COLLATERAL ATTACKS UPON ADMINISTRATIVE DETERMINATIONS:

CONCLUSIVENESS IN CASES OF CIVIL DAMAGE SUITS

AGAINST ADMINISTRATIVE OFFICERS

Submitted to the Faculty of Law of Georgetown University in partial fulfillment of the requirements for the degree of Jurisdoctor.

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COLLABORAL ATTACKS UPON ADMINISTRATIVE DETERMINATIONS:
CONCLUSIVENESS IN CASES OF CIVIL DAMAGE SUITS
AGAINST ADMINISTRATIVE OFFICERS

"As to cases which the law seems unable to determine . . . the law appoints officers and leaves such matters to them to determine to the best of their judgment . . . He who bids the law rule, bids God and reason rule, but he who bids man rule adds an element of the beast; for desire is a beast, and passion perverts rulers, even though they be the best of men. Therefore the law is reason free from desire."

--- Aristotle, Politics, III, xvi, 4, 5.

I. INTRODUCTION

The government of the states of the United States is one of delegated authority from the people. The government of the United States is one of delegated authority from the various states. The Constitution of the United States sets forth the powers of the federal government, and the primary purpose of that document was to safeguard to the states the powers which they had not delegated to the central
government. The constitutions of the various states are expressions of limitations of, or express delegations of, authority to the state government by the people of the respective states.

Under the constitutions, a system of law has been devised to provide for a government of law which has eliminated the possibility and restricted the probability of a government by men. The founding fathers clearly sensed the evils suggested by Aristotle centuries prior to their time. The government has become one of checks and balances with the protection inuring to the benefit of those desiring civil liberties and the protection of private property. The separation of powers in the three branches of the government and the provisions of the Fifth and Fourteenth Amendments to the federal Constitution have afforded the protection, desired by man through the ages, of his property unless taken pursuant to "due process" of law.

SEPARATION OF POWERS
The power delegated to the central government was not given to the government, as a whole, but to the Congress was given the power to enact the law, to the executive was given the power to enforce the law, and to the courts was given the power to provide "equal justice under the
law". Similar differences of governmental procedure and capacity have been maintained in the majority of the constitutions of the states of the United States. The "police power" has been maintained by both the federal and the state governments and, in accordance therewith, an attempt has been made to regulate and protect the public health, public safety, the morals of the community, and of late, to a greater extent than ever before, to promote not alone the social welfare but the economic welfare.

DUTY OF THE LEGISLATIVE BRANCH

The duty of the legislature is to anticipate dangers and to enact laws not only to halt past evils but to protect the people from future or contemplated evils as well as existent dangers. Because of the complex and rapidly changing communal life, broad and general enactments have not proven sufficiently restrictive as to the particular dangers or evils, and many times have not reached the crux of the situation to be remedied. Specific enactment, oftentimes, limits beyond the contemplated scope to the point where the very purposes of the act may be defeated because the particular evil described therein does not coincide strictly with the evil to be regulated.
II. ADMINISTRATIVE BODIES

NECESSITY OF ADMINISTRATIVE BODIES

Due to the complexities of society and the important and sudden changes which take place almost instantaneously, legislative bodies have established "expert administrative bodies" to regulate, by the promulgation of rules and regulations, the actions of the public under this general delegated legislative authority. Definite metes and bounds must be set forth, within which the administrative officers may exercise jurisdiction. It has been definitely determined that what may be prohibited entirely may be subject to governmental supervision and restriction; also, that many innately good things may be so performed or executed as to endanger the safety, health, morals or the general welfare of the governed. (1)

EXERCISE OF POLICE POWER

Health, safety, morals and general welfare are vital to the life of the state and often it is absolutely necessary that immediate action be taken to protect these fundamentals. Were the legislatures to attempt to make laws to cover all instances, it would necessitate their being in session three hundred sixty-five days in the year, as each day

(1) Aaron v. Broiles, 64 Tex. 316; 55 Am. Rep. 764
brings forth new problems. The innumerable fields of regulation and the complexity of the assumed duties of government have made the time worn practice of legislation by the legislative bodies of the government only, verge upon folly. Laws, so enacted, would become so complicated that their enforcement would break down under their own weight as did the enforcement of the Codes under the National Recovery Act. It was not alone the unconsti-
tutionality of the NRA that brought about its downfall and unpopularity with the people.

The judiciary is even less fitted to perform the func-
tions required, as its delegated power limits it to the trial of "cases and controversies" in the Supreme Court and the legisla-
tive court dockets are already crowded with the administration of justice under the laws enacted. To saddle courts with the duty of promulgating rules and regulations of conduct would place them under an already "overload of burden". Then, too, the judicial proceedings do not lend themselves to summary action and the long drawn out deliberated judgments would not adequately protect the life, liberty and property of the individual or the general public. The executive branch of the government is essen-
tially bound with the duty of enforcement of the orders of the
courts, and the laws of the legislatures, and it has not been considered proper, within the understanding of the Constitution, to have the enforcement agency also the legislative agency. This has, heretofore, been considered repugnant to the doctrine of the separation of powers.

The Congress of the United States and the legislatures of the various states have therefore found it expedient to set up administrative bodies. They have delegated to such bodies the authority to enact rules and regulations to bring about the ends and purposes of Congress or the legislatures as expressed in the broad and general acts delegating such authority to said administrative bodies within the limitations set forth in the legislative enactment. The limitations are highly important, as without these restrictions, the courts are at a loss to know the purposes of the legislatures or Congress, and the power to legislate is inherent in Congress and cannot be delegated away. A use of a power in excess of that clearly delegated by the legislative body is clearly and definitely unconstitutional. So it is also with an excessive use by a member of an administrative body.
The legislative bodies have designated by general enactments objects, acts and evils to be obtained, regulated or remedied, and unto these legislatively created bodies has been given the power to promulgate rules and regulations to bring about the desired effects; to determine, in individual circumstances, whether or not certain acts, property, or evils are not committed, held or exist contrary to such rules and regulations; and to take such summary action as is necessary to remedy the existent dangers or evils.

Aristotle enunciated this principle in the following words:

"Law is in all cases universal, but in some cases it is not possible to speak universally with correctness ... This is the reason why not all things are according to law, because on some subjects it is impossible to make a law and there must be a special determination from case to case; for the rule of what is indeterminate must itself be indeterminate also."

--- Aristotle, Nicomachean Ethics, V, x, 4, 6.

In effecting the desired results in a field where private and property rights are,
or are likely to be, infringed upon. The "due process" clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States protect these inalienable rights. The state has always been immune from suit for its tortious acts, and though the state during the rule of the kings and emperors was considered personal the general complexion and understanding of the terms has changed, and the state is now impersonal. The overzealous or arbitrary manner of an officer may cause his overstepping the definite limitations set forth by the legislative body and such officer is then exercising power "outside the jurisdiction".

III. LIABILITY OF JUDGES FROM CIVIL DAMAGE SUITS

The "personal state" was not subject to liability because of the ancient concept of the divine right of kings, together with the doctrine that "the king can do no wrong". In this country, a policy has been accepted that the state, charitable institutions, and such public benefactors are not liable for their tortious acts. Perhaps no legal principal is more firmly established than that where there
is a right there is a remedy, and to permit property to be taken
or personal privileges to be infringed upon when there is no
justification, except the well-meant ignorance of public officers,
is a denial of such right. Where then must redress be sought -
from the public officers in personal damage suits?

ORIGIN OF
DOCTRINE OF
IMMUNITY IN
ENGLAND

Judges of the crown have been considered officers
of the king and have acted in the name of the king.

Lord Coke, in 1608, advised that insomuch as the
judges of the realm have the administration of justice, under the
king, to all his subjects, they ought not to be called in ques-
tion for any judicial proceedings by them, except before the king
himself, "for this would tend to the scandal and subversion of
all justice; and those who are most sincere would not be free
from continual calumniations". (1) In an early Irish case brought
against the chief justice of the King's Bench of Ireland on the
grounds that he had illegally issued a warrant causing the false
imprisonment of the plaintiff, Mr. Justice Mayne of the Court,
though recognizing the wrong committed by the chief justice, in
his opinion wrote, "Liability to every man's action, for every

(1) Floyd and Barker, 12 Coke, 25, 77 Eng. Rep. 1305
judicial act a judge is called upon to do, in the degradation of
the judge, and cannot be the object of any true patriot or hon-
est subject. It is to render the judges slaves in every court
that holds plea, . . . If you once break down the barrier of
their dignity, and subject them to an action, you let in upon the
judicial authority a wide, wasting, and harassing persecution,
and establish its weakness in a degrading responsibility".
Mr. Justice Fox, in his opinion in the same case, wrote, "There
is something so monstrous in the contrary doctrine, that it would
poison the very source of justice and introduce a system of
servility, utterly inconsistent with the constitutional indepen-
dence of the judges, an independence which it has been the work
of ages to establish, and would be utterly inconsistent with
the preservation of the rights and liberties of the subject".

DOCTRINE IN United States
An attorney sued the judge of the Superior Court
of Massachusetts for having removed, while hold-
ing court, the attorney (the plaintiff) from the bar for malprac-
tice and misconduct in office, pursuant to the statute which em-
powered the courts of general jurisdiction to remove attorneys

(1) Taaffe v. Downs, 5 Moore's Privy Council 41; 17 Eng.Rep. 15
for "any deceit, malpractice, or other gross misconduct". The plaintiff alleged that the court never acquired jurisdiction to act in the case, because there was not a formal accusation made against him, or statement of grounds of complaint, or formal citation issued to him to answer. No malicious or corrupt act was alleged on behalf of the plaintiff. Mr. Justice Field ruled, "It is a general principal applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction ... They are not liable to civil actions for their judicial acts, even when such acts are in excess of jurisdiction, unless perhaps where the acts in excess of jurisdiction are done maliciously or corruptly". 

In a subsequent decision Mr. Justice Field wrote, in commenting on the case of Randall v. Brigham, "... the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and

the clear absence of all jurisdiction over the subject-matter. There is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But there jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend." According to Mr. Justice Fields, the law requires that a judge's actions in excess of jurisdiction, even though malicious and corrupt, can be questioned only as provided by statute or by impeachment and removal from office.

"The immunity of . . . judges in the United States, . . is established beyond dispute", was the gist of the opinion of Mr. Justice Holmes in Alsua v. Johnson, wherein it was definitely shown that the judge did not only act wrongfully, but acted unlawfully and illegally, with full knowledge that he was doing a wrong.

A similar rule has been followed in the state courts, as Justice Kent wrote in an opinion of the court in the case where a chancellor committed one of the officers of the Court of Chancery for malpractice and contempt, and a judge of the Supreme Court in vacation discharged the officer on a writ of habeas corpus and was found not liable in an action at the suit of the officer for the penalty given by the habeas corpus act: "for a judge of a court of record is not liable to answer personally, in a civil suit, for any act done by him in his judicial capacity, nor for errors in judgment". (1) A South Carolina court ruled that a justice of the peace may commit for a contempt; that the warrant of commitment under his hand and seal was the best evidence of the contempt, and that he was not liable to an action for what he did in his judicial capacity, though he was subject to indictment if he acted oppressively. (2) And the same court reports, (3) "No suit would lie against a judge for any judgment rendered by him in his judicial character, though liable to impeachment".

(2) Lining v. Betham, 2 Bay's 1 (S.C.), in 1796.
(3) Brodie v. Ruthledge, 2 Bay's 69 (S.C.)
The reasons for this special treatment to officers of the court is much more interesting than the fact that they are immune from personal damage suits. (1)

The paramount reasons have been placed in the following categories:

1. The saving, for the public, of judicial time which would otherwise necessarily have to be used in the defence of private litigation. (2)

2. The prevention of undue influence upon judicial determinations through the threats, or even the possibility, of subsequent damage suits based thereon. (3)

3. The fear that men of property and responsibility might otherwise be deterred from judicial service. (4)

4. The especial importance of an independent judiciary in the American federal and state constitutional systems. (5)

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 to such form of collateral attack.

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.

(2) Little v. Moore, 1 Southard 74, 7 Am. Dec. 574.
(3) Stewart v. Case, 57 Minn. 62; Stewart v. Conley, 22 Minn. 747; Taaffe v. Downes, supra;
(4) Phelps v. Sill, 1 Day's Case in Error (Conn.) 715.
7. Judges in their exercise of the judicial functions 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. (1)

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 community.

9. Underlying the whole principle of immunity, the feeling not always articulated expresses 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. (2)

State courts have been consistent in protecting the judges of superior courts or courts of general jurisdiction, even though the judge exceeds his jurisdiction, and though they qualify such immunity by adding, "unless he acts maliciously or corruptly" (3) the judges are loath to lend weight to such allegations.

Justices of the peace, or other magistrates of inferior or limited jurisdiction, are not liable for errors of judgment or mistakes

(1) Sweeney v. Young, et al., 82 N. H. 159, 151 Atl. 155.
(2) National Surety Co. et al. v. Miller, 155 Miss. 115, 124 So. 251.
of law while acting within their jurisdiction, unless they act from impure or corrupt motives. This extends the rule applied to judges of the superior courts or those of general jurisdiction (1) to those of inferior or limited jurisdiction. In an instance of a justice of the peace holding a man unlawfully, when the injured party brought an action against the justice of the peace but failed to allege that the justice of the peace had exceeded his jurisdiction, the court ruled that, "where it cannot be determined from the complaint, in an action against a justice of the peace for malicious prosecution and false imprisonment, that he was not acting judicially and that the act complained of was not within his jurisdiction, the complaint is open to demurrer". (2)

IV. METHODS OF CONTROL OF ADMINISTRATIVE OFFICERS

DISCRETIONARY Administrative tribunals and bodies are composed of public officers, as are the courts, and the rules governing the control of the courts have been applied to some of them. Before the boards and commissions


(2) Lacey v. Hendricks, supra.
were created as administrative bodies, as such, there had grown up under the "police power" large bodies of public officers whose acts were controlled in any one of the three following manners:

1. Civil suits or criminal prosecutions against such officers in their private capacity for alleged illegal acts committed in discharge of their official duties;

2. Opportunity was given the courts to pass on the validity of the acts of public officers where the latter were obliged to resort to the courts for aid in enforcing orders; and

3. Power was in the courts to issue extraordinary writs to restrain or compel administrative action.

These officers, like unto our modern administrative bodies, had the power of summary action and could relieve a nuisance, condemn property and deprive one of privileges in summary proceedings when found necessary. Wide discretionary power has been given them, and should the same reasons for protecting the judges and justices of the courts, in their discretionary powers, be applied to these administrative bodies? Those opposed to immunity feel that the administrative officers should be held 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.

(1) Administrative Justice and Supremacy of Law, John Dickinson
In an action brought in the King's Bench against the Marshal of the King's Household, it was determined that a capias had been issued by the court to the Marshal, in his official capacity, but that the action brought was between two individuals not of the King's Household and that the Marshal had exceeded his jurisdiction even though he had acted in accordance with the capias delivered to him by the court. The terminology of the court is interesting as similar words will be enunciated from the high benches of this country many years later. The court said,

"When the court has jurisdiction of the cause and proceeds erroneously, then no action lies against the officer or minister who executed the precept of the court. But when the court has not jurisdiction of the cause, then the whole proceeding is coram non judice, and actions will lie against them without regard to the precept or process for it is not of necessity to obey him who is not a judge of the cause." (1)

V. DETERMINATION OF ADMINISTRATIVE OFFICER—FINAL

The health boards were the first to be established under the recognition of the right of the legislative body to delegate their specific authority to regulate and protect the general welfare. It would seem, therefore, to

(1) Case of the Marshalsea, 10 Coke Rep. 68b, 77 Eng.Rep. 1025
obtain the oldest and most substantial law on the subject of the
liability of the officers' performing functions pursuant to the
powers and duties entrusted to them that this particular field
would be the most helpful. The law does not seem to be definite,
and neither is it consistent in all jurisdictions.

CHARACTERIZATION OF ADMINISTRATIVE ACTION

The town of Groton was prostrate with scarlet fever and diphtheria and the city board of health acted, pursuant to a statute which delegated them with "all the powers necessary and proper for the preservation of the public health and the prevention of the spreading of malignant diseases" ... to "examine into all nuisances and sources of filth found within the town which in their judgment shall endanger the health of the inhabitants". The statute further empowered them that "... when any such filth or nuisance shall be found on private property, such board shall notify the owner ... to remove the same at his expense, within such time as the board shall direct and after the expiration of such time such board shall cause such filth or nuisance forthwith to be removed or abated". It was determined by the board of health of Groton that the origin of the epidemic was the oyster beds in the river.
Brush and vegetable matter had been placed in the river to afford better oyster fishing. The state board of health was also asked for an opinion. Both concurred that the nuisance was caused by the vegetable matter and the brush and ordered that it be removed. This action was taken in September. The epidemic was greatest from May to September but it was thought that if the brush were disturbed during the raging season that it might stimulate the spread of the pestilence. A new health commission was installed in the fall, and in December, pursuant to the findings of the former board of health, the new officers ordered the brush removed, and upon failure of the owners to remove the same, it was removed, by the board, and the expense charged to the owners. Subsequently it was determined that the brush was not a nuisance and personal damage suit was brought against the members of the board of health as individuals.

CONCLUSIVE-

The court, in its opinion, asks these pertinent questions: Does the statute confer upon the board of health the right to determine conclusively, in any case, what are nuisances and sources of filth which endanger the health of the inhabitants; so that if they act in good faith,
and merely err in judgment, the statute will justify the act
done, although the property of a third party may be destroyed?
There to the court, in essence, replied that the object of the
statute was to preserve the "public health and safety" and that
in such cases there is a necessity that the action be immediately
taken. If time were taken to resort to the courts to determine
the "jurisdictional fact" as to whether or not there be a nuisance,
the health and safety of the community might be seriously injured
and the city depopulated. The balance swings between life and
property.

The court takes cognizance of the fact that the
statute does not intend to authorize the destruc-
tion of property not in fact a nuisance, but asks,
"Who is to decide?" Investigation requires time, and time is of
the essence. If the board of health is to act at its peril, then
they will not decide. The interest of the board in such matters
is no greater than that of the other members of the community
and they desire simply to do their duty, but if such duty be ham-
pered by a liability for damages for error committed in its dis-
charge, it would become a motive of very little power. The final
determination of the question of nuisance must be left to someone, and the court feels it just as well to leave it to the body to whom such duty has been delegated. The criteria used to determine whether or not they have proceeded properly are: "Was the power exercised in good faith; with proper care and prudence; and in the manner prescribed by the statute?"

The court further asks: "Does not a private individual have the right to abate a nuisance without resorting to the courts for redress, then why is the statute necessary, were this not giving to the board of health greater power than the individual may exercise?" Such a statute would then be unnecessary.

The court then goes on to consider the contention that such a construction (1) renders the act unconstitutional, (2) takes away the right of trial by jury, (?) deprives the owner of his property without due process of law, (4) confers judicial powers upon a tribunal not warranted by the Constitution, and (5) takes private property for public use without compensation. To refute such objections, the analogy of the right to take the life of an assailant in self defense is offered, with the quip that in one instance property is being
destroyed, and in the other, which is even a greater destruction, life is being destroyed. The reasonableness of such action must, of course, be considered. Immediate action to preserve the life and health of the inhabitants was reasonably found in the instant case and good faith and caution were exhibited. The court added that the property was not taken for a public use but was destroyed for the protection of the public health.

In the instant case, we find many of the same bases given to protect the administrative officers as are advanced to protect the judges and justices of the superior courts from liability in personal damage suits.

DOCTRINE OF IMMUNITY AS EVIDENCED IN CASES

In the state of Iowa, a family was erroneously quarantined for smallpox, pursuant to a statute imposing upon the board of health the duty of quarantining, "all infectious or contagious diseases dangerous to the public". Action was brought against the board and the members thereof as individuals. The court decreed that officers acting judicially are not liable for injuries which may result from such acts performed in the honest exercise of their judgment, however erroneous or mistaken the action may be, provided there

(1) Raymond v. Fish, 51 Conn. 90; 50 Am. Rep. 7
be no malice or wrong motive present. It was further stated, "Where the public health is involved, this rule should not be applied, notwithstanding the fact that courts of great ability so held. It is the modern tendency of judicial opinion to hold that the public health is the highest law of the land, and (quoting from 2 Tiedeman on State and Federal Control § 169) 'whenever a police regulation is reasonably demonstrated to be a promoter of public health, all constitution guaranteed rights must give way to be sacrificed without compensation to the owner'. Upon the question of jurisdiction the court ruled that the exemption of officers from liability extends only to matters in which they have jurisdiction under the statute, and it may be said that the board of health has no jurisdiction unless a cause for disease actually exists." The court then continued: "... This view is too narrow... It is enough if the matter is colorably though not really in their jurisdiction."

Pursuant to a New York statute authorizing "Any net... in or upon any of the waters of this state, or upon the shores of... the waters of this state, in violation of any existing or hereafter enacted statutes or laws for the protection (1)

(1) Beeks v. Dickinson County et al., 171 Iowa 244, 138 N.W. 211
of fish, ... is hereby declared a public nuisance, and may be
abated and summarily destroyed ... and no action for damages
shall lie or be maintained against any person for or on account
of any such seizure or destruction", the defendant state game
officer condemned and destroyed nets of the plaintiff fisherman.
The court ruled upon the constitutional question involved, that
the state may declare that a net, though not in use, was a nui-
sance, and that though it is difficult to determine where prop-
erty illegally used may be destroyed summarily, and where judi-
cial proceedings are necessary for its condemnation, yet that if
the property were of great value, ... the owner would have good
reason to complain of such act (namely, the summary destruction),
as depriving him of his property without due process of law.
But where the property is of trifling value, and its destruction
is necessary to effect the object of a certain statute, ... it
is within the power of the legislature to order its summary
(1) abatement." Another consideration is here given, to which
the court looks when deciding the judicious act of the adminis-
trative officer. The value of the property destroyed and the
benefit to the public are considerations, and unless such

(1) Lawton v. Steele, 152 U. S. 123.
destruction would place too great a burden upon the private owner the Supreme Court of the United States will not find this a deprivation of property "without due process of law".

In the city of Englewood, New Jersey, there were thirty cases of scarlet fever and the daughter of the plaintiff was ordered quarantined, together with the rest of the family, if they chose to intermingle in the house and did not confine the daughter to one room. The city physician and four other doctors determined that the girl had scarlet fever, and two other doctors contended that she did not. The house was quarantined in accordance with the state statute, which provided that an examination be made into all causes of disease injurious to the health of the inhabitants and that the same be removed and abated. Section 15 provided, inter alia, "... that no suit shall be maintained . . . to recover damages against . . . officers or agents, on proceedings had by them to abate and remove . . . unless it shall be shown . . . that the cause of disease did not exist, was not hazardous and prejudicial to the public health, and that the board acted without reasonable and probable cause to believe that such cause was in fact . . ." Upon finding that the cause had not, in fact, existed, action was brought against the city, the
board and officers as individuals. The court, after disposing of the question of the liability of the state, said, "A public officer, acting in good faith, upon a sudden and alarming emergency, under the sanction of a constitutional and valid law in a matter of public duty, is not to be held responsible for the unavoidable and necessary result of such act of duty. An injured party may have a right to resort to the public for satisfaction, but the law has ever held that the officer, himself, not exceeding his power and not guilty of oppression or bad faith, is not personally liable." A New Jersey judge in a subsequent decision advised, "That such (referring to the doctrine enunciated in the aforementioned case) is the law in this state, regardless of what it may be in other jurisdictions, is clear." And New Jersey courts have been consistent in their decisions.

In Indiana, it has been determined "there is a difference: if the position is judicial or quasi-judicial, there is no liability; while if administrative, there is liability. An early New York court ruled that an officer, acting under a commission from government, who is enjoined by law to the performance of certain things, if in his judgment or opinion the requisites

(2) Elmore v. Overton, 104 Ind. 348; 54 Am. Rep. 345.
therein mentioned have been complied with, . . . is not answer-
able to a party who may conceive himself aggrieved for an omission -
(1) arising from mistake or mere want of skill. A California
court said, in 1856, "Whenever, from the necessity of the case,
the law is obliged to trust to the judgment and discretion of an
officer, public policy demands that he be protected from the
(2) consequences of an erroneous judgment."

Other government officers have been declared immune
from liability. Park commissioners had failed to repair a teeter-
totter and a child was injured. The court on ruling as to the
liability of the officer, stated that the neglect of a public
officer to perform a public duty will constitute an individual
wrong only when the person complaining is able to show that the
act of the officer involved a duty owing to him as an individual,
and that by the failure of the officer to perform his duty, the
complainant has suffered a special and peculiar injury and it
"would be an anomaly in the law which would relieve the munici-
pality from liability for the non-feasance of its officers and
without regard thereto subject such officers individually to
liability therefor."

(1) Seaman v. Patten, 2 Gaines N. Y. Term Rep. 312 (1805)
(2) Downes v. Lent, 6 Cal. 94
(3) Smith v. Iowa City, et al., 213 Iowa 391; 239 N. W. 29
A log was negligently and carelessly left upon the highway at a dangerous right angle turn which was not properly sloped when constructed, and because of such construction of the curve and the log in the road the plaintiff was injured. The court stated, as in the Iowa case, that "If the duty is, in fact, ministerial, and the act was one designed for the benefit of the individual injured and to whom its performance is due, the officer failing to perform . . . would be personally liable. If the duty is a purely public duty, owing to the state, then, a failure to perform such duty will not give rise to a cause of action in favor of the individual", and the instant case fell within such classification. The three town trustees and the road overseer in a Minnesota town had been advised that a bridge on the public highway was in a dangerous condition, but negligently failed, neglected, and refused to repair the same. In a tort action against them, the court ruled that no liability would be imposed as this "accords with the general understanding of lawyers and laymen as to the liability of town officers". The North Carolina court on similar facts ruled that, "Overseers of roads may at times be held liable for negligent default in the

(1) Stevens v. North States Motor, Inc., 161 Minn. 745; 201 N. W. 435
(2) Bolland et al. v. Gihlstorff et al., 154 Minn. 50, 94; 158 N. W. 725
performance of their duties", but in the instant case no funds were available and that "Public officers, in the performance of their official and governmental duties involving the exercise of judgment and discretion, may not be held liable as individuals for breach of such duty, unless they act corruptly and of malice".

A Minnesota court ruled in the case of Stewart v. Case, supra, that an assessor was immune from liability even though he act "wrongfully, unlawfully, wilfully and maliciously", and that if the rule protects at all, it protects wholly. In Wisconsin, it was determined that the board of tax appeals acting "without authority, wrongfully and with intent to injure and oppress" was immune from personal liability.

The courts of Vermont have determined that the authority to health and highway officers must protect them to a certain extent, and the New Hampshire courts ruled that "injuries resulting from such reasonable and customary measures as he (meaning the administrative officer) may in good faith adopt or direct," and thereby protect the officers of the state. In the state of Maine, wall paper was removed from the walls where it was thought that the family had been afflicted with smallpox but in fact had not.

(2) Templeton v. Beard et al., 159 N. C. 63; 74 S. E. 735
(3) Stewart v. Case, 53 Minn. 62; 54 N. W. 938.
(4) Steele v. Dunham et al., 26 Wis. 593.
(5) Daniels v. Hathaway et al., 65 Vt. 247, 26 Atl. 970.
and the court ruled that there was no liability. In Utah, in
an action brought against the state health officer, it was
charged that sheep had been negligently quarantined, and as a
result of such action many had died. The court ruled that the
inspector was acting in a quasi-judicial capacity and that no
liability would attach unless the acts complained of were willful,
malicious, corrupt or without jurisdiction. A distinction was
made between what constitutes a ministerial act and a judicial or
quasi-judicial act.

From the foregoing cases, it would seem that the
law might be crystalized in the statement of Mecham,
in his treatise on "Public Officers", wherein he states, "...
it is well settled that the quasi-judicial officer cannot be
called upon to respond in damages to the private individual for
the honest judgment within his jurisdiction, however erroneous
(1) or misguided his judgment may be."

VI. DETERMINATION OF ADMINISTRATIVE OFFICER — NOT FINAL

This problem has brought into the law, however,
many nice and fine distinctions. Mr. Justice
Holmes, while sitting on the bench of the Supreme Court of the

(1) Mecham, Public Officers, § 640.
Commonwealth of Massachusetts, wrote an opinion in the now oft quoted case of Miller v. Horton, which has had a great influence on the jurisdictional and constitutional aspect of this problem. An action in tort was sued out against the officers of the board of health, who had killed and destroyed a horse they had determined to be infected with glanders, pursuant to a statute which empowered them to "condemn the animal infected therewith ... to pay the owner the equivalent thereof". The court found the officers to be personally liable on the grounds that:

1. there was no protection or reimbursement made for one whose horse is killed but does not have glanders;

2. that when, as here, the horse not only is not paid for, but may be condemned, without appeal, and killed, without giving the owner a hearing or even notice, then it is a deprivation of property without due process of law.

The court further pointed out that if there is no provision made for a hearing before, then there must be a hearing afterward, and if it does not do so, the statute may leave those who act under it to proceed at their peril and the owner gets his hearing in an action against the officers.

At first blush, it would seem that there is a definite contradiction between this case and the case of Raymond v. Fish.

(1) Raymond v. Fish, 51 Conn. 80; 50 Am. Rep. 3
However, the board was given power to "examine into all nuisances and sources of filth injurious to . . . health . . . and to . . . remove . . . all . . . which in their judgment shall endanger the health". In Connecticut, this gave the officers greater latitude, but it did not meet the first objection set forth by Judge Holmes. The court did answer by stating that there was no reason for reimbursement as even a private individual may take such action as is necessary to mitigate a nuisance, and that if the private individual has this right without a statute, then certainly a board established by the state to protect the health and life of the community should be given wider powers when acting pursuant to statute.

The Supreme Court of the United States, years after the enactment of the Fourteenth Amendment, determined that there is a balance between the value of the property destroyed and the benefit to the community.

The Supreme Court of the state of Illinois, in the case of Pearson v. Zehr, determined that even though the officers of the board of health, duly commissioned pursuant to a statute, had ordered the horses destroyed because of their supposed infection with glanders, that it was no justification that the commissioners

(1) Lawton v. Steele, 152 U. S. 133.
(2) Pearson et al. v. Zehr, 138 Ill. 48; 29 N. E. 854.
acted in good faith, that there were reasonable grounds for the belief that some of the horses were diseased, that they had made an honest and careful investigation and examination to the best of their ability and as a result thereof decided and determined that the horses were so diseased and that the others were exposed, they were not immune to a tort action. The jury had determined that the horses did not have glanders and that therefore, the commissioners were acting "in excess of jurisdiction" and that whatever they might do would not justify their actions. This involves the question of "jurisdictional fact" upon which the courts turn hither and yon.

Mr. Holmes definitely sets forth in Miller v. Horton that due to the fact that the animal was not infected, the board was "without jurisdiction". A Chinaman, claiming to be born in the United States, upon application for reentering claimed citizenship. The immigration authorities found that he was born in China, and the learned Justice in his decision states, "... no abuse of authority of any kind is alleged. That being out of the case, the first of them is answered by the case of United States v. Sing Tuck". (First of them had reference to the

(3) United States v. Sing Tuck et al., 217 U. S. 559.
jurisdiction and finality). Such a statement seems contrary to the decision of Miller v. Horton, supra, as if this is a question of jurisdiction, then it is a legal question and the court determines the legal questions. It certainly was as true a "jurisdictional fact" as the problem of whether or not the horse had glanders and if the administrative officers' determination is taken in one instance it should in the other. Is there much difference between finding by the administrative body if the horse had glanders to determine its jurisdiction, and finding if the Chinaman was a citizen to determine if the administrative officers had jurisdiction? The court finds there is.

An inspector of the board of health caused to be destroyed, in a Wisconsin city, a quantity of fish, and the owner of the fish charged, in his tort action, that the officer "negligently, ignorantly, and carelessly performed his duties as such inspector, that he did, without any reason or cause, destroy and make unfit for sale a large quantity of good and fresh fish, offered for sale by the vendor at a public market". It was admitted, on trial, that the inspector exercised a judicial and discretionary power. The court, in ruling upon the findings, stated: "This is a high and responsible judicial power, as it
concerns the public health, and as it may affect the rights of property, and the officer exercising such a power is within the protection of that principle, that a judicial officer is not responsible for damages to anyone for any judgment he may render erroneously, negligently, ignorantly, corruptly, or maliciously he may act in rendering it, if he act within his jurisdiction."

This extends the doctrine enunciated in the previous case and places such administrative officers on the same plane as judges of the superior courts.

Conroy was a meat vendor and the health officer, a physician, determined that one of the steers of the plaintiff was sick and infected with anthrax. The steer died, was flayed, and the skin was placed with others. Upon examination by the state veterinarian the hides were ordered destroyed. After taking notice of the fact that anthrax is one of the most virulent and deadly diseases known to science, the court determined that the officers had acted in good faith and had good cause for the order. The jury, however, found the steer was not afflicted with anthrax, and there was no probable cause for such determination, whereupon the court determined that the defendant was liable. The case

(1) Fath v. Koeppel, 72 Wis. 289; 33 N. W. 579.
does differ in this regard from Fath v. Koeppel, supra, in that it was admitted that the officers were performing a judicial function and it was simply the next step for the court to find that such an officer is immune from liability. In the instant case, however, such an admission was not made. This case is said to overrule Fath v. Koeppel and bring Wisconsin courts in line with Massachusetts.

The Wisconsin court advisedly ruled, "The discretion in which such officers are protected must be limited to the line where their acts invade the private property rights of another, for which invasion the law awards no redress other than an action against the one actually committing the trespass." Judge Dillon said upon this question: "The discretion which protects such an officer . . . stops at the boundary where the absolute rights of property begin." Again it was stated that 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, the result is liability regardless of the utmost good faith, due care, and diligence on the one side, and immunity regardless of

(1) Lowe v. Conroy, 120 Wis. 151; 37 N. W. 942
the grossest negligence and frequently even malice on the other."
A truckload of crabs was seized on the mistaken assumption that
they were being transported from one fish and game district into
another in violation of law, and though the officers did not ask
questions as to the place of origin or the place of destination
upon the finding of the fact the court said, "The civil liability
of an officer committing a tort appears to be exactly the same as
that of a civilian". This grave distinction between the corporeal
and the non-corporeal is not warranted by the modern diligence
to protect not only the tangible rights of the individual
but the intangible. The reckless and contemptuous actions of the
officers bring such strong statements from the court, and if ap-
plied universally they would cause great injustices to arise.

The evils of the determination by a jury, one of un-
learned (for an administrative body, one of specially qualified),
is illustrated by the Michigan case of Voss v. Adams. Testi-
mony showed the defendant dentist pulled sixteen teeth after
giving a general anesthetic. The court directed the verdict
for the defendant on the grounds assuming malpractice no damage
could be shown. Negligence was not in question and was not

(1) Silva. v. Mackley et al., 175 Cal. App. 443;
  16 Pac. II, 887; 27 Pac. II, 791.
raised. Local practitioners testified that they were unable to determine what the consequences might have been had the teeth been extracted at different times and what difference the extraction of all at one time had made. The jury found definitely the damages, however, and they were assessed by the court. Such examples tend to cause little weight to be lent to jury determinations and to intensify the plea for final determinations by specially qualified officers.

The problem of the "jurisdictional fact" is one of the finest problems facing the courts. Courts seldom write a unanimous decision where the problem is involved. In the case of Crowell v. Benson, the question of the existence of the employer-employee relationship arose together with the question as to the occurrence of the injury in interstate commerce. The court held that a judicial trial de novo was necessary in the proceedings to enjoin the compensation award rendered under the federal Longshoremen's and Harbor Workers' Compensation Act. The term "jurisdictional" is used in such connections that it would cause one to assume that the term was synonymous with "constitutional" although the holding purports to be

reached through a statutory interpretation. It was upon this basis that a wholly independent judicial trial de novo, distinguished from an independent judicial judgment upon the record made by the administrative officers was based. A high standard of legalistic thinking is required of the administrative officers to determine between the following differences, "within the subject matter of the general jurisdiction of the board", or, again, "within the scope of the subject matter over which the board has general jurisdiction" or "within the "colorable" jurisdiction of the tribunal, and a line of demarcation between the phrases "in excess of jurisdiction" and "in the absence of jurisdiction". In placing such a burden upon administrative officers, the courts have given officers a legal question which they themselves have not been able to determine with consistency. The New Hampshire court, in the case of Sweeney v. Young, advised that "immunity of an officer from liability for judicial acts does not exist wherever he acts outside the jurisdiction, but is he has right to pass on jurisdictional questions, and makes an erroneous decision, he is protected".

(1) Sweeney v. Young et al., 82 N. H. 153; 171 Atl. 155.
The inadvisability of having a court intercede in the determination of the administrative officer is definitely set forth in Utah, in the case of Jenkins v. Ballantyne, wherein the court states: "The emergency may be such as not to admit of the delay essential to judicial inquiry and consideration, or the subject of such action and the process may be of such a nature or the conditions and circumstances in which the act must be performed to effect the protection and give effect to the law may be such as to render judicial inquiry and consideration impracticable."

(1) Jenkins v. Ballantyne, 8 Utah 247; 16 L. R. A. 689.
(2) Talker v. Sauvinet, 92 U. S. 90.
law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction.\(^{(1)}\)

In the City of New Orleans, an automobile had been parked in violation of a city ordinance and the police had taken the car and impounded it. The facts stipulated that the car did constitute a nuisance during the time it was parked where the owner left it but that once it had been hauled away it no longer constituted a nuisance and the officer had no right to withhold the car without giving the owner notice and hearing in accordance with "due process of law". The purposes of the ordinance were no longer being achieved by the holding of the car, and though the owner might be subject to fine, still he could not be deprived of his car when it was no longer constituting a nuisance. The court ruled that even after the nuisance was abated the car could be

subsequently detained and the owner forced to pay without notice, hearing or right of appeal. In such a case, the determination and decision of the inferior officer is final and binding. It will be noted here, however, that the ordinance was amended to change the charge from one for redelivery in the form of a penalty to a charge for cost of abating the nuisance. The courts have maintained that after a nuisance is abated, a judicial hearing or right of appeal should be granted before summarily depriving the owner of his property.

DETERMINATION The case of Stone et al. v. Heath et al. presented the question of whether a board of health could be restrained from ordering that a nuisance be abated. The court expressed the opinion that it could not be restrained under the statute as the jurisdiction conferred is summary in its nature and the objects to be attained by its exercise would be defeated in many, if not most, cases if the orders of the boards of health were subject to judicial examination and revision at the instance of affected parties before they could be carried into effect. The decisions of the board of health, it was pointed out, are not final and conclusive in such cases.

(1) Steiner v. City of New Orleans, 172 La. 275; 176 So. 536.
to all purposes in regard to the parties interested on the question of whether the thing complained of is a nuisance. The finding of the administrative body establishes, for the time being, that there is a nuisance but that the officers act at their peril if it turns out in subsequent proceedings that there was in fact and in law no nuisance. It was further stated, "And the question whether there was a nuisance, or whether if there were one, it was caused or maintained by the parties charged therewith, may be litigated by such parties in proceedings instituted against them to recover the expense of the statement or may be litigated by the parties whose property has been injured or destroyed in proceedings instituted by them to recover for such loss or damage."

REQUIREMENTS OF "DUE PROCESS" Justice Peckham, in North American Storage Co. v. Chicago, where food stuff was ordered destroyed while in cold storage, and the property was destroyed, considered many cases heretofore mentioned, and concluded in one of the comments on the case of Miller v. Horton, supra, that: "The statute may provide for paying him in case it should appear that his property was not what the legislature

(1) Stone et al. v. Heath, supra.
had declared to be a nuisance and may give him his hearing in that way. If it does not do so, the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them."

It has not been my purpose to determine in what instances one is entitled to a hearing. The Supreme Court of the United States has ruled that: "Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with as, in the judgment of the legislature, is necessary for the protection of its citizens.

That a state, in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the citizens," and continues," . . . no state can deprive a person of his life, liberty, or property without due process of law; but in determining what is due process of law, we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power.
So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction." The Supreme Court has limited this sweeping power, in this regard, however, because when "the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record; for if not, it is our duty to revise and correct the error." This statement would evidence the fact that the Supreme Court of the United States will go into the evidence to determine if the facts bear out the decision of the court and provide for the taking of property under the "due process of law" restriction of the Fourteenth Amendment.

In a New York case relative to the right of an individual to carry on the business of selling milk, the court ruled that such right was a "constitutional one and can only be interfered with in the exercise of the police power of the state because . . . of the circumstances surrounding it, the public health is imperiled." If, as a matter of fact, the

(1) North American Cold Storage Company v. City of Chicago, supra.
(2) Postal Telegraph Cable Co. v. Newport, 247 U. S. 464
public health is not imperiled, the summary determination of the board of health does not make it so; and its interference with his business would subject the persons constituting the board to the same perils and liabilities as an individual who interferes with a lawful business.

VII. CONCLUSIONS

PROPOSED BASES FOR IMMUNITY OF OFFICERS

From the aforementioned cases it is evident that a hearing is allowed following the issuance of the order and prior to the execution. Essentials of a judicial hearing have always been that there must be notice and an opportunity to be heard. In summary proceedings in the exercise of the police power, notice and an opportunity to be heard prior to the administration by the officers are not often essential. In the absence of an opportunity to be heard, however, the officer who destroys before the hearing and notice must establish before the courts in a suit for damages that the nuisance abated possessed the characteristics which the officer claimed to have found and that is a condition to the justification of his action. The chief bases for such rulings are that the administrative

bodies are of limited jurisdiction and that the "due process" clauses protect the owner of property until he has somehow, somewhere, the opportunity to offer evidence as to the condition of this property as he finds it. This is the requirement of the (1) Supreme Court of the United States to satisfy "due process".

Mr. Justice Brandeis has recognized that the Supreme Court of the United States has refused to be governed by a rigid rule in deciding when, and to what extent, finality may be given to an administrative finding of fact involving the taking of property. He relates, "It has weighed the relative values of constitutional rights, and essentials of powers conferred, and the need of protecting both. It has noted the distinction between informal, summary administrative action based on ex parte casual inspection of unverified information, where no record is preserved of the evidence on which the official acted, and formal, deliberate quasi-judicial decisions of administrative tribunals based on findings of fact expressed in writing, and made after hearing evidence and argument under the sanctions and the safeguards attending judicial proceedings. It has considered the nature of the facts in issue, the character of the relevant evidence, the need in the

business of government for prompt final decision . . . It has enquired into the character of the administrative tribunal provided and the incidents of its procedure. And where that prescribed for the particular class of takings appeared 'appropriate to the case, and just to the parties to be affected', and 'adapted to the end to be attained', the court has held it constitutional to make the findings of fact of the administrative tribunal conclusive. Thus, the court has followed the rule of reason.\(^{(1)}\)

The Supreme Court has determined that "due process of law" does not always entitle an owner to have the correctness of findings of fact reviewed by a court; and that in deciding whether such review is required, "respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these: and if found suitable or admissible in the special case, it will be adjudged to be 'due process of law'.\(^{(2)}\)

The Supreme Court of the United States has therefore determined that it will allow the findings of the administrative body to be final and conclusive provided that it can be shown that the conclusion of the body is born out by the evidence exhibited.

\(^{(1)}\) St. Joseph Stock Yards Co. v. United States et al., 298 U. S. 58.
The administrative officer, however, though acting to the best of his ability and enjoined by law must predetermine what the decision of the court may be upon the "jurisdictional fact" and whether or not the determinations reached will be accepted by the jury or by the courts upon appeal in a personal damage suit.

To enable administrative officers in their endeavor to prosecute the law and to provide for the health, safety and general welfare, it has been suggested that there be established flexible rules within which the officers might enjoy a degree of protection like unto the rules and reasons given for the protection of the judges of the courts. It having been definitely determined that the determination of the "jurisdiction fact" is generally the determination of the case involved, and though Mr. Chief Justice Hughes wrote in one of his opinions that the "judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to the findings upon the hearing and evidence", still to have a vigorous enforcement of the rules and regulations set forth by the administrative bodies and to obtain fearless officers, a measure of protection must be given them.
Similar to the bases given for the protection given to judges and justices in the superior courts, these general rules provide for the guidance of the courts in determining the liability of administrative officers:

1. Whenever a full and complete hearing has been tendered the owner of the property, and reasonable notice and ample opportunity to be heard, and such hearing embraces the substantial minimum necessary to satisfy the limitations imposed by the "due process" clauses then the administrative officer should not be subject to a personal damage suit upon his summary actions;

2. Whenever the offended party has other means available, as the use of the extraordinary remedies (i.e. injunctions, writ of habeas corpus, mandamus, prohibition, declaratory judgment, certiorari, or by direct appeal), and these remedies have not been taken advantage of, or the offended party has not taken full advantage of the administrative hearings then he should be estopped to bring an action against the administrative officer in tort;

3. Whenever the administrative officer or body is the fact-finding body by statutory injunction, the officers exercising such power pursuant to the statutory duty shall not be liable in a suit unless it can be shown that the officer was not actuated by proper motives and did not exercise due care; that he did not act as a reasonable man might have acted under such circumstances; that the officer acted in an "arbitrary or capricious" manner; and that the findings of the administrative officer or body was not and could not reasonably be assumed to have been supported by the evidence; and

4. Whenever the administrative officers are negligent, then liability should attach even though the general
function of the body is judicial in nature and that
the officers are required to exercise such care and
diligence as reasonable and prudent men of like
knowledge and standing under like and similar cir-
cumstances should exercise.

All of these rules and regulations are proposals for
constitutional safeguards of an elaborate structure devised
"to buttress from different sides the central doctrine of the
supremacy of law," for truly, as Aristotle said centuries ago:

"The laws should be the rules, and magistrate
or magistrates, whether there be one or more,
should be supreme only over those matters con-
cerning which it is impossible for the laws to
speak with precision because of the difficulty
of a general principle embracing all particulars."

— Aristotle, Politics, III, xi, 19.