employer, or *the* employer, he can get a judicial trial *de novo*. Also on another issue, namely, did the accident occur on navigable water, he can get a

[100] *Supra* note 47, at 54.

[101] *Ibid.* at 47.

[102] South Chicago Coal & Dock Co. v. Bassett (1940) 309 U. S. 251, and other cases cited therein at 258.

trial *de novo*, but even if he wins on this latter issue he may not have protected his bank account. The employee discovering that he has no remedy under the Longshoremen's and Harbor Worker's Act, may turn to the state workmen's compensation law.[103] The employer has protected his pocketbook only if the schedules of compensation in the latter are lower than those in the former.

Why should the Constitution be read as creating distinctions that are totally lacking in practical value? More particularly, why should the Supreme Court of California be impressed by such refinements as a model for interpreting the California Constitution?

One more decision should be mentioned, one that has not been cited in any of the recent California cases—the decision of the United States Supreme Court in 1936 in *Baltimore & Ohio Railroad Co. v. United States*.[104] By a five to four decision the Court held that when a rate order of the Interstate Commerce Commission is attacked in injunction proceedings in a United States district court on the allegation that the order is "confiscatory", the railroad company is entitled to a trial *de novo* of that issue. Why should a district court retake all the evidence? May the railroad try the case before the Commission on one body of evidence and try it before the court on other evidence? Why is a district court, even though in such a case it consists of three judges, regarded as capable of a better brand of justice or of more accurate appreciation of the evidence in a rate case than the experienced Commission whose excellent performances have commanded the greatest respect and whose findings on all other issues of fact are final? Justices Brandeis, Stone, Roberts and Cardozo dissented. The same year Justices Brandeis, Stone and Cardozo had disagreed with the majority's holding in *St. Joseph Stock Yards Co. v. United States*[105] that a stockyard was entitled to a judicial reweighing of the evidence in the administrative record when a rate order made by the Secretary of Agriculture was attacked in a United States district court on allegations that it was confiscatory. Nothing had been said in that case about trial *de novo*. It should be noted also that three justices—Brandeis, Stone and Roberts—dissented in *Crowell v. Benson* from the majority's view that judicial trial *de*

[103] The United States district court's decision in the trial *de novo* that the accident did not occur on navigable water would settle merely a jurisdictional issue; the principle of *res judicata* would not apply to bar proceeding under the state law.

[104] (1936) 298 U. S. 349.

[105] *Supra* note 80.

novo must be accorded the two excepted issues of fact. These three judges stood for finality of the administrative decision on all issues of fact. It was a five to three decision—Justice Cardozo, appointed to the Holmes' vacancy, had not yet taken his place on the bench.

In the *Drummey* case, in 1939, the Supreme Court of California should have weighed the high probability that the Supreme Court of the United States with its changed personnel would not extend trial *de novo* of administrative fact finding beyond the sporadic instances covered by the decisions here reviewed. When we consider what judges dissented and the force of their dissents, there is a high probability that one or more of those decisions will be overruled. None of them touched administrative revocation of licenses even in the field of federal administration. Nothing in them compels a state court to give trial *de novo* where the revocation is by a state administrative board or officer.

Only one of the above cases should have disturbed the Supreme Court of California, but not in the *Drummey* case. It is *Baltimore & Ohio Railroad Co. v. United States*, holding that a United States district court must give a trial *de novo* of a rate order of the Interstate Commerce Commission when it is attacked on allegations that it is confiscatory. That decision was not rested on the judiciary clauses of the Federal Constitution but on the due process of law clause of the Fifth Amendment. If that decision is sound and is not to be overruled, it seems that the due process of law requirement of Amendment Fourteen equally compels state courts to give trial *de novo* of rate orders of a state commission when they are alleged to be confiscatory. When the American Toll Bridge Company[106] in 1938 applied to the California Supreme Court for review of a rate order of the State Railroad Commission, alleging that the order reducing rates on the Carquinez Bridge was confiscatory, the court did not jump to the conclusion that it was bound to give a trial *de novo*. It thought that it needed to do no more than reweigh the evidence in the Commission's record as required by the decision in *Ohio Valley Water Co. v. Ben Avon Borough*.[107] The further advance of the United States Supreme Court toward "government by the judiciary" made in the *Baltimore & Ohio* case could have been ignored by the

[106] American Toll Bridge Co. v. Railroad Comm. (1938) 12 Cal. (2d) 184, 83 P. (2d) 1.

[107] *Supra* note 82.

California Supreme Court only on the assumption that that advance had halted and was in retreat.[108]

To sum up this long discussion:

1. Nothing in the Federal Constitution as interpreted by the United States Supreme Court requires the decision of issues of fact, made by a state administrative board or officer after a fair hearing,[109] to be subjected to review in a state court by trial *de novo*, nor even to a judicial reweighing of the evidence contained in the administrative record, except the issue whether a state administrative rate order is confiscatory. According to the decision in *Ohio Valley Water Co. v. Ben Avon Borough*, it is enough in that case that the state court reweighs the evidence as taken by the administrative body. Trial *de novo* is not required in that case unless the United States Supreme Court extends the doctrine of *Baltimore & Ohio Railroad Co. v. United States* to state rate-making bodies.

In other words, the Constitution of the United States as interpreted by the United States Supreme Court does not forbid the states to give finality to the fact decisions of its administrative boards and officers, with the single exception just stated.

2. The Constitution of the United States contains no prohibition against a state's vesting judicial functions in state administrative officers.[110] Even if the Federal Constitution compelled the states to observe the principle of separation of powers, and it does not, the United States Supreme Court finds nothing in that principle to forbid vesting in administrative officers power to decide issues of fact

[108] It is sometimes suggested that even the doctrine of Ohio Valley Water Co. v. Ben Avon Borough does not apply to the California Railroad Commission on the ground that the Commission is a "court" and itself performs the duty required of some state court, by that decision. But the United States Supreme Court holds that whatever a state may call a state rate-making body, and though it may be a court for some purposes, it is an administrative body exercising legislative functions when it prescribes rates. Prentis v. Atlantic Coast Line Co. (1908) 211 U. S. 210.

[109] I exclude summary destruction of property without a hearing. There is a well known line of cases of which Lawton v. Steele, *supra* note 13, and Miller v. Horton, (1891) 152 Mass. 540, 26 N. E. 100, are examples, holding that in case of such summary destruction of property the owner is entitled in a tort action against the officer to retry the issue of fact whether the property destroyed had the vice which the statute condemned. It is said that statutes authorizing such summary destruction would deny due process of law if trial *de novo* in a suit against the officer was not left open. It is said, however, that there is a growing tendency to hold otherwise. See Powell, *Separation of Powers: Administrative Exercise of Legislative and Judicial Power* (1913) 28 POL. SCI. Q. 34.

[110] Reetz v. Michigan, *supra* note 42; Consolidated Rendering Co. v. Vermont (1908) 207 U. S. 541.

and issues of law necessary to the performance of their duties. It holds that the principle is not violated by giving finality to administrative decisions of fact issues, subject to the sporadic exceptions above discussed; nor is it violated by authorizing administrative officers to decide issues of law provided their decisions on questions of law are not final.[111]

3. The Supreme Court of California in the *Drummey* case should have said that the principle of separation of powers in the state constitution and the vesting by article VI of the judicial power of the state in the courts do not forbid the legislature to vest in administrative officers, having either state-wide or local authority, the powers indispensably necessary to the discharge of their statutory duties—powers to decide issues of law and fact. The court need not soften this down by saying that these powers when exercised by an administrative board or officer are *quasi*-judicial. It may strike off the *quasi* and call them plainly judicial functions. It may say that they are functions which both courts and administrative officers needs must exercise, and therefore while judicial they are not exclusively so. When the Code of Civil Procedure of 1872 said, in section 1068, that the writ of certiorari might be issued by any court to determine whether "an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer," it assumed that boards and officers other than courts did exercise judicial functions, otherwise the section would have mentioned inferior courts only. The California court now says that the Code of 1872 is controlling as to the meaning of "certiorari" as mentioned in article VI of the constitution. Why is it not equally controlling as to the conception in 1872-1879 whether parts of the judicial function might be vested in administrative bodies? The supreme court says that judicial functions may be vested in the administrative officers of local governments but not in administrative officers exercising state-wide authority. It accounts for this by saying, that article VI in enumerating the courts in which "the judicial power of the State" is vested includes "such inferior Courts as the legislature may establish in any incorporated city or town, township, county or city and county," and when the legislature vests "judicial functions" in any local administrative officer, it may be said to have made that officer an "inferior court". On the other hand, the courts of state-wide jurisdiction are named in the constitution. The

[111] See the statements of Chief Justice Hughes quoted in text to notes 51 and 101, *supra*.

State Board of Equalization is not one of them, therefore, it is not a court, and cannot be given "judicial functions", that is, *it cannot be authorized to decide anything.* No, the court did not *hold* that. It merely held that certiorari would not lie to review its decisions because we, the supreme court judges, cannot admit that the Board exercises judicial functions.

Local administrative officers are numerous and have a variety of functions. They would be surprised to know that they are courts. Should we say, "Good morning, Judge," to everyone of them? Historical research might establish that section 1068 of the Code of 1872, in speaking of boards and officers exercising judicial functions, referred exclusively to local boards and local officers, but until that proof is produced I shall continue to doubt it.

One remedy for taking this fog out of our judicial thinking is for the court itself to remove it, by declaring that article VI reserves to the courts exclusively only the function that is exclusively judicial, namely, the final determination of what is the law. Another remedy would be a declaratory amendment of the constitution, an amendment that would relieve the court of its embarrassment, to the following effect:

> Nothing in this constitution shall be construed as denying the legislature power to vest in administrative officers, boards, or commissions authority to decide, in the first instance, any questions of law or fact arising in their application of the statutes they are authorized to administer, with such finality on questions of fact as the legislature may prescribe.

II

COURT REVIEW OF ADMINISTRATIVE DECISIONS

1. *By writ of certiorari.* Confessing that among its prior decisions there were many in conflict,[112] the California Supreme Court unfortunately chose to hold in *Standard Oil Co. v. State Board of Equalization*[113] that the writ of certiorari may not be used in this state to review the decisions of state administrative boards or officers exercising state-wide authority. The fallacious ground for this decision I have amply explored.

That unfortunate decision cut off the people of California from

[112] These conflicting decisions are cited and discussed by Rode, *Administrative Adjudication in California and its Review by the Writ of Certiorari* (1937) 25 CALIF. L. REV. 694.

[113] *Supra* note 5.

using the most appropriate proceeding known to the common law to obtain judicial review of administrative decisions. It is true that the original common-law scope of court review when review was sought by certiorari was limited to inquiring whether the administrative body had acted outside its jurisdiction, but this narrow limitation had been disregarded by the courts in many states, and review by certiorari extended to the correction of errors of law made in the exercise of jurisdiction, and to the inquiry whether the administrative decision was supported by substantial evidence. Thus review by certiorari had been so adjusted that it gave a proper degree of finality to the administrative agency's fact finding, but corrected its errors of law, both substantive and procedural, and kept it within the scope of its statutory authority, or jurisdiction.

As early as 1891 a learned writer summed up his discussion of the decisions in many states as follows:

"The better rule at the present time, as derived from these decisions, is that the province of the writ of certiorari is to quash the decision of a subordinate administrative tribunal: first, because it has exceeded its jurisdiction; second, because it has not followed the formalities required by law; and third, because it has made an error in application of a principle of law to the case at bar—among which errors of law is to be included the finding of a fact unsupported by evidence."[114]

While the Supreme Court of California was free to follow its earlier and sounder decisions to the effect that state-wide administrative agencies vested with decisional power, as well as local ones, exercise judicial functions, and were therefore reviewable by certiorari, the court was not equally free to expand the writ beyond the correction of jurisdictional error as had been done in other states where the judges were not embarrassed by statutory codifications of procedure.

In California, section 1068 of the Code of Civil Procedure crystalized the early common-law scope of the writ of certiorari and confined it to correction of jurisdictional error. While at times the California court has fudged a bit over this line and actually corrected errors that were not jurisdictional, it has always professed not to do so,[115] purporting to stick to its view that the certiorari the constitution authorizes the courts to use is certiorari as defined in the Code of 1872. The decision in *Standard Oil Co. v. State Board of Equal-*

[114] Goodnow, *The Writ of Certiorari* (1891) 6 POL. SCI. Q. 493, 529.

[115] Rode, *op. cit. supra* note 112, at 704-706.

ization refusing to review the board's decision might have been rested on the ground that the alleged error sought to be reviewed was not jurisdictional, but an error of law committed in the exercise of jurisdiction. Clearly it was such. The board without doubt had jurisdiction in its proceeding to levy an additional tax. The error complained of by the company was that the board erred in holding that the sales in question were not tax-exempt as a matter of law.[116] Thus, even if the court had held that the board's decisions were subject to some review by certiorari, the review available by that writ would not have extended to the error complained of.

2. *By writ of prohibition.* By the court's decision in *Whitten v. State Board of Optometry*,[117] the writ of prohibition is not available at all to control administrative boards and officers vested with state-wide authority. The "reasoning" was the same as that which struck down certiorari—that the writ of prohibition is available only to control tribunals or officers exercising "judicial functions", that the State Board of Optometry in discharging its statutory function of revoking licenses of optometrists for causes defined by statute is not exercising "judicial functions", because, says the court, the legislature lacks power to confer such functions on an administrative agency possessed of state-wide authority. The court thus confirmed its anomalous position, fully discussed above,[118] that state-wide administrative agencies cannot be authorized to decide issues either of fact or law.

Nowhere has the writ of prohibition a wide scope. Its use is to stop an officer, board, or tribunal from taking jurisdiction or continuing to exercise jurisdiction over a case not legally within its jurisdiction. It would have been a useful writ by which to stop a state-wide administrative agency from acting where it has no authority to act. The court's decision that prohibition is not available for this purpose, I regret to state, was even less well grounded than its decision with respect to certiorari. In the *Standard Oil Co.* case the court ran to the Code of Civil Procedure of 1872 to see what were the limits of certiorari when the constitution of 1879 was adopted. Had the court run to the same place to find the limits of the writ of prohibition at that time, it would have found that the definition there extended the writ to "any tribunal, corporation, Board, or person,"

[116] See the fuller statement, *supra* p. 113.

[117] *Supra* note 76.

[118] *Supra* Part I of this article.

and did not confine it to those exercising judicial functions.[119] That restriction came into the Code by statutory amendments in 1881[120] and 1919.[121] Why did not the court disregard these statutes and say, as it so often has said, that the legislature cannot diminish the jurisdiction conferred upon the courts by the constitution?

3. *Writ of mandate.* In the *Drummey* case[122] the court reacted to the need for some mode of getting into court for review of alleged errors of state-wide administrative boards and officers. Unfortunately, however, the court held that when an administrative decision revoking a license is attacked by application for a writ of mandamus the court should give a trial *de novo* of the issues of fact. How far the court's retreat, in the *McDonough* case,[123] from this extreme position is intended to go is uncertain. In the latter case the court said that its decision in the *Drummey* case "should be limited to the situation therein appearing" and "is not to be applicable otherwise."[124] By "situation therein appearing" did the court refer to revocation of licenses as something to be dealt with differently from other administrative decisions, differently not only from administrative decisions refusing to grant licenses, but *all* other administrative decisions? Or by "situation therein appearing" did the court mean that trial *de novo* is to be given only when some "constitutional fact" issue can be smelled out?

Apart from these uncertainties, mandamus is not a satisfactory writ for the review of administrative decisions in general. Although in some states its scope has been broadened by judicial decision, in its traditional use it does not extend to revision or control of administrative decisions either of fact or law.[125] Its normal use with respect to administrative boards and officers vested with authority to make decisions in accordance with the law and the evidence is to compel them to take jurisdiction and make a decision, where they have refused to act, but not to control or dictate the decision to be arrived at.[126] While a valuable writ for its specific purposes, these purposes are limited.

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[119] CAL. CODE CIV. PROC. (1872) § 1102.

[120] Cal. Stats. 1881, p. 20.

[121] Cal. Stats. 1919, p. 291.

[122] *Supra* note 3.

[123] *Supra* note 66.

[124] *Ibid.* at 753, 91 P. (2d) at 1042.

[125] See the discussion by Chief Justice Taft in Work v. United States *ex rel.* Rives (1925) 267 U. S. 968.

[126] CAL. CODE CIV. PROC. § 1085.

4. *Writ of habeas corpus.* Another time-honored writ is available to review and set aside some administrative decisions, namely, the writ of habeas corpus, but this writ is obtainable only by a person who is under arrest or in detention, which is seldom the result of administrative decisions.[127]

This exhausts the list of writs which, under the state constitution as it now stands, the supreme court and the district courts of appeal have original jurisdiction to issue. The recent decisions establish that two of them, certiorari and prohibition, are no longer usable to get review of alleged errors of state-wide administrative agencies, and the other two, mandamus and habeas corpus, have definite limitations.

The net result is that judicial procedure in this state is woefully lacking in proper remedies in the higher courts for the redress of erroneous decisions of state-wide administrative agencies. Moreover, without an amendment of the state constitution, the legislature is powerless to provide proper remedies in those courts, for it is the settled interpretation that only by constitutional amendment may the jurisdiction of the supreme court or the jurisdiction of the district courts of appeal be enlarged.

Is adequate and appropriate relief available in the superior courts? Those courts have original jurisdiction to issue the four writs above discussed, but when issued by the superior courts, they have exactly the same limitations that they have when issued by the appellate courts. The state supreme court comes to our rescue by suggesting that the inadequacy of these remedies may be rectified by giving jurisdiction to the superior courts to review the decisions of state-wide administrative agencies by trial *de novo*.[128] The court says that the legislature may now do this. But must we rush from inade-

[127] In the federal courts this writ has been found useful in reviewing administrative decisions to exclude or expel aliens from the country. Since the alien against whom an adverse decision is made is then being held in detention by immigration officers, he may test the legality of his detention by applying to a United States district court for a writ of habeas corpus. In the resulting trial the court reviews the record of the administrative hearing to determine whether the administrative adjudicator committed (1) error of law, or (2) error of procedure. The court does not reweigh the evidence on the issues of fact, but accepts the administrative fact finding as final if there is some evidence to support it, except in a proceeding to expel or deport a resident alien where, if he claims citizenship, he is entitled to a complete judicial trial of this issue. See the discussion of the Ju Toy case, *supra* p. 123, and of Ng Fung Ho. v. White, *supra* p. 137.

[128] In Whitten v. California State Board of Optometry, *supra* note 76, at 446, 65 P. (2d) at 1297; and in McDonough v. Goodcell, *supra* note 66, at 753, 91 P. (2d) at 1042.

quate relief to a so-called form of review that makes the administrative adjudication waste motion whenever it is attacked in the courts? Trial *de novo* is in reality not a mode of *review* at all because it is what its Latin name expresses, namely, a trial of the matter all over again. As the California Supreme Court says, it "is a complete trial of the controversy, the same as if no previous hearing had ever been held."[129]

This is so fundamental that I shall illustrate it, even though for most readers it needs no illustration. The valuation of the property, other than franchises, of every railroad, railroad car company, gas and electric company, and of various other public utility companies, for purposes of *ad valorem* taxation is a function of the State Board of Equalization, and the constitution commands the Board to arrive at "the actual value of such property.[130] Suppose that the legislature should provide for trial *de novo* in the superior court of the Board's valuation in every instance. Is it likely that a superior court judge would come nearer to the "actual value" than the experienced assessors employed by the Board? After all, "actual value" means somebody's judgment of actual value. Trial *de novo* would merely substitute the judge's judgment for the Board's judgment. If an appeal were taken from the judge's decision, the appellate court would not reweigh the evidence to determine whether the judge had found the actual value. The appellate court would say that the trial judge's finding was final if there was any evidence to support it, even though the appellate court if it were free to reweigh the evidence might come to a different conclusion. In short, under that system trial judges would be the assessors instead of the State Board of Equalization. Consequently the law makers of this state have refused to provide trial *de novo* of assessments of property for *ad valorem* taxation, whether made by state or local assessing officers. The judicial review available is limited to inquiring into charges of fraudulent overvaluation and errors of law.[131]

So, with respect to any statute in any field of governmental regulation the legislature should weigh carefully whether it is better to rely for its enforcement upon the processes of the criminal law or other court proceedings, or whether for any of a variety of reasons administration of the statute by administrative boards or officers is

[129] Collier & Wallis, Ltd. v. Astor, *supra* note 67, at 205, 70 P. (2d) at 173.

[130] Art. XIII, § 14.

[131] 24 CAL. JUR. 214.

better. If the latter is its conclusion and it provides properly qualified personnel to discharge the duties, it rarely will wish to undermine their authority by subjecting their decisions to trial *de novo*.

"The finality of administrative fact determination if supported by substantial evidence is the heart of the existing administrative law system. It took many years of travail and controversy to arrive at this standard. The burden of proof is on those who wish to turn the clock back. I have yet to see any demonstration that the existing standard is an evil. The best its opponents can do is to point to a few isolated cases where administrators have gone astray. For each one of these, a dozen cases of error by the courts can be cited."[132]

About five years ago the American Bar Association began a crusade to secure judicial review of federal administrative decisions in all fields in which Congress had not already provided a review satisfactory to the Association. At the outset there was much talk of demanding trial *de novo*, or at least complete judicial reweighing of the evidence on issues of fact, but long discussion in the Association and its committees resulted in entire abandonment of this extreme objective. A bill drafted by one of its committees, and approved by vote of the Association was introduced in Congress, and was there known as the Walter-Logan bill.[133] Far from proposing trial *de novo* in the federal trial courts, it sought review exclusively in the federal appellate courts, that is, in any United States circuit court of appeals, including the Court of Appeals for the District of Columbia. These appellate courts were required not to disturb the fact finding of the administrative agency, unless the court found "(1) that the findings of fact are clearly erroneous, or (2) the findings of fact are not supported by substantial evidence." The "clearly erroneous" rule of clause (1) was an imitation of the rule which now governs a federal appellate court in reviewing the finding of facts made by a federal trial judge in civil suits at law or in equity.[134]

Thus it was the matured judgment of the American Bar Association that the fact finding of federal administrative agencies should have the same degree of finality that is given to the fact finding of federal trial judges in civil suits. While the "clearly erroneous" rule

[132] Feller, *Administrative Procedure and the Public Interest* (1940) 25 WASH. U. L. Q. 308, 320.

[133] The original draft is printed in (1939) 6 U. S. LAW WEEK 617, 619.

[134] FED. RULES CIV. PROC., Rule 52. See especially MOORE and FRIEDMAN, MOORE'S FEDERAL PRACTICE (1938) 3115-3118.

of clause (1) would have given a high degree of finality to the administrative fact finding, it was supposed to give the court a bit more leeway in reconsidering the evidence than the "substantial evidence" rule of clause (2), although the margin of difference is not wide. Nevertheless in the final passage of the bill through Congress, clause (1) was stricken out. It was the judgment of Congress that the standard of finality of federal administrative decisions of issues of fact should be the "substantial evidence" rule, the rule which the Supreme Court of the United States has so frequently applied to administrative decisions. As is well known, the Walter-Logan bill was vetoed by the President but not because the judicial review it proposed was a limited one, but chiefly because this limited review was extended by the bill to some agencies which the President thought should not be subjected to any judicial review at all.[135]

A limited judicial review in which the court may set aside an administrative decision because of prejudicial error in procedure or error of law but which pays a high degree of respect to the administrative finding of facts has the endorsement of substantially all students of administrative law. It is unfortunate that under the constitution of California as recently interpreted by the supreme court, the legislature lacks power to provide for this pattern of review in the appellate courts. Resort to a trial court, such as the superior court, is wholly unwarranted where trial *de novo* is not desired. As we have seen, the only remedies now available in the California appellate courts are either not available at all to review decisions of state-wide administrative agencies or are limited to particular classes of such decisions. There must be a constitutional amendment to enlarge the power of the legislature to give it a free hand to provide appropriate judicial review of the decisions of every administrative agency. If the legislature is given power, it may be trusted not to adopt a single, uniform system of review for all the various state administrative agencies but to consider what is appropriate for each agency, giving proper protection to private rights without undermining the efficiency of our administrative system. Wherever an administrative agency acts in a special field which requires expert knowledge, and the personnel of the agency is chosen because it has this expert knowledge, or expertness develops by handling a multitude of cases of like kind, it is highly probable that the legislature will desire to

[135] See the veto message, H. R. Doc. No. 986, 76th Cong. 3rd Sess. (1940); (1940) 9 U. S. LAW WEEK 2366.

give a high degree of finality to the fact finding of that agency. In such case it will want to provide for limited judicial review, limited to allegations of error in procedure and error of law, in an appellate court, probably in the district courts of appeal. To start such a review in the superior court is waste motion, added expense, and profitable only to lawyers.

In providing appropriate methods of judicial review the legislature should also have a free hand to ignore all the so-called extraordinary legal remedies, certiorari, mandamus, prohibition, crippled as they are by technical limitations, and provide that a person aggrieved by an administrative decision can hale that decision into court by a simply worded petition in which he alleges what errors he claims have been made, petitioning the court to review and set aside the decision if prejudicial error has been committed. The procedure should also include a power in the court to remand the case to the administrative agency to reconsider it in the light of the court's corrections. Review by simple petition in an appellate court was one feature of the Walter-Logan Bill to which no one objected. Section 5 of that bill prescribed the method of getting into court and the scope of the court's review.[136] The use of statutory modes of review,

[136] H. R. 6324, 76th Cong. 3d Sess. (Nov. 28, 1940). "SEC. 5. (a) Any party to a proceeding before any agency or independent agency as provided in section 4 of this Act who may be aggrieved by the final decision or order of any agency, or independent agency, as the case may be, within thirty days after the date of receipt of a copy thereof, may at his election file a written petition (1) with the clerk of the United States Court of Appeals for the District of Columbia; or (2) with the clerk of the circuit court of appeals within whose jurisdiction such aggrieved party resides or maintains his principal place of business or in which the controversy arose, for review of the decision. Before filing a petition such party may within ten days after the date of receipt of the copy of the final decision or order make a motion to the agency or independent agency concerned for a rehearing, tendering a statement of any further showing to be made thereon which shall constitute a part of the record, and the time for appeal shall run from the date of the order on such motion if denied or the order made on such rehearing if a rehearing shall be had. The petition shall state the alleged errors in the decision of the agency or independent agency concerned. The Attorney General of the United States and the agency or independent agency shall each be served by the petitioner with a copy of the petition and it shall be the duty of the Attorney General of the United States to cause appearance to be entered on behalf of the United States within thirty days after the date of receipt by him of a copy of the petition and it shall be the duty of the agency or independent agency, as the case may be, within thirty days or such longer time as the court may by order direct, after receipt of a copy of the petition to cause to be prepared and filed with the clerk of such court the original or a full and accurate transcript of the entire record in such proceeding before such agency or independent agency. Upon the filing of any such petition for review, the court to which the same is directed shall have jurisdiction of the proceeding and of the ques-

as distinguished from the common-law modes, enables the legislature to provide as complete or as limited a review as it thinks appropriate to each agency. One instance of such a statutory review is that prescribed by the legislature for review in the appellate courts of the decisions of the Industrial Accident Commission. The statute says that a person affected by a decision of the Commission may apply to the supreme court or to a district court of appeal "for a writ of certiorari or review". The quoted expression is a misleading choice of words. It has misled lawyers into assuming that this statutory review is of the same scope as the certiorari review defined in section 1068 of the Code of Civil Procedure, whereas it is a special statutory review erroneously named certiorari.[137] The statute provides for

tions determined therein and shall have power to grant such temporary relief by restraining order, mandamus, or otherwise as it may deem just and proper. The court may affirm or set aside the decision or may direct the agency or independent agency concerned to modify its decision. Any case may be remanded for such further evidence as in the discretion of the court may be required but no objection not urged before the agency or independent agency, as the case may be, shall be considered by the court unless the failure or neglect to urge such objection shall be excused by the court for good cause shown. To facilitate the hearing of such appeals and avoid delay in the hearing of other matters before the court, such court may constitute special sessions thereof to consist of any three judges competent in law to sit as judges of a circuit court of appeals, which special sessions may be held concurrently with the regular sessions of said court. Any decision of any agency or independent agency shall be set aside if it is made to appear to the satisfaction of the court (1) that the findings of fact are not supported by substantial evidence; or (2) that the decision is not supported by the findings of fact; or (3) that the decision was issued without due notice and a reasonable opportunity having been afforded the aggrieved party for a full and fair hearing; or (4) that the decision is beyond the jurisdiction of the agency or independent agency, as the case may be; or (5) that the decision infringes the Constitution or statutes of the United States."

[137] There is some history behind this. The first California workmen's compensation act, the Roseberry Act, provided for judicial review exclusively in the superior court, limited to the same scope as the present statutory review in the appellate courts. Act approved April 8, 1911, Cal. Stats. 1911, pp. 796, 804. In Great Western Power Co. v. Pillsbury (1915) 170 Cal. 180, 149 Pac. 35, an employer disregarded this statute and applied directly to the supreme court for review by writ of certiorari. The court held this to be proper on the ground that the Roseberry Act was not effectual to oust the supreme court of original jurisdiction to issue the writ of certiorari to review the decisions of boards exercising judicial functions. The court said, "...in the absence of some special constitutional authorization—and there was none such when the Roseberry Act was passed—the constitutional jurisdiction of this court could not be taken away or impaired by legislative act." *Ibid.* at 183, 149 Pac. at 37.

Before this case came to the court the legislature had already substituted review in the appellate courts, district courts of appeal or the supreme court, by the second California compensation statute, the Boynton Act (Cal. Stats. 1913, c. 176, p. 279), but the compensation claim in question had arisen under the former law and the supreme court regarded its jurisdiction to review as not arising from the second statute, but re-

review exclusively in either a district court of appeal or in the supreme court.[138] It provides that this review "shall not be extended further than to determine whether: (a) The commission acted without or in excess of its powers."[139] If the statute had stopped there, the review authorized would have been limited to the scope of certiorari as defined in the Code of Civil Procedure, but the statute goes on to authorize these appellate courts to determine whether:

"(b) The order, decision, or award was procured by fraud.

(c) The order, decision, or award was unreasonable.

(d) If findings of fact are made, such findings of fact support the order, decision, or award under review."[140]

That points (b) and (c) could not be reached by certiorari is obvious. The legal jargon in point (d) is the common substitute for saying that the court, accepting the facts as found by the Commission, may determine whether the award was correct as a matter of law, that is, the court may determine whether the Commission committed any error of law in the exercise of its jurisdiction. This last is a kind of error which the supreme court constantly says it cannot correct in a certiorari review, but it does so in reviewing decisions of the Industrial Accident Commission.[141]

The statute further provides that "The findings and conclusions

viewed the decision in exercise of the power given it by the constitution to issue the writ of certiorari. This is one of the decisions in which the court stretched certiorari to cover review of an alleged error of law but the court by fallacious reasoning held that the error was jurisdictional and therefore within the scope of certiorari. The constitutional amendment of October 10, 1911, authorizing the legislature to create "an industrial accident board" to adjudicate compensation claims did not expressly give any power to the legislature to define what judicial review there should be of the board's decisions. The constitutional amendment of November 5, 1918, however, did so very clearly. It gives the legislature "plenary powers" to "fix and control ... the manner of review of decisions" of the Industrial Accident Commission. CAL. CONST. art. XX, § 21.

Prior to this amendment the court might properly disregard the review authorized by statute and regard its review as the certiorari review authorized by the original constitution and defined in the Code of Civil Procedure. After that amendment it should have regarded the statutory review as fully authorized by the constitution, as a special statutory certiorari of broader scope than that defined in the Code of Civil Procedure.

[138] CAL. LABOR CODE § 5955.

[139] *Ibid.* § 5952.

[140] *Ibid.*

[141] See, for example, Spreckels Sugar Co. v. Industrial Accident Comm. (1921) 186 Cal. 256, 199 Pac. 8. The court seemed to think it necessary to pretend that the error was jurisdictional. But see also Hendrickson v. Industrial Accident Comm. (1932) 215 Cal. 82, 8 P. (2d) 833, where the court annulled an award for error of law without pretending that the error was jurisdictional.

of the Commission on questions of fact are conclusive and final and are not subject to review."[142] The court holds that this does not prevent it from looking at the evidence sufficiently to determine whether there is any substantial evidence in the record of the Commission's hearing to support the Commission's finding. Even where there is substantial conflict in the evidence, the court says that it is bound by the Commission's findings. And this is true even where the contention is that the claimant is not an employee of the defendant, or that the employment is "casual", although if either of these contentions is true the claim is not compensable under the statute. These particular fact issues might be called jurisdictional, but even so the court holds that the Commission's findings with respect to such facts are as final as its findings with respect to any other facts.[143]

Undoubtedly, by providing this statutory review of the decisions of the Industrial Accident Commission, the legislature enlarged the jurisdiction of the appellate courts, because it required them to give a review broader in scope than the constitution as it stood before 1918 authorized them to give, but the legislature was specifically authorized to do so by the amendment of that year.

This is an example upon which we should enlarge, and extend its principle to all administrative boards, officers or agencies. A constitutional amendment should be adopted to give the legislature plenary powers to provide whatever scope of judicial review it deems necessary with respect to the decisions of any administrative agency, and to confer jurisdiction upon, or enlarge or restrict the jurisdiction of, any court in this state for that purpose.

At the last election Proposition No. 6,[144] proposed by the legisla-

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142 CAL. LABOR CODE § 5953.

143 Dearborn v. Industrial Accident Comm. (1921) 187 Cal. 591, 203 Pac. 112 (casual employment); Hillen v. Industrial Accident Comm. (1926) 199 Cal. 577, 250 Pac. 570 (employment relation); Gale v. Industrial Accident Comm. (1930) 211 Cal. 137, 294 Pac. 391; Sada v. Industrial Accident Comm. (1938) 11 Cal. (2d) 263, 78 P. (2d) 1127.

144 It proposed that a new section be added to article VI of the constitution, to read as follows:

"SEC. 5a. The superior court shall also have jurisdiction to review by writ, trial de novo, or other means, to the extent and in the manner as may be provided by the Legislature, generally or specially, any order, decision, or determination of any administrative officer, board or commission. Any determination by the superior court on such review shall be subject to appeal in such manner as is now or may hereafter be provided in civil cases. Nothing contained in this section shall in any way limit the jurisdiction conferred upon the Supreme Court, district courts of appeal, or superior court

ture as Senate Amendment No. 9, was defeated by a narrow margin.

Some of the objections made to it were:

1. It restricted the legislature to choosing the superior courts as the reviewing courts. To this it was objected that the "normal function" of the superior courts "is to determine controverted issues of fact," as the supreme court has said, and that where alleged errors of law or of procedure were to be reviewed the review should be lodged in the appellate courts, saving the expense of first litigating the issues in a trial court.

2. It was said that the draftsmen disclosed too great fondness for trial *de novo* both because this was prominently mentioned in the draft and because the review was to be in the superior court which is the appropriate court only when such review is desired.

3. The concluding clause which was said by the draftsmen to have been intended to preserve the present mode of reviewing the decisions of the State Railroad Commission, by proceedings exclusively in the supreme court, did not clearly do so, it was argued. The words objected to were: "Nor shall this section be a *limitation on the power* to provide for review of orders, decisions or determinations of the Railroad Commission." The objection was that while the legislature was not limited to choosing the superior court to review the decisions of that commission, it could do so if it chose. Persons friendly to proper regulation of public utilities suggested that the draftsmen should have excepted the Railroad Commission in clear cut words.

4. It was also objected that no express exception was made with respect to review of the decisions of the Industrial Accident Commission. It was feared that the proposed amendment which by its terms extended to all administrative boards or commissions, would, being later in time, supercede section 21 of article XX which places review of the decisions of that commission in the appellate courts.

Having these objections in mind, I believe a new attempt should be made, and I believe the electorate will welcome a proper attempt to put our administrative house in order. I think the legislature should be given an entirely free hand to prescribe the method and scope of review it deems fit with respect to each administrative agency and therefore an unhampered discretion to select the appropriate

by this Constitution or authorized by this Constitution to be conferred upon such courts by the Legislature, nor shall this section be a limitation on the power to provide for a review of orders, decisions or determinations of the Railroad Commission."

court, with two exceptions. These exceptions are the Railroad Commission and the Industrial Accident Commission, both authorized by special constitutional provisions. After the experience of a quarter of a century with the present systems of judicial review of the decisions of those commissions, we may safely perpetuate them by express provision in the constitution.

I venture to propose the following wording of an amendment:

The legislature shall have power to vest in any court of this state original jurisdiction to review any decision of any administrative officer, board or commission by any procedure the legislature may adopt or devise, giving to such judicial review as broad or as limited scope as the legislature shall deem appropriate to the type of administrative decision involved. Review by any court of an administrative decision may be reviewed in any higher court in the manner and to the extent that the legislature may prescribe.

Provided, that no court of this State except the Supreme Court shall have power to review any order or decision of the State Railroad Commission, and provided that no court of this State except an appellate court shall have power to review any decision or award of the Industrial Accident Commission.

All provisions of this constitution respecting the initiative shall extend to the subjects of legislation mentioned in this section, and all provisions of this constitution respecting the referendum shall apply to acts passed by the legislature in pursuance of the powers herein given.[145]

In order to clarify the status of state administrative agencies I think this proposed amendment should be preceded by the proposal made in Part I of this article, to-wit:

Nothing in this constitution shall be construed as denying the legislature power to vest in administrative officers, boards, or commissions authority to decide, in the first instance, any questions of law or fact arising in their application of the statutes they are authorized to administer, with such finality on questions of fact as the legislature may prescribe.

Editorial Note: A resolution designated Senate Constitutional Amendment No. 8 has now been introduced in the legislature to submit to the people as one amendment the proposals above made. It was introduced by Senator Robert W. Kenny, with Senators T. H. De Lap and W. P. Rich as co-signers.

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[145] Under the constitution at present the people by initiative and referendum have the same powers to make laws that the legislature has. The sentence in the text is added merely to avoid any interpretation that the new powers I propose for the legislature should be regarded as an exception to that rule.