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REPORT

of

Committee on Thesis

The undersigned, acting as a Committee of the Graduate School, have read the accompanying thesis submitted by Howard T. Lambert for the degree of Master of Arts. They approve it as a thesis meeting the requirements of the Graduate School of the University of Minnesota, and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts.

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MASTERS THESIS

"BOARDS AND COMMISSIONS:THEIR APPOINTMENT AND POWERS."

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PREFACE

Part One of this thesis deals with the establishment of boards and the tenure of commissioners. This is what might be termed the higher level of the law of officers. Part Two deals with the two fundamental non-executive powers which are usually delegated to boards, -the power to hold trial and the power to promulgate ordinances. Indisputable executive powers are touched upon incidentally. No attempt has been made to discuss them.

The word "Board", mutatis mutandis, as used, includes the terms officer, inspector, bureau, commission, commissioner and administrative trustees. The abbreviation G.S. used frequently in the footnotes refers to the General Statutes of Minnesota, published in 1913. The references to cases in the footnotes have been abbreviated to a limited extent, If the full title is desired, it may be ascertained by consulting the table of cases.

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(The texts of the Constitutions may be found in "The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories, and Colonies," compiled by Francis Newton Thorpe. 7 vol. 1909. Washington.)

Proposed Constitution of New York State (1915).

The text of this proposal, which has since been rejected, may be found in the Reports of the Constitutional Convention, Numbers 92 and 93 ("Record").

II. Statutes.

General Statutes of Minnesota. 1913.

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I. TEXT BOOKS.

Cooley, Thomas M., A Treatise on Constitutional Limitations which rest upon the legislative power of the States of the American Union, (1903), 7th edit. 1036 pp. Boston.

Goodnow, Frank J., Comparative Administrative Law, (1893), 2 vol. N.Y.

——— ———, Principles of Administrative Law in the United States, (1905), 480 pp. N.Y.

Lewis, Sutherland on Statutes and Statutory Construction, (1904), 2 edit. 2 vol. Chicago.

Mechem, Floyd R., A Treatise on the Law of Public Offices and Officers, (1890), 751 pp. Chicago.

Stimson, Frederic Jessup, The Law of the Federal and State Constitutions of the United States, (1908), 386 pp. Boston.

Parker, Leroy, and Worthington, Robert H., The Law of Public Health and Safety and the Powers and Duties of Boards of Health, (1892), 471 pp. Albany.

Throop, Montgomery H., A Treatise on the Law relating to Public Officers and Sureties in Official Bonds, (1892), 963pp. N.Y.

Willoughby, Westel Woodbury, The Constitutional Law of the United States, (1910), 2 vol. N.Y.

II. MONOGRAPHS.

Bondy, William, The Separation of Government Powers in History, Theory, and in the Constitution, (1896), Columbia University Studies in History, Economics and Public Law, V: 134-318.

III. MAGAZINE ARTICLES.

Blue, L.A., Recent Tendencies in State Administration, (1901) Annals of the American Academy XVIII: 434-445.

Bowman, Harold M., American Administrative Tribunals, (1906), Political Science Quarterly XXI: 609-625.

Powell, Thomas Reed, Separation of Powers: Administrative Exercise of Legislative and Judicial Power, (1912), Political Science Quarterly XXVII: 215-238.

Young, Jeremiah S., Administrative Reorganization in Minnesota, (1915), American Political Science Review IX: 273-286.

IV. POLITICAL ESSAYS

The Federalist. This collection consists of a series of political arguments in support of the proposed Federal Constitution of 1789. John Jay, James Madison and Alexander Hamilton were the authors of the essays.

BOARDS AND COMMISSIONS: THEIR APPOINTMENT AND POWERS.

PART ONE. ESTABLISHMENT AND REMOVAL OF BOARDS.

CHAPTER I. CREATION OF BOARDS.

(1) Constitutional Boards.

Administrative Boards[1] were rarely created in the early State Constitutions. The reason for this is historical. At the time of the adoption of the majority of the Constitutions, the Board played a minor role in administration. It is not until the last quarter of the nineteenth century that we find more than an occasional use of the Board in governmental machinery, particularly among the American Commonwealths.

In the Constitutions of the past twenty years a remarkable change in this particular is noticeable. Whether it was the apparent successful working of the Federal system of Departments, Bureaus and sub-Bureaus, or, a feeling that state agencies, wielding the exceedingly important powers with which some of the "new" boards were vested, should have something more than a mere legislative sanction is not for discussion in this chapter. The point is that many boards came to have a direct constitutional basis and sanction for their existence and the powers they exercised.

(1) Consult the preface as to the use of the term "board".

By the Deleware Constitution of 1897 an ex officio Board of Pardons,[1] a State Board of Agriculture,[2] and a State Board of Health[3] were created. The Board of Agriculture was worked out in detail. Very little of importance was left to the Legislature, save the power of placing additional duties on it. On the other hand, the Constitution provided but little more than a name for the Board of Health. The plan of its organization and the detail of its powers and duties were to be provided by law.

Deleware may be regarded as typical of the other states adopting new constitutions during the last decade of the nineteenth century. The provisions in regard to boards are not elaborate, but they are significant of a rapid change.

Alabama in her Constitution of 1901 created boards vested with the administration of certain educational institutions.[4] In confining herself to the mention of but two boards, Alabama cannot be considered an exception to the rule, we are seeking to establish. The South has been very slow in adopting the system of administering government by boards, as compared with industrial and population centres of the

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(1)-Art.VII.(ex officio).Boards of Pardon are frequently created in the Constitutions, of the earlier period. Such a board was established by the Minnesota Constitution(1857).
(2)-Art.XI.
(3)-Art.XII.
(4)-Art.XIV.sections 262, 264 and 266.

United States.

The Virginia Constitution of 1902 provided for the creation of six boards and two commissioners.The State Board of Education,(1) the Department of Agriculture and Immigration,(2) the Board of Prison Directors(3) and the State Corporation Commission were dealt with in detail.This remark applies particularly to the Commission last mentioned. The functions vested in it are similar to those provided for in Public Utility Commission laws.The constitutional detail as to organization and duties is remarkable. A Bureau of Labor and Statistics,(4) an elective Commissioner of Agriculture,(5) and a Commissioner for the State Hospital of the Insane(6) are also provided for,the details as to organization (establishment) and powers being left to the Legislature. No new powers or peculiar offices are created by this charter.The fact to be emphasized is that they are provided for by the Charter.

To bring out this current more clearly,it is necessary to consider the Oklahoma Constitution of 1907.This document is of well-nigh universal detail,and nowhere is its minuteness so noticeable as in the treatment it affords

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(1)-Art.IX. Sec.130 is very detailed as to appointment.
(2)-Art.X.
(3)-Art.XI.
(4)-Art.V.sec.86.
(5)-Art.X.sec.145.
(6)-Art.XI.sec.152. There is also an elective Superintendent of Public Instruction,but like the Board of Pardons,a Constitutional basis for this office is not unusual.

administrative boards. The inevitable result of making boards constitutional organs, is to make them a part of the executive department, an executive hierarchy, or even an executive "Cabinet". Article VI provides that the Superintendent of Public Instruction, the State Examiner and Inspector, the Chief Mine Inspector, the Commissioner of Labor, the Commissioner of Charities and Corrections and the Commissioner of Insurance shall be with the Governor, Treasurer, Auditor and Attorney General the "executive authority" of the State.

A Board of Health,(1) Board of Dentistry, of Pharmacy, a Pure Food Commission, a Department of Banking(2) and a Department of Highways(3) are to be created by law. Within this same class fall the Board of Agriculture(4) and the office of State Printer.(5) The Board of Equalization,(6) Board of Education(7) and the Commissioners of Land Office(8) are ex officio in membership.

The Constitution itself goes into detail with regard to certain of the Boards. Those mentioned above, classed as members of the executive department, are vested with detailed powers by that document. An elaborate formulation

(1)-Art.V.sec.39. This includes the next three mentioned.
(2)-Art.XIV. (3)-Art.XVI
(4)-Art.VI.sec.31. (5)-Art.V.sec.37.
(6)-Art.X. This Board is frequently found in the older Constitutions.
(7)-Art.XIII. (8)Art.VI.sec.32-34.

of powers and organization is made with reference to the Corporation Commission.As in the Virginia Constitution[1] the functions of this Board are those usually assigned to a Public Service Commission.[2] The detail is even greater in this Constitution than it was there.

We cannot leave this review of Constitutional Boards of these typical States without considering the system adopted in the proposed New York Constitution of 1915.[3] In Article XI, section 13, a State Board of Charities, a State Lunacy Commission and a State Commission of Prisons were created; in Article XII, a Board of Regents for education in the public schools; and, in Article VII, a Department of Conservation was described in more or less detail. The most suggestive tendency is noticed in Article VI, however, which provides for the departmentization of the State government. A Department of Law, Finance, Accounts, Treasury and State are provided for headed, each, by the usual departmental officers of the State governments. In addition to these, Departments of Taxation, Public Works, Health, Agriculture, Charities and Corrections, Banking, Insurance, Labor and Industry, Education, Public Utilities and of Civil Service were created, or rather, continued

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(1)-supra page 3.
(2)-Art.IX, sec.15 et seq.
(3)-This proposed Constitution has, since, been rejected.

by the proposed Constitution.

By the Minnesota Constitution of 1857 three Boards were created, each one ex officio; a State Board of Investment,[1] a State Canvassing Board[2] and a State Board of Pardons.[3] The office of State Librarian was also created.[4] Clearly these, as functioned, are of little administrative significance.

From the discussion and illustrations which have preceded, it is clear that the present day tendency is to create Boards by constitutional provision. But only a very few of the States have modern Constitutions. Comparatively speaking, a vast majority of Boards are of legislative origin. There are striking examples of Boards created by executive and by judicial authority, without the sanction of law. Overburdened Judges have appointed Court Commissioners to offices by themselves created. The invalidity of such proceeding is clearly manifest. The Minnesota "Efficiency and Economy Commission" is an example of what an executive can, and what he cannot do. The position of such a body in the governmental system is merely that of any voluntary association of influential citizens-they may foster and guide public sentiment in certain channels. From a legal and

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(1)-Art.8.sec.6.
(2)-Art.5.sec.2.
(3)-Art.5.sec.4.
(4)-Art.5.sec.4.

constitutional standpoint they are of not the slightest consequence.Their political power is individual,not governmental.[1] They may suggest reforms and offer advice,but there is no power to command or enact in them. From a practical standpoint,the legislative control over the exchequer restricts the creation of such bodies by the other departments.[2] While the good which can be accomplished by a public-spirited body of men ought not be minimized,a "Board" which not only volunteers its services,but,in addition,meets its own expenditures cannot claim,in this age of questioned motives,recognition as an impartial,disinterested,governmental tribunal.

(2) Boards created by the Legislature.

The vast majority of administrative Boards are the creation of the Legislature.By creation is meant the origination,the conception of the idea of a board.It is but a phase,the first phase,in the establishment of a board.It is to be clearly differentiated from the process by which a board is formed and organized.In this sense,this power is exercised directly and as an inherent prerogative by the constituent assembly and by the legislature.While lim-

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(1)-See "Preliminary Report" Minnesota Efficiency and Economy Commission,(1914)p.7. As to the financing of its work, see article by J.S.Young,"Administrative Reorganization in Minnesota"-American Political Science Review IX:273-274.(1915).
(2)-The question has been raised as to whether it is proper for a Governor to use his contingent fund for this purpose.

itations may be placed on the power of the legislature in this respect[1], as a rule no limitations are placed upon the exercise of this prerogative.

Summary and Conclusion.

The power to create boards is inherent in the constitution framing organ. It is generally lodged impliedly in the legislature. It cannot be authoritatively exercised, without express grant, by either of the other departments.

The policy of creation by the executive under the existing system has been discussed. Perhaps, there is no feature in state administration so noticeable as the multitude of boards which are functioning. It seems to be the contemporary belief that the period of experimentation is rapidly drawing to a close.[2] The Board, or the single Commissionership, has proven its worth as an administrative agent. More than that, it has become indispensible. If this conclusion is accepted, it follows that it should have a constitutional basis, as a primary unit in state government in its executive branch. The power of the legislature to create such organs should be limited to the institution of those of a more or less temporary nature.[3]

(1)-For instance, Oklahoma, in her recent Constitution provides that the "Legislature shall have no power to appropriate any of the public funds for the establishment or maintenance of a Bureau of Immigration".-Art.V.sec.48.
(2)-Consult an article by L.A.Blue on Recent Tendencies in State Legislation: Annals of the American Academy 18:434(1901)
(3)-Departmental offices are not included, manifestly, in this statement or conclusion.

CHAPTER II. THE MANNER OF ESTABLISHING BOARDS.

In the past Chapter the question as to what organ in the frame of government should create Boards was discussed.In the present Chapter an investigation will be made as to the manner of instituting such a body.Manifestly,the subject is limited to those boards which are created by the legislature.The constitutent assembly is not affected with a lack of power.Its authority is beyond question.On the other hand the legislature is limited by the system of checks and balances and other restrictions of a constitutional nature.

(1) Methods of selecting Boards.

Boards may be either elective or appointive.It is usual for the Constitutions to leave the manner of choice in this regard to the discretion of the Legislature.(1) The California Constitution provides that "all officers(save constitutional officers)...shall be elected by the people, or appointed,as the Legislature may direct".(2) Here both methods are enumerated.The Indiana Constitution is typical. It provides that "all officers whose appointments are not

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(1)-Cal.(1879)Art.XX.sec.4. Indiana (1851) Art.XV.sec.1. These represent the general types.
(2)-Cal.ibid.

otherwise provided for in this Constitution, shall be chosen in such manner as now is, or hereafter may be, prescribed by law".(1)

By the Constitution of Minnesota, however, the Governor "shall have power, by and with the advice and consent of the Senate, to appoint...such...officers as may be provided by law".(2) At first glance, this provision would seem to forbid the Legislature to make certain officers elective, and other officers appointive by the Governor alone. Yet in one instance(3) a very important Board has been made elective, and in a very large number of Boards, the Governor appoints alone. On careful reading, this clause is ambiguous, and the Legislature is probably justified in exercising its discretion as to method.

The method of election is little used so far as comparative numbers indicates, tho its sanction is oftentimes appealed to in the selection of the boards of greatest importance.

There can be little doubt from an administrative point of view that appointment is the preferable method of selecting the members of a board. Harmony, responsibility and

(1)-Ind. supra p.9, n.(1).
(2)-Art. V. sec. 4. The omitted matter refers to the appointment of a State Librarian.
(3)-Railway and Warehouse Commission. G.S. 4171. See preface as to use of G.S.

expertness result in economy in administration as well as in efficiency.It is not within the scope of this thesis to discuss which form is the more "popular",more democratic.

(2) "Manner of Appointing" distinguished from Nomination.

Does the power of prescribing the manner of appointment,which is as a rule vested in a legislature,carry with it the power of nominating the appointee? If the power of appointment is to be regarded as an executive function a Court would be obliged to construe the constitutional provision as to manner of appointment as not including the power to nominate.(1) To hold otherwise would tempt the legislature into unconstitutional legislation.Assuming the contrary,that the power of appointment is general in nature and not confined to any particular department,the rule adopted by the courts has been to include nomination within the meaning of the power granted.(2) Some courts reverse this argument by holding that when the people vested the Legislature with this power,it would seem difficult to believe that it was intended to deny to that body the power to nominate.In other words,the power to nominate is general,not executive.(3) Without discuessing the intrinsic nature of the

(1)-People v. Freeman,80 Cal.,233
(2)-People v. Hurlbut,24 Mich.44,63;People v.Freeman,supra; People v. Langdon,8 Cal.,1,16;Hovey v.Riley,119 Ind.,386.
(3)-Board v.Baltimore,15 Md.,376,461.

power of appointment[1] and going into further detail as to its influence, it may be stated as the usual rule that the Legislature may nominate under the power to prescribe the manner of appointment.

In certain of the states this power is fordidden in express terms by the constitution.[2]

(3) The Power of the Legislature to designate the Person or Body which shall appoint.

Tho the legislature may possess the power, it would be clearly impossible for it to make current selections for offices. Not only the comparatively great number of offices to be filled, but the fact that there could be no intelligent selection on the part of the legislature as a whole, sustains this view. The Governor, on whom rests the responsibility for efficient administration, should select his co-administrators, within certain limitations, which will be noticed later.[4] It is customary, therefore, for the Legislature to vest this power in some other authority, generally the Governor.[3] The naming of certain officers as ex officio members of Boards is an exception to this practice.[5]

The designation of the authority to make an appointment, is not an exercise of the appointing power.[6] Where the

(1)-This will be discussed in detail in Chapter III.
(2)-Ohio, for instance, provides: "but no appointing power shall be exercised by the General Assembly". Art. II. sec. 27.
(4)-Chapter II. sec. 4. The policy of legislative appointments will be discussed in Chap. III.
(3)-In Minnesota the Governor appoints the members of 25 boards. He shares in the appointment of the members of four other bodies.
(5)-There are 12 ex officio boards in Minnesota, and eight others which are partly composed of ex officio members.
(6)-State v. Kennon, 7 Oh. St. 547.

power has been questioned, it has been in reference to the body in which the appointment power was reposed.

The question was raised in the case of Overshiner v. State as to whether the Legislature could vest in the State Dental Association the power of choosing three of the five members of the State Board of Dental Examiners.(1) The Court speaking thru Hadley, J. said:

"Where the Constitution is silent and the question is one of public policy, or relates to the best means or agency for the attainment of some governmental end, it must be presumed that the framers of the Constitution intended to invest the legislative body with a large discretion in the selection of the agencies most suitable and beneficial to the public." (2)

The court then goes on to justify this view by citing numerous examples, from practice in Indiana, of a similar selection by private associations.(3) These illustrations refered to offices of lower rank than that of the principal case.

A similar problem was presented to the New York courts(4) and those of California(5) with reference to municipal Commissioners. In Sturgis v. Spofford it was decided that the Legislature could vest the appointment of Pilot Commissioners in the Chamber of Commerce of New York City and in certain representatives of Marine Insurance Associat-

(1)-156 Ind., 187.
(2)-ibid, p.189.
(3)-ibid, p.193.
(4)-Sturgis v. Spofford, 45 N.Y., 446.
(5)-In re Bulger, 45 Cal., 553.

ions.The reasoning of the court is that since restrictions in this regard were imposed on the legislature as to certain officers,it was intended that,with these exceptions,the legislature was free to vest the power of appointment without restraint.The weight of these cases as authorities in support of the Overshiner case is not entirely certain,because of the peculiar position of the municipality with reference to legislative control.Their holdings are somewhat suggestive of the ~~legislative~~ judicial inclinations.(1)

In Minnesota,appointment by voluntary associations of State Boards does not exist. Indirectly,one or more members of three different boards are,in effect,named by private associations.When an officer of a private body is made an ex officio member of a board,that body when it elects such officer does an act closely akin to appointing a state officer.(2) The validity of such selections has never been questioned in the Minnesota courts.(3)

That the legislature may vest the appointment of subordinate or departmental officers in any of the three departments or in governmental boards is generally conceded.In practice this power is granted to and exercised by nearly every board in the Minnesota administrative syatem.(4)

(1)-In re Bulger,45 Cal.,55$ goes to the extent of permiting aliens to exercise this power.Whether a distinction exists as to the municipalities will be discussed in.Ch.III.
(2)-Farmers Institute Board,G.S.2990;Public Library Commission,G.S.4911;Stallion Registration Board,5072.The Advisory Board of the Minimum wage Commission might also be mentioned in this connection.G.S.3910.
(3)-The practical side of this questionnwill be discussed later on in this section.
(4)-The Board of Control might be mentioned in particular.

Three reasons have been asserted as justifications of the vesting of appointing powers in private associations. The first is based upon customary practice.This has been noticed above.The second is based upon constitutional inference.The third,upon public policy.The theory is that it takes an expert to select an expert.What does the Governor know of the respective ability of the numerous dentists in the state to serve upon a Board of Dental examiners?The ability,the peculiar interest and the wide acquaintance with personnel gives to such associations standards upon which to base appointment unexcelled by any other governmental agency.(1)

The plea of expediency should not always prevail, however.It should never permit an abdication by the recognized branches of the government of their inherent powers. No one would argue for the proposition that the legislature could turn over all administration(save that reposed by the Constitution in regularly constituted bodies) to organs chosen by voluntary associations-bodies second removed from the organs of popular choice.If the price of efficiency is private government,the adequacy of our republican government is open to serious challenge. That the existing frame of

(1)-see Overshiner v. State,156 Ind.,187.

government may adopt the advantages of private selection without an abdication of functions, will be made evident in connection with the discussion of list appointments in the succeeding section.

(4) Legislative Limitations on the Power to Nominate.

(a) Qualifications of appointes: The power which the legislature has of prescribing qualifications for officers and boards is practically undisputed today. Justice Field in a leading case said:

"The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgement, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of the different States from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely..."(1)

Among the qualifications prescribed for boards in the Minnesota Statutes are found the following: professional license, college diploma in a particular field of research, a prescribed collegiate course, faculty membership, "practical" knowledge, prescribed number of years of experience in a particular profession or trade and "tecnical" skill. Interest in the subject matter is referred to in the statute provid-

(1)-Dent.v.West Virginia, 129 US., 114.

ing for a State Forestry Board in the following terms:[1]

"So far as practicable, all such appointees shall be appointed with reference to their knowledge of, and interest in, the planting and cultivation of trees in prairie regions the preservation of natural forests, the reforesting of denuded lands, and the protection of the sources of streams."

In addition to these requirements bonds of varying amounts, the general, and, sometimes, a special oath and citizenship are usually mentioned. In the case of the Soldiers Home Board, the statute prescribes that preference shall be given to old soldiers, other qualifications of prospective appointees being equal.[*] Closely akin to these limitations on the appointive function, are certain disqualifications sometimes mentioned, such as faculty affiliation (with reference to certain boards of examiners), conflicting business interests and the holding of another public office.

(b) Appointment from a selected list: State Legislatures have frequently enacted laws which provide that the appointing power shall select the appointee from a list of names submitted to him by some other organ, in the majority of cases, a private association. We have noticed that certain states have sanctioned the practice of appointing Boards by means of such associations.[2] When the list sub-

(1) G.S.3783.
(2) -supra pp.12-16.
(*) G.S.3957.

mitted includes but three,or when there is no choice,whatever,given,the effect of the two methods of appointment is the same.When but one name is recommended,there is a virtual abdication of authoritative government,tho the semblance remains.The Governor,or whoever is to appoint,does a ministerial act,pure and simple.Appointment carries with it the idea of selection,of a discretionary act.There is less objection,from this standpoint when the list is enlarged to afford a foothold for the exercise of judgment tho the limits are extremely narrow.

The Minnesota Supreme Court has held,however,that even this does not afford the appointing officer sufficient lattitude.In State ex rel Attorney General v. Griffen,(1) decided in 1897,the question at issue was as to whether a law which provided that the Governor should appoint five members of a State Board of Pharmacy from a list of fifteen names submitted to him by the State Pharmaceutical Association,and after the first year,one from a list of five,was constitutional. The law was declared invalid.In the course of the opinion of the court,(speaking thru Justice Collins) the constitutional provision vesting the ap-

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(1)-69 Minn.,311.

pointment power in the Governor,with the consent of the Senate is referred to.[1] This provision gives to the Governor broad powers.His judgment and freedom are not qualified save by the requirement as to the consent of the Senate.If any other view were true "the legislature could delegate the power of selection to a natural person,or to a ward caucus,and compel the chief executive to surrender his prerogative to such person or caucus".[2] He might be required to select from a class of one. Even if the Governor consented to such a scheme it would be invalid."He cannot delegate the power of appointment;he cannot surrender his authority to another;he cannot relinquish or renounce the right".[3]

This decision is frankly opposed to the idea of appointment from a list.It is still law in Minnesota.The law to which it applied was ammended so as to read "the Governor'may'" instead of the "Governor 'shall'" appoint from the list presented.[4]

In spite of this decision there are ~~at least~~ six Boards the membership of which,at least in part,is made up of persons,recommended to the Governor in a list,from

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(1)-This provision(Art.5.sec.4)is quoted supra p.10.
(2)-p,312. This portion of the opinion is particularly suggestive when compared with the portion of the opinion in the case of Overshiner v. State (Ind.)quoted supra p.13.
(3)-p.313.
(4)-G.S.5029.

which he is required to select.The words of the statutes are not entirely free from ambiguity in respect to this last statement,however. The State Dental Association is required to present its recommendations within at least ninety days before the expiration of a membership in the Board occurs,In case of failure the Governor makes the appointment from men of his own selection and choice.(1)

The result is that there are one or more members of the State Board of Forestry,(2) the State Board of Electricity,(3) the State Board of Arbitration,(4) the State Barbers Board,(5) the State Board of Dental Examiners,(6) and of the State Live Stock Sanitary Board(7) who hold their seats by virtue of an unconstitutional provision in the law.The only apparent distinction which can be drawn between these enactments and that which was declared unconstitutional is that the former are of the "mixed" type of boards,partly ex officio,partly of the Governors selection,by and with the advice of the Senate and partly by selection from the lists submitted,while the latter was composed entirely of persons recommended by the Pharmaceutical Association.This distinction could,hardly,be considered a reason for regard-

(1)-G.S.5015.
(2)-G.S.3783.
(3)-G.S.5082.
(4)-G.S.3940.
(5)-G.S.5055.
(6)-G.S.5015.
(7)-G.S.4690.

--------ing the appointment of those members who are selected from a list as valid.

The identical question has not arisen in other states. Reasoning from the analogy of the Civil Service regulations, to which the Minnesota statutes above referred to are somewhat analogous, a view contrary to that expressed by the Minnesota Courts might prevail. In those regulations there is a list, a more or less narrow exercise of the selective power, and an advisory body to frame the list, tho it is true, that body, is governmental in its nature. State v. Griffen is based upon a question as to the limitation of the Governor's powers, more than upon the point that the recommending body is a non-voluntary association, however, so that this latter distinction is scarcely significant.

It might be argued that there is no appointment power unless it is free from such restrictions.(2) The contrary view might be adopted that such power is purely ministerial, that discretion plays no part in it. The fact is that there is, both, an appointment power and a power on the part of the Legislature to restrict that power. The difficulty of drawing a line between the respective boundaries

(1)-This is virtually the holding in the Minnesota case in reference to restrictions of appointment to a list. By a proviso incorporated in the opinion, it is said: "It will be understood that we do not intimate that the legislature cannot create an office, and itself appoint the officer thus provided for, or lodge the power of appointment elsewhere than with the chief executive, or that in its enactments, it mightnot provide that appointees to legislative offices as distinguished from offices created and fixed by the Constitution, must possess certain qualifications. It has been frequently held that the right of the legislature to prescribe

of the legislative power and the appointment power is no proof that both classes do not exist.(1)

It might be assumed from the previous discussion that Minnesota is opposed to appointment from a list, or by decision bound to oppose the Civil Service. This is not true. The Court holds that when the power of appointment is vested in the Governor, his selection cannot be restricted to a list of names submitted to him by a private association. The decision really reaches the heart of the question in spite of these apparent limitations. With the exception of the Railway and Warehouse Commission which is elective, and the twenty-three ex officio boards or members of Boards, all of these Commissions are appointed either by the Governor alone, or by him with the concurrece of the Senate. In the second place the Civil Service, if it were adopted in Minnesota, would not, if common precedent is observed, apply to these higher administrative officers of the State.(2) The list must emanate from a private association, therefore.(3) In a word, the Minnesota view is based solely upon Article 5, section 4 of the Constitution which gives to the Governor absolute power to appoint (wherever he is author-

(1)-See Reports of the Attorney Generals Opinions (U.S.) XIII: 516, 524.

(2)-The case of State v. Frear, 146 Wis., 291 and People v. Gaffney, 142 App.Div.(N.Y.)122 discuss the rationale of the Civil Service broadly, and should be consulted for the purposes of an analogy.

(3)-In the case of Ex parte Lucas, 160 Mo., 218 the Court dodged the question decided by the Minnesota Court by holding that the Governor alone could object when the appointment power vested in him was so curtailed. This case also holds that mandamus may be invoked to compel an private association to make recommendations, a most unusual view.

ized by the Legislature to exercise that power, as the Courts interpolate) by and with the consent of the Senate. Where no such clause exists, as in the greater number of States, it is probable that under the power of prescribing the "manner" of appointment the Legislature could limit the discretionary power of the appointing officer to selection from a definate list, whatever its source.

In a preceding page it was stated that the great objection to appointment, direct, by private associations lay in the fact that this constituted a virtual abdication of the powers vested in governmental bodies.(1) The method of appointment under discussion is an improvement in that there is a check exercised by a public officer. Efficiency is achieved thru the form of legality, at least, tho in practical affect, there may be no substantial difference in the methods employed.(2)

(c) Geographical and Political Limitations: Occassionally the Legislature limits the class of citizens from which the appointing power may choose thru geographical considerations. Florida, for instance provides that no member of the State Board of Control shall be appointed

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(1)-supra p.16.
(2)-supra, 17-18.

from the ~~citi~~ residents of any county in which an institution which is under the administration of that Board is situated.(1) The State Normal School Board in Minnesota must include one person from each county in which a Normal School is situated, and only one.(2) The Surveyors-General of Logs-a state administrative office in Minnesota-must be appointed according to certain districts of the State, specefied.(3) Such limitations have been upheld.(4)

The appointing power is in some laws limited as to the time in which the appointment must be made. These provisions are of importance only at the time of first establishing the Board. The "continuance" clause prevents the vacating of an office thru failure to appoint in a legal manner a successor to the incumbent. The genral rule seems to be that when a law states that the Board shall be appointed by January first, it must be so appointed, orthe power to appoint, so far as that office is concerned, is destroyed.(5) Wisconsin, however, has adopted a rule which declares such a direction in the statute is not mandatory, but merely directory. Consequently, the right to appoint may be exefcised at a later date.(6)

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(1)-see citation in note 4, infra.
(2)-G.S.2970.
(3)-G.S.5453-5454.
(4)-State ex rel Attorney General v. Bryan, 50 Fla., 293.
(5)-Board of Education v. Okla. Territory, 12 Okla., 286.
(6)-State ex rel Johnson v. Nye, 148 Wis., 659.

Certain secondary limitations have been mentioned in the preceding discussion.(1) There is one other limitation which is frequently provided, of about the same level of importance. The appointing power is prohibited from selecting more than two members of a Board of three from the same political party, or in larger boards, a proportional number.

Briefly recapitulating the subject matter of this Chapter, we have seen that Boards may, as in the case of all public officers, be either elected or appointed. However the tendency, as shown clearly in the proposed New York Constitution is to make such administrative bodies elective because of their new position with reference state administration. By far the greater number of boards at the present time are appointive. Appointment is the preferable method, in spite of the growing importance of Boards and the powers they exercise because the people are neither in a position to judge of the fitness of a candidate to perform the functions of the office; again, because of the length of the ballot bound to result from such a policy, there will be popular control only in name.(2)

(1)-supra p.17.
(2)-Goodnow, "Comparative Administrative Law" II:17-18.

Under the clause in the State Constitutions which provides for the "manner" of appointing Boards-the Legislatures are generally conceded the power to nominate such bodies, as well as to ~~appoint~~ create them. In some states there has been a little doubt thrown upon this view, because of the notion that the appointment power is intrinsically executive in nature,(1) and, in other states the legislatures have been forbidden to nominate officers. The policy of a legislative appointment as compared with appointment by executive officers, particularly the Governor, will be discussed later on in this thesis.(2)

Courts have generally conceded to the Legislature the power to name the officer or body which may select the officer. In so far as this duty is reposed on voluntary associations, however, it is very questionable.

To provide a schedule of qualifications for the higher members of the State administration is a generally accepted power of the Legislature. There is more doubt as to the validity of legislative limitations refering to the list of names from which the appointee must be selected. It is a form of the Civil Service idea applied to the higher officers of State administration. In Minnesota the power

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(1)-The intrinsic nature of the appointment power will be discussed in Chapter III.
(2)-Chapter III.

has been denied to the Legislature, because of the view that whenever the Governor is given the power to nominate any officer or board member, no limitations can be placed on the power because of the unqualified terms used by the Constitutions with reference to the exercise of that power by the Governor. Viewed in the light of policy and efficient administration, recommendations made by private associations are to be commended; viewed in the light of law, private government should not, because of its superior efficiency, force recognized governmental bodies to abdicate their functions.

CHAPTER III.THE POWER OF APPOINTMENT.

In the previous two Chapters the creation of a Board and the manner of establishing such an administrative organ have been discussed.It is the purpose of the present Chapter to discuss the nature of the appointment power,the exercise of that power in its ordinary and peculiar phases,a few of the constitutional interpretations,and, finally,the policy of appointment by the legislature and executive branches.Our viewpoint heretofore has been legislative.In this Chapter the subject matter will be examined,rather,from the standpoint of the executive.

(1)Intrinsic Nature of the Power of Appointment. The exercise of that Power.

In England the power of appointment[1] is a prerogative of the Crown.The early American view followed that of England closely.[2] Some of the earlier decisions of the American Courts have asserted that the power of appointment was executive in nature.[3] And in the Constitution of the United States[4] and the majority of State Constitutions[5] this general rule might find justification.

(1)-Appointment is used in this Chapter,unless otherwise specified as the power to select an officer and grant him a commission to office.
(2)-The case of State v. Baucher,3 N.D.,389 gives the English and the American views a brief consideration.Jefferson's Letter to Kercheval is famous as a result of the argument presented in behalf of executive appointments.The Federalist (No.76) treats upon this subject.Neither Jefferson nor Hamilton go deeply into the question as to the intrinsic nature of the power,however.
(3)-Taylor v. Commonwealth,3 JJ.Marsh(Ken.),401;State v.Kennon, 7 Oh St 547. (4)-Art II sec 2 (2 3). (5)-see note (1)p 29 inf.

With this somewhat meagre statement as to the intrinsic nature of the power of appointment in mind,(2) an investigation will be made of the applicationsof the doctrine. In the first place,does the doctrine mean that the power of appointment can be exercised by the executive department alone? The very wording of the Constitution of the United States disapproves an affirmative answer. Art.II.sec.2,clause 2 provides,in part that:

"But the Congress may by law vest the appointment of such inferior officers,as they think proper,in the President alone,in the courts of law,or in the heads of departments" "He shall nominate,and by ahd with the advice of the Senate,shall appoint ambassadors.....and all other officers of the United States,whose appointments are not herein otherwise provided for."

Thus so far as inferior officers are concerned the power may be exercised by the judiciary.In regard to higher officers,the upper branch of the Legislature is given a concurring power.In Minnesota a like concurrence is provided for,(3) and it is the same is nearly all of the States.(4) The Constitution of the United States vests in

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(1)-By this is meant that the power of appointment,exclusive of purely minor officers,is vested in the executive branch,tho perhaps not exclusively,in view of constitutional interpretations that have been made.See Stimson,"The Law of the Federal and State Constitutions of the United States" p.206.
(2)-Mechem,"Public Officers","Appointment to office,whether made by judicial.legislative or executive bodies,are in their nature essentially executive acts." sec.104.
(3)-Art.5.sec.4.
(4)-Stimson supra note (1)

both the House of Representatives and the Senate the power of choosing their officers.(1) The same power is given to either branch of the legislature in Minnesota(2) and, in addition, the Supreme Court is given a limited appointment power.(3)

Thus it is clear, that even tho the power of appointment is regarded in theory as exedutive in nature, in practice it is split up between all three departments of government. This "departmental" idea of appointment, may be regarded as an exception to the general power, but in actual government the Board appointments made under it are very numerous.

Officers, purely departmental in function, in so far as the legislative and the judicial branches are concerned are not particularly important from the administrative standpoint. A complete treatment of the Board Idea would include a discussion of boards created and appointed by the executive, legislative and judicial departments for the purposes of information and investigation as well as for administration.

There are important administrative boards which are brot in under the departmental idea, and we must con-

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(1)-Art.I.sec.2 (5). Art.I.sec.3.(5).
(2)-Art.4.sec.5.
(3)-Art.6.sec.2.

sider some of the types of these exceptions to the rule of executive boards.

(a) Municipal appointments: The majority of the decided cases with reference to boards and their establishment deal with municipal boards or commissions. Cities, under the American system, are creatures of the legislature, tho the Home Rule provisions of many of the State Constitutions may cut in on this generalization. Thus the Legislature creates a body which exercises powers essentially executive, legislative and judicial in nature. When the legislature assumes to appoint a city Board in reality it is exercising a departmental power. In no case has the power of the legislature to appoint such officers been held to be unconstitutional as in violation of the theory of the separation of powers.(2) On the other hand, these cases are ordinarily cited as champions of the theory that the power of appointment is not executive.(1) The true view seems to be that such appointments are merely departmental, tho it is to be remarked that the courts generally ignore this distinction, and seek to justify the appointment on general grounds, which would apply to the entire system of boards.

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(1)-See especially a note in 13 American State Reports @ 130.
(2)-The case of State v. Denny, 118 Ind. 382, is an apparent exception to this statement. The real decision goes off on the point that the legislative appointment was an interference with the powers of local self government. (see State v. French, 141, Ind. 618). It must be admitted however that some of the language employed by Justice Coffee might be interpret- as opposed to legislative appointments, in any event, regardless of the local home rule provisions. The Indiana Court has been inclined to favor a strong executive, however.

The case of Board of Police v. Baltimore[1] is typical in this respect. The extreme cases which have permitted a legislature to clothe a non-governmental body, even a body composed partly of aliens, with appointment power have referred to the appointment of municipal officers.[2]

(b)-Benevolent Institutions: In Indiana a distinction has grown up in regard to benevolent institutions such as usually come under the supervision of State Boards of Control or Boards of Charities and Corrections. In the cases of Howey v. Carson[3] and Hovey v. Riley[4] it was decided that the Boards in control of such institutions may be appointed by the Legislature. In the first case above mentioned Justice Berkshire, a champion of the rights of the executive, sustained the appointment of the Trustees for the Hospital of the Insane by the Legislature on the ground that this was the customary method of appointment in regard to such officers, before the adoption of the Constitution of 1851. Inasmuch as the provisions of the new Constitution of 1851 did not alter the terms of its predecessor, the Court implied that the legislative appointment in this regard to these officers was considered to be

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(1)-15 Md., 376. The able opinions in the case of People v. Hurlbut, 24 Mich., 44. are also worth notice.
(2)-Sturgis v. Spofford, 45 N.Y. 446; In re Bulger, 45 Cal., 553.
(3)-119 Ind., 395.
(4)-119 Ind., 386.

valid under the former Constitution by the framers of the instrument of 1851. In the case of Hovey v. Riley,(1) decided a month later, a broad extension of the doctrine announced in the Carson case is made. This case dealt with the validity of the legislative appointment of a Trustee to the Blind Institute. It will be observed that this officer falls within the same class as those in the previous case, with one exception,-the legislature created this office after the Constitution of 1851 had been adopted. This fact, if the language used in the Carson case is considered to be a statement of what the Court there meant, should be controlling, unless the whole class of benevolent institutions are to be regarded as an exception to the general power of the executive to appoint. The Court held, in the first place, that the "practical exposition" of the Constitution establishes principles, and does not refer to validity of the particular custom, alone, under consideration. Secondly;-

"Benevolent institutions are the property of the State, and, as such, within them general control of the legislature. As the legislature has general authority over the property of the state, and as it may appoint agents or officers to manage that property, there is a solid foundation" for the practice as to appointments of this class of officers.(2)

The Court holds, therefore that the appointment of

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(1)-119 Ind., 386.
(2)-p.393.

Boards in control over benevolent institutions is a legislative function. The dictum of the case applies this rule to all cases where the management of State property is concerned.

Considered in its full significance, this phase of the appointment power would greatly narrow the influence of the Governor on State administration. To apply it to Boards in Minnesota, it would mean that the executive could not claim the right to the administration of the State forests, highways, game and fish laws, educational institutions, and finally, of all benevolent institutions recognized as belonging to the state. This would constitute a remarkable diminution in executive authority, if the legislature should attempt to assert the prerogative that is claimed for it.

The exception in favor of legislative appointment of officers and boards in control over benevolent institutions, or, still more broadly, of boards in which are vested the administration of or over state property seems to be peculiar to Indiana. Whether it is a universal principle cannot be determined until more courts have expressed themselves upon the subject.(1)

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(1) Elliot, J. in an able dissent to the case of State v. Hyde, 121 Ind., 20, states: "The conclusions deducible from these authorities is... that where the legislature has power to establish a scientific department, or to establish any public institution, it has, as an incident of that power, the right to select the means and agencies it deems necessary to carry into effect the law it has enacted." p. 44. The learned Justice attempted to stretch the principle applied to benevolent institutions to other institutions, and failed. Such an extension would leave the executive but little.

(c) Statutory offices:The broadest of all exceptions to the executive power of appointment,in fact an exception which is virtually as broad as the rule,itself is that, which, sometimes announced by the courts,that where a legislature has the power to create an office by statute,it has the power to fill that office.(1) In effect,such a rule would seem to indicate that the doctrine that all powers not expressly delegated to the Federal government are reserved to the states,means not what it says,but that they are reserved to the legislatures of the states.The legislature has the total residuary power,under the limitations of the state Constitution,to pass laws.But if we assume that there is an inherent power in the executive branch to appoint the members of the administrative department,unless delegated by the state constitution to the legislature,it is difficult to understand,exactly,upon what basis a legislature assumes to limit by mere statute the residuary executive prerogatives. The field of the executive is state administration.If the legislature thinks it expedient to widen the field of administration,it has full power to do so under the Constitution.But to place officers of its own selection,or selected by such persons or bodies as are designated by

(1)-State v. Covington,29 Ohio St.102. cf.supra pp.11-12 and cases there cited. The fact that many of these decisions are in reference to municipal appointments does not militate against their authority in this particular.Such decisions are generally couched in universal terms,and it seems likely that the principles ennunciated in them would be applied to the appointment of state officers and boards.

it,in control over that administration is in violation of the principle of reserved powers,unless the state constitution expressly confers upon the legislature that power. Inasmuch as a clause in a constitution which vests in the legislative branch the power of determining the "manner" of appointment would,if,construed broadly,(1) be regarded as a limitation on the powers of the executive to appoint,it should receive a restricted interpretation,an interpretation which would not unnecessarily weaken the constitutional position of any of the departments.However,the general rule of the courts has been to permit an exercise of the power of appointment under the clause above referred to.These cases, therefore,directly support the exception under discussion, by sanctioning legislative appointments,or designation of the appointing power,in regard to offices created by the legislature.

Where this rule prevails,the two exceptions previously noted fall within its terms.The rule as to municipal appointments has a more solid foundation,than the remaining phases of the [illegible] general exception as to statutory offices.The Indiana rule above noted,is recognized by a court which does not approve of the broad exception.(2)

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(1)-Supra pp.11-12.As a matter of policy,a narrower rule would be adopted.People v. Hurlbut,24 Mich.44.Infra sec.3.

(2)-The appointment power is intrinsically executive.(389). To prescribe the manner and to nominate are two distinct powers."If there is no limit,then the General Assembly may appoint all the offices created by statute...It may create offices without limit and fill them with its own appointees. (p.393.) State ex rel Jameson v. Denny,118 Ind.,382.By terms of its Constitution,Ohio follows a rule in accord with Indiana. State v. Kennon,7 Oh.St.547.See Overshiner v. St.supra,13.

Thus, there are three different exceptions to the general power of appointment of the executive, which is exercised by the legislative department, for departmental reasons, -that in regard to municipal appointments because the municipality is an agency, an offspring of the legislature; the benevolent institutions, because they are state property, and as such are subject to legislative authority; finally, statutory offices, because to appoint to them is indivisible from the power of establishing them. The extension of the departmental idea in this manner is remarkable. Just what the extent of the administrative power of the executive will be after these exceptions are carried to their logical conclusion, is mere conjecture. There is a limit to the capacity of the legislature to appoint, but there is no limit to its ability to designate others, than members of the executive department, to fill offices.(1)

From the above discussion it is evident that there is a broad distinction between terming the power of appointing boards an executive function and actually making it so. "The executive power cannot always be defined by any fixed standard, in the abstract. What would come within the

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(1)-An interesting line of cases in Illinois hold that the Drainage Commissioners may be appointed by the District Court. Their functions are largely judicial, according to the reasoning of the courts, and hence their appointment by the court is in reality a departmental appointment. See Moore v. People, 106 Ill., 376; Blake v. People, 109 Ill., 504; Kilgour v. Drainage Commissioners, 111 Ill., 342; Huston v. Clark, 112 Ill., 344; Owners of Lands v. People, 113 Ill., 296.

executive power of our form of government,would fall within the legislative of another and vice versa."(1) In an frequently quoted sentence,Webster clears up the mystery of the power of appointment.He said:

"First,the denomination of a department does not fix the limits of the power conferred upon it,nor even their exact nature;and,second(which indeed flows from the first), that in our American Governments the chief executive magistrate does not necessarily,by force of his general character of Supreme Executive,possess the appointing power. He may have it,or he may not,according to the particular provisions applicable to each case in the respective Constitutions."(2)

Reduced this means that the people,thru the constitution,may vest appointment power in the legislature. It is true that the power of appointment comes from the body politic.This premise often leads to erroneous conclusions:(3)

"In this country under our form of government,the sovereignty has been transferred (from the King)and is in the hands of the people.It is conceded in this case,as it must be in all cases arising under our political institutions,that the sovereign authority-the People-in creating a State Government can lodge the authority to appoint its officers in any branch of that government or bestow it at pleasure upon any official upon whom they may elect to bestow the same."Representing the public,the Legislature may create and fill offices unless restrained by the Constitution. And in People v. Hurlbut;the same sentiment is expressed.(4)

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(1)-People v. Hurlbut,24 Mich.,44.
(2)-Speach on the "Presidential Protest" quoted from State v. Hyde,121 Ind.,20,44. This latter case expresses much the same view.See also Board. v. Baltimore,15 Md.,376.
(3)-Justice Wallen in State ex rel Standish v. Baudher,3 N. D.,389,395.
(4)-supra.(1). p.63.

The grave defect in this conclusion has been pointed out by Justice Berkshire. It is his opinion that the fundamental nature of our government is ignored.

"All departments of the State Government, but each in its respective domain, represent the people."(1)

This is another method of saying what was said above.(2)

It seems that the power of appointment must be viewed as political. As such it may be exercised by all of the departments along the lines of their respective functions. Diverse degrees to which the theory of the separation of powers has been applied in the respective State governments and the personal philosophy of the Judges have lead to a swinging of the balance toward the legislative branch.(3) In so far as this confers on the legislature the power of appointing, or of designating who shall appoint, an administrative officer or board, it is distinctly contrary to the spirit of our institutions. Only when granted to the legislatures in explicit terms by the constitutions, should the Courts sustain its exercise.

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(1)-City of Evansville v. State, 118 Ind., 426, 440-441.
(2)-supra, 35-36.
(3)-Goodnow, "Comparative Administrative Law", II: p.22.

(2) Constitutional Interpretation.

The State Constitutions are generally regarded as limitations on powers. In practical effect they are apportionments of power between the three departments. The huge reservoir of governmental power is reserved to the states; the Constitutions order the amounts which shall flow from the three faucets. Courts in determining just what organ may appoint the members of the various boards are bound by the limits established by the fundamental law, Federal or State. The policy of appointment by the executive cannot govern them. The question is, does the legislature have the power to appoint, and the authority to delegate that power? (1)

As a general rule, the State Constitutions incorporate into their Bills of Rights a clause providing for a more or less definite separation between the departments. If, as the Courts are wont to say, the power of appointment is executive in nature, and a subsequent clause in the Constitution vests that power in the legislature to a limited degree, a conflict arises which must be determined before there can be a valid exercise of that power. This apparent conflict vanishes, if the constitution is regarded as one, unified whole. All parts must be considered together. Imper-

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(1)-People v. Hurlbut, 24 Mich., 44; People v. Freeman, 80 Cal., 23 .

fections due to the necessities of the systems of checks and balances limit the application of the abstract principle. Contemporary writings and debates frequently show, as in the case of the Federal Constitution, that an entire, practical separation was not designed.(1) On principle, however, it would seem that whenever a power belonging peculiarly to one of the departments is vested in another, the Courts should, in view of the policy expressed in the Bill of Rights, construe such a power narrowly. Applied to the subject matter under discussion, it seems that when a legislature is given the power to designate the manner in which an appointment shall be made, it should be confined to that precise act. It would seem that without some express power, the Legislature could not appoint at all. It is a noticeable fact that the Constitution of the United States is careful to clothe the House and the Senate with the power of choosing the minor departmental officers necessary. Such a power could not have been considered as inherent and open to implication from the creation of the two branches themselves. All of the cases, even those to be considered in the next paragraph, which place much reliance upon the practical exposition of the Constitution, are carefully

(1) "The Federalist", Numbers 47, 48. Board v. Mayor of Baltimore, 15 Maryland, 376.

provide a semblance of a constitutional basis for their holding.Every fact seems to point to the enforcement of a restrictive principle applicable to legislative appointing power.(1)'

Some Courts have made much of the practical exposition of the Constitution as a basis for determining to what extent the legislature may name the members of boards, or,delegate that power to other bodies or persons.Custom played a determining role in the case of Hovey v. Carson.(1) It was also invoked in the case of Hovey,Governor of Indiana v.Riley,tho as has been stated in another place(2) there could be no custom with reference to the particular officer in question.The office was newly created.The custom in regard to offices somewhat similar in nature,in the opinion of the Court,established a principle,applicable to all analogous cases. In brief,the view is that a constitution, adopts within its terms,customs which arose under the same terms,in a previous Constitution.(3) The history of the power of appointment has been used as a criterion of the terms of the constitutional grant to the legislature.Justice Elliot(4) points out that employment of the historical test will result in narrowing the exercise of the appoint-

(1)'-In State v. Denny the view is adopted that the appointment power is inherent in the people,not the executive.Silence on the subject takes no part of the power away from them. 118 Ind.,382.
(1)-119 Ind.,386395.
(2)-119 Ind.,386. Supra,pp.32-33.
(3)-This is virtually a confirmation of legislative practice. See Mayor. v. Baltimore,15 Md.,376,458,461.
(4)-State v. Denny,supra,p.404.

ment power exercised by the legislature.

(3) Policy in regard to the Exercise of the Power of Appointment.

A great deal has been said as to which is the better policy, to clothe the Legislature with the power to appoint or control appointment, or, to vest the power in the Executive branch. The treatment given here will be summary in nature, not because it is of slight importance in connection with the establishment of Boards (it is exactly the contrary), but because it is a matter of opinion, rather than of authority. Reasoning which is applicable to the government of the United States, should be directly in point here.

The policy of appointment was thoroly considered by Alexander Hamilton in certain numbers of the Federalist.(1) His arguments may be summarized in a single sentence:

"..One man of discernment is better fitted to analyse and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment."(2)

Hamilton, however, was inclined to emphasize the necessity of a strong executive. On this point he gained the

(1)-Particularly Numbers LXXVI and LXVII.
(2)-Paragraph 4 of Number LXXVI. (April 1, 1888).

support, in time, of those who had been favorable to a strong legislative department. Jefferson wrote in the year 1816:[1]

"Nomination to office is an executive function: to give it to the legislature, as we do, is a violation of the principle of the Separation of Powers; it swerves members from correctness, by temptation to intrigue for office themselves, and to a corrupt barter for votes, and destroys responsibility by dividing it among a multitude. By leaving nomination in its proper place among executive functions, the principle of the distribution of powers is preserved, and responsibility weighs with its heaviest force upon a single head."

In Ohio, the Constitution forbids appointment by the Legislature.[2] This provision was adopted by the Constitutional Convention in order that the corrupt practice of trading votes for offices for votes for laws might be abolished.[3] The evils predicted by Jefferson, worked out in practice.

It is difficult to find an argument with which to meet the views expressed above, and the actual experience as shown by the history of Ohio. To place a "concurring" power in the Senate may be supported.[4] It lends stability to the government, and acts as a check upon the activities of an impolitic or corrupt executive. But at best this vests in the legislative branch a power of affirming, or disaf-

(1)-Letter of Nov. 21, to S. Kercheval, Esq., of Virginia. It is to be found in Field v. People, 3 Ill., 141, in the dissenting opinion and in People v. Freeman, 80 Cal., 235.
(2)-Art. II, sec. 27.
(3)-State v. Kennon, 7 Ohio St. 547.
(4)-Federalist, Number LXXVI. (Hamilton).

firming, merely and not a power of nominating. The man chosen is always of the choice of the executive, tho it must be admitted that patronage has crept into Federal appointments.

Tho the Courts may recognize the policy of executive appointments, they have been very loathe to interpret the Constitutions of States in that manner. Judge Christiancy of the Michigan Court ruled in favor of legislative appointment on the ground that the power was in the Legislature, tho the exercise of that power might be very bad policy.(1) This is undoubtedly a correct attitude of the Courts, providing that the power clearly exists, and is not merely implied from the power to provide for the "manner" of appointment.

Summary.

Intinsically the power to appoint is an executive function. It is not always vested in the executive department, alone, however. Departmental appointments have always been provided for. Appointments classed as belonging to to the legislative department have been greatly extended in number in three directions, municipal, proprietary and, thirdly, to all offices created by statute. Manifestly, there-

(1)-People v. Hurlbut, 24 Mich. 44, 63.

fore, the exercise of the power is not confined to the department, which in theory, should have exclusive control. In fact the legislature seems to possess a greater power of appointment, then the executive department, tho as a general rule, it does not exercise that power.(1) It is difficult to understand, in view of the spirit of our institutions, which is republican and which should logically place each of the three departments on parity as regards their representative capacity, -how this extension has occured. It has occured, and the principles of interpretation which have been applied to the State Constitutions have given impetus to the tendency.

From a consideration of the policy of appointment, it seems clear that it should be vested in the executive, save perhaps, in regard to minor departmental officers. Mutual independence of the several branches of the government dictate that such appointments should be departmental.

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(1)-The Legislature could not assume the power of appointing the members of all of the administrative Boards in the State Government, from the very nature of the case. It does an act closely akin to this in creating ex officio boards, but as a rule, the functions of such boards are unimportant. The majority of Minnesota Boards are appointed by the Governor, or by the Governor on advice of the Senate. In practice the theory of appointment is observed, therefore, to a greater or less extent.

CHAPTER IV. VACANCIES, SUSPENSIONS, and REMOVALS.

A discussion of the power of appointing boards would be incomplete without a consideration, however brief, of the power of filling vacancies and removing the officers after their appointment.

(1) Vacancies.

By Article 5, section 4, the Constitution of Minnesota, it is provided that the Governor shall "fill any vacancy that may occur in the office of Secretary of State, Treasurer, Auditor, Attorney General, and such other state and district offices as may be hereafter created by law, until the next annual election, and until their successors are chosen and qualified." In section 5723 of the General Statutes, a list of eight events, upon the happening of which an office shall become vacant, are enumerated. Section 5726 amplifies the provision in the Constitution, quoted above.(1)

The usual rule is that a vacancy is filled by the same agency which filled the office in first instance.(2) In many cases, the Senate concurs in the nominations of the Governor. When a vacancy occurs during the recess of the Legislature, either an exception must be made, or the office

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(1)-Stimpson, "The Law of the Federal and State Constitutions of the United States", sec.202. In this reference will be found the provision usual to the various State Constitutions.
(2)-People ex rel Gorham v. Campbell, 2 Cal., 135.

must be vacant until the next session of the Legislature. The Governor is ordinarily vested with a power to fill the vacancy in this emergency.(1) The same rule applies when the office is elective.(2) Whether it was the intention of the Legislature, or not, the Board of Control in Minnesota, which is appointed by the Governor with the advice and consent of the Senate, does not receive the benefit of this exception. It is expressly provided in the act(3) that vacancies shall be filled in the same manner as the original appointment was made. The same appears to be true of the Soldiers Home Board,(4) the Board of Arbitration(5) and the office of the Superintendent of Schools.(6)

In nineteen cases the absolute power is given to the Governor to fill vacancies in Boards. In three of these instances(7) the board was appointed by the Governor by and with the advice of the Senate. Inasmuch as the original appointments of certain of the boards were made from from limited classes of persons, it is generally provided that the vacancy shall be filled from the same class.(8)

(1)-Tax Commission, G.S.2336.
(2)-Railway and Warehouse Commission, G.S.4172.
(3)-G.S.4001.
(4)-G.S.3957.
(5)-G.S.3940.
(6)-G.S.2870.
(7)-Public Examiner, Board of Equalization (partly ex officion however) and the Superintendent of Banking.
(8)-Board of Forestry, Board of Dental Examiners, Board of Horseshoers, Board of Electricity, State Barbers Board, Board of Arbitration and Live Stock Sanitary Board.

(2) Suspension.

During the pendency of the hearing accorded an officer before his absolute removal from office, it is customary for the executive to suspend him temporarily from his office. This power need not have been expressly granted the Governor. It is usually implied from either the power to remove[1] or the power to appoint.[2] "Where the Constitution gives a general power or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the performance of the other."[3]

The reason why the power should be exercised has been stated by Justice Mitchell:[4]

"The safety of the State, which is the highest law, imperatively requires the suspension, pending his trial, of a public officer,-especially a custodian of public funds,-charged with malfeasance or non-feasance in office."

Of course where the Governor has the power to remove arbitrarily, as when no tenure is fixed or grounds of removal are provided by statute, there can be no question whatever of his right to suspend. The greater includes the lesser.[5]

(3)-Removal.

It is usually stated that the power to remove is a necessary incident of the power to appoint.[6] This is not

(1)-State v. Peterson, 50 Minn., 239.
(2)-State v. Megardien, 85 Minn., 41.
(3)-Justice Mitchell in State v. Peterson, supra, quoting from Cooley, "Constitutional Limitations". p.244.
(4)-State v. Peterson, supra, p.245.
(5)-In addition to the two Minnesota cases referred to, the case of State v. Police Commissioners, 16 Mo.App.48 should be consulted.
(6)-But see for qualifications, Parish v. St.Paul, 84 Minn., 426. State v. Thompson states the broader view. 91 Minn., 279.

accurate.It must be taken with certain qualifications,which will be brot out during the course of this discussion.Some of the Constitutions provide that the Governor may remove all officers appointed by him.(1) Minnesota does not give this power to the Governor,in terms.The power is vested in the Legislature,to provide for the removal of inferior officers from office,for malfeasance,or non-feasance in the performance of their duties.(2) By statute,however,it is proided that the Governor

"shall appoint,and when necessary commission,all o officers and employes of the State whose selection is not otherwise provided for by law,and at his pleasure,may remove any such appointee whose term of service is not by law prescribed."(3)

Unless prohibited from so doing,the Legislature may provide by whom an officer or board member shall be removed.(4) The Constitutional provision in Minnesota is merely declaratory of the law.The popular branch may also designate the grounds for removal and provide for the tenure of office as incidental to its legislative power.

The Legislature,cannot provide for removal for any

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(1)-Col.,IV,6;Ill.,V,12;Md.,II,15;Neb.,V,12;Pa.,VI,4 (with the exception of Judicial Officers);West Va.,VII,10;Del., XV,6. See Stimpson,"The Law of Federal and State Constitutions",sec.266.
(2)-Art.XIII,sec.2.
(3)-Section 58,G.S.
(4)-People v. Whitlock,92 N.Y.,191.

cause whatever, save in certain states.(1) While the Constitution of Minnesota provides for removal on the grounds of malfeasance or nonfeasance, only,(2) it cannot be supposed that inefficiency,(3) neglect of duty,(4) incompentency,(5) or misfeasance in Office(6) could not be made statutory grounds for removal. They are, impliedly, included within the terms malfeasance and nonfeasance. There is one ground for removal, established with reference to the Board of Control, which is not so clear. Section 4010 of the General Statutes provides:

"Every officer or member of said board, and every officer or employee of any institution under its control, who by salicitation, or otherwise exerts his influence, directly or indirectly, to induce other officers or employees of the state to adopt his political views, or to favor any particular person or candidate for office, or to contribute funds for campaign or political purposes, shall be removed from his office or position by the authority appointing him."

The majority opinion seems to favor the validity of this ground for removal. The argument is, that while a citizen has the right of free speech, he has not the right to hold the particular office in question. He assumes the conditions of that office,(7) when he accepts the appointment.

(1)-Oklahoma, VIII, 2 and Texas, XV, 7 so provided in their Constitutions.
(2)-Art. XIII, sec. 2.
(3)This is a ground for removing the Tax Commission members, members of the State Highway Commission, and of the Railway and Warehouse Commission.
(4)-See Boards mentioned in (3).
(5)-State Board of Control.
(6)-ibid.
(7)-McAuliffe v. New Bedford, 155 Mass., 216; People v. Scannell, 175 N.Y., 606; Ex parte Curtis, 106 U.S., 371. (See note (1) p.52.
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The contrary view is maintained by the Virginia Courts. Every citizen, who possess the educational qualifications, has a right to hold office, free from disqualifications of a political nature. If he may be removed for political activity he has not the freedom of speech guaranteed to every citizen by the Constitution.(1) It is curious to note, that in the Federal law, appointees of the President, by and with the consent of the Senate are not included within the class of those who may be removed because of political activity.(2) There is a vigorous dissent to the Virginia case based upon the grounds that "it is a self-evident proposition, that the Legislature may establish reasonable regulations for the conduct of those in the service of the state."

When the appointing power is exercised concurrently, the executive cannot consider the power of removal as an incident of his office.(3) Minnesota has adopted this rule with reference to an appointment made concurrently by a mayor and municipal judges, but from the cases cited in support of the decision, there appears to be no distinction between such a case and one where the appointment is the act of the Governor, with the advice of the Senate.(4)

Can the Courts review a removal made by an admin-

(1)-Louthan v. Commonwealth, 79 Va. 196.
(2)Ex parte Curtis, 106 U.S. 371. The Virginia case refers to this case, and interprets it to be in accord with the principles of free speech. It seems to hold otherwise, however.
(3)-Carr v. State, 111 Ind., 101.
(4)-State v. Brandt Thompson, 91 Minn., 279, citing, People v. Freese, 76 Cal., 633.

istrative officer? Justice Mitchell presents two of the views followed by the Courts. At common law an office was in incorporeal hereditament.The holder of it,therefore, could not be deprived of his "property" without notice and hearing. This view is adopted by certain of the State courts.(1) In the United States it is generally believed that an office is a public trust,not a property right.It is not based upon any contractual right.It,therefore,cannot come under the Fourteenth Ammendment as to property,and the removing power is free to act within legislative restrictions.(2)

Another distinctionnis more usually drawn.Whenever the Legislature limits the tenure of an office to a period of years,or establishes grounds for the removal of the members of a particular board,the courts may review the determination of the administrative officer who removes the member.(3) The latter has no final power unless the court affirms his decision.He can merely suspend ad interim.His determination of the facts of the case are not reviewable. It is only the adequacy of his reasons for removing,assuming the state of facts to be as he views them.(4)

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(1)-State v. Pritchard,36 N.J.L.,101;Dullam v. Wilson,53 Mich.,392;State v. Peterson,50 Minn.,239 (limited to case).
(2)-State v. Hawkins,44 Oh.St.98.
(3)-State v. Duluth,53 Minn.,238;People v. Therrien,80 Mich., 187;Rowell v. Battle Creek,169 Mich.,19.
(4)-State v. Dart,57 Minn.,261,263-264.

Conversely, where there are no limitations placed on the executive in so far as removal is concerned, the courts do not assume the right of review.(1) The Louisiana Courts are inclined to opposes any right of review.(2) Notice and hearing are specifically provided in the statutes creating the Tax Commission(3) and the Railway and Warehouse Commission.(4)

Summary.

Vacancies are filled, permanently or temporarilly, by the executive. In all cases the Governor has the power to suspend an officer, under suspicion, and until he has been heard in his own defense. The Legislature has complete authority over the power vested in an officer of removing another officer or board member. Where absolute, plenary power is vested in the executive, his decision is not subject to the review of the courts, nor is it when the Legislature fails to provide a definate tenure for the office or grounds for removal. In such cases the power to remove is inherent in the power to appoint. Where such limitations are provided, however, the administrative decision on the law of the case, is reviewable.

(1)-Wright v. Gamble, 136 Ga., 376; State v. McGarry, 21 Wis., 496.
(2)-State v. Rareshide, 32 La. Ann. 934.
(3)-G.S.2335 (Tax Commission, removal of members); G.S.4174a (4) (Railway and Warehouse Commission-ibid.)

BOARDS AND COMMISSIONS: THEIR APPOINTMENT AND POWERS.

PART TWO. POWERS DELEGATED TO BOARDS.

CHAPTER I. DELEGATION OF POWERS.

The theory of the Separation of Powers is of vast importance from the standpoint of constitutional law. The watchword of the American Colonists was liberty. The apportionment of governmental functions among the three orthodox departments was the method adopted of securing this liberty. Pressure of business, a growing need for expert advice and knowledge, the minute division of labor and the cooperative spirit, -all the products of the new industrialism, -have made necessary alterations in the the original colonial theory. The country has grown and with it the governmental institutions. Withal, the rules of the Courts, which forbid the delegation of the powers of one department to another, persist.

As a general proposition, it may be stated that there can be no delegation of the functions of the respective departments of the Federal government, to another of the departments. A different principle might well obtain in the states. These units are not required, in the nature of things, to establish the threefold division of powers

in their governmental system.In practice,however,the principle has been universally adopted by the states.(1)

The rule as to the delegation of powers has been expressed as follows by Judge Cooley:

"One of the settled maxims of Constitutional law is,that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.Where the sovereign authority of the state has located the authority,there it must remain;and by the constitutional agency alone the law must be made until the constitution itself is changed."(2)

What is said here of the legislative delegations of legislative powers holds equally true of the other departments.

The legislative branch,from the very nature of its functions of law making,is responsible for an improper delegation of powers,when it occurs.It is the creative department of the government,but it must create with a due regard for the principles of fundamental law.Whether it has done so,or not,is a question for the court to decide,and while the courts are bound to follow the same rule,that rule is construed in some cases narrowly,in other cases with liberality induced by the needs of a developing country,or,finally,a compromise is struck somewhere between these limits.

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(1)Infra,p.58.
(2)-"Constitutional Limitations"-(6 edit.)p.137. Field v. Clark,143 U.S.649 (legislative to executive:State v.Young, 29 Minn.474 (legislative to judiciary).See Bondy,"Separation of Governmental Powers" p.162.

The problem of the delegability of powers is an intensely practical one. A law is passed giving to an executive board the power to frame a standard insurance policy. Is this power executive or legislative in nature?(1) Is there any uniform test which may be applied in order to reach a solution of this problem? What is the nature of the power to establish a table of charges for public service companies? To pass administrative ordinances? These questions, and others analogous to them, are arising constantly, and the answer turns upon a determination as to whether the powers granted are properly delegable.

A review of the express grants of power to the several branches of government in the Federal Constitution will show that no invariable test was applied as to the nature of the powers to be exercised by each. Absolute separation of the departments proved to be impossible, or at least, impracticable. Each department was given powers which, in theory, at least, should have been invested in one of the other departments. The necessity of a system of checks and balances a thorogoing application of the principle.(2) In fact, if we are to judge from the Constitution itself, it may be asserted that it was not the intention of the fram-

(1)-Anderson v. Insurance Company, 59 Minn., 182 discusses this general question.
(2)-Bondy, "Separation of Governmental Powers" Ch. IV, V.

ers of that instrument to distribute powers according to intrinsic nature.Rather,they looked at conditions from a general point of view and,in many instances,placed powers where they could be most efficaciously administered.(1)

State governments,so far as the Federal Constitution is concerned,need not be organized in accordance with the theory of the separation of powers,(2) unless,perhaps,it is conceded that a union of powers in one body of officials amounts to a denial of a republican form of government to the citizens of the state.(3) There is some doubt as to whether the question of delegation of powers can be brot before the Supreme Court on the grounds that it violates due process under the Fourteenth Ammendment.(4) For instance, if a board is given the power to conduct a hearing,administer oaths and issue compulsory process it is exercising something very close to a judicial power.Could a person who had been convicted under such a procedure,appeal the case to the Supreme Court of the United States on the ground that there was an improper exercise of the judicial power,and as a consequence,a denial of due process?It has been held that he could not.Due process does not mean a trial in court.The question of the propriety of the dele-

(1)-Bondy,supra,pp.74-76.The power of appointment,considered in Part One is a very good example of this.
(2)-Consolidated Company v. Vermont,207 U.S.541;Reetz v. Michigan,188 U.S.505;Goodnow,"American Administrative Law" p.35.
(3)-Willoughby,"Constitutional Law" sec.740.
(4)-Carfer v.Caldwell,200 U.S.293;Railway v. McClure,10 Wal.511;Powell,"Separation of Powers," Political Science Quarterly 27: 213,217.

gation does not arise under the due process clause.(1)

Bondy in his monograph on the Separation of Governmental Powers attempts to define executive, legislative and judicial acts:

"Any act which in effect establishes a rule of civil conduct irrespective of the manner in which, or the body by which it is enacted, must be conceded to be legislative in nature." (2)

"Any act which tends, no matter how indirectly, to the enforcement of a law, or the enforcement of a superior command, is executive in nature."(3)

"The power to hear or determine, or power to examine facts when ascertained, is judicial in nature."(4)

Other classifications, similar in nature, have been attempted. Definition seems to be particularly useless in this connection. We may say that delegation is improper, that a certain power with which the executive has been clothed is legislative in nature. But if there is one fact apparent, it is that the powers of neither the Federal nor the State Constitutions are distributed according to the nature of powers, to an extent which would permit of a definition to control being framed which could determine even approximately whether the delegation was proper or not. Litigation arises over a specific power. The determination of issues does not depend upon a theoretical characterization of the

(1)-Carfer v. Caldwell, 200 U.S.293.
(2)-Bondy, cit.op., p.70.
(3)-Ibid.
(4)-Ibid., p.71.

general powers of a board.(1)

Summary

The theory of the Separation of Powers has become deeply ingrained in our system of government.It is regarded as a fundamental safe-guard of our individual liberty.It is reflected either in the special or general distribution clauses of the State or Federal Constitutions.The doctrine that powers peculiar to each department cannot be delegated,has followed as a necessary corollary of the theory.

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(1)-Throop,"Public Officers," sec.25.

CHAPTER II. THE EXERCISE OF JUDICIAL FUNCTIONS BY BOARDS.

(1)-Power of Compulsory Process, Hearings, and Decision.

Under this general heading will be discussed not only the substantive powers enumerated in the title, but also some of the general distinctions which exist between the judicial functions of a board and the judicial powers of the Courts. It is very difficult to draw any line between these two phases of the same essential power which will divide them to a degree which even approaches completeness. In numerous instances from an early period in the history of the several states, the legislatures have invested boards with the power of issuing compulsory process, of ascertaining facts and of hearing and deciding questions of administrative significance. Boards, as well as Courts, must have machinery for securing evidence. "The authority to ascertain facts, and apply the law to the facts when ascertained, appertains as well to other departments of the government as to the judiciary. Judgment and discretion are required in all departments." (1)

Boards use the facts ascertained by them as a bas-

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(1)-State v. Harmon, 31 Oh.St.250, 259. See also France v. State, 57 Oh.St.1, 17.

is for an order or regulation; Courts use the facts found for the purposes of formulating a judgment or determining a sentence.(1)

The distinction between judgment and judicial power is at times very important in the determination of the questions involving the propriety of a delegation of powers of a judicial nature to boards.The Constitutions almost invariably use the term "judicial power" in their distributing clauses.Does the mere fact that Courts are by the fundamental law vested with judicial power render the legislature incapable of vesting the power of exercising "judgment" in a board?

In the case of State v. Thome(2) the plaintiff claimed that the legislature had exceeded its power in creating a board for the equallization of taxes,because the commissioners in the performance of their duties were required to exercise "judicial functions".The Court held that the Constitution does not limit the bodies which may act judicially to the Courts of Law or Equity,"Judicial power" refers to the ordinary jurisdiction of Courts under English and American systems of jurisprudence in matters of law and equity. "Every officer or board that is required in the

(1)-Ex parte Shrader,33 Cal.279,283.
(2)-112 Wis.81,87.

administration of the law, to determine from the facts by an exercise of judgment, a course of action, within legislative restraints and guides, must necessarily act judicially in a sense. The power oftentimes partakes so much of the judicial function, that it is spoken of as "quasi-judicial". (1)

"Judicial power" has been defined in general terms as the "power which adjudicates upon and protects the rights and interests of individual, citizens and to that end construes and applies the laws." (2) "It has never been held to apply to those cases where 'judgment' is exercised as incident to the execution of a ministerial power." (3) Judicial power seems to be the power to hear and determine controversies between adverse parties on questions of juridical litigation. (4)

There are many acts which require the exercise of judgment and which are judicial in nature. Nevertheless such acts may be far removed from an exercise of "judicial power" as vested in the Courts. The discretion given to the President in "reciprocity" treaties is a striking illustration of the limits toward which a grant of discretion may go. (5) The quasi-judicial powers exercised by Boards

(1)-See "George v. People", 167 Ill. 461.
(2)-Cooley, "Const. Limitations", p. 91.
(3)-Owner of Lands v. People, 113 Ill. 296, 309.
(4)-People ex rel. Armstrong v. Murphy, 65 App. Div. (N.Y.) 126.
(5)-The validity of such a delegation is discussed in Field v. Clark, 143 U.S. 649.

differ from judicial functions proper, not in the nature of the power exercised, but in the nature of the rights affected by the exercise of that power.(1) The theory of the Separation of Powers has clearly broken down in this respect. The line of demarkation between a body which exercises judgment, such as the Interstate Commerce Commission and a Court is not at all well defined.

The test sometimes applied to the effect that a Court exercises its judgment for the purpose of ending an existing dispute, while an administrative body acts with the future in mind can apply to hearings which precede the promulgation of an order or regulation and not those conducted to ascertain violations of existing rules. The hearings before a Board of Equalization are peculiarly of this latter type, tho in numerous other cases, also, Boards are given authority to impose statutory penalties, much the same as does a Court. In view of the power exercised by the Courts of declaring statutes unconstitutional, no dangerous diminution of the judicial authority of the regular Courts, may be expected from the exercise of "discretion" by administrative authorities. The power to conduct hearings vested in boards is a legitimate class of legislation, when ques-

(1) Powell, "Separation of Powers", Political Scienc Quarterly 27: 215, 233.

tioned as an improper delegation of judicial functions.(1)

There are, then, four tests which have been applied for the purpose of determining whether a power is judicial in the nature that it is improper for an administrative body to exercise it.

(a)-The power of construing a law belongs to the Courts.(2)

(b)-Historical: particular powers exercised for a long period of time by a department are considered to assume the nature of the general powers of that department.(3)

(c)-Judicial power generally acts with reference to disputes already in existence;on the other hand,boards generally conduct hearings for the purpose of determining whether or not a certain rule or regulation should be promulgated.

(d)-Courts exercise judgment generally with reference to facts presented before the tribunal under the rules of evidence;boards arrive at a judgment after considering all of the facts it can obtain by voluntary effort.(4)

These distinctions are merely approximate.They have been formulated,as a rule to meet the needs of the partic-

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(1)-France v. State,57 Oh.St.1.18-19.
(2)-George v. People,167 Ill. 447.
(3)-State v. Harmon,31 Oh.St.250; Callman v. Judd,23 Wis.343.
(4)-Willoughby,"Constitutional Law" sec.744.

ular case, and to justify a delegation which is more expedient, perhaps, than constitutional. The mere fact that the Courts review the identical state of facts and render decisions on the same subject matter would seem to be conclusive aganst a distinction. Undoubtedly the true view to take would be acknowledge that there is a body of administrative law in the United States growing up from shere necessity, within the constitutional government, tho, perhaps, repugnant to fundamental law.(1) Congress and the various State Legislatures construe the organic law strictly. Powers conferred upon the Judiciary cannot be delegated. Powers which are not expressly so conferred may be vested in administrative organs. In Minnesota, there is nothing to prevent the Legislature from calling a board a Court, and vesting that body with full judicial powers.(2)

(2) Judicial Review of Administrative Determinations.

It has been, somtimes, stated that the constitutional difficulty at the basis of administrative determinations vanishes if an appeal to the regularly constituted courts is provided. It is certain that this would protect the fundamental rights of a citizen, at last instance, from the a-

(1)-Consult Bowman, "American Administrative Tribunals," Political Science Quarterly 21: 609.
(2)-Art. 6. sec. 1, Constitution.

buse thru arbitrary action of the executive, which seems to be made so much of by the defenders of the Judiciary. The rule of the United States courts is that all acts of a board or commission which are considered by the parties affected to be unfair, unjust or unreasonable are subject to review by the Courts, whether such review is provided for by statute or not.(1) The ordinary rule is that a Court will not review an administrative finding of fact, unless expressly authorized by statute.(2) The decision alone is examined as to whether it was justified by the facts as determined.(3) Michigan has held that when a Court is precluded by statute from reviewing fact as well as law, e.g., when it cannot proceed with the trial of the case de novo, it will look into the question as to whether there has been a proper delegation of power to the board. In other words the Court says, "If we cannot examine into the subject matter, upon which you base your decision, we will investigate whether your decision, or the method you employed in ascertaining facts, was authorized. We will protect ourselves by completely reviewing the case, or, if we are not permitted to do so, you must defend your right to have heard the matter at all." There seems to be something of a

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(1)-Dent v. West Virginia, 129 U.S.114; Reetz v. Michigan, 188 U.S.505; Wisconsin v. Chittendon, 112 Wis.558.
(2)-Willoughby, Constitutional Law, sec.752. Appeal is provided for in many instances by statute in Minnesota.
G.S.5143 (Fire Marshall). G.S.2349 (Tax Commission).
G.S.4669 (State Board of Health). G.S.4191-4194 (Railway & Warehouse Commission).
G.S.3822 (Bureau of Labor).
(3)-Bartlett v. Kane, 16 Howard, 263.

threat in this view.[1] It is perfectly proper to determine whether the proceeding constitutes due process or not, in the State Courts at least, and in the Federal Courts in so far as the jurisdiction of a Federal board is concerned.[2]

(3) Boards and the Punishment of Criminals.

The rights, in themselves, which come directly under the judicial branch of the government, are affected by another class of powers granted to boards. Administrative officers have been vested with what is essence amounts to a power to alter the sentence of a Court. Whether it be an order for the transfer of convicts from a reformatory to a prison, a shortening or suspending of the term of punishment, or other forms of altering the sentence by a board, the validity of such legislation has been sustained in many states.[3] Such a power is held to be merely disciplinary.[4] The sentence of the Judge is rendered subject to the discretionary acts of the executive board, which the overcrowded or unsanitary conditions of prisons render necessary.[5] Minnesota, by providing that no sentence shall be made for a definite term of years,[6] escapes the objection that a shortening of the sentence is a violation of the

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(1)-Fitch v. Board, 133 Mich. 176.
(2)-Willoughby, Constitutional Law, Ch. LXIV. See supra p. 58-59.
(3)-See Petition of Cassidy, 13 R.I. 143.
(4)-In re Linden, 112 Wis. 523; Rich v. Chamberlain, 104 Mich. 436
(5)-Ibid.
(6)-G.S. 9267-9280. Section 9267 covers this point.

theory of the Separation of Powers.

The question is whether the Legislature has the right to vest the power, in a board, of altering the sentence of Court. This in turn resolves itself into the question as to whether the fixing of a penalty is legislative or judicial. The general rule is that the department which creates an offense (the legislature) may fix the penalty. Under this power it has been assumed that the legislature may vest in boards the power to alter sentences. This does not follow logically, and the better argued cases rely on the policy of the delegation.

Such legislation is supported by other authorities on the grounds that it is an exercise of an executive power analogous to pardon. The unsoundness of this argument lies in the fact that the Pardon Power is an express constitutional exception to the separation of the departments.(1)

Viewed from the standpoint of the health of the prisoner it is entirely proper that he should be under the control of the administrative boards. Again the place of imprisonment, because of uncontrollable changes in physical conditions, may become uninhabitable. A Board, manifestly is the only organ which can be utilized to meet such exigen-

(1)-Miller v. State, 149 Ind. 607. A note in 42 L.R.A.S. 978 goes into these arguments to some little extent.

(2)-

cies.[1] Again, discipline can be administered only thru the agency of similar organs. In short, it seems that public policy dictates that these interferences with the full working out of the judicial power shall be sanctioned.

Illinois stands counter to the general tendency. Her Courts hold that it is unconstitutional to allow an administrative board to review the findings and sentence of a Court, and alter them.[2] The right of settling definitely the time limit of a sentence is fully within the scope of the judicial power. It is as exclusive as the power to convict a person found guilty of crime.[3]

On reason, it seems that this power, when vested in administrative boards brings much danger with it. If the legislature can go to this extent in vesting powers, why could it not vest in a board the power of imposing a sentence on verdict of a jury and relegate the Court into the position of an umpire at the trial between the opposing attorneys? It would seem to be a very satisfactory solution of the problem to place prisons and reformatories under the administration of a board appointed by the Justices of the Supreme Court, governed by rules as to discipline, health, transfer, etc., drawn up by that Court.

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(1)-In re Linden, 112 Wis. 523.
(2)-People v. Mallary, 195 Ill. 582, 595.
(3)-Consult the dissenting opinion of Jordan, J. in Miller v. State, 140 Indiana, 607, 627.

(4) Judicial Delegation and the Police Power.

The doctrine of practical necessity and efficiency as is brot our in the line of cases just referred to, applies particularly to police regulations. Prompt and summary execution of such laws requires that a certain degree of judicial discretion be vested in boards in which the administration of such laws is vested.(1) It cannot be stated baldly that a police power measure is ipso facto outside of the rule against the delegation of powers. It is true, however, that the Courts are prone to ignore the question as to the validity of a law when its necessity as a measure for the protection of the general health, safety or morals of a community is clear.(2) Public emergency has been held a proper basis for the delegation to a Board of Health of the power to conduct hearings and to issue orders in pursuance thereof. The argument was that if the civil authorities were obliged to await the slow progress of public prosecution, the evil arising from nuisance would seldom be avoided.(3) In such cases the doctrine as to the delegation of powers is explaimed away for the public benefit. Constitutional principles are stretched to the merest strands when the validity of apolice

(1)-Los Angeles v. Spencer, 126 Cal.670; Ex parte [illegible] Fisk, 72 Cal.125.
(2)-State Board of Health v. Roy, 22 R.I.538.
(3)-Van Wormer v. Board of Health, 15 Wend.263.

measure is under consideration. This tendency is very important in view of the fact that the functions of a large number of boards at the present day are based upon the police power.

(5)-Jury Trial and Administrative Determinations.

Closely akin to the subject matter of this section is the question raised by the objection to board hearings on the ground that they deprive a person of a right to a trial before his peers.Due process does not necessarily include a jury trial.(1) The jury is of ancient common law origin.It refers to trial in common law cases in particular.It cannot be said,therefore,to be a matter of right in so far as hearings before a purely administrative board is concerned.The right does not apply to special and summary proceedings.(2)

Summary.

The function of ascertaining facts for the purpose of intelligent departmental action belongs to each of the three departments of government.The same method may be employed by each branch.The exercise of discretion and judgment are alike inherent innall branches.A helpful,tho not

(1)-Supra pp.58-59.
(2)-People v. Hill,163 Ill.182;People v. Kipley,171 Ill.44, 72.

conclusive test between an administrative and judicial tribunal refers to the facts and the use to which they are put. A system of administrative Courts and a body of administrative law is being developed even within the principle which forbids the delegation of departmental powers as opposed to the theory of the separation of the legislative, executive and judicial departments of government. Practical necessity and the growing influence of the police power, both the result of the present industrial and commercial regime, have demanded that the doctrine of the separation of powers and its corollary, as to the non-delegability of the powers expressly or impliedly vested in any one of the departments, be limited or, even, be 'construed' into non-existence.

CHAPTER III. THE DELEGATION OF LEGISLATIVE POWER TO EXECUTIVE BOARDS.

A large number of commissions are vested with the power of making such rules and regulations as are necessary for the proper exercise of the functions vested in th them by the legislature. For instance the Board of Health of Minnesota is authorized to adopt, alter and enforce reasonable regulations of permanent application thruout the whole or any portion of the state, or for specified periods in parts thereof for the preservation of the public health. Upon approval of the Attorney General, and the due publication thereof, such regulations shall have the effect of law.(1)

It seems to be practically settled that the power of substantive legislation cannot be granted to any other tribunal by the legislature. Such a power is what may be t termed an essential power of the legislative branch.(2) It is likewise certain that an administrative board to perform its functions properly must be granted a discretionary power in applying the law. This discretion assumes a concrete form in rules and regulations which amplify a statute or which relate to special conditions to which it shall be

(1)-G.S.4640.
(2)-Wayman v. Southard, 10 Wheat. 1, 41.

applied.The question,therefore,is:'What amounts to a delegation of the power of legislating?'From the wide extent to which the ordinance power is vested in boards we are admonished not to be too confident in asserting where the precise limitation is upon the competency of the legislature to delegate the powers of government.(1)

A questionable delegation of powers is construed more liberally when made in reference to public health, safety and morals.Taking the ordinance power as quoted above in regard to the Board of Health,as typical,an examination will be made of a few of the cases dealing with the validity of such delegation.

The preservation of public health has,always,been deemed a proper exercise of the police power.This is one of the recognized objects of the police power.It is by virtue of this power that the legislature is universally conceded the right to create Boards of Health and to confer upon them whatever powers are necessary for the preservation of the general health of the community or of the entire state.(2)

In the first place the regulations adopted by such a board must have a reasonable and legitimate object and adopt

(1)-State v. Gloucestor,50 N.J.L.585,594;Lewis,Sutherland on Statutes, I: 148-149.
(2)-Boston Beer Co.v.Mass.,97 U.S.25,33;Wilson v.Sanitary District,133 Ill.443;Henghold v. Covington,108 Ken.752.

a means proper in view of the object sought. Justice Jordan in his opinion in the leading case of Blue v. Beach[1] states the rule to be as follows:

"As a general proposition, whatever laws or regulations are necessary to protect the public health and secure the public comfort is a legislative question, and, appropriate measures, intended and calculated to accomplish these ends are not subject to judicial review. But nevertheless, such measures or means must have some relation to the end in view, for, under the mere guise of the police power, personal rights and those pertaining to private p property will not be permitted to be arbitrarily invaded by the legislative department; and consequently its determination under such circumstances is not final, but is open to review by the courts...The court will look into the substance of the thing involved and will not be controlled by mere forms."(2)

What is "reasonable" is a question of fact. "In the presence of a great calamity the court will go to the greatest extent, and give the widest discretion in construing regulations that may be adopted."[3]

Again, a regulation cannot be proper and at the same time be contrary to statute. "Boards cannot enlarge or vary, by the operation of such rules, the powers conferred upon them by the legislature, and any rule or by-law which is in conflict with the state organic law or antagonistic to the general law of the state or opposed to fundamental principles or inconsistent with the powers con-

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(1)-155 Ind.121,131.
(2)-See also Wong Wai v.Williamson,103 Fed.1,7;Weil v.Ricord,24 N.J.L.169,174.
(3)-Jew Ho v. Williamson,103 Fed.10,21.

ferred upon such boards,would be improper."[1] Accordingly, the general rule is that such regulations should be in accordance with the constitution and laws of the state.[2]

Given,then,a law which is valid as to its objects and subject matter,we come to the next question,"Is it proper for the boards to propouhd such rules and regulations?"

The decisions of the Courts lead one to a conclusion that it is considered highly expedient to deal in this manner with matters which affect the public interests so closely and matters which must,from their very nature, be dealt with in detail. Yet the striking resemblance between what we will term the ordinance power of boards,and the legislative power is such that the Courts,finding themselves in a dilemma,have been forced to rely upon subtle reasonings familiar only to the law and metaphysics.

A legislature cannot delegate the power of making the law but can delegate the power of determining the factors upon which such a law shall depend.[3] If by this doctrine is meant that the application of a law to a particular state of facts is an administrative function,it is proper.But if it means that a board may determine what con-

(1)-Blue v. Beach,155 Ind.121,131;Parker and Worthington, Public Health and Safety,sec.86.
(2)-Jew Ho v.Williamson,103 Fed.10;Department of Health v. Rector,145 N.Y.32.Commonwealth v. Drew,208 Mass.493.
(3)-Lockes Appeal,72 Pa.St.491.

ditions shall be precedent to enforceing the the law, the power seems purely legislative. A law is a law in name only, if it has no effect save on the terms which the boards may see fit to apply to it. They act above, and not in pursuance of the law.

A certain class of statutes provide that within a certain number of days after the passage of the act, a board, which is designated, shall adopt measures necessary to facilitate the enforcement of the law and prepare rules to amplify its general subject matter. If this should be considered a power to determine when the law shall become effective, it would be clearly unconstitutional.(1) What the Courts do in this case is to hold that the law was effective from the date of its enactment. The enforcement of it, alone, is delayed in order that the administrative board may amplify it with rules and regulations and determine methods for placing it into effect. The law, as passed, is capable of enforcement only after the board acts. To make this statement and immediately after to say that the law must be regarded as being effective at onee seems to raise, what is at best, a subtle distinction. If the board refuses to act, the law will become, or it seems, will remain a nul-

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(1)-Leeper v. State, 103 Tenn. 500.

lity.The board has a substantial veto upon it.This is a weighty objection,without doubt,but the Courts dodge its point and hold that a refusal on the part of a commission to act will not be presumed.(1)

The case of Isenhour v. State,decided in 1901 by the Indiana Courts brings out the rationale of such statutes. The Indiana law gave to the Board of Health the power to define the minimum standard of foods and drugs, and to define specific adulterations,within ninety days after the enactment of the law.In its opinion the Court said:-

"The obvious purpose of the statute was to commit to a body of learned and scientific experts the duty of preparing such rules and prescribing such tests as may from time to time in the enforcement of the law be found necessary in determining what combination of substances are injurious to health,and to what extent,if at all,admixtures or deteriorations of foods or drugs may go without injuriously affecting the health of the community.That which is required by the State Board of Health has no semblance to legislation.It merely relates to procedure in the laws execution for a reliable and uniform ascertainment of the subjects upon which the law is intended to operate.Nor does the duty imposed upon the State Board in any sense postpone the taking effect of the law until the duty is performed.Performance cannnever be said to be complete.The duty is continuing and will arise at any time when a new food or drug is put forward.Besides it is paradoxical to say that a law is not effective until the State Board has acted,when it is certain that without the law they could not have acted at all.And to say that their act puts the act into operation is to excuse them from acting,because

(1)-Leeper v. State,103 Tenn.500.

no law requires it...The peculiar nature of the subject embodying as it does considerations of sanitary science, is such as to require for a just legal control something more than legislative wisdom, to designate accurately the subjects and instances intended to be affected. The classification of these subjects and the prescribing of rules by which they may be determined by qualified agents is not legislation, but merely the exercise of an administrative power. The law itself is complete and effective in all its parts. In respect to matters to be determined by the State Board of Health in its execution, it awaits the performance of these duties. When performed the law operates on the thing done by the board. While unperformed the law remains ready to be applied whenever the preliminary conditions exist." (1)

A statute must, however, be complete in all its terms and provisions when it leaves the legislative branch of the government. Nothing can be left to a delegate of the legislature. In form, as well as in substance, it is a law in all its details. It may be left, however, to take effect at some future time on the doing of an act or the happening of an event.(2) When a statute is incomplete as a law and leaves it to a board to determine what shall and what shall not be deemed an infringement of the law, it is unconstitutional,(3) A legislature cannot abdicate its own prerogatives or shift the responsibility for unconstitutional legislation upon any other tribunal.(4) As stated before, the distinction is between the power to make the law and a power exercised under the law.(5)

(1)-157 Ind.517,521-522.
(2)-Dowling v. Insurance Co.,92 Wis.63,74.
(3)-State v. Burdge,95 Wis.390;Schaezlein v.Cabaniss,135 Cal.466.
(4)-Noel v. People,187 Ill.587.
(5)-State v. Railroad,38 Minn.281,300.

In a discussion of the ordinance power, it is necessary to refer to the distinction between ordinances carrying with them a criminal penalty and those enforced by means of civil damages. From the nature of the case of criminal prosecutions questionable procedure should never be resorted to. "A departmental regulation may have the force of law in a civil suit... and yet be ineffectual as the basis of a criminal prosecution.. The obvious ground of the distinction is that to make an act a criminal offense is essentially an exercise of legislative power which cannot be delegated."(1) An administrative ordinance, on the other hand, is a mere rule, ministerial in nature, without penal sanctions. Briefly, the rule is, that unless a Board is given express authority by statute to make a rule which has, by law, a penal sanction, such a rule cannot carry with it a criminal penalty. It is unconstitutional to grant to a board the power to declare a rule or regulation of its own formulation, criminally punishable.(2)

While the necessity and propriety of particular regulations is determined primarily by the legislature, their character, whether reasonable, impartial and consistent

(1)-United States v. Maid, 116 Fed. 650.
(2)-Ex parte Cox, 63 Cal. 21; Willoughby, Constitutional Law, sec. 781, contains a rather full discussion of this subject.

with state policy is a question for the Courts." (1) In favor of a narrow and illiberal construction it has been said that "a sound public policy certainly dictates that at this time when the rights of property and the liberty of citizens are sought to be invaded by every form of subtle and dangerous legislation, the Courts should see to it that those benign principles of the common law which are the shield of personal liberty and private property suffer no impairment." (2)

The rule of the large majority of the courts is more liberal however. While it is true that the character or nature of such boards or commissions is administrative only, still the powers conferred upon them by the legislature, in view of the great public interests confided in them, have usually received from the courts a liberal construction, and the right of the legislature to confer upon them the power of making reasonable regulations is recognized. (3) The public good attained or to be attained justifies this rule of liberal construction. (4) In times of calamity or emergency, public interest demands a still more liberal rule than is ordinarily applied. (5) Minnesota has adopt the liberal rule. (6)

(1)-State v. Speyer, 67 Vt. 504, 506.
(2)-Department of Health v. Rector, 145 N.Y. 32.
(3)-Blue v. Beach, 155 Ind. 121, 131.
(4)-Henghold v. Covington, 108 Ken. 752, 756; Perth Amboy v. Smith, 19 N.J.L. 52.
(5)-Jew Ho v. Williamson, 103 Fed. 10, 21.
(6)-Schmidt v. Board, 34 Minn. 112; Iosco v. Board, 93 Minn. 134, 137.

Justice Mitchell discusses the policy of vesting an ordinance power in boards so clearly and cogently that an extended quotation will be made from his opinion.(1)

"It is not every grant of powers involving the exercise of discretion and judgment, to executive or administrative officers, that amounts to a delegation of legislative power...The maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of difficult and delicate enquiry...The principle is repeatedly recognized by all the courts that the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously do itself. All laws are carried into execution by officers appointed for the purpose; some with more, others with less, but all clothed with powers sufficient for the efficient execution of the law. These powers often necessarily involve in a large degree the exercise of discretion and judgment, even to the extent of investigating and determining facts and acting upon and in accordance with the facts thus found. In fact this must be so, if the legislature is to be permitted to effectually exercise its constitutional powers. If this were not permissable, the wheels of government would often be blocked and the sovereign state find itself helplessly entangled in the meshes of its own constitution...The difference between the power to say what the law shall be, and the power to adopt rules and regulations, or to investigate and determine facts, in order to carry into effect a law already passed, is apparent...The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and the conferring of an authority or discretion to be exercised under and in pursuance of the law."

This was also the view expresses in Lockes Appeal, a leading case.(2) There it was said that the legislature cannot delegate its power to make a law; but it can make a

(1)-State v. Milwaukee Railroad, 38 Minn. 281, 299-300. The decision of this case was reversed in the Supreme Court of the United States, yet this portion of the decision is affirmed as sound law. State v. Railroad, 100 Minn. 445, 476; Lewis, Sutherland on Statutes, sec. 88; Buttfield v. Stranahan, 192 U.S. 470, 497.

(2)-72 Pa.St. 491, 498-499.

law to delegate a power to determine some factor or thing upon which the law makes,or intends to make its own action depend...There are many things upon which wise and useful legislation must depend,which cannot be known to the law making power,and must,therefore,be a subject of enquiry and determination outside the halls of legislation.

The use of scientific experts is as necessary to the administration of many of the regulatory statutes of the present day as it is in the formulating of a statute or in the ascertainment of facts by the Courts.(1) Legislative wisdom is not so inclusive that it can know,in advance,all of the numerous states of facts to which its measure may apply.The only recourse of this department is to rely upon administrative discretion.(2) The presumption is that a commission will act properly in the exercise of the powers delegated to it.(3)

Summary-It seems clear from the above authorities that delegation of ordinance power-the power to draft rules and regulations and promulgate them-on the grounds of public interest and legislative expediency is valid and constitutional. The tendency seems to be towards general laws. De-

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(1)-Isenhour v. State,157 Ind.517,521-522.
(2)-Ibid.; State v. Wagener,77 Minn.483.
(3)-State v. Wagener,77 Minn.483.

tails are left to administrative tribunals.Thus the executive is making rules differing from laws only in degree, and enforceing them. While hearings are conducted for the purpose of determining whether,or not,a particular rule should be adopted,that it not their only function.Hearings-administrative trial-also function in determining whether there has been an infringement or violation of the executive order. It is difficult to regard a body which can exercise these three powers as executive,at least executive in the strict sense. Why isnthe judgement they exercise not judicial within the meaning of the Constitutions? The answer will be found in the word political expediency. Why is not the power to frame rules not legislative? Because a contrary holding would clog up the wheels and machinery of government,-because it is not expedient. Expediency has fostered the board until it has reached its present place of tremendous importance in the government of the state.It has outgrown the purely executive.It is now,what has been termed,the fourth branch of the government-the administrative branch.)