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TORT LIABILITY OF ADMINISTRATIVE OFFICERS

BY EDWARD G. JENNINGS*

ONE of the most perplexing problems of administrative law,¹ as of tort law also,² concerns the individual liability for damages of public officers who, in the performance of official duties, commit errors causing injury to private personal or property rights. Herein becomes sharply apparent the impact of modern public law development upon traditional concepts. The pride and glory of Anglo-American common law have been thought to be the principle that no man is above the law administered by the ordinary courts of the realm,³ and that "color of office" consequently creates no immunity for the "unlawful invasion of another's rights."⁴ In tenacity this principle has been paralleled by, and is no doubt in part a consequence of, that of the sovereign's own immunity.⁵ The latter concept, derived from the time of an

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¹"Administrative law" is used in the meaning of Freund "as law controlling the administration, and not as law produced by the administration." Freund, *Cases on Administrative Law*, 2nd ed., p. v.

²See 2 Cooley, *Torts*, 4th ed., secs. 295-317; Harper, *Torts*, sec. 298.

³Dicey, *The Law of the Constitution*, 8th ed., pps. xxxvii, 324-326. Compare the statement of a recent American writer that "Anglo-American scholars and jurists are becoming increasingly conscious of the weakness of our law in that class of actions which has to do with obtaining money damages for injuries to person and property caused by governmental officers, employees, and agencies." Pfiffner, *Public Administration* 438-439.

⁴*Downs v. Lazzelle*, (1916) 102 W. Va. 663, 668, 136 S. E. 195, 197: "To warrant petitioners in invading the curtilage and close of the plaintiffs and tearing down their wall, they must have a clear legal right to enter for that purpose. Otherwise they will be without immunity from damages for their wrong; and the fact that they are officers or agents of the State furnishes no defense, unless they be clothed with the full panoply of the law." See also *D'Aquilla v. Anderson*, (1929) 153 Miss. 549, 558, 120 So. 434, 436: "One of the first things an officer should learn on assuming the duties of office is the law bearing on his office and its duties. He does not become the law of the land by assuming office, and can do no act unless the law authorizes him to do so, which will affect any other person's rights, property, or liberty;" *Stiles v. Municipal Council of Lowell*, (1919) 233 Mass. 174, 182, 123 N. E. 615, 616: "Personal liability attaches to executive or administrative officers who interfere with rights of individuals in ways not authorized by law. The cloak of office is no protection to them even when acting in good faith."

⁵As to the close connection between the two principles, see *McCord v. High*, (1868) 24 Iowa 336, 350, where Dillon, C. J., placed much emphasis upon the absence of any other remedy as a reason for permitting a personal action to lie against an officer though acting in good faith; but compare the language of the same court in *Packard v. Voltz*, (1885) 94 Iowa 277, 280-281, 62 N. W. 757, 758-759, in reference to the liability of officers of subordinate political subdivisions that share the sovereign im-

absolute personal sovereign who in strict Austinian theory could not be the fountainhead of law and at the same time be subject to it, seems largely anomalous now that sovereignty has become with us an impersonal ultimate having no very direct impact upon the reality of its exercise.⁶

The elimination of sovereign immunity would seem to be a first essential of the complete solution of the problem here treated, from the point of view both of fairness to the officer who acts in the public interest and the exercise of whose judgment in acting the public demands, and of assuring full compensatory justice to the injured individual.⁷ Since in the minds of courts such a

munity only to the extent of the public character of their functions: "It would certainly be an anomalous doctrine that would exempt the corporation itself from liability for the doing of a lawful act in a negligent manner, upon the ground of its compulsory agency in behalf of the public welfare, and at the same time affix a liability upon its agent for precisely the same acts done under its express authority. . . . It must be a reason for the rule of exemption, on the part of a political corporation, that its agency is a public necessity, and it seems to us that the same law that would give it exemption from liability for negligence would protect from liability the servant through whom, only, the corporation can discharge its duty to the public. . . . Legally, the county justifies, in that it has done no act for which it is liable, and hence its agent, through whom it did the act, is for the same reason justified. The same public policy that would give justification to the corporation would extend it to the legitimate means for doing the act." See, however, *Falasco v. Hulen*, (1935) 6 Cal. App. (2d) 224, 44 P. (2d) 469 (police officer held individually liable for negligence in operation of motor vehicle in line of duty). It is sometimes asserted that "A public officer who is a member of a corporate body upon which a duty rests cannot be liable for the neglect of that body. If there be refusal to exercise the powers of such body, it is the refusal of the body, and not of the individuals composing it." *Hartford Accident & Indemnity Co. v. Templeman*, (Tex. Civ. App. 1929), 18 S. W. (2d) 936, 937. The usual answer the courts make is that wrongful action by an officer is not official action. A better answer is that there is nothing necessarily incongruous in visiting personal consequences upon the individuals participating in wrongful official action, even though still regarded as official. Compare *First Nat'l Bank of Key West v. Filer*, (1933) 107 Fla. 526, 533, 537, 145 So. 204, 206-208: ". . . it by no means follows that a public officer may not . . . be held personally and individually responsible for the acts of public boards of [or ?] official bodies, so far as he personally joins in and lends his efforts toward the accomplishment of the wrongful acts of the body or board itself as an entity. . . . The illegal act or omission of a public corporation or board of which the officer sued was a member, becomes the act of those members who actually participate in its consummation, and such officer members so participating in the illegal act or neglect may be sued and held liable personally for the resulting damage that may have been sustained by a person specially injured by the default in duty."

⁶See the thoroughgoing historical and analytical treatment of the whole subject of sovereign immunity in *Borchard, Government Liability in Tort*, (1924) 34 *Yale L. J.* 1, 129, (1925) 34 *Yale L. J.* 229, (1926) 36 *Yale L. J.* 1, (1927) 36 *Yale L. J.* 757, 1039; see also *Notes*, (1930) 39 *Yale L. J.* 550, (1934) 43 *Yale L. J.* 674.

⁷Compare *Garner, French Administrative Law*, (1924) 33 *Yale L. J.* 597, 599: "It can now be said without possibility of contradiction that there

means of securing a complete solution requires legislative action that has not as yet been sufficiently forthcoming,⁸ the ensuing discussion deals with the law of officers' liability on the assumption of the absence of any other form of compensatory redress for injuries resulting from official error.⁹ The problem becomes one of approximating the most nearly adequate adjustment of the respective interests of the private individual and the officer in terms of the larger public interest that is always present in such cases.

In the minds of those who view administrative justice in its modern significance as an excrescence upon the legal system to be received with suspicion, there would be nothing either startling or undesirable in holding administrative officers generally to the utmost accountability in the exercise of their powers and in the same measure as private individuals to the consequences of a presumed knowledge of the law that even courts and lawyers themselves have never in fact possessed. But as it will more fully appear, an absolute personal accountability for the exercise of administrative powers has never been uniformly the law, and an acceptable philosophical starting point is believed to be contained in the following language of the special committee on administrative law in its report to the American Bar Association at the 1934 meeting:

"It [the committee] recognizes and accepts, without approval or disapproval, the apparently irresistible tendency of government everywhere vastly to extend its scope of operations and of regulation, and, in its new undertakings, to employ administrative machinery for the making of detailed rules and the initial determination of controversies. It assumes that the administrative method has demonstrated the advantages generally claimed for it, arising

is no other country where the rights of private individuals are so well protected against the arbitrariness, the abuses and the illegal conduct of the administrative authorities and where they are so sure of receiving reparation for injuries sustained on account of such conduct [as under the French *droit administratif*];" Allen, *Bureaucracy Triumphant* 48: ". . . the remedies of the subject against the State in France are easier, speedier, and infinitely cheaper than they are in England today." Of course the elimination of sovereign immunity need not necessarily be coupled with a separate system of administrative courts for the determination of suits against the state as in France.

⁸See Borchard, *The Federal Tort Claims Bill*, (1933) 1 U. Chi. L. Rev. 1; Note, (1930) 39 Yale L. J. 550.

⁹As to officers of "municipal" corporations generally, it is assumed that the liability asserted arises out of the performance of "public" functions, for which the corporation itself is not liable. Where the functions are "proprietary," since the corporation is liable, the liability of the officer need involve no considerations peculiar to the law of public officers.

from the employment of a body of experts exercising continuous supervision over a subject-matter requiring expert or specialized experience and training. . . . [T]he committee proposes to accept these advantages as demonstrated and, in its recommendations and activities, to attempt to preserve them."¹⁰

As applied to the criminal and tortious liability of private individuals, a rule that ignorance of the law is no excuse is no doubt the only one generally practicable.¹¹ Also there are the situations in which affirmative action constituting an invasion by one private individual of another's rights is not excused by his reasonable mistake as to the other's title or by his reasonable belief in the existence of facts creating a privilege.¹² But only under exceptional circumstances imposing a duty to act is a private individual under liability to anyone for nonaction, and still less frequently is he under liability to anyone for his failure to take affirmative action adversely affecting the person or property of another, even although such action if taken would have been privileged.¹³ Even today it is not for the law to encourage everyone into becoming a busybody;¹⁴ and consequently, in most instances of affirmative action constituting an interference by one private individual with the affairs of another, the most nearly adequate adjustment of all the interests concerned would seem to require that the actor ascertain at his peril the facts and the law upon which the rightfulness of his interference depends.¹⁵ There

¹⁰(1934) 59 American Bar Association Report, 542-543.

¹¹That "mistake of law" has come to have greater significance in relation to quasi contractual recovery, rescission, or reformation, or as a defense in suits for specific performance, see McClintock, *Equity*, secs. 72, 88, 93; Woodward, *Quasi Contracts*, secs. 11, 35-44, 94, 134.

¹²As in the case of conversion by the purchase of a chattel in good faith reliance on the seller's title, where there is no "estoppel" element that may be asserted against the true owner, see, for example, *Employers' Fire Ins. Co. v. Cotten*, (1927) 245 N. Y. 102, 156 N. E. 629; or as in case of the privilege of arrest by a private person acting without a warrant, which is dependent on a felony having been actually committed, see *Restatement, Torts*, sec. 119; or as in case of the privilege of a private individual to abate a private nuisance, see *Restatement, Torts*, sec. 201, comment (g).

¹³Compare the language of section 314 of the *Restatement, Torts*: "The actor's realization that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action;" although by section 76 the actor's privilege in the defense of third persons is stated to be "under the same conditions and by the same means as those under and by which he is privileged to defend himself."

¹⁴"Justice is doing one's own business and not being a busy body." Plato, *Republic* ii, 368. See Pound, *Outlines of Lectures on Jurisprudence*, 4th ed., p. 27.

¹⁵Though compare the privilege of trespass and conversion that is permitted even to private individuals upon reasonable belief in their necessity to avoid or mitigate the effects of a "public disaster," defined to include "conflagration, flood, earthquake or pestilence," see *Restatement, Torts*, sec.

is thus ordinarily imposed upon him a risk if he voluntarily assumes to act; but no duty of assuming the risk of acting.¹⁶

On the other hand the law governing a public officer's powers and duties ordinarily imposes upon him a duty of making the initial determinations of fact or law or both upon which the rightfulness of their exercise depends, and of acting in accordance with his own determinations.¹⁷ The fact that his affirmative duty to act may run only to the public collectively, so as not ordinarily to subject him to the danger of a private suit for the consequences of nonaction,¹⁸ does not perceptibly ease the position in which the officer thus may find himself if he may become liable for the consequences of mistaken action—he still must steer his course

196; and the privilege of arresting a person reasonably believed to have committed a felony that was actually committed, see Restatement, Torts, sec. 119. The pressing emergency character of such particular situations justifies the holding out of some incentive to affirmative private action.

¹⁶There are of course the occasional instances in which a private individual is virtually conscripted into an ad hoc official character; to that extent his liability is subject to the same special considerations applicable to official liability. See *Vandell v. Sanders*, (1931) 85 N. H. 143, 145-146, 155 Atl. 193, 194-195 (defendant held privileged to violate speed ordinance while carrying firemen to fire in his private automobile).

¹⁷See *Raymond v. Fish*, (1883) 51 Conn. 80, 96-97. Of course if the question comes up only in a subsequent judicial proceeding involving liability to a private individual for the consequences of nonaction, a court is not going to hold that the officer violated a duty in failing to take the action that his determination of the facts or law apparently called for, if it has turned out that his determination was in error. State of mind alone does not ordinarily determine legal controversies. But where the controversy is entirely between the officer and the public, as in a removal proceeding, the same entirely objective standards of legal rights and duties do not prevail. See *In re Application for Removal of Nash*, (1920) 147 Minn. 383, 387, 391, 181 N. W. 570, 572-574. It is believed that a health officer directed to quarantine against contagious disease, who should for no valid reason refuse to quarantine a family in whose midst he honestly believes contagious disease to exist, is no less derelict in the performance of his duty to the public, and should be no less subject to removal as an unfit public servant, because it happens in the particular case that he made an error in diagnosis not entirely uncommon among physicians. From the point of view of the public interest involved in such a state of facts, it is much more reasonable to hold the officer subject to removal for nonaction than to hold him subject to personal liability for having acted. See the discussion in *Beeks v. Dickinson County*, (1906) 131 Iowa 244, 249-250, 108 N. W. 311, 312-313, wherein the defendant health officer was held not liable for the loss of the plaintiff's crop occasioned by his being quarantined for smallpox, which it turned out he did not have.

¹⁸For the view that public officers are not subject to private actions for the consequences of "nonfeasance," see generally, *Smith v. Iowa City*, (1931) 213 Iowa 391, 395, 239 N. W. 29, 31; *Stevens v. North States Motor, Inc.*, (1925) 161 Minn. 345, 348, 201 N. W. 435, 436; *Bolland v. Gihlstorff*, (1916) 134 Minn. 41, 42, 158 N. W. 725; *Hipp v. Ferrall*, (1917) 173 N. C. 167, 171-172, 91 S. E. 831, 832-833; *Binkley v. Hughes*, (1934) 168 Tenn. 86, 93-94, 73 S. W. (2d) 1111, 1112-1113; *Thomas v. Wilton*, (1884) 40 Ohio St. 516, 517; *Antin v. Union High School Dist. No. 2*, (1929) 130 Or. 461, 478-479, 280 Pac. 664, 669-670.

between the latter danger and the consequences personal to himself of the nonperformance of his public duty, which may take the form of criminal penalties or removal.¹⁹ Upon the facts of *Miller v. Horton*,²⁰ only a board of commissioners thoroughly remiss in its performance of a public duty could have failed to order the plaintiff's horses destroyed pursuant to its own honest and reasonable finding that they were infected with glanders, entirely regardless of the subsequent judicial determination of that issue in the plaintiff's favor, which there was neither the time to await nor a method by which the board could have secured it before acting.²¹ The risk imposed is one that even omniscience cannot avoid, if the subsequent judicial determination happens to be the one that is in error.²²

Industrialization, urbanization, and ever increasing rapidity of

¹⁹See note 17 supra. The liability of the officer to such penalties for nonaction of course becomes all the clearer when it turns out that his determination calling for action upon his part was not in fact mistaken.

²⁰(1891) 152 Mass. 540, 26 N. E. 100. See also *Pearson v. Zehr*, (1891) 138 Ill. 48, 29 N. E. 854; *Lowe v. Conroy*, (1904) 120 Wis. 151, 97 N. W. 942.

²¹The declaratory judgment procedure, under the federal act, 48 Stat. 955, 28 U. S. C. A. sec. 400, Mason's U. S. Code, tit. 28, sec. 400, and in the more than thirty states in which the Uniform Act has been adopted, see Borchard, *The Uniform Declaratory Judgments Act*, (1934) 18 MINNESOTA LAW REVIEW 239, has especial significance from the point of view of the administrative officer in those situations in which immediate action is not required. See Borchard, *Declaratory Judgments* ix: "The utility of the declaratory judgment in the adjudication of conflicting claims between the citizen and the administration has also not been fully appreciated. It is not merely its speed, inexpensiveness, and simplicity which commend the declaration of rights in administrative law, nor yet the facts that it enables disputes to be determined in their incipency before they have grown into devastating battles and that a decision is obtainable without the prior necessity of a purported violation of law or precarious leap in the dark. It is rather the fact (1) that administrative officers in the performance of their duties or in challenges to the validity of their acts require no coercive remedies or sanctions, but merely a declaration of their legal relations, in order to remain, or be kept, within the bounds of legality; and (2) that the procedural vehicles by which administrative acts are submitted to judicial review, namely, the extraordinary legal remedies and injunctions, have accumulated so vast a cargo of technicalities that the citizen desirous of challenging an administrative power or privilege finds himself frequently engulfed in a procedural bog which bars him from his goal. *Nor has the officer under present practice any effective method of himself raising the issue of legality when challenged, for he must usually await the litigating initiative of his adversary.*" (Italics supplied.)

²²Unless omniscience includes the accurate prophesying of judicial error, The possibility of the latter becomes more apparent when it is remembered that under the usual practice a trial or appellate court would be required to sustain a jury verdict against the defendant officer, although convinced by the evidence of a balance of probabilities in favor of the officer's own original determination. See *Wallace v. Feehan*, (Ind. App. 1932) 181 N. E. 862, 867.

communication and closeness of interdependence between communities have raised problems of health and safety that permit of no delay in their solution, and wherein the public disaster likely to result from mistaken nonaction or overcaution may prove calamitous. From the point of view of the public interest, most people, including courts and lawyers, would now agree that as between two evils it is less serious that personal and property rights be interfered with, even though mistakenly and unnecessarily as shown by judicial hindsight, than that whole communities be decimated by disease as the consequence of overcautious administrative foresight.²³

At the same time that modern economic, industrial, technological, and social forces have increased the complexity of the problems with which governments have to deal, and largely as the consequence thereof, modern public law evolution has tended more and more to thrust upon the administrative branch a fusion of the threefold governmental functions.²⁴ As the number of administrative officers and tribunals has multiplied and the scope of their activities enlarged, their function has ceased to be in any exclusive sense a mechanical law-applying one,²⁵ and has come

²³Compare *Beeks v. Dickinson County*, (1906) 131 Iowa 244, 248-249, 108 N. W. 311, 312-313: "It is the modern tendency of judicial opinion to hold that the public health is the highest law of the land. . . . Whole communities have been exposed and suffered because of mistakes in judgment and over-caution for the liberty of the individual;" *Raymond v. Fish*, (1883) 51 Conn. 80, 96-97: "In such cases there is absolute necessity for immediate action. There is no time to resort to the courts to determine whether the supposed nuisances are so in fact, and are destroying life and health in the vicinity. During such delay an entire village might become depopulated." In *Board of Health v. Court of Common Pleas*, (1912) 83 N. J. L. 392, 395, 85 Atl. 217, 218, in reversing an order granting a judicial trial de novo in the prosecution of one Montencourt for having violated a quarantine imposed by the board of health, the court pointed out: "To assume that the Legislature intended to confer a review of a discretionary power of this character, vested in a statutory board, charged with its exercise in critical situations, involving detriment to the life and health of a community, is tantamount to a declaration that the police power of the state is moribund and useless."

²⁴It is believed that the effect of the decisions in *Panama Refining Co. v. Ryan*, (1935) 293 U. S. 388, 55 Sup. Ct. 241, 79 L. Ed. 446, and *Schechter Poultry Corp. v. United States*, (1935) 295 U. S. 495, 55 Sup. Ct. 837, 79 L. Ed. 1570, will not be to call a halt to this tendency of fusion so long as reasonably specific standards are provided as conditions of delegation, and so long as there is adherence to fundamental "judicial" safeguards, such as a fair hearing and reasonably specific fact-findings, in the administrative exercise of delegated power. See also, *St. Joseph Stockyards Co. v. United States*, (1936) 298 U. S. 38, 56 Sup. Ct. 720, 726, 80 L. Ed. 1033; *Southern Ry. Co. v. Virginia*, (1933) 290 U. S. 190, 198, 54 Sup. Ct. 148, 151, 78 L. Ed. 260; *Morgan v. United States*, (1936) 56 Sup. Ct. 906.

²⁵If it ever was strictly such, see *Brown, Administrative Commissions and the Judicial Power*, (1935) 19 MINNESOTA LAW REVIEW 261, 267-268:

to involve law-declaratory and adjudicatory aspects to almost as great an extent as the judicial function itself.²⁶ One of the most significant features of the administrative development that has taken place has been the substitution, for the determination of complicated problems of fact and policy involving expert knowledge, of specialized tribunals "appointed by law and informed by experience"²⁷ for the less specialized judge and lay jury of the courts of general original jurisdiction.

On the other hand, the multiplication of administrative authorities and mushroom expansion of their activities involve the inevitable tendency of bureaucracy to reach out ever for more power, and offer temptations and opportunities for the play of the sadistic impulses and extreme addiction to technicalities so frequently noticeable in small men when placed suddenly in positions of authority and power, without the professional traditions behind them that in the case of judges have served as such a strong restraining influence. To the extent necessary to curb such tendencies the injection into administration of some lay influence through the medium of damage suits with their accompanying visitation of personal consequences upon the officer whose action is challenged, no doubt appears to many to be still worth preserving alongside the nontortious forms of judicial control—and with added reason in those situations wherein the latter are wholly lacking.

Judges of superior courts of the regular judicial hierarchy, acting within the judicial function, have always formed a category

". . . it is sometimes held that an act is administrative or ministerial rather than judicial because it lacks in discretionary quality and calls merely for the ascertainment of facts and the almost automatic application of the law thereto. . . . This is certainly unsatisfactory. The character of an act claimed to be judicial certainly cannot be determined by the ease or difficulty of the case to be decided; . . ."

²⁶See Blachly and Oatman, *Administrative Legislation and Adjudication*, 1-42. The action of many administrative tribunals, particularly the public service commissions, is in fact much more "legislative" in character than "judicial," see *Prentis v. Atlantic Coast Line Ry.*, (1908) 211 U. S. 210, 226, 29 Sup. Ct. 67, 69, 53 L. Ed. 176; but because of the extent to which the courts have imposed "judicial" processes upon administrative action even when primarily "legislative" in character, see *St. Joseph Stockyards Co. v. United States*, (1936) 298 U. S. 38, 56 Sup. Ct. 720, 726, 80 L. Ed. 1035; *Panama Refining Co. v. Ryan*, (1935) 293 U. S. 389, 431-433, 55 Sup. Ct. 241, 253-254, 79 L. Ed. 446; *Southern Ry. v. Virginia*, (1933) 290 U. S. 190, 198, 54 Sup. Ct. 148, 151, 78 L. Ed. 260; *Morgan v. United States*, (1936) 56 Sup. Ct. 906, the analogy to the judicial function is the one that is most emphasized in the text.

²⁷McKenna, J., in *Illinois Central Ry. v. Interstate Commerce Commission*, (1907) 206 U. S. 441, 454, 27 Sup. Ct. 700, 704, 51 L. Ed. 1128.

of absolute privilege, even for conduct dictated by malice.²⁹ The following reasons for so sweeping a rule of immunity may be suggested: (1) The saving to the public of the drain upon judicial time that would otherwise be necessitated for the defense of private litigation;³⁰ (2) The prevention of undue influence upon judicial determinations through the threats or even the possibility of subsequent damage suits based thereon;³¹ (3) The fear that men of property and responsibility might otherwise be deterred from judicial service;³² (4) The especial importance of an independent judiciary in the American federal and state constitutional systems;³³ (5) The need somewhere of absolute finality in the litigation of controversies, along with the practical difficulties and lack of adequate criteria in subjecting judicial determinations

²⁹Chancellor Kent, in *Yates v. Lansing*, (1810) 5 Johns. (N.Y.) 282, 291, 298, refers to the "doctrine which holds a judge exempt from a civil suit or indictment, for any act done, or omitted to be done by him," as a "sacred principle" with a "deep root in the common law." "The rule extends to judges from the highest to the lowest, to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power." *Weaver v. Devendorf*, (1846) 3 Denio (N.Y.) 117, 120. See also *Phelps v. Sill*, (1804) 1 Day's Cases in Error (Conn.) 315, 329; *Chamberlain v. Clayton*, (1881) 56 Iowa 331, 334, 9 N. W. 237, 238; *Stewart v. Cooley*, (1877) 23 Minn. 347, 350; *Melady v. South St. Paul Stock Exchange*, (1919) 142 Minn. 194, 196, 171 N. W. 806, 807.

³⁰2 Cooley, Torts, 4th ed., 424.

³¹See *Stewart v. Case*, (1893) 53 Minn. 62, 67, 54 N. W. 938: "Protection is not extended to the judge for his own sake, but because the public interest requires full independence of action and decision on his part, uninfluenced by any fear or apprehension of consequences personal to himself, except in so far as he may be accountable to the state for the manner in which he shall discharge the duties intrusted to him;" *Stewart v. Cooley*, (1877) 23 Minn. 347, 350: "... so that he may feel free to act upon his own convictions;" Harper, Torts, 667-668.

³²*Phelps v. Sill*, (1804) 1 Day's Cases in Error (Conn.) 315, 329: "No man would accept the office of judge, if his estate were to answer for every error in judgment, or if his time and property were to be wasted in litigations with every man, whom his decisions might offend."

³³*Yates v. Lansing*, (1810) 5 Johns. (N.Y.) 282, 298: "Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence, and destroy their authority;" *Stewart v. Cooley*, (1877) 23 Minn. 347, 350: "An independent judiciary is justly regarded as essential to the public welfare and the best interests of society." In fact a plausible argument might be made that the judicial immunity is a constitutional as well as a common law principle, from the analogy of the reasoning in *Evans v. Gore*, (1920) 253 U. S. 245, 40 Sup. Ct. 550, 64 L. Ed. 887, holding the salaries of judges of the "constitutional" courts exempt from income taxation by virtue of the provision of the third article of the United States constitution that their compensation "shall not be diminished during their Continuance in Office;" see also *O'Donoghue v. United States*, (1933) 289 U. S. 516, 53 Sup. Ct. 740, 77 L. Ed. 1356, and compare *Williams v. United States*, (1933) 289 U. S. 553, 53 Sup. Ct. 751, 77 L. Ed. 1372 (Court of Claims not a constitutional court in this sense); and see Note, (1933) 47 Harv. L. Rev. 133.

to such a form of collateral attack;³⁴ (6) The existence of adequate opportunities for change of venue, new trial, or reversal on account of prejudice or error, thereby minimizing the need, as against judges not of last resort, of an additional tort liability;³⁵ (7) The theory advanced by Cooley that judges in their exercise of the judicial function are under no duty, the first requisite of a private action, to the individual litigants before them, but are rather under a duty owing only to the public collectively and sanctioned sufficiently by the criminal law and the impeachment or removal power;³⁶ (8) The mere possibility arising from the fact that judges, as the ones administering tort liability, have at least had no reason for being unfriendly toward their own immunity;³⁷ and (9) Underlying the whole principle of immunity, the feeling not always articulately expressed that it would be manifestly unfair for the law to place one in a position the very significance of which is to require *his* opinion and accord it especial deference in the matter in hand, and yet at the same time to penalize him with personal consequences by reference to the opinion of another or others in regard to the same matter.³⁸

A view that malice is so incompatible with the judicial func-

³⁴"Such civil responsibility . . . would open each case to endless controversy. . . . And it is to be borne in mind that if one judge can be tried for his judgment, the one who presides on the trial may also be tried for his, and thus the process may go on until it becomes intolerable." 2 Cooley, Torts, 4th ed., 425.

³⁵Such a reason for the immunity loses most of its force in commonwealths, such as Massachusetts at the time of the Sacco-Vanzetti trial, so backward as to confine the power to grant a new trial on account of prejudice to the trial judge against whom prejudice is charged, see Morgan's review of Ehrmann, *The Untried Case*, (1934) 47 Harv. L. Rev. 538, 546.

³⁶Cooley, Torts, 1st ed., 380. Compare *Sweeney v. Young*, (1925) 82 N. H. 159, 163, 131 Atl. 155, 158: "Their obligation to do justice being owed to the state rather than to the parties coming before them, malice gives the parties no more right to sue them than an honest error subjecting the act to reversal."

³⁷Compare Brown, *Administrative Commissions and the Judicial Power*, (1935) 19 MINNESOTA LAW REVIEW 261, 288, in reference to the tendency of courts to hold that disbarment, in contrast to the other instances of the revocation of professional licenses, is a strictly judicial prerogative within the separation of powers principle: "Whether this is because, as the courts have declared, the admission and disbarment of attorneys is a traditional and peculiar prerogative of the courts or whether it is because the judges, as members of the legal profession, have a greater understanding and sympathy for the rights of an attorney charged with unprofessional practices may perhaps be left to conjecture."

³⁸As expressed in *National Surety Co. v. Miller*, (1929) 155 Miss. 115, 123, 124 So. 251, 253, "a matter within his jurisdiction and about which he is called on to decide under the law and the facts, in which he is to pass judgment, in other words, is to adjudge the issue one way or another."

tion as to deprive determinations imbued with it of their official character appears never to have been urged at all seriously as a possible basis for an exception to the judicial privilege.³⁹ The cumulative effect of the suggested reasons for the immunity, rejecting as entirely inadequate only the seventh and eighth, would appear sufficiently to justify its inclusion of malice, in that malice, equally with any other basis of liability, is subject to the vagaries of proof and capable of fictitious allegation in purely vexatious suits infringing upon judicial time, impartiality, independence, and finality.⁴⁰ In this connection the dangers of vexatious suits are

³⁹See *Anderson v. Park*, (1881) 57 Iowa 69, 71-72, 10 N. W. 310, 311: "Where a judicial or other officer does no more than what the law requires him to do, it is immaterial, so far as his legal liability is concerned, in what state of mind he does it." In this case malice on the part of the judge in committing the defendant in a criminal trial was held to have been immaterial, since the law required committal so long as the defendant himself took no steps to stay sentence. But it involves a further step to say that malice is immaterial when because of it the judicial power is admittedly exceeded. In *Sweeney v. Young*, (1925) 82 N. H. 159, 164, 131 Atl. 155, 158, the action was for damages against the members of a school board for the malicious expulsion of a student. The governing statute authorized expulsion only for gross misconduct, and it was conceded that the misconduct was not gross. In affirming a directed verdict in favor of the defendants, the court stated that "Malice of itself as a state of mind is not a wrong for which the law gives redress. . . . Since the plaintiff's dismissal is to be here treated as violating none of his rights, it follows that the manner or means by which the dismissal was brought and the reasons for it were not injurious. They cannot be treated separately and as distinct from the result." It is submitted that such reasoning proves immunity for malice only by assuming that because of the immunity for malice there was no wrong.

In *Stewart v. Cooley*, (1877) 23 Minn. 347, 350, the action was against the municipal court judge of Minneapolis for having maliciously conspired to charge the plaintiff with perjury. An order sustaining a demurrer was reversed on the ground that the complaint charged the institution of the conspiracy prior to the commencement of the judicial prosecution, and that therefore the defendant's conduct had not been "in the course of any judicial proceeding, or in the discharge of any judicial function." But the decision has been adversely criticized, see *Cooley*, *Torts*, 1st ed., p. 412, note 5, on the ground that the conspiracy alone would have caused no injury without the "judicial" concurrence of the defendant in the issuance of process. But see also *Melady v. South St. Paul Stock Exchange*, (1919) 142 Minn. 194, 198, 171 N. W. 806, 807, 808, holding the "quasi judicial" committee of the Stock Exchange individually immune from liability for having maliciously expelled the plaintiff from membership, but suggesting the possibility of liability for malice had the defendants "begun and conducted the prosecution and decided it as well" instead of having merely decided it.

⁴⁰Compare *Sweeney v. Young*, (1925) 82 N. H. 159, 164-165, 131 Atl. 155, 158: "Whether the judicial act is reasonable or not bears on the probabilities of malice, and it therefore becomes a subject of collateral consideration in passing on the issue of malice;" *Field, J.*, in *Bradley v. Fisher*, (1871) 13 Wall. (U.S.) 335, 348, 20 L. Ed. 646: "Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action;" *Mechem*, *Public Officers* 427: ". . . if the action can be maintained by the allegation of improper motives,

thought to be sufficient to require immunity from substantiated and successful ones as well.⁴¹ To the extent that "judicial" wrongdoing is irremediable otherwise, as by appeal or writ of error or the extraordinary remedies, the possibility of a wrong without a remedy, required by the above considerations of practicability and public interest, results.⁴²

The same absolute immunity extends to legislators,⁴³ and is frequently said to extend to the highest executive officers of the federal and state governments by reason of the especial dignity of their positions.⁴⁴ In connection with the power of courts to direct their extraordinary remedies against such officers, the apparently growing tendency is to place the emphasis upon the nature of the particular act or duty sought to be compelled, restrained, or reviewed, rather than upon the especial dignity of the defendant's official position, or upon the demands of courtesy to a co-ordinate department, or upon fear of infra-governmental friction or of inability to enforce the court's decree.⁴⁵ It is believed that in the

no litigant will fail to allege that they existed, and the public officer may constantly be called upon to defend himself from actions at law brought with motives fully as malicious as those which are asserted to have inspired him."

⁴¹See Harper, Torts, 667-668.

⁴²Compare Stone, J., dissenting in *United States v. Butler*, (1935) 297 U. S. 1, 56 Sup. Ct. 312, 325, 80 L. Ed. 1033: "... the only check upon our own exercise of power is our own sense of self-restraint."

⁴³The "legislative" immunity is generally expressly embodied in provisions of the federal and respective state constitutions. United States constitution, art. 1, sec. 6; Minnesota const., art. 4, sec. 8. The "legislative" immunity, as well as the immunity of executive officers for acts strictly within their "executive" powers, has been thought to be embodied also in the separation of powers principle, see Mechem, Public Officers 393-394.

⁴⁴See Harper, Torts 667. The cases Harper cites involve primarily the extraordinary remedies rather than liability in tort, with the exception of *Spatulding v. Vilas*, (1895) 161 U. S. 483, 16 Sup. Ct. 631, 40 L. Ed. 780, which held there was no liability for language contained in an official communication, but otherwise laid down no sweeping rule of immunity. In *Livingston v. Jefferson*, (C.C. Va. 1811) 1 Brock. 203, 4 Hughes 606, Fed. Cas. No. 8,411, a demurrer to an action against Thomas Jefferson, brought after he had ceased to be president, on account of a trespass alleged to have been committed while president, was sustained on the ground of the local character of the cause of action. If it is the value of official time that is of particular significance in the case of high executive officers of state and nation, a distinction might well be drawn between actions commenced during the defendant's term of office, and actions brought afterwards, for alleged misconduct while in office. An action was pending at the time of his death against the late Governor Olson of Minnesota, for damages occasioned by his use of troops in closing a factory during labor troubles; and a demurrer to the complaint had been overruled.

⁴⁵See *Cooke v. Iverson*, (1909) 108 Minn. 388, 393, 122 N. W. 251-253; *State ex rel. Kinsella v. Eberhart*, (1911) 116 Minn. 313, 314-320, 133 N. W. 857-860; *Kumm, Mandamus to the Governor in Minnesota*, (1924) 9 MINNESOTA LAW REVIEW 21; *Notes*, (1930) 14 MINNESOTA LAW REVIEW 303, 572; (1935) 19 MINNESOTA LAW REVIEW 481.

main the same consideration should determine the liability of such officers to actions for damages, at least to the extent of precluding the laying down of any absolute rule of immunity.⁴⁶

There are necessarily those key positions in government in which the incumbent for reasons of both policy and politics is permitted as to certain matters and for the time he is in office to exercise an uncontrolled personal discretion.⁴⁷ The only sanction against abuse must be political rather than legal. In this sense "executive" discretion is of much wider and more arbitrary significance than "judicial" discretion, which usually suggests at most a "legal" discretion controllable by legal processes.⁴⁸ To the extent that policy-determining administrative authorities possess a discretion of an "executive" or frequently "legislative" character,⁴⁹ they must necessarily be free of liability for the exercise thereof, not because of any rule of immunity attached especially to their positions, but essentially because of the complete absence of any adequate criteria by which to determine that their exercise of such a discretion in a particular way was "legally" wrongful.⁵⁰ To the extent, however, that courts have imposed legal controls upon administrative processes, administrative discretion must necessarily mean something less than executive or legislative discretion in the political sense; and the present discussion is concerned primarily with the question of liability for

⁴⁶See 2 Cooley, Torts, 4th ed., p. 389.

⁴⁷See, generally, Finkelstein, *Judicial Self-Limitation*, (1924) 37 Harv. L. Rev. 338; Finkelstein, *Further Notes on Judicial Self-Limitation*, (1925) 39 Harv. L. Rev. 229; Weston, *Political Questions*, (1925) 38 Harv. L. Rev. 296; Field, *The Doctrine of Political Questions in the Federal Courts*, (1924) 8 MINNESOTA LAW REVIEW 485.

⁴⁸For example, when the governor of a state is empowered to remove a subordinate elective officer for "malfeasance or nonfeasance in the performance of his official duties," see 2 Mason's 1927 Minn. Stat., sec. 6954, whether to proceed at all in the exercise of his removal power is held to be a matter committed to the governor's "executive" discretion, so that a court may not by mandamus compel him to do so. See *State ex rel. Birke-land v. Christianson*, (1930) 179 Minn. 337, 229 N. W. 313. But as soon as the governor has decided upon action rather than non-action, and so far as his removal power is subject to limitation by the terms of the statute, his discretion in the exercise of it has become essentially "judicial" in character and therefore subject to control by certiorari. See *State ex rel. Kinsella v. Eberhart*, (1911) 116 Minn. 313, 133 N. W. 857.

⁴⁹See note 26 *supra*.

⁵⁰The statement in the text does not sufficiently explain the immunity for an unconstitutional exercise of delegated legislative power. Perhaps the best explanation is that such action in its legislative aspects is void, and cannot directly affect personal or property rights without losing its exclusively legislative character, by passing into the realm of administration, either by the same or other officers, whose liability is therefore to be determined by other principles than that of legislative immunity.

the exercise of administrative powers which in their direct impact upon the personal and property rights of private individuals may be assumed to be subject to ascertainable legal limits that have been exceeded. It is therefore directly from the analogy of the judicial immunity that the problem is approached; and the reasons suggested as the basis of the judicial immunity should have some direct bearing throughout the ensuing discussion.

I. LIABILITY FOR "QUASI JUDICIAL" ADMINISTRATIVE ACTION

Prior to the advent of administrative justice in its present-day dimensions and significance, the courts had experienced little or no difficulty in permitting administrative officers to share to a considerable extent in the judicial immunity when found to be acting in an essentially "judicial" or "quasi judicial"⁵¹ capacity. As

⁵¹The only advantage of "judicial" being "softened by a quasi," see Holmes, J., dissenting in *Springer v. Government of the Philippine Islands*, (1928) 277 U. S. 189, 210, 48 Sup. Ct. 480, 485, 72 L. Ed. 845, would seem to be by way of paying at least lip service to the separation of powers principle in the very process of disregarding for practical reasons its full implications. As the meaning of "judicial power" "cannot be brought within the ring-fence of a definition," see *State ex rel. Attorney-General v. Hawkins*, (1886) 44 Ohio St. 98, 109, 5 N. E. 228, 232, accordingly the meaning of the phrase "quasi judicial" varies with the nature of the particular problem to which its usage is addressed. As a term differentiating the administrative from the judicial process, in order to sustain administrative action within the separation of powers principle in the very situations in which it most closely resembles the ordinary action of courts both in its method and in its effect on personal and property rights, the prefix "quasi" is quite meaningless, see Brown, *Administrative Commissions and the Judicial Power*, (1935) 19 MINNESOTA LAW REVIEW 261, 265-275; and the only satisfactory explanation of the extent to which the courts have held the separation of powers principle not to preclude the administrative exercise of the police power would seem to be that such power has enough vitality to provide the procedural methods best suited to the accomplishment of its purposes, in other words, is procedural as well as substantive. See Brown, *Administrative Commissions and the Judicial Power*, (1935) 19 MINNESOTA LAW REVIEW 261, 303. As a term expressing sufficient similarity to the judicial process to permit of court review of administrative action by the extraordinary remedy of certiorari, the prefix "quasi" is at least useful, and has come to mean primarily that the administrative action so sought to be reviewed is of a type that is subject to ascertainable legal limitations and proceeds by hearing in an essentially "judicial" manner. See *Dullam v. Wilson*, (1884) 53 Mich. 392, 19 N. W. 112; *State ex rel. Kinsella v. Eberhart*, (1911) 116 Minn. 313, 314-320, 133 N. W. 857-860; *Minnesota Sugar Co. v. Iverson*, (1903) 91 Minn. 30, 33, 97 N. W. 454, 455; *State ex rel. Hardy v. Clough*, (1896) 64 Minn. 378, 67 N. W. 202. And for the purpose of applying the analogy of the judicial immunity to administrative action, the prefix "quasi" has tended to mean merely the presence of a discretionary element similar to that involved in a judicial determination, with practically no emphasis on the element of procedural similarity to the judicial process. See *Bishop, Noncontract Law* 785, 786. The three problems have involved entirely different considerations, and entirely different approaches. The same matter may be non-judicial in the sense of

shown by John Dickinson, a "tendency to hold that administrative determinations were judicial in character, and that the officers making them were protected by judicial immunity, at least when acting in good faith and from pure motives, is conspicuous in the cases from about 1770 to about 1870."⁵² A disposition in this connection to use "quasi judicial" as synonymous with "discretionary," and both alike as antitheses of "ministerial," is noticeable in the decisions.⁵³ Consequently, in applying the analogy of judicial immunity to administrative determinations, the courts tended to emphasize not so much the presence in the latter of the fundamental "judicial" safeguards such as notice and hearing, which were in fact generally lacking, as the presence of the characteristic, in common with judicial action, of being the means of securing a judgment on facts, law, or policy of him or them whose opinions in the matter in hand the law has asked and to which at least for some purposes it accords especial significance.⁵⁴

Early decisions applied the judicial analogy even to the point of including immunity for malice.⁵⁵ In the later cases, however,

permitting it to be confided to an officer or tribunal outside the regular judicial hierarchy, and at the same time judicial for purposes of permitting court review by certiorari and extending to it the judicial immunity; or it may be non-judicial in both of the first two senses and at the same time judicial in the third. "The character of the office or tribunal does not determine the question, but, rather, the nature of the act performed" as applied to the problem immediately before the court. *Minnesota Sugar Co. v. Iverson*, (1903) 91 Minn. 30, 33, 97 N. W. 454, 455.

⁵²Dickinson, *Administrative Justice and the Supremacy of Law* 44-45, note 20.

⁵³See *Fidelity & Casualty Co. of New York v. Brightman*, (C.C.A. 8th Cir. 1931) 53 F. (2d) 161, 165-166; *State ex rel. Funk v. Turner*, (1931) 328 Mo. 604, 617, 42 S. W. (2d) 594, 598; *State ex rel. Robertson v. Farmers' State Bank*, (1931) 162 Tenn. 499, 505, 39 S. W. (2d) 281, 282-283; *National Surety Co. v. Miller*, (1929) 155 Miss. 115, 123, 124 So. 251, 253; *Stevens v. North States Motor, Inc.*, (1925) 161 Minn. 345, 348, 201 N. W. 435, 436; *Keifer v. Smith*, (1919) 103 Neb. 675, 677, 173 N. W. 685; *Chamberlain v. Clayton*, (1881) 56 Iowa 331, 333, 9 N. W. 237, 238; *Bishop*, *Noncontract Law* 785, 786; *Brown*, *Administrative Commissions and the Judicial Power*, (1935) 19 MINNESOTA LAW REVIEW 261, 268-269.

⁵⁴See *National Surety Co. v. Miller*, (1929) 155 Miss. 115, 123, 124 So. 251, 253 ("about which he is called on to decide under the law and the facts, in which he is to pass judgment, in other words, is to adjudge the issue one way or another"); *Stevens v. North States Motor, Inc.*, (1925) 161 Minn. 345, 348, 201 N. W. 435, 436 ("duties which call for the exercise of his judgment or discretion, as to its [the act's] propriety or the manner in which it is to be performed"); *Wilson v. Spencer*, (1912) 91 Neb. 169, 171, 135 N. W. 546, 547 ("in a matter wherein it is his duty to exercise judgment and discretion"); *Pawloski v. Jenks*, (1897) 115 Mich. 275, 276-277, 73 N. W. 238: "His decision on the question of the approval of the bond of plaintiff required the exercise of judgment, and it would be intolerable that his action be reviewed at the suit of parties claiming to be injured thereby."

⁵⁵*Stewart v. Case*, (1893) 53 Minn. 62, 66, 54 N. W. 938 (assessor held

there is a noticeable tendency at least by dicta to limit the immunity of administrative officers for quasi judicial determinations to those rendered in good faith and from proper motives.⁵⁶ The

immune from liability though alleged to have "wrongfully, unlawfully, willfully, and maliciously" overassessed plaintiff's property): "If the rule protects such officers at all, it protects them for the same reason and to the same extent as in the case of judges of courts;" *Steel v. Dunham*, (1870) 26 Wis. 393, 396-398 (members of board of tax review held immune from liability for having "without authority, wrongfully, and with intent to injure and oppress" increased the assessment on plaintiff's property): "But I am not so clear upon the question whether they ought not to be held personally liable when they act maliciously and corruptly. But even in that case my brethren think that, upon grounds of public policy, they ought not to be responsible in a civil action; and I defer to their judgment. Most cogent reasons can doubtless be rendered in support of this view of the question. The duties which these officers are called upon to perform are frequently most difficult, delicate and embarrassing. The public interests require that all property not exempt should be assessed at its true value for taxation. But many persons will resort to any expedient to prevent all their taxable property from being assessed, or, if assessed at all, from being assessed at its true valuation. They will deceive assessors, and intimidate and overawe boards of equalization, if possible. If they cannot carry their points, they are very likely to charge that the officers are acting from personal spite and corrupt motives. And it is unquestionably true, that many timid officers would be deterred by such persons from a proper discharge of the duties imposed upon them . . . if they were held liable in any case to a civil action. The bare fact that they might be harassed by a law suit would in many cases lead them to yield to demands which were unreasonable, and which they ought to resist to the utmost. And hence there are the strongest considerations, on grounds of public policy, for holding that these officers, while performing the duties imposed upon them by this law as a board of review, and while acting within their jurisdiction, are not liable to a civil action in any case;" *Wilson v. Spencer*, (1912) 91 Neb. 169, 172-173, 135 N. W. 546, 547-548: "The mere allegation . . . that in performing work which was clearly within the scope of his duties the officer acted maliciously, wantonly, and unlawfully does not state an actionable wrong" (but the court suggested that it might have been sufficient had the plaintiff set forth that "the work was not performed for the public interest, but alone intended to damage the plaintiff"); *Weaver v. Devendorf*, (1846) 3 Denio (N.Y.) 117, 120, see supra note 29; see also *Sweeney v. Young*, (1925) 82 N. H. 159, 164-166, 131 Atl. 155, 158, supra note 39; *Kittler v. Kelsch*, (1927) 56 N. D. 227, 216 N. W. 898 (prosecuting attorney not liable for malicious prosecution because acting in quasi judicial capacity), noted (1928) 12 MINNESOTA LAW REVIEW 665.

⁵⁶See *Logan City v. Allen*, (1935) 86 Utah 375, 380, 44 P. (2d) 1085, 1087 ("in the absence of corrupt or malicious motives"); *Fidelity & Casualty Co. of New York v. Brightman*, (C.C.A. 8th Cir. 1931) 53 F. (2d) 161, 165 ("unless he be guilty of wilful wrong"); *State ex rel. Robertson v. Farmers' State Bank*, (1931) 162 Tenn. 499, 505, 39 S. W. (2d) 281, 283 ("it must appear that he acted willfully, maliciously, or corruptly"); *Wilbrecht v. Babcock*, (1930) 179 Minn. 263, 265, 228 N. W. 916 ("unless it appears that the particular acts complained of were not only unnecessary but were done corruptly or maliciously"); *Stevens v. North States Motor, Inc.*, (1925) 161 Minn. 345, 348, 201 N. W. 435, 436 ("unless guilty of wilful wrong"); *Roerig v. Houghton*, (1919) 144 Minn. 231, 234, 175 N. W. 542, 543 (immunity limited to the "honest" exercise of judgment); *National Surety Co. v. Miller*, (1929) 155 Miss. 115, 123, 124 So. 251, 253 ("so long as they act in good faith and from honest motives"); *Keifer v. Smith*, (1919) 103 Neb. 675, 677, 173 N. W. 685 ("in the absence

following reasons for such a limitation may be suggested: (1) The view that malice is incompatible with the official character of the determination;⁵⁷ (2) The usual entire absence of opportunity to preclude prejudiced administrative action through change of venue, coupled with the unavailability of appeal or writ of error and the restricted scope of the extraordinary remedies as methods of reviewing administrative action;⁵⁸ and (3) The fact

of malice, oppression in office, or willful misconduct"); *Hipp v. Ferrall*, (1917) 173 N. C. 167, 169, 91 S. E. 831, 832 ("unless they act corruptly and of malice"); *Beeks v. Dickinson County*, (1906) 131 Iowa 244, 247-249, 108 N. W. 311, 312 ("providing there be no malice or wrong motive present" or "gross negligence amounting to malice"); *Chamberlain v. Clayton*, (1881) 56 Iowa 331, 334, 9 N. W. 237, 238 ("unless the act complained of be willful, corrupt, or malicious"); *Adams v. Schneider*, (1919) 71 Ind. App. 249, 255, 124 N. E. 718, 720 ("in the absence of corrupt motives"). In *Hale v. Johnston*, (1918) 140 Tenn. 182, 197-198, 203 S. W. 949, 953, it is suggested that the rule whereby an officer whose powers "are discretionary, and to be exerted or withheld according to his own judgment, . . . is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a willful exercise of them, where no corruption or malice can be imputed to him, . . . goes no further than to relieve public officials of liability for nonfeasance and for the misfeasance of their servants or agents." For the tort of "oppression in office," which requires malice but not the absence of probable cause as in malicious prosecution, see *Miller v. Runkle*, (1908) 137 Iowa 155, 114 N. W. 611.

⁵⁷But compare *Sweeney v. Young*, (1925) 82 N. H. 159, 163-165, 131 Atl. 155, 158 (facts stated supra note 39): "The public interest that public officers shall be 'free and fearless' in the exercise of their judicial duties makes it of immaterial bearing on their liability for their judicial acts whether or not they act from good motives. . . . Judicial acts do not lose their character as such because malice induces them, and it is not of consequence whether the act is free from error or irregularity, except for the malice, or whether there is involved some error or irregularity in addition to the malice, and, if so, whether or not the malice accounts for it. . . . Whether the judicial act is reasonable or not bears on the probabilities of malice, and it therefore becomes a subject of collateral consideration in passing on the issue of malice. Tribunals other than those intended by legislation would thus be called upon to pass upon questions for which their qualifications are ordinarily doubtful. . . . That a jury is better fitted to pass upon an educational question when the honesty and good faith of the committee is made an issue is hardly to be maintained. Entire independence of school boards in their judicial action is as desirable and important in the public interest as the independence of judges of courts."

⁵⁸Compare *Brinkley v. Hassig*, (C.C.A. 10th Cir. 1936) 83 F. (2d) 351, 356-357 (proceeding to enjoin revocation by state board of medical license): "The principal contention . . . is that the members of the board were prejudiced against appellant before the hearing started, and that some of them were active in instigating the complaint. . . . The spectacle of an administrative tribunal acting as both prosecutor and judge has been the subject of much comment, and efforts to do away with such practice have been studied for years. . . . But it has never been held that such procedure denies constitutional right. . . . Assuming such preconceived prejudice, what is the answer? The statute provides but one tribunal with power to revoke a doctor's license, just as the Supreme Court of Kansas is the only body with power to disbar a lawyer. If such powers may not be exercised if the members of the board or court are prejudiced, then any lawyer or doctor who commits an offense so grave that it shocks every right-thinking

that, of the reasons suggested for the judicial immunity, the fourth and eighth are here absent and the first and fifth not so compelling in the case of administrative action, at least in the minds of judges, as to require immunity for malice.⁵⁹ Otherwise, the second and third reasons advanced to sustain the immunity of judges, are of almost equal significance as applied to the determinations of administrative officers, and are the ones most frequently given for the immunity that is extended to them.⁶⁰

person, has an irrevocable license to practice his profession if he can get the news of his offense to the court or board before the trial begins. . . . From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. [See Minnesota, Laws 1929, ch. 57, sec. 13; ch. 299, sec. 11; ch. 388, sec. 11; *Stockwell v. Township Board*, (1871) 22 Mich. 341.] But where no such provision is made, the law cannot be nullified nor the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal." See Blachly and Oatman, *Administrative Legislation and Adjudication* 241, 242, for a criticism of this common feature of administrative action.

⁵⁹Though compare *Sweeney v. Young*, (1925) 82 N. H. 159, 164-166, 131 Atl. 155, 158, supra notes 39, 40, 57.

⁶⁰See *National Surety Co. v. Miller*, (1929) 155 Miss. 115, 123, 124 So. 251, 253: ". . . when we create boards and commissions and invest them with high duties and powers towards the accomplishment of great public objects, if we are to subject them to actionable liability for errors of decision and judgment and cast their estates in ruin, although they act within their jurisdiction and in good faith, we will have only insolvents in office, or else those who will be so fearful of disaster to their private fortunes and the safety of their families that the rule of their conduct will be that of non-action or of action so feeble and halting and cautious, their performances so paralytic of the vigor of decision, that they would become little more than objects of commiseration and at last of contempt;" *Stewart v. Case*, (1893) 53 Minn. 62, 67, 54 N. W. 938: "If they [assessors] were liable to have the considerations upon which they make the valuations impeached at the suit of every dissatisfied property owner, it is doubtful if men fit to hold the office could be induced to take it;" *Wilson v. Spencer*, (1912) 91 Neb. 169, 171, 135 N. W. 546, 547: "This rule is particularly applicable to officers in control of highways, for the reason that their operations touch the property of so many persons that, if not exempt, they might be constantly harassed;" *Melady v. South St. Paul Stock Exchange*, (1919) 142 Minn. 194, 197, 171 N. W. 806, 807: "When one of the purposes of an incorporated association is to arbitrate controversies between its members, the board or committee of arbitration is a quasi-judicial body within the spirit of this rule;" *Roerig v. Houghton*, (1919) 144 Minn. 231, 175 N. W. 542 (denial of building permit); *Chamberlain v. Clayton*, (1881) 56 Iowa 331, 9 N. W. 237 (refusal of board of trustees of state school to permit teacher to enter upon employment); *Fidelity & Casualty Co. of New York v. Brightman*, (C.C.A. 8th Cir. 1931) 53 F. (2d) 161 (bank examination by state banking commissioner); *Keifer v. Smith*, (1919) 103 Neb. 675, 173 N. W. 685 (issuance by stallion registration board of pedigree papers for a stallion that turned out to be a grade); *Pawloski v. Jenks*, (1897) 115 Mich. 275, 73 N. W. 238 (refusal of city council to approve plaintiff's liquor bond).

It has been said that "the legal principle underlying the recognition of the officer's liability and the right to enforce it remains the same, whether the suit be brought by a taxpayer on behalf of the injured public board, or

Owing to a combination of historical with constitutional factors, the "quasi judicial" immunity so developed ran head-on into a conception of "jurisdictional facts" and into the prevailing judicial absolutism when dealing with property rights of a tangible character. Because administrative tribunals in their judicial aspects could be regarded as courts only in the "inferior" sense,⁶¹ no "presumption" of jurisdiction attached to their determinations; and procedural modes, when imposed by the empowering statute, became a measure of administrative power, in other words "jurisdictional."⁶² Starting with a special capacity theory of delegated powers,⁶³ the courts regarded as not done officially that which there was no authority to do; and at a time when notice and hearing and an orderly process of fact-finding embracing a substantial minimum of the "judicial" safeguards had not yet become fairly defined attributes of administrative action, it was therefore perfectly natural for a court to conclude that an authority to destroy animals infected with glanders could not justify the destruction of animals honestly and reasonably though mistakenly believed to be so

by plaintiff as an individual, to redress his private wrong." *First Nat'l Bank of Key West v. Filer*, (1933) 107 Fla. 526, 533, 145 So. 204, 207. But in the case of officers administering public funds, even where acting in a clearly quasi judicial capacity, there is a tendency to talk in terms of a trust relation for purposes of determining liability to the public, see *Twitchler v. Bergeson*, (1932) 185 Minn. 414, 417, 241 N. W. 578, 580 (defendant member of school board held liable in taxpayer's action to account personally for moneys improperly expended for the purchase of real estate without authorization by popular vote, and for excess over reasonable cost of purchase price of other items): ". . . appellant, by so voting for such expenditures, violated the trust imposed upon him by law and became personally liable for the money wrongfully expended;" *Land, Log & Lumber Co. v. McIntyre*, (1898) 100 Wis. 258, 262, 75 N. W. 964, 969-970.

⁶¹"Where courts of special and limited jurisdiction exceed their powers, the whole proceeding is *coram non iudice*, and all concerned in such voir proceedings are held to be liable in trespass. (Case of the Marshalsea, (1614) 10 Co. 68. *Terry v. Huntington*, Hardres, 480.)" Chancellor Kent, in *Yates v. Lansing*, (1810) 5 Johns. (N.Y.) 282, 290.

⁶²*Stuart v. Palmer*, (1878) 74 N. Y. 183, 188; *Stiles v. Municipal Council of Lowell*, (1919) 233 Mass. 174, 182-183, 123 N. E. 615, 616.

⁶³See Dickinson, *Administrative Justice and the Supremacy of Law* 307-308: "The law of court review of administrative determinations has been infected with a hidden confusion by the transformation which has quietly shifted the emphasis of so much executive action to the function of adjudication. The earlier law of review . . . took its starting-point from the principle of *ultra vires*; so that review became focused on the issue of jurisdiction or extent of authority, instead of appearing openly in the guise of a proceeding in error to correct an adjudication by an inferior tribunal. . . . The *ultra vires* theory of review coöperated with American constitutional doctrine to present the review proceeding as a proceeding essentially collateral in character. The typical form of such collateral review is the traditional tort action for damages against an officer who has exceeded his authority."

infected.⁶⁴ For the "taking"⁶⁵ of any form of private property required at least due process of law, which in turn called for notice and hearing and the "ordinary decencies" of judicial procedure; and a court was unable to presume that enough of these to satisfy due process had been had before the administrative officer or tribunal.

Logically the only conclusion of such a process of reasoning is that in the administrative exercise of the state's police power a correct decision on the merits is in nearly every case a "jurisdictional" fact;⁶⁶ and the extreme inversion of results thereby

⁶⁴Miller v. Horton, (1891) 152 Mass. 540, 26 N. E. 100; see also Pearson v. Zehr, (1891) 138 Ill. 48, 29 N. E. 854; Lowe v. Conroy, (1904) 120 Wis. 151, 97 N. W. 942. Compare Dickinson, Administrative Justice and the Supremacy of Law 308-310: "Since there was no question of an old-fashioned officer like a sheriff or bailiff having held a hearing or made a formal finding of fact preliminary to taking the action complained of, the facts were of necessity tried by a jury in the collateral tort action—that is, in the review proceeding itself. . . . In short, so long as the usual type of executive action brought under review was not 'quasi-judicial' [in the sense of adequate notice and hearing and reasonably specific fact-findings, see supra note 51], it was not only natural but inevitable that the fact-finding process should be a part of the review proceeding, and not of the administrative process itself. . . . If the right of review is rested on the theory of ultra vires, and an administrative officer is given authority, for instance, to destroy infected articles or diseased animals, it is possible to argue that he is 'without jurisdiction' or authority over articles not actually infected or over animals not really diseased. Consequently, in order to determine the question of his 'jurisdiction,' it becomes necessary to determine in the review proceedings these 'jurisdictional facts.'"

⁶⁵At the time Miller v. Horton, (1891) 152 Mass. 540, 26 N. E. 100 was decided, the permissibility of a "taking" of private property without compensation under the police power, as distinguished from a "taking" with compensation under the eminent domain power, had not become so firmly settled as it is today, and at 152 Mass. 547, 26 N. E. 102, Mr. Justice Holmes suggested: "When a healthy horse is killed by a public officer . . . for fear that it should spread disease, the horse certainly would seem to be taken for public use as truly as if it were seized to drag an artillery wagon."

⁶⁶Where the police power properly extends to an entire classification, because of the known propensities of the greater number of the individual items or members within it, as in the case of a statute requiring the disinfection of *all* imported rags, since the statute validly applies to all such rags it becomes immaterial that the particular rags put through the disinfecting process were not in fact in need of it, and whether they were or not is consequently not a "jurisdictional" fact. Train v. Boston Disinfecting Co., (1887) 144 Mass. 523, 11 N. E. 929. "Within limits, it [the legislature] may thus enlarge or diminish the number of things to be deemed nuisances by the law, and courts cannot inquire why it includes certain property, and whether the motive was to avoid an investigation. But wherever it draws the line, an owner has a right to a hearing on the question whether his property falls within it, and this right is not destroyed by the fact that the line might have been drawn so differently as unquestionably to include that property." Holmes, J., in Miller v. Horton, (1891) 152 Mass. 540, 546, 26 N. E. 100, 102. Furthermore, in most instances of the application of the police power to the complete destruction or denial of property or other rights, it may be assumed that the power was not intended and could not validly have been intended, to apply in individual instances in which the

produced was reached in the cases holding that the effect of the absolute accountability of administrative officers for reaching a correct decision on the merits in such matters as the abatement of nuisances, was to dispense entirely with any constitutional necessity for even a minimum of the "judicial" safeguards in their conduct of the administrative proceedings.⁶⁷ Taking into consideration also the absolute character of the concepts of trespass to realty and conversion of tangible personalty, along with "the extension of administrative interference with individual property rights after the middle of the nineteenth century, and . . . the greater theoretical importance attached at the same time to such rights,"⁶⁸ it becomes an understandable proposition that "the judgment or discretion of the quasi-judicial officer, though exercised honestly and in good faith, does not protect him where by virtue of it, he undertakes to invade the private property rights of others, to whom no other redress is given than an action against the officer."⁶⁹ Or as phrased by Judge Dillon, "The discretion which protects such an officer . . . stops at the boundary where the absolute rights of property begin."⁷⁰

Although the conception of "jurisdictional facts" is by no means confined to the cases involving "the absolute rights of property,"⁷¹ it is in those cases that the "boundary" where such rights begin, and "jurisdictional facts," come together to mean one

reasons for the destruction or denial are entirely lacking. Thus it usually may be assumed that the legislature could not validly authorize the destruction of healthy animals; nor the denial of entrance into a particular calling or profession to one who has met all the lawful requirements for it; nor the denial of a permit for the use of property for a lawful purpose. In all such cases, if the argument stated in the text is pushed to its logical conclusion, a correct decision on the merits becomes a "jurisdictional" fact.

⁶⁷People ex rel. Copcutt v. Board of Health of City of Yonkers, (1893) 140 N. Y. 1, 35 N. E. 320.

⁶⁸Dickinson, Administrative Justice and the Supremacy of Law 46-47, note 20.

⁶⁹Mechem, Public Officers 428.

⁷⁰McCord v. High, (1868) 24 Iowa 336, 350.

⁷¹See Stiles v. Municipal Council of Lowell, (1919) 233 Mass. 174, 182-183, 123 N. E. 615, 616. This was an action for damages against three members of the council for having wrongfully removed plaintiff from the offices of city treasurer and collector of taxes. The council's power to remove the plaintiff was for "such cause as it deemed sufficient," but provided "that reasons be specifically given in writing and that the person sought to be removed should be notified of the proposed action and furnished with a copy of the reasons." Plaintiff had been given no notice and no copy of the reasons for his removal. The court without hesitation affirmed a judgment in plaintiff's favor, for the reason that "The municipal council was clothed with the power of removal of city officers so long as there was conformity to the requirements of the law. When the members ceased to comply with the law they were acting outside their official capacity and were subjected to responsibility as individuals."

and the same thing and collaborate to produce the harshest consequences. There persists a resulting distinction, as regards quasi judicial immunity, between administrative action affirmatively interfering with tangible property rights, and such action when it interferes merely with personal liberty,⁷² or only negatively, as through the denial of a license or permit, with such rights of a more intangible character as the right to enter a particular calling or profession or to devote tangible property to a specified use.⁷³ Once the magic "boundary where the absolute rights of property begin" is ascertained, or in other cases the line delimiting "jurisdictional facts" more or less arbitrarily drawn,⁷⁴ the result

⁷²Compare *Beeks v. Dickinson County*, (1906) 131 Iowa 244, 108 N. W. 311 (no liability for erroneous quarantine, although the statute, literally construed, authorized the quarantine only in cases of "infectious or contagious diseases dangerous to the public"); *Board of Health v. Court of Common Pleas*, (1912) 83 N. J. L. 392, 85 Atl. 217 (same type of case). The greater immunity permitted in the personal liberty cases has of course a close analogy in the law of arrest on reasonable suspicion and belief, see *Restatement, Torts*, sec. 119.

⁷³See Note, (1935) 34 Mich. L. Rev. 113.

⁷⁴For example, with *Stiles v. Municipal Court of Lowell*, (1919) 233 Mass. 174, 123 N. E. 615 (for facts see *supra* note 71), compare *Jaffarian v. Murphy*, (1932) 280 Mass. 402, 183 N. E. 110, which was an action against the mayor of Somerville for having refused to issue to plaintiff a license to operate a miniature golf course. It was alleged that the defendant "did not exercise good faith, did not give it his fair consideration, but was most arbitrary and capricious in exercising his discretion." This time the same court held there was no liability, for the reason that "The mayor's conduct in not acting in good faith and in abusing his power in a tyrannical and unlawful manner did not affect his jurisdiction in the matter, although it affected the validity of his decision." By the court's reasoning, a semblance of formalities confers jurisdiction, and immunity results. But in substance, is a proceeding in which the hearer does not exercise good faith, does not give the evidence his fair consideration, and is arbitrary and capricious throughout, a hearing at all? Was not the power of removal, if divorced from its method, just as much within the jurisdiction of the council in the first case, as the power of withholding the license, by divorcing it from its method, was held to be within the jurisdiction of the mayor in the second case? From the point of view of all the parties concerned, considerations of fairness and justice would seem to require the same result in both cases. And suppose that in the first case the council had been authorized to remove "all" municipal officers on notice and full hearing; that the council had removed the plaintiff by giving him the required notice and full hearing, with opportunity to test before them the legality of their jurisdiction; but that in the action for damages the court had held that he was not a "municipal" officer within the removal statute for the reason that he served also in a capacity as collector and custodian of state funds (a not unlikely possibility, compare the facts of *State ex rel. Hilton v. Essling*, (1923) 157 Minn. 15, 195 N. W. 539, which was not, however, an action for damages). Here it would have been clearer still that the council would have been acting entirely beyond its jurisdiction, and liability would automatically follow. Yet it is believed that if such a mistake was within the bounds of reasonable official action, the facts of the supposed case present a far less satisfactory basis of liability than the facts of either of the cases stated, each of which involved a violation of the single

is liability regardless of the utmost good faith, due care, and diligence on the one side, and immunity regardless of the grossest negligence and frequently even malice on the other. From the point of view both of the officer and the injured party, the liability, if too great on the one side, is too little on the other, and vice versa.

Analytically, and from the point of view of the administrative officer, there is not one iota of difference in the nature of his determination suggested by the phrase "jurisdictional facts." It is equally a part of his public duty to make a determination of the "jurisdictional facts" along with all other facts upon which his authority and duty to act depend. Likewise, as between "jurisdictional" and other facts, the classification of the fact to be found in no way affects the character of the fact-finding operation. Consequently the proposition has been asserted that the liability for an administrative officer's determinations of "jurisdictional facts" "depends upon his right to pass upon the jurisdictional question."⁷⁶ But on the one hand, how often is it to be supposed that a quasi judicial administrative officer was not in fact intended to have both the duty and the right of making the initial determinations of *all* questions upon which his authority to act depends?⁷⁶ And on the other hand, under the growing doctrine of the United States Supreme Court, how often does the clearest "right" of an administrative officer or tribunal to make the initial determinations of those questions that because of con-

plain meaning, so apparent that everyone who reads may understand, contained in the statutes upon which the powers depended.

⁷⁶*Sweeney v. Young*, (1925) 82 N. H. 159, 163, 131 Atl. 155, 157-158: "If he goes outside his general authority, he is not protected for the consequences of his action. If within his general authority his erroneous exercise of it is due to special reasons of jurisdictional invalidity, he is protected. In the one case he is not called upon to act; in the other he is. When jurisdiction is special, acts outside of it are not protected. When it is general, all acts within it are protected. . . . The school board had general jurisdiction to dismiss. The general right and authority of dismissal was vested in them, and their exercise of it was not an unwarranted act of assumed power, but merely an erroneous exercise of actual power, for which liability does not attach. The dismissal was a decision of a case between the plaintiff and the school district, which the board was the duly constituted tribunal to determine."

⁷⁶Compare *National Surety Co. v. Miller*, (1929) 155 Miss. 115, 127, 124 So. 251, 254: "If, on this question of immunity, we shall consider jurisdiction as no greater than legal power, then immunity disappears, and all that the law throughout generations has said on that subject is laid aside. For so long as officers act within their legal powers there is no occasion for immunity. The very term presupposes error—action without or beyond legal power. . . . We cannot grasp the conception that nonexistence can be less than nonexistence, or that there can be different kinds of nonexistence, or that that which is absent can be more absent."

stitutional requirements or statutory interpretation are held to be "jurisdictional,"⁷⁷ result in the according to such determinations of any finality in the non-tortious forms of judicial control?

The right of making a jurisdictional determination is not dissonant with its lack of finality; and lack of finality upon non-tortious collateral attack or review should have no directly proportionate relation to tortious liability.⁷⁸ Even superior courts have no right to proceed without jurisdiction, which is a different thing from the right of making the jurisdictional determinations;⁷⁹ and their determinations of a truly "jurisdictional"⁸⁰ character are as open to non-tortious collateral attack with respect to both fact and law as are the determinations of inferior courts or administrative tribunals.⁸¹ Yet this fact was never supposed to

⁷⁷See *Crowell v. Benson*, (1932) 285 U. S. 22, 52 Sup. Ct. 285, 76 L. Ed. 598 (issues of existence of employer-employee relationship and occurrence of injury within interstate commerce held to require judicial trial de novo in proceeding to enjoin compensation award rendered under the federal Longshoremen's and Harbor Workers' Compensation Act); *Ben Avon Borough v. Ohio Valley Water Co.*, (1920) 253 U. S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908 (issue of confiscation arising out of the fixing of rates by state utility commission held to require the opportunity for an independent judicial consideration of the evidence, though limited to the record made before the commission); *St. Joseph Stockyards Co. v. United States*, (1936) 298 U. S. 38, 56 Sup. Ct. 720, 80 L. Ed. 1033 (same as to the fixing of rates for the services of stockyards companies by the Secretary of Agriculture). To the extent that the term "jurisdictional" is used in such connections, it is believed to be practically synonymous with "constitutional," although the holding purports to be reached, as in *Crowell v. Benson*, through statutory interpretation. However, the peculiar requirement of *Crowell v. Benson* of a wholly independent judicial trial de novo, as distinguished from an independent judicial judgment upon the record prepared by the administrative tribunal, would seem to be entirely the result of statutory interpretation and not of constitutional necessity.

⁷⁸As is more fully developed below, the availability of nontortious collateral attack upon or review of administrative determinations is more properly a basis for dispensing with tortious liability.

⁷⁹For example, "Prohibition will not lie against an inferior court or the judge thereof to deprive it or him of the right to pass upon the extrinsic facts determinative of jurisdiction." *Downs v. Lazzelle*, (1916) 102 W. Va. 663, 668, 136 S. E. 195, 197.

⁸⁰That is, "jurisdictional" in the conflict of laws or "subject matter" sense, see *McClintock*, *Equity* 57. As applied to the determinations of superior courts the term "jurisdictional" is admittedly of narrower import than as applied to those of "inferior" courts and administrative tribunals.

⁸¹And compare the proposal that "In all actions tried without a jury, the court shall find the facts specially and state separately its conclusions of law thereon; . . . The findings of the court in such cases shall have the same effect as that heretofore given to findings in suits in equity," see proposed rule 68, Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia, xiii-xiv, 117-118, prepared by the Advisory Committee appointed by the Supreme Court of the United States pursuant to the Act of Congress of June 19, 1934, ch. 651, 48 Stat. at L. 1064. If this proposed rule is accepted by the Supreme Court, the peculiar "sting" to administrative de-

afford a basis for a "jurisdictional" exception to the judicial immunity.⁸² Logically a proposition that the liability of a quasi-judicial administrative officer for his determination of "jurisdictional facts" "depends upon his right to pass upon the jurisdictional question" is broader than it sounds; and the inevitable consequence of its consistent application would be to dispense entirely with the attachment of any especial significance for liability purposes to "jurisdictional facts."

In order to avoid the harsh consequences of a consistent application of the conception of jurisdictional facts, the courts have also attempted to draw a distinction between the complete absence of jurisdiction and a mere "excess" of jurisdiction, permitting immunity for the latter.⁸³ It is difficult to grasp a distinction whereunder the extent to which jurisdiction is exceeded is not by so much a complete absence of jurisdiction.⁸⁴ Further-

terminations involved in the cases cited in note 77 *supra*, except the trial de novo requirement of *Crowell v. Benson*, (1932) 285 U. S. 22, 52 Sup. Ct. 285, 76 L. Ed. 598 will have been largely removed; and the only "finality" of any sort upon federal appellate review, except in the case of appeals from the judicial determinations of state courts, will be that commensurate with the constitutional requirement of jury trial in the cases in which it is applicable and has not been waived.

It has been held that "jurisdiction" may be conferred upon an administrative tribunal by consent, see *State ex rel. Grubbs v. Schultz*, (1919) 142 Minn. 112, 171 N. W. 263.

⁸²Of course, a probate judge who should proceed to try a man criminally, to cite the instance of a possible judicial liability suggested by Field, J., in *Bradley v. Fisher*, (1871) 13 Wall. (U.S.) 335, 352, 20 L. Ed. 651, could hardly be said to have acted in his "judicial" capacity at all. But this would not constitute a "jurisdictional" exception to his immunity—for the example is one of such a bald "usurpation" as to have raised no genuine jurisdictional question. Concededly the right to pass upon a jurisdictional question presupposes the existence of a real jurisdictional question. Suppose the probate judge were equally without jurisdiction, as subsequently held by a higher court, to continue supervision of a testamentary trust after the settlement of an estate—would Field, J., have thought him liable for having attempted in good faith to exercise such a power?

⁸³*Bradley v. Fisher*, (1871) 13 Wall. (U.S.) 335, 352, 20 L. Ed. 651; *Calhoun v. Little*, (1898) 106 Ga. 336, 342, 32 S. E. 86, 88-89; *National Surety Co. v. Miller*, (1929) 155 Miss. 115, 126-127, 124 So. 251, 253-254. Compare *Bell v. McKinney*, (1885) 63 Miss. 187, 191-192 (mayor, though a "court" only in the "inferior" sense, held immune from liability for having imprisoned a person for an offense committed entirely outside the municipality).

⁸⁴Compare *National Surety Co. v. Miller*, (1929) 155 Miss. 115, 127, 124 So. 251, 254: "We cannot grasp the conception that nonexistence can be less than nonexistence, or that there can be different kinds of nonexistence, or that that which is absent can be more absent;" and Ballantine, *Manual of Corporation Law and Practice* 276, in reference to the similar distinction that has been drawn with regard to the *ultra vires* acts of private corporations: "Whether such a distinction as this is sound admits of very reasonable doubt. If a corporation is authorized to make a particular contract, and exceeds its power in this respect, it certainly acts without any

more, from the point of view of the injured party, the consequences of an excessive or abusive exercise of jurisdiction may be no less serious than had there been a complete absence of jurisdiction; and from the point of view of the officer, an excessive or abusive exercise of jurisdiction through negligence or malice, to which under the distinction as drawn liability would not attach, is certainly more reprehensible than action taken entirely without jurisdiction if resulting from the mistaken determination, in the exercise of the utmost good faith, due care, and diligence, of a difficult jurisdictional question. The results of the distinction are frequently satisfactory; but it is neither easy of application nor sufficiently adequate as a general formula. And to the extent that by excess of jurisdiction the courts really mean that the action taken "was within the subject-matter of the general jurisdiction of the board, or, again, with within the scope of the subject-matter over which the board has general jurisdiction,"⁸⁵ or in other words was within the "colorable" jurisdiction of the tribunal⁸⁶—a meaning not entirely consonant with a distinction between "excess" and "absence"—, does it not follow that official liability for jurisdictional determinations is being made to depend primarily upon their reasonableness under the circumstances? If so, jurisdictional facts become significant in determining official liability only in so far as they show such a clear "usurpation" of authority as a court cannot conceive of a reasonable official in the exercise of good faith, due care, and diligence having undertaken, and which may take the form of an abusive or excessive exercise of jurisdiction as easily as of a complete absence of jurisdiction. And does not this suggest the basis of a

power over the subject in so far as the excess is concerned . . . a distinction, shadowy, to say the least, between want of power on the part of the corporation and mere excess of power . . . must result, and has resulted, in confusion and conflicting decisions. It seems absurd to say that a corporation which takes a mortgage to secure a loan, when its charter expressly declares that it shall have the power to loan money on personal security only, acts, not without power, but merely in excess of power, in taking the mortgage. Making the loan is within the power of the corporation, but taking the mortgage is as entirely beyond its actual authority as if it were not authorized to make the loan at all."

⁸⁵National Surety Co. v. Miller, (1929) 155 Miss. 115, 123, 124 So. 251, 253.

⁸⁶This follows so long as the word "jurisdictional" retains any special administrative significance. For example, the workmen's compensation proceeding in *Crowell v. Benson* (1932) 285 U. S. 22, 52 Sup. Ct. 285, 76 L. Ed. 598, supra note 77, involving as it did the absence of the employer-employee relationship and of the occurrence of the injury within interstate commerce, was not brought within the "jurisdiction" of the compensation commissioner by virtue of the fact that it was within the "scope of the subject-matter" of workmen's compensation.

rule of liability that could as easily embrace non-jurisdictional determinations, and so eliminate entirely in the present connection any need of a separate category for jurisdictional facts? An attempt will be made further on to formulate such a rule.

No more significant from the officer's point of view and so far as the characterization of his action as quasi judicial is concerned, than the distinction as to "jurisdictional facts," is the overlapping distinction that turns on whether his action results in the affirmative invasion of tangible property rights. It is believed that the absolute character of the concepts of trespass to realty and conversion of tangible personalty should have but a very restricted application in the law of public officers. To say that "The civil liability of an officer committing a tort appears to be exactly the same as that of a civilian,"⁸⁷ and for that reason to apply such concepts to him, is to depart from the premise stated and to impose a larger liability upon the officer than upon the civilian, for the very reason that, as already pointed out, the law also imposes upon the officer the duty of assuming the risk of mistaken action to an extent not true of the civilian.

Nor is the absolute character of the concepts of trespass to realty and conversion of tangible personalty to be regarded as peculiarly "enshrined in the constitutions." Modern economic organization has abundantly demonstrated that material well being is no longer dependent upon the attachment of any especial legal sanctity to property in the form of a part of the earth's surface or of an otherwise tangible character; and that the "right" to follow a particular calling, profession, or trade, already highly susceptible of administrative disposition, or the "rights" in the benefits of business ingenuity and in employment, may be no less dear. And juristic development without statutory aid has long recognized a privilege of trespass and conversion even in private individuals whenever "it reasonably appears to the actor to be necessary, for the purpose of averting a public disaster,"⁸⁸ defined to include "conflagration, flood, earthquake or pestilence."⁸⁹ To the extent that official action is taken for the purpose of avoiding or mitigating the effects of a "public disaster" so defined, it partakes to the same extent of the same privilege.⁹⁰

⁸⁷*Silva v. MacAuley*, (1933) 135 Cal. App. 249, 257, 26 P. (2d) 887, 890.

⁸⁸Restatement, Torts, sec. 196 (1), comment (f).

⁸⁹Restatement, Torts, sec. 196, comment (a).

⁹⁰Restatement, Torts, sec. 202, comment (d).

But can it be successfully contended, without reliance on philosophical excursions having their only proper place in political and not in legal forums and running counter to the whole trend of modern development, that the same preponderant public interest thought sufficient in the enumerated instances of "public disaster" to justify trespass and conversion even by private individuals upon their reasonable belief in the necessity therefor, is not also present in all the situations wherein the law has decreed *official* interference with personal and property rights? Are not nuisances, plant and animal diseases, food adulteration, and all the manifold abuses of absolute rights that are within the legitimate purpose of regulatory legislation under the police power to curb in behalf of the public health, safety, and welfare, in their totality perhaps as great or an even greater social menace than the fewer though more dramatic instances of "conflagration, flood, earthquake or pestilence?" The only difference must be found in the less pressing emergency character of the situations not amounting to an immediate "public disaster." Would not the most accurate legal measure of this difference be secured by restricting a privilege on reasonable belief in such situations to *official* action, without otherwise restricting the nature of the privilege?

The Restatement of the Law of Torts, after recognizing the privilege on reasonable belief of private individuals and public officers alike in the enumerated instances of "public disaster," sets forth that in the abatement by public officers of ordinary public nuisances not amounting to a "public disaster" as defined, "It is not sufficient that the actor reasonably believes in the existence thereof."⁹¹ It then sets forth the further proposition that, in the performance of a "duty or authority imposed or created by legislative enactment . . . to enter land in the possession of another,"

"Since the privilege to enter the land depends upon the existence of the duty or authority in the actor, a reasonable belief on his part as to the existence thereof will not justify his entry if he has in fact no such duty or authority. It may be, however, that the authority or duty is to proceed when certain facts are reasonably believed to exist. In this case a reasonable but mistaken belief in the existence of the prescribed facts will justify the entry."⁹²

⁹¹Sec. 202, comment (e). It is said that a private individual is not entitled to abate a public nuisance at all unless it also constitutes a private nuisance to the actor, see sec. 201 (1) (a); though compare *Raymond v. Fish*, (1883) 51 Conn. 80, 99.

⁹²Sec. 211, comment (e).

Such a proposition is a convenient way of reconciling a number of apparently conflicting decisions.⁹³ But it is submitted that unless a contrary interpretation is compelled by the clearest language, the only reasonable interpretation of every statute purporting to authorize official trespass and conversion in the abatement of nuisances or for other regulatory purposes is that both the duty and the power arise as soon as the facts conditioning the privilege "are reasonably believed to exist."⁹⁴ Certainly the officer's public duty then arises. And from the point of view both of the officer and of the public interest that the performance of his duty is designed to safeguard, is it a fair interpretation that the power conferred is not intended to be coterminous with the duty imposed?

It is in the administrative exercise of the police power in a

⁹³For example, in *Miller v. Horton*, (1891) 152 Mass. 540, 542, 26 N. E. 100, the statutory authority of the board of health, if literally interpreted, was restricted to "cases of farcy or glanders;" see also *Pearson v. Zehr*, (1891) 138 Ill. 48, 51, 29 N. E. 854, 855 (authority to destroy "diseased animals"). On the other hand, in *Raymond v. Fish*, (1883) 51 Conn. 80, 93, the statutory authority of the board of health specifically included "all nuisances and sources of filth . . . which in their judgment shall endanger the health of the inhabitants." (Italics supplied.)

⁹⁴In *Raymond v. Fish*, (1883) 51 Conn. 80, 96-97, the court attached no especial significance to the literal construction of the words of the empowering statute set forth in note 93: "The statute does not mean to destroy property which is not in fact a nuisance, but who shall decide whether it is so? . . . If the board of health are to decide at their peril, they will not decide at all. They have no greater interest in the matter than others, further than to do their duty; but duty, hampered by a liability for damages for errors committed in its discharge, would become a motive of very little power." In this case an accumulation of brush used in the development and preservation of the plaintiff's oyster beds had been destroyed because of its believed relation to a diphtheria and scarlet fever epidemic—a relation which the trial court had found to be nonexistent. The epidemic had entirely ceased some three months before the action was taken in December for the purpose of preventing recurrence the following summer, so that the case can hardly be considered as one of an immediate public disaster in the form of "pestilence" within the rule of sec. 196 (1), comment (a) of the Restatement. What is believed to be of much significance for present purposes is that the plaintiff had been accorded notice and full hearing in the proceeding before the board of health.

In *Wilbrecht v. Babcock*, (1930) 179 Minn. 263, 228 N. W. 916, the court apparently thought it without especial significance that the effect of the defendant highway commissioner's action, in raising a 1½ foot embankment in a way that was alleged to have been "unnecessary," was to throw surface waters back upon the plaintiff's land.

And where no trespass to realty or conversion is involved, the courts are entirely ready to follow the rule of construction suggested, see *Beeks v. Dickinson County*, (1906) 131 Iowa 244, 108 N. W. 311 (here the authority to quarantine against "infectious or contagious diseases" if literally construed was no greater than that in *Miller v. Horton* or *Pearson v. Zehr*, supra note 93); and *Board of Health v. Court of Common Pleas*, (1912) 83 N. J. L. 392, 85 Atl. 217.

way that directly and affirmatively affects tangible property rights as well as rights of an intangible or personal character that the dangers of overcaution and timidity are most apparent. And in its application to problems calling ever more for specialized training and expert scientific knowledge, any rule of absolute liability based upon the "jurisdictional" character of the determination or the tangible character of the rights affected renders to such an extent abortive the whole purpose of modern administrative development in substituting specialized administrative tribunals for the judges of general original jurisdiction and lay juries. Although pointing out that "No one would insist, for instance, that a finding of the Interstate Commerce Commission, or of a state utility commission, as to what is a reasonable rate, or a finding of the Federal Trade Commission as to what amounts to unfair competition, should be subjected to the verdict of a jury on the point,"⁹⁵ Dickinson also suggests that

"The desirability of such a retrial of the facts in a lawsuit, with renewed presentation of evidence after the administrative agency has considered the facts and has acted, may be an open question in nuisance and health cases and certain others arising in the field of police regulation."⁹⁶

But as between the finding by a board of veterinaries that particular animals directly before them are infected with glanders, and a finding by a lay jury, peculiarly susceptible to the misuses of expert testimony, long after the animals are dead and buried without benefit of formaldehyde, that they were not so infected, is not the balance of probabilities in fact very preponderantly in favor of the accuracy of the first finding? Many have come to believe that with the advent of modern science and technology the superiority of the lay jury as a fact-finding body has become a myth, and the jury itself a moribund institution as regards the trial of civil cases generally. Without going that far, one may yet recognize the incongruity of permitting determinations by those supposedly best qualified to make them to be re-examined from the ground up by an inexpert body and with consequences personally disastrous to the original trier.⁹⁷

⁹⁵Dickinson, *Administrative Justice and the Supremacy of Law* 108-109.

⁹⁶Dickinson, *Administrative Justice and the Supremacy of Law* 108.

⁹⁷The incongruity becomes more apparent when it is remembered that in an appellate proceeding to review a judgment entered on a verdict against the defendant officer, the court may be required by the usual practice to affirm the judgment so long as the verdict in relation to the evidence in the record was within the bounds of reason, even although the evidence definitely preponderated in favor of the administrative determination. See *Wallace v. Feehan*, (Ind. App. 1932) 181 N. E. 862, 867.

The doctrines of *Ben Avon Borough v. Ohio Valley Water Co.*⁹⁸ and *Crowell v. Benson*,⁹⁹ requiring an independent judicial determination of certain constitutional or jurisdictional issues in proceedings to enjoin administrative rate schedules and compensation awards,¹⁰⁰ involve neither the interposition of a jury nor the possibility of consequences personal to those rendering the administrative determinations in controversy. The application of similar doctrines in damage suits requires not only the same duplication of time spent in fact-finding,¹⁰¹ despite a balance of probabilities in favor of the administrative determination having achieved a correct result,¹⁰² but involves an additional likelihood of injustice to the defendant officer which in turn has been thought to disserve the public interest by cautioning too great timidity in administrative action and dissuading men of property and responsibility from serving in that capacity.¹⁰³ And the back-handed twist whereby a rule of absolute liability has been made to dispense with any constitutional necessity of adherence to a minimum of the "judicial" safeguards in the administrative process itself,¹⁰⁴ is a direct boomerang to the individual affected in his person or property by administrative action, whose interests in more cases than not would be found to be better secured by adequate notice and a fair hearing, coupled with an opportunity for judicial review by some form of proceeding in error, than by remitting him to an original suit against a likely judgment-proof officer.

It is now settled as to most matters involving the exercise of the police power that administrative process may satisfy due process, provided it assures adequate notice and a fair hearing, and provided it assures also some opportunity for judicial review to correct errors of law and secure against arbitrary, oppressive, or unreasonable fact-findings.¹⁰⁵ Due process requires neither

⁹⁸(1920) 253 U. S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908.

⁹⁹(1932) 285 U. S. 22, 52 Sup. Ct. 285, 76 L. Ed. 598.

¹⁰⁰See note 77 supra.

¹⁰¹Such a criticism is particularly pertinent to the trial de novo requirement of *Crowell v. Benson*, see note 77 supra; see also Notes, (1933) 46 Harv. L. Rev. 478; (1932) 41 Yale L. J. 1037.

¹⁰²See Hughes, C. J., in *St. Joseph Stockyards Co. v. United States*, (1936) 298 U. S. 38, 56 Sup. Ct. 720, 726, 80 L. Ed. 1033: "But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence."

¹⁰³See note 60 supra.

¹⁰⁴*People ex rel. Copcutt v. Board of Health of City of Yonkers*, (1893) 140 N. Y. 1, 35 N. E. 320, see note 67 supra.

¹⁰⁵See Brown, *Administrative Commissions and the Judicial Power*, (1935) 19 MINNESOTA LAW REVIEW 261, 265, note 11, and cases there cited.

jury trial nor adherence to the separation of powers principle. And by whatsoever processes of tenuous reasoning the separately embodied jury trial and separation of powers requirements of the federal and respective state constitutions have been avoided by the courts in permitting the administrative exercise of the police power, they would seem all to come down to a proposition of according to such a power enough vitality to accomplish its purposes by the most suitable methods.¹⁰⁶

In other words the police power is procedural as well as substantive. As much as any man in judicial life the present chief justice has realized the new and overwhelming significance of the part played in modern governments by their administrative branches, and the inevitableness of continued developments in the same directions.¹⁰⁷ The fact of accurate perception, rather than unfriendliness of the type displayed by less acute minds, should account for the importance attached by him to such matters as adequate notice and hearing and specific fact-findings in situations in which they had never before been assumed to have any significance—as even in the case, for example, of the exercise by an administrative officer or tribunal of permissibly delegated legislative power—¹⁰⁸ and at the same time to the availability of opportunities for judicial review in which a court may substitute its own independent judgment on fundamental issues of fact as well as of law.¹⁰⁹ In other words, the imposition upon administrative processes of a substantial minimum of the “judicial” safeguards would seem to be in reality a counterpart of recognizing their modern significance and permanence, and a method of extending the arm of welcome into the judicial fold to brothers

¹⁰⁶See *Brown, Administrative Commissions and the Judicial Power*, (1935) 19 MINNESOTA LAW REVIEW 261, 303.

¹⁰⁷See the statement quoted in *Frankfurter and Davidson, Cases on Administrative Law*, 1st ed., vii.

¹⁰⁸*Panama Refining Co. v. Ryan*, (1935) 293 U. S. 388, 431-433, 55 Sup. Ct. 241, 253-254, 79 L. Ed. 446; with which compare *Cardozo, J.*, dissenting in the same case, at 293 U. S. 444-448, 55 Sup. Ct. 258-260. Historically, *Cardozo, J.*, would seem to be on firmer ground, see *Commonwealth v. Sisson*, (1905) 189 Mass. 247, 252-253, 75 N. E. 619, 621-623; but in the light of modern conditions the majority opinion by the chief justice would seem to be the sounder analytically. For so long as reasonably specific standards are required as conditions of the delegation of legislative power to administrative officers or tribunals, their exercise thereof involves not only legislative discretion but also an essentially “judicial” determination whether the conditions of the delegation are present, which should therefore proceed in a “judicial” manner. See also *Morgan v. United States*, (1936) 56 Sup. Ct. 906; *Southern Ry. Co. v. Virginia*, (1933) 290 U. S. 190, 198, 54 Sup. Ct. 148, 151, 78 L. Ed. 260.

¹⁰⁹*St. Joseph Stockyards Co. v. United States*, (1936) 298 U. S. 38, 56 Sup. Ct. 720, 726, 80 L. Ed. 1033.

at least of the half-blood—at the same time retaining for the courts organized under the constitution an adequate degree of the ultimate control.¹¹⁰ Does not the attitude emanating from the nation's highest court indicate a complete reversal of the reasoning in *People ex rel. Copcutt v. Board of Health of City of Yonkers*,¹¹¹ and suggest that the protection of the interests of the private individual against improper administrative action is to be sought primarily and as the general rule in the administrative process itself, as supplemented by facilities for judicial review involving neither the interposition of a jury nor the possibility of consequences personal to the officer whose action is challenged?

To the extent that procedure by notice and hearing with specific fact-findings thus becomes characteristic of administrative action, such action as the general rule may be assumed to be "quasi judicial" in the sense of facilitating review by certiorari,¹¹² the scope of which has steadily tended to enlarge under the pressure of increased administrative activities.¹¹³ As to administrative

¹¹⁰As pointed out in note 81 supra, the "discrimination" against the findings of administrative tribunals involved in the doctrines of *Ben Avon Borough v. Ohio Valley Water Co.*, *Crowell v. Benson*, and *St. Joseph Stockyards Co. v. United States*, will have been largely removed if proposed rule 68 of the Rules of Civil Procedure for the federal courts is accepted by the Supreme Court.

¹¹¹(1893) 140 N. Y. 1, 35 N. E. 320. See note 67 supra. Compare *Dickinson*, *Administrative Justice and the Supremacy of Law* 44, 310: "To the boards and commissions which have sprung up in recent years the courts have applied the same methods of control which had been worked out in the decisions dealing with the older types of public officers. . . . It may be, and usually is, the case, however, that the very essence of the administrative proceeding has been the determination by expert specialists of precisely these ["jurisdictional"] facts after due notice and hearing. On the doctrine of 'jurisdictional facts,' the determination must be made over again, and independently, by the court or jury, in order to determine whether the administrative agency exceeded its competence. Such a doctrine logically applied would eviscerate the whole administrative process, and it is not applied logically; but enough of it is left to confuse very badly the utterances of the courts on the question of review of facts."

¹¹²Though not in the federal courts, see *Degge v. Hitchcock*, (1913) 229 U. S. 162, 171, 33 Sup. Ct. 639, 57 L. Ed. 1135: "It is true that the Postmaster General gave notice and hearing to the persons specially to be affected by the order and that in making his ruling he may be said to have acted in a quasi-judicial capacity. But the statute was passed primarily for the benefit of the public at large and the order was for them and their protection. That fact gave an administrative quality to the hearing and to the order and was sufficient to prevent it from being subject to review by writ of certiorari."

¹¹³See *Mitchell, J.*, in *Moede v. County of Stearns*, (1890) 43 Minn. 312, 313, 45 N. W. 435: ". . . we have to recognize the fact that the office of this writ has been extended beyond what it was at common law;" and compare the New York certiorari statute, permitting a court to determine upon the record "whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts [found by the administrative tribunal], that the verdict of a jury, affirming the exis-

action affecting property rights, whether "quasi judicial" in this or any other sense or not, a remedy by injunction, usually with the opportunity for a complete trial de novo, is frequently available.¹¹⁴ To a very great extent such remedies constitute a continuation of the administrative process, albeit in judicial forums.¹¹⁵ But before a rule as to tort liability that therefore assumes the normal adequacy of the administrative process may be propounded, account must be taken of the special considerations present in those situations involving the protection of the public health, safety, and welfare against emergencies in which the imperativeness of prompt action precludes both adequate notice and hearing as well as the possibility of preventive judicial intervention; and also of those situations in which the administrative officer is said to be acting ministerially, as distinguished from quasi judicially or otherwise in the exercise of discretion.

The speed of an administrative adjudication is not necessarily opposed to the adequacy of the hearing afforded, and is one of its aspects most worthy of judicial emulation.¹¹⁶ Cases of the first type are the very ones in which it is of the utmost importance that the officer be not influenced toward overcaution by fear of subsequent damage suits arising out of his prompt action taken in good faith, even though mistakenly, in the public interest. Officers so required to act are usually medical or otherwise scientific experts, or persons carrying out their instructions. Even though acting ex parte or without the opportunity of a really effective contest, there is still something of a balance of probabilities in favor of the accuracy of their determinations. On the other hand, the accelerating process no doubt reaches a point after which the possibilities of error are increased proportionately by

tence thereof, . . . would be set aside by the court, as against the weight of evidence," and to "make a final order, annulling or confirming, wholly or partly, or modifying, the determination reviewed, as to any or all of the parties." New York, Civil Practice Act, secs. 1304, 1305.

¹¹⁴See McClintock, *Equity* 74.

¹¹⁵As illustrative, compare what the Supreme Court has said the "constitutional" courts may not do by way of carrying forward the "legislative" aspects of administrative proceedings, as in *Keller v. Potomac Electric Power Co.*, (1923) 261 U. S. 428, 43 Sup. Ct. 445, 67 L. Ed. 731; *Federal Radio Commission v. General Electric Co.*, (1930) 281 U. S. 464, 50 Sup. Ct. 389, 74 L. Ed. 969; and see *Federal Radio Commission v. Nelson Bros. Bond & Mtge. Co.*, (1933) 289 U. S. 266, 53 Sup. Ct. 627, 77 L. Ed. 1166, with what they actually do, as in *West v. Chesapeake & Potomac Telephone Co.*, (1935) 295 U. S. 662, 55 Sup. Ct. 894, 79 L. Ed. 1640, see particularly the dissent by Stone, J., beginning at 295 U. S. 680, 55 Sup. Ct. 901.

¹¹⁶See Stephens, *What Courts Can Learn from Commissions*, (1933) 19 A. B. A. Journ. 141.

the promptness of the action taken, and in all such instances the safeguards that inhere in the "quasi judicial" administrative process, in the sense of notice and hearing, are entirely lacking. Even so, the police power should have equally enough vitality in all such instances to dispense for the same reasons with what is virtually a form of liability without fault; and if the emergency character of the situations dealt with, in order to dispense with even a semblance of notice and hearing preliminary to administrative action, be required to approximate a "public disaster" within the rule of the Restatement already considered,¹¹⁷ the only question that would be left open for a jury's determination in subsequent suits against the officer is whether the defendant had acted reasonably under the circumstances.

II. "MINISTERIAL" LIABILITY WITHOUT FAULT

The distinction between the terms "discretionary" and "quasi judicial" on the one hand, and "ministerial" on the other, as applied to administrative action, is one that has never been drawn in a way fully or satisfactorily to explain the consequences, as regards immunity for error, of the distinction. It is said that when "the law in words or by implication commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the functions are termed 'quasi judicial;'"¹¹⁸ and conversely, that "a duty is to be regarded as ministerial when it is a duty that has been positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated."¹¹⁹ But it has also been pointed out that such a statement "obviously requires some modification, as it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail;"¹²⁰ and on the other hand, "that a necessity may exist for the ascertainment, from personal knowledge or from information derived from other sources, of those facts or conditions, upon the existence or fulfillment of which, the performance of the act

¹¹⁷See above, pp. 289-91.

¹¹⁸See *State v. Hastings*, (1893) 37 Neb. 96, 117, 55 N. W. 774, 781, quoting from Bishop, *Noncontract Law*, 785, 786.

¹¹⁹*First Nat'l Bank of Key West v. Filer*, (1933) 107 Fla. 526, 534, 145 So. 204, 207.

¹²⁰*Ham v. Los Angeles County*, (1920) 46 Cal. App. 148, 162, 189 Pac. 462, 468.

becomes a clear and specific duty, does not operate to convert the act into one judicial in its nature."¹²¹ The resulting confusion is apparent in the squarely conflicting decisions as to the nature of identically the same types of administrative action.¹²² It has consequently been judicially held that the true test is whether the law "unqualifiedly requires the doing of a certain thing. To the extent that its performance is unqualifiedly required, it is not discretionary, even though the manner of its performance may be discretionary."¹²³

Such a statement of the distinction at least suggests a standard capable of application, and would seem to have the additional happy effect of tending to obliterate the further distinction that so many courts have drawn between ministerial misfeasance and nonfeasance. For the latter most courts have held even ministerial officers not to be liable, generally on the theory that the duty to act at all is one owing only to the general public collectively and not separately to the private individuals likely to be injured by its omission; to whom a duty to act in a proper manner arises only after action has been undertaken.¹²⁴ It is believed that, the

¹²¹*First Nat'l Bank of Key West v. Filer*, (1933) 107 Fla. 526, 534, 145 So. 204, 207.

¹²²For example, compare *Fergus v. Brady*, (1917) 277 Ill. 272, 275, 115 N. E. 393, 395: "The duties of the auditor and treasurer in issuing and paying warrants are purely ministerial;" with *Hicks v. Davis*, (1917) 100 Kan. 4, 5-6, 163 Pac. 799: "... the functions of a state auditor are more than those of a mere ministerial officer . . . it would do the state as well as the auditor a great injustice to announce a rule that the auditor would subject himself to a personal liability in every case when it was finally adjudicated that he had erred on the side of the public by refusing to audit and honor a questionable demand against the state. . . . Such duties . . . are of too great importance and call for too much prudence, judgment and discretion to be characterized as merely ministerial." "The main perplexity in the case of public officials . . . whose responsibilities include and blend almost indefinitely the judicial, legislative, and administrative functions, is to determine where the ministerial and imperative duties end and the discretionary powers begin." *Ham v. Los Angeles County*, (1920) 46 Cal. App. 148, 162, 189 Pac. 462, 468.

¹²³*Ham v. Los Angeles County*, (1920) 46 Cal. App. 148, 162, 189 Pac. 462, 468.

¹²⁴See *Smith v. Iowa City*, (1931) 213 Iowa 391, 395, 239 N. W. 29, 31: "The negligence, if any, of the individual members of the park board was the failure on their part to maintain the device or instrumentality in question in repair and in a safe condition for the use of the public; that is, they are guilty, if at all, of nonfeasance only;" *Stevens v. North States Motor, Inc.*, (1925) 161 Minn. 345, 349, 201 N. W. 435, 436 (action against county commissioners and state highway officers on account of an accident resulting from a sharp turn in the highway that had been constructed without an incline upon the outer side of the curve, at which there had been several accidents known to defendants. It was also alleged that defendants had negligently permitted a log 11 feet long and 10 to 14 inches in diameter to remain upon the highway in direct line of travel around said curve, causing the automobile in which plaintiff was riding to overturn. In

clear duty having been imposed, and subject to the ordinary limitations of foreseeability, official liability may be premised upon the consequences of wrongful nonaction as easily as of wrongful action; and that

"It is immaterial that the duty is one primarily imposed on public grounds, and therefore, primarily a duty owing to the public. The right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance, which it was in part the purpose of the law to protect him against."¹²⁵

But the distinction as stated above is far more appropriate in determining the availability of the writ of mandamus to compel official action than as a test of official liability,¹²⁶ and in so far

affirming an order sustaining a demurrer, the court distinguished *Tholkes v. Decock*, (1914) 125 Minn. 507, 147 N. W. 648, as "a case of misfeasance on the part of the overseer in repairing a culvert in a public highway. It was not a case of nonfeasance like unto the case at bar. There, the overseer undertook to repair the culvert, and while so doing went beyond his duty in that he left a pitfall in the culvert overnight, an independent tort for which he was personally liable, the same as would any other person, in no way connected with the highway, have been. . . . It constituted misfeasance as distinguished from nonfeasance, and therein lies a distinction between that case and the one at bar"; *Carpenter v. Atlanta & C. A. L. Ry.*, (1922) 184 N. C. 400, 406, 114 S. E. 693, 696 (no liability for death from electric shock resulting from contact with asphalt tank negligently permitted to lie in close proximity to electric wires): "For the negligent breach of a public duty administrative, ministerial, and imposed entirely for the public benefit, a public officer may not be held individually liable to a person who has been injured by his negligence unless the statute creating the office or imposing the duties makes provision for such liability"; *Hipp v. Ferrall*, (1917) 173 N. C. 167, 91 S. E. 831; *Thomas v. Wilton*, (1884) 40 Ohio St. 516; *Binkley v. Hughes*, (1934) 168 Tenn. 86, 92-94, 73 S. W. (2d) 1111, 1112-1113, distinguishing *Vance v. Shelby County*, (1925) 152 Tenn. 141, 273 S. W. 557; *Antin v. Union High School Dist. No. 2*, (1929) 130 Or. 461, 479, 280 Pac. 664, 669-670; *Adams v. Schneider*, (1919) 71 Ind. App. 249, 258, 124 N. E. 718, 720-721.

¹²⁵*Raynsford v. Phelps*, (1880) 43 Mich. 342, 345, 5 N. W. 403; see also *Vance v. Hale*, (1928) 156 Tenn. 389, 395, 2 S. W. (2d) 94, 96-97 ("misfeasance in the omission of a duty placed upon him"); *Hale v. Johnston*, (1918) 140 Tenn. 182, 198, 203 S. W. 949, 952-953 ("we consider it wholly immaterial whether it be considered that the negligence of defendants . . . was misfeasance or nonfeasance. . . . Inaction would none the less be a misfeasance because they had assumed the discharge of the statutory duty, and failure to perform a positive duty is positive wrong"), though compare the later Tennessee case of *Binkley v. Hughes*, (1934) 168 Tenn. 86, 92-94, 73 S. W. (2d) 1111, 1112-1113, *supra* note 124; *Gage v. Springer*, (1904) 211 Ill. 200, 204, 71 N. E. 861, 862; *First Nat'l Bank of Key West v. Filer*, (1933) 107 Fla. 526, 535, 145 So. 204, 207 ("where the law imposes upon a public officer the performance of ministerial duties in which a private individual has a special and direct interest, the officer will become liable to such individual for any injury which he may proximately sustain in consequence of the failure or neglect of the officer either to perform the duty at all, or to perform it properly. In such a case the officer is liable as well for nonfeasance as for misfeasance or malfeasance"); *Ham v. Los Angeles County*, (1920) 46 Cal. App. 148, 165-166, 189 Pac. 462, 468.

¹²⁶The statements so often made that certiorari is the proper remedy to

as it entails the consequence that an officer in the performance of his ministerial duties is required "at his peril" and "without regard to his motives" to find correctly the facts and interpret correctly the law "imposing a duty upon him and calling for action on his part,"¹²⁷ it is based on no substantial difference from which such a consequence can logically be derived. Placing all emphasis on whether the duty involved is one that the law "unqualifiedly requires" shows the extent to which the courts have confused executive with judicial discretion. As to the rank and file of officers exercising administrative powers over persons or property, it is from the judicial analogy rather than that of executive discretion of a policy-determining or political character that the problem of liability must be approached. And the judicial function, as regards the litigation of controversies generally and as the rule rather than the exception, involves no very wide scope of discretion once the fact-finding and law-interpreting process is ended—there is thereafter quite frequently upon judge or jury a duty of the very type that the law "unqualifiedly requires" and for which adequate sanctions exist.

In other words "judicial" discretion is to a very large extent confined to the fact-finding and law-interpreting process,¹²⁸ and

review quasi judicial administrative action, and mandamus the proper remedy to compel the performance of ministerial administrative duties, have deceived a recent non-legal writer into making the unfounded assertion that "The remedies of certiorari and mandamus are mutually exclusive." See Pfiffner, *Public Administration* 449. Very frequently the ascertainment of a duty that the law "unqualifiedly requires" so that the writ of mandamus will compel its performance, involves also a proceeding quasi judicial in character so that the writ of certiorari is equally available to review it. For example, with *State ex rel. Pete v. Eklund*, (1936) 196 Minn. 216, 264 N. W. 682 (certiorari to review alleged wrongful removal of officer protected by veterans' preference law), compare *State ex rel. Boyd v. Matson*, (1923) 155 Minn. 137, 193 N. W. 30 (mandamus to compel reinstatement of officer alleged to have been wrongfully removed under veterans' preference law). In *Roerig v. Houghton*, (1919) 144 Minn. 231, 175 N. W. 542, the officer who was held not liable for having refused to issue a building permit to the plaintiff, on the ground that his duties in that respect were quasi judicial in character, had already been mandamused in another proceeding, see *State v. City of Minneapolis*, (1917) 136 Minn. 479, 162 N. W. 477, into issuing the permit.

¹²⁷*Reichert v. Milwaukee County*, (1914) 159 Wis. 25, 36, 150 N. W. 401, 404; see also *Clark v. Kelly*, (1926) 101 W. Va. 650, 661, 133 S. E. 365, 369.

¹²⁸By a trial court's "discretion," an appellate court usually means the limits within which its rulings on procedural and evidential questions will be accorded "finality;" and in this sense the word "discretion" is of course entirely inappropriate to the law-interpreting function. But as a basis of the judicial immunity, it is submitted that the word "discretionary" as characterizing a judicial determination applies as fully to its law-interpreting aspect as to those of fact-finding and trial administration.

refers to and gathers its significance from the fact that it is the exercise of "judgment" by him or them whose opinion in the matter in hand the law has asked and to which it therefore renders some especial significance. "The character of an act claimed to be judicial certainly cannot be determined by the ease or difficulty of the case to be decided;"¹²⁹ and no more in the case of administrative than of judicial action is the fact-finding and law-interpreting process in any way simplified or rendered more mechanically law-applying by the fact alone that it is preliminary to the ascertainment of a duty that the law "unqualifiedly requires." The complicated character of modern regulatory legislation and of the problems with which it deals has increased proportionately the difficulties in the way of ascertaining correctly the facts and interpreting correctly the law upon which duties even of the most clearly ministerial character within the accepted tests depend; and it is also apparent that the law ordinarily in no way relieves an officer on account of the ministerial character of his duties from the necessity of making all such preliminary determinations of fact or law.¹³⁰ Under the distinction as stated an administrative officer's duties may be "ministerial" for liability purposes although both adequate notice and a full hearing were accorded.¹³¹ From the point of view both of fairness to the officer and of the public interest, the same criticisms that were directed against a rule of absolute accountability for quasi judicial determinations lose none of their force by reason of the "ministerial" character of the duties ascertained by an identical process.

III. THE QUESTION SHOULD BE PRIMARILY ONE OF THE REASONABLENESS OF OFFICIAL ACTION

Because of a more or less articulate feeling that the above-considered distinction between "quasi judicial" and "ministerial" powers and duties is both inadequate and unsound as a test in determining administrative liability, some courts have tended to confine liability for the exercise even of clearly ministerial powers and duties almost exclusively to those performed under the im-

¹²⁹Brown, *Administrative Commissions and the Judicial Power*, (1935) 19 MINNESOTA LAW REVIEW 261, 268-269.

¹³⁰Compare *Fergus v. Brady*, (1917) 277 Ill. 272, 275, 115 N. E. 393, 395 (auditor as ministerial officer held unable to challenge constitutionality of statute upon which his powers depended); see also Note, *Right of Ministerial Officer to Raise Defense of Unconstitutionality in Mandamus Proceedings*, (1931) 15 MINNESOTA LAW REVIEW 340.

¹³¹And vice versa, they may be "quasi judicial" although no notice and hearing were accorded, see notes 51, 53, and 54, *supra*.

mediate supervision of a superior, and which therefore consist entirely in obedience to his commands.¹³² It would seem to be a necessary corollary of such a rule that obedience to the command of the superior should be a complete defense to the subordinate.

The New Jersey court appears to have gone as far as any in almost completely obliterating any significance as regards official liability of the distinction between "quasi judicial" and "ministerial" functions. In *Tyrell v. Burke*,¹³³ the plaintiff had passed the state board examination required of an embalmer, but had failed to pass the examination required of a funeral director; and the defendant members of the licensing board had refused to issue to him an embalmer's license on the mistaken assumption that the law required that both examinations be passed before the embalmer's license could validly be issued. The court expressly recognized that the only duty the defendants had failed to perform was "ministerial" in the sense that the plaintiff could have brought a proceeding in mandamus to compel the issuance of the license, he having passed the only examination requisite for it.¹³⁴ But a judgment in plaintiff's favor for damages was reversed on the ground that despite "considerable ignorance of their duties by members of the board, and perhaps also negligence in their performance, we find nothing from which it could be inferred that what occurred exhibits malice or bad faith toward the plaintiff. Without the latter the law affords no redress in the form of damages by action against the members."¹³⁵

Again in *Lincoln Bus Co. v. Jersey Mutual Casualty Insurance Co.*,¹³⁶ the defendant state banking commissioner who had

¹³²See *Hipp v. Ferrall*, (1917) 173 N. C. 167, 169-170, 91 S. E. 831, 832, where the court asserted a broad rule of immunity even for ministerial officers to the extent of the public character of their functions, except "in case of subordinate officials having physical charge of public work and where a negligent breach of duty may be clearly recognized as the proximate cause of an injury to a claimant. In such instances, though at times technically officers, they can scarcely be considered as being in the exercise of governmental duties at all, but are rather administrative agents, and are held for breach of duty, the proximate cause of the injury, whether such duties are incident to the office they have undertaken or arise by virtue of a contract to perform them."

¹³³(1933) 110 N. J. L. 225, 164 Atl. 586.

¹³⁴Compare *Roerig v. Houghton*, (1919) 144 Minn. 231, 175 N. W. 542, supra note 126. That a court will very rarely if ever interfere with an administrative determination as to whether an applicant has passed a qualifying examination, see *Mitchell v. McKeivitt*, (1932) 128 Cal. App. 458, 17 P. (2d) 789, noted (1934) 7 So. Cal. L. Rev. 477; see also (1931) 17 Cornell L. Q. 103.

¹³⁵At 110 N. J. L. 227, 164 Atl. 587.

¹³⁶(1932) 10 N. J. Misc. 1114, 162 Atl. 915.

taken over the affairs of the insolvent insurance company was sought to be held personally liable for expenditures incurred in assuming the defense of suits pending against the policy holders, expenditures for such a purpose being entirely unauthorized. The commissioner clearly had no discretion in the matter, except in so far as the term "discretion" could be made to include for immunity purposes the determination by him of the question of law necessarily preliminary to the ascertainment of his duties. The court held him not liable, saying:

"The expenditures are not, however, to be disallowed and the commissioner made to suffer the consequences because of an honest mistake. The statute had not been construed by the court, and he misinterpreted its meaning. A public official, acting with due care and diligence, under advice of counsel, in the discharge of a public trust, is, as a matter of public policy, not liable for mistaking his course in the performance of his duties, for otherwise the government would be seriously hampered by honest men refusing to enter its service."¹³⁷

It is to be noted that the New Jersey court in the second case emphasized that the defendant officer had been in the exercise of "due care and diligence." Because of the rule of so many courts relieving even ministerial officers of liability for nonfeasance,¹³⁸ such courts have been impelled to find some basis of liability in the affirmative character of the action actually taken as much as in the "ministerial" character of the officer's duty or determination preliminary to it; and although not usually repudiating traditional dogma, modern courts seem to be tending more and more to emphasize official negligence as the basis of official liability, without particular emphasis upon the ministerial character of the powers and duties involved, and in situations in which by the earlier law negligence should be theoretically immaterial. In *Silva v. MacAuley*,¹³⁹ where the defendant officers were held liable for the value of a truckload of crabs which they had seized on the mistaken assumption that they were being transported from one fish and game district into another in violation of law, the tort involved was thus one of the conversion

¹³⁷At 10 N. J. Misc. 1116, 162 Atl. 916. "The rule of law as to public officers is that they are not personally liable upon their official contracts, although in excess of their powers, if they are not guilty of bad faith, and the persons with whom they contract have equal means with themselves of knowing the extent of their authority, or the latter depends upon a public statute." *Henry v. Henry*, (1905) 73 Neb. 746, 750, 103 N. W. 441, 442, 107 N. W. 789.

¹³⁸See note 124 supra.

¹³⁹(1933) 135 Cal. App. 249, 26 P. (2d) 887.

of tangible personalty, in which under the theories already developed the element of negligence would have been entirely unessential to liability, and as to which even a quasi judicial character would have been no defense to liability in its absolute form. The court nevertheless emphasized the element of negligence by pointing out that

"No questions were asked by them of the truck driver, from what waters the crabs had been taken. The defendants appear to have been wholly indifferent as to whether the crabs were taken from Port Orford or any other place; they were simply seizing a truckload of crabs that was passing through. Had any questions been asked of the truck driver as to the source of the crabs, the truth or falsity of his answers as to where they had been obtained could have been ascertained in a very few minutes. A telephone inquiry to the quarantine station to which we have referred would have furnished the information within a short space of time."¹⁴⁰

Similarly in *Wallace v. Feehan*,¹⁴¹ in which officers acting under the authority of the state conservation board were held liable for the unnecessary destruction of a crop of growing corn in the process of eradicating the corn borer, and the tort involved was therefore technically one of trespass to realty, the court nevertheless pointed out that "The gist of the liability is negligence," and that "the method of enforcing the regulations by commissioners and boards must be reasonable."¹⁴² The Florida court has stated in general terms that "diligence in the discharge of their duties is required of public servants, particularly where the rights of owners of property may be jeopardized by their neglect."¹⁴³ And the Iowa court has emphasized the quality of negligence "not as the gist of the plaintiff's cause of action, but as a destroyer of a possible affirmative defense by the defendants. If the defendants had pleaded immunity from liability on the ground . . . that . . . they were acting in an official capacity in the performance of official duty, then the question of whether they acted as reasonably prudent men under the circumstances would

¹⁴⁰At 135 Cal. App. 256, 26 P. (2d) 890.

¹⁴¹(Ind. App. 1932) 181 N. E. 862.

¹⁴²At 181 N. E. 867. The case may properly be regarded as one of trespass ab initio resulting from the abuse through negligence of the privilege of entry. See Restatement, Torts, sec. 202, comment (h); sec. 214 (1).

¹⁴³*Palm Court Corp. v. Smith*, (1931) 103 Fla. 233, 236, 137 So. 234, 236 (defendant collector of taxes held personally liable for having neglected for five days to deposit plaintiff's check in payment of taxes, the bank on which it had been drawn having failed on the fifth day, causing plaintiff to lose the benefit of the payment).

become material."¹⁴⁴ Whether negligence be "the gist of the liability" or merely "a destroyer of a possible affirmative defense" would seem to be primarily a question of pleading.¹⁴⁵

All roads therefore apparently lead to the attachment of some significance to official negligence as the basis of official liability; and one is impelled to the conclusion that the time has come for the development of an approach to the law of official liability under which results will no longer turn in any case, as if by magic, and entirely unrelated to realities, upon a conception of "jurisdictional facts," or upon the character of the injury as one affirmatively affecting tangible property rights, or upon a distinction between "ministerial" and "quasi judicial" powers and duties. The ill effects of the "jurisprudence of conceptions" involved in the traditional approach are not confined alone to the resulting confusion and inconsistencies in the law; they extend to causing injustice in individual instances either to the officer or to the private individual whose interests are affected; they stimulate toward overcaution in those very aspects of administrative action in which overcaution is least to be desired, and instill too little fear of personal consequences in others in which the injury to the individual affected may be no less serious; and in the end the public interests suffer.

¹⁴⁴Goold v. Saunders, (1923) 196 Iowa 380, 383, 194 N. W. 227, 228.

¹⁴⁵See also, emphasizing official negligence as the basis of official liability, Falasco v. Hulén, (1935) 6 Cal. App. (2d) 224, 242, 44 Pac. (2d) 469, 477 (defendant ambulance driver held liable for negligently running down plaintiff while driving injured child to hospital): "Public officers . . . are not relieved from liability for acts of negligence;" Wolfson v. Wheeler, (1933) 130 Cal. App. 475, 19 Pac. (2d) 1004 (agricultural commissioner and his deputy held liable for the death of plaintiff's sheep resulting from thallium which the defendants had spread upon a field for the proper purpose of killing rodents, but in a negligent manner); Proper v. Sutter Drainage Dist., (1921) 53 Cal. App. 576, 581, 200 Pac. 664, 666: "It was negligence on the part of the trustees to collect and convey through the canals of the district water far in excess of the carrying capacity of said canals," causing plaintiff's lands to overflow (with this case compare Wilbrecht v. Babcock, (1930) 179 Minn. 263, 228 N. W. 916, see note 94 supra); Ham v. Los Angeles County, (1920) 46 Cal. App. 148, 163, 189 Pac. 462, 468: "If the supervisors are empowered and required to provide for the care and repair of the highways by general rules and orders delegating the specific execution of the work to a road overseer or superintendent, and they have failed to do this, and damage to third parties results from defects in the highway of which they have notice, they, and not the road overseer, would seem to be liable. On the other hand, if the supervisors of the county have made and given the necessary general provisions and directions to impose this specific duty on the road overseer, he alone is responsible for the negligence;" McClellan v. Carter, (1923) 30 Ga. App. 150, 177 S. E. 118 (cattle inspector held liable for dipping a bull in such a negligent manner as to cause his death); Russell v. Considine, (1917) 101 Kan. 631, 168 Pac. 1095 (same).

As a starting point it is assumed that administrative officers are not to be placed generally in the category of judges and their opinions accepted as the law of the land, even for the single purpose of extending to them complete immunity for the consequences of mistaken action. Furthermore, to the extent that administrative officers even of a clearly "quasi judicial" character may be assumed to be liable for the consequences of malice, it is not perceived why they should at the same time go scot free of liability for the consequences of clear negligence in the making of their determinations or in the action taken pursuant to them. It has been pointed out that a private individual willing to attempt coercion of administrative action through the threats or the actual bringing of fictitious and vexatious suits is not likely to be deterred by the necessity of alleging malice,¹⁴⁶ and it should follow that the existence of clear negligence as an additional basis of liability would not be likely to increase materially the number of suits of such a character or the threats thereof. Administrative time is probably not yet deemed to be uniformly so precious as to preclude even the drain thereon that would be necessitated by the defense of substantiated and successful suits; and for the time so lost the public may well find its compensation in the added incentive to administrative integrity and the exercise of due care and diligence in the first instance. On the other hand it is not perceived why the particular character or category in which an officer is placed by an arbitrary test, or the nature of the issue determined or of the right affected, should ever render him liable for less than negligence, or conduct the equivalent of it. In the remaining pages the attempt is made to set forth and sufficiently elaborate in a series of six propositions a formulation for the law of official liability that is believed to be both adequate and free of the objections inherent in the traditional approach.

1. Whenever adequate notice, a full hearing, and reasonably specific formal fact-findings, in other words, the opportunity for an effective contest embracing a substantial minimum of the "judicial" safeguards, can be had without jeopardizing the public interest through the delay incident to them, they should be held to be a constitutional prerequisite to the administrative adjudication of personal or property rights.

For present purposes such a requirement is of the utmost importance in two respects:

¹⁴⁶See note 40 supra.

(a) The self-sufficiency of the administrative process itself, from the point of view of conserving the rights of the private individuals whose interests are affected, is proportionately enhanced; and

(b) By transferring the emphasis from the abstract character of administrative determinations, powers, and duties to their effect upon personal and property rights, and requiring for that reason, and as the rule, a substantial minimum of the main incidents of the "judicial" process, the effect is to render administrative action quite generally, as the rule rather than the exception, "quasi judicial" in the sense of facilitating judicial review by the extraordinary remedies.

2. Whenever the individual aggrieved by administrative action of the above type has available a non-tortious remedy, as by direct appeal, certiorari, declaratory judgment, mandamus, prohibition, or injunction, and has failed to avail himself of it, a further remedy against the officer by an action in tort is for that reason barred.

It is frequently held that the possibilities of infra-administrative relief must have been exhausted before judicial intervention of any sort will be granted.¹⁴⁷ The above proposition carries the same principle a step further. As already pointed out, to a very great extent the remedies enumerated constitute a continuation of the administrative proceeding, albeit in a judicial forum.¹⁴⁸ Furthermore, because of the unfortunate situation in which an officer acting in good faith and with the utmost diligence is otherwise placed, justice to him should require the imposition upon the individual of the burden of doing everything in his power to mitigate damages, including the exhaustion of his non-tortious judicial remedies.¹⁴⁹ To the extent that the relief actually

¹⁴⁷Compare *First Nat'l Bank of Greeley v. Weld County*, (1924) 264 U. S. 450, 44 Sup. Ct. 385, 68 L. Ed. 784; 26 U. S. C. A., sec. 156, Mason's U. S. Code, tit. 26, sec. 156: "No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, . . ."

¹⁴⁸See above, at note 115.

¹⁴⁹Compare *Dickinson*, *Administrative Justice and the Supremacy of Law* 66: ". . . if the case was a proper one for injunctive relief, but no such relief was asked, the injured party ought to be precluded from later insisting on damages. The cases only point to this distinction, but do not make it articulate." But see further *Jaffarian v. Murphy*, (1932) 280 Mass. 402, 405, 183 N. E. 110, 111, where the court emphasized as one of the grounds for denying recovery of damages sustained by the defendant's improper

secured by the exhaustion of such remedies does not avoid the damages resulting from wrongful administrative action, as in the case of damages accruing during the necessitated delay, additional relief by way of damages, either in the same proceeding¹⁶⁰ or in a separate action in tort against the officer, should not be precluded by reason of the second proposition alone. The effect of adverse determinations on the merits in proceedings actually taken under the non-tortious judicial remedies as precluding a further action in tort against the officer is stated as proposition four.

3. Whenever the defendant officer or officers against whom liability in damages is asserted are themselves the fact-finding tribunal duly "appointed by law and informed by experience" and subject to a substantial minimum of the "judicial" safeguards in the trial of the very issues on which the authority for their action depends, and assuming that their liability is not entirely precluded by reference to propositions two and four, the only

denial of a miniature golf license, that "parties aggrieved by rulings and orders of one exercising judicial powers must seek to have errors in the proceedings corrected by appeal or exception. . . . In cases where an official or board acting in a quasi judicial capacity within the scope of its authority errs, commonly the law affords an aggrieved party adequate relief by resort to one of the extraordinary remedies" (the whole tenor of this opinion represents a definite break with the earlier and stricter Massachusetts view); *Steel v. Dunham*, (1870) 26 Wis. 393, 398, where the court emphasized that the plaintiff could either have enjoined collection of the overassessment upon his property or paid and sued for a refund: "This affords the injured party a full and ample remedy where the taxing officers act illegally, or maliciously and corruptly, without giving him a personal action against them;" but compare *Gage v. Springer*, (1904) 211 Ill. 200, 204, 71 N. E. 861, 862-863, where an action for damages resulting from a conspiracy on the part of the defendant members of the local board of public improvements to permit a contractor to use a cheaper grade of paving material than required by ordinance, was held not to be precluded by the fact that the plaintiff could have enjoined the departure from the terms of the ordinance, or could have compelled compliance by mandamus, or could have resisted collection of the assessment against him on the ground of the departure. To the extent that wrongful administrative action is malicious, the reason for requiring exhaustion of the available non-tortious remedies is not so strong. Where administrative action proceeds by notice and hearing, it is believed that the burden ordinarily should be upon the private individual to seek extraordinary relief, rather than upon the administrative officer or tribunal to seek a declaratory judgment, even where that is available; since such an administrative determination, so long as the private individual has available a means of securing judicial review that he has failed to seek, is entitled to *res adjudicata* effect, see *Chicago, R. I. & P. Ry. Co. v. Schendel*, (1926) 270 U. S. 611, 46 Sup. Ct. 420, 70 L. Ed. 757; *Hoffman v. New York, N. H. & H. R. Co.*, (C.C.A. 2d Cir. 1934) 74 F. (2d) 227, 230; *Dennison v. Payne*, (C.C.A. 2d Cir. 1923) 293 Fed. 333, 341.

¹⁶⁰Under modern statutes mandamus proceeds as an ordinary "civil action," see *State ex rel. Tracy v. Cooley*, (1894) 58 Minn. 514, 518, 60 N. W. 338, and an award of damages may be made as a part of the same proceeding, see 2 *Mason's 1927 Minn. Stat.*, sec. 9730.

question before the court in the action in tort is whether they acted beyond the bounds of reasonable official action in the making of their determination or in the action taken pursuant to it.

Such a test of liability would relieve officers of the type stated from liability in whatsoever connections for the consequences of honest mistakes made with proper motives and in the exercise of due care and diligence. The same result might also be achieved by making the question of their liability turn on whether they had acted as reasonable men would have acted under the same circumstances. But the suggested test of liability has been deliberately so phrased as to be for the court alone to determine, and to present no independent jury question. It has been shown that the objection to a rule such as that of *Miller v. Horton*¹⁵¹ is not alone on the ground that it permits liability without fault in a situation in which such a liability is socially unjustifiable, but also on the ground that it permits a lay jury in a retrial de novo to substitute its own inexpert opinion, usually on scientific issues, for that of the tribunal appointed for the very purpose of performing the fact-finding function on the theory that it is the one best qualified both by training and experience to do so.

This second aspect of the objection would not be entirely eliminated by permitting a jury to determine, as in ordinary negligence cases between private individuals, whether the defendant officers had acted as reasonable men would have acted under the same circumstances. The most carefully drawn instructions cannot keep out of the application of such a test of liability a certain amount of the jury's own subjective experience, which is not disastrous so long as the experience drawn on applies only to the reaction of ordinary men to ordinary factual situations. In the use of expert testimony of a scientific character the results are less satisfactory. But it is a still further step for a jury to be permitted to say that the determination of a fact-finding tribunal appointed by law for the purpose was not reasonable. It may be one thing for a jury with the aid of the dental profession to be permitted to determine that the extraction of more than eight teeth at one sitting is or is not tortious negligence on the part of a dentist;¹⁵² but it would be quite another thing for it to be permitted to award damages to a dentist against the members of a state licensing board who had punished him professionally on such a ground. In other words, whenever an administrative

¹⁵¹(1891) 152 Mass. 540, 26 N. E. 100.

¹⁵²See *Voss v. Adams*, (1935) 271 Mich. 203, 259 N. W. 889.

authority has been appointed, empowered, and equipped as a fact-finding tribunal for the very purpose of supplanting the jury in a specialized field and of developing standards therein, its own findings and action taken pursuant to them constitute a more acceptable determination than any a jury can render that such findings and action *are reasonable*.

On the other hand, the function of judges, as against administrative tribunals and juries alike, is to afford protection not only against errors of law but also against arbitrary or oppressive action in the form of fact-findings that exceed the outermost limits beyond which the judge cannot conceive of a sane mind not his own reaching a like conclusion on the evidence. The distinction that it is thus sought to bring out is aptly illustrated in the recent Minnesota case of *Anderson v. Consolidated School District No. 144*.¹⁵³ To the extent that a school teacher's employment is of a contractual nature, the law generally affords as a remedy for a wrongful removal an action for damages against the municipality employer. In such an action by a teacher discharged under a statute limiting the school board's power of removal to "cause," it was held error to instruct the jury that it was for them to determine whether the board had "acted in a reasonable and proper manner in the determination of the question before them." The trial court had properly warned the jury that the standard of reasonableness was not their own but that of "reasonable and competent men," and the appellate court recognized that the question properly raised by the case was whether the board had "acted in bad faith or arbitrarily and capriciously upon the facts before it or properly within its knowledge." But a finding not reasonably supported by evidence or facts otherwise properly within the tribunal's presumed knowledge *is* "arbitrary and baseless."¹⁵⁴ The result of the case is that in an action for damages against the municipality the only question is, not whether in the minds of a lay jury the administrative tribunal has acted on the evidence as reasonable men would have acted, but rather whether it has acted in a way in which reasonable men *could* have acted. In other words, there is no independent jury question raised, upon which the trial or an appellate court may not substitute its own independent judgment for that of the jury.

Are not the same considerations of deference to the findings

¹⁵³(1936) 196 Minn. 256, 264 N. W. 784.

¹⁵⁴See *Interstate Commerce Commission v. Louisville & Nashville R. R.*, (1913) 227 U. S. 88, 91, 33 Sup. Ct. 185, 186, 57 L. Ed. 431.

of the administrative tribunal appointed by law for the purpose, that were thus held controlling in an action for damages against the municipality, equally controlling when the only change in the facts is the substitution of the members of the tribunal individually as defendants and a shift in the nature of the action from contract to tort?

In the application of such a test of liability, it would seem to be clear that the exercise without notice and hearing of a power of removal that is expressly made to depend upon notice and hearing, constitutes official action of an arbitrary and capricious character which a court is capable of saying no reasonable official could possibly have undertaken, just as much as it may be said of it that it constitutes entirely unofficial action because taken without jurisdiction.¹⁵⁵ It should still be the first duty of a public officer of whatever sort to inform himself of the single plain meaning, so apparent that everyone who reads may understand, contained in the statutes upon which his powers depend. To the extent that official action obviously constitutes a "usurpation" of authority in the premises, whether because of absence or mere abuse or excess, liability should follow. But it would be equally beyond the bounds of reasonable official action for an officer within his jurisdiction not to exercise good faith or give the evidence his fair consideration, but instead to be "arbitrary and capricious" throughout.¹⁵⁶ And on the other hand he would be relieved of liability so long as his errors of whatever kind, were within the bounds of reason and good faith, and relieved also of the hazards of a jury's independent answer to that question.

4. The effect of an adverse determination on the merits in a proceeding actually taken under a non-tortious judicial remedy should normally be to bar a further action in tort against the officer.

This proposition follows from the third, since the scope of review secured by a proceeding under any of the non-tortious forms of judicial control¹⁵⁷ is normally at least as broad as that

¹⁵⁵As in *Stiles v. Municipal Council of Lowell*, (1919) 233 Mass. 174, 123 N. C. 615, see note 71 *supra*.

¹⁵⁶As in *Jaffarian v. Murphy*, (1932) 280 Mass. 402, 183 N. E. 110, see note 74 *supra*.

¹⁵⁷Excepting the writ of prohibition, which is a sufficient remedy only where there is a complete absence of jurisdiction, see *State ex rel. Brandt v. Thompson*, (1904) 91 Minn. 279, 97 N. W. 887; *State ex rel. Townsend v. Ward*, (1897) 70 Minn. 58, 63-64, 72 N. W. 825-826, apparent as a matter of law, see *Downs v. Lazzelle*, (1916) 102 W. Va. 663, 668, 136 S. E. 195, 197.

permitted in an action in tort against the officer under proposition three.

5. Whenever the defendant officer or officers against whom liability in damages is asserted are themselves the tribunal duly "appointed by law and informed by experience" for the determination of the very issues upon which the authority for their action depends, but the emergency character of the required action precludes both adequate notice and hearing as well as the possibility of preventive judicial intervention or review, the question in the action in tort should be whether they had acted in the circumstances as reasonable men would have acted; but a court should require very "clear evidence" to sustain a jury verdict that they had not so acted.

Here there is neither the opportunity of an effective contest before the administrative tribunal nor a non-tortious judicial remedy available that can either prevent or undo the damage; so that the only possibility of a "hearing" at all is in an action in tort against the officer. Even so, it is believed to be the inherent vitality of the police power rather than the rule of the *Copcutt Case*¹⁵⁸ that justifies dispensing in such situations with the necessity of an administrative hearing; and the "public disaster" rule of the Restatement,¹⁵⁹ as applied to official action,¹⁶⁰ should normally relieve of liability for reasonable error. One may still doubt whether a jury of "12 men sworn to well and truly try the cause" is the proper tribunal for passing upon the reasonableness of official determinations, though made *ex parte*, if of a medical or otherwise scientific character, with such finality that a court may not substitute its own judgment for that "of the jury trying the case," even though convinced by the evidence of greater probabilities in favor of the defendant officer's determination.¹⁶¹ But the dangers are no greater than are involved in the submission to juries of questions of a scientific character in private controversies generally; and if a court pays adequate attention to the "presumption" in favor of official determinations of a scientific character,¹⁶² both in its instructions and in passing

¹⁵⁸(1893) 140 N. Y. 1, 35 N. E. 320, see note 67 *supra*.

¹⁵⁹Sec. 196 (1), comments (a) and (f).

¹⁶⁰Sec. 202, comment (d).

¹⁶¹As held in *Wallace v. Feehan*, (Ind. App. 1932) 181 N. E. 862, 867.

¹⁶²See *Rudolphe v. City of New Orleans*, (1856) 11 La. Ann. 242, 243 (in action by captain of ship for damages caused by ship's being compelled to return to Ft. Jackson for quarantine on advice of city health officer that there was cholera aboard, city held not liable for reason that officer himself was not liable): "He was acting officially, and we do not think the un-

upon the sufficiency of the evidence to sustain the jury's verdict,¹⁶³ the likelihood of individual instances of injustice in the application of such a standard of official liability in the situations falling under proposition five should not be great.

6. As to all other types of administrative action, that neither proceed by notice and hearing nor involve issues of a peculiarly scientific character, the standard of liability should normally be whether the defendant officer or officers have acted as reasonable men would have acted under the same circumstances.

It is of course not feasible that the formalities of notice and hearing should precede each successive step in the carrying out of a plan of administrative action properly determined upon; nor that they should accompany all the manifold types of administrative action that, although not in any sense an "adjudication" of personal or property rights, may nevertheless affect them injuriously. In all such situations liability should ordinarily be based upon negligence in performance, whether of commission or omission; and since the establishment of official negligence in such connections ordinarily does not involve issues of a scientific character, the impact upon administration of lay opinion, through the medium of a jury applying the reasonable man standard, should not be an undesirable influence. Here the so-called "presumption" of official rectitude is perhaps no more than synonymous with the burden of proof, which is already upon the plaintiff without it. Depending upon the nature of the particular case, it should be within the trial court's discretion to permit the jury to take into consideration the availability of a declaratory judgment at the litigating initiative of the defendant officer in reaching its determination whether he acted reasonably.

The above propositions are not set forth as of universal application to all administrative officers. There are those administrative tribunals that have acquired such a standing as "courts

certain testimony of two or three inexperienced men should be sufficient to invalidate his official acts. We have repeatedly said that we will not presume upon slight testimony that sworn officers have violated their duty in matters of discretion confided to them, and that those who allege an illegal exercise of that discretion should be held to establish such allegation by conclusive proof."

¹⁶³For such a presumption to have significance at this later stage in the trial, it must of course be given more than the mere procedural effect of sustaining the burden of coming forward with evidence until a minimum quantity of rebutting evidence has been introduced by the one against whom the presumption operates. But that presumptions may properly be and often are given the suggested additional effect, see Morgan, *Some Observations Concerning Presumptions*, (1931) 44 Harv. L. Rev. 906, 931-932.

in effect and in fact"¹⁶⁴ as already to have secured by clear precedents a full measure of the judicial immunity. They are suggested, however, as adequate standards of maximum liability for the rank and file of administrative officers and tribunals until such time as they individually acquire by experience "a competence comparable to the traditional ability of . . . judges" and "the methods of deliberation and decision" of courts, so as to become "courts in effect and in fact"¹⁶⁵ and as such therefore entitled to be unreasonable.¹⁶⁶

¹⁶⁴See McFarland, *Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations*, (1934) 20 A. B. A. Journ. 612, 623.

¹⁶⁵See McFarland, *Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations*, (1934) 20 A. B. A. Journ. 612, 623.

¹⁶⁶The approach developed dispenses with the necessity of separate consideration of the problem of officers who act under statutes later held to be unconstitutional, for which see Field, *The Effect of an Unconstitutional Statute in the Law of Public Officers: Liability of Officer for Action or Nonaction*, (1928) 77 U. Pa. L. Rev. 155; Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, (1927) 16 MINNESOTA LAW REVIEW 585.