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ADMINISTRATIVE AGENCIES
ALSO SOME MINNESOTA AND WISCONSIN COMPARISON

GEORGE CAHILL*

I.

The administrative agency has during the last fifty years become a governmental problem child. Uncontrolled agency powers lead to bureaucracy. Administrative law sets the controls, by prescribing the conduct of agency action and providing for review or appeal for aggrieved parties. The conscious beginnings of administrative law in this country were first outlined by Professor Goodnow in his work "Comparative Administrative Law", published in 1893.1 With the advent of the Interstate Commerce Commission2 and other governmental agencies, both state and federal, limitations upon agency action, powers and procedure have been developed by court decisions.

"The power lodged in administrative agencies is the most important aspect of our government today."3 It invades every activity of our daily lives. Administrative law has been defined as "simply the procedure and methods of the executive branch of the government in its contacts with private interests and provides for judicial checks upon its authority."4 The field of procedure and evidence at agency hearings has been the subject of three different theories. The ultra-liberal or popular theory was outlined by President Roosevelt, in December 1940, in his veto of the Walter-Logan bill. He said:

"The administrative tribunal or agency has been evolved to handle controversies arising under particular statutes. It is characteristic of these tribunals that simpler and non-technical hearings take the place of court trials and informal proceedings

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3 The Interstate Commerce Commission was created in 1887—id.

4 "The power lodged in administrative agencies is the most important aspect of our government today. Its growth has been the response to need and not to malicious usurpation of power. Indeed there have been and continue to be instances of abuse of administrative discretion but in the course of time various safeguards have been developed to curb them. The recently adopted administrative procedure acts by federal and state governments incorporate some of the safeguards. Whether they are sufficient to secure fair dealing and democratic participation remains to be seen. "Carrow, Background of Administrative Law. (1948). p. 19 Associated Lawyers Publishing Company, Newark, N.J.

4 Another definition given in Mr. Carrow's recent book (supra p. 26) is: "We might define administrative law as dealing with the powers of administrative
supersede rigid and formal pleadings and processes. A common sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decision with an eye that looks forward to results rather than backwards to precedent and the leading case. . . . Substantial justice remains a higher aim for our civilization than technical legalism. . . . Court procedure is adapted to an intensive investigation of individual controversies. But it is impossible to subject the daily routine of fact finding in many of our agencies to court procedure. . . . Its technical rules of procedure are often traps for the unwary and technical rules of evidence often prevent common sense determinations on information which would be regarded adequate for any business decision."

The courts are passive by nature and act only on motion of counsel. A lawsuit is like a chess game, success depending largely, if not sometimes altogether, on the astuteness of the prevailing attorney. An administrative agency makes its own rules, investigates, and if its investigation shows need for action, summons the parties before it, often prosecute or is the complainant, is not hampered by technical rules of evidence, and comes to a decision with dispatch. The agency is both

agencies as they affect persons outside the government, with the processes with which these powers are exercised and with the controls over such powers and processes."

In 1927 Justice (then Professor) Frankfurter defined administrative law as follows: "... administrative law deals with the field of legal control exercised by law-administering agencies other than the courts, and the field of control exercised by the courts over such agencies." Frankfurter. The Task of Administrative Law. (1927) 75 U. of Pa. Law Rev. 614, 615. The recently adopted administrative procedure act defines agency as follows: "Sec. 2 (a) Agency means each authority of the Government of the United States other than Congress, the courts, or the governments of the possessions, territories, or the District of Columbia."

While the bulk of matters coming before administrative agencies are controversies between the government and private persons, there are numerous matters coming before such agencies that are disputes between individuals or persons, such as workmen's compensation cases, reparation cases under the Interstate Commerce Commission between shippers and carriers, and similar proceedings under state statutes, matters before the National R.R. Adjustment Board, and representative proceedings before the National Labor Relations Board.

527 Am. Bar Assoc. Journal 52. President Roosevelt further said in this message:

"Before the commencement of this administration the Supreme Court speaking through its present Chief Justice definitely recognized the usefulness and constitutionality of the administrative tribunal, referred to the obvious purpose of the legislation to furnish a prompt, expert and inexpensive method for dealing with a class of questions which are peculiarly suited to examination and determination by an administrative agency assigned to that task."

6 In support of the popular theory Mr. Justice Jackson, in an opinion concurred in by Mr. Justice Frankfurter, in the case of Sec. Exch. Comm. v. Chenery Corp., 91 L.Ed. 1995, 2004-5 (1947) says: "I have long since urged and still believe, that the administrative process deserves fostering in our system as an expeditious and non-technical method of applying law in specialized fields." (emphasis supplied).
prosecutor, judge and jury. These agencies handle multitudinous small matters in which the parties are not represented by attorneys, at which hearings, the presiding officials are not trained in the rules of evidence, such as engineers, physicians, accountants, barbers, beauticians and numerous specialists none of whom are either lawyers or judges. On the other hand some agencies handle matters of great magnitude and importance. A pertinent example of such is the case of *Federal Trade Commission v. Cement Institute.*

This originally was a hearing before the Federal Trade Commission. Mr. Justice Black in his introductory statement of facts in the Supreme Court's opinion says:

"These respondents are: The Cement Institute, an unincorporated trade association composed of 74 corporations which manufacture sell and distribute cement, the 74 corporate members of the institute and 21 individuals who are associated with the Institute. It took three years for a trial examiner to hear the evidence which consists of about 49,000 pages of oral testimony and 50,000 pages of exhibits. Even the findings and conclusions of the Commission cover 176 pages. The briefs with the accompanying appendixes submitted by the parties contain more than 4000 pages." (p. 705)

While the foregoing is probably an extreme case it shows the important part that the administrative agency plays in our scheme of government especially as its findings are generally for all practical purposes conclusive.

The historic division of government into legislative, executive and judicial departments is not clear cut. They often overlap. In the field of public law, including the regulation of different businesses affecting the public—the control of health, education, public utilities, insurance, banking etc.—these agencies legislate and adjudicate, and are not bound by the strict rules of evidence. The proponents of the popular theory can amply justify the abandonment of most of the more technical rules at agency hearings.

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7 The state licenses and regulates numerous trades, professions and personal activities such as accountants, architects, attorneys, barbers, beauticians, chiropractors, podiatrists, dentists, embalmers, osteopaths, pharmacists, physicians, surveyors, veterinarians, automobile operators, aircraft airmen and airports, hotels, restaurants, saloons, warehouses and warehousemen, banks, insurance companies, sale of securities, wholesale liquor dealers, those about to marry, etc., etc.

7a 333 U.S. 683, 687, S.Ct. 793 (1948).

8 Mr. Justice Holmes in Springer v. Philippine Islands, 277 U.S. 189, 209-11 (1928) says: "The ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. . .We do not carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so."

9 Professor Davis writing in the Harvard Law Review in 1942 says: "Almost everywhere, except in the common law world, the rules of evidence are un-
The courts are often of necessity obliged to make decisions on hearsay reports based on investigations made by various welfare, probationary and other officials, and on other evidence clearly not admissible, even before a court sitting without a jury. While it is true that Mr. Roosevelt's theory (the popular theory) would produce dispatch in government business transacted by its agencies and commissions, the individual citizen would have little or no protection from possible bureaucratic absolutism. The lack of orderly procedure before these agencies, especially in contested matters, and the limited right of appeal or review, infringes on the individual's constitutional right of "due process," under the Fifth as well as the Fourteenth Amendments of the Constitution. The popular theory has been referred to by former Chief Justice Hughes as personal government rather than government by law. 9a

The second or orthodox theory, sometimes called the technical rule, goes to the other extreme; it prescribes strict rules of evidence at agency hearings. It has been advocated, at least by reference, by the conservative justices of the Supreme Court, notably Justices Sutherland, Butler, Chief Justice Hughes, and by Dean Roscoe Pound10 of known. Among English-speaking peoples the rules have developed only in the last few centuries. In the United States reversals by appellate courts for erroneous admissions far exceed those in England. . . The detective, the banker, the physicist, the statistician, the investigator find facts without formality and without rules. No pretense is made of applying the rules of evidence in many hearings conducted by private arbitrators, private associations, social case workers, labor arbitrators, and international arbitral tribunals. Even in courts, the findings made without the application of the rules of evidence are far more numerous than is customarily recognized. Juvenile courts, municipal courts, police courts, summary courts, and the like, are frequently quite unaware of the orthodox rules. Admiralty courts, especially in prize cases, frankly reject the idea of formal rules of evidence. In the ordinary law and equity courts, state and federal, the use of affidavits in granting ordinary restraining orders and temporary injunctions is familiar and interlocutory questions of fact of various kinds are often decided on the basis of evidence which the rules would exclude. Grand juries in many jurisdictions may consider all evidence that comes to their attention, relevant and irrelevant. In various administrative duties, instructing or discharging fiduciaries, for example, judges act upon information made available to them. In habeas corpus and extradition cases there are immense bodies of authority to the effect that though liberty of the person is involved, decisions may be based upon affidavits and ex-parte statements, dispensing to that extent with the right of cross-examination. And most amazing of all (to me shocking) is the seemingly universal practice of acting on unsworn statements, or affidavits or secret information and denying the right of introducing rebuttal evidence when the judge of a criminal court finds facts in order to fix the sentence of a convicted defendant. The finding may make the difference between a suspended sentence and a twenty year term in the penitentiary and yet the defendant may be denied, even the opportunity of knowing the nature of the decisive evidence and the opportunity to rebut it. A combing of the opinions upholding these practices yields as a sole justification . . . that sentencing is a matter of discretion of the trial judge and therefore the rules of evidence need not apply. The bulk of agency business in broad way more nearly resembles the functions which judges exercise without regard for the traditional rules." 55 Harvard Law Rev. 364, 367-9 (1942).

9a See note 11 post.

10 Dean Pound reviewing the annual survey of American Law (1944) says:
the Harvard Law School. Justice Hughes, in 1920, in a public address, referring to such agencies said that “they represent to a striking degree a prevalent desire to do without law.”

In the last fifty years administrative agencies, both state and federal, have encroached to an alarming extent on the domain of private law. These agencies make findings of fact, that are generally not review-able. Where review is taken, their findings, even as to the application of the statute, are accepted as the informed opinions of specialized experts. They are a fourth department of the government, with a law unto themselves, and are subject to political pressure more so than the courts. Mr. Justice Sutherland, speaking for the court in the Jones case, said that “our institutions must be kept free from the appropriations of unauthorized power” by those lesser agencies. Mr. Justice Hughes in the St. Joseph's Stockyards Co. case said: “Legisla-tive agencies with varying qualifications, work in a field peculiarly exposed to political demands. They may be expert and impartial, others subservient.”

“Even more significant is the marked preponderence of public and adminis-trative law—of determinations of administrative agencies and officers affect-ing everyday rights of individuals over the law applied by the courts governing private relations. The survey as a whole suggests Jenning's proposition that in the English-speaking world public law is swallowing private law. Also the reviews of the different subjects seem to reflect a steady growth of extra-legal if not lawless exercise of official power and rise of official absolutism. In connection with the tendency to concede the widest power and freedom from official scrutiny to administrative agencies, this suggests a change in our policy in the direction of centralized absolutism. In the same direction the decisions show a tendency to extreme interpretations and to accept extreme interpretations made by administrative agencies,” 33 Am.B.Assoc. J. 1093-1095 (1947) (Italics added).

12 “the factual findings made in the administrative proceeding will not be reviewed by the courts if any reasonable support exists in the record.” John Schulman, Supra.
The objection to the technical rule is that it is impractical. The administrative agency is often necessarily composed entirely of laymen who have no knowledge of the rules of evidence, and as Judge Dibell of the Minnesota Supreme Court aptly said, in the Hardstone Brick Co. case:

"It is a mistake to suppose a conclusion can not be reached safely by administrative bodies unless they proceed in accordance with jury trial rules of evidence. . . Most of the world's work is done without. . . There was ample evidence the admissibility of which can not be questioned in such a proceeding as this to sustain the findings of the commission. . . The court can make but a limited review of the determination of the department. If it keeps within its jurisdiction and its action is not arbitrary or oppressive or unreasonable or without evidence to support it the court can not interfere. . . How far courts should go in permitting evidence not receivable in common law trials is in part a question of policy. . . The department went far afield. In no event was the relator prejudiced. The result reached by the department was practically the necessary one."

The third or modern theory as to the field of the administrative agency, which admits a just basis for the popular as well as for the technical theory, is a compromise. Congress and some state legislatures, have through their uniform administrative acts provided for a fair hearing, upon due notice, reasonably probative evidence, right of review and protection of the individual from the "official absolutism" referred to by Dean Pound.

In 1939 Chief Justice Stone advocated collaboration between court

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24a State ex rel Hardstone Brick Co. v. Department of Commerce, 174 Minn. 200-203, 219 N.W. 81 (1928).
15 Professor Wigmore suggests a compromise between the popular and the technical theories, See Vol. 1, Wigmore on Evidence, 3rd ed. page 27-43.
16 The modern school philosophy is epitomized by Mr. Justice Frankfurter in in U.S. v. Ruziska, 91 L.Ed. 290 (Dec. 16, 1945) where he says: "Both courts and administrative bodies are law enforcing agencies, utilized by congress as such. In construing the enforcement provisions of legislation like the Marketing Act, it is important to remember that the courts and administrative agencies are collaborative 'instrumentalities of justice' and not business rivals."
17 The Wisconsin Act provides (Wis. Stat. 227.10-1) that agencies shall not be bound by common law rules of evidence but shall admit all testimony having reasonably probative value; "but shall exclude irrelevant or unduly repetitious testimony. . . Basic principles of relevancy, materiality and probative force, as recognized in equitable proceedings, shall govern the proof of all questions of fact."
18 The North Dakota Act (N.D.Stat. 28:3206) provides that in agency hearings the common law rules of evidence may be waived "if such waiver is necessary to ascertain the substantial rights of all the parties" but that only evidence of probative value shall be accepted.
19 See note 10, supra.
20 In the third Morgan case (U.S. v. Morgan, 307 U.S. 191, 1939) the court said: ". . . in construing a statute setting up an administrative agency and provid-
and agency. The tendency on review of administrative decisions is a liberal one\(^2\) as long as the constitutional rights of the individual are preserved. Even legal inferences, according to the later decisions,\(^2\) will not be disturbed, if based upon substantial evidence and are not contrary to law.

Regarding the field of the administrative agency, Professor Brown\(^2\) says:

"We are undoubtedly at a critical time in the growth of administrative law. The great advances now being made in governmental control of private industry and business undoubtedly call for a greater reliance on administrative agencies as instruments of control and even in the traditional field of legislative and judicial action there is an increasing demand for conferring upon administrative tribunals the functions formerly performed by legislatures and courts. Up to the present time, unfortunately this system of administrative lawmaking and adjudication has largely, like Topsy, 'just grewed'. As new needs have developed, new executive tribunals have been created to meet them...the present development is a singularly haphazard and unplanned thing, with far too little attention being paid to principles and details of organization and procedure, which aim to secure that proper balance between public demands and private right, without which no governmental agency deserves to exist." (italics supplied)

\(^2\)In N.L.R.Bd. v. Donnelly Garment Co., 91 L.Ed. 584.867 (1947) Mr. Justice Frankfurter says: "Even in judicial trials, the whole tendency is to leave the rulings as to the illuminating relevence of testimony largely to the discretion of the trial court who hears the evidence...Courts of appeal are less inclined to base error on such rulings. Administrative tribunals are given freer scope in the application of the conventional rules of evidence."

\(^2\)Justice Murphy in Cardillo v. Liberty Mutual Ins. Co., 91 L.Ed. 1028, 1036-37 (1947) says: "It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner is charged with the duty of initially selecting the inference which is most reasonable and his choice if otherwise sustainable, may not be disturbed by a reviewing court...even if such an inference be considered more legal than factual in nature, the reviewing courts' function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by law. Such is the result of the statutory provision forbidding suspension of compensation orders only 'if not in accordance with law'. Our attention must therefore be cast upon the inference drawn by the Deputy Commissioner in this case that Ticer's injury and death did arise out of and in the course of his employment. If there is factual and legal support for that conclusion our task is at an end." (italics supplied).

\(^2\)"Administrative Commissions and the Judicial Power." Ray A. Brown, Pro-
Administrative agencies are neither courts nor legislative bodies. They legislate and adjudicate. They "are delegated specific jobs relating to a particular subject in the course of which it may be necessary to settle disputes adjudicatively or make subsidiary interpretations of policies or both." Their task is a unitary process in which the adjudicative and legislative or rule making functions often coalesce, and in such proceedings the courts hold that "due process" requires the formalities of judicial procedure except where the agency action is purely the making of rules and regulations.

Findings of fact by an administrative body may be declared by statute to be conclusive. If proper procedural requirements have been taken and if the findings are supported by substantial evidence there is no violation of due process.

Hearsay evidence alone uncorroborated by competent testimony will not support a finding except in complicated cases of a specialized nature, where it is practically the only evidence available. As to judicial notice administrative agencies may notice the same facts as courts and in addition thereto matters of common knowledge in their specialized field and from their experience in handling similar cases. As to

Professor of Law, University of Wisconsin, (Feb. 1935) 19 Minn. Law Rev. 261, 263.


"Because of the different constitutional requirements imposed by the courts on what they designate as a process of a judicial nature as distinguished from from one of a legislative nature, it is necessary to keep rule making and adjudication as distinct as possible. The Federal Administrative Procedure Act treats them in separate sections and provides for somewhat different procedures, although several statutes require that the agency conduct its rule making like those of a political tribunal." Carrow, op. cit. p. 36.

In a concurring opinion in St. Joseph's Stockyards Co. v. U.S., 298 U.S. 72-73, (1936) Mr. Justice Brandies says: "Is there anything in the constitution which expressly makes findings of fact by a jury of inexperienced laymen, if supported by substantial evidence, conclusive, that prohibits congress making findings of fact by a highly trained and especially qualified administrative agency likewise conclusive, provided they are supported by substantial evidence. The inexorable safeguard which the due process clause assures us is, not that a court may examine whether the findings as to the value or income are correct, but that the trier of facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."

Hoyt, Some Practical Problems met in the Trial of Cases before Administrative Tribunals, (1941) 25 Minn. Law Rev. 545-551. He says: "Summarizing the present state of the law with respect to the admissibility of hearsay testimony before the administrative tribunals, it can probably be said with safety that the mere admission of such testimony is not reversible error, but that the use of such testimony as the sole basis for a vital finding, through permitted in small minority of states, is generally frowned upon by the state and federal courts, except where the fact to be proved is of so complicated a character that some degree of hearsay is practically a necessity."

id. p. 554.
the use of ex-parte investigations\textsuperscript{28} of agency officials, they can not be used as a basis for a decision unless made a part of the record, and subject to cross-examination. Regardless of the admission of incompetent evidence, including uncorroborated hearsay or unauthorized judicial notice, if there is substantial evidence to support the findings, the reviewing court will not interfere, unless the erroneous testimony was clearly prejudicial.\textsuperscript{29}

The administrative agency may go farther than determine the facts; it may declare a new principle based on its specialized experience, if there is substantial evidence to support it, and the determination is reasonable and within the authority of the agency under the statute creating it.\textsuperscript{30} Agency regulations and interpretations of the statute are given respect and due consideration by the courts and sometimes "decisive weight."\textsuperscript{31}

Where the agency makes a determination that is reasonable and fair, the court will not disturb it, if the agency acts within its delegated


\textsuperscript{29} id. p. 558-559.

\textsuperscript{30} In Securities Exc. Com. v. Chenery Corp. 91 L.Ed. 1995, 2004-5 (1947), the court says: "The scope of our review of an administrative order is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern. Our duty is at an end where it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress... We are unable to say in this case that the Commission erred in reaching the result it did. The facts being undisputed we are free to disturb the Commissioner's conclusions only if it lacks any rational and statutory foundation. In that connection the Commissioner made a thorough examination of the problem, utilizing statutory standards and its own accumulated experience with reorganization matters. In essence it has made what we indicated in our prior opinion would be informed, expert judgment on the problem. It has taken into account 'those more subtle factors in the marketing of utility securities that gave rise to the very evils that the Public Utility Holding Company Act of 1935 was designed to correct' and has relied upon the fact that the 'abuse of corporate position, influence and access to information may arise questions so subtle that the law can deal with them effectively, only by prohibitions not concerned with the fairness of a particular transaction.' In Dobson v. Comm. of Int. Rev., 320 U.S. 489, 502 (1943) the court says: "In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. The Tax Court is informed by experience and kept current with tax evolution and need by the volume and variety of its work. While its decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible."

\textsuperscript{31} In Skidmore v. Swift & Co., 89 L.Ed. Adv. Ops., 125-128, 323 U.S. 134-140, (1944) Mr. Justice Jackson says: "The fact that the administrators policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This court has long given considerable and in some cases decisive weight to Treasury decisions and to interpretative regulations of the Treasury and other bodies that are not of adversary origin. We consider the rulings, interpretations and opinions of the Administrator under the Act (Fair Labor Standards Act) while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance." See Armour & Co. v. Wantock, 323 U.S. 124.
power, (i.e. has jurisdiction), and there is no question of constitutional right.\textsuperscript{32}

In administrative hearings, while the technical rules of evidence, are not binding, the agency findings must be based on reasonably probative testimony and not on mere rumor or uncorroborated hearsay.\textsuperscript{33}
The doctrine of res adjudicata does not apply to decisions of administrative agencies.\textsuperscript{34}

The application of the modern theory as to hearings before governmental agencies is exemplified in the case of \textit{Federal Trade Commission}.

\textsuperscript{32} In the case of Interstate Comm. Comm. v. Illinois, 215 U.S. 452, (1910) Mr. Justice White speaking for the court, said: "The statute endowing the commission with large administrative functions and generally giving effect to its order concerning complaints brought before it without exacting that they be previously submitted to judicial authority for sanction, it became necessary to determine the extent of the powers which the court may exert on the subject. Beyond controversy in determining whether an order of the commissioner shall be suspended or set aside we must consider: (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence, it may be contained in the previous one, viz, whether even if the order is made in form within the delegated power, the exertion of authority which is questioned has been manifested in such an unreasonable manner as to come in truth to be within the elementary rule that the substance and not the shadow determine the validity of the exercise of the power. . . Plain as it is that the powers just stated are the essence of judicial authority and which therefore may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may under the guise of exerting political power usurp merely administrative functions by setting aside a lawful administrative order upon our own conception as to whether the administrative power has been wisely exercised. Power to make the order and not the mere expediency or wisdom of having made it is the question."

\textsuperscript{33} In the case of Consolidated Edison Co. v. N.L.R.Bd., 305 U.S. 197 (1938) Chief Justice Hughes says: "The companies urged that the board received 'remote hearsay' and mere rumor. The statute provides that 'the rules of evidence prevailing in the courts of law and equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of the technical rules so that the mere submission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. But this assurance of a desired flexibility in administrative procedure does not go so far as to justify orders without basis in the evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." In the case of N.L.R.Bd. v. Remington Rand Co., 94 Fed. 2nd 862-873, (1938) Circuit Judge Hand says: "The examiner was quite within his powers in examining the witnesses; a judge often does. He did admit much that would have been excluded at common law, but the act specifically so provides. No doubt that does not mean that mere rumor will serve to support a finding, but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs."

\textsuperscript{34} State ex rel Zoning Board of Appeals (Wisconsin, 1948), 35 N.W. (2nd) 312. The doctrine of res adjudicata does not apply to decisions of administrative bodies. See also Duel v. State Farm Mutual Auto Ins. Co., 1 N.W. 2nd 887, 2 N.W. 2nd 871. In the latter case the court says: "The extent of the power of an administrative agency to reconsider its own findings has nothing to do with res adjudicata; the latter doctrine applies solely to courts."
v. Cement Institute,\(^3\) where Mr. Justice Black speaking for the court says:

"Administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence... and of course rules which bar certain types of evidence in criminal and quasi-criminal cases are not controlling in proceedings like this where the effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress. ... We sustain the Commission's holding... In doing so we give great weight to the Commission's conclusion, as this court has done in other cases. In the Keppel case the court called attention to the express intention of Congress to create an agency whose membership would at all times be experienced, so that its conclusions would be the result of an expertness coming from experience. We are persuaded that the Commission's long and close examination of the questions it has decided have provided it with precisely the experience that fits it for the performance of its statutory duty. The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practice—that kind of practice, which if left alone destroys competition and establishes monopoly."

In this case the Court of Appeals reversed the Federal Trade Commission, and the Supreme Court reversed the Circuit Court of Appeals and approved the findings of the commission.

The expertness of the administrative agency in its own peculiar field is not only given great weight by the courts but it has been held that the agency may disregard expert testimony given before it, if such testimony is contrary to the expert experience of the agency.\(^4\)

There are however some courts who do not subscribe to this doctrine. In a recent federal case\(^3\) Circuit Judge Clark, reversing an affirmance of an order of the Patent Office, says:

"The majority of this court are of the opinion that the learned trial court takes altogether too narrow a view of its own jurisdiction. It proceeds upon the theory that the case is one for the strict and extreme application of the doctrine of administrative finality which might better be known as 'administrative infallibility.' But whatever may be one's opinion of this doctrine, it has no possible application in this case... The whole theory of administrative finality stems from the assumption that the administrative agency is composed of 'experts', in many instances a most erroneous assumption."

\(^3\) 333 U.S. 683 (1948).
\(^4\) McCarthy v. Industrial Comm., (Wis., 1927), 215 N.W. 824.
\(^3\) Dorsey v. Kingsland, 173 F. (2d) 405, 408 (1949).
II.

The recent federal "Administrative Procedure Act" was initially prepared and sponsored by the American Bar Association. The title to the act is significant. It is "An act to improve the Administration of Justice by prescribing Fair Administrative Procedure." (Italics supplied). The committees of the association had been working on this subject several years prior to 1946, when the association persuaded Congress that the procedure in hearings before federal agencies needed revamping in order to secure for the individual a fair hearing. The act provides for public information by publication in the Federal Register of the scope of the agency's powers, methods of procedure, rules and availability of its records for public inspection. That notice of proposed rule making be published; that interested parties be able to participate in rule making; that no rule take effect until thirty days after publication. In adjudicative matters requirements are due notice, pleadings and a hearing; written findings with reasons therefor, arrived at by 'reliable, probative evidence' on consideration of the entire record; adjudication being separate and independent of the investigative and prosecution function; decisions to be made by hearing officers or upon the record submitted with argument; ample provision for review which may compel agency action delayed, or set aside the same when arbitrary, contrary to constitutional right, in excess of jurisdiction, not supported by substantial evidence, all with due regard to the prejudicial error rule. Declaratory rulings may be made.

During the past twenty years there has been a growing demand for improvement in state agency proceedings to secure therein a proper balance between public interest and protection of private right. In 1930 the Governor of New York appointed Mr. Benjamin to study the administrative agencies of that state. The American Bar Association from 1933 to 1936 through its special committees submitted recommendations for the improvement of administrative procedure, both state and federal. In 1939 the Association's committee prepared a uniform state act covering the basic principles of fair administrative procedure. Using this act as a pattern the National Conference of Commissioners on Uniform State Laws, as its October, 1946, meeting, approved the Model State Procedure Act. This Act or the previous association act has been enacted by about a dozen states.

36 Sec. 7. (c).
38 Am. Bar Assoc. Reports for 1933 to 1939, inc.
39 California, Illinois, Indiana, North Dakota, North Caroline, Ohio, Pa., Mo. and Wisconsin. The uniform state act prepared by the Bar Assoc. committee was adopted in Wisconsin and Ohio in 1943; in N.D. 1941. This was before the adoption of the model state act by the Comm's. on Uniform State Laws.
The state act attempts to cover only the fundamental principles of fair play and common sense that should have uniform application in state agency hearings and procedure. It consists of only thirteen sections, not including the usual formal sections of severability, repeals and time of taking effect. It covers the legislative phase of agency action, that in rule making, notice to be given to interested parties with opportunity for a hearing and to advice as to the propriety and necessity of particular rules, and that new rules may be proposed, as also amendments to existing rules; that ample publication be made. That the validity of a rule may be passed upon by the appropriate court; and that the agency make declaratory rulings as to the application of a rule to a specific fact situation. The model act covers the judicial phase of agency action by providing for due notice, reasonable rules of evidence, and written findings\(^4\) made by the examiner who heard the testimony; and finally adequate and uniform provision for review.

III.

The Minnesota Statute devotes only nine sections to administrative procedure as such.\(^4\) State agencies are empowered to make and amend rules, upon notice and public hearing. Agency regulations are subject to approval of the attorney general, are filed with the secretary of state, and with the clerks of each District Court in the state; and are to have the force of law. The attorney general, the secretary of state and the commissioner of administration are constituted a publication board, charged with the compilation of periodic publications of agency rules and regulations; they being entitled to judicial notice and a rebuttable presumption of validity. There is no statutory provision for procedure or evidence in contested cases, for declaratory rulings, or that the official who signs the findings have knowledge of the record, or that official notice be taken of generally accepted facts within the specialized knowledge of the agency. No provision is made for review except as may be prescribed in the act creating the agency. Redress can be had in most cases by certiorari, mandamus, prohibition, 

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\(^4\) The practice of responsible agency heads who are not familiar with the evidence "rubber stamping" the findings of a subordinate is condemned by the courts. In Morgan v. U.S., 568. (1936) Chief Justice Hughes says: "The weight ascribed by law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer making the findings had addressed himself to the evidence and upon the evidence has conscientiously reached the conclusions which he deems it to justify. That duty can not be performed by one who has not considered the evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear." See also Kaegi v. Industrial Commission, 285 N.W. 845 (Wis., 1939).

\(^4\) 1945 Minn. Stat. 15.041 to 15.049 inc.; Laws 1945, Chap. 452 and 459.
quorom warranto, or other of the extraordinary remedies. Available review of adverse agency action is often a matter of grave uncertainty.\textsuperscript{41a}

It is doubtful that the Minnesota Statute\textsuperscript{42} covers contested cases. The Minnesota State Bar Association in 1946 adopted the following resolution:

"Be it resolved, that the Minnesota State Bar Association favors the passage by the Legislature of an act abolishing the writs of certiorari, mandamus, and prohibition. \textit{...} and substituting therefore, a simple practice act based upon petition and order."

The State Bar's administrative law committee, reporting to the 1948 convention, advocated the exactment of "A well rounded administrative code which would include at least procedure for the issuance of declaratory rulings and review thereof and uniform and simple procedure for judicial review in contested cases."

This committee prepared an administrative procedure act which was presented to the 1949 legislature, but it died in committee. This proposed act falls far short of "a well rounded code." In agency hearings it permits opinion as well as hearsay evidence and makes no provision for declaratory rulings\textsuperscript{43} or a simplified form of review.

IV.

In Minnesota as far back as 1913, it was recognized that the state administrative departments needed reorganization and simplification. A commission was appointed to study the 75 different government agencies in the interest of efficiency and economy. The commission's report to the 1915 legislature brought no results. Nothing further was done until the 1923 legislature appointed an interim committee which studied the reorganization plans of different states and as a result made

\textsuperscript{41a} The scope of the extraordinary remedies is so uncertain that lawyers often employ two or more of such means of review to be sure they are not thrown out of court on technical grounds. As a recent example of this where both certiorari and mandamus were used on the same set of facts see the two cases: State ex rel Spurck v. Civil Service Board, 32 N.W. (2d) 574, (June 11, 1948); State ex rel Spurck v. Civil Service Board, 32, N.W. (2d) 583, (June 11, 1948).

\textsuperscript{42} The only reference in the Minnesota Statute to contested cases is a single sentence, under the heading of, "Rules and Regulations." \textit{...} They (the agencies) shall prescribe reasonable notice, a fair hearing, findings of fact based upon substantial evidence\textsuperscript{4}. \textit{...} Minnesota should adopt the Wisconsin Act which is an entire chapter of the Wisconsin Statutes and a very complete and scientific administrative code, being Chapter 227 of the Wisconsin Statutes.

\textsuperscript{43} It is probable that the Minnesota Uniform Declaratory Judgment Act (M.S.A. 555.01 and 555.05) would empower the District Court to pass on the validity of an agency rule or regulation, and also as to the applicability of a regulation to a given situation on the application of an interested party. Most Minnesota agencies have adopted rules of procedure and have filed them with the secretary of state, but the official publication board has never functioned for the reason that the general publication and editing of the rules would cost more than the publication of the state statutes; that is to say that the cost is prohibitive.
a report to the 1925 legislature. This committee recommended the Massachusetts system for a department of administration having fiscal management of all state agencies; the establishment of civil service; control of departmental purchases and expenditures; approval of all contracts; the making of the biennial budget; the purchase of all supplies and equipment for all state agencies and institutions; that the then 92 existing boards and agencies be consolidated into a few major departments. The 1925 legislature, pursuant to this report, made a reorganization, by centralizing in the department of administration financial control of all state agencies; created an executive council and 13 administrative departments.

A second reorganization act was passed in 1939 which made minor changes in the 1925 general plan. The department of administration was placed under the control of a single commissioner of administration, who under the 1939 law became general business manager, budget commissioner, and purchasing agent for all state agencies, commissions, boards and institutions. Some of the original departments were reclassified and there were created a department of Public Examiner, a department of Social Security, including divisions of Public Institutions, of Social Welfare and of Employment and Security, and a Department of Taxation.

The only state agencies not under the control of the Commissioner

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44 "After a fierce battle in the legislature the reorganization bill was passed, after it had been considerably modified, and in the opinion of many competent critics, very much weakened. Not much was done in the way of eliminating useless and obsolete state functions or in making regroupings in the interest of efficiency. The outstanding achievement is the creation of administrative and financial control." Prof. Young, 10 Minn. Rev. Laws, 40-44 (see Laws 1925, c. 426). Justice Stone in the case of State ex. rel. v. Poirer, 189 Minn. 200, 201, 203, (1933) speaking of the 1925 act said: "The law of 1925 intended a thoroughgoing reorganization. Expressly by Art. I, sec. 1, all of said departments and all officials of state government were subjected to the new law. By Art. II sec. 2, all inconsistent former legislation are superseded, modified, or amended to conform to and give full force and effect to the provisions of this act... The purpose of the law of 1925 was so to organize and simplify the state government as to make it safe for the taxpayer. It was to be achieved through consolidating departments and increasing the power and consequently the responsibility of the governor for management of the state's business. The members of the dominating commission of the administration and finance serve at his pleasure. Art. III sec. 2. The thought was that the centralization of responsibility in the governor, more than anything else, would result in economy of administration and celerity and economy of needed action."

45 Minn. Laws 1925, Chap. 426.

46 Laws of 1939, Chap. 431 and 441.

The above mentioned reorganization acts of 1925 and 1939 have given to Minnesota a streamlined organization of its administrative agencies, which has set up those agencies in logical and related groupings, has centered responsibility in a relatively small number of key officials resulting in economy to the taxpayer and efficiency in the conduct of the state's business.

47 The major administrative departments are:

Executive Council (State Board of Investment, M.S.A. 15.01, 9001 to 23)
Department of Administration (M.S.A.16.01 to 16.62)
of Administration are the state university, municipal corporations, and political subdivisions of the state, and professional and regulatory examining and licensing boards.

The plan of Minnesota’s administrative agencies starts at the top with the elected constitutional officers; the governor, lieutenant governor, secretary of state, attorney general, auditor and treasurer. Then come the executive council, and the department of administration, presided over by the commissioner of administration.48 This is followed

Department of Agriculture, Dairy and Food (1945 M.S.A. 17.01 to 17.34)
Department of Civil Service (1945 M.S.A. 43.01 to 43.36)
Department of Commerce (Divisions of Banking, Insurance and Securities)
Department of Conservation (Divisions of Forestry, Game and Fish, Drainage and Waters, Lands and Minerals, M.S.A. 84.01-84.42)
Department of Education (Chaps. 128-130, 131, 132, 133, M.S.A. 1945)
Department of Health (Minn. Stat. Chaps. 145, 146, 147, 148.)
Department of Highways (M.S.A. 169.01 to 169.97)
Department of Labor and Industry, (M.S.A. 175.01 to 175.37)
Department of Public Examiner (M.S.A. 215.01 to .25)
Department of Social Security (Divisions of Public Institutions, Social Welfare, and Employment and Security.)
Department of Taxation (Board of Tax Appeals M.S.A. 270.01 to .26)
Railroad and Warehouse Commission (M.S.A. 216.01 to .68)
University of Minnesota, a Constitutional corporation; not subject to the Department of Administration—State v. Uni. of Minn., 175 Minn. 259 (1928)
University of Minnesota, a Constitutional corporation; not subject to the Department of Administration—State v. Unis. of Minn. 175 Minn. 259 (1928)

48 The executive council consists of the governor, the secretary of state, the attorney general, the auditor and the treasurer. The executive council has jurisdiction over the investments of state funds, depositaries of state funds, over state timber, mineral lands, settlement of claims as to land granted by the United States subject to confirmation by the legislature, relief of distressed school districts, issuance and sale of state bonds and certificates of indebtedness and emergency relief (M.S.A. 9.01 to 9.28). The state board of investment consists of the governor, state treasurer, state auditor, attorney general, and one of the regents of the University appointed from the board of regents. It has control and investment of school funds, permanent university fund, swamp land fund and other permanent trust funds of the state; also teachers insurance and retirement fund. (M.S.A. 11.01 to 11.09) The commissioner of administration is purchasing agent and general business manager for all state agencies, is charged with the purchase of all supplies, materials, equipment, printing, utility services for all state institutions, to maintain, operate supervise and control all state buildings; to prepare the biennial budget (under the supervision of the governor), to operate the allotment system; to approve all contracts and appropriations for state agencies. (M.S.A. 16.01 to 16.62) The public examiner is general auditor for all state agencies, officers and institutions. He shall audit the books of the state treasurer, and shall exercise a constant supervision over all public offices, agencies, institutions and all the
by the other administrative departments, the heads of which are appointed by the governor with the approval of the senate, the only exception being an elective railroad and warehouse commission.

V.

The Minnesota decisions defining the field of agency hearing and procedure adopt the modern or compromise theory above defined; also the substantial evidence rule. The extent of the review of administrative findings is limited to whether there was a denial of constitutional right (including due process), whether the agency had jurisdiction, and whether its action was arbitrary or basically unfair. The admissibility of incompetent testimony does not vitiate agency decision, if there is sufficient competent evidence to support the findings. Refusal to consider competent evidence is fatal, if it was such as could have affected the result. The credibility or weight of evidence can not be passed upon review. Agency expertness in its field is given considerable weight. Agency action may be compelled by mandamus, even though its findings may not thereby be controlled.

The scope of agency review in Minnesota is tersely stated in *State v. Jenson* as follows:

"In reviewing the determinations of administrative boards, such as the optometry board, this court will inquire no farther than to determine whether the board kept within its jurisdiction, divisions of the state government including counties, municipalities, school districts, towns and villages. He shall recommend systems of accounting and report irregularities and unbusinesslike practices to the governor, the legislature and to the department affected. (M.S.A. Chap. 215).

49 *State v. G.N.Ry.Co.*, 130 Minn. 57 (1915); *State ex rel City of Ely v. Minn. Tax Com.*, 137 Minn. 20 (1917); 162 N.W. 675; *Shain v. G.N.Ry.Co.*, 137 Minn. 157 (1917) 162 N.W. 1078; *State ex rel Dybdal v. State Sec. Com.*, 145 Minn. 221, 176 N.W. 759 (1920); *State ex rel Suari v. State Sec. Comm.*, 149 Minn. 101, (1921) 182 N.W. 910; *Chica.&N.W.Ry.Co. v. Verschingel*, 197 Minn. 580 (1936) 268 N.W. 709; *State v. TriState Tel.&Tel.Co.*, 204 Minn. 516 (1939) 284 N.W. 294.

50 In re *Mpls. & St.L.R.R.* 297 N.W. 805 (1933); *Hardsone Brick Co. case supra*

51 "The court does not consider the wisdom or expediency of the order. The court ascribes to the findings of the commission 'the strength due to judgments of a tribunal appointed by law and informed by experience' and its conclusion when supported by substantial evidence, is accepted as final." *State v. G. N. Ry. Co.*, 135 Minn. 19 (1916) 159 N.W. 1089. "The findings of the commission are entitled to great weight and we will not disturb them unless they are manifestly contrary to the evidence Colosimo v. Giacomo, 199 Minn. 600, 602, (1937) 273 N.W. 632. See also *Pechavar v. Oliver Mining Co.*, 196 Minn. 558 (1936), 265 N.W. 429, 268 N.W. 854. Benson v. Hygenic, Artificial Ice Co. 198 Minn. 250, (1936); 269 N.W. 460. Where there is a conflict in the evidence finding of commission will not be reversed. *Poster v. Schmahl*, 197 Minn. 602, 607 (1936) 268 N.W. 634; *Chamberlain v. Taylor*, 198 Minn. 274-6 (1936) 269 N.W. 525; *Reinhard v. Univ. Film Exc.*, 197 Minn., 371, 375 (1936), 267 N.W. 223. "Commission will not be reversed if reasonable minds can draw a conclusion in harmony with the commission." "Johnson v. Nash-Finch Co.*, 197 Minn. 616-617 (1936), 268 N.W. 1, *Brameld v. Albert Dickinson Co.*, 186 Minn. 289-292 (1932) 242 N.W. 465.

52 *Application of Mpls. Street Ry. (Minn. 1949) 37 N.W. 2d 533-537.*

53 205 Minn. 410, 286 N.W. 305 (1939).
whether it proceeded upon a proper theory of law, whether its action was arbitrary or oppressive, and whether the evidence affords a reasonable and substantial basis for the order sought to be reviewed."

The findings of an agency are not only entitled to great weight, but "the evidence must be viewed in the light most favorable to such findings." Where there is any evidence reasonably tending to sustain the findings of the director they will not be disturbed on review. "Fact questions or issues not raised before the commission will not be considered on review."

The most comprehensive statement on administrative law in the Minnesota decisions is the opinion in the Tri-State Telephones rate case, decided in 1939. Rate making is defined as an inherently legis-

54 "In reviewing findings of the Industrial Commission our function is not to determine whether on the facts the decision of the commission is correct or even preferable to another, but rather and only to determine whether the findings have sufficient basis of inference reasonably to be drawn from the facts. . .that the findings of fact of the commission are entitled to very great weight and. . .this court will not disturb them unless they are manifestly contrary to the evidence. . .in determining whether the facts and the reasonable inference to be drawn from them sustain the findings of the industrial commission, the evidence must be viewed in a light most favorable to such findings. Liakos v. Yellow Taxi Co., 225 Minn. 34-39, 29 N.W. 2d, 481-484 "and cases cited" Judd v. Sanitorium Commission of Hennepin County (1948) 35 N.W. 2d 431-433. "the findings of the Industrial Commission on questions of fact will not be disturbed unless a consideration of the evidence and the permissible inferences require reasonable minds to adopt contrary conclusions." Liakos v. Yellow Taxi Co. Supra. See also Miller v. Peterson Construction Co., 32 N.W. 2d 48-50 (Minn. 1949); also Hamlin v. Coolerator Co. (Minn. 1949) 35 N.W. 2d 616-622.

55 Hamlin v. Coolerator Co. supra. In the case of Chillson v. State Div. of Employment & Security, 214 Minn. 322, 336, 8 N.W. 42-45, the court said: "In reviewing an order or determination of an administrative board, the Supreme Court will go no further than to determine whether the evidence was such that the board might reasonably make the order or determination which it made." See also Stepan v. J. C. Campbell Co., 36 N.W. 2d 40 (1949).

56 Nelson v. Reid & Wackman, 36 N.W. 2d 544 (Minn. 1949).

57 In the case of Tri-State Telephone Co., 204 Minn. 616, 284 N.W. 294, 300, 303, the court said: "Due process demands that the rates be fixed only after a hearing attended by at least the rudiments of fair play. The commission is in consequence required to base its decision upon the evidence and arguments disclosed at the hearing: its order must be supported by findings of fact which are in turn sustained by the evidence. . .(p. 303) the findings of fact are conclusive provided that the requirements of due process are met by according a fair hearing and acting upon evidence and not arbitrarily and that in such a case the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings."

58 In the case of Arrow Bus Service Inc. v. Black & White Duluth Cab Co., (Minn. 1948) 32 N.W. 2d 590, 592, the court said: "The court may not assume the functions of the commission. To do so would be unconstitutional assumption of legislative powers. . .In a proper case it may determine the sufficiency of the evidence to support a finding or examine questions of law arising from such findings or in rate cases determine whether rates are confiscatory. It may exercise judicial, but not legislative powers." See also State R.R&W.H. Comm. v. M.&St.L.Ry.Co., 209 Minn. 564, 571-2, 297 N.W. 189, 193, also State v. N.P.Ry.Co.et al, 22 N.W. 2d 569-582 (Minn. 1946); also the Tri-State Tel. Tel. case, supra.
lative function. The substantial evidence rule, the requirements of due process, a fair hearing, decision based on sufficient findings of fact supported by the record, the weight to be given to agency competence especially in complicated cases, that the reviewing court can not resolve conflicting testimony or pass on credibility of witnesses, protection of right of review, are all set forth with citations from the Minnesota as well as from the Federal decisions. The reviewing court can not encroach on the legislative functions of an administrative agency. The entire record must be available to the reviewing court. Agency findings can not be based on anything outside of the record.

On questions of policy, the agency's decision is final as this is a legislative power. The determination of the State Railroad & Warehouse Commission as to what facilities should be furnished the public at a particular station is the exercise of a legislative power or a purely administrative function and will not be disturbed by the reviewing.

58 In the case of Hunter v. Zenith Dredge Co. (Minn. 1945) 19 N.W. 2d 795-799, where the statute provided that the findings of the medical board were binding on the commission but the law did not require the findings to be made a part of the record before the commission, the failure to include the findings in the record for the reviewing court was held a denial of right of review guaranteed by the Workmen's Compensation Act and by due process in both the state and federal constitutions for the reason that the entire record must be available to the appellate court.

59 In State ex rel, G. N. Ry. Co. 123, Minn. 463, 467, 114 N.W. 155, (1913) Judge Taylor says: "The question as to what accommodations are reasonably necessary to afford proper transportation facilities to the public is legislative or administrative, and not judicial in its nature; and the courts can interfere with the action of a body intrusted with the power to determine such questions only when such action oversteps the limitations, constitutional or otherwise, placed upon the exercise of such power."

In Brogger v. Chi. St. P., M. & O. Ry. Co., 137 Minn. 338, 340, 163 N.W. 662, (1917) the court says: "The Legislature has authorized the Railroad & Warehouse Commission to determine what transportation facilities are reasonably necessary for the accommodation of the public, and to require railroad companies to furnish such facilities which 'will promote the security and convenience of the public.' The power is legislative and administrative in its nature, and, in reviewing the orders of the commission issued thereunder, the courts can not substitute their own judgment, as to the necessity or propriety of a proposed change, for that of the commission, but must confine themselves to determination of the judicial questions committed to them." In St. Joseph's Stockyards Co. case, supra, Chief Justice Hughes says: "The fixing of rates is a legislative act. In determining the scope of judicial review of that act, there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative powers. Exercising its rate making authority, the legislature has a broad discretion. It may exercise that authority directly or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents. As to matters within the broad field of legislative discretion its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive provided the requirements of due process, which are specifically applicable to such agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. In such cases the judicial inquiry into the facts goes no farther than to ascertain whether there is evidence to support the findings and the question of weight of the
court subject only to the judicial limitations above set forth. Rate making is a legislative act, as also regulations of a barber board.60

VI.

One of the first states to enact a comprehensive administrative procedure act is Wisconsin. In 1943, before either the model state act or the federal act had been approved, Wisconsin passed a uniform procedure act covering fully the basic principles of fair administrative procedure. The Wisconsin act is a scientific codification of state administrative law and is more complete than either the state model act or the federal act. It makes ample provision for the making, amending, filing and promulgation of agency rules, declaratory orders and judicial review of the same.61 As to procedure in contested cases, timely notice of hearing, preliminary statement and notice61a (pleadings) of issues, reasonable rules62 of evidence, "official notice"63 of any generally recognized fact64 in the particular agency field, restriction to official record, sufficiency of findings of fact,65 are all provided for in adversary cases.

The agency official who decides must be familiar with the record, at least by personal consideration of a "summary of the evidence prepared by the person conducting the hearing together with his recommendations as to findings of fact" and opportunity for argument there-

60 Regulations of a barber board determining qualifications of barbers and teachers in barber colleges are not unconstitutional as an unlawful delegation of legislative power, the barber board having discretion to interpret the policy of the statute within reasonable limits to safeguard public health. Lee v. Delmont, 36 N.W. 2d 530, (Minn. 1949).

61 Wisconsin devotes an entire chapter of its statutes to administrative procedure and review—chapter 227. Wis. Statute 227.04 to .06 gives a few minor exceptions to its rule based upon conditions (local) and special circumstances. These are cases under the Workmen's Compensation Act, the Unemployment Compensation Act, assessment of public utility property for taxation, and purely local boards and agencies.

61a In a recent N.D. case the order of the N.D. Public Service Comm. was set aside because no formal statement or complaint of the claims of the petitioner had been served on the respondent as required by the N.D. Act. Petition of Village of Wheatland-N. P. Ry. Co. v. McDonald et al, 42 N.W. 2d 321, (N.D. Jan. 28, 1950).

62 Wis. Stat. 227.10 "Agencies shall not be bound by common law or statutory rules of evidence. They shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony . . . . Basic principles of relevency, materiality, and probative force, as recognized in equitable proceedings, shall govern the proof of all questions of fact." (italics supplied)

63 Wis. Stat. 227.10 (3) "Agencies may take official notice of any generally recognized fact or any established technical or scientific fact." But this may be contested.

64 Wis. Stat. 227.13. "Decisions. Every decision of an agency in a contested case shall be in writing, accompanied with findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each contested issue of fact without recital of evidence."
on by both parties. Right of review is fully provided for. Appeal may be taken from the reviewing court to the Supreme Court of Wisconsin.

VII.

As to procedure before Minnesota's administrative agencies, there was no uniform statutory guide until 1945, when state agencies were empowered to make and amend rules upon notice. By inference only the new legislation provided for a fair hearing in contested cases, and findings of fact based upon substantive evidence. The statute does not specifically cover adversary hearings. No uniform provision is made for review or for judicial or official agency notice. However, the Minnesota Supreme Court has fully set out the basic principles of administrative law as hereinabove set forth.

As stated there is in Minnesota no uniform provision for review of agency or commission orders. For example under the Securities Division (Blue Sky Law) the only review of an order is by certiorari from the Supreme Court, the district court is by-passed. In proceedings before the R.R. & Warehouse Commission review of final orders is taken to the district court and under the R.R. & Warehouse Statute the District Court may take further original testimony before it and consider such testimony in addition to the record before the Commission. However even in this case the general rule of administrative law is followed and the district court is merely a court of review. The

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66 Wis. Stat. 227.20. "The review...shall be confined to the record. (1) The court may affirm the decision of the agency, or may reverse or modify it, if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being (a) contrary to constitutional rights or privileges; or (b) in excess of the statutory authority or jurisdiction of the agency or affected by other errors of law; or (c) made or promulgated upon unlawful procedure; or (d) unsupported by substantial evidence in view of the entire record as submitted: or (e) arbitrary or capricious. (2) Upon such review weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved as well as discretionary authority conferred upon it."

67 Wis. Stat. 227.21. Review of agency decision is taken to the Circuit Court of Dane County, Wis. (the seat of government) unless otherwise provided in the particular statute. Under the Wis. Uniform Procedure Act a unified mode of review is prescribed from all agency or official decisions. Prior to this statute there were over 70 different statutes prescribing as many different modes of review.

68 M.S. Sec. 15.041 to 15.049 (Laws 1945 Chap. 452 and 590).
69 Wisconsin Agency Procedure Act, as above stated, is a complete code of administrative uniform procedure and review, and Minnesota would do well to adopt the Wisconsin Act, with such modifications as local conditions might require. On the other hand Wisconsin, as well as North Dakota, has no logical or related topical groupings of their state agencies or central fiscal and managerical control in the interest of economy and efficiency. These states could profitably copy the plan of the Minnesota state agency structure and classification.

70 M.S.A. 80.27.
71 M.S.A. 216.27-216.25.
Minnesota Supreme Court discussing the functions of the district court on appeal in matters of a policy or legislative nature before the R.R. & Warehouse Commission has said:²

"...The district court does not have the power on appeal or otherwise to exercise legislative or administrative power. On appeal from an order of the commission the court examines the whole matter in controversy to determine whether the evidence reasonably tends to support the findings of fact upon which the order must be based and to examine the questions of law arising from such facts. In deciding an appeal, the court, for lack of power, does not assume to exercise the functions of the commission to substitute its own findings for those of the commission. Nor does it act on its own conception of the wisdom of the order brought before it for review. It decides only the judicial questions, whether the order is reasonably supported by the evidence and whether it is lawful and reasonable. It does not try the case de novo. (italics supplied)

The lawfulness and reasonableness of the commission's order is to be tested by whether it kept within its jurisdiction, whether, in arriving at its decision it was guided by the controlling rule of law (in his case the statute) or acted capriciously and at pleasure, and whether the evidence fairly supports the findings on which its conclusions rest. . Its (the district court) appellate function embraces no power of revision, but only the judicial power of review to determine for itself, after an examination of the entire matter in controversy as to both questions of fact and law, whether the commission's findings of fact, upon which its order must be based, are reasonably supported by the evidence, and whether in the light of such factual findings its order is reasonable and lawful."³

VIII.

The proposal for a federal administrative court is now before the 81st Congress through Senator McCarran's bill (S.684) and that of Congressman Cellar (H.R.466) who are respectively the chairmen of the Senate and House Committees on the Judiciary. Senator McCarran with the sponsorship of the American Bar Association was mainly responsible for the new federal administrative procedure act which was evolved to improve the administration of justice by insuring to the average citizen a fair and impartial hearing before the agency. The pro-

²Northern Pac. Ry. Co. v. Village of Rush City, (Minn. 1950) 40 N.W. 2d 886, 891.
³Northern Pac. Ry. Co. v. Village of Rush City (Minn. 1950) id. In this case the district court set aside and vacated the order of the Railroad & Warehouse Comm. and the Supreme Court affirmed the judgment of the District Court. As to review of agency-rule making and also public hearings prior to agency rule-making, see the recent and able discussion in Chap. X of Judge Vanderbilt's work "Minimum Standards of Judicial Administration" (1949) published by the Law Center of New York University for the National Conference of judicial Councils. Judge Vanderbilt recommends a general statutory requirement for review of agency rule-making and action for a declaratory judgment. I assume that our Minnesota declaratory act would be available.
posed federal administrative court is a necessary and natural corollary to the administrative act to secure to an aggrieved litigant either a further hearing in certain cases or a right of appeal to this higher specialized tribunal. Mr. Louis G. Caldwell of the District of Columbia Bar, writing in the American Bar Journal for January 1950, describes the proposed court as a step in the right direction. He states the advantages of the new court to be specialization on review or appeal, also promotion of "uniformity both in the substantive and adjective law in the administrative process, including the umpiring of jurisdictional clashes which so often occur between agencies." Also a specialized court would afford relief to other overburdened federal courts not specially qualified to handle administrative disputes. The present federal courts have naturally sidestepped an intense and detailed review of agency hearings and decisions. Mr. Caldwell says:

"In a large measure the courts have denied themselves the power to review determinations of these agencies almost entirely on issues of fact and to some extent on issues of law. Although the Constitution was usually invoked as a reason, I venture to say that a most important factor in this self denial was a sense of inadequacy for such burdens and a reluctance so greatly to increase the judicial work load. This can be read between the lines in several Supreme Court decisions. These three advantages, expertness through specialization, development toward uniformity, and relief of the federal courts seem to me to amply justify this comparatively mild and cautious experiment."

As far back as 1929 Marvin B. Rosenberry, the scholarly Chief Justice

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74 Senator McCarran's proposed court would consist of 5 judges appointed as other federal judges except that the appointees would have special qualification of training and experience in administrative as well as other law. None of such appointees would within 5 years of his appointment have been an officer or employee of the executive branch of the government because among other things such judges would be obliged to disqualify themselves in many cases and would lead people to feel that such a court would be unduly partial to government agencies. The jurisdiction of the court would be confined to agency matters although not exclusive of other federal courts. "The procedure of the court would be of two kinds, for each kind it would be similar to that with which we are all familiar. When the court sits as a trial court, it would operate like other trial courts—with one or more judges, etc. It would also be a reviewing or appellate court in the same fashion as other courts—with three or more judges sitting in a case. In other words there would be nothing unusual about the method and procedure in the court. It might operate anywhere in the country, however depending upon the needs of its business as time goes on. In appropriate cases as required by the Constitution, and in any case in which the Court would fail to afford equal protection to the parties before it, appeals could be taken to the Supreme Court in the same fashion as in other cases in other courts." (95 Cong. Rec. 573, 575). In no event would the new court supersede the Court of Claims, the Customs and Patent Courts or the Tax Court. We are advised by Senator McCarran's office that this bill for the proposed court will not be reached by the present Congress.

of the Supreme Court of Wisconsin, writing in the Political Science Review envisaged the need of an administrative court. He said:

"That the development of administrative law must stop short of combining in one person or group, legislative, executive, and judicial power which may be exercised arbitrarily, without preserving to the party claiming to be deprived of his life, liberty, or property, a right of review, appears axiomatic. It seems probable that the matter will be worked out by way of constitutional amendment, permitting the creation of a court comparable to the French Council of State, in order that highly technical and complex questions involved in administrative law may be reviewed by a competent tribunal." 

The doctrine of the separation of powers and the prohibition of delegation of legislative power conflict with the powers that are conceded necessary to governmental agencies. The task of the federal administrative procedure act recently adopted and Senator McCarran's proposed federal administrative court is to control and limit these administrative commissions, bureaus and agencies so as to keep a proper balance between the public welfare and individual right. At the state level this should be done by state administrative procedure acts (which have been enacted in a number of states) and the state courts. In the leading Wisconsin case of State ex rel. Wis. Inspection Bureau et al v. Whitman, State Comn'r of Ins. Judge Rosenberry explores the field of agency powers. He says:

"The essential fact upon which courts, legislatures, and executives, as well as students of law agree, is that there is an overpowering necessity for modification of the doctrine of separation and non-delegation of powers of government. In the face of that necessity, courts have upheld laws granting legislative power under the guise of the power to make rules and regulations, have upheld laws delegating judicial power under the guise of the power to find facts. As Mr. Root said: 'The old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and Courts as in the last generation. 'The public interest would be greatly advanced and our law clarified, if the situation as it exists were frankly recognized and an attempt made by all departments of the government to guard against the dangers foreseen by Montesquieu and apprehended by every thoughtful student of the subject. For there can be no doubt that, in sus-

76 Vol. 23 American Political Science Review p. 32, 43 (Feb. 1929).
77 196 Wis. 472, 220 N.W. 929 (1928).
taining laws which combine legislative and judicial power in a single administrative agency, we are on the way back to where we were when the doctrine of the separation of powers was enunciated as a political theory, and before it had been wrought into our constitutional system. It is considered that the constitutional aspects of administrative law have been so far developed by statute and decision as to indicate in a general way the line which separates that kind of legislative power which may not be delegated from that kind which may be delegated. The power to declare whether or not there shall be a law; to determine the purpose or policy to be achieved by the law; to fix the limits within which the law shall operate is a power which is vested by our Constitution in the Legislature and may not be delegated. When, however, the Legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose; in the language of Chief Justice Marshall, 'to fill up the details'; in the language of Chief Justice Taft, 'to make public regulations interpreting the statute and directing details of its execution.' It is legislative power of the later kind which is oftentimes called the rule-making power of boards, bureaus, and commissions. The delegation of power to subordinate administrative agencies is fraught with danger, for the reason that it introduces into our system of governmental agency which may exercise some of the powers of each of the co-ordinate departments of government in combination. As was pointed out by Mr. Dicey, there will remain two checks upon the abuse of power by administrative agencies. In the first place, every such agency must conform precisely to the statute which grants the power; secondly, such delegated powers must be exercised in a spirit of judicial fairness and equity and not oppressively and unreasonably. The doors of the courts of this country will stand open to any citizen complaining that he has been deprived of his constitutional rights, no matter under what form of law the deprivation has been worked. The emergence of administrative agencies will not impair or destroy the checks and balances of the Constitution. To these two may be added a third check, one which seems to us is frequently overlooked, and that is that all of these administrative agencies are creatures of the Legislature and are responsible to it. Consequently the Legislature may withdraw powers which have been granted, prescribe the procedure through which granted powers are exercised, and if necessary, wipe out the agency entirely. For these and other reasons, it seems much wiser to permit administrative law to develop in our constitutional system slowly and in an orderly way rather than to attempt to achieve it at a single bound by constitutional amendment."

IX.

From the foregoing survey we conclude that administrative law, as now reformed and revised pursuant to the recent federal and state
administrative acts, is implemented to assure to private persons democratic participation in rule-making, reasonable availability and publicity of agency processes and their rules and regulations. As to procedural agency action there is guaranteed a fair hearing at the trial level, with right of review. The federal act as we have stated purposes, significantly, to prescribe "fair administrative procedure." The fundamentals of fair procedure come within the purview of the "due process" clauses of our state and federal constitutions. Hence the inquiry: what is due process as applied to procedure before administrative agencies? The most satisfactory answer that we have been able to find, is that given by Chief Justice Gallagher of the Minnesota Supreme Court in the Zenith Dredge Company case decided in 1945. He said:

"The words 'due process of law' when applied to judicial proceedings mean a course of legal conduct consonant with rules and principles established in our system of jurisprudence for the protection and enforcement of private rights. Due process requires notice before judgment, an opportunity to be heard in an orderly proceeding adapted to the nature of the case and the right of appeal or review of a decision regarded by a litigant as unjust."

A more inclusive delimitation of the "due process of law clause" in the Fourteenth and Fifth Amendments may be deduced from the opinion of Judge Burke of the North Dakota Supreme Court in the case of State v. Magrum (June 13, 1949) which is that procedure or lack thereof that is "offensive to the common fundamental ideas of fairness and right," is a violation of due process of law. The concept "due process of law" is based on natural justice or the Natural Law. A partial application of this general principle is expressed by Judge Vanderbilt, Chief Justice of the Supreme Court of New Jersey, as follows:

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79 Professor Corwin discussing the due process clause of the Fifth Amendment, says: "From the point of view of constitutional limitations on power and so from the point of view of the control exercised by the Supreme Court, through review, upon the powers of government, whether state or national, in the United States, this clause and its companion piece, the 'due process of law' clause of Amendment XIV are the most important clauses of the Constitution. Originally 'due process of law' meant simply the modes of procedure which were due at the common law. Today 'due process of law' means 'reasonable' law or 'reasonable procedure', that is to say, what a majority of the Supreme Court find to be reasonable in some or other sense of that extremely elastic term. In other words it means in effect, the approval of the Supreme Court." Corwin: "The Constitution and What it Means Today. 9th ed. p. 168-170. (1947).
80 Hunter v. Zenith Dredge Company (Minn. 1945) 19 N.W. 2d 795-799.
81 State v. Magrum, 38 N.W. 2d 358, 360; see also cases cited.
"Perhaps the fundamental principle upon which justice in the Common-law world is based is the right to be heard—audi partem. 'It is a rule founded upon the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights and the constitutional provision that no person shall be deprived of these without due process of law has its foundation in this rule.' Implicit in this is the requirement of due notice as a condition precedent to the proper exercise of the administrative power. The right to a hearing, however generously preserved, is of little use, unless those affected are informed beforehand of the contemplated action. Notice in short must be given, and it must fairly indicate what the respondent is to meet." (emphasis supplied)

X

POSTLUDE

The foregoing outline of administrative agencies and the need for their control by the courts leads us back to the fundamental principles of jurisprudence. Modern positivism has, during the last generation, attempted to undermine the basic moral principles of our American constitutional government, founded and built, as it is, on the Natural Law.83 In this particular we quote from an address by Federal District Judge, Robert N. Wilkin, of Cleveland, Ohio, delivered in December 1948. He said:84

"Any lawyer whose professional career began during the first ten years of the present century and who is still alive and able to note the trends of current thought, witnessed two great changes in the philosophy of jurisprudence. When he came to the bar, Coke, Blackstone, Kent, Story, Minor, and Cooley were still respected sources of legal learning, and the Natural Law philosophy of the Founding Fathers was unquestioned. But during the ensuing thirty years there was a great shift from these authorities and that philosophy to what has come to be known as

83 Sir William Blackstone in his Commentaries (Book I, p. 39, 40, 42 et passim) says: "This law of nature being coeval with mankind and dictated by God, Himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to this: and such of them as are valid derive all their force and all their authority mediatly or immediately from this original... Providence...in compassion to the frailty, the imperfection and the blindness of human reason, hath been pleased, at sundry times and in divers manners to discover and enforce its laws by an immediate and direct revelation. (e.g. the ten commandments)... Upon these two foundations, the law of nature and the law of revelation, depend all human laws: that is to say, no human laws should be suffered to contradict these" A short definition of natural law is given by Holaind.S.J. "Natural Law and Legal Practice" (1899) as follows: "Natural Law is a body of moral principles which reason itself teaches, and which are binding on all men."
84 Univ. of Notre Dame "Natural Law Institute Proceedings 1948. Vol. 11, 125. 24 Notre Dame Lawyer 343 (1949).
modern positivism or realism. And now within the last eight or ten years there are unmistakable signs of dissatisfaction over the insufficiency, the aridity, of modern positivism, and very definite indications of a revival of Natural Law philosophy. It is unnecessary to trace in detail the extent or the effect of positivism during the early decades of this century. That has been well done by Dean Pound, Mr. Ben Palmer, Mr. Harold McKinnon, Mrs. C. P. Ives, and others. As Mr. McKinnon says:\cite{85} "This teaching (positivism) nullifies the Declaration of Independence, the preamble of the Constitution and the Bill of Rights. It nullifies twenty-five hundred years of progress in political and legal theory and re-enacts in the present age some of the worst political and legal errors of ancient times. It is indistinguishable, in its origin and its logical effect, from the philosophies which have characterized lands against which we have just fought the bloodiest war in history." In this century positivism tended to discredit the judicial function and over-emphasize the importance of administrative procedure. The fiat rule of administrative boards was substituted quite extensively for legal procedure of courts. Precedent was disregarded, balance of power was scoffed at; and the Constitution was openly flouted . . . The critical problems of our national life today have come directly from this materialistic and positivist attitude toward life and law. When the ethical and moral content of our philosophy was abandoned, men felt free to assert without restraint their novel theories and their personal class selfishness, avarice and greed. As a result of this disrespect for courts and the judicial process there followed a corresponding neglect of the common interest and public welfare. (emphasis supplied). The sole aim in life of most men was profits or wages, and the affairs of government were abandoned to policy amateurs or self-seeking politicians who bartered and traded for self-aggrandizement and success of party, bloc, or union. Disputes between the great monopolies of employers and unions led to strikes which paralyzed the economic life of the country. Agents of government merely pampered and pandered instead of enforcing the established principles of law which for centuries had protected the community interest."

\cite{85} Harold R. McKinnon of the San Francisco Bar; 33 A.B.A.J. 106, 966 (1947). In his thesis entitled "The Higher Law" Mr. McKinnon traces the history of the Natural Law doctrine from Aristotle and others among the Greeks, Cicero and other Roman Jurists, including Gaius, Ulpian and Justinian; through the early Fathers of the Christian Church, Saints Paul, Augustine, Ambrose and Jerome. In the middle ages he states: "The outstanding thinker of this period was the great medieval philosopher St. Thomas Aquinas, who wrote that the rational creature, being subject to Divine Providence, has a share of Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law." According to St. Thomas, therefore, all men made laws must conform to this law of nature, and 'if at any point (a man made law) is in conflict with the law of nature, it at once ceases to be a law; it is a mere perversion of law." "As a result of teaching such as this, it was recognized throughout the middle ages, that the natural law was antecedent and para-
Finally, Dean Roscoe Pound, lecturing before the students of Notre Dame University, in June 1942, had this to say about uncontrolled administrative orders:

"To autocrats and dictators law is anathema. To them, it is unthinkable that those who exercise the power of a politically organized society are to rule, as the medieval put it, under God and the law. . . .(a) substitute for law preached by the late juristic adviser of the Soviet government in Russia, may be called administrative absolutism. There is to be no law, or rather only one rule of law, namely, that there are no laws but only administrative ordinances and orders. This doctrine has been urged throughout the world with the rise of absolute governments and has been making headway in the English-speaking world with the rise of administrative agencies controlling every form of enterprise and activity. . . .It is significant that the Russian jurist who urged a regime of administrative orders is no longer with us. He was eliminated in the 'purge' a few years since. If there had been law at hand, and not merely administrative orders, he might have lost only his job and not his life as well."

mount to the state in every way, and that it stood above all earthly powers, above king and emperor, above pope and people. . . .From medieval sources it came to England, where it characterized the writings of such men as Hooker and Sydney and of the jurists Bracton and Fortescue, Coke and Blackstone and Pollock. Finally it came to America, where it permeated the writings of the Founding Fathers—of Wilson and Hamilton, of Adams, Dickinson and Otis; while from the pen of Jefferson it received classic and let us hope immortal expression in the famous preamble to the Declaration of Independence that all men are created equal and that they are endowed by their Creator with certain inalienable rights and that the purpose of government is to secure these rights."