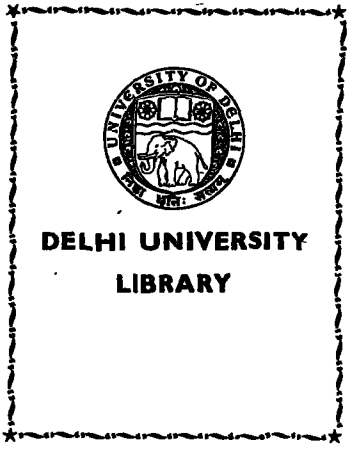

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HARVARD STUDIES IN ADMINISTRATIVE LAW

VOLUME I

LONDON : HUMPHREY MILFORD
OXFORD UNIVERSITY PRESS

The Insurance Commissioner

IN THE

United States

A Study in Administrative Law and Practice

BY

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WITH A FOREWORD BY

FELIX FRANKFURTER

BYRNE PROFESSOR OF ADMINISTRATIVE LAW
IN HARVARD UNIVERSITY

CAMBRIDGE

HARVARD UNIVERSITY PRESS

1927

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PRINTED AT THE HARVARD UNIVERSITY PRESS
CAMBRIDGE, MASS., U. S. A.

TO

ROBERTA WILHITE PATTERSON

MY MOTHER

PREFACE

As PREFACES are seldom read, this is the proper place for the author to acknowledge his mistakes. Despite a diligent effort to avoid errors of citation, I cannot hope that the voluminous footnotes in the present book are free from such errors. In order to collate similar statutory provisions and subordinate them to the pertinent textual comment, I was obliged in most instances to transcribe the statutory citations two or three times. The method of assembling the statutory material is explained in Appendix B.

For errors of judgment in the text I have no apology, since I hope that for the most part these may be charitably regarded as "differences of opinion." However, one kind of mistake may not be thus regarded. I refer to mistakes in respect to actuarial science and the insurance business. I make no claim to expertness in these fields, and I have explained in Appendix B why and how I have dealt with them here.

In Chapter I, I have given a general survey of the more striking conclusions of the succeeding chapters. I hope that this summary will indicate what is on the menu, and at the same time provide cafeteria service for those who have not the time or digestion for the larger meal.

The scope and the data of this study are indicated in Appendix B. In this connection I have taken occasion to make some general comments on American insurance legislation, which do not fall strictly within the scope of my study of administrative law and practices.

This study was commenced as a part of my graduate work in the Harvard Law School, and was continued thereafter as the duties of teaching permitted. A list of the latest statutory compilations and session laws which were consulted is contained in Appendix C. I have endeavored to make an independent and unbiased research. The only financial aid I have received was given by the Commonwealth Fund of New York City, to which I am grateful for contributing the necessary sums for typing and other expenses.

My intellectual indebtedness I can scarcely hope to acknowledge, much less to repay. Without Professor Frankfurter's stimulus and

guidance I should not have completed the task. From the work of Professor Ernst Freund I have derived many valuable suggestions. My approach to the problems of this study has been deeply influenced by two of my former teachers: Professor Underhill Moore, who first led me beyond the conventional limits of conceptual thinking; and Dean Roscoe Pound, who pointed me the path of sociological jurisprudence. To Mr. John H. Johnson I am grateful for his assistance in collecting statutory materials. And there were many others who also helped.

EDWIN W. PATTERSON

NEW YORK, *December, 1926*

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GENERAL INTRODUCTION

THE widening area of what in effect is law-making authority, exercised by officials whose actions are not subject to ordinary court review, constitutes, perhaps, the most striking contemporary tendency of the Anglo-American legal order. The massive volumes of Statutory Rules and Orders, published annually since 1890,[1] testify to the pervasive domain of delegated legislation in Great Britain. The formulation and publication of executive orders and of rules and regulations are in this country still in a primitive stage, which only serves to render more portentous the operation of these forms of law. But the range of control conferred by Congress and the State legislatures upon subsidiary law-making bodies, variously denominated as heads of departments, commissions and boards, penetrates in the United States, as in Great Britain and the Dominions, the whole gamut of human affairs. Hardly a measure passes Congress the effective execution of which is not conditioned upon rules and regulations emanating from the enforcing authorities. These administrative complements are euphemistically called "filling in the details" of a policy set forth in statutes. But the "details" are of the essence; they give meaning and content to vague contours. The control of banking, insurance, public utilities, finance, industry, the professions, health and morals, in sum, the manifold response of government to the forces and needs of modern society, is building up a body of laws not written by legislatures, and of adjudications not made by courts and not subject to their revision. These powers are lodged in a vast congeries of agencies. We are in the midst of a process, largely unconscious and certainly unscientific, of adjusting the exercise of these powers to the traditional system of Anglo-American law and courts. A scientific scrutiny of these

[1] See J. A. Fairlie, *Administrative Procedure in Great Britain*, University of Illinois, Studies in Social Sciences, XIII, No. 3 (Sept., 1925).

issues and a conscious effort towards their wise solution are the concerns of administrative law. The broad boundaries and far-reaching implications of these problems may be indicated by saying that administrative law deals with the field of legal control exercised by law-administering agencies other than courts, and the field of control exercised by courts over such agencies.

But Administrative Law is hardly yet given *de jure* recognition by the English-speaking bar, although the term has now established itself in the vocabulary of the United States Supreme Court. Until very recently even scholars treated it as an exotic. Thus, Dicey in his classic "Law of the Constitution," thanked God, like a true Briton, that *le droit administratif* of the tyrannized French had no counterpart on English soil. But in his "Introduction" to the last edition, he showed himself painfully aware that the channel which separates tendencies in English law from the system and precepts which the French call *droit administratif* is constantly narrowing. Before that "Introduction" reached the public, he had made still handsomer concessions. Again like a true Briton, facing facts eventually and not forever denying them, Dicey was jolted by the famous Arlidge case [2] into writing an exposition of its deep significance. The very title of his essay — "The Development of Administrative Law in England" [3] — must have roused many an unsuspecting reader. The development to which Dicey so strikingly directed attention in April, 1915, has since then luxuriantly unfolded, and English writers [4] have analyzed acutely the deep forces it reflects. Yet the Lord Chief Justice only the other day [5] inveighed against it as if it were an alien and wholly avoidable phenomenon!

[2] Local Government Board *v.* Arlidge, [1915] A.C. 120.

[3] 31 *Law Quarterly Review*, 148.

[4] See *e.g.*, Carr, *Delegated Legislation;* Sir Lynden Macassey, *Law-making by Government Departments*, 5 Journal of Comparative Legislation (3d series), 73; Laski, *Growth of Administrative Discretion*, 1 Journal of Public Administration, 92; Sir Josiah Stamp, *Recent Tendencies towards Devolution of Legislative Functions to the Administration*, 2 Journal of Public Administration, 23.

[5] See London *Times*, December 11, 1926, p. 14.

In the United States, the pioneer scholarship of Frank J. Goodnow and Ernst Freund long remained caviar not merely to the general. Their work was for many years unheeded by bench and bar, a fact which is not too surprising when it is recalled that legal education hardly took note of it. But the prophetic scholar has his amused revenge when practice propounds theory. Necessity *is* the mother of discovery. And so, this illegitimate exotic, administrative law, almost overnight overwhelmed the profession, which for years had been told of its steady advance by the lonely watchers in the tower. Hardly a volume of bar association proceedings is now without some reference to this new phenomenon. Brute fact compels resort to despised philosophy. Isolated cases, in their multitudinous and varying recurrence, require correlation and creative direction. Thus, we find this weighty recognition of the exigency of our problem in Senator Root's presidential address to the American Bar Association for 1916:

> There is one special field of law development which has manifestly become inevitable. . . . The Interstate Commerce Commission, the state public service commissions, the Federal Trade Commission, the powers of the Federal Reserve Board, the Health Department of the States and many other supervisory offices and agencies are familiar illustrations. Before these agencies, 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; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to right, 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. Yet the powers that are committed to these regulating agencies and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers, these agencies must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed and that, with us, is still in its infancy, crude and imperfect.[6]

Similar appeals have been made by Charles E. Hughes,[7] Mr. Justice Sutherland[8] and William D. Guthrie. One pas-

[6] 41 Amer. Bar Assoc. 356, 369.

[7] 39 N. Y. State Bar Ass. Rep. 267, 269–70. [8] 42 Amer. Bar Ass. Rep. 197.

sage in Mr. Guthrie's address before the New York State Bar Association in 1923 strikingly illustrates how far we have travelled from the conventional conception entertained by English-speaking lawyers of *droit administratif* as an essential denial of the Rule of Law:

> I am not prepared to say that the time has yet come for the creation of special courts similar to the French administrative courts, although I am convinced that this will ultimately be found to be advisable.[9]

One could hardly find more emphatic evidence, than this utterance by a distinguished common-law lawyer, of the gradual approach of different systems of law in fashioning similar covenants and similar swords in order to regulate similar situations.

It is idle to feel either blind resentment against "government by commission" or sterile longing for a golden past that never was. Profound new forces call for new social inventions, or fresh adaptations of old experience. The "great society," with its permeating influence of technology, large-scale industry, and progressive urbanization, presses its problems; the history of political and social liberty admonishes us of its lessons. Nothing less is our task than fashioning instruments and processes at once adequate for social needs and protective of individual freedom. The vast changes wrought by industry during the nineteenth century inevitably gave rise to a steady extension of legal control over economic and social interests. At first, state intervention manifested itself largely through specific legislative directions, depending for enforcement generally upon the rigid, cumbersome, and ineffective machinery of the criminal law. By the pressure of experience, legislative regulation of economic and social activities has turned to administrative instruments. Inevitably this has greatly widened the field of discretion, and thus opened the door to its potential abuse, arbitrariness. In an acute form and along a wide range of action, we are confronted with new aspects of familiar conflicts in the law between rule and discretion.

[9] 46 N. Y. State Bar Assoc. Rep., 169, 187; Guthrie, League of Nations and Miscellaneous Addresses, 352, 377–8.

Because of the danger of arbitrary conduct in the administrative application of legal standards (such as "unreasonable rates," "unfair methods of competition," "undesirable residents of the United States,") our administrative law is inextricably bound up with constitutional law. But after all, the Constitution is a *Constitution*, and not merely a detailed code of prophetic restrictions against the ineptitudes and inadequacies of legislators and administrators. Ultimate protection is to be found in the people themselves, their zeal for liberty, their respect for one another and for the common good — a truth so obviously accepted that its demands in practice are usually overlooked. But safeguards must also be institutionalized through machinery and processes. These safeguards largely depend on a highly professionalized civil service, an adequate technique of administrative application of legal standards, a flexible, appropriate and economical procedure (always remembering that "in the development of our liberty insistence upon procedural regularity has been a large factor"[10]), easy access to public scrutiny, and a constant play of criticism by an informed and spirited bar. They are still to be achieved, for we have hardly begun to realize deeply their need. Particularly in the field of so-called minor interests, administrative technique and traditions demand study and improvement. The vast interests confided to bodies like the Interstate Commerce Commission, the Federal Trade Commission and State public service commissions, just because they are so vast, are not likely to suffer much or long from incompetence or injustice in our legal system. The incidence of law is most significant at the lowest point of contact. The experience of the mass of men with law's relation to their small concerns is the most important generator of that confidence in law which is its ultimate sanction.

Undoubtedly, a reading of the current law reports gives a just sense of the confusion and incoherence, of the rampant empiricism, which characterizes the present state of administrative law. But we must be on our guard against an undue

[10] Brandeis, J., dissenting, in Burdeau *v.* McDowell, 256 U. S. 465, 477 (1921).

quest for certainty, born of an eager desire to curb the dangers of discretionary power. For the problem of rule *versus* discretion is far broader than its manifestations in administrative law. There are fields of legal control where certainty — mechanical application of fixed rules — is attainable; there are other fields where law necessarily means the application of standards — a formulated measure of conduct to be applied by a tribunal to the unlimited versatility of circumstance.[11] To be sure, the application of a standard to individual cases opens the door to those abuses of carelessness and caprice and oppression against which we cannot be too alert. But resort to standards avoids the oppression and injustice due to abstractions (*e.g.*, "freedom of contract" instead of a working girl), whereby individual instances are tortured into universal molds which do not fit the infinite variety of life.

In administrative law we are dealing preëminently with law in the making; with fluid tendencies and tentative traditions. Here we must be especially wary against the danger of premature synthesis, of sterile generalization unnourished by the realities of law in action. Administrative law is markedly influenced by the specific interests entrusted to a particular administrative organ, and by the characteristics — the history, the structure, the enveloping environment — of the administrative to which these interests are entrusted. Thus, "judicial review" and "administrative discretion" cannot be studied in isolation. "Judicial review" is not a conception of well-defined scope, operative wherever the courts review the action of administrative bodies. The problems subsumed by "judicial review" or "administrative discretion" must be dealt with organically; they must be related to the implications of the particular interests that invoke a "judicial review" or as to which "administrative discretion" is exercised. Therefore, a subject like "judicial review," in any scientific development of administrative law must be studied not only horizontally but vertically, *e.g.*, "judicial

[11] See Roscoe Pound, *Administrative Application of Legal Standards*, 44 Reports Amer. Bar Assoc., 445.

review" of Federal Trade Commission orders, "judicial review" of postal fraud orders, "judicial review" of deportation warrants. For judicial review in postal cases, for instance, is colored by the whole structure of which it forms a part, just as in land office cases, or in immigration cases, or in utility valuations, or in insurance license revocations, it derives significance from the nature of the subject matter under review as well as from the agency which is reviewed.

What we need, above all else, is to know what is happening, by objective demonstration of intensive scientific studies, instead of merely speculating, even wisely speculating, or depending on partisan claims of one sort or another. Research to no small measure is a painful means of proving what the insight of a rare few has suspected or discerned. There is need also for a technique of appraising the work of administrative agencies, and of establishing the utility of such scientific appraisals. The generalizations, the philosophizing will gradually emerge from specific studies. Intensive studies of the administrative law of the States and the Nation in practice will furnish the necessary prerequisite to an understanding of what administrative law is really doing, so that we may have an adequate guide for what ought to be done. Here, as in other branches of public law, only here probably more so, we must travel outside the cover of law books to understand law.

Only a physiological study of administrative law in action will disclose the processes, the practices, the determining factors of administrative decisions, and illumine the relation between commissions and courts now left obscure by the printed pages of court opinions. Thanks to the Commonwealth Fund, Mr. Henderson gave us such a study of the Federal Trade Commission,[12] and now, aided by the Commonwealth Fund, Professor Patterson, in the first of a series of Harvard Studies in Administrative Law, has laid bare the complicated system of administrative control of the stupendous human and financial interests that are implied in the business of insurance. While the tendencies with which we are concerned

[12] G. C. Henderson, *The Federal Trade Commission.*

are new in their pervasiveness and proportions, the long story of state regulation of insurance serves to remind us that even these seemingly novel problems are rooted in history. The shaping of our administrative law thus calls for students trained in the common law and familiar with its history. But, in addition, the inquirer must have a sympathetic understanding of the major causes which have led to the emergence of modern administrative law, and must be able to move freely in the world of social and economic facts with which administrative law is largely concerned. Above all, he must have a rigorously scientific temper of mind. For we are seeking the formulation of a body of law based upon objective criteria when, in truth, studies like Professor Patterson's must themselves largely formulate and even create the criteria which scientific inquiry assumes.

FELIX FRANKFURTER.

Harvard Law School.

THE INSURANCE COMMISSIONER IN THE UNITED STATES

CHAPTER I

GENERAL SURVEY

§ 1. The position of the insurance commissioner in the field of administrative law, 3.
§ 2. Defects and remedies: Personnel and scope of regulation, 12.
§ 3. Defects and remedies (continued): Methods and control of administrative determinations, 21.

§ 1. *The position of the insurance commissioner in the field of administrative law.* "Administrative Law" is a new name for some old problems of governing. It is "old" because the problems of official powers of procedure, of the relations between the governing and the governed, are as old as the beginnings of any recognized system of what may fairly be called "law." It is old, too, because its sanctions are brought to bear upon the person, the property, and the reputation of the governed. Its procedural problems are at least as old as the so-called "rational" methods of trial. The attempt to strike a balance between speed and fairness has baffled more than one generation of lawyers. The growth of administrative discretion is, at least in part, a result of the revolt against the rigidity and ritualism of judicial procedure — a revolt which has all but defied the law against perpetual motion. And even the inert resistance of administrative powers to the logical partitioning of the "separation-of-powers" doctrine may be said to antedate the formulation of that doctrine by Locke and Montesquieu. The newness of the term "administrative law" should not mislead one into expecting something novel or strange.

That "administrative law" is a new name, as far as Anglo-American lawyers are concerned, can scarcely be denied. As late as 1914 the eminent Mr. Dicey was asserting that, however it might be in France, no such thing was known in English law. That he lived to recant this assertion is some evidence of the newness of the term. In America, one finds an occasional use of the term in judicial decisions prior to 1900; yet even to-day it seldom finds a place in the language of the judicial opinions which deal with its problems. The judges who wrote those opinions, if they had ever heard of "administrative law" at all, probably regarded it as the mere

"froth of the law," a conception of "political science" or "public law." The twenty-year old treatise on the subject by an eminent public-law scholar, Dr. Goodnow, has left scarcely a trace of its influence upon the current of judicial thought. True, as far back as 1911, Professor Ernst Freund, of the University of Chicago School of Law, published an excellent selection of cases on Administrative Law; and courses in the subject have been given for a number of years in leading American law schools. Yet these and other academic studies have produced but little effect upon the bar and bench. No rubric in the digest of American decisions, no textbook generally recognized by the legal profession as a repository of its learning, bears the title "Administrative Law."

Mark Twain once remarked, speaking of the fact that the French had no word for "home," that they had the thing itself so well that they had no need of the name. The *bon mot* cannot be said of administrative law. True, we have the thing; but not so well that we can do without the name. To give a thing a name is to give it a place in one's intellectual tool-box. Many of the problems of insurance regulation referred to in the following pages have been passed over in statute and judicial opinion with naïve banality because they were not recognized as real lawyers' problems belonging to a recognized field of law. And not a few of these judicial decisions, the present writer believes, might have been turned the other way if counsel had seen, and had been able to make the court see, the kind of thing that is called administrative law.

The newness of the "facts" with which administrative law deals has tended to obscure the essential oldness of its basic concepts. Concepts, said William James, can never change; they are mathematical values without life or growth, useful on the assumption of their fixedness. On the other hand, "facts," the flux of life, are ever changing. Administrative devices have been extended or invented chiefly in those fields of social adjustment which signify the newer, rather than the older, civilization. Administrative law is the characteristic legal tool of machine industry and technical specialization, of scientific prevention and social responsibility; and whether its field be workmen's compensation or zoning, pure food or juvenile delinquency, the practice of medicine or the insuring of risks, it has new interests to weigh in the balance and new scales to devise. One cannot assume, for example, that the same code of procedure which works well in workmen's compensation will do for the regulation of insurance enterprises. As well might one expect to

apply the violent methods of military law to the taking of the census! Perhaps this very diversity of interests, this pluralism of functions, explains the failure to recognize administrative law as a term of art. Yet the principle of conservation of thought demands that we seek the common factors, the more inclusive ordering, of these pluralistic facts. We must not be content to remain on the intellectual level of the New Zealand tribe which had a different name for each kind of tree, but no word for tree.

The newest thing about administrative law is its emphasis upon the relation between methods and results. This functional approach leads to the creation of new concepts, however much we may persuade ourselves that we are merely stretching the old ones. The tripartite separation of powers is the dogma which has suffered most from this stretching process. Judges may argue, as the late Justice Brewer did in one early Kansas case,[1] that the insurance commissioner is merely executing the law, as all good executives should, by first ascertaining the "facts" and then applying the prescribed rule; yet they are surely using a fiction, as Jhering long ago said, to smooth the pathway from the old concept to the new one. We may as well recognize that sometimes the insurance commissioner is an official clerk, sometimes he is a judge, sometimes he is a law-giver, and sometimes he is both prosecuting attorney and hangman. He is partly executive, partly judicial, and partly legislative; and yet he is not confined within any of these categories. I defy anyone to tell me when he stops legislating and begins to judge, or where he stops judging and begins to execute. And even if I could have written a book about the legislative, the executive, and the judicial powers of the commissioner, I should not by many means have told the whole story. The insurance departments are institutions with nearly a century of growth, and institutions have a way of not fitting precisely into our categories. The only way to tell the story of the insurance commissioner is to tell what he is trying to do and how he is trying to do it. And we must not forget to tell something about himself and his helpers.

Whereabouts in this pluralistic universe of administrative law does the insurance commissioner belong? Who are his next-door neighbors, from whom he may borrow analogy in time of need? To answer this question, we must invoke several different standards of comparison. In the first place, we may compare the insurance department with other departments in respect to organization and

[1] Phoenix Insurance Co. *v.* Welch (1883), 29 Kan. 672,676.

personnel. In the second place, we should consider the scope of his powers, the types of conduct, and the range of persons who may come under his ban. Thirdly, we should consider the legal devices which he employs to attain his ends. A fourth and most important basis of comparison is the procedure of his official action. And lastly, we must not neglect the restrictions upon his official action from without — the agencies of control. Of these in their order.

The organization of the insurance department, as it exists in nearly all the American states, resembles that of a cabinet department of the Federal government. At the head of the department is a single official, who, in theory at least, makes all decisions and controls all official action of the department. Beneath him are (in the larger insurance departments) a corps of examiners and actuaries, of policy-examiners and license deputies or clerks, and rate deputies or clerks, who have immediate control over particular branches of the work. In the smaller states, of course, he is both head and shoulders of the department. Even in the larger ones, the number of his subordinates rarely equals that of even the smaller departments at Washington; and for this reason he takes a more active part in the work of the department than does a cabinet officer. On the other hand, we may say (though it is by way of anticipation) that, unlike the cabinet officer, he is not answerable to, or removable by, his Chief Executive, and he has no cabinet meetings, to give him the perspective of the government functioning as a unit, to take his time, or to censor his activities.

In personnel, too, the insurance department resembles the cabinet departments of the nation. Appointed himself, the commissioner has more power to choose his own assistants than have most cabinet officials. Like them, he is usually chosen chiefly for political reasons, and is almost invariably a "party man." Like them, too, he relies upon his subordinates, who have learned their work under his predecessors, to carry on the traditions of his office. Yet unlike the cabinet officer, he is not expected to be a statesman as well as a politician. The technical nature of his tasks cries for some degree of specialized knowledge of the insurance business, and this he usually has. Yet he is seldom an expert either in insurance or in official administration. Still, not unlike some cabinet officers, he sometimes uses his official experience as a stepping-stone to larger remuneration as the servant of private enterprise.

The scope of his official powers is narrow, but it is growing broader and deeper. It is confined to the conduct of insurers and

their employees and of certain others engaged in insurance as a business. Rarely does he have official power over the man in the street. Yet, if one takes as typical the half-dozen or so states which are leading the way, one can say that his powers over those in the insurance business are reaching more and more into the recesses of individual liberty. First, he was a convenient collector of taxes and an assembler of dreary information. Then he became a watch-dog over the reserve funds and other assets of insurers. Finally, he has come to be a dictator of financial plans, a dictator (in another sense) of policy forms as well, a censor of business-getting methods and an arbiter of rates. And yet through it all he stands, occasionally, as a guardian angel between the insurers with their sacred treasures, and the populace with its thoughtless clamor for the gold that it would spend and have, too. He is, on the whole, more of a personage in the official world than most people suspect.

His powers are at once broader and narrower than those of boards of health, for example. Broader, because he has greater power and greater legal immunity in enforcing his decisions; narrower because insurance enterprises are carried on by a narrower range of persons than those whose activities affect the public health, and because the misconduct of insurance enterprises affects a more restricted range of persons, perhaps, than do epidemics or unwholesome foods. Yet the range of persons who are indirectly affected by the ordinary work of the insurance department is rarely equalled in the case of *ordinary* decisions of health boards.

That the insurance department has a wider scope of activity than the state banking department can scarcely be doubted; for the former has all the powers over assets and investments which the latter possesses, and many more besides. The state public utilities commissions loom larger in the public mind, and no doubt in many states their work is more important; and yet because they are more judicial in temperament and less inquisitive, they probably have less real hold on their business enterprises than the commissioner has on his. A commission which can order a railroad company to stop its trains at Hillsville has (if the Interstate Commerce Commission will let it) a considerable degree of power; but so has a commissioner who can tell insurance agents what rate of interest they must charge on their premium notes.

With respect to administrative devices, the insurance commissioner has an armory of weapons which can scarcely be equalled. True, those departments, such as the Interior Department, which

have control in a proprietary capacity over public property, have a more effective means of enforcement; and so, too, have the tax-collectors with their warrants of distress, and the immigration officials with their orders of deportation. Yet for the tasks in hand the commissioner's devices are scarcely less drastic. His licensing power is his chief weapon. Insurers, their agents, and brokers (if any), are all required, in most states, to obtain licenses based upon their individual qualifications. This license is (or may be, if the commissioner chooses to make it so) no perfunctory fee-taking or tax-gathering measure, but a real test of the qualifications of the applicant. More insurers fail to meet the test than do agents or brokers. Even if domestic insurance companies are, in a substantial minority of states, freed from the threat of revocation of license, the foreign insurers are everywhere subject to this sanction, and the grounds of revocation are not infrequently as broad as the heavens and as vague as the blue sky. Indeed, the so-called "Blue Sky" laws furnish the closest analogy to the statutory scope of his discretionary powers. The medical licensing boards have more than once been judicially denied the power to revoke licenses on grounds (for example, "grossly unprofessional conduct") which are no more indefinite than some of those (for example, "will best promote the interests of the people of this state") which are enacted as grounds for the revocation of insurance licenses. On the other hand, the commissioner does not have that arbitrary power of revocation or refusal which has sometimes been granted to officials licensing dram-shops, auctioneers and race-tracks.

The insurance department has other strings to its bow. Its visitorial and inquisitorial powers are drastic. Not only may the commissioner lawfully demand of insurers voluminous reports as to their financial standing (a demand sanctioned by revocation of license and judicial penalties); he may also demand the privilege of inspecting the company's records and assets at its home office, and, unless we are very much mistaken, he is legally privileged to enter the office of a domestic company and examine whatever he sees fit. While there is no statutory authorization for the capricious or arbitrary exercise of these powers, the conditions of their exercise are not regulated by statutory rule; he may make an examination "whenever he deems it prudent for the protection of policy-holders in this state," and no notice or hearing need precede his decision to do so. Furthermore, he has the unique power to assess and collect from the company examined the expenses of such an examina-

tion, including in many states the per diem compensation of unofficial examiners (private actuarial concerns) employed by him to make the examination. The expense bill not uncommonly amounts to several thousand dollars. That he may with comparative impunity order an examination ostensibly to ascertain the financial condition of a company, but actually for some other purpose which he deems useful, is fairly demonstrable. I can think of no other official who has an equal power of making his own search-warrants.

Besides these licensing and inquisitorial powers, the commissioner has effective powers of enforcement through judicial proceedings. Here his usual tool is a suit against an insurer to obtain the appointment of a receiver and an injunction against the further doing of business. Of judicial prosecutions for penalties he has in fact a well-nigh exclusive control; but the direct penal sanctions do not often need to be invoked. Thus, he has greater control over the machinery of judicial enforcement than have boards of health or medical licensing boards; and while his findings do not have the statutory force in judicial proceedings of the Interstate Commerce Commission's findings, actually they are given scarcely less weight by the courts.

The latitude of his powers is considerably enhanced by the informality of his procedure. He is far less judicial in temper than is, for instance, the public utilities commission. That the collegiate or board form of administrative organization tends to greater formality in procedure than the unitary or single-head type can scarcely be doubted. The commissioner need call no "meeting" to make a decision; he can lock himself in his office and make it alone. Though he has extensive powers to subpoena and examine under oath witnesses and their records, it seems that the power is infrequently resorted to. Most of his decisions, it appears, are arrived at from the inspection of documents, exchange of letters, and face-to-face talks. In a surprising number of the statutes authorizing revocation of an insurer's (especially of a foreign insurance company's) license, no provision is made for notice to the company and a hearing of its evidence before the revocation takes place. Judicial reports of contested revocations disclose only rare instances of a formal hearing safeguarded by oath, confrontation, and cross-examination. What other licensing bureau operates with equal informality of procedure?

In the fixing of insurance rates, extensive hearings like those of public utilities commissions are more common, though even here

by no means universal. Thus, he has power to, and does, in some states, order a general percentage reduction of fire rates without the formality of a hearing. It need scarcely be said that no notice or hearing is granted before an order to examine a company is made or (usually) before a suit to throw it into the hands of a receiver is started. However, the need of these procedural safeguards is diminished by the circumstance that the evidence upon which the commissioner acts is usually (because it relates to financial conditions) documentary data obtained from the insurers themselves.

Workmen's compensation boards and public utility commissions, physician's licensing boards and "Blue Sky" boards, are commonly required to, and do, give persons affected by their orders a full and "formal" hearing. Even the Patent Office and the Federal Trade Commission, relatively feeble though their decisions are, have elaborate hearings. The insurance commissioner's procedure is that of an inquisitor rather than an umpire.

Aside from his orders of individual application (licensing or revocation of a license, visitation, etc.) the commissioner actually exercises (though he is seldom expressly granted) extensive rule-making powers. His "rulings" are more than mere advice: they are generalized predictions as to his future decisions, and thus have the functional characteristic of law. They are regularly and continuously published by private publishers, and, so far as one can tell, highly respected if not implicitly obeyed. These rulings of the commissioner are quite comparable to those of the Federal Treasury Department on income-tax questions. They are issued sometimes in response to particular inquiries or complaints, sometimes by way of general regulation. The commissioner's published rulings give evidence of being less carefully prepared than are the Treasury Department rulings, and they are more often in the form of "advice." They deal more frequently with questions of substance than of procedure.

With respect to control from without, it is more difficult to allocate the commissioner in the administrative field. From the executive side he is (except in such states as Illinois, Nebraska, and Idaho, where systems of centralized state administration have been inaugurated, and except, to a more limited extent in Virginia) almost completely autonomous. The governor usually cannot remove him, or upset his decisions; and administrative appeals are so rare as to be negligible in the picture. The attorney-general

has certain checks on his power to license new enterprises and on his power to institute judicial proceedings. Otherwise, he is practically immune from executive control. From the legislative side, leaving out of account the disused impeachment proceeding, he is subjected to multitudinous and detailed statutory regulations. Yet he frequently writes the statute with his own hand, and shows his confidence in himself by the vagueness or total absence of the statutory norms governing his decisions. Judicial control is the most important check upon his powers. Perhaps because the courts have felt that they were dealing with a prosecuting attorney or a tax-collector rather than with a quasi-judicial tribunal, they have frequently overturned his decisions where they simply disagreed with him. Still, a majority of the courts of last resort concede him nearly as wide measure of discretionary power as is yielded to public utility commissions, and far more than is accorded to boards of health. Judicial appeals on the merits are infrequently provided for by statute; and the remedies for review of his decisions most commonly used (*mandamus* and injunction) are restricted in theory, at least, to abuse of discretion or excess of statutory power. Still, the threat of judicial reversal leads him, in many instances, to seek the advice of his attorney-general, and thus constitutes a real check upon his exercise of his powers.

On the whole, the judicial review of the commissioner's orders and decisions is more thorough-going and less perfunctory than is that of the United States Supreme Court over orders of the Interstate Commerce Commission, for instance, or that of the state courts, it seems, over their local public utility commissions. Perhaps his decisions are more frequently overturned, when contested, than are the revocations of medical licensing boards; perhaps less frequently than boards operating under zoning statutes or ordinances; yet perhaps a far smaller percentage of his decisions is actually contested than in the case of either. Judicial control of the insurance commissioner is rather a brooding omnipresence than a ubiquitous censor. Certainly he is less subjected to judicial control than are, for instance, the patent office or the Federal Trade Commission; for, most of his orders or decisions, unlike theirs, are (unless we are much mistaken) not open to attack in collateral proceedings.

In conclusion, it must be noted that the daily work of an insurance commissioner is not accurately pictured merely by describing his powers. One must not imagine him as continually hustling

about, revoking licenses right and left, prying into business secrets, and sending iniquitous insurers to prison. The daily routine of his office resembles that of the Federal Census Bureau, or of the Federal Department of Agriculture, or of any other fact-gathering and information-dispensing department. Here are the tons of annual statements, there the files of examiners' reports, yonder the index of agents' licenses. Most of the work can be done by subordinates while the commissioner is away fishing — and who would know the difference?

On the ledger of governmental activities, is the insurance department to be reckoned as a liability or an asset? We are speaking now not of dollars and cents (for the gross premium tax makes the financial reckoning obvious), but of such intangible values as social welfare and hindrance of private enterprise. The present writer feels, after a study of the subject extending over five years, that the insurance department is distinctly an asset. The insurance business is peculiarly one "affected with a public interest," in that it combines with vast possibilities for social welfare exceptional opportunities for abuse. It has the glittering lure of "easy money" for the unscrupulous and the adventurous promoter, and the mystery of an unknown technique for the unwary insurant. That the activities of the commissioner keep out many a small and unsound insurance enterprise, many a dishonest or incompetent agent or broker, can scarcely be doubted. In this alone, perhaps, is more than compensation for the irksome burden of annual reports and routine examinations upon the larger, admittedly sound, companies. Moreover, even the "big fellows" of the insurance business are the better for official supervision. If an unrelenting competition works at its best, it affords constant temptation to deception and unsound methods of financing, against which human virtue alone has no dependable resistance. On the other hand, if the competition does not work as it is supposed to, the insuring public, without governmental aid, is helpless before a virtual monopoly. Thus the commissioner is a balance wheel, at least, and occasionally, as in the case of Elizur Wright, he engenders a genuine dynamic force in the creation of new standards and the hastening, if not the making, of desirable social change.

§ 2. *Defects and remedies: Personnel and scope of regulation.* "Those who can, do; those who cannot, teach." With this Shavian sentence hanging over him, a law teacher might well hesitate to

propose action, as something incompatible with academic thought. Whether or not Mr. Shaw's brilliant jibe of a generation ago has point for the present generation of law teachers, it seems certain that they are becoming industrious, if not useful, proposers of change in legal institutions. Hence I feel that my work would be but half done if I did not offer some specific criticisms of defects and at least a few suggestions of remedies. Even if I can never apply my proposed remedies in action, I must, in formulating them, take account of those biological characteristics and social heritages of adult Americans which stand in the way of a proposed change. Every proposer of legal reform must make, consciously or unconsciously, a postulate as to the degree of mutability of "human nature" which he assumes to exist. Hence, if the reader finds my remedies over theoretical, or unduly cautious, if may well be that his postulate is of lower, or higher, degree than mine. While many of these criticisms and suggestions have been incorporated in the descriptive portions of the text, it will serve the convenience of the reader to have them summarized, with cross-references which will enable him to examine the data upon which they are based.

The outstanding problems of the administrative regulation of the insurance business may conveniently be grouped under five heads:

1. Problems of the personnel and organization of the insurance department. 2. Problems of the scope of the conduct to be regulated. 3. Problems of the administrative devices by which the commissioners' decisions are effectuated. 4. Problems of administrative procedure. 5. Problems of control.

1. *Personnel and organization.* Speaking of judicial justice, Dr. Ehrlich emphatically said: "There is no guaranty of justice except the personality of the judge."[1] Even if this be an exaggerated criticism of judicial justice, it is scarcely less than true of administrative justice. It is less than true of the kind of justice administered by the insurance commissioner, because the ninety-and-nine of his (including his subordinates') determinations are governed by a fixed routine and are amenable to agencies of control with a degree of certainty which is close to mathematical. These routine determinations are thus but little affected by the variations in the personality actually found among the heads of the departments. Yet it is the one case in a hundred which makes one acutely conscious of the problems of insurance administration, and in this

[1] *The Science of Legal Method*, (1917), p. 65.

one case the personality of the commissioner is a vital factor. Hence the emphasis on personnel is, pragmatically, justified.

Political appointments are the most serious causes of defects in personnel. The selection of the commissioner by the governor and state senate, which is the commonest method of choice,[2] plays into the hands of the political organization scarcely more surely than does a popular election, which ranks second in frequency.[3] Thus, thirty-six states have methods of selection which facilitate "political" appointments. While the instances are rare in which a man without either previous experience in the insurance business or technical training as a lawyer, is selected,[4] yet these qualifications can be satisfied without going outside the party organization. It is not essential, perhaps not even desirable, that the appointee should be an actuarial expert. The expert, as Professor Frankfurter has well said, should be "on tap, but not on top." The trouble is that the man is chosen too much because of his political friendships or his political following. Hence he thinks of his office as either an avocation or a sinecure.

The three New England states which leave the selection to the governor and executive council have made it easier to obtain non-political appointments.[5] Massachusetts, one of these states, has the most illustrious record in point of personnel, and her influence upon the legislation of other states has probably been the greatest. For states which do not have a separately elected executive council, appointment by the governor alone offers the greatest opportunity for merit appointments; or, in the case of states which have adopted the centralized type of administration, the head of the grand division (for example, "Department of Trade and Commerce") in which the insurance department is allocated might well be given the power to choose the commissioner. If an insurance board were created for administrative decisions or appeals, it might well be given the power of choice.

The short term, the frequent changes,[6] and the small salary[7] are other causes (or consequences?) of "political" appointments. Merely to increase the salaries would not remedy this defect; it would only intensify the struggle for the political plum. Yet an increase in compensation would lessen the sacrifice which the suc-

[2] *Infra*, § 5, p. 34.
[3] *Infra*, § 5, p. 34. This method was found in fifteen states.
[4] *Infra*, § 6, p. 40.
[5] *Infra*, § 5, p. 34.
[6] *Infra*, § 7, p. 45.
[7] *Infra*, § 8, p. 46.

cessful insurance agent is called upon to make if he aspires to go into the administrative work, and would make the call of an insurance company or a private actuarial firm a less potent cause of resignations. For the rest, the state must barter political power for the power of money. Hence, a longer term (at least six years), a higher salary (depending upon the state, but in no event less than $5,000 at the current purchasing power of the dollar), and a sacred tradition that a reappointment should be given without question to a successful incumbent, would improve matters. To give his decisions a more definite legal status would enhance the attractiveness of the office.

Another defect that should be remedied is the practice of allowing the commissioner to carry on his private business without interruption during his incumbency. It is believed that the commissioners are too often absent from their governmental offices. If the commissioner were regarded as an administrator of justice, he would be subjected to the tradition which forbids the practice of law by a judge on the bench. Even if some able men would be unwilling to accept an appointment which entailed a severance of private connections, it is believed that a mediocre commissioner whole-heartedly "on the job" would be better than an abler man who treated the work as his avocation.

The subordinates of the insurance departments appear to be relatively better than the heads. Underpaid and overworked though they are, they are more frequently chosen solely with an eye to their ability to get the job done than is the commissioner himself. Perhaps this is largely due to the fact that they are appointed by the commissioner alone, and removable by him,[8] and are less frequently changed. If they were better paid, and were chosen without regard to their previous residence within the state, considerable improvement would result. The smallness of most of the departments has prevented the application of the grading and standardizing process that goes with the "civil-service" method of selection. New York has used the civil-service method with apparent success, and has further enhanced the attractiveness of the higher subordinate positions by a scheme of organization which gives each man a considerable degree of power within his sphere of action.

2. *Scope of commissioner's control.* From the standpoint of the scope of the conduct attempted to be regulated, the trouble is that

[8] *Infra*, § 9, p. 48.

the insurance departments have, voluntarily or not, attempted too much rather than too little. We are not here concerned with the problem of individual initiative *versus* state control, but rather with the narrower problem of administrative ways and means. No insurance department in the United States is fully equipped to administer adequately all of the laws assigned to it. True, the larger departments, which have supervision over the larger number of domestic companies, are almost adequately manned to perform the task of supervision of their own companies, and the effectiveness of the supervision of these departments makes up in part for the wholly inadequate supervision which is inevitable in some of the smaller states. Still, the effectiveness of even the larger departments is confined, it is believed, within the range of conduct which can be supervised by documentary data. The insurance departments are primarily organized to deal with such data. They are not organized to deal with types of conduct which are ascertainable only from non-documentary data. Hence the more recent types of insurance regulation, which have extended the scope of state regulation to include the latter types of conduct, have placed tasks upon the insurance departments which they are inadequate to perform. A summary of the chief types of conduct regulated will illustrate this generalization.

The formation of new domestic insurance companies is everywhere subjected to more or less supervision of the insurance commissioner, if not in the initial stages of incorporation, at least before the new company is authorized to solicit business.[9] While difficult problems of statutory interpretation frequently arise (for instance, as to the purposes for which companies may be formed), the attorney-general's office, or the courts, will usually relieve the commissioner of this responsibility. In the case of capital stock companies, the statutory prerequisites are usually defined with sufficient clearness to make the commissioner's task merely one of investigating documentary data. It is believed that this part of the commissioner's work is performed reasonably adequately in every state. Since only one state requires anything corresponding to the "certificate of public convenience" which the banking commissioner is commonly called upon to give,[10] this troublesome question of administrative discretion is avoided.

The newer types of legislation, however, have added to the commissioner's tasks questions which can be answered only by refer-

[9] *Infra*, § 10. [10] *Infra*, § 10 and n. 20.

ence to undefined non-documentary data. In the incorporation or licensing of the newer types of "mutual" (assessment) insurance companies, the commissioner is frequently called upon to pass upon the integrity and financial standing of the proposed incorporators. Likewise, the statutes requiring him to license the selling of insurance stock usually call for something more than "paper evidence." The insurance departments are not well equipped, it seems, to undertake such work.

The annual renewal of licenses of insurance companies places a heavy burden on all the insurance departments; it probably occupies at least a majority of the working time of every department.[11] The investigation which precedes a renewal is usually limited to an analysis of the company's annual report.[12] Even this documentary task is a tedious and lengthy one, and hence is apt to be superficially done in the smaller departments. The dangers of superficiality are minimized, however, by the fact that the larger companies, which do business in several states, submit substantially the same financial statement to a number of different departments, each of which is a check against the errors of the others. Even in those states which do not require domestic companies to renew their licenses annually,[13] the work of checking over the annual reports of such companies goes on.

The annual renewal is too valuable a feature of insurance supervision to be discarded. The law may indulge the (somewhat dubious) assumption that a doctor or lawyer who has once been shown competent and trustworthy remains so; yet to apply such an assumption to an insurance enterprise would be too violent. Probably most insurance enterprises would be soundly conducted without this continuous supervision; but one cannot see any legislative criterion by which such enterprises could be separated, in advance, from the ones which have to be watched. Hence the annual renewal feature (or at least the annual analysis of financial statements) will have to go on. One minor suggestion which might facilitate the work I have made elsewhere: namely, that the period between the date of filing the financial statement and the issuance of the renewal license be made sufficiently long or flexible to allow ample time for checking over the former.[14]

The licensing of foreign insurance companies (that is, those incorporated in another state or in a foreign country) would be an

[11] *Infra*, § 12.
[12] *Infra*, § 13, p. 124.
[13] *Infra*, § 12, p. 93.
[14] *Infra*, § 12, p. 96.

insuperable task for most of the insurance departments, were it not for the fact that the commissioners, either because of express statutory provision,[15] or because of the absence of restrictions upon the kind of evidence which they must require,[16] commonly accept the reports or certificates of other departments — usually, of the domiciliary department of a company incorporated in the United States. It may safely be said that no insurance department is adequately equipped to investigate fully and independently all the insurance enterprises applying to it for admission. The National Convention of Insurance Commissioners maintains a standing committee for the interchange of data on companies, which greatly facilitates the task of passing upon new applications for licenses. The work of this committee should be strengthened (if constitutional obstacles do not prevent) by annual appropriations from each state. The recurrent "wars" between various states over the admission of the companies of the one by the other might be avoided by the exercise of the states' power to enter into treaties with each other, with the approval of Congress.[17] This power, though used in respect to other subjects,[18] has never been resorted to in the case of insurance.

The examination of insurance companies,[19] closely related as it is to the commissioner's powers over the companies' assets and financial conditions,[20] calls chiefly for the scrutinizing of documentary data. True, the inspection of a document will not always disclose all the data necessary; for instance, a company may have a bond and mortgage in its possession, and yet the examiner cannot tell, from a mere inspection, whether or not the debt has been paid, wholly or in part.[21] On the whole, however, the task is a routine checking over of "papers." Even so, it is a laborious and lengthy task, frequently beyond the man power of the department. The mandatory periodical examination of domestic companies (chiefly life) is the chief cause of the trouble. It is believed that these mandatory provisions should be done away with, as they are in many states, it seems, only perfunctorily observed, and the larger

[15] *Infra*, § 22, p. 369. [16] *Infra*, § 26.

[17] United States Constitution, Article I, § 10.

[18] Frankfurter and Landis, *The Compact Clause of the Constitution — a Study in Interstate Adjustments* (1925), 34 *Yale L. J.*, p. 685.

[19] *Infra*, § 22.

[20] *Infra*, § 16.

[21] See Wolfe, *The Examination of Insurance Companies* (1910), pp. 22, 23.

companies, which entail most of the work, are the very ones which, as a rule, are least in need of watchful scrutiny of their financial conditions. The commissioner could still make a special examination of such companies "whenever he deems it prudent to do so";[22] and meanwhile he could devote more of his attention to the smaller and newer concerns, which, because they have fewer documentary data to go over, and because they are more likely to become insolvent, offer greater opportunity for the effective prevention of evils. The situation would be worse than it is but for the fact that the states in which most of the larger companies are incorporated — notably New York — are the best equipped to do the work of examination.[23]

The licensing of agents[24] and brokers[25] calls for the investigation of non-documentary data in large measure. The "questionnaire" or the "examination" used by the larger departments[26] may disclose the applicant's competency, but it is doubtful to what extent they keep out rogues. The Pennsylvania commissioner, Mr. Donaldson, several years ago, proposed that the insurance agents and brokers be organized into local groups, somewhat like local bar associations, for the purpose of examining and certifying the applicants for licenses. The fruitful possibilities of this scheme should be developed. No department, it is believed, has an adequate force of inspectors to investigate the character of each applicant. Hence the questionnaire and the written examination represent the best that can be done, and should be copied in other states. Probably the supervision of agents can be made most effective through revocations of licenses, which, though calling for an oral hearing, will be sufficiently infrequent not to be unduly burdensome. Such types of conduct as rebating, misrepresentation, and twisting,[27] by agents or brokers, resting, as they do, "in parole,"

[22] *Infra*, § 22, p. 347.

[23] Life insurance companies have the largest reserves and hence take the most time to examine. Probably nearly half of the outstanding life insurance in the United States (ordinary and industrial) is in companies incorporated in New York, and therefore subjected to periodical examination by its large staff of examiners. About two-thirds of the outstanding life insurance in the United States at the close of 1923 was in companies which reported to the New York department. (See the Insurance Year Book (1923–24), pp. A 290–291, and summary, pp. A 430–432.)

[24] *Infra*, § 14.

[25] *Infra*, § 15.

[26] *Infra*, § 14, p. 168.

[27] *Infra*, § 21.

can nowhere be more than sporadically supervised, by revocation of license upon the complaint of a private individual.

The approval or disapproval of policy forms [28] is a documentary task, and it is believed that this work is done with reasonable adequacy in the larger states. However, the mass and variety of forms (chiefly life, accident, and health) to be approved must make it impossible for a department not having at least one full-time policy examiner to inspect the forms submitted more than perfunctorily. The answers to the questionnaire, which indicate wide diversity as to the percentage of forms rejected,[29] lend support to this conclusion. The statutory requirements, not only as to the prescribed and prohibited clauses, but also as to the kinds and combinations of insurance which a company may engage in, are so diverse as to prevent the acceptance, by one department, of the approval given by another department, as conclusive evidence that the form approved complies with the former's legislation. No reason is perceived why, by concerted action, the various departments could not draw up and have adopted a uniform statute as to life, health, and accident insurance forms, which require but few variations to meet local conditions (in contrast with fire insurance policies). With such statutes in force, the approval by the home department of the company (or, as to an alien company, by the department in which it has made its deposit of securities) could then be accepted in the other states in which it might do business, and the wasteful duplication of effort in the inspection of policy forms would be eliminated.

The regulation of rates (chiefly of fire insurance rates) [30] is one of the newer tasks thrust upon the commissioner, and one for which he is not well fitted. Leaving aside the uncertainty of the standards for basic rates, the mere removal of discriminations between classes of risks calls for the investigation not only of extensive documentary data, but also of voluminous non-documentary evidence as a basis for comparison. For instance, the protracted hearings in Indiana in 1923, relating to the basic rate for the city of Indianapolis, involved a thorough study of the city's waterworks in comparison with those of cities more favorably treated, and, after all, the hearings resulted in concessions by the insurers rather than in a definite ruling by the commissioner.[31] If such

[28] *Infra*, § 18. [29] *Infra*, § 18, p. 268. [30] *Infra*, § 19.

[31] The commissioner at first made a ruling against the insurers, but later revoked it when the rating bureaus offered to make concessions. See *infra*,

hearings were at all numerous, the commissioner would have but little time for other work. The preference of the commissioners for the flat percentage reduction (for example, ten per cent in all rates),[32] based upon a study of underwriting profits for all classes of business over a limited period of years, is no doubt partly due to the greater ease of basing a decision upon documentary data. If the state really wishes to undertake seriously the task of fixing fire insurance rates (as distinguished from mere supervision of private rating bureaus), it should create a separate board for that purpose, as in Massachusetts (advisory) and in one or two other states.[33] Meanwhile, the insurers (except life) should bestir themselves to obtain more adequate statistical bases for their rating schedules.

The deposit laws[34] have proved popular with the insurance departments chiefly, it is believed, because they are easy to enforce. The commissioner can ascertain whether the statute has been complied with simply by tabulating the securities in the vaults of the state capitol and assigning their values on the basis of tables of valuations. The valuation of real estate mortgages is a little more difficult. While the withdrawal of all the securities calls for some extra-mural investigation, the necessity for such withdrawals seldom arises. On the other hand, the interests of the companies are inadequately safeguarded in many states because of the lack of protection against official misappropriation of deposited securities. The state treasurer should be given the custody of all deposited securities.

The increasing tendency of the insurance departments to pass upon one or all phases of the merits of policy holders' claims[35] is more objectionable on the ground of ineffectiveness than upon any doctrinal grounds, such as separation of powers or denial of "due process." Such controversies will usually involve a sifting of non-documentary data, and the hearing will absorb more time than most of the departments can give if they are to do their other tasks well.

§ 3. *Defects and remedies (continued): Methods and control of administrative determinations.* — 3. *Administrative devices.* The licensing power is the staple administrative tool of the insurance

§ 19, n. 13. No doubt the concessions were forced by the commissioner's ruling, hence the proceeding was not futile.

[32] *Infra*, § 19, p. 279.

[33] *Infra*, § 19, pp. 272, 279.

[34] *Infra*, § 17.

[35] *Infra*, § 20.

departments. If clearly defined and intelligently handled, it is admirably adapted to the tasks of state control over the insurance business. It is nowhere clearly defined. In the first place, there is great uncertainty as to the legal consequences of the issuance of a license to a company [1] agent or broker. One is unable to say in any jurisdiction whether it settles anything more than that the licensee is no longer unlicensed; that is, whether it confers a defence to a judicial prosecution for any other offence than that of doing business without a license. While the short duration of most of these licenses (the domestic company's license in some states continues until revoked) minimizes the practical importance of the problem, it should nevertheless be settled. Again, the statutes fail to indicate the legal consequences of the refusal of a license. May the company which has been erroneously refused a license by the commissioner show such error as a defence to a criminal prosecution for doing business without a license? While the decisions on statutes relating to other subjects than insurance indicate pretty clearly what the answer should be, the statutory language should be specific. The ancestor of the insurance license is the license tax, and one cannot be sure that, in the process of evolution the former has shed all of its simian characteristics.[2]

In the third place, the grounds of refusal or revocation of a license are inadequately defined.[3] Such phrases as "will best promote the interest of the people of this state" (New York) tend to make the commissioner a benevolent despot. A remedy for this evil is suggested elsewhere.[4] Scarcely less serious are the numerous provisions authorizing refusal or revocation of a license for "non-compliance with the laws of this state." An extended analysis of these provisions fails to assign them any definite content.[5] A glance at the insurance provisions of any state (except possibly Michigan and Colorado) shows the provision designed for judicial enforcement confusingly mingled with those designed primarily for administrative enforcement; and many provisions cannot be with certainty assigned to either category. The remedy is by legislation.

Second in importance are the inquisitorial and visitorial powers of the commissioner.[6] The exercise of these powers is inevitably unregulated; the commissioner must be allowed to investigate upon suspicion if his supervision is to be effective. Yet the exercise

[1] *Infra*, § 11, p. 74.
[2] *Infra*, Appendix A, § 40, p. 524.
[3] *Infra*, § 13.
[4] *Infra*, § 12, p. 119.
[5] *Infra*, § 13, p. 133.
[6] *Infra*, § 22.

of the inquisitorial powers leads to some abuse — how much, it is hard to say. The remedy lies, it is submitted, not in attempting to define the grounds for examination further than has already been done ("whenever he deems it prudent for the protection of policy holders in this state" is the commonest formula), but in minimizing the legal consequences of an examination of an insurance company. The chief legal consequence to be eliminated is the company's obligation to pay the expenses of the examination. Mere statutory definition of the items of expense, or even a rigid auditing, will not eliminate the various abuses to which this power is susceptible.[7] The only remedy, it is believed, is to provide, as only a few states now do, that the expenses of all examinations shall be paid out of the state treasury. The commissioner would thus be made definitely responsible for ill-advised examinations, and could no longer order an examination as a means of penalizing a company. The revenue for such expenses could be obtained by increased license fees, if necessary. However, in most states the gross premiums taxes bring in much more than enough revenue to pay all the expenses of insurance supervision.

Approval and disapproval powers are used to a limited extent in insurance legislation. They, too, are inadequately defined. The Massachusetts statute requiring "approval" of an increase of capital stock after the stock has been sold is an extreme example of faulty draftsmanship.[8] Again, the legal consequences of the disapproval of a particular clause in a policy form, in an action by the insured against the insurer to recover on a policy containing such a disapproval clause, are left uncertain.[9] Finally, the grounds of disapproval, or of refusal to approve, are frequently left to a latitudinous implication.

Of the other administrative powers, little need be said. The power to compel the attendance of witnesses, and the power to compel them to testify, are too inadequately defined. The commissioner should be given such powers as a necessary adjunct to his other powers. The powers of a judicial referee or master in chancery would furnish an apt analogy. The privilege of the examiner to enter a company's place of business and inspect its books and securities should be given definite scope.[10]

4. *Administrative procedure.* The administrative procedure of the insurance departments is their most vulnerable spot. This

[7] *Infra*, § 22, pp. 342–346.
[8] *Infra*, § 16, p. 218.
[9] *Infra*, § 18, p. 267.
[10] *Infra*, § 30.

criticism is most true if we look at the law in the books; it is somewhat less true if we look at the law in action. For the essentials of administrative procedure are the principles of "fairness" of which the lay administrator is ordinarily cognizant; and the practices of the insurance departments are somewhat better than their statutory precepts. However, the observance of procedural fairness in practice is at best but fairness as a matter "of grace"; and it is no technical rule of "due process" which requires that notice and hearing be given as "of right" and not merely of grace.[11] The difference between the two is indicated by those answers to the questionnaire which stated that the commissioner gave a hearing "depending on circumstances" or "if there is doubt." [12] How can the licensee be given an opportunity to bring out all the "circumstances," or to create a "doubt," unless he is given a hearing? Therefore, the statutory requirements are the measure of the commissioner's procedure, rather than his benevolent and variable practices.

The most serious defects are found in respect to the licensing of companies, especially of foreign companies. Only one state explicitly requires that an opportunity for a hearing be given before the commissioner *refuses* to issue or renew a foreign company's license.[13] In every state but one, provisions were found which authorized the *revocation* of a company's license without giving it notice or hearing.[14] While it is believed that no state permits the commissioner to take such action without "cause" (that is, arbitrarily or capriciously), yet the implication of a hearing requirement from the provisions for "cause" is too uncertain to furnish a satisfactory substitute for explicit requirements. In no reported case has the refusal or revocation of a company's license been attacked on the ground that a hearing was refused; yet in a decided majority of the reported cases in which such an attack was made, the report fails to disclose that any hearing was had prior to the administrative decision.[15]

Now this situation might be based upon some sound policy peculiar to insurance companies. Thus, it is arguable that revocation on financial grounds must be speedy to be effective, and that

[11] *Infra*, § 25, and n. 58.

[12] *Infra*, § 25, n. 90 and n. 99.

[13] *Infra*, § 25, p. 398.

[14] *Infra*, § 25 p. 398. This statement is true of at least *one* type of company in every state but one.

[15] *Infra*, § 25, p. 403.

the data of the administrative decision will be the company's own records and documents, so that the "facts" will be undisputed. Even so, the interpretation of "facts" is often the crucial question, and a hearing may throw light upon their meaning. Moreover, this does not apply to those other grounds of revocation which rest upon non-documentary evidence. On the whole, it is submitted that there are no peculiar features of the insurance business which require a departure from the essentials of administrative procedure.

This conclusion is strengthened when we look at the historical antecedents. The insurance company license, as a device under the police power of the state, evolved partly from the tax license, a device used under the revenue power.[16] The revenue feature still adheres to it. The change was gradual and was overlooked in the successive statutory revisions. Again, from the earliest time, the licensing power has been used as a device to exclude foreign corporations from the state.[17] The attitude of the United States Supreme Court toward foreign corporations generally, coupled with the specific ruling that an interstate insurance business was not "interstate commerce," lent support to the view that foreign insurance companies might be arbitrarily dealt with by the state;[18] and local jealousies, or perhaps the irritating methods of foreign insurers, made the states unwilling to treat the foreign corporation any better than they had to. Again, the single-head type of organization does not lend itself as well to formal hearings as does the board type.[19] Furthermore, the insurance department has rapidly developed in the last few decades from a fact-gathering agency into an active regulatory agency; and the legislation has not kept pace with the growth. Finally, the notion that a judicial hearing *after* the revocation was an adequate substitute for an administrative hearing *before* the revocation,[20] must have antedated the judicial decisions which held that certain questions were conclusively settled by the commissioner's decision.[21] Thus, there is ample historical explanation for the absence of procedural requirements in the licensing statutes. And while a legal doctrine or practice may survive for valid reasons wholly different from those which caused its origin, the obsolescence of the original reasons is some evidence that the survival is due merely to the inertia of habit.

[16] *Infra*, p. 524.
[17] *Ibid.*
[18] *Infra*, § 25, p. 402.
[19] *Infra*, § 4.
[20] *Infra*, § 25, p. 399.
[21] *Infra*, § 37, p. 502.

That the reasons for the absence of procedural requirements in respect to companies' licenses are chiefly historical is supported by the circumstance that such requirements are much more commonly found in the legislation empowering refusal or revocation of an agent's or broker's license.[22] The "agency qualification" laws, as well as the broker's licensing statutes, are comparatively recent in origin, and their administration calls for the investigation of non-documentary data more frequently than in the case of company licenses. Even here, the older pattern (no notice or hearing) has been imitated in a number of states.[23] If insurance agency or brokerage is to be recognized as an expert vocation, then the agent is no less entitled to a hearing than the doctor or the lawyer.

Approval and disapproval powers are so inadequately defined that it is not surprising to find them unaccompanied by procedural requirements.[24] It is far from clear that a provision for judicial review is an adequate substitute, for instance, in the case of disapproval of policy forms. With respect to insurance rates, the exercise of approval or disapproval powers is more commonly hedged about by procedural safeguards;[25] the model of public utility rate-fixing was too obviously at hand to be ignored. So, the approval of mergers or reinsurance, which smacks of judicial litigation, has been frequently accompanied by full provisions for an administrative hearing.[26]

Absence of notice and hearing requirements are not the only defects of insurance department procedure. The commissioner is commonly not required to give any reasons for his decisions. It is by no means clear that such a requirement should be made applicable to all the commissoner's decisions; even judges are frequently at a loss to motivate their holdings, and only the appellate judges are required to do so. However, the commissioner might well be required to cite the relevant statutory provisions upon which he bases his decision — a requirement frequently not observed in practice.[27] There is evidence that a considerable number of commissioners consider themselves authorized to do whatever they regard as "right," and such a requirement would give them pause.

The absence of any clear requirements, or practice, as to the office records of the commissioner's decisions[28] is symptomatic of

[22] *Infra*, § 25, pp. 404–406.
[23] *Infra*, § 25, and n. 95.
[24] *Infra*, § 25, p. 389.
[25] *Infra*, § 25, p. 390.
[26] *Infra*, § 25, p. 215.
[27] *Infra*, § 26, p. 411.
[28] *Infra*, § 27, p. 413.

his procedural looseness. One should not expect him to preserve the formality of a clerk of a court; yet his decisions are too momentous to be scattered through letter-files. More serious are the omissions of requirements that notice be given *after* an administrative decision, to the company or person adversely affected thereby,[29] or the provisions which indicate that the revocation of a license shall take effect *before* such a notice has been received.[30] The commissioner is now fully graduated from the class of mere "letter-writing" officials.

Of administrative review (or, rather, the absence of it) more will be said in connection with control. Finally, the provisions as to the making of "regulations" by the commissioner are everywhere inadequate or wholly absent. The rare enactments directly authorizing the making of rules are silent as to the procedure of rule-making, either before or after the rule is made.[31] Of more moment is the total absence, in most states, of any recognition of the commissioner's rule-making functions. For the making of rules goes on all the time; indeed, the more important ones are printed and distributed, by a New York publishing house, to those who pay for the service. The exercise *sub rosa* of administrative powers not explicitly granted is always attended with more dangers of abuse than if the same powers are defined. A few statutory sections would suffice to clarify the scope and procedure of practices which are now anomalous.

5. *Control of administrative decisions.* The provisions for judicial control of the insurance commissioner's decisions are scanty and vague.[32] This is probably an advantage, rather than a defect; for the courts have been better able to work out methods of judicial review, through the adaptation of *mandamus* and injunction, than could be done by any new-fangled statutory procedure. Judicial empiricism has been at its best, too, in defining the scope of review; for the courts have, on the whole, displayed commendable adaptability and skill in sensing, if not in defining, the boundaries between that which the commissioner can best decide and that which the court can best decide, and in rendering unto Caesar that which is Caesar's.[33] The statutory provisions for appeal from the commissioner's decisions [34] add but little to the procedure of review, and frequently authorize the court to try the controversy

[29] *Infra*, § 27, p. 417, and cross references.
[30] *Infra*, § 12, p. 100.
[31] *Infra*, § 30, pp. 420–426.
[32] *Infra*, § 36, pp. 477–480.
[33] *Infra*, § 37, p. 494.
[34] *Infra*, § 36, p. 477.

anew without regard to the commissioner's decision. This is undesirable because the questions of insurance regulation are frequently technical or involve protracted investigation, for which the court can ill spare the time and labor. It is much easier for the court to say that the commissioner was not clearly wrong than for the court to say that he was clearly right. *Mandamus* and injunction are therefore the better remedies.

The judicial recognition of the commissioner's discretionary power renders all the more harmful the absence of other effective agencies of control. In only six states is any administrative review of the commissioner's action provided for.[35] The Virginia Corporation Commission seems a better type of reviewing agency than the departmental heads of Illinois, Idaho, or Nebraska, yet the administrative organization of the latter has other advantages which pretty clearly outweigh anything thus far developed in this country. If the commissioner's powers and procedure are strengthened and defined as has already been urged, then some method of administrative review should be provided, and an appeal in a prescribed way from the commissioner to the head of the department (for instance, the Department of Trade and Commerce) would seem best.

Other executive officials, in states other than those just mentioned, have but little control over the actions of the commissioner. A conspicuous exception is the provision which the fraternal societies have succeeded in getting adopted in many states, that the attorney-general shall sue to enjoin an insolvent domestic fraternal society "if he deems the circumstances warrant it." [36] The sinister suggestion of political pressure in these provisions is enough to condemn them. The attorney-general's commonest rôle is that of certifying the regularity of proposed articles of incorporation — a task properly assigned to him.

Of legislative control there is not much to say. The commissioner has a great deal to say about the insurance laws that are enacted, and that is as it should be; yet whenever an emotional drive brings forward a popular reform, he is powerless to stop it,[37] and that, too, is perhaps as it should be. The chief criticism of legislative control has been its misplacement of emphasis. Too often the salaries of employees and other office details are meticulously prescribed, while the social and economic policies which the legislature ought to articulate are uttered in words "of sound and fury," signifying nothing.

[35] *Infra*, § 28. [36] *Infra*, § 33, p. 451. [37] *Infra*, § 34.

CHAPTER II

ORGANIZATION AND PERSONNEL

§ 4. Title; number; single-head type of organization; boards for rate-making, 29.
§ 5. Methods of selection and removal, 34.
§ 6. Qualifications; other duties, 39.
§ 7. Term; length of service, 44.
§ 8. Compensation, 46.
§ 9. Subordinates; cost of the service, 48.

[In this chapter, specific citations of statutes and constitutional provisions are not given in the footnotes, as a rule, because the numerous cross-references in the citations would make them quite bulky. A list of the statutes on which the study is based is given at the end of the chapter.]

§ 4. *Title; number; single-head type of organization; boards for rate-making.* In every state of the union, and in the District of Columbia and the Territory of Alaska as well, one or more officials are charged with the administration of the laws relating to private insurance undertakings. In every state except Arizona, a single official is invested with the general powers and duties of this nature. In twenty-one states [1] the title of this official is "insurance commissioner"; in fourteen states [2] his title is the obvious variant "commissioner of insurance"; while in seven states [3] he is designated as "superintendent of insurance." In three states [4] he is known as the "commissioner of insurance and banking," in one [5] as "director of insurance," and in one [6] as "chief of the bureau of insurance." In Louisiana the secretary of state performs the

[1] Ark., Cal., Conn., Del., Fla., Ga., Ky., Me., Md., Miss., Nev., N. H., Okla., Ore., Pa., R. I., S. C., Utah, Wash., W. Va.

[2] Colo., Ind., Ia., Mass., Mich., Minn., Miss., Mont., N. C., N. D., S. D., Texas, Va., Wis., Wyo.

[3] Ala., Ill., Kan., Mo., N. M., N. Y., Ohio. Also in the District of Columbia.

[4] N. J., Tenn., Vt. For Tenn., the title, to be exact, is "Commissioner of Insurance and Banking."

[5] Idaho.

[6] Nebraska, L. 1919, Ch. 190. The Secretary of Trade and Commerce is nominally the head of the insurance department. Neb. Comp. Stats. 1922, § 7245.

duties of this office without additional title,[7] in the Territory of Alaska the territorial treasurer and the territorial secretary divide the duties between them,[8] and in Arizona the administration of the laws relating to insurance companies is entrusted to the Corporation Commission of three members.[9]

Thus, by far the commonest designation is that of "commissioner," and in the present discussion the term "insurance commissioner" will be used generically. The title "commissioner" originated in New Hampshire,[10] but was soon adopted by Massachusetts,[11] which was also the first state to attempt the administrative regulation of insurance companies.[12] The title "superintendent" was first used in New York.[13] These variations in title have no functional significance. The "commissioner" in Massachusetts or Iowa has about the same powers and duties as the "superintendent" in New York or Kansas. Of the two, "commissioner" seems the more expressive term, since "superintendent" suggests a degree and scope of control much greater than that possessed by any existing American official.

In another respect, however, the variations in title are significant. Massachusetts and New York have been the pioneer states in insurance legislation, and the other states have followed in their footsteps. While it is difficult to trace the actual borrowing from one state by another, it seems that the ascendancy of Massachusetts is properly indicated by the greater prevalence of the title "commissioner." Not until 1919, when Idaho adopted "Director," did any state break away from this dichotomy.

It will thus be seen that the prevailing type of administrative organization of the insurance departments of the various states is that of a single head, with one or more subordinates. Only in Arizona are the general powers and duties of the department vested in a board.[14] Yet it was not always thus. The earlier insurance de-

[7] La. Wolff's Stats., 1920, pp. 927–1009. [8] Alaska L, 1919, Ch. 46.

[9] Arizona Civil Code, 1913, § 3390. However, the chief clerk of the commission carries on the routine work and for many purposes occupies a position analogous to that of the commissioner in other states.

[10] N. H. Laws, 1851, Ch. 1111 (approved July 5, 1851).

[11] Mass. Laws, 1852, Ch. 231 (approved May 18, 1852).

[12] Mass.: — Resolves of the General Court, 1807, Ch. LVI, p. 39 (Feb. 23, 1807); Laws, 1827 (January Session), Ch. CXLI, Sec. 2 (approved March 10, 1827). See *infra*, Appendix A, § 40.

[13] N. Y. Laws, 1859, Ch. 366.

[14] In Florida (Comp. Laws, 1914, §§ 2757 et seq.) most, and in Virginia (Code 1919, Ch. 167) many, of the general powers are vested in a board.

partments were organized on the board plan, and it was only by a process of experimentation, especially in the New England states [15] that the single-head type of organization was evolved.

The choice between these two types of organization is to be determined by the nature of the work to be done.[16] For the work of the state insurance department, the single-head type offers the most advantages. It tends to secure energy and promptness of decision, which are highly important in the regulation of the solvency of insurers, since a few days' delay may mean loss to many policyholders. Moreover, the statutes designed to secure the solvency of insurance companies have usually been sufficiently specific and detailed in their provisions to leave but little room for administrative policy-determining, which can best be exercised by a board. Again, the insurance department devotes perhaps the larger part of its time to the work of gathering information about the various insurance enterprises, and in this respect the commissioner is the supervisor of a group of clerks and actuaries — a post for which, obviously, a single administrator is better adapted than is a group. The single-head type has the further advantage that it tends to focus responsibility.[17]

On the other hand, the board type possesses a few advantages in this field of administration.[18] Chief among these is the tendency to secure greater continuity in administration. Frequent changes in the personnel of the head of the department have been one of the chief sources of weakness in the state regulation of insurance. The new appointee, with only such guidance as he can get from the subordinates who have served under his predecessor, must mark time while he learns the details of his work and formulates his policies. A board of three members, one of whom is appointed every two or four years, will be able to go ahead with greater confidence because two at least of its number will be experienced.

[15] N. H. Laws, 1851, Ch. 1111 (approved July 5, 1851); Mass. Laws, 1852, Ch. 231 (approved May 18, 1852); Vt. Public Acts, 1852, No. 46, p. 47 (approved Nov. 23, 1852); *Ibid.* p. 42 (approved Nov. 23, 1852) (relates to health insurance companies); R. I. Acts and Resolves of the General Assembly (Oct. Session), 1854, p. 13, § 17. For a more detailed account of the history of the board type, see *infra*, Appendix A, p. 532.

[16] Ghose, *Comparative Administrative Law* (1919), p. 289.

[17] *Ibid.* For a discussion of the relative merits of these two types of organization, see Holcombe, *State Government in the United States* (1916), pp. 319–325.

[18] For an enumeration of some advantages of the board type in general, see Munro, *The Government of American Cities* (1916), pp. 253–256.

A second advantage of the board type is that it offers opportunity for the representation of various types of thought. The expert in actuarial science, the politician, and the legal expert can all be represented. Rarely can a single commissioner combine these qualities. It must be said, however, that no board of insurance commissioners in the United States has ever avowedly been constituted along these lines. The closest approximation to it is in those instances where, for example, the board was made up of the governor, the state treasurer or other fiscal officer, and the attorney-general.[19] A board of *ex officio* members, each of whom is busy with the affairs of his own department, is not well suited to the task of constant supervision imposed upon the insurance department.[20]

A third advantage of the board type is that it can exercise more wisely broad discretionary powers of a quasi-legislative character. While the administration of insurance laws has usually been a matter of applying detailed statutes to statistical material, yet in some respects,[21] the insurance commissioner is empowered to apply an indefinite legal norm (for example, "is not carrying out its contracts in good faith",[22] "hazardous to the public or to its policyholders"[23]) and for the policy-formulating which necessarily goes on in the application of these standards, there is wisdom in counsel. Furthermore, in the fixing of rates (usually fire insurance rates), the commissioner, in the states where he possesses such power, is exercising a function not unlike that of the various public service commissions, which are everywhere organized on the board plan. It is significant that several of the more recent boards of insurance commissioners have been set up for the sole purpose of fixing rates.[24]

[19] Neb. Laws, 1913, Ch. 154, Art. II, § 3 created a state insurance board consisting of the governor, auditor of public accounts, and attorney-general. The Florida board was composed of the state treasurer, comptroller and attorney-general (Fla. Comp. Laws, 1914, § 2757 *et seq.*). The original Massachusetts board was composed of the secretary, treasurer and auditor of the Commonwealth (*supra*, n. 11). The Rhode Island board was composed of the lieutenant-governor and the treasurer (*supra*, n. 16).

[20] Both the Florida board and the Nebraska board were abolished. Neb. Laws, 1919, Ch. 190; Fla. Laws 1915, Ch. 6847, § 1.

[21] *Infra*, especially §§ 13, 14, 15.

[22] Cal. Stats., 1915, Ch. 608, amending Political Code, § 596b. Similar statutes are cited, *infra*, § 13.

[23] Colo. Laws, 1913, Ch. 99, § 13. Similar statutes are found, *infra*, § 13.

[24] Ky. Acts, 1912, Ch. 5; Mass. Acts, 1919, Ch. 350, § 48; Okla. Laws, 1915, Ch. 174; Tex. McEachin's Tex. Civil Stats. Anno. (1914), § 4877.

A combination of these two types of administrative organization, while common enough in other fields of administration,[25] has seldom been tried in insurance administration. A recent interesting experiment along this line is the Virginia insurance department as recreated in 1906.[26] A commissioner of insurance is placed at the head of the department, but in many important respects he is subject to the control of the Corporation Commission,[27] which also has control over public service companies and other corporate activities. As a safeguard against arbitrary or ill-considered action, this scheme appears to be admirable. Even more desirable would be a board of experts and representatives of conflicting classes, created solely for insurance administration. However, the expense of maintaining such a board in every state would be prohibitive. Advisory boards organized along these lines aid and partly control the insurance commissioner in both France and Germany. The French law of March 17, 1905, for the regulation of life insurance enterprises, establishes (Art. 10) an advisory board of twenty-one members, whose advice the Minister of Commerce (who corresponds to our insurance commissioners) is obliged to take on certain important matters (Art. 6, Art. 9). The insurance law of the German Empire, of May 12, 1901 (extending to all forms save marine and state insurance) provides for a similar advisory board (Art. 70–73).[28]

[25] See Holcombe, *State Government in the United States*, p. 321, for a summary of various types of board organization.

[26] Va. Laws, 1906, p. 122, Ch. 1; Va. Code, 1919, § 4169. In 1917, Michigan created an "advisory board" of five members, elected by and from the employers contributing to the workmen's compensation fund, to advise with the commissioner "as to the means and method of administering" said fund. Mich. L. 1917, No. 206, pp. 12, 13.

[27] See last note. The organization of the Arizona department is, in effect, very similar. In Iowa, the commissioner is subjected to the control of the executive council (consisting of the governor, secretary, auditor and treasurer of the state) in one respect only, namely, in regard to the examination of foreign insurance companies. Ia. Code, 1919, § 5475.

[28] The insurance department of the German Empire was organized on a combination plan, having a president, director, and twelve permanent members of the board. Zehnter, *Das Reichsgesetz über die privaten Versicherungsunternehmungen* (1902), § 70 and commentary. In addition, there are a number of "temporary" members, appointed for five-year terms, who advise the permanent officials, and have a vote on the adoption of certain specified administrative decisions. (Arts. 70–76.) The number of these advisers, originally fixed at forty (Imperial Ordinance of Dec. 23, 1901, § 8), was increased to fifty-four in 1912. (Resolution of the Bundesrat of June 11, 1912; *Reichs-*

§ 5. *Methods of selection and removal.* The commonest method of selecting the insurance commissioner in the various states is by executive appointment. In twenty-one states he is nominated by the governor and confirmed by the senate.[1] In three of the New England states the commissioner is appointed by the governor and his executive council.[2] The governor alone exercises the power of appointment in only four states.[3] Other modes of executive appointment are: by the auditor of public accounts,[4] jointly by the governor, comptroller and treasurer,[5] and by the commissioners of the District of Columbia.[6] Election by the state legislature is the method of selection in three states.[7] In fifteen states the insurance official is popularly elected, but in only seven of these [8] is the insurance department a separate department; in the other eight the adoption of this mode of selection may be ascribed to the fact that a popularly elected state official, having other duties to perform, is made *ex officio* head of the insurance department.[9] As state after state has abandoned the *ex officio* commissioner and created a separate department, almost uniformly the newly created office has been filled by executive appointment.[10]

gesetzblatt, 1912, s. 376.) A search which extended to the close of 1923 disclosed no statutory changes in respect to these features of the organization of the German insurance office.

[1] Ark., Cal., Colo., Conn., Ill., Ia., Mich., Minn., Mo., Neb., N. J., N. M., N. Y., Ohio, Pa., S. D., Tex., Utah, Vt., Wis., Wyo. In Nebraska, the Secretary of Trade and Commerce, who nominally directs the insurance department, is appointed by the governor and senate, but the director, his subordinate in charge of insurance, is named by the governor alone. Neb. Comp. Stat., 1922, §§ 7246, 7248.

[2] Me., L. 1917, Ch. 206, § 83; Mass., General Laws, 1921, Ch. 26, §§ 1, 6; N. H., Public Stats., 1901, Ch. 167, § 1. In Mass. and N. H., the Executive Council is popularly elected. In Maine, it is chosen by joint ballot of the two houses of the legislature.

[3] Ala., Idaho, Ore., Tenn. The administrative reorganization which took place in Idaho in 1919 (Laws, 1919, Ch. 8) seems the most thorough and effective one which has taken place in any state to date, and it is significant that the sole power of appointment and removal is lodged in the governor.

[4] Ky. Carroll's Stats. (1915), § 745.

[5] Md. Bagby's Anno. Code (1918), § 175.

[6] D. C. Torbett's Code (1919), § 645.

[7] R. I., S. C., Va.

[8] Del., Kan., Miss., N. C., N. D., Okla., Wash.

[9] Ariz. (corporation commission); Fla. (state treas.); Ga. (comptroller-general); Ind. (auditor of state); La. (sec. of state); Mont. (state auditor); Nev. (state controller); W. Va. (state auditor).

[10] It must be noted, however, that Delaware and North Carolina changed from the appointive to the elective mode of choice. Colorado seems to be the

As between executive appointment and popular election, the advantages are decidedly with the former, so far as the present office is concerned. Election for policy-determining officials, appointment for expert administrators, has become the rallying cry of governmental reorganization. That the insurance commissioner partakes more of the latter than of the former character will become apparent from an examination of his powers and duties. Seldom if ever does the choice of that official involve far-reaching questions of policy which loom large in the public mind. Even when, as in the Armstrong investigation in New York, insurance problems engross the popular interest, the appeal for reform is addressed to the legislature and not to the insurance head. On the other hand, no state administrative office, unless it be that of public health, exacts of its incumbent a higher degree of technical knowledge. Not one elector in a hundred can determine whether or not a candidate possesses the requisite training and experience for this office. Again, the candidate for popular election as insurance commissioner has slight chance of making his candidacy stand out in the long list of candidates for state offices, and success here, as in the case of the other minor state offices, will depend upon the party emblem rather than on the merits of the candidate. More important still is the fact that popular election, involving as it does the approval of party leaders and (in most states) two campaigns — the primary and the final election — will deter many able and experienced men from entering the service of the state. It is therefore fortunate that the office of insurance commissioner was created too late in most states to be caught by the wave of reform which in the early nineteenth century led to the adoption of popular election for all state executive offices.[11] In only five states is the method of selecting the insurance commissioner prescribed in the state constitution and thus placed beyond the power of legislative alteration.[12]

But it cannot be said that the prevailing system of executive appointment works ideally. The requirement of approval of the state senate drags the office into the hotchpot of the spoils system; the governor must consult the wishes of the party leaders who,

only state in which the commissioner comes under the "civil service" law. See Wilson *v.* People *ex rel.* Cochrane (1922), 71 Colo. 456, 208 Pac. 479.

[11] Holcombe, *op. cit.*, pp. 90, 320.

[12] Del., III, 21, 11; N. D., III, 82; Okla., VI, 22; Tex., XVI, 38; Va., XII, 155.

whether members or not, control the votes of that body.[13] Moreover, this check upon the governor's control over the administration of law contributes largely to that administrative disintegration, which has been the principal cause of the impotency of our state governments,[14] and against which the recent administrative reforms in Illinois,[15] Idaho[16] and Nebraska[17] may be regarded as wholesome reactions. Furthermore, owing partly to this check upon the governor's power of appointment, the chance of getting an appointee with the requisite training and experience is greatly lessened, as the range of choice frequently is limited to "deserving" party workers.[18] Wisconsin has endeavored to curb this tendency by providing that the appointee shall not serve on any political committee nor as campaign manager.[19] It is questionable how far this statutory pronouncement will serve to eradicate a practice which is so deeply rooted in American political life. The Iowa statute, requiring that nominations be referred to a bi-partisan committee of the senate, which shall report to the senate in executive session, seems a more effective check on political appointments.[20]

These same objections exist to election by the state legislature, and the additional objection that the energy of the policy-determining branch of the government should not be spent on the appointment of executives. Selection by the governor and executive counsel has decided advantages, but on the whole those five states have done wisely which have boldly left the choice of the insurance commissioner to the Governor alone. Only thus can responsibility for the appointment be focused, and popular control over the administration be effectively exercised.[21]

In more than half the states there is no provision for the removal of the insurance commissioner by the executive branch of the government. This group includes not only those states in which the commissioner is an elective official, but also a number of others in which he is chosen by executive appointment or by the legislature. In these states, then, the commissioner cannot be removed

[13] Holcombe, *op. cit.*, p. 337.
[14] *Ibid.*, p. 281.
[15] Ill. Laws, 1917, p. 2.
[16] Ida. Gen. Laws, 1919, Ch. 2.
[17] Neb. Comp. Stats., 1922, §§ 7242–7266, 7745.
[18] See Gephart, *Principles of Insurance* (1917), II, 299; Graham, *The Romance of Life Insurance* (1909), p. 123.
[19] Wis. Statutes, 1917, § 1966y.
[20] Ia. Comp. Code, 1919, § 5460.
[21] Mathews, *Principles of American State Administration* (1917), p. 183.

save by judicial conviction or by impeachment. Impeachment is at best a cumbersome mode of removal,[22] rarely used; it is "the gun behind the door." Judicial removal is scarcely less unwieldy. Since it is generally held that, in the case of state officials having fixed terms of office (which includes nearly all the insurance commissioners), the governor, unlike the president of the United States, does not have the power of removal as an incident to his power of appointment,[23] the commissioner, once installed in office, is practically safe from removal for his term of office.

In twenty states, the insurance commissioner, by virtue of statutory or constitutional provisions, may be removed by some executive board or official.[24] In thirteen states, the removing official is the governor alone,[25] in Missouri and New York the power of removal is vested in the governor and senate, in New Hampshire, in the governor and council, in Maryland, in the governor, comptroller and treasurer, in Iowa in the executive council of which the governor is a member. In Kentucky, the auditor of state possesses this power along with the power of appointment, while in Virginia the removal power is vested in a board, the Corporation Commission, which does not possess the power of appointment. Thus, in only a minority of the states is the chief executive granted the power to insure a capable and honest administration of the office. This is another phase of disintegrated administration. By way of comparison one must note that in the seven Canadian provinces which have superintendents of insurance, each holds office at the will of the governor of the province.

Of the states providing for executive removal, a slight majority—twelve — require that it be for cause. In most instances, the causes for removal are named in the statute or in the constitution: for example, "neglect of duty, breach of trust, incompetency or malfeasance in office," [26] while in other cases the provision reads, "for

[22] Mathews, *op. cit.*, p. 185.

[23] 29 Cyc. 1370, by Prof. Frank J. Goodnow.

[24] In Maine, the provision for removal by the governor and council (Rev. Stats., 1916, Ch. 53, § 83) was stricken out (Me. L., 1917, Ch. 206), and there is now no provision for removal by the executive alone.

[25] Colo., Conn., Idaho, Ill., Mass., Mich., N. J., N. M., Ore., S. D., Tex., Vt., Wis. In Mo., the governor may suspend, but not remove, the commissioner, whenever, in his opinion, the public interest may require it (Rev. Stats., 1919, § 6083).

[26] Colo., L. 1913, Ch. 99, § 4. Very similar are Ill. Const., 1870, Art. V, § 12; Mich. Comp. Laws, 1915, § 9095; N. M. Const., 1910, Art. V, § 5; Va. Code, 1919, § 4198.

cause," [27] or "for good and sufficient cause." [28] The Iowa statute enumerates nine grounds of removal.[29] In eight states the power of removal is not limited by any provision as to cause and is, therefore, arbitrary,[30] but in only five of these does a single official possess this unlimited power.[31]

For the office of insurance commissioner, some method of removal other than legislative impeachment or judicial conviction should exist; and removal for cause seems best adapted to promote the efficient administration of the office. The commissioner has little power to determine broad questions of policy, and the governor's arbitrary power of removal on grounds of policy is apt to be used for removal on grounds of politics. On the other hand, men possessing the requisite training and experience are less likely to be attracted to the office if the tenure is subject to arbitrary termination. While the grounds of removal named in existing laws are sufficiently broad to cover almost every conceivable misconduct in office, yet they do exclude removal for avowed political reasons. Moreover, the requirement of "cause" carries with it the necessity of notice to the official, specifying the grounds of proposed removal, and a hearing, at which he must have an opportunity to defend himself.[32] Although the decision of the removing official as to the existence of ground for removal will usually not be reviewed or set aside by the courts,[33] yet the accused officer has an opportunity to try his case at the bar of public opinion, and this in itself constitutes a real check upon political removals.

The question of appointment or removal on political grounds is very hard to nail down. In an effort to get some light on this point, the following question was asked:

[27] Conn. General Statutes, 1918, §§ 4059, 4061; Md. Bagby's Anno. Code, vol. 3, 1914, Art. 23, § 175; Neb. Rev. Stats., 1913, § 3142. The Maryland statute formerly provided for arbitrary removal (Townsend *v.* Kurtz (1896), 83 Md. 331, 34 Atl. 1123), but the words "for cause" were inserted in 1912. (Md., L. 1912, Ch. 355).

[28] Tex. McEachin Tex. Civil Statutes Annotated, 1913, § 6027.

[29] Ia. Code, 1919, § 648.

[30] Idaho (governor), Ky. (auditor), Mass., Mo. (governor and senate), N. H. (governor and council), N. Y. (governor and senate), Ore. (governor), Vt. (governor). It is generally held that a provision for removal by the appointing power, with no provision as to cause of removal, confers arbitrary power of removal without specifying charges or giving notice or hearing. Townsend *v.* Kurtz (1896), 83 Md. 331, 34 Atl. 1123.

[31] See last note.

[32] 29 Cyc. 1409.

[33] 29 Cyc. 1413, n. 46.

Do you know whether the person holding the office has ever, during the past ten years, been a member of a different political party from that of the governor of the state? If so, in how many instances has that happened?

Only twenty-five answers were received to this question. Several hinted that it was a rather foolish question to ask. However, eleven answered "Yes," of which five indicated that this situation had arisen more than once. Of these eleven, four [34] have popularly elected commissioners, while the remainder [35] have appointed ones. In so far as these meagre returns are typical, and with due allowance for adventitious factors (for example, temporary or "hold-over" appointees), the answers indicate that political considerations play a less important part in the selection and removal of this official than in the case of other state officials.

§ 6. *Qualifications; other duties.* Only twelve states prescribe any technical qualifications for the office.[1] These states require that the incumbent shall have had some experience in the insurance business. Usually no length of time is fixed; however, Arkansas requires three years,[2] and Idaho [3] and Tennessee [4] each require five years of experience. Sometimes other qualifications are added, such as "of well known business ability," [5] "well versed and experienced in the business of insurance and in matters relating thereto," [6] "known to possess a knowledge of the subject of insurance and skill in matters pertaining thereto." [7] In Delaware, where the commissioner has the additional duties of bank supervisor, the incumbent is to be an expert accountant.[8] A few states have qualifications so vague as to be practically no limitation upon the field of eligibles, such as "some suitable person," [9] "selected solely with regard to his qualifications and fitness to discharge the duties of this position." [10] At the other extreme was the Kentucky statute

[34] Del., W. Va., Wash., Mont.
[35] Ariz., Colo., Conn., Mass., Minn., N. M., Ohio.
[1] Ala., Ark., Colo., Idaho, Ill., Kan., Mo., Okla., Ore., Tenn., Utah, Wis.
[2] Ark. L., 1917, p. 1038, § 4.
[3] Idaho L., 1919, Ch. 8, § 7.
[4] Tenn. Anno. Code, 1917, § 3276a2.
[5] Ark. L., 1917, p. 1038, § 4.
[6] Kan. General Stats., 1915, § 10787. Similarly, Ala., § 8320.
[7] Wis. Stats., 1917, § 1966y.
[8] Del. Rev. Code, 1915, § 572.
[9] Conn. Gen. Stats., 1918, § 4059, Ky. Carroll's Stats., 1915, § 745.
[10] Iowa Code, 1919, § 5460.

declaring that the appointee must be "skilled as an insurance actuary," [11] which was evidently too narrow, since it was changed.[12] No state requires that the commissioner shall have had training as a lawyer.

It is regrettable that the statutes do not give greater emphasis to the technical qualifications for this office. While lack of the statutory qualifications would probably infrequently lead to the removal of the incumbent by ouster proceedings, yet an express statutory provision, requiring certain technical qualifications, would, operating through public opinion, constitute a check upon unsuitable appointments, and even upon aspirants to the office by popular election.[13] Perhaps the experienced insurance agent, acting as he does as an intermediary between the companies and the insuring public, is as well qualified for the office as anyone who is available under the present régime; and yet one would like to see higher executive officials of insurance companies attracted to the position. It is important that the official should have the confidence of the public, but it is likewise important that the state's representative should be capable of coping with the companies' experts on matters of technical detail — a situation which does not generally prevail at present.[14]

As revealed by the answers to the questionnaire, the technical qualifications of the commissioners are of four types: (1) Training as a lawyer; (2) Training as an actuary; (3) Experience in the insurance business; (4) Experience as a subordinate employee or official of the insurance department. Of the thirty-one commissioners who answered this inquiry, six (all appointed) are lawyers; the other twenty-five are not, and one had the effrontery to add that he was glad of it! Only one (Nebraska) is an actuary. On the other hand, only twelve have had no previous experience in the insurance business (six of these are elected). Of the remaining nineteen, four have been home office officials, seven, agents or

[11] Ky. L., 1870, Ch. 538, § 2.

[12] See *supra*, n. 9.

[13] Of the states prescribing technical qualifications, only Del., Kan., and Okla. have popularly elected commissioners.

[14] One commissioner confessed his inability to understand the figures presented by the insurance companies to justify the blanket increase of ten per cent in fire insurance rates during the war. See *Proceedings, National Convention of Insurance Commissioners* (1919), pp. 165, 167. A perusal of some ten volumes of these proceedings gives the writer the impression that not more than a dozen of the commissioners really understand the details of their work.

solicitors, and eight did not specify the kind of work done. The fourth type of experience is represented by twelve commissioners who had previous experience in their own departments. Only five (all popularly elected) had none of these four types of preparation when they assumed office; and the average length of service of these five was 5.5 years. On the whole, then, the commissioners seem better qualified for their positions than most other state officials.

California in the early days tried a unique experiment in limiting the list of eligibles to this office. By a statute adopted in the session of 1867–68 [15] the insurance commissioner was to be nominated by a convention of the presidents, vice-presidents or other chief managing officers of domestic insurance companies, to be held in San Francisco each year, each company being given one vote. The nomination was subject to the approval of the governor. The object of this provision was evidently the laudable one of removing the appointment from politics, but it would hardly do to let the wolves choose the sheep-dog.

Some fourteen states provide that the commissioner shall not be directly or indirectly interested in any insurance company, except as policyholder.[16] The minuteness with which these statutes are worded manifests in the minds of the framers thereof a greater anxiety as to corruption or favoritism in the incumbent than as to incompetency. This is characteristic of the naïve spirit in which American administrative statutes have been drawn. It is too often assumed that anybody can fill any office, provided only he will be honest. However, the provision in question is obviously desirable and should be universally adopted. True, it bars able insurance executives; but the administration of law must be above suspicion.[17]

In a number of states, eligibility is limited to residents, or even electors, of the state.[18] In practice, this requirement is universally observed; indeed, some courts have held that it is implied, in the absence of express provision, that only residents are eligible to

[15] Cal. Statutes, 17th Session, 1867–68, Ch. 300, § 2.

[16] Cal., Conn., Del., Kan., Mich., Neb., N. H., N. J., N. M., N. Y., Ohio, S. D., Vt., Wash.

[17] However, under the French and German systems, officials of insurance companies serve on the advisory boards. See Art. 21 of the French Life Insurance Law of 1905; *Reichsgesetz über die privaten Versicherungsunternehmungen von 12 mai* 1901, § 72.

[18] Ga. (6 yrs.), Kan. (elector), Mich., Mo. (R. S. 1919, § 6083), Mont., Nev., N. M., N. D., S. D., Wyo.

public office,[19] and this is undoubtedly a correct interpretation of our traditional political creed. Certainly, however, no obvious reason exists for applying this requirement to the insurance commissioner. The office is one calling for the highest order of administrative ability and for considerable experience in its actual duties. Knowledge of local conditions is of far less importance — far less than in the case of the city manager, for example. Why should not an able commissioner go from a small state to a larger one and thence on, as his ability becomes recognized, just as a state university professor does? The spread of the city manager plan of municipal government has opened up new possibilities in the field of professional administration, which should be emulated in state administration. A body of professional insurance commissioners, devoting their lives to the work and ambitious of promotion to larger fields, would lead to a greater degree of efficiency in this field of administration. It is noteworthy that Ohio in 1913 abolished the requirement of residence.[20]

The failure to recognize the need of expertness in this field of administration may be ascribed in large measure to the fact that in most states a separate insurance department has been established only in recent years, and in a number of states the commissioner still has other duties imposed upon him. While the tendency has been to create a separate department, in only twenty states, it seems, is the commissioner freed from all other duties than insurance supervision.[21] To these may be added the ten states in which the commissioner is given the functions, and usually the title, of State Fire Marshal[22] — functions sufficiently related to those of insurance commissioner to call for similar qualifications and experience. The supervision of state banks, which devolves upon the insurance commissioner in three states,[23] is somewhat more re-

[19] 29 Cyc. 1377.

[20] Ohio L., 1913, p. 842 amending Bates Anno. Ohio Code, 1900, §266, which read: "No person shall be appointed who is not an elector of this state."

[21] Ala., Cal., Colo., D. C., Idaho, Ill., Ia., Kan., Mass., Mich., Miss., Mo., N. M., N. Y., N. D., Ohio, Pa., S. C., Tenn., Utah, Wyo. "Seems" because, in the confused state of our statutes, it is never safe to say what the statutes do not contain.

[22] Ark., Me. (without title), Md., Mich., Miss. (without title), N. H. (without title), N. C. (without title), Vt., Wash., Wis. In Kentucky, the fire marshal and insurance commissioner are both in the office of the auditor of state.

[23] Del., N. J., Tex. In N. M. the powers of the superintendent of insurance are nominally vested in the state bank examiner with a deputy for insurance, N. M. L., 1921, Ch. 47, p. 105. In Mass., the "division of insurance," of which

motely related to his insurance functions; though the element of expert accountancy is common to the two, the practice of the other states in separating the two seems a wise one. However, in an administrative reorganization such as that of Illinois, Nebraska, or Idaho, banking and insurance, each with its separate head, may well be grouped together under a Director of Trade and Commerce.[24] Only eight states cling to the practice, once quite common, of devolving the duties of insurance supervision upon some state fiscal officer, usually chosen by popular election.[25] The similarity between these two functions — fiscal and insurance administration — is more apparent than real; practically the two are quite distinct, as is recognized in the Illinois, Idaho, and Nebraska reforms. Louisiana alone retains the original Massachusetts scheme of entrusting insurance supervision to the popularly elected secretary of state. These minor state offices, which usually attract little attention in primary or election, are commonly the rewards of party service, and for this reason, as well as the diversity of functions, it is difficult to attain high professional standards for the office of insurance commissioner in those states where this combination exists.[26]

Occasionally other duties are imposed on the commissioner,[27] among which the most important are those in connection with the

the commissioner of insurance is head, is a part of the "department of banking and insurance" (General Laws, 1921, Ch. 26, § 1), but the connection between the division of insurance and the division of banking is very slight.

[24] See Idaho General Laws, 1919, Ch. 8; Ill. Laws, 1917, p. 2, §§ 3, 4, 5; Neb. Comp. Stats., 1922, Index.

[25] Fla. (state treasurer), Ga. (comptroller-general), Ind. (auditor of state), Ky. (the insurance commissioner is a distinct official but he is a subordinate of the auditor of public accounts); Mont. (state auditor), Nev. (state controller), R. I. (state auditor), W. Va. (state auditor). In most instances the work of insurance administration is actually done by a deputy, but the statutory powers are lodged in his superior. Also, in Alaska (treasurer of territory).

[26] "Other states . . . have attached their insurance departments to the auditor of state's office, where it is administered oftentimes in a most perfunctory manner." — S. H. Wolfe, *State Supervision of Insurance Companies, Annals of Am. Acad. Pol. and Soc. Sci.* (1905), xxvi, 317, 320.

[27] E.g., Ala., § 8329 (compensation commissioner); Conn. (member of teacher's retirement board); Me. (member of industrial accident commission); Neb. (certain duties under Employer's Liability Act); N. C. (administers the "Blue Sky Laws", N. C. Pell's Revisal, § 4805a); Okla. (member of warehouse commission). In Maine the commissioner is also empowered to license persons of good reputation and moral character to act as agents for manufacturers of lightning rods. Me. R. S., 1916, Ch. 44, §§ 33–35.

Workmen's Compensation Acts, a field of compulsory insurance in which the commissioner's expert knowledge (if he has it) should be valuable. The tendency toward state insurance raises the interesting query whether, as a problem in practical administration, a separate department should be created for this purpose, as in Germany and England, or this function should be given to the existing officials who supervise private insurance undertakings. So far, the problem is academic.

§ 7. *Term; length of service.* The fixed term of office is an all but universal characteristic of American state administrative organization, and this holds true of the insurance commissioners. In only two states does the commissioner hold for an indefinite term.[1] By far the commonest period is four years, which is the term fixed by law in twenty-six states.[2] In thirteen states it is two years,[3] in six, three years,[4] and in two, six years.[5] The short term is regarded as a necessary corollary of the independence of the executive in non-parliamentary governments, in order that the executive may be responsive to changes in public opinion. However, since the insurance commissioner does not possess extensive policy-determining powers, and since those which he does possess are seldom subjects of public discussion, a longer term may safely be granted him than to the chief executive. Significantly, twelve states grant a longer term to the insurance commissioner than to the Governor,[6] while in only one state is the term shorter.[7] The tendency toward a longer term is a hopeful sign.

Under ideal political conditions, an indefinite term coupled with arbitrary power of removal by the governor or a bureaucratic head would probably make the position attractive to the highest type of insurance expert. As it is, the four-year term with removal for cause seems about the best combination. If it were an established

[1] Idaho, Neb. In the District of Columbia, the term of the superintendent of insurance is indefinite.

[2] Ala., Cal., Colo., Conn., Del., Fla., Ill., Ia., Ky., La., Me., Md., Miss., Mo., Mont., Nev., N. C., Okla., Ore., Pa., Utah, Va., Wash., W. Va., Wis., Wyo.

[3] Ga., Ind., Kan., Mich., Minn., Neb., N. M., N. D., S. C., S. D., Tenn., Tex., Vt.

[4] Mass., N. H., N. J., N. Y., Ohio, R. I.

[5] Ariz., Ark.

[6] Ariz., Ark., Colo., Conn., Ia., Me., Mass., N. H., N. Y., Ohio, R. I., Wis. This comparison is based on Congressional Directory (Jan., 1921), p. 168.

[7] Ind. (auditor of state, elected).

tradition that reappointment would be the reward of faithful and efficient service, regardless of changes in the gubernatorial office or other appointing official, the way would be open to secure expertness and continuity in administration to a high degree. On the other hand, the indefinite term with removal only for cause would create the danger of an intrenched and self-sufficient bureaucracy, which is (and not without reason) one of the *bêtes noires* of the American political mind.

The statutory term gives only an inadequate idea of the actual length of service, which is considerably shorter. Taking the last ten years (prior to 1921) as a basis of comparison, one state (Ohio) had seven different men in the office during this period; five states (Colorado, Idaho, Minnesota, Pennsylvania, and Montana), each had five commissioners during this period, while only two states (so far as the questionnaire shows) had the same person throughout this period. The average number of commissioners during this period was 3.31. Only nine of the thirty-three commissioners reporting had held their present positions four years or more;[8] eight had been in office less than a year. The average length of service of the thirty-three was 3.14 years. In view of the fact that the average statutory term is (excluding the states not reporting) 3.85 years, it appears that the average length of service (3.14) was less than the average term. Even if we exclude the commissioners who had taken office since January 1st, 1921 (since in that year an unusually large number of changes took place), the average service of the remaining twenty-five is only 3.99 years, which would indicate that reappointments or reëlections are rare.

If one considers total length of service in the department, the results are somewhat better. The average here (thirty states) is 4.44 years. It is interesting to note that the average length of service of the popularly elected commissioners, whether as commissioner (3.67 years) or as a member of the department (4.9 years) exceeds the corresponding averages for the appointed commissioners (2.27 and 4.2 years, respectively).

The frequent changes in personnel have been one of the chief sources of weakness in the administrative regulation of insurance enterprises. Each new incumbent must, as the commissioners have frequently stated in their national conventions, mark time while he familiarizes himself with the voluminous files and the manifold duties of his office. To acquaint himself with the statutes of his

[8] Ark., Conn., Fla., Nev., N. D., S. D., Va., Vt., Wash.

official being (numbering on the average several hundred sections) is a task of no inconsiderable magnitude; and if he attempts to delve into his predecessor's rulings and the advisory opinions of his legal counsel, he has still more to learn. For some time after assuming office he will, unless rarely trained or gifted, be at a disadvantage in any contest of wits with the larger companies' representatives. Moreover, the confusion and uncertainty arising from this discontinuity of administration injures those engaged in the insurance business in direct ratio to the extent of the commissioner's powers of effective control. To bring about a greater length of service, then, should be one of the chief objects in any attempts to improve the state insurance departments. Massachusetts has more than once furnished a striking example (in Elizur Wright and Frank H. Hardison) of what can be accomplished by an able commissioner holding office for a long period, and several of the other Eastern states have similar records. On the whole, the tendency appears to be toward greater length of service.

§ 8. *Compensation.* While the insurance commissioner collects various fees from the companies which he supervises, happily no state at present fixes his compensation upon the basis of fees received. In every state he is upon a fixed salary. The amount varies greatly from state to state—from $2,250 in New Hampshire,[1] and $2,500 in three states,[2] and $3,000 in seven,[3] to $7,500 in Pennsylvania,[4] and $10,000 in New York.[5] About a dozen states were paying, in 1919, as much as $5,000,[6] and if one excludes the

[1] N. H. L., 1923, Ch. 124, § 1. In this and the following notes in this section it is well to bear in mind that occasionally changes have taken place which are concealed in the unassorted mass of appropriations bills. Also, the commissioner may receive further compensation as the holder of some other official title, e.g., state fire marshal.

[2] Me. Rev. Stats., 1916, Ch. 117, § 18; Okla. L., 1923, Ch. 49, p. 71; Utah L., 1921, Ch. 156, § 1.

[3] Colo. Comp. L., 1921, § 2473; Ga. L., 1923, p. 15; Kan. L., 1923, Ch. 1, p. 12; Mo. Rev. Stats., 1919, § 6087; N. D. L., 1923, Ch. 28, p. 24; S. C. L., 1924, p. 1261; Vt. L., 1923, No. 7, § 44.

[4] Pa. L., 1923, No. 274 ("The Administrative Code"), § 208.

[5] N. Y. L., 1917, Ch. 181, p. 651.

[6] Cal. ($6,000), Ga. ($5,000), Ill. ($5,000), Ind. ($7,500), La. ($5,000), Mass. ($5,000), N. J. ($6,000), N. Y. ($10,000), Pa. ($7,500), Wash. ($5,000), Wis. ($5,000). A re-survey in 1925 disclosed that the following states were paying $5,000 or more: — Cal., Ill., Mass., Neb. (secretary of trade and commerce), N. J., N. Y., Ohio, Pa., Wash., W. Va. (state auditor), Wis.

states in this group who have *ex officio* commissioners (who devote only part time to the insurance work),[7] the number of states which pay an adequate salary for this type of work is still further reduced. The relative variation in salary may be indicated by a comparison with the salaries of the governors made in 1921.[8] In only three states did the salary of the insurance commissioner equal that of the governor,[9] while in twenty-three it was sixty per cent or less of the governor's salary.[10]

In most of the states the salary paid is too small to attract and keep the ablest type of administrators. Compared with the salaries paid the higher executive officials of the insurance companies, or the technical advisers, or even moderately successful insurance agents, the salaries are pitifully small. True, government cannot pay for talent, in dollars, as much as private business can; and yet the disparity is nowhere more striking than here. The noteworthy thing is that so many able men have given themselves for the honor and the glory of the cause, and for the avenue thus opened to lucrative positions with insurance companies.

Several reasons may be advanced why the salary of the insurance commissioner should be not less than that of the governor. The governor has, except in time of emergency, less law-enforcing power than the commissioner; the latter's duties are more exacting and require a higher degree of specialization, and the training required and obtained in the duties of the office cannot be as readily procured; the governorship has a greater prestige which will attract men to it regardless of salary; and finally the governor frequently has a mansion, travelling expenses, and other perquisites.

Most states are already burdened with the heavy cost of expanding administration, and perhaps the present salary scale of insurance commissioners is as heavy as the traffic will bear. The administrative regulation of insurance is a task calling for professional talent of no less order than that possessed by the judges of the courts of last resort in the various states, and yet the salary paid the single insurance commissioner is, in most states, decidedly less

[7] I.e., Ga. (comptroller-general), Ind. (auditor of state), La. (secretary of state), N. J. (commissioner of banking).

[8] Based on the list of governor's salaries in Congressional Directory (Jan., 1921), p. 168.

[9] Ga. (each $5,000), N. Y. (each $10,000), Wis. (each $5,000).

[10] Ala., Ariz., Ark., Colo., Del., Fla., Ill., Kan., Ky., Me., Md., Mass., Mont., Neb. (1/3), Nev. (1/3), N. J., N. M., N. C., N. D., Ohio, R. I., S. D., Utah.

than that paid to the justices of the highest appellate state court.[11] The American doctrine of judicial supremacy has its pecuniary side.

§ 9. *Subordinates; cost of the service.* All the states have recognized that the work of insurance supervision has outgrown the capacity of a single individual, and have provided for one or more assistants, actuaries, examiners, clerks, and so forth. In contrast with the lack of provision for removal of the commissioner himself, it is commonly provided that these subordinates shall be subject to removal by the commissioner. In some states it is expressly provided[1] that the deputy commissioner and other subordinates shall be removable "at the pleasure" of the commissioner, while in other states this power of removal is a necessary corollary of the power of appointment vested in the commissioner plus the absence of any fixed term of office for the subordinate.[2] Thus, while the commissioner generally possesses the powers of an autocrat within his department, he is practically autonomous as to administrative control from without.

However, the commissioner's power to appoint and remove subordinates is subject to a few important limitations: In the first place, some eleven states have adopted state civil service commissions or boards. The extent to which these boards exercise a check upon the insurance commissioner's powers of appointment varies in different states. In New York, in 1915, 164 out of 179 employees in the insurance department were in the graded civil service, while in Illinois in 1917 a larger proportion of the employees of that department were exempt from the civil service rules. Since

[11] Judicial salaries ranged in 1919 from $3,000 in S. D. to $17,500 in New York (supreme court). The salaries of judges in the twelve states paying the insurance commissioner $5,000 or more in 1919 were, in 1919, as follows: Cal., $8,000; Ga., $5,000; Ill., $10,000; Ind., $6,000; La., $6,000; Mass., $10,000; N. J., $12,000; N. Y., $17,500 for supreme court in New York City, ($13,700 for court of appeals); Pa., $13,000; Wash., $6,000; Wis., $7,500. In the spring of 1924, the average salary paid to judges of the highest court in each state was $7,701.06. See "Report of Special Committee on Increase of Judicial Salaries," *Amer. Bar Assn. Rep.* (1924), XLIX, p. 320.

[1] E.g., Ala., § 8323; Ia., § 5462; Ky., § 745; Mich. Comp. Laws, 1915, § 9088; Mo., § 6085; Tenn., § 3276 (a) (3); Tex., § 4489; Va., § 4171; Wash. L., 1911, p. 165, § 6.

[2] Prof. Goodnow states it to be "the universal rule that where the duration of an office is not prescribed by law, the power to remove is an incident of the power to appoint." 29 Cyc. 1371. See also his *Principles of the Administrative Law of the United States* (1905), p. 312.

most of these employees perform clerical work which may be standardized and classified, probably the percentage subjected to civil service regulations in New York represents about the right proportion.

In a few states the appointment by the commissioner of his subordinates is subject to the approval of the governor [3] or of the governor and council [4] or of the state auditor,[5] while in Idaho the appointment of subordinates is taken away from the director of insurance and vested in the commissioner of commerce and industry.[6] Furthermore, in most states the amount of money available for clerical assistance is limited, usually by the itemized provisions of the annual appropriation bill, occasionally by a maximum sum, unitemized, prescribed in the statute,[7] or by the required approval of some other administrative board or official.[8] A few states, however, apparently give the commissioner the power to determine how much of the state's money shall be expended in employing assistance,[9] while the states are commonly quite generous in allowing the commissioner to employ temporary assistance where the bill is to be paid by the insurance company.[10]

The practice of most state legislatures of fixing precisely the salary of each deputy, actuary, examiner, clerk, and stenographer in the department is a questionable one. In the first place, it is legislative interference in the details of administration; the legislature should look to the administration for results, and should not handicap the official by imposing upon him its own notions as to the number of subordinates and the relative value of each. Sec-

[3] Mich. Comp. Laws, 1915, § 9088; Pa. L., 1911, p. 607, § 31; S. D. Political Code 1913, p. 41a, § 5; Colo. L., 1915, Ch. 96, § 3; Miss., § 5016 (deputy).

[4] Me., Ch. 53, § 83; Mass. General Laws, 1921, Ch. 26, § 7 (only as to first deputy, actuary and chief examiner; commissioner alone appoints "clerical assistants").

[5] Ky., §747, as to clerks; the deputy-commissioner is appointed and removable at pleasure by the commissioner (*Ibid.*, § 745).

[6] Idaho L., 1919, Ch. 8, § 9.

[7] Ala., § 8324; Ariz., § 3379 ($5,000); Ky., § 747 ($9,800 for clerks); N. H., Ch. 167, § 7 ($1,000 for clerks); N. J., p. 161, § 3 (fees received); R. I. ($1,900); S. C. ($2,000).

[8] N. J. (governor), N. D. (state auditing board), Utah (governor), Vt. (board of control).

[9] Ore. (additional assistance in the discretion of the commissioner), Tex. (chief clerk and such others as the labors of his office may require).

[10] E.g., Cal. L., 1919, Ch. 178, § 7; Fla. L., 1919, Ch. 7871, § 1; N. H., Ch. 167 § 7. See also *infra*, § 22.

ondly, even if the commissioner is allowed to write the statute himself, it is inflexible. The commissioner cannot change the internal organization of his department to meet new demands, or to carry out his own ideas of reform; he cannot adjust his salaries to the exigencies of the material available for the various positions, for if the statute says the actuary shall receive $2,500, he must get one for that sum, willy-nilly. Finally, it deprives the commissioner of the power of rewarding capable and diligent subordinates with increases in salary. If an experienced examiner resigned and the only man available to fill his place were a beginner, the latter would have to receive the same salary as the former. The legislature may well fix the total sum to be spent by the department, and the salary of the commissioner, but with a careful auditing system and drastic safeguards against the commissioner's exceeding his appropriation, it need go no further.

Aside from the power of removal, the commissioner possesses no means of disciplining the members of his staff. Suspension, demotion, fines and penalties, as punishments for misconduct or neglect of duty, are unknown in this as in nearly all fields of American administration.[11]

The disciplinary value of the power of removal, however, is not measured by the frequency of its exercise, since its very existence is a threat, and it alone is sufficient to prevent gross misfeasance or laziness. Unfortunately, the commissioner has relatively little power of rewarding faithful and efficient service. It has been pointed out that usually he cannot increase an employee's salary, since that is fixed by the legislature. He may recommend an increased appropriation, but the adoption of such a recommendation is subject to too many contingencies to make it an inspiring goal for the ambitious subordinate. He may promote the subordinate to a higher position, when one becomes vacant, and considerable promotion of this sort goes on. Thus, a clerk may become familiar with the duties of an examiner, and in course of time he may be graduated to that position, whence he may, if the political auguries be propitious, attain the position of deputy commissioner. On the other hand, his career may be cut short by a political upheaval, or by the induction of a new commissioner who has friends of his own, and does not forget them.

The results of the questionnaire show a condition more promising than might be expected with respect to the opportunities for pro-

[11] Mathews, *op. cit.*, p. 187; Goodnow, *op. cit.*, p. 374.

motion from a subordinate position to that of commissioner. In twelve states out of the thirty,[12] the present commissioner was an employee of the insurance department before assuming his present duties. In only two of these twelve states (North Carolina and Oklahoma) is the commissioner popularly elected, and there seems little reason to doubt that the appointive system offers far greater chance of promotion to ambitious subordinates. While the practice of choosing the commissioner from among the members of the insurance staff might, if regularly employed, lead to the dangers of a self-perpetuating bureaucracy, certainly the *efficiency* of the department would be improved if the path of opportunity were open from the bottom to the top.

The salaries of subordinates in the state insurance offices are generally quite inadequate, if one expects to attract and retain competent assistants. The recent wave of high prices effected some improvement in this respect, but it remains to be seen whether the new level can be maintained. To take an extreme example, Kansas as late as 1915 allowed only $1,500 for the assistant superintendent, while Massachusetts with one of the strongest departments as late as 1918 offered only $3,000 for a chief actuary. As a rule, the actuary is the highest paid subordinate, with the exception, in some instances, of the deputy commissioner.[13] Actuarial science is a well-developed field, with high professional standards and a definite course of study offered by some of the larger universities, and with well-organized learned societies of national and even international scope.[14] The actuary is the professional man of the insurance department. In order to meet the competition of the companies and of other state insurance departments, many insurance departments have raised the actuaries' salaries to a point above the general level. Even so, they cannot successfully compete with the financial rewards offered by insurance companies or by private

[12] Ariz. (chief clerk of corporation commission), Ark., Conn., Mich., Minn., Neb., N. M., N. C., Ohio, Okla., Ore., Pa.

[13] In Mo. L., 1923, p. 42, and Ia. L., 1923, Ch. 334, p. 371, the salary of the actuary exceeds that of the commissioner himself. A re-survey in 1925 covering the 1923 session laws, disclosed that the following states made provisions for a salaried actuary: Colo., $2,400; Fla., $3,000; Ga., $3,000; Ill., $4,500; Ia., $5,000; Kan., $3,000; Md., $500; Mich. $2,500; Minn., $3,000; Mo., $4,000; N. Y., $6,000; N. C., $2,500; N. D., $3,000; Ohio, $4,000; Pa., $5,000; S. C., $2,400; Tex., $2,700.

[14] Actuarial Society of America; Institute of Actuaries; International Congress of Actuaries.

practice as a consulting actuary. The low salary scale of subordinates should be borne in mind in connection with the statutory provisions, not uncommon, giving the deputy or examiner administrative powers (in respect to examinations) almost as great as those of the commissioner himself.[15]

Thus the insurance department, like the other state departments with the exception of justice, public health, and education, is not manned by a body of professional administrators. One fact tending to support this conclusion is that, almost exclusively, local talent is employed. In only four of the thirty-one jurisdictions answering the questionnaire has any regular employee of the insurance department ever been regularly employed by an insurance department of another state.[16] The subordinates of the insurance department do not, like state university professors, for example, constitute a distinct body of trained men who move from state to state as better opportunities offer.

Yet these subordinates give continuity to the work of the department as much as any other one factor.[17] Despite the frequent changes in the personnel of the insurance commissioner, the changes in the subordinate personnel are less frequent, or at least less sweeping. In an effort to get some idea of the continuity in personnel, it was asked who was the oldest employee in point of service, and what was his length of service. In twenty-two of the thirty-one jurisdictions, some subordinate official or employee had been in the department longer than the commissioner had been.[18] In nine of these, the position held by a subordinate who had served longer than the commissioner was deputy commissioner,[19] in three, actuary,[20] in the others, minor clerical positions.[21] Among the longer periods of service, were thirty-nine years in New York (first deputy commissioner) and Wisconsin (general clerk), thirty and one-half years in Pennsylvania (deputy commissioner), thirty-five

[15] See *infra*, §§ 22, 30.

[16] Fla., Ia., Utah, Wash.

[17] Gephart, *Principles of Insurance* (1917), II, 299.

[18] Colo., Conn., Del., Ia., Ill., Kan., Me., Md., Mass., Mich., Minn., Neb. N. M., N. Y., N. C., Ohio, Ore., Pa., S. D., Utah, W. Va., Wis.

[19] Kan., Md., Mass., Mich., N. M., N. Y., N. D., Pa., Utah.

[20] Conn., Minn., Ohio.

[21] Colo. (stenographer), Del. (clerk), Ia. (securities clerk), Me. (chief clerk), Neb. (chief clerk), N. C. (cashier), Ore. (record clerk), S. D. (chief clerk) Wis. (general clerk). In Massachusetts a clerk had the longest period of service but the deputy commissioner had been in the department much longer than the commissioner.

years in Massachusetts (clerk), and thirty years in Connecticut (actuary). In New York, fifty-six employees of the department had been in the service twelve years or more. From pure self-defence (if for no other reason) the new commissioner usually retains in office one or more of his predecessor's appointees, who will assist him in adapting himself to his new task. In this respect the state insurance departments resemble the main departments of the national administration.

In addition to the regular employees on fixed salaries, the commissioners frequently employ for temporary work private individuals, usually consulting actuaries or expert accountants, on a *per diem* basis. In nearly all the states this practice appears to be expressly authorized,[22] or impliedly recognized by statutes giving the commisisoner a fund which he may use in this way. The dangers of this arrangement are obvious. It vests the powers of the state in persons who are not officials or employees of the state. The chief work done by these outside employees is that of examining insurance companies. While the work of examining a company as to its financial soundness is a technical, routine task, involving some but not much discretion,[23] yet the objects of examination under recent statutes comprise more than the obtaining of a simple financial statement; they embrace also the ascertaining of the company's methods of doing business, which are more and more being regulated by statutes and official rulings.[24] The practice of employing unofficial examiners was commented upon unfavorably in the National Convention of Insurance Commissioners in 1919,[25] and the decided tendency is to accept, as a basis for action, only the reports of examinations made by the regular official examiners. Thus, of the twenty-nine commissioners who answered the question: "Do you *ever* act upon the reports of special examiners or actuaries, not regularly employed members of your staff?" — only twelve unreservedly answered "Yes"; eight stated that they did so exceptionally or very infrequently; three did so only with respect to the reports of examiners of other state departments (probably most

[22] Ala., § 8336; Ariz., Conn., Fla., Ia., La., Nev., N. M., Ore., Minn. Laws, 1915, Ch. 208, § 4 (professional consulting actuary designated semi-annually by insurance commissioner).

[23] See Wolfe, *The Examination of Insurance Companies* (1910), *passim*.

[24] See the statement of Commissioner Young of North Carolina, one of the more experienced commissioners, in *Proc. N. C. I. C.* (1919), p. 231.

[25] Com'r Donaldson of Pa., *Proc. N. C. I. C.* (1919), p. 228; Com'r Savage of Iowa, *Ibid.*, p. 231.

departments would act on such a report); and six answered "No" without reservation. However, for states which do not appropriate enough money to employ an adequate examining force, the problem will remain a serious one. At this same convention in 1919 it was suggested that the larger states might lend their examiners temporarily to the smaller ones, but the commissioner from New York, which employed forty-five examiners, did not feel that he could spare any of their time.[26]

What of the cost of the service? The total expenses of the different insurance departments vary from as low as $4,000 in Delaware or $1,529 in Nevada,[27] to as high as $464,660 in New York.[28] Among the states expending large sums are: Illinois, $89,860;[29] Massachusetts, $124,560; Texas, $118,496; New Jersey, $89,123; Pennsylvania, $88,869; Connecticut, $62,664; Kentucky, $52,159; Missouri, $50,715, and Ohio, $48,858. The grand total for all states in 1919 was $1,809,201.[30] While the exact figures are not available, it seems clear that, taking the country as a whole, the various insurance departments are not sustained by the fees and charges which they collect. Thus, aside from the receipts of departments regulating "Financial Institutions," the total from "Other Corporations" was $1,742,719;[31] and as "Other Corporations" includes public service corporations, it seems safe to assume that the total income from fees and charges of the insurance departments was considerably less than, perhaps not more than a half of, the $1,809,201 which represented their total expenditures in 1919. However, if one includes the enormous amounts paid by the insurance companies in taxes on premiums and property, clearly the insurance business more than pays the cost of regulating it.[33]

[26] *Ibid.*, p. 228.

[27] *Financial Statistics of States* (1919), p. 76, published by the United States Census Bureau.

[28] N. Y. L., 1917, Ch. 181, pp. 651–655. The salaries of regular employees were $361,510. In 1923–4, the New York insurance department spent $597,-569.13, of which $473,553.36 was for personal service. N. Y. Annual Report of the State Treasurer, June 30, 1924, p. 18. [29] Ill. L., 1919, p. 194.

[30] The last eight figures are taken from *Financial Statistics of States* (1919), p. 76.

[31] *Ibid.*, p. 69. However, the term "Financial Institutions" may include insurance companies. Thus, in 1923–4, the insurance department of New York turned into the state treasury fees aggregating $2,129,685.14. N. Y. Annual Report of the State Treasurer, June 30, 1924, p. 14.

[32] In New York, in 1923–4, the receipts from the tax on insurance companies

The foregoing account of the structure and organization of the state insurance departments may have given the impression that they are in a deplorable condition. If so, this impression must be corrected. Taking into account the relatively greater efficiency of the departments which do most of the work, and the ameliorative factors which are steadily operating to produce better conditions (among which the National Convention of Insurance Commissioners is conspicuous), one is led to conclude that the record of the insurance departments compares most favorably with that of any other branch of the state administration. One prominent actuary has gone so far as to assert that state supervision of insurance companies was, in 1905, "far more effective than is the supervision exercised over national banks." [33]

LIST OF STATUTES AND CONSTITUTIONAL PROVISIONS

Ala. Code, 1923, §§ 8319–8332; Alaska Laws, 1914, Ch. 46; Ariz. Civil Code, 1913, Title xxiv, Const., 1910, Arts. VIII, XV; Ark. Acts, 1917, p. 1038; Cal. Political Code, Statutes, 1919, Ch. 645, Ch. 178; Colo. Laws, 1913, Ch. 99; Conn. General Statutes, 1918, §§ 4059, 4061, 1017, 2212, 4065; Del. Revised Code, 1915, Const., Art. III; Fla., Const., 1885, Art. IV, General Laws, 1919, Ch. 7871, Compiled Laws, 1914, § 169a; Ga. Const., 1877, Art. V, § 2, Laws, 1912, p. 119, Laws, 1919, p. 9; Idaho Compiled Statutes, 1919, § 261, Laws, 1919, Ch. 8; Ill. Const., Art. V, Laws, 1917, p. 2, §§ 5, 9, 12, Laws, 1909, p. 262, Laws, 1919, p. 194; Ind. Burns' Annotated Indiana Statutes, 1914, §§ 151, 7207, Laws, 1919, Ch. 103; Ia. Compiled Code, 1919, Laws, 1919, Ch. 348; Kan. General Statutes, 1915, §§ 10782–10791, 10936; Ky. Carroll's Statutes, 1915, §§ 744–747, Const., 1891, § 91, Laws, 1920, Ch. 16; La. Wolff's Statutes, 1920, pp. 927–1009, Const., 1913, Arts. XXXIX, LXXXI; Me. Revised Statutes, 1916, Ch. 53, Ch. 117, Laws, 1917, Ch. 206, Laws, 1919, Ch. 329; Md. Bagby's Annotated Code, 1918, Art. XXIII, §§ 175, 178a; Mass. General Laws, 1921, Ch. 26, Ch. 175; Mich. Compiled Laws, 1915; Minn. General Statutes, 1913; Miss. Hemingway's Annotated Code, 1917, §§ 5014–5017, 6774; Mo. Revised Statutes, 1909, Ch. 61, Art. I; Mont. Const., 1889, Art. VII, § 1, Revised Code, Supplement, 1915, Political Code, 1907; Neb. Revised Statutes, 1913, Laws, 1913, Ch. 154, Art. II, § 31, Laws, 1919, Ch. 190; Nev. Const., 1864, Art. V., § 19, Revised Laws, 1912, Statutes, 1915, Ch. 99; N. H. Public Statutes, 1901, Ch. 115, 167; N. J. Compiled Statutes, 1910, p. 160 *et seq.*; N. M. Const., 1910, Art. V, § 5, Annotated Statutes, 1915, §§ 2802–2804; N. Y. Consolidated Laws, 1909, Ch. 28, and session laws through 1924; N. C. Pell's Revisal, §§ 4680 *et seq.*; N. D. Const., 1889, Art. III, § 82, Compiled Laws, 1913; Ohio Laws, 1913, p. 842, Laws, 1917, p. 299; Okla. Const.,

was $4,312,443.14. N. Y. Annual Report of the State Treasurer, June 30, 1924, p. 12.

[33] S. H. Wolfe, *State Supervision of Insurance Companies, Annals of Am. Acad. of Pol. and Soc. Sci.* (1905), XXVI, p. 323.

1907, Art. VI, § 22, Laws, 1915, Ch. 174, Laws, 1919, Ch. 67, Ch. 270; Ore. Lord's Oregon Laws, 1909, § 4600 *et seq.*; Pa. Public Laws, 1911, p. 607; R. I. Public Laws, Jan., 1918, Ch. 1645, Laws, 1909, p. 1344, General Laws, 1909, p. 173; S. C. Civil Code, 1912, §§ 2691 *et seq.*; S. D. Political Code, 1913, p. 41a; Tenn. Annotated Code, 1917, § 3276 *et seq.*; Tex. McEachin's Texas Civil Statutes Annotated, Arts. 4877, 4485, 4486, 6027, 7052; Utah Laws, 1909, Ch. 121; Vt. General Laws 1917, §§ 356, 5504, 7342, Public Acts, 1917, No. 160; Va. Code, 1919, §§ 4169–4171, 4184–4186, 4193, 4198; Wash. Remington and Ballinger's Code, 1910, § 6070, Laws, 1911, p. 165, Laws, 1907, Ch. 109, Laws, 1919, Ch. 124; W. Va. Const, 1872, Art. VII, § 2, Acts, 1907, Ch. 77, Acts, 1919, p. 3; Wis. Statutes, 1917, §§ 1946h, 1966y, 20.55; Wyo. Laws, 1919, Ch. 75.

CHAPTER III

SCOPE OF CONTROL BY ADMINISTRATIVE

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§ 10. *Formation of new companies.** — 1. *The distinction between incorporation and licensing.* The formation of a new insurance company involves two steps: First, the incorporation, or official recognition of a new juristic person; and second, the authorization of the company to engage in the business of making insurance contracts. The incorporation endows the group with juristic personality, but the powers of the juristic person are narrowly limited until it obtains the state's privilege to engage in the busi-

* This section was printed, in substance, in the University of Pennsylvania Law Review for November, 1925 (vol. 74, pp. 20–35). Copyright, 1925, by Edwin W. Patterson.

ness for which it was formed. The first step is normally consummated by the issuance of a certificate of incorporation; the second by the issuance of a license or certificate of authority to engage in the insurance business.[1]

The first step stands for state control over group action generally,[2] and is, of course, not peculiar to insurance corporations. It is not surprising, therefore, to find that in a number of states the insurance commissioner is not given official power over the incorporation of insurance companies, which takes place in the same way as the formation of other companies;[3] that is, the certificate of incorporation is issued independently of the insurance commissioner, by the secretary of state or other official who is empowered to issue such certificates for business corporations generally. In a second group of states, though the application for incorporation is made directly to the secretary of state, and the certificate of incorporation is issued by him, the enterprise must first be approved by the insurance commissioner in certain particulars.[4]

In a third and somewhat larger group of states, however, it seems that the incorporation of insurance companies is treated as *sui generis;* the application is made directly to the insurance commissioner, who acts independently of the secretary of state (usually, however, subject to the approval of the attorney-general as to the formal legality of the application) and takes both steps: the incorporation and the authorization to do business.[5] It is difficult

[1] See Jackson *v.* Mutual Fire Ins. Ass'n of Ark. (1922), 154 Ark. 342, 347, 242 S. W. 567, holding a mutual company, under the Ark. statutes, not bound by a contract of insurance made after the certificate of incorporation, but before the license, was issued. An express provision to this effect is found in Ala., § 8422.

[2] Freund, *Standards of American Legislation,* (1917), pp. 39, 40.

[3] Ala. Code 1923 (other than mutual companies); Ark. (Kirby and Castle's Digest, 1915); Conn. (except fraternal societies); Fla. Comp. Laws, 1914; Ga. Code, 1910; Mo. Rev. Stats., 1919, § 6439 (as to county mutual companies); Nev., § 1286; N. H., Chase's Pub. Stats., 1901, and Supp., 1901–13; N. J., p. 2840, §§ 4, 5; N. M., § 2825; Ohio, § 9512; R. I., Ch. 212, § 10 (special act of the legislature in each case); S. C., § 2834; Tenn., § 2024 (cf. § 2259); Va., § 4201.

[4] Del., § 575; Ind., § 4613; Me., Ch. 53, § 63; Minn., § 3256; Mo., § 6106; Mont., §§ 4043, 4077, 4413; Pa., § 103 (commissioner certifies approval to governor); S. D., § 9155; Vt., § 5518 (commissioner must certify that it "will promote the public good of the state"); Wash., § 7130; W. Va., § 74.

[5] Ala., §§ 8419 (mutual, other than life), 8458 (fraternal), 8510; Ariz., §§ 3425, 3482; Colo. L., 1915, p. 269; Idaho, § 4942; Ill., Ch. 73, § 56; Ia., § 5477; Ky., §§ 661, 619; La., § 3567 (here the secretary of state is *ex officio*

to generalize, since successive statutes have often provided different modes of incorporation for different kinds of companies.[6]

The third form of administrative control seems preferable, since the insurance commissioner can do the work (largely perfunctory) of incorporation as well as any other official, and is thereby in a position to stop inimical enterprises at an earlier stage than under the other two methods of control. Moreover, if insurance companies are placed in a class by themselves, the perplexing problems of correlating the insurance statutes with the general incorporation laws will be avoided.[7] Finally, from the standpoint of the incorporators themselves, it is more convenient to have to deal with only one official than with two. The tendency of recent legislation is to adopt this form of control.

While the two steps mentioned above are theoretically distinct, in practice it is often hard to draw the line, and to say when, if ever, the corporation comes into existence (that is, has the attributes of juristic "personality") before it is finally authorized to engage in the insurance business. The statutes frequently fail to make this clear. Thus, under the New York statute,[8] it was held that the "incorporators become a corporation before subscriptions to the capital stock are invited";[9] while under a very similar

insurance commissioner); Mich., II, 1, § 4; Miss., § 5043; Neb., § 3218; N. Y., §§ 10, 70 (life), 110 (fire), L., 1917, Ch. 155, § 1, Ch. 4, § 1; N. C., § 4727; N. D., § 4839; Okla., § 6667; Ore., § 6365 (subject to approval of corporation commission); Tex., §§ 4705, 4707; Wis., § 1896; Wyo., § 5243. In nearly every case the approval of the charter by the attorney-general is required.

[6] E.g., under Fla. L., 1915, Ch. 6850, the articles of association of a mutual company are approved by the state treasurer (insurance commissioner) and the legal existence of the corporation dates from his approval and filing of such articles (§ 6). See also Mo., § 6439, which provides for the incorporation of county mutual companies by the circuit court. See Okla., § 6926 (approval of mutual casualty company by insurance board); S. C., § 2773 (mutual protective association); S. D., § 9266 (township mutuals formed by county auditor).

[7] Such questions constantly arise in the courts; e.g., Greiger *v.* Salzer (1917), 63 Colo. 167, 165 Pac. 240.

[8] Ins. Law of 1892, § 110, which provides that upon filing the declaration of intention to incorporate and a copy of the charter and proof of publication of the intention, "such corporation, if a stock corporation, may open books for subscription to its capital stock. . . ."

[9] Van Schaick *v.* Mackin (1908), 129 App. Div. 335, 113 N. Y. Supp. 408. The court held that the general incorporation law therefore applied and invalidated a subscription to stock which was not accompanied by a cash payment of at least ten per cent.

statute in Missouri [10] the courts decided "there is no corporation until the amount of the proposed stock has been subscribed." [11] Probably under most statutes of similar wording, the New York view would be preferred.[12]

Some states have provided that the commissioner shall issue, not a certificate of incorporation, but a license to the incorporators to solicit stock subscriptions.[13] Where only this has been done, the incorporators have not yet attained juristic personality,[14] and the two steps (incorporation and authorization) become coincident in point of time. This arrangement seems well adapted to protect the public against unsound insurance enterprises.

2. *Discretionary powers of commissioner.* The statutes uniformly lay down pretty definite rules for the formation of insurance companies,[15] and, hence, most of the work of the commissioner in this connection is routine or perfunctory. Disputed questions of fact can seldom arise, and the application of the statute to the facts will usually be simple and direct when once the statute has been found and interpreted. For example, an application was made to the commissioner for the incorporation of a company to guarantee payment of mortgage notes and bonds, under the statute relating to the formation of surety companies. The commissioner refused the application on the ground that the casualty insurance statute

[10] Mo. Rev. Stats., 1909, § 6898, provides that after certain steps are taken the secretary of state "shall issue a certificate of incorporation, upon receipt of which they shall be a body politic and corporate and may proceed to organize in the manner set forth in their charter and to open books for subscription to the capital stock . . . but it shall not be lawful for such *company* to issue policies . . . until *they* have fully complied with the provisions of this article."

[11] Taylor *v.* St. Louis Nat'l L. I. Co. (1915), 266 Mo. 283, 181 S. W. 8; Reynolds *v.* Whittemore (1916), 190 S. W. 594; Reynolds *v.* Title Guaranty Trust Co. (1916), 196 Mo. App. 21, 189 S. W. 33, 37; Reynolds *v.* Union Station Bank of St. Louis (1918), 198 Mo. App. 323, 200 S. W. 711. In these cases the courts attained the same object as in the New York case, namely, protected the enterprise against inimical stock subscription agreements.

[12] King *v.* Howeth & Co. (1914), 42 Okla. 178, 181, 140 Pac. 1182 (*semble*, corporation in existence before stock subscribed). But see Blinn *v.* Riggs (1903), 110 Ill. App. 37, 49 under a similar statute (corporation in existence when capital stock subscribed though not paid in).

[13] Colo. L., 1915, p. 279; Conn. § 4192 (as to fraternal societies); Ky., § 623; Ore., § 6365 (3); Va., § 4237.

[14] Greiger *v.* Salzer (1917), 63 Colo. 167, 165 Pac. 240, construing Colo. R. S., 1908, § 3117, which is similar to the Colorado statute cited in the last note.

[15] Except in Rhode Island, where the old practice of incorporating each company by special statute still prevails. See *supra*, note 3.

was the one applicable to this kind of business. The court granted a *mandamus*, saying that the commissioner had no discretion as to which statute was applicable.[16]

In another case, the proposed articles of incorporation submitted to the commissioner did not contain the information called for by express statutory provision, as to "the time when and the manner in which payment on stock subscribed shall be made"; nor as to "the mode in which the election of directors or managers shall be conducted," nor "the mode of liquidation at the termination of the charter." In a *mandamus* proceeding to compel the commissioner to issue a certificate of authority, it was argued that these were "technical requirements"; but the court refused the writ, pointing out that the non-compliance with the statute was obvious on the face of the document submitted, and adding that "the requirements of the statute cannot be disregarded as mere surplusage." [17] The statute in this case is a typical example of the sharply defined rules governing the commissioner's power to issue certificates of incorporation to newly formed companies. Generally, the commissioner's duties under such statutes are "ministerial."

Frequently, however, there are standards or principles which the commissioner has to apply, and in the application thereof he should be allowed discretionary power within limits. Thus, he is frequently called upon to determine whether the capital stock has been subscribed, or the assets invested, "in good faith," [18] and the court should uphold his decision unless an abuse of discretion appears,[19] for the indicia of fraud can rarely be reproduced in a judicial record. An exceptional statute is the Vermont provision which requires the commissioner, before approving the formation of a new insurance company, to hold a public hearing to determine whether the establishment of the company "will promote the general good of the state." [20] Certificates of public convenience, which are fre-

[16] People *ex rel.* Gosling *v.* Potts (1914), 264 Ill. 522, 106 N. E. 524.

[17] State *ex rel.* Lumbermen's Accident Co. *v.* Michel (1909), 124 La. 558, 50 So. 543.

[18] E. g., Idaho, § 4942; Ia., § 5478; La., § 3582; Tex., § 4707; Va., § 4206; Wyo., § 5249. So. Ala., § 8425 ("bona fide applications for insurance" of mutual company.)

[19] American Life Ins. Co. *v.* Ferguson (1913), 66 Ore. 417, 134 Pac. 1029, (in determining whether a company has the "paid-up unimpaired capital" required by statutes the commissioner "is given a wide discretion in safeguarding the interests of the present and prospective stockholders and policyholders of the company").

[20] Vt., § 5518.

quently required in the formation of new banking enterprises, are not elsewhere found in insurance legislation.

The permissible subjects of insurance are usually set forth in detail in the statutes, and while the language is usually indefinite enough to permit minor innovations, new forms of insurance must await legislative authorization. A Nebraska statute, however, apparently gives the insurance board unregulated discretion to extend indefinitely the legally permissible subjects of insurance.[21]

The commissioner's approval of the company's investments, often provided for, will usually be construed to be governed by the terms of the statutes prescribing the investments for going concerns.[22] Frequently the "approval" of the insurance commissioner generally is required, or he is to approve, and so forth, if he finds that "the laws of this state have been complied with." In either event, his discretion is regulated by the other statutory provisions.

3. *Investigation by the commissioner.* The methods to be pursued by the commissioner in ascertaining whether or not the statutory requirements as to paid-up stock, investments, and so forth, have been complied with, vary considerably. One method is for the commissioner to take the affidavit of the incorporators or directors to the effect that this has been done.[23] This method is apparently based on the naïve notion that a man who will violate the law will not forswear himself. However effective the oath may have been in the religious atmosphere of the Middle Ages, it is but a feeble substitute for direct official supervision. A second method is for the commissioner to have an examination made by one or more disinterested persons, competency or knowledge of the insurance business and of the wiles of promoters not specified.[24] This method

[21] Neb. R. S., 1913, § 3218, provides that a company may be formed to transact specified kinds of insurance or for any risk which is a proper subject of insurance, not prohibited by law or contrary to sound public policy, "to be *determined by the insurance board.*" Cf. N. C. Supp., 1913, § 4726: "or against any other casualty . . . which is a proper subject of insurance."

[22] See *infra*, § 16.

[23] Ia., § 5479 (evidence in affidavit or otherwise satisfactory); Md. I, 180 (officers of company certify under oath); Minn., § 3313 (directors certify under oath); Ohio, § 9522; Tex., § 4708; Va., §§ 4205, 4206; Wyo., § 5249.

[24] Ill., Ch. 73, § 56 (by commissioner in person or by three disinterested persons who certify under oath); Nev., § 1290 (three disinterested residents). Cf. N. Y., § 11 (examination by the commissioner or by one or more competent and disinterested persons); Ohio, § 9522 (alternative method); Tex., § 4707 (same); Wash., § 7038 (same); Wyo., § 5249 (same).

apparently contemplates a sort of layman's examination, which is obviously inadequate. The third method is to have an examination made by the commissioner himself or by one of his deputies or regular examiners. This is the commonest method;[25] a few states leave the method unspecified.[26] Every insurance department should be adequately equipped at least to examine the affairs of new companies and nip unsound enterprises in the bud. It is believed that many of them are not.

4. *License to sell stock in insurance company.* Coincident in time with the spread of the so-called "Blue Sky" laws, there has been an increasing tendency to invest the commissioner with drastic powers of supervision over the sale of stock in insurance companies. Persons selling insurance stock, or the companies themselves, or both, are required to obtain licenses from the commissioner. The statutes in terms commonly confer unregulated discretion upon the commissioner in the granting or revoking of these licenses. For example, he may refuse a license unless he is "satisfied" or "finds" that "its operations would be beneficial to the public,"[27] that "the business proposed to be transacted within the state is proper and right,"[28] that its "plans and purposes" are "proper,"[29] that its "condition is satisfactory,"[30] that the amount of securities is "reasonable,"[31] that the price at which the securities are to be sold is "adequate,"[32] that the commissions and sala-

[25] Idaho, § 4942; Ind., §§ 4651, 4651a; Me., Ch. 53, § 85; Md. I, § 180 (in addition to the affidavit of the officers); Kan., § 5191; Ky., § 621; Miss., § 5037; Mo., § 6107; Mont. Supp., § 178c; Ohio, § 9522 (alternative method); Ore., § 6365 (8); Pa., § 107; Tex., § 4707 (alternative method); Va., §4206; Wash., § 7038; Wis., § 1897t; Wyo., § 5249 (alternative method). See also Vt., § 5518 (public hearing).

[26] Ia., § 5479; Colo. L., 1915, p. 279 ("shall by investigation satisfy himself"); La., § 3582 ("satisfactory evidence"); N. H. L., 1913, Ch. 42, §§ 1, 2 (same); N. D., §§ 4839, 4921; Okla., § 6674; Ore., § 6326 (1); S. C., § 2699; S. D., § 9116; Tenn., § 3277; Utah, § 1140; Vt., § 5521; W. Va., §§ 15e, 74.

[27] Colo. L., 1915, p. 279; Mo., § 6370. It seems these provisions are aimed to prevent fraud and are not the same as the "certificate of public convenience" referred to above.

[28] Ala. § 4613; Miss. § 5149.

[29] N. Y. L., 1913, Ch. 52, § 66; N. C. Supp., § 4824a (4).

[30] *Ibid.* In Ga., a new domestic company "shall collect, hold and disburse its funds under such rules and regulations as insurance commissioner may prescribe." Park's Anno. Code, 1914, Vol. 2, § 2412J.

[31] *Ibid.* See also Va., § 4237 ("for good cause").

[32] *Ibid.*

ries to be paid are "fair." [33] A Minnesota statute goes even further, providing that the license of a stock-selling agent "shall be subject to revocation at any time" by the commissioner "for cause appearing to him sufficient." [34] Literally construed, this gives the commissioner not only unregulated but also (judicially) uncontrolled discretionary power.[35] It should therefore be declared unconstitutional unless the selling of insurance stock is, like liquor-selling and other forms of vice,[36] in the class of activities which may be absolutely prohibited and which hence (by a dubious argument *a fortiori* generally accepted by the courts) [37] may be tolerated on any terms, however arbitrary, which the legislature may see fit to impose.

Such a construction should be avoided. The grant of unregulated discretion in these cases is due to an ardent desire by the lawmakers to put an end to the sale of bogus or watered securities, coupled with the inability to lay down any standards by which to measure the soundness of an enterprise. The statutes are a striking example of legislative abdication in favor of the administration. There is recent and high authority for the view that these grants of unregulated power will not be declared unconstitutional.[38] The solution therefore lies with the legislatures, which should make a determined effort to substitute standards of business ethics and business efficiency for the loose phrases now employed.

5. *Similarity of corporate names.* An example of standardized discretionary power is found in the provisions which declare that the name of a new insurance company shall not be similar to the

[33] *Ibid.* In Colorado and Missouri, the statutes fix the percentage of commissions to be paid.

[34] Minn., § 3283. Cf. the N. Y. provision: may refuse or revoke certificate "if, in his judgment, such refusal will best promote the interest of the people of the state."

[35] In Ayers *v.* Hatch (1900), 175 Mass. 489, 56 N. E. 612, "for such cause as he shall deem sufficient" was said to repel the idea that removal of a public officer could be "at pleasure," but the court's inquiry into the cause was perfunctory.

[36] Commonwealth *v.* Kinsley (1882), 133 Mass. 578; Martin *v.* State (1888), 23 Neb. 371, 36 N. W. 554.

[37] For examples of this type of judicial reasoning see Commonwealth *v.* Kinsley, *supra*, n. 36, and White, J., in Oceanic Steam Navigation Co. *v.* Stranahan (1909), 214 U. S. 320, 342, 29 Sup. Ct. 671.

[38] Hall *v.* Geiger-Jones Co. (1917), 242 U. S. 539, 37 Sup. Ct. 217; Caldwell *v* Sioux Falls Stock Yards Co., 242 U. S. 559, 37 Sup. Ct. 224; Lloyd *v.* Ramsay (1921), 192 Ia. 103, 183 N. W. 333.

name of an existing insurance corporation.[39] These statutes exhibit considerable diversity in phraseology; for example, "which is an interference with or too similar to one already appropriated";[40] "so nearly resembling as to be calculated to deceive";[41] "so similar as to be likely to mislead the public or to cause inconvenience";[42] "liable to be mistaken by the public for the names of other corporations or in any way cause confusion."[43] Such phrases as "an interference with" or "too similar" and even "closely resembles"[44] call for a judgment as to degree without indicating the grounds upon which that judgment is to be exercised; and "to cause inconvenience" indicates too trivial a degree of similarity. Such phrases as "likely to mislead the public," or "calculated to deceive,"[45] express the standard about as clearly as may be done. On the other hand, it seems unnecessary to give the commissioner unregulated power in approving the name of a new company.[46]

Fortunately, the common law decisions on unfair competition are aids in giving meaning to such statutory provisions. Thus, it has been held that the statute does not prohibit the adoption by a life insurance company of a name similar to one already adopted by a company engaged only in fire insurance business, it being shown that many such similarities exist and that in the opinion of company officials they do not cause confusion or uncertainty.[47] On the other hand, it should not be necessary to show, as in an action

[39] Cal. P. C., § 609 (Cum. Supp., 1906–13), Pol. Code, 1907, § 453e; Idaho, § 4938; Ia., §§ 5510, 5601, 5623; Ky., § 722; Me., Ch. 53, § 59; Mich. II, 1, § 18; Mont. C., § 4042; Neb., § 3209; Nev., § 1311; N. J., p. 2839, § 3; N. M., § 2847; N. Y., § 10; N. D., § 4837; Ohio, §§ 9512, 9513, 9522, 9607 (23), 9341, 9349 (different wording as to each type of company); Okla., § 6667; Ore., § 6305 (1); Pa., § 96; Utah, § 1138; Wash., § 7130; Wis., § 1897b; Wyo., § 5243.

[40] Cal. P. C., § 609. [41] Idaho, § 4938.

[42] Ia., § 5623. Cf. Ala., § 8386 "so similar . . . as in the opinion of the commissioner . . . is calculated to result in confusion or deception"); Me., Ch. 53, § 59 ("likely to mislead the public"); Mont. C., § 4042 (same); N. J., p. 2539, § 3 (same); Ohio, §§ 9512, 9513.

[43] Ky., § 722. See also Ala., § 8420 ("so similar as to be confusing or misleading"), Ohio, § 9522.

[44] Mich. II, 1, § 18; Okla., § 6667.

[45] N. Y., § 10.

[46] As is done, for example, in Mass., § 49: "The name of the corporation shall be subject to approval by the insurance commissioner . . ." (But see Mass., Ch. 155, § 9: company shall not "assume a name so similar thereto as to be likely to be mistaken for it").

[47] Commercial Union Assurance Co. *v.* Smith (1888), 2 N. Y. Supp. 296 (N. Y. Sup. Ct.).

for damages, that some other company will be directly or substantially injured by the adoption of a similar name, since the object of such regulation is to protect not only the interests of other companies but primarily the interests of the public.[48]

The statutes are usually not broad enough to prevent similarity of the name of a domestic company to one adopted previously by a corporation not as yet admitted to do business in the state.[49] Thus, in 1919 there were three separate companies in the United States doing business under the name of "Liberty Life Insurance Company." [50] Even where the statute prohibits the adoption of a name similar to that of *any* existing corporation,[51] the commissioner, though he may search the published lists of all insurance companies in existence for similar names before approving a proposed name,[52] may not learn of the formation at about the same time of a company with a similar name under the laws of another state. Only a centralized registration bureau or centralized supervision would prevent such conflicts. The statutes are frequently not broad enough to allow the refusal of authorization to a foreign company because its name resembles that of a domestic company, and in the absence of statute the commissioner has no power to make and apply such a regulation by analogy to the statute covering the formation of domestic companies.[53]

The statutes usually confer expressly upon the commissioner the power to reject the name of a domestic company applying for authorization for the first time if it is "similar" to the name of an existing company; [54] yet sometimes the statute simply lays down

[48] In the case last cited, both these elements are discussed without discrimination.

[49] E.g., Idaho, § 4938 (same or similar to the name of a company already *authorized* in this state); Mass., Ch. 155, § 9 (corporation carrying on business in Mass.); Mich. II, 1, § 18 ("any other corporation doing business in this state"); Ohio, § 9341 (like Idaho).

[50] Commissioner Savage of Iowa in *Proc. N. C. I. C.* (1919), p. 234.

[51] E.g., Ala., § 8420; Mont. Code, § 4042; N. J., p. 2839, § 3.

[52] Commissioner Savage suggested this method in his remarks cited in n. 50, and said he used it.

[53] People *ex rel.* Traders Fire Ins. Co. of N. Y. *v.* Van Cleave (1899), 183 Ill. 330, 55 N. E. 698.

[54] E.g., Cal. P. C., § 609; Ia., §§ 5510, 5523, 5601; Ky., § 722; Mont. C., § 4042; N. M., § 2842; N. D., §4837; Ohio, §§ 9513 (cf. § 9512, conferring same power on attorney-general), 9522, 9607 (23) (mutual fire companies, superintendent and secretary of state shall pass upon similarity of name if they disagree, attorney-general decides), § 9349 (may withhold license); Okla., § 6667; Pa., § 96 (commissioner may prohibit); Wyo., § 5243.

the norm without specifying who is to enforce it or how that is to be done.[55] It would seem clear that if the commissioner has power to disapprove the articles of incorporation, he is impliedly given power to reject the articles of incorporation, or to refuse a certificate of authority, until the misleading similarity of name is removed by a change of name. To leave it to the courts to enforce the provision by injunction or suit for damages after the new company has commenced business is to prefer *ex post facto* justice to preventive justice. The deception should be nipped in the bud. Yet it has been *said* that under such a statute, the commissioner has no power to reject articles of incorporation on this ground,[56] and held that at all events a court may properly enjoin the formation of a competing enterprise which proposes to apply for incorporation under a name similar to plaintiff's.[57] The *dictum* seems clearly unsound,[58] and, if the commissioner had power to refuse a certificate of incorporation or of authority on the ground of similarity of name, it would seem that the decision, likewise, was wrong, because, conceding that the commissioner's decision would not be conclusive against judicial attack, the plaintiff should have been required to exhaust his administrative remedies before resorting to a judicial proceeding.[59]

[55] E.g., Ala., § 8420; Mich. II, 1, § 18. ("No company formed under this act shall assume any name which is the same as or closely resembles the name of any other corporation doing business in this state.") See also S. D., § 9154. In Utah, R. I., Tenn., it seems the commissioner has no power over similarity of name. In others (Ala., Ore., Tex., Vt., Wash.) his power must be derived by implication from general powers of disapproval.

[56] See Modern Woodmen of America *v.* Hatfield (U. S. D. C., Kan., 1912), 199 Fed. 270, 277.

[57] *Ibid.*

[58] The Kansas statute required the organizers (of a fraternal society) to file with the superintendent of insurance a certificate stating, among other things, "proposed corporate name of the association which shall not too closely resemble the name of any similar association." The superintendent was to issue a certificate of his approval "in case (he) shall find that its (the organizers' certificate's) provisions are in accordance with section 1 of this act," which apparently referred to the requirements above mentioned. The problem was therefore the same as that raised by many other statutes where similarity of name is forbidden but no express power is given the commissioner to reject the articles on that ground. Unless such power is to be implied, the prohibition is meaningless. See also People *ex rel.* Felter *v.* Rose (1907), 225 Ill. 496, 80 N. E. 293 (*mandamus* to compel issuance of certificate of incorporation denied on ground of similarity of name).

[59] Plaintiff alleged that defendants were about to apply to the superintendent for authority to do business under a similar name.

Whether or not the action of the commissioner, or other official, in approving a particular name should be conclusive against subsequent judicial attack, is another question. It would be advantageous to have the question of similarity of name settled once and for all by the granting of the certificate of incorporation. The corporation would then be assured that an established business would not be upset by a subsequent judicial decision that its name "resembled" too closely that of an existing corporation. The commissioner, it would seem, is quite as able to decide these questions of degree as is a judge; moreover, he has on file the names of all existing corporations doing business in the commonwealth. On the other hand, such conclusiveness would be disadvantageous to corporations already doing business in the state. How could the procedural safeguards be made adequate to secure a fair and full hearing of all interferences in name? The obvious analogy of patents and trade-marks supports the view that the commissioner's decision on a corporate name should not be conclusive against collateral attack in a suit by a corporation affected.

This problem has had an interesting history in Massachusetts. In a petition for leave to file an information in the nature of *quo warranto* and to restrain the use of a corporate name by defendant corporation, the plaintiff alleged prior user of the name and resulting confusion and injury, actual or prospective. The defendant was incorporated under a statute which merely prohibited the use of a name "in use by any existing corporation." [60] A later section provided that the issuance of a certificate of incorporation "shall . . . be conclusive evidence of the organization and establishment of such corporation." [61] The court denied the petition, chiefly on the ground that the issuance of the certificate of incorporation was conclusive on the question of similarity of name.[62] While the court confined itself to holding that plaintiff could not invoke the remedy, *quo warranto*, the decision was interpreted in a later case as holding that the issuance of the certificate of authority was conclusive in a suit in equity by a previously existing corporation against one organized with a similar name.[63] There the plaintiff, as in the

[60] Mass. L., 1870, Ch. 224, § 8; same as Mass. Pub. Stats., 1882, Ch. 106, § 8.

[61] *Ibid.*, § 11.

[62] Boston Rubber Shoe Co. *v.* Boston Rubber Co. (1889), 149 Mass. 436, 21 N. E. 875.

[63] American Order of Scottish Clans *v.* Merrill (1890), 151 Mass. 558, 24 N. E. 918.

Kansas case,[64] brought suit before the commissioner of insurance had passed upon defendant's application for a certificate of incorporation, and made the commissioner and the secretary of state parties defendant. Mr. Justice Holmes, who wrote the opinion, saw the analogy of the patent law:

> Of course, the right of the defendants to use the name might be left subject to revision upon a private suit, notwithstanding the issue of the charter, after the analogy of patents. The question is one of construction, and the language of the statute is not entirely conclusive. But practically the construction is settled by *Boston Rubber Shoe Co.* v. *Boston Rubber Co.*, 149 Mass. 436.[65]

In support of this construction, he adduced the analogy of a trade-name acquired under a patent, after the patent has expired:

> It [plaintiff] received its name in the first instance as a corporate name under the statute, subject as such to whatever interference by subsequent corporations might be permitted under the statute. The name remained subject to the same degree of interference, whatever importance it might acquire in a business way. The principle is somewhat like that upon which patentees have been denied the exclusive right to the names of their patented articles as trade-marks after their patents have expired. The degree of protection to which the plaintiff is entitled is measured by the rights which the statute confers on it. The limit is marked by the adjudication of the insurance commissioner.[66]

While constitutional questions were not discussed, the reasoning quoted would strongly support the validity of a statute making the issuance of the certificate of incorporation conclusive as to similarity of name, at least against collateral attack, as here.

However, this construction of the statute was overturned in the following year by a statute which declared that the action of any board, commissioner or officer of the commonwealth in approval of a certificate of incorporation should be subject to "revision" by "the Supreme Court or the superior court in a suit in equity brought by any corporation affected thereby, to enjoin a corporation organized with a similar name from doing business under such name."[67] This statute has been carried forward without substantial modification into the latest revision.[68] It is expressly made applicable to insurance companies.[69] On the whole balancing of the conflicting

[64] *Supra*, note 56.
[65] 151 Mass. 1. c. 560.
[66] 151 Mass. 1. c. 562.
[67] Mass. L., 1891, Ch. 257, § 1 (relates solely to this point).
[68] Mass. G. L., 1921, Ch. 155, § 9.
[69] Mass., § 49.

interests involved, it is believed these later statutes represent a sounder view than the judicial decisions. The test of similarity of name is empirical: Does or will the similarity actually lead to confusion and cause injury to the business of the prior user? To pass upon this question in advance of actual user, as the commissioner has to do in passing upon the proposed name of a corporation which has not yet done business, is a much more conjectural process than the determination of the same question by a court after the newer corporation has done business a substantial length of time. The interests involved are too weighty for snap judgment. However, the officials having approval powers may prevent litigation by resolving all doubts in favor of the prior appropriator of a somewhat similar name.[70]

§ 11. *Legal and extra-legal consequences of issuance, refusal or revocation of a company license; frequency of refusals or revocations.* The licensing power, which has come into play prominently in the last generation or two in the regulation by the state of professional and business activities, is the chief administrative instrument in the control of the insurance business. In every state the insurance commissioner is given the power to issue and revoke licenses, or, as they are frequently called, "certificates of authority," of insurance companies, of one kind or another. It is significant that a similar method of control is used in Germany[1] and in France.[2] The French *conseil d'état* as early as 1809 required tontine societies to obtain special authorization from the ministers of the interior and of the treasury.[3]

The licensing power, supplemented as it is by broad inquisitorial powers, is, if properly circumscribed and applied, the most satisfactory method of regulating the conduct of insurers. It is pre-

[70] See W. U. R. Ill. 11 (1923), a ruling by the attorney-general, relying upon People *v.* Rose, *supra*, n. 58, that he had implied power to reject the proposed name of an insurance company because of similarity to that of an existing company, and refusing to approve the proposed name, "Illinois National Life Insurance Company," because there were already in existence two domestic companies, one named "National Life Insurance Company of the United States," the other called "Chicago National Life Insurance Company."

[1] *Das Reichsgesetz über die privaten Versicherungsunternehmungen, von 12 Mai*, 1901, § 4. (No material changes to the close of 1923.)

[2] French Law of March 17, 1905, Art. 2 (House Documents, Vol. 55, 59th Congress, 1st session, 1905–06, p. 13).

[3] Pannier, *De l'Autorisation et de la Surveillance des Sociétés d'Assurance sur la Vie en France* (Paris, 1905), p. 342.

ventive rather than punitive in its operation. Individual interests are conserved with least sacrifice where the individual is officially advised, in advance, that a certain type of conduct will subject him to punishment. In the case of conduct the unlawfulness of which is a question of degree or of application of an indefinite standard to particular facts, such an advance warning is necessary to avoid the hardship of penalizing the individual who acted honestly but erroneously. Moreover, this very hardship is apt to paralyze the efficient administration of standardizing legislation through the ordinary process of judicial penalties, and thus cause such legislation to fail to secure the social interests which it is meant to secure.

Furthermore, the insuring public is protected by the circumstance that the denial or revocation of a license is a definite warning of the insecurity of a company, given in a much more speedy and dependable way than through a criminal prosecution of the insurance company. Indeed, the effectiveness of this warning in injuring the company's good will is, as will be pointed out, one of the chief sources of danger in the licensing power. Again, the licensing power is better adapted to the enforcement of standardizing legislation of a technical nature, than is the ordinary judicial machinery of prosecuting attorney, judge and jury. The technical questions involved call for specialization of function, and this demand is met by the creation of a special organ — the insurance department — for this purpose. Hence, the courts are seldom resorted to for the enforcement of regulatory insurance legislation. Control of insurance enterprises through judicial machinery would be sporadic and fitful; the specialized organ of control can exercise a continuous supervision, a watchfulness not distracted by the burden of other duties. Finally, it may be noted that the licensing official normally performs the work of both prosecutor and judge. This arrangement, involving as it does certain procedural dangers,[4] has the merit of minimizing the reliance upon private initiative for the enforcement of law — a reliance which is one of the weaknesses of the judicial system — and of securing more prompt and speedy action. So marked is this advantage of promptness that the public has shown a decided tendency to appeal to the insurance department for the enforcement of some kinds of private contract claims in preference to the traditional jurisdiction of the courts.[5]

[4] See *infra*, § 24, pp. 393, 407.

[5] See Payment of private contract claims, *infra*, § 20, p. 283.

Thus far it has been assumed that the licensing power is granted to the insurance commissioner for the purpose of enabling him to regulate the conduct of insurance enterprises. This is not the only function for which the licensing power may be used, nor is it the only one for which it has been used. Briefly speaking, the licensing power may be used for one or more of three purposes: Revenue, regulation, registration. The first falls under the state's power of taxation; the second two under the police power. The early statutes requiring the insurer to obtain a license were chiefly if not wholly revenue statutes;[6] and to this day a majority of the states require the payment of "license fees" by foreign insurance companies.[7] While in some instances these fees are so small in amount that they might be regarded as compensation for the official labor involved in issuing the license, in other instances the amount — $300,[8] $250,[9] $200,[10] — precludes the notion that this is an official "fee" and indicates it is actually if not technically a "tax." Moreover, the enormous amount of revenue derived in every state from taxes on foreign insurance companies based on the amount of premiums collected within the state, is grounded upon the theory that the state may attach onerous conditions to its grant of a license to a foreign corporation not engaged in interstate commerce,[11] and the provisions of the licensing statutes are everywhere such that the insurance commissioner could unimpeachably refuse a license where the company had not paid the tax.

The emphasis upon taxation in the earlier statutes and, to a lesser extent, in the later ones, is no doubt partly accountable for the failure of the courts to recognize and give effect to the broad discretionary power conferred by many statutes upon the commissioner for regulatory purposes.[12] Where the only prerequisite

[6] See *infra*, Appendix A, p. 542.

[7] The data were obtained from the "Life Insurance Law Chart" for 1921–22; copyright, 1921, by the Spectator Company, New York.

[8] Md., W. Va.

[9] N. C.

[10] Fla., Miss., Okla. In Nev. and Ore. the fee is $100 for life companies.

[11] Henderson, *The Position of Foreign Corporations in American Constitutional Law* (1918), pp. 102–107. The tendency of the Supreme Court is to recede from its extreme position in favor of the arbitrary power of a state over a foreign corporation not engaged in interstate commerce. Terral *v.* Burke Construction Co. (1922), 257 U. S. 529, 42 Sup. Ct. 188); Henderson *op. cit.*, p. 111; Fidelity and Deposit Co. of Maryland *v.* Tafoya (1926) U. S. Adv. Ops., 379, 46 Sup. Ct. 331.

[12] See *infra*, p. 499.

to obtaining a license is the payment of a defined sum of money, courts will tend to hold that the issuance of the license is "ministerial," that is, that the commissioner's refusal is not conclusive against judicial investigation and control. From this position it is an easy step to a sweeping judicial control over the commissioner's licensing acts when done in the enforcement of regulatory statutes.

By "registration" is meant the filing of certain information by the licensee as a prerequisite to obtaining a license. For instance, the annual statement of the company, showing its financial condition, the listing of its authorized agents, and so forth, are means of providing for those dealing with it ready access to information which might otherwise be difficult to procure. This information is preserved in the office of the commissioner, and considerable portions of it are published in his annual report. Here again — in respect to these "registration" requirements — the commissioner's licensing power is usually precisely regulated by statute and correspondingly subject to extensive judicial control.

Legal consequences of granting, refusing and revoking licenses. The granting, refusal, or revocation of a license to an insurance company by the commissioner has certain legal consequences affecting the company and its agents in its legal relations to the state and to private persons. These legal consequences may be determined by examining first, the legal position of a corporation which has been granted a license by the insurance commissioner to do business in the state; and second, the legal position of an unlicensed corporation, that is one which is "doing business" in the state without having attempted to procure a license therefor.

The term "legal consequences" requires a word of explanation. Obviously the phrase means the consequences attached by or arising out of law. What, then, is "law"? Of the various types of definitions of law — analytical, historical, philosophical — the analytical one seems most useful and appropriate in this connection. The Austinian imperative is manifest in the bulk of insurance legislation, which consists for the most part of commands and prohibitions addressed ostensibly if not actually to private persons. Two further elements of the analytical concept must here be postulated: Law is a system of rules or norms to be applied with impersonal regularity; and a violation of law is followed by a sanction in the form of penalty or redress, imposed or enforced by governmental action. This governmental action might, logically, be taken by any

department of the government, but for various reasons the more recent analytical jurists have chosen to restrict law to the system of norms enforced by the courts of law.[13] While this definition is already too narrow because of the rapid increase of administrative justice systematically administered, it may be accepted for the present purpose because it serves to bring out the degree of independence of the courts enjoyed by the insurance commissioners. "Legal consequences" may therefore be defined as those consequences which will arise in judicial proceedings or as a result of action by the ordinary courts.

Legal consequences of granting license to company. The legal consequences attached to the granting of a license or certificate of authority by the insurance commissioner are nowhere accurately defined. Such a license or certificate may be regarded either as an operative document, a juristic act conferring a privilege upon the company, or as a statement of fact and opinion by the commissioner having at most evidential value in judicial proceedings against the company for a violation of the statutory requirements.[14]

The statutory provisions seldom make a clear choice between these two possible interpretations of the company license. One of the closest approximations to a definition of the effect of issuing a license is to be found in a Montana statute:

> Nothing in this act shall be construed into permitting any insurance corporation, association or society to do a business in the state of Montana, *even when in possession of the license provided for herein*, unless such corporation . . . shall have complied with the laws of the state of Montana, now in force, or which may hereafter be enacted.[15]

Under this statute a company could be prosecuted for not having had the required reserve fund at the time of the issuance of a license, even though the commissioner had decided that it did meet

[13] Gray, *The Nature and Sources of the Law*, Ch. IV.

[14] The distinction is similar to that between the orders of the Interstate Commerce Commission before, and after, the Amendment of 1906. Before 1906, the orders of the commission were only *prima facie* evidence of their correctness, in judicial proceedings (I. C. C. *v.* Alabama Midland Ry. Co. (1897), 168 U. S. 144, 18 Sup. Ct. 45; since 1906, the order of the commission is, within limits, a legally unimpeachable operative act, imposing a duty judicially enforceable. I. C. C. *v.* Illinois Central R. R. Co. (1909), 215 U. S. 452, 30 Sup. Ct. 155.

[15] Mont. Code, 1921, § 6115 (L., 1897, p. 77, § 5). (Italics ours.) To the same effect, it seems, is Okla., § 6686: "a license or certificate of authority, *subject to all requirements and conditions of the law*, to transact business in this state."

with all statutory requirements. On the other hand, it seems clear that a company which had obtained such a license could not be successfully prosecuted for "doing business without a license." The license thus becomes a mere registration formality, from a juridical point of view, however valuable it may be as a practical commitment of the administrative official who has almost exclusive control over the judicial enforcement of the insurance laws.

At the other extreme, perhaps, is an Indiana statute which declares:

> Said copy of such license shall be conclusive evidence in any suit against any such company of the facts therein stated, including the authority of such agent named to act for such company.[16]

The last clause raises a doubt as to whether it was the beneficent purpose of the legislature to extend any protection to the companies; it may have been meant merely to relieve insured persons from the burden of proving the authority of the agent to bind the company. However, "including" shows that the clause is not limited to this purpose, and the normal meaning is that if the license recites that the company has complied with all the laws of the state (as they usually do), the license is a conclusive defense to a prosecution for any violation of the insurance laws committed prior to its issuance. This is going pretty far, since the commissioner does not examine a company thoroughly at each yearly renewal of a license, and previous violations could easily escape him. Perhaps in case of misstatement of fact by the company the court would get around the statute on the theory that the fraud "vitiated" the legal effect of the license, that is, made it voidable as contracts are voidable for fraud. Still, if the violation existing before the license was issued has ceased to exist by that time, what harm will be done if prosecution is barred? If the violation continues after the issuance of the license, the licensee will be punishable therefor. The issuance of the license is thus a short statute of limitation on insurance prosecutions.

These two statutes are the most explicit ones. The others may be divided into four groups. In one group, the emphasis is upon the license as an official *statement* of facts found to exist by the commissioner; his "certificate" is regarded as somewhat like that

[16] Ind., § 4791. Possibly this provision is intended merely to have the same effect as N. D., § 4839, which says that the certificate of authority "shall be conclusive evidence of the fact of the organization of such corporation" (i.e., newly formed domestic company).

of a recorder of deeds (though obviously the "facts" certified in the two cases are quite unlike, the one being of a "fact," recording of the deed, directly observed by the recorder, the other of a multitude of complex "facts" which the official can know only by hearsay or inference). An example of this type is an Illinois law which requires that each agent for a foreign fire or marine company shall obtain annually from the superintendent of insurance "a certificate of authority, *stating* that such company has complied with all the requisitions (*sic*) of this act which apply to such companies." [17] The official statement thus issued would have at most evidential value. Similar provisions are found in a number of states.[18] Occasionally the statute attaches some evidential value to the certificate. The commonest is the fraternal insurance provision that the commissioner's certificate "shall be *prima facie* evidence of the existence of such society at the date of such certificate." [19] It is sometimes provided merely that certified copies of the license may be introduced in evidence.[20]

A second type of statute emphasizes that the licensee is "permitted," "authorized" or "empowered" to engage in the insurance business within the state. From Illinois we get an example of this type, also. The statute relating to fraternal societies authorizes the superintendent to "issue to such society a permit, in writing, authorizing such society to do business within this state." [21] Such

[17] Ill. Ins. Laws, 1922, Ch. II, § 22 (pamphlet) (same Jones and Addington, 1913, § 6284). The other language of this lengthy section indicates that no conclusiveness is attached to the issuance of a license.

[18] Colo., § 3553; Ia., § 5484 (possibly third class), § 5640 ("shall issue a certificate of that fact"); Ky., § 648a (6) (not clear); Me., Ch. 53, § 85 ("shall issue to it his certificate of that fact"); N. H. S., p. 409; N. J., p. 2842, § 9, i, Ohio, § 9522 ("license reciting that it has complied with the law and is entitled to transact the business authorized"); Ore., § 6333; R. I., Ch. 220, § 18 ("stating that such insurance company has complied with all the requirements of the law of this state"); S. D., § 9160; Tenn., § 3354; Tex., § 4931; Utah, § 1140 (1); Vt., § 5546; Wis., § 1897 (certificate reciting in detail certain facts, plus a general statement that company has complied with the law).

[19] Ohio, § 9473. Similar provisions: Ohio, § 9476 (*prima facie* evidence that the licensee "is a fraternal benefit society within the meaning of this act"); Ore., § 6478 (like Ohio, § 9473), § 6480 (like Ohio, § 9476); S. C., § 2767 (like Ohio, § 9476); Tenn., § 3369a (95) (like Ohio, § 9473). Similar provisions are found in other states which have adopted the Uniform Fraternal Bill.

[20] Ohio, § 9350 ("may be used in evidence for and against the company in all actions"). See also Tex., § 4931 (certificate shall be evidence of "qualifications" of surety company).

[21] Ill. Ins. Laws, 1922 (pamphlet), Ch. VI, § 6.

a provision would seem to preclude any attack upon the licensee for a violation of the insurance statutes which had ceased to exist before the license was issued. Whether it would preclude judicial action for a continuing violation (for example, a business-getting practice closely akin to rebating, which was openly engaged in both before and after the issuance of the license) is an open question. Language of this type is also common.[22]

In a third type of provision, the language of both of these types is so combined that either or both may be meant. An example is a Georgia statute which, after providing for the issuance of a formal license under the seal of the commissioner, "authorizing and empowering the person . . . or company to transact the kind of business specified in the license," goes on as follows:

> Before an insurance company shall be licensed to transact business in this state, the insurance commissioner shall be satisfied by such examination as he may require that such company is duly qualified under the laws of this state to transact business herein.[23]

To what governmental department is the final interpretation and application of this last provision committed? If the commissioner is honestly but erroneously "satisfied" that a company is "duly qualified," will the court, in a proceeding by the state bringing in issue the legality of its methods of doing business or its financial condition, hold that the commissioner's decision is conclusive so far as facts existing when the license was issued are involved; or will the court declare that compliance, to the satisfaction of the *court*, is a "jurisdictional" condition precedent to the validity of the license, and declare the license no protection if the court finds the company was not duly qualified? [24]

[22] Ala., § 8425; Ariz., § 3378; Ark. (Crawford and Moses, 1921), § 5987 ("shall entitle it to do business"); Conn., § 4108 ("license to transact business"); Del., § 575; Fla. (Gen. Stats., 1920), § 4249; Idaho, § 4950 ("authorized and licensed"); Ill. (Jones and Addington, 1913), § 6272; Mo., § 6165 ("permitted and authorized"); Nev., § 1266; N. D., § 4839 (which certificate "shall be its authority to commence business and issue policies"); Ohio, § 9350 (same), § 9372 ("such renewal certificates shall be the authority of such agents to issue new policies in this state for the ensuing year"); Ore., § 6420 ("granting it full power to transact business under this act"); S. C., § 2710 (the license "shall give to the company obtaining the same power and authority to appoint any number of agents to take such risks or transact any business of insurance in each and every county"); Tex., § 4728; Vt., §§ 5531, 5554; W. Va., § 18; Wash., § 7038; Wyo., § 5249 ("written permission").

[23] Ga., Parks Anno. Code, 1914, II, § 2415a.

[24] Other examples of this third type are: Ariz., § 3381; Colo., § 3553 (cited,

In a number of statutes the reference to the licensing of insurance companies is so indirect that no clew can be gained as to the effect of the issuance of a license. Thus in Massachusetts the provision as to foreign companies reads:

> Foreign companies, upon complying with the conditions herein set forth applicable to such companies, may be admitted to transact in the commonwealth . . . any kinds of business authorized by this chapter, subject to all general laws now or hereafter in force relative to insurance companies, and subject to all laws applicable to the transaction of such business by foreign companies and their agents . . . provided, further, that the provisions of section eighty-one . . . shall not apply to any foreign mutual fire company which had been admitted to transact business in the commonwealth prior to January first, 1921, and was then actually transacting business therein without complying with said provisions.[25]

The proviso, under the rule of *expressio unius*, indicates that no proscriptive right to continue a practice is gained by the obtaining of a license, at least where the law is changed; but it does not follow that this is true where the law has not been changed. At all events, the legal consequences of issuing a license seem uncertain.[26]

Whether any significance is to be attached to the variations in statutory phraseology above noted is an open question. Probably we must look to judicial decisions on broad grounds of policy to settle the question.

There are weighty reasons in favor of the view that the commissioner's "license" or "certificate" should, so long as it remains in force, afford a conclusive protection against judicial prosecution for doing the kind of business specified in the certificate. As has been pointed out, one of the chief merits of the licensing system is that it is preventive rather than punitive, that it enables the individual or individuals concerned to ascertain in advance of action whether such action or conduct will be lawful or unlawful. If in a judicial proceeding for penalties or ouster of a company, the court will inquire *de novo* whether or not the company is "duly qualified," the commissioner's "license" amounts merely to expert advice, and the company is still left in uncertainty. Even if the

n. 18); Ia., § 5484; Kan., § 5191; La. (Wolff's 1920), p. 936, § 2; Mo. § 6165; N. J., p. 2842, § 9; Pa., § 62; Utah, § 1140 (1).

[25] Mass., § 150.

[26] Even though the next section (151) provides that the foreign company must obtain from the commissioner "a license stating that it has complied with the laws . . . and specifying the kinds of business it is authorized to transact."

commissioner's certificate be accorded evidential value, the uncertainty is not removed.

On the other hand, it may be argued that the requirements imposed upon insurance companies by the statutes are to be enforced by the courts as well as by the insurance commissioner;[27] that in the issuance of a first license, much less in the issuance of a renewal license, the commissioner does not make an exhaustive investigation into the company's compliance with the numerous statutory requirements, and the state should not be precluded by his decision; that obvious mistakes of the commissioner should not preclude the state, and doubtful questions of interpretation can best be decided by a court. Moreover, in the evolution of the commissioner's certificate from a receipt for "taxes" or "license fees" to a regulatory license, it is not clear that it has lost its original inconclusive character.

Strange as it may seem, apparently only one judicial decision in the three quarters of a century that has elapsed since the licensing system was introduced into insurance administration has dealt squarely with the question — is a privilege or immunity conferred by an insurance commissioner's certificate of authority if it was issued without a compliance by the company with statutory requirements? In *Hartford Fire Ins. Co.* v. *State*[28] the state was seeking to recover statutory penalties from a foreign company for doing business in the state without a "certificate of authority" from the superintendent of insurance, as required by a statute taking effect March 9, 1871. The defense was that on February 25, 1871, the auditor, under a statute then in force,[29] had issued to the defendant a certificate of authority to do business in the state for the ensuing year. The state was allowed to prove that at that time the defendant had not paid into the state treasury the sum of $50, as required. It appeared that the auditor when he sent the certificate drew a draft on the company for $50, which was later paid, and the auditor turned the money into the treasury on March 21. A judgment assessing $100 and costs against the company was affirmed, the court saying that the words "before

[27] State *ex rel.* Atty. Gen. *v.* Fidelity and Casualty Ins. Co. (1888), 39 Minn. 538, 41 N. W. 108.

[28] Hartford Fire Ins. Co. *v.* State (1872), 9 Kan. 210.

[29] The statute provided: "Before the auditor shall issue any certificate of authority . . . there shall be paid into the state treasury, by the corporation or its agent, for the support of common schools, the sum of $50."

the auditor of state shall issue," and so forth, indicated that the payment of the money was a "jurisdictional" fact and hence the certificate was void on collateral attack.[30] It was also argued that the company had not complied with other requirements, as to the filing of statements, and so forth; but the court declined to express an opinion as to whether or not such a non-compliance would vitiate the certificate.

It may be noted, first, that for the purposes of this case the certificate may be regarded as a tax receipt, which is not conclusive proof of payment; and secondly, that it is conceded by implication that, apart from "jurisdictional" requirements, the commissioner's certificate of authority would be a defense to such a proceeding.

In *State ex rel. Attorney-General* v. *Fidelity & Casualty Ins. Co.*[31] the question was whether or not a New York company which had been annually licensed by the insurance commissioner for a number of years should be ousted from Minnesota because it was doing business in violation of a retaliatory statute, the state attempting to prove that the New York laws would forbid a Minnesota corporation from doing a similar business in New York. The writ of *quo warranto* was quashed, the court holding that the New York statutes did not clearly have that effect. However, Dickinson, J., felt no doubt as to the propriety of the court determining this question regardless of the issuance of a license to the respondent by the insurance commissioner:

> It is said on the part of the respondent that we ought not to entertain the proceeding, because the determination of the question whether it should be licensed and permitted to transact its business in this state is committed by law to a branch of the executive department of the state, and that the judicial department of the state has no constitutional control over the action of the executive department. In this the counsel for respondent fail to distinguish between the authority of the judicial department to control the action of executive officers, and the power and duty of the court to determine, in causes before them, the rights of the parties, although the legal propriety and effect of the action of executive state officers may necessarily thus be brought in question. We have assumed, without so deciding, that the insurance commissioner, in respect to the discharge of his duties, is exempt from judicial control. The insurance commissioner, in granting certificates or licenses to foreign corporations to do business here, acts in a ministerial capacity. His determination and

[30] The brief of counsel for the appellant contains an able argument in favor of the opposite view.

[31] (1888), 39 Minn. 538, 539, 41 N. W. 108.

action are not judicial and final. If our statute, to be hereafter recited, prohibits foreign corporations, under certain circumstances, to do business in this state, the authority or license of the commissioner in disregard of that statute would be unavailing.[32]

The court did not overturn the commissioner's ruling. However, there are weighty arguments in favor of the view that when the extraordinary writ of *quo warranto* is invoked to test the existence of a privilege or license claimed to be derived from the state, the state should not be precluded from proving that the issuance of the license was based upon an erroneous interpretation of the law. It would seem that the state should have some judicial remedy for correcting the mistakes of its licensing officials.

On the other hand, it seems that the same arguments do not apply to a criminal prosecution, to an action for penalties, or to a proceeding instituted by a private individual.[33] With the exception of *quo warranto* proceedings, brought by the state in its own behalf, the issuance of a license or certificate of authority by the commissioner should confer a defense in a judicial proceeding brought against the licensee predicated upon a breach of duty in engaging in the insurance business, so long as the license has not expired or been revoked. The scope of the conduct thus protected remains to be determined. It seems clear that the scope of the privilege must be determined by reference to the statutes under which it is issued. If the commissioner's certificate purports to authorize the doing of business of a kind, or in a way, not authorized by the statutes under which he acts, the licensee's privilege will nevertheless be only as broad as the statute.[34]

[32] 39 Minn. at pp. 539–540. See also State *ex rel.* Phelps *v.* Gearheart (1922), 104 Ohio St. 422, 135 N. E. 606, *semble* accord.

[33] In Boston Rubber Shoe Co. *v.* Boston Rubber Co. (1889), 149 Mass. 436, 21 N. E. 875, the court held that the secretary of state's act in issuing a certificate of incorporation to a company under a certain name was conclusive against attack by *quo warranto* proceedings instituted by a previously existing corporation having a similar name. The court said: "The question whether the franchise was improperly obtained, or improvidently granted, may arise in proceedings for a forfeiture in behalf of the public, but it is not open in proceedings by a private person under the Public Statutes, C. 186, Sec. 17." In Langworthy *v.* Washburn Flouring Mills Co. (1899), 77 Minn. 256, 259, 79 N. W. 974, however, the court speaks of "the *presumption* arising from the act of the insurance commissioner" in issuing a license or certificate of authority to a foreign company, in an action on premium notes of the insured.

[34] People *ex rel.* Gosling *v.* Potts (1914), 264 Ill. 522, 531, 106 N. E. 524, *arguendo*.

Furthermore, it seems clear that the certificate cannot be construed to confer a privilege of doing business in a way expressly forbidden by statute. For instance, a company licensed to do business generally cannot claim a privilege of rebating, or of combining to increase rates, or of issuing forbidden policy forms. On the other hand, where the company's plan of doing business, its investments, and financial condition are submitted to the commissioner at the time when the license is applied for, and approved by him, the company so licensed should not be subjected to judicial penalties for doing business under these conditions. Certainly a physician or a lawyer who had passed an examining board would not be judicially penalized for practising his profession on the ground that the examining board had made a mistake in passing him. Statutes should be drawn so as to indicate more clearly the questions which the insurance commissioner is authorized to determine in passing upon an application for authorization. Such phrases as "duly qualified under the laws" leave the matter too much at large.

The meagre judicial authority on the collateral conclusiveness of insurance company licenses is explained by the fact that judicial proceedings to enforce the insurance laws are seldom resorted to, and that whenever they are, they are usually instituted by, or at the suggestion of, the commissioner himself, who would naturally not attack the validity of his own act, but would avoid discussion by exercising his power of revocation.[35]

Clearly the commissioner's advice to a company that the business in which it is engaged does not fall within the insurance laws and that it need not obtain an insurance company's license, does not confer any privilege of engaging in such business.[36] Nor does his issuance of a license under certain conditions constitute a binding precedent so as to preclude him or his successor from later refusing a license under the same or similar conditions.[37] It is quite another thing, however, to say that a license does not confer a legal privilege during the period for which it is issued.

Legal consequences of refusal or revocation of license. With one accord, the statutes of the various states impose penalties for

[35] In Hartford Fire Ins. Co. *v.* State, *supra*, n. 28, the prosecution was instigated by the Superintendent of Insurance to test the validity of the license issued by his predecessor.

[36] State *ex rel.* Fishback, Ins. Commissioner *v.* Globe Casket & Undertaking Co. (1914), 82 Wash. 124, 143 Pac. 878.

[37] State *ex rel.* Leach *v.* Fishback (1914), 79 Wash. 290, 140 Pac. 387.

engaging in the insurance business without a license. These penalties are partly direct, partly indirect. The direct penalties fall more heavily upon the agent of the unlicensed company than upon the company itself — doubtless for the reason that the company in such a case is usually beyond the reach of the state's process. The penalties imposed on agents run as high as $2,000,[38] $100 a month,[39] and frequently $500,[40] while imprisonment for as much as a year [41] or six months,[42] is not uncommon. Montana contents herself with declaring the agent guilty of a felony,[43] while other states pronounce his offence a misdemeanor.[44] Prosecutions of individuals for acting as agents of unlicensed foreign companies, while not common, are by no means rare.[45]

The direct penalties imposed upon unlicensed companies for doing insurance business, while not ostensibly as severe as under the anti-trust statute, for example, are probably sufficient to make violation of the law unprofitable. These penalties are usually imposed, by the language of the statute, upon the corporation, its officers, managers, and agents. The fines range as high as $100

[38] Idaho, § 5116.

[39] Ariz., § 3414. Other examples of milder penalties: Ore., § 6334 ($50); Tenn., § 3315 ($100); Utah, § 1141 ($100); Va., § 4235 ($100).

[40] Ala., § 4591; Conn., § 4294; Kan., § 5182; Ky., § 762a–21; Miss., § 5091; Mo., § 6160; Nev. Laws, 1913, Ch. 158, § 2. Other states provide smaller penalties: Neb., §§ 3310–11 ($200); Fla. Laws, 1919, Ch. 7865, § 2 ($200); Ind., § 2644 ($100); La., §§ 3588–3589 ($300); Me., Ch. 53, § 115 ($300); Mich. IV, 2, § 4; Ohio, § 660; Okla., § 6691; Pa., § 63; R. I., Ch. 220, § 18 ($1,000); S. D., § 9159 ($200); Vt., § 5614 ($1,000); Wis., § 19550 (5) ($1,000); Wash., § 7088.

[41] Ky., § 762a–21; Mich. IV, 2, § 4; Neb., §§ 3310–11; Ohio, § 660; Okla., § 6791; Wis., § 19550 (5).

[42] Ind., § 2644; Kan., § 5182; Mo. § 6160; N. M., § 2813; Wash., § 7088. N. C., § 3490, authorizes as much as two years imprisonment for an adjuster of an unauthorized fire company. Lighter maximum prison sentences are authorized by: Ala., §§ 4591 (30 days), 8400 (100 days); Ore., § 6334 (15 days); S. D., § 9159 (60 days); Tenn., § 3337 (30 days); Utah, § 1141 (2 months).

[43] Mont. Code § 4021.

[44] Del., § 578; Ga. Code, 1910, II, 10th Div., § 626; Ia., § 5473; N. Y., § 53; N. D., § 4920.

[45] Very few of these cases have reached the appellate courts. Examples are: Paul *v.* Virginia (1868), 8 Wall (U. S.) 168; Comm. *v.* Gaither (1900), 107 Ky. 572, 54 S. W. 956; State *v.* Beardsley (1902), 88 Minn. 20, 92 N. W. 472 The prosecution must prove that the defendant was engaging in the insurance business; if the business is a mere wagering or lottery scheme, prosecution under these statutes fails. State *v.* Towle (1888), 80 Me. 287, 14 Atl. 195. A perusal of the digest shows that prosecutions of agents have been much more numerous than prosecutions of companies.

per day,[46] $250 for each offence,[47] $1,000,[48] $500,[49] $200,[50] $100.[51] Imprisonment for officials of one year,[52] or lesser periods,[53] is also authorized, in a few instances. Prosecutions or actions for penalties against unlicensed companies or associations are apparently rare; and of these only one case has been found in the reports in which the defendant had made any attempt to procure a license.[54] The penalties fall most heavily upon the agents of the unlicensed insurers, as the agents are more readily subjected to the jurisdiction of the local courts. Even where the companies can be reached, a suit to enjoin the company from doing business without a license, or a *quo warranto* proceeding, is more commonly resorted to.

The indirect sanctions or civil penalties have been more fruitful of litigation than the direct penalties. A number of states expressly provide by statute that one acting as agent for an unlicensed insurance company shall be personally liable upon all contracts of insurance made by him in its behalf.[55] The ambiguous character of the liability imposed by such statutes has given rise to two distinct views: one that the statute imposes a strictly penal liability upon the agent, measured by the amount of loss sustained by the insured under the policy, regardless of whether the insured

[46] Ind., § 4697 (domestic company); Ky., § 648a–8 (domestic life company); N. H. Laws, 1913, Ch. 42, § 14 (domestic life company).

[47] Mo., § 6322.

[48] Del., § 580; Ia., § 5540 (officer or manager); Md. I, § 205; Okla., § 6804; Pa., § 73. A fine of as much as $5,000 is authorized by Wis., § 19550 (5).

[49] Conn., § 4294; Ill., § 68; Kan., § 5178; N. J., p. 2867, § 89; N. M., § 2813; Ohio, § 660; Wash., § 7088; Wyo., § 5287.

[50] Neb., §§ 3310–11; N. H., Ch. 170, § 15; Mass., Ch. 175, § 189.

[51] Neb., § 3292; Ore., § 6346 (2); Tenn., § 3350a (9). Ala. apparently imposes no penalty on unlicensed companies.

[52] Del., § 580; Ia., § 5540; Neb., §§ 3310–3311; Ohio, § 660.

[53] Neb., § 3292; Okla., § 6804; Wash., § 7088.

[54] Hartford Fire Ins. Co. *v.* State (*supra*, n. 28). This is apparently the only case in which a license had been refused, revoked or issued. In other cases the defendant contended the business transacted did not fall within the scope of the statute. E. g., Comm. *v.* Wetherbee (1870), 105 Mass. 149; Indiana Millers' Mutual Fire Ins. Co. *v.* People (1896), 65 Ill. App. 355 ($1,000 fine imposed); Lee Mutual Fire Ins. Co. *v.* State (1882), 60 Miss. 395 ($2,000 fine imposed).

[55] Ala., § 8372; Conn., § 4273; Ga. Penal Code, § 2445; Ia., § 5540; Me., Ch. 53, § 121; Mich. IV, 1, § 13; Minn., § 3266; Miss., § 5079; Nev., § 1294 (directors and officers); N. J., p. 2846, § 19 (directors); N. C., § 4813; Okla., § 6693; Ore., § 6334 (5) (unless insured is notified the insurer is unlicensed); Pa., § 64; S. D., § 9159; Tenn., § 3316; W. Va., § 63; Wis., § 1919a (5).

was deceived into believing that the company was duly licensed,[56] or whether the agent knew that the company was unlicensed,[57] or whether the elements of fraud or deceit were present,[58] or whether the insured complied with the conditions of the policy which would have been conditions precedent to a recovery against the company.[59] The other view is that the liability is compensatory,[60] that the requisites of a common law action of deceit are to be read into the statute,[61] and that the agent is liable only if the company is insolvent.[62]

Aside from these express provisions, a liability has been held to be imposed upon the agent by implication from the terms of statutes, which are quite common, declaring "it shall be unlawful" for any person to solicit for, or transmit an application to, or a policy from, any unlicensed company.[63] In all of these cases the company either was insolvent when the policy was issued, or later became so, though in two cases the agent was held liable though he did not know of the insolvency at the time, the court saying that the statute imposed a duty on him to exercise care to ascertain that it was solvent before he issued the policy.[64]

The civil liability thus imposed upon the agent is more severe than the direct penalties above enumerated; and apparently the injured individual is more vigilant in invoking the former than the public officials are in enforcing the latter. At all events it seems

[56] Woolwine *v.* Mason (1913), 128 Tenn. 35, 157 S. W. 682; Noble *v.* Mitchell, 100 Ala. (1893), 519, 524, 534, 14 So. 581.

[57] Noble *v.* Mitchell, *supra*, n. 56.

[58] Woolwine *v.* Mason, *supra*, n. 56.

[59] Woolwine *v.* Mason, *supra*, n. 56 (breach of promissory warranty ignored); Noble *v.* Mitchell, *supra*, n. 56 (failure to submit proofs of loss, no defence).

[60] Price *v.* Garvin (Tex. Civ. App., 1902), 69 S. W., 985.

[61] Webster *v.* Ferguson (1905), 94 Minn. 86, 91, 102 N. W. 213 (no recovery where insured knew company was unlicensed); Simons *v.* Vaughn & Blackwell (1915), 165 Ky. 167, 176 S. W. 995; Vertrees *v.* Head & Matthews (1910), 138 Ky. 83, 127 S. W. 523. The Kentucky statute is in terms compensatory. See Simons *v.* Vaughn & Blackwell, *supra*, p. 181. See also Preston *v.* Preston (1915), 163 Ky. 565, 174 S. W. 2. The Oregon statute (*supra*, n. 55) apparently adopts the deceit theory.

[62] Simons *v.* Vaughn & Blackwell, *supra*, n. 61.

[63] Hartman & Daniels *v.* Hollowell (1905), 126 Ia. 643, 102 N. W. 524; Latham Merc. & Comm. Co. *v.* Harrod (1905), 71 Kan. 565, 81 Pac. 214; Landusky *v.* Beirne (1903), 80 App. Div. 272, 80 N. Y. Supp. 238; Morton *v.* Hart (1890), 88 Tenn. 427, 12 S. W. 1026.

[64] Hartman *v.* Hollowell, *supra*, n. 63; Latham, etc., Co. *v.* Harrod, *supra*, n. 63.

a questionable application of civil penology to impose an indirect penalty of unlimited amount (in one case the insured recovered $7,500 from the agent) [65] upon the agent through the civil remedy, where the direct penalty, as shown above, seldom exceeds $500. This perhaps explains why the courts have sought to mitigate the agent's liability by bringing it within the ordinary principles of the law of torts.[66]

The indirect penalties imposed upon unlicensed companies are, in practical effect, less severe than those imposed upon the agents. A Mississippi statute provides that a foreign unlicensed company cannot sue in the state; [67] other statutes expressly declare all contracts made by a foreign unlicensed insurance company to be void,[68] or forbid recovery of premiums by the company.[69] Kentucky, on the other hand, expressly declares that the "contract" shall be enforceable.[70] Statutes quite commonly provide that "it shall be unlawful" for any foreign insurance company to do business, and so forth, in the state, without having obtained a license.

These provisions have given rise to much litigation. Despite early doubts,[71] it has been generally held that, though the statute declares the issuance of a policy by an unlicensed company to be "unlawful," the insured and insurer are not *in pari delicto*, or the company is "estopped" to take advantage of its own wrong, and

[65] Woolwine *v.* Mason, *supra*, n. 56.

[66] See the cases cited *supra*, notes 60, 61, 63. The severity of the penalty is made harsher by the circumstance that, in many states, the statutory definition of an "agent" is much broader than the common law definition; a person who, at the request of an applicant, transmits an application or a premium to a company with which he has had no previous dealings, or to a broker outside the state, is subjected to liability though no common law agency exists. Noble *v.* Mitchell, *supra*, n. 56; Hartman *v.* Hollowell, *supra*, n. 63; Simons *v.* Vaughn & Blackwell, *supra*, n. 61; Landusky *v.* Beirne, *supra*, n. 63; Woolwine *v.* Mason, *supra*, n. 56; Price *v.* Garvin, *supra*, n. 60. However, the Kansas court refused to extend the statute to cover the case of a mortgagee applying to an unlicensed company for a transfer of a policy already issued. First Nat. Bank *v.* Renn. (1901), 63 Kan. 334, 339, 65 Pac. 698.

[67] Miss. Ann. Code. (Hemingway, 1917), § 5118. No attempt has been made to collect statutes prohibiting suits by *any* foreign unlicensed corporation, insurance or otherwise. There is reason to believe that such statutes are unconstitutional. Henderson, *The Position of Foreign Corporations in American Constitutional Law*, pp. 184, *et seq.*

[68] Cal. P. C., § 596; La., §§ 3595, 3605; N. C., § 4763.

[69] N. H., p. 2859, § 69. [70] Ky., § 762a (21), § 638.

[71] Hoffman *v.* Banks (1872), 41 Ind., 1; Rising Sun Ins. Co. *v.* Slaughter (1863), 20 Ind. 520, which is practically overruled by Behler *v.* German Mutual Ins. Co. (1879), 68 Ind., 347, 353.

hence the insured is not barred from recovering on the policy.[72] This doctrine is in harmony with the purpose of these statutes as police regulations to protect the insuring public. Hence the penalty most frequently imposed is that the unlicensed company is denied a recovery upon a premium note given for a policy.[73] This indirect penalty is obviously less severe than the indirect penalty imposed upon the agent.[74] The contract being voidable at the election of the insured, he may recover premiums paid from the company[75] or from the agent to whom they were paid[76] in an action for money had and received.

The courts have somewhat softened the rigors of these penalties by adopting the view that, in an action by the foreign company to recover on the contract, the defendant must allege and prove (burden of proof) that the plaintiff was doing business in violation of the statute,[77] and by holding that where a contract of insurance

[72] Ehrman *v.* Teutonia Ins. Co. (1880), 1 Fed. 471 (Dist. Ct. E. D. Ark.); New England Fire & Marine Ins. Co. *v.* Robinson (1865), 25 Ind. 536, 540; Germania Fire Ins. Co. *v.* Curran (1871), 8 Kan. 9, 16; Clay Fire & Marine Ins. Co. *v.* Huron Salt & Lumber Mfg. Co. (1875), 31 Mich. 346, 351; Ganser *v.* Fireman's Fund Ins. Co. (1885), 34 Minn., 372, 25 N. W. 943; Swan *v.* Watertown Fire Ins. Co. (1880), 96 Pa. St. 37. However, in Haverhill Ins. Co. *v.* Prescott (1861), 42 N. H. 547, it is said, though not decided that the insured could not recover back premiums paid. *Contra, semble,* Union Central Life Ins. Co. *v.* Thomas (1874), 46 Ind. 44.

[73] Farmers & Merchants Ins. Co. *v.* Harrah (1874), 47 Ind. 236; Cassady *v.* American Ins. Co. (1880), 72 Ind. 95, 101; Haverhill Ins. Co. *v.* Prescott Ins. Co. (1861), 42 N. H. 547; Aetna Ins. Co. *v.* Harvey (1860), 11 Wis. 394; Automobile Ins. Co. *v.* Barondess (1919), 107 Misc. 513, 176 N. Y. S. 839. Cf. Burmood *v.* Farmers' Union Ins. Co. (1894), 42 Neb. 598, 60 N. W. 905, holding revocation of license no bar to recovery of premiums on contract made prior to revocation.

[74] *Supra,* this section, p. 85.

[75] Union Central Life Ins. Co. *v.* Thomas, *supra,* n. 72. But see Haverhill Ins. Co. *v.* Prescott, *supra,* n. 72.

[76] McCutcheon *v.* Rivers (1878), 68 Mo. 122.

[77] Fidelity & Casualty Co. *v.* Eickhoff (1895), 63 Minn. 170, 177, 65 N. W. 351 (action by foreign surety company against principal, for indemnity); Langworthy *v.* Washburn Flouring Mills Co. (1899), 77 Minn. 256, 259, 79 N. W. 974 (action for premium); Scottish Commercial Ins. Co. *v.* Plummer (1880), 70 Me. 540 (action by foreign insurance company on bond covering defalcation of agent); Langworthy *v.* Garding (1898), 74 Minn. 325, 329, 77 N. W. 207. *Contra;* Automobile Ins. Co. *v.* Barondess, *supra,* n. 73. In Indiana it was at one time held that the company could not recover premiums unless it alleged and proved compliance with the statute. Farmers' and Merchants' Ins. Co. *v.* Harrah, *supra,* n. 73, but apparently the contrary view prevailed; Cassady *v.* American Ins. Co., *supra,* n. 73.

is made in State A upon property located in State B, by a company not licensed in State B, the courts of State B will allow the company to recover upon the premium note,[78] though the latter doctrine has been denied on the ground that the statute is designed to protect the insuring public in State B and the courts of State B must give effect to this declared policy no matter where the contract is made.[79] An unlicensed company may recover on premium notes for policies made in the state at a time when it was licensed;[80] the refusal or revocation of a license does not affect contracts previously made.

It will thus be seen that the legal consequences of the refusal or revocation of a company's license are sufficiently drastic to afford a powerful deterrent against defiance of the commissioner's powers. To determine the full effect of his revocation or refusal, however, one further question must be answered: May a company or its agent in a proceeding involving the direct or indirect penalties above described, escape the penalty if it can satisfy the court that the commissioner's refusal or revocation of its license was erroneous, or an "abuse of discretion" such that his action would be overturned in a *mandamus* proceeding? No case has been found which squarely answers this question. In the cases above cited,[81] the company had not applied for a license. From the reasoning in the Minnesota case above cited[82] it might be inferred that, in a *quo warranto* proceeding at least, the court would determine for itself whether or not the company was entitled to a license. But all the other analogies are against it. Thus, one case held that where a person was prosecuted for doing business as a lightning-rod agent without having obtained a license from the insurance com-

[78] Columbia Fire Ins. Co. *v.* Kinyon (1874), 37 N. J. L. 33; Connecticut River Mut. Fire Ins. Co. *v.* Way (1883), 62 N. H. 622, both on the theory that the contract was valid where made and hence enforceable everywhere. See also Provincial Ins. Co. *v.* Lapsley (1860), 81 Mass. 262 (unlicensed Canadian company may recover premium on policy, delivered in Mass., to resident of Ala., insuring vessel in Maine).

[79] Seamans *v.* Zimmerman (1894), 91 Ia. 363, 59 N. W. 290; Seamans *v.* Temple Co. (1895), 105 Mich. 400, 63 N. W. 408; Seamans *v.* Christian Bros. Mill Co. (1896), 66 Minn. 205, 68 N. W. 1065 (all actions by receiver of unlicensed foreign company to recover on premium notes given for policies "issued" in Wis.; recovery denied).

[80] Lycoming Fire Ins. Co. *v.* Langley (1884), 62 Md. 196, 215.

[81] All the cases in which penalties were applied, in notes 56 to 63 inclusive, except McCutcheon *v.* Rivers, *supra*, n. 76, where the point was not raised.

[82] State *ex rel.* Atty.-Gen. *v.* Fidelity and Casualty Ins. Co., *supra*, n. 27, and excerpt from the opinion, *supra*, p. 80.

missioner as required by statute, it was no defence to show that the commissioner had wrongfully refused the defendant a license, the court saying that the commissioner's decision could not be collaterally attacked.[83] A similar view has been taken in many other cases, under statutes granting licensing powers for various purposes, some regulatory, some for revenue.[84] It would be highly inexpedient to allow the commissioner's decision to be attacked in a collateral proceeding, by a company which had defied his powers. Still greater would be the confusion if the propriety of the commissioner's action could be tested in every action on a premium note or other proceeding in which the indirect penalties might be invoked. The company should either attack the decision by a direct proceeding, such as *mandamus* or injunction, or do no business in the state.

Moreover, if the license confers a privilege and an immunity against prosecution for doing business, *e converso* the unlicensed company has no such privilege or immunity. If the licensing power is to be effective, its exercise must be followed by definite legal consequences; it must be something more than an advisory opinion, to be set aside by a court in any and every proceeding. This legal consequence seems a necessary postulate of the licensing power, whether it be "discretionary power" or such as is commonly called "ministerial." [85]

Extra-legal consequences of granting, refusing or revoking a company's license. The granting of a license or certificate of authority to an insurance company by the commissioner is an official approval of its financial soundness and plan of doing business. The state does not guarantee the trustworthiness of the company, nor does the commissioner personally; indeed, it has been

[83] State *v.* Stevens (1916), 78 N. H. 268, 99 Atl. 723.

[84] State *v.* Myers (1876), 63 Mo. 324 (broker's tax license); City of New York *v.* 503 Fifth Avenue Co. (1915), 90 Misc. 277, 153 N. Y. Supp. 7 (sign license); Armour & Co. *v.* Comm. (1913), 115 Va. 312, 79 S. E. 328 (merchant's license); State *v.* Doerring (1905), 194 Mo. 398, 415, 92 S. W. 489 (dentist's license); People *v.* Rotledge (1916), 172 Cal. 401, 156 Pac. 455 (chiropractor's license); City of St. Louis *v.* Kellman (1922), 295 Mo. 71, 243 S. W. 134, 137 (milk dealer's license). See 23 Cyc. 120, n. 70 and 15 R. C. L. 292 (as to liquor licenses). *Contra:* Royall *v.* Virginia (1886), 116 U. S. 572, 6 Sup. Ct. 510 (lawyer's tax "license"; *held* defendant may show he tendered the tax; the license is merely a receipt); State *v.* Cooper (1905), 11 Idaho 219, 81 Pac. 374 (physician's license).

[85] See Patterson, *Ministerial and Discretionary Official Acts* (1922), 20 *Mich. L. R.*, 848, especially p. 872.

held that where the commissioner honestly but erroneously issued a certificate of authority to an insolvent company, he was not liable in an action by one who procured insurance in such company in reliance upon the certificate.[86] Nevertheless, the insuring public does rely considerably upon the commissioner's certificate. Many inquiries are answered by the commissioner; and insurance agents use the approval of the state insurance department as a "talking point" in soliciting applications. One of the stock objections against state supervision, of course, is that it tends to place the weaker companies, in the eyes of the public, upon the same plane with the stronger ones, since both have the same stamp of official approval. With respect to old line companies, however, the standards of safety are well above the minimum; and the delicate problems of assessment or fraternal insurance cannot be solved by a reversion to the policy of *laissez faire*. The increasing reliance of the public upon the commissioner's approval calls for stricter standards and more thorough investigation before such approval is granted.[87]

The refusal to license a foreign company applying for the first time for admission to the state does not have such serious consequences as the revocation of, or refusal to renew, a license already granted. The insuring public in the company's home state, and in other states where it is doing business, will probably not learn of the refusal, and thus the injury to its reputation will not be great. No valuable agency organization will be destroyed, since none has been established. Moreover, the refusal of a license is usually not a definite decision; in the course of correspondence between the commissioner and the company, the commissioner will specify certain conditions which must be complied with; the company which does not feel able to comply with these requirements will simply drop the correspondence. Most of the commissioners found it difficult, for this reason, to give any data as to the number of applications refused during the year.[88] It is impossible to distinguish, in most instances, between "applications" and mere inquiries.

The revocation of a license, or refusal to renew it, has, on the other hand, far-reaching consequences. Especially if it is accom-

[86] State to use etc. *v.* Thomas (1890), 88 Tenn. 491, 12 S. W 1034 (action on official bond of commissioner); see also Minter *v.* McSwain, *infra*, § 37, n. 16.

[87] Wolfe, *State Supervision of Insurance Companies* (1905), *Ann. Am. Acad. Pol. and Soc. Sci.*, xxvi, 317.

[88] The Ill., Mass., N. Y., and Pa. departments stated it was impossible to give exact figures on the number of refusals.

panied by litigation, the commissioner's action — here definite and unmistakable in its significance — will probably be given publicity in the newspapers, aside from the official publication of the notice of revocation required by statute in many states. Rival agents will not be slow to spread the news. Hence the insuring public is apt to be more promptly informed about, and attach more significance to, the revocation of a license than the granting of one. In no business enterprise is a good reputation more vital than in the insurance business. And "there is no reputation more delicate, more valuable as an asset, and more carefully guarded . . ." [89] Even groundless attacks upon its reputation have "the peculiar danger of serious injury to the credit of such institutions of a public nature, as banks and insurance companies . . ." [90]

The effect upon the company's agency organization is even more swift and disastrous. In many states, the revocation of a company's license is followed by an immediate personal notice to all of its agents, and even without such notice the agents will find it out. Whether the revocation was right or wrong, the agents are very likely to seek other employment. This is more apt to be true in such lines as life, accident, and health insurance, than in fire insurance and other lines in which one man will be agent for a number of companies. Aside from the serious legal penalties described above, resulting in an enforced idleness during the period of suspension of the company's authority, the disheartening effect of having to make an uphill fight against strong competition, as representative of a company which has "been in trouble" is enough to disrupt the agency organization. One commissioner estimated that the suspension of a large life insurance company's authority in a large state for even ten days would cost the company $100,000 in the damage to its agency organization alone.

Frequency of exercise of power of refusal or revocation. The data obtained from the questionnaire indicate that the power of revocation of a company's license is rarely exercised. Answers to this question [91] were received from thirty-four departments. The total number of revocations during the year was sixty-three, of which thirty-two, for some reason, were in North Carolina. The average

[89] Lippincott, *The Essentials of Life Insurance Administration* (1905), *Ann. Am. Acad. Pol. and Soc. Sci.*, xxvi, 192, 204.

[90] Hall, J. (for the court), in Dresser *v.* Hartford Life Insurance Co. (1908), 80 Conn. 681, 711, 70 Atl. 39.

[91] "14 (b). In how many instances during the past year, if any, have you revoked a company's authority to do business in the state?"

number per state was 1.85, or, excluding North Carolina, .94. Eighteen states, including the four largest, reported no revocations at all.[92] On the other hand, only thirty-one states attempted to answer the question as to frequency of refusal,[93] of which five [94] gave only indefinite answers, such as "a few." The total refusals reported by the remaining twenty-six [95] numbered 109, an average of 4.2. Only seven states,[96] chiefly the smaller ones, reported no refusals. It is gratifying to note that the power of refusal is more frequently exercised than the power of revocation.

While these data and other evidences indicate that the drastic power of revocation is sparingly exercised, the possibility of its exercise constitutes a threat of such proportions as to make the companies anxious to comply with the commissioner's demands even though they regard them as unreasonable. Moreover, most of the departments appreciate the serious effects of a revocation, and even where the company must be compelled to withdraw from the state, they will allow it to retire "voluntarily" without incurring the odium of a revocation.[97] Here again no data were obtainable because the line between a voluntary and an involuntary retirement is, under such circumstances, a shadowy one.

§ 12. *Details of power to license companies; grounds of refusal.* Practically everywhere the statutes distinguish between domestic and foreign corporations with respect to the licensing power. The latter are subjected to exclusive administrative regulation and control; the former are more frequently subjected to judicial control at the instance of the commissioner. The distinction is not always apparent without a close reading of the statutes; and it varies with respect to different classes of companies (fire, life, accident, assessment, and so forth).

[92] These states were: Ariz., Del., D. C., Fla., Mass., Mich., Mont., Nev., N. H., N. M., Ohio, Ore., Pa., Wash., W. Va., Wis., Ill., N. Y.

[93] "14 (a). In how many instances during the past year, if any, have you refused an application, formal or informal, from a company for a license to do business in the state?"

[94] Ia., Mich., N. Y., Vt., Wash.

[95] Ariz., Ark., Colo., Conn., Del., D. C., Fla., Ida., Kan., Minn., Mont., Neb., Nev., N. H., N. M., N. C., N. D., Ohio, Okla., Ore., S. D., Utah, Va., W. Va., Wis., Wyo.

[96] Ariz., Mont., Nev., N. H., N. M., N. C., Utah.

[97] Such is the practice of the New York department, and the reason why no actual revocations are reported.

With but few exceptions, domestic companies are required to obtain licenses or certificates of authority from the commissioner,[1] and foreign companies are required to everywhere. The licensing of a domestic company for the first time, involving as it does an examination of its assets and business affairs, is a more laborious task than the initial licensing of a foreign company, which is usually done upon the basis of an examination made by the state of its domicile. The chief difference between the two, however, comes in respect to the power of the commissioner over the company after it has been admitted. In a number of states, especially the larger eastern states such as Massachusetts and New York, the license of a domestic company is not renewed annually, but is of indefinite duration.[2] A majority of the states, however, provide that both classes of companies must renew their licenses annually.[3]

[1] Ala., § 8425 (mutual, other than life); Ariz., §§ 3378, 3381; Ark., § 5031; Colo. L., 1913, Ch. 99, § 21; Conn., §§ 4281, 4293; Del., § 575; Fla. L., 1919, Ch. 7869, §§ 1, 2759; Ga., §§ 2414, 2418; Idaho, §§ 4942, 5006; Ill., § 97 (county mutual); Ia., §§ 5623, 5640; Kan., § 5178; Ky., § 648a; Me., Ch. 53, § 85; Mass., Ch. 175, §§ 4, 32; Mich. I, 2, § 5; Minn., § 3294; Miss., § 5029; Mo., § 6225; Mont. Code, §§ 4017, 4019; Neb., §§ 3144, 3167; Nev., § 1266, L. 1913, Ch. 158, § 1; N. H. S., p. 393, § 8, L. 1913, Ch. 42, § 5; N. J., p. 2842, § 9; N. M., §§ 2813, 2814; N. Y., § 9; N. C., §§ 4691, 4692; N. D., § 4920; Ohio, §§ 9349, 9522; Okla., § 6686; Ore., § 6365; Pa., § 107; S. C., § 2699 (?); S. D., § 9180; Tenn., § 3310; Tex. Art. 4738; Utah, § 1140; Vt., § 5546; Va., §§ 4176, 4203 (corp. comm'n); Wash., § 7038; Wis., § 1897t; Wyo., § 5264.

[2] E. g., see Mass., Ch. 175, § 150 (as to foreign companies); N. Y., § 32; N. J., p. 2842, § 91 (indefinite period for domestic company license); Ore., § 6365 (8); Pa., § 107; Vt., § 5546; Wis., § 1897t; Wyo., § 5249. There does not appear to be any provision for renewal periodically of the licenses of domestic companies generally in Ala., Ark., Cal., Fla., Ill., Ind., N. J., Tenn., in addition to the states just cited.

[3] Ariz., § 3381; Ark., Digest, 1921, §§ 6054 (inter-indemnity exchange), 6089, 6090 (fraternal), 6137 (surety cos.); Colo. L., 1913, Ch. 99, § 21; Conn., §§ 4084, 4293; Del., §§ 82 (revenue license), 575 (*semble*); Ga., § 2418; Idaho, § 5006; Ill., § 97 (county mutual); Ill. Ins. Laws, 1922, Ch. II, § 22 (foreign cos.); Ind., § 4790 (foreign cos., semi-annually); Ia., §§ 5484, 5623, 5640 (domestic and foreign cos.); Kan., §§ 5185, 5277, 5278; Ky., § 648a (6) (domestic life); La., §§ 3588, 3614, 3663; Me., Ch. 53, §§ 85 (domestic cos.), § 105 (foreign cos.); Md. I, § 188, II, § 184; Mass., § 150 (foreign cos.); Mich. I, 2, § 5, II, 2, § 1, III, 4, § 15; Minn., § 3294; Miss., §5089; Mo., §§ 6189, 6225; Mont. S., § 4019; Neb., § 3167; Nev., § 1278; N. H. L., 1913, Ch. 42, § 5 (domestic life); N. H., Ch. 169, § 6 (foreign cos.); N. J., p. 2855, § 59; N. M., § 2814; N. Y., § 32 (foreign cos.); N. C., § 4718; N. D., § 4920; Ohio, §§ 9350, 9372, 9436, 9523; Okla., § 6686; Ore., § 6336 (?); S. C., §§ 2696, 2700 (?); S. D., § 9160; Tex., § 4730 (life); Utah, § 1140; Va., § 4210; Wash., § 7038; W. Va., Ch. 34, § 58. In the Ore. and S. C. statutes just cited it is doubtful if the language

In a few statutes the duration of the license, foreign or domestic, seems not to be specified.[4]

A more important distinction is in respect to the power of revocation. While most states authorize the commissioner to revoke the license of a domestic company under some circumstances,[5] or at least to notify it to cease issuing policies [6] (a step which seems to be similar to revocation, though the legal consequences of it are not determined), in many states the grounds for revocation of a domestic company's license are much narrower than those for the revocation of a foreign company's license.[7] Thus, in the jurisdictions just referred to, the commissioner has no power of revoking a domestic company's license on the ground of its financial unsoundness; his remedy in these jurisdictions is to apply to the court for an injunction against the doing of business by the com-

includes domestic companies. In the Life Insurance Law Chart for 1921–22, compiled by Mr. A. R. Fullerton of the Equitable Life of New York (Copyright, 1921, by The Spectator Co., New York City), it is said that in every state the license of a foreign life company must be renewed annually. See *infra*, p. 96.

[4] Ala; Ark. (except as to surety companies); Cal.; Fla.; N. D., § 4839; Ohio, § 9365.

[5] Ariz., § 3381; Ark., §§ 4979, 4987, 5009, 5023; Cal. P. C., 1917, § 633b; Colo. L., 1913, Ch. 99, § 24, L., 1917, Ch. 81, § 1; Del., § 573; Fla. L., 1919, Ch. 7869, §§ 1, 2773; Ga., §§ 2430, 2433, 2437; Idaho, §§ 4961, 4968, 4982; Ill., Ch. 73, §§ 29, 80e; Ind., §§ 4689, 4691, 4706e; Ia., §§ 5471, 5494, 5500; Kan., § 5166; Ky., § 753; La., §§ 3564, 3602; Me., Ch. 53, § 141; Md. III, § 178 (6), (9); Mich. I, 2, § 11; Miss., §§ 5026, 5075; Mo., §§ 6140, 6144, 6178, 6338; Mont. Code, § 4029, S., §§ 4065a, 4141; Neb., § 3148; Nev. L., 1913, Ch. 158, § 2; N. J., p. 2861, § 71; N. M., §§ 2809, 2819, 2861; N. Y., § 60; N. C., § 4702; N. D., § 4922; Ohio, § 9406 (discrimination between applicants for insurance), § 9582; Ore., § 6359; Pa., § 50; S. C., §§ 2700, 2731, 2739; S. D., § 9178; Tex., §§ 4785, 4899, 4895, 4747, 4755, 4802; Utah, § 1134; Vt., § 5576 (discrimination); Va., § 4180; W. Va., Ch. 34, § 15e; Wash., § 7039.

[6] Ala., § 8346; Conn., § 4130; Mass., Ch. 175, §§ 5, 23; Minn., § 3262; N. H. L., 1913, Ch. 42, § 6; R. I., Ch. 224, § 4; Tenn., §§ 3287, 3318. This note excludes states which allow "revocation" of domestic companies' licenses.

[7] E. g., N. J., p. 2861, § 71 (failure to file report); N. Y., § 60 (discrimination or rebating). The N. Y. department states that it has no power to revoke a domestic company's license (i. e., on financial grounds, it seems), but only power to apply for a receiver. Similarly narrow grounds of revocation of domestic company licenses are found in: N. D., § 4922 (false statement in annual report); Ohio, § 634 (2) *et seq.*; Pa., § 50; R. I., Ch. 224, § 2 (assessment companies only); Tenn., § 3348a (7) (entering into rate-fixing agreement); Vt., § 5576 (discrimination).

pany and a receiver to take charge of it.[8] A large number of western and southern states authorize the revocation of a domestic company's license for financial unsoundness and other grounds equally broad.[9] Yet provision is made in practically all the states for the appointment of a receiver for a domestic company at the instance of the commissioner or of the attorney-general.[10] Probably this procedure would be resorted to in every case where a domestic company has got into financial difficulties or has been mismanaged. Revocation of its license, if effective, will only stop the doing of new business; it will not protect existing policy-holders of the company against further mismanagement and dissipation of its assets. The commissioner is not authorized to take possession of the company's property without an order from a court. Hence a judicial proceeding is the usual, if not the exclusive, remedy in such cases.

In an endeavor to ascertain to what extent the commissioner, in revoking licenses, acts independently of a judicial determination that grounds for revocation exist, a question was asked: "14 (c). Do you usually revoke the company's license prior, or subsequent, to the appointment of a receiver by a court of equity?" Unfortunately, the question makes no distinction as to foreign and domestic

[8] Especially in Conn. (see § 4297), Md., Mass.., N. Y., and several other Eastern states. To the same effect are: N. D., § 4925; Ohio, § 634 *et seq.;* Okla., § 6677; R. I., Ch. 219, § 4 *et seq.;* Tenn., § 3285; Vt., § 5604 *et seq.* (domestic *and foreign* companies); Wash., § 7040 (but cf. § 7039); Wis., § 1970m; Wyo., § 5272. This list includes the states which have the largest domestic companies. See also Ore., § 6363; but apparently Ore., § 6359 provides for revocation as well.

[9] E. g., Ga., § 2437; Idaho, § 4982; Kan., § 5166; Mich. I, 2, § 11; Miss., §§ 5026, 5075; Mont. S., § 4065a; Neb., § 3148; N. C., § 4702; Ore., § 6359; Pa., § 50; S. C., § 2700; S. D., § 9178; Tex., § 4899; Va., § 4250; Wash., § 7039; W. Va., Ch. 34, § 15e.

[10] Ala., § 8344; Ark., § 4984; Cal. P. C., § 601; Colo. L., 1913, Ch. 99, § 63; Conn., §§ 4297, 4130, 4086; Del., § 573 (after revocation of license), § 575; Fla. L., 1915, Ch. 6843, § 1; Idaho, § 5079; Ill. (Ch. 73), §§ 11, 25, 70; Ind., §§ 4691, 4726; Ia., §§ 5471, 5485, 5486, 5568; Kan., §§ 5169, 5413, 5227; Ky., § 753; La., § 3580; Me., Ch. 53, § 86; Md., § 178 (7); Mass., Ch. 175, § 6; Mich. I, 3, § 2; Minn., § 3260; Miss., § 5032; Mo., § 6349; Mont. Code, § 4065; Neb., § 3147; Nev., §§ 1301, 1320; N. H. L., 1891, Ch. 56, § 2, L., 1913, Ch. 42, § 8; N. J., p. 2854, § 56; N. Y., § 63; N. C., § 4702; N. D., § 4925; Okla., § 6677; Pa., § 51; S. D., § 9181; Tenn., § 3285; Utah, § 1134; Vt., § 5604 *et seq.;* Va., § 4242; Wash., § 7042; W. Va., Ch. 34, §§ 20, 29. Many of these states also authorize revocation of the company's license on the same grounds which afford a basis for receivership proceedings. See *supra*, n. 9.

companies, nor as to the grounds of revocation. The answers indicate that the power of revocation is usually exercised *before* a receiver is appointed by the court.[11]

Duration of license. It is usually provided that the duration of a company's license shall be one year,[12] or, under the Mobile Bill as to fraternal insurance, "one year or until a new license is granted or definitely refused."[13] Indiana limits the duration of foreign company licenses to six months.[14] At the expiration of the license, a renewal license or certificate is issued. The limited duration of the license is probably due to the original revenue-producing character of the license, and to the common requirement of annual financial reports by the companies. As a result of this limited duration, the commissioner is not only authorized but is also practically compelled to exercise a more continuous watchfulness over the affairs of insurers than in the case of licensees, such as physicians and lawyers, whose licenses are of unlimited duration.

Date of issuance or renewal. The date of issuance of the annual license is an administrative detail which has importance in two ways: first, the date should be fixed so as to coördinate with the most usual date for the ending of the fiscal year of the insurance companies (probably December 31st), so that the company may have time to prepare its annual report to the commissioner after the end of its fiscal year; and secondly, the date of the issuance of the license should be placed a sufficient length of time after the filing of the annual report to enable the insurance department to check over the annual report before issuing the renewal license.[15] Various dates have been adopted — another instance of the lack of uniformity in insurance legislation. The commonest date ap-

[11] *Prior*: Colo., Conn., Del., Fla., Idaho, Ia., Kan., Md., Mass., Mich., Minn., Neb., N. D., Ohio, Okla., S. D., Utah, Vt.; *Subsequent:* Ariz., W. Va., Wis.; *Depends on Circumstances:* Ark., N. C., Va., Wash. Probably most of these answers refer to foreign companies, and simply indicate that the license of such a company will usually be revoked before a court of its home state has appointed a receiver for it. In view of the small number of revocations (*supra*, § 11, p. 91), the answers are indicative rather of the commissioner's attitude than of any fixed practice.

[12] See the statutes cited *supra*, n. 3. See also Pa., § 20; Tenn., § 3302a.

[13] E. g., Ariz., § 3384; Ky., § 681c; Mich. II, 4, § 15; N. C. S., § 4798b.

[14] Ind., § 4790. In a few states the duration of the license is apparently not specified; e. g., Ala., §§ 8333, 8380; Vt., § 5640 (fraternals).

[15] See *infra*, § 22, p. 333, for dates of filing annual reports.

pears to be April 1st,[16] with March 1st a close second.[17] A few instances of earlier dates are found.[18] New York and Massachusetts have adopted later dates,[19] which is probably necessary in order to give the department time to inspect the annual reports or financial statements before the date for renewal comes. Frequently, in the states in which a shorter period for checking the annual report is allowed, the department is not in a position to issue the renewal on the date specified. In such a case, a new license may be issued at the date of expiration of the old one; but the more usual practice appears to be to let the company hold over under the old license until the necessary investigation has been made, and then issue the renewal license as of the date of expiration of the old. The legal consequences of this practice do not appear to have been passed upon judicially.[20] To avoid this anomalous practice, the date of issuance of a renewal license should be fixed a sufficient length of time after the filing of the annual statement to enable the department to go over the report carefully. Minnesota fixes no date but provides the renewal license shall be issued upon approval of the annual statement.[21]

[16] Ariz., §§ 3381, 3384; Conn., §§ 4200, 4293; Idaho, § 5006; Ia., § 5484 (life); La., §§ 3588, 3614, 3663; Mich. II, 4, § 15 (fraternal); Mo., § 6412 (fraternal); Mont. S., § 4019; Neb., § 3167; N. H. L., 1913, Ch. 42, § 5; N. C., § 4718; Ohio, § 9379; Ore., § 6336; Pa., § 20; S. C., § 2710 (foreign); Tenn., § 3302a; Vt., § 5554 (foreign); Wash., § 7038. The variations in phraseology of these statutes are typical of the needless diversity of insurance legislation.

[17] Colo. L., 1913, Ch. 99, § 21; Ga., § 2418; Ia., §§ 5623, 5640 (other than life); Kan., §§ 5185, 5278; Mich. I, 2, § 5, II, 2, § 1; Miss., § 5089; N. J., p. 2855, § 59; N. M., § 2814; Okla., § 6686; S. D., § 9160; Tex., § 4761; Utah, § 1140; W. Va., Ch. 34, § 58; Wis., § 1916 (life companies).

[18] January 31, Md., § 188; Nev., § 1278; Wis., § 1916 (other than life). In Indiana, licenses are issued in January and July. In the following statutes the date of renewal or expiration is not specified: Ala. (no renewal provision); N. D., § 4920; Ohio (other than life); Va., § 4210; Wyo., § 5269.

[19] N. Y., May 1st (§ 32); Mass., July 1st (Ch. 175, § 150); also Ky. (§ 6486a), and Me. (Ch. 53, § 105).

[20] In Lycoming Fire Ins. Co. *v.* Langley (1884), 62 Md. 196, it appeared that the commissioner asked for an examination of the company and did not issue a renewal license on March 1; but on April 23, he issued a renewal license, dated January 1 preceding. The court was not called upon to pass upon the position of the company with respect to contracts made between March 1 and April 23, since the contract in question was made on February 24, before the old license had expired.

[21] Minn., § 3294. For a discussion of the annual statement of a company, see *infra*, § 22, p. 333. Mo. (§ 6225) adopts the impossible requirement that the renewal shall be issued as soon as the annual statement is filed. In Me.

Who exercises licensing power? The commissioner or superintendent is with a few exceptions the official designated to exercise the power to issue and to revoke licenses. In Arizona, these powers are vested in the Corporation Commission,[22] in Idaho, in the Department of Commerce and Industry,[23] in Illinois and Nebraska in the Department of Trade and Commerce.[24] In a few instances, a court is empowered to revoke licenses as an incident to other proceedings.[25]

"Suspension" of license. Closely connected with "revocation," strictly so called, is the "suspension" of a company's license, which is authorized in all except a few [26] of the states. Suspension is a temporary or conditional revocation, operating as a revocation for a limited period or until certain conditions are complied with. A company whose license has been suspended is in the same position, legally, during the period of suspension, as any other unlicensed company, it would seem; but at the termination of the suspension it would be reinstated without complying with all the prerequisites to obtaining a new license. Suspension is a milder form of penalty than revocation, for while both involve cessation of business, the injurious effects of suspension would be less upon the company's business and reputation. In many instances the statute prescribes the period of suspension, just as in case of a jail sentence; [27] in other cases no period is fixed, and the duration

(Ch. 53, § 85), a renewal license is issued to a domestic company whenever an examination of it is made.

[22] Ariz., §§ 3377, 3381. In Va. there are conflicting provisions: § 4176 authorizes the commissioner to issue and revoke licenses; but this is apparently superseded by § 4203 and other sections which vest those powers in the corporation commission.

[23] Idaho, §§ 4942, 4950, 4961, 4968.

[24] Ill. L., 1917, p. 2; Neb. Comp. Stats., 1922, §§ 7242–7246. Okla., § 6759 authorizes revocation by the State Insurance Board, as well as by the insurance commissioner.

[25] Ia., §§ 5491, 5494; Ky., § 674; Mont., §§ 4157, 4164. See also Md. III, § 178 (7) (suspension by court); R. I., Ch. 219, § 10 (forfeiture of charter).

[26] Conn. and Neb. apparently make no express provision for "suspension" as distinguished from revocation; but the power to suspend is to be implied, in certain instances, from the provisions for reinstatement, cited *infra*, notes 28, 29, 30. In Ohio, R. I., Tex., W. Va., Wis., and Wyo. apparently no distinction is made between revocation and suspension.

[27] Ariz., § 3392 (1 yr.); Ark., § 5087 (3 to 6 mos. for first offence, 1 yr. for second offence); Cal. P. C., § 596b (not over 1 yr.); Colo. L., 1913, Ch. 99, § 21 (6) (1 to 3 mos.), § 54 (not exceeding 6 mos.); Del., § 580 (until fine paid); Fla., § 2772 (1 yr.); Ga. §§ 2434, (90 days), 2494 (1 yr.); Idaho, § 5010 (1 yr.);

of the suspension is to be determined by the commissioner in the exercise of a discretionary power, which is, it seems, unregulated and uncontrolled to an extent even greater than the power of a judge in fixing a criminal sentence.[28]

Reinstatement. The power of the commissioner to determine the duration of suspension is affected in some instances by the provisions as to reinstatement, which frequently provide that a company whose license has been revoked shall not be readmitted or reinstated within a given period, occasionally as high as five years,[29] usually shorter.[30] In other instances, the commissioner is expressly

Ill., § 44 (90 days); La., § 3628 (3 mos.); Mich. II, 4, § 12 (90 days), III, 2, § 11 ("for such time, not less than 3 mos. nor more than 1 yr., as to the commissioner shall seem just and proper"); N. M., §§ 2820 (1 yr.), 2839 (6 mos. or less); N. C., § 4767 (3 to 6 mos. for first offence, not less than 1 yr. for second offence); Utah, § 1166 (6 mos. maximum); Vt., § 5576 (3 to 6 mos. first offence); Va., § 4223 (90 days).

[28] Ariz., § 3497 (fraternal); Ark., §§ 4979, 4984, 5020; Del., § 580; Ga., § 2441; Idaho, § 5188; Ind., § 4627; Ia., § 5471 (until statute complied with), §§ 5494, 5668; Kan., § 5166 (until solvency restored, etc.); Ky., §§ 656, 753; La., § 3601; Me., Ch. 53, §§ 87, 113 (until disability removed), 118 (until judgment paid); Mich. I, 4, § 13 (until fine paid); Minn., § 3260; Miss., §§ 5026, 5032, 5112 (during default); Mo., § 6348; Mont. S., § 4065a; Nev., § 1274; N. H., Ch. 170, § 15, L., 1913, Ch. 122, § 26, Ch. 127, § 4; N. J., p. 2881, § 135 (until policy claim paid); N. M., § 2832; N. Y. L., 1916, Ch. 14, § 324, L., 1915, Ch. 506, § 1; N. C., § 4701; N. D., § 4925; Ore., §§ 6678, 6359; Pa., § 50; S. C., § 2700; S. D., § 9179; Tenn., § 3283; Utah, § 1134; Va., § 4180; Wash., § 7039.

[29] Mo., §§ 6144 (5 yrs., for discrimination in rates, rebating, or misrepresenting terms of policy), 6311 (5 yrs., removing suit to U. S. Court).

[30] Ala., § 8339 (1 yr.); Ga., § 2417 (not less than 2 yrs.); Ill., §§ 33 (not less than 3 yrs., for removing suit to U. S. Court), 80f (15 mos.); Ind., §§ 4706c, 4714c (1 yr., rebating, misrepresentation); Ia., § 5670 (not less than 1 yr.); Kan., § 5353 (not less than 1 yr., for doing business through non-resident agents); La., §§ 3595 (after 1 yr.), 3628 (not less than 12 mos., second offence, rebating); Mich. II, 4, §§ 6, 7 (1 yr. rebating, twisting); Miss., §§ 5064 (1 yr., rebating or discrimination in rates), 5083 (1 yr.), 5133 (3 yrs., removing suit to U. S. Court), 5134 (3 yrs., failure to pay judgment); Mont., §§ 4029 (1 yr., discrimination or rebating), 4040 (1 yr.), 4032 (90 days); Neb., §§ 3159 (3 yrs., removal to U. S. court), 3281 (3 mos., rebating, discrimination or twisting); Nev., § 1309 (1 yr.); N. H., p. 568, § 5 (1 yr.), Ch. 169, § 10 (3 yrs.); N. M., §§ 2861 (1 yr.), 2819 (6 mos.); N. C., §§ 4705 (1 yr.), 4767 (1 yr.); N. D., § 4925 (3 yrs.); Ohio, § 9406 (3 yrs.); Okla., § 6759 (3 yrs. in case of revocation by insurance board); Pa., § 181 (1 yr.); Vt., § 5576 (1 yr.); Wis., § 1917. These statutes are to be distinguished from those (*supra*, n. 27) in which a maximum period of *suspension* is prescribed. In the latter the suspension is automatically terminated at the end of the period fixed in the commissioner's order of sus-

authorized to reinstate a company upon more or less certain conditions, without restriction as to time.[31] Many states apparently make no express provision for either suspension or reinstatement.[32] In those states where provision is made for suspension,[33] the omission is not important. In either case, the commissioner, it would seem, has power to relicense the company without exacting compliance with all of those terms and conditions which are made prerequisite to the granting of a new license.

Notice after revocation of license. If the revocation of a license has the definitive consequences of a judicial judgment, provision should be made to allow the company to comply with the ruling before the injurious legal consequences ensue. A careful reading of the statutes discloses that, in many instances, this safeguard against harsh and oppressive action has been overlooked. In a

pension; while reinstatement may take place, if at all, only by the act of the commissioner in relicensing the company. The distinction might also be important in determining the amount of fees to be paid.

[31] Cal. P. C., § 603a, 1915 (when company becomes solvent); Conn., § 4255 (solvency restored); Fla., §§ 2772 (when president of company certifies he will obey the law), 2773 (when company pays judgment); Ga., § 2437 (showing solvency); Idaho, §§ 4968 (payment of execution), 5010 (pay penalty and file agreement to obey the law); Ill., § 69 (proof of condition); Ind., § 4628 (compliance with law); Kan., § 5169; Ky., § 753; La., § 3618 (when expenses of examination paid); Me., Ch. 53, § 112 (proof of solvency); Mich. II, 3, § 11, II, 4, § 12, IV, 2, § 16; Minn., §§ 3260, 3264 (judgment paid); N. J., p. 2881) § 135 (payment of policy claim); N. M., § 2820 (o ı agreeing to obey the law); N. Y. L., 1916, Ch. 14, § 324; N. D., §§ 4922 (on compliance with provisions specified), 4927 (filing annual report); Okla., § 6678 (when default or disability is ended); Ore., § 6359 (indefinite); Pa., § 127 (when default ceases); S. C., §§ 2700 ("while such default or disability continues"), 2745 (payment of judgment); S. D., §§ 9175 (on filing annual statement), 9186 (on payment of taxes and penalties and "complete compliance" with the laws), 9179 (same as S. C.); Tenn., §§ 3283 (same as S. C.), 3318 (same); Tex., § 4747 (when execution against company is satisfied); Utah, § 1134 (same as S. C.); Vt., § 5621 (until judgment paid); Va., § 4195 (on compliance with specific provision); Wash., § 7071 (on filing statement and paying fees and taxes); W. Va., § 49 (when commissioner is satisfied of company's soundness).

[32] N. D., § 7040; Ohio, §§ 9437, 9454, 9582, 9607 (21); Ore., §§ 6357, 6416, 6328, 6431; R. I., Ch. 220, §§ 5, 23, Ch. 225, § 14; S. C., § 2739; Tenn., §§ 3292a (1), 3295, 3302, 3348a (5); Utah, §§ 1143, 1167, 1168; Vt., §§ 5555, 5603, 5635; Va., §§ 4303, 4320; W. Va., Ch. 34, § 15e; Wis., § 1968 (3); Wyo., § 5275. In some of these states there are found elsewhere provisions for suspension as to other types of companies. See notes 27, 28, *supra*.

[33] Ariz.; Ark.; Del.; Md.; Mass.; Pa., § 50; Tex., § 4824; Va., §§ 4180, 4250, 4270; Wash., § 7039.

number of states, the revocation apparently takes effect at once,[34] that is, without regard to whether or not the company and its agents have received notice of the revocation. This is serious, not only from the standpoint of the direct penalties imposed for doing business without a license, but also and even more so from the standpoint of the civil or indirect penalties, that is, the effect on the company's contracts made after revocation. In one case it was held that an agent who, in ignorance of the revocation of the company's license, eighteen days later issued a policy on behalf of the company, was liable in an action by the insured to recover back the premium paid.[35] A number of statutes apparently provide that the revocation shall not take effect until after publication in a newspaper of notice of revocation,[36] but even this constructive notice does not fully protect the company and especially the agents in distant parts of the state. A few statutes are so worded that the revocation apparently does not take effect until after notice has been sent to the company,[37] or to the agents.[38] It seems that

[34] This seems to be the case in Ala., §§ 8339, 8382, 4507, 4592; Ariz., § 3381; Ark.; Cal.; Colo.; Conn.; Del.; Ga.; Idaho; Ind., § 4628; Ia. (usually); La. § 3595; Md. III, § 178 (6); Nev., § 1274; N. C., §§ 4702, 4703 (?); N. Y. L., 1913, Ch. 9 (§ 32); Ohio, §§ 9406, 9454, 9582; Pa., § 50; R. I., Ch. 220, § 4; S. D., § 9179; Tex., §§ 4747, 4785, 4899; Utah, § 1134; Vt., § 5576; W. Va., § 15e; Wis., § 1917. In some of these statutes there is a provision for the giving of notice after the revocation; in others, as in New York and Pennsylvania, no such provision is made. It is no answer to say that the commissioner will usually be lenient, so long as the possibility of legally authorized harsh or oppressive action exists.

[35] McCutcheon *v.* Rivers (1878), 68 Mo. 122. Even if the commissioner is merciful, private citizens may not be.

[36] Ala., § 8343; Ind., § 4709; Ia., § 5650; Kan., §§ 5166, 5353; Ky., § 753; La., § 3603 (in official journal); Me., Ch. 53, § 166; Mass., Ch. 175, § 5; Mich., III, 4 § 28; Minn., § 3260; Miss., § 5032; Mo., §§ 6160, 6348; Mont. Code, § 4068; N. H., Ch. 169, § 9; N. J., p. 2878, § 124; N. Y., §§ 207, 86; N. C., § 4701; N. D., § 4925; Ohio, § 635 ("after the publication"). Okla., § 6678; R. I., Ch. 220, § 23; S. C., § 2700; Tenn., § 3283; Utah, § 1134 (no new business shall thereafter be done); Vt., § 5555 ("after first publication"); Va., § 4180; W. Va., § 49 (after first publication); Wyo., §§ 5238, 5275.

[37] Mass., Ch. 175, § 26; Minn., § 3261; Miss., § 5112; Mont. Code, § 4161; Nev., § 1328; N. H., Ch. 169, § 9; N. J., p. 2861, § 71; N. M., § 2809; Wash., § 7039; Wyo., §5238. Notice of a revocation is to be carefully distinguished from the notice and hearing given the company before revocation. See § 24.

[38] It seems that under these statutes the revocation does not take effect until the agents have received the notice: Ill., §§ 69, 70; Ky., § 653; Me., Ch. 53, § 113; Nev. L., 1913, Ch. 158, § 2; N. M., § 2809; Wash., § 7039. See also Ore., § 6359.

Michigan alone provides (in two instances) that the revocation or suspension shall not take effect, so far as penalties are concerned, until a fixed time (ten days) after the receipt of notice of revocation.[39] Where the revocation is based on insolvency, the time must necessarily be short, in order to protect the insuring public against further injury. However, in the case of minor violations, such as rebating or discrimination, the injury from postponing the taking effect of the revocation would not be serious.

Many statutes require the commissioner, upon revoking a company's license, to publish notice thereof in a newspaper,[40] or to notify the company,[41] or the agents; [42] but performance of this duty by the commissioner is not made a condition precedent to the taking effect of the revocation unless the statute is so worded as to give it that effect.[43] At any rate the language of many of the statutes indicates that the revocation is effective at once without regard to notice of the company or its agents that the license has been revoked.[44] Considering that publication in a newspaper is designed primarily to inform the insuring public and only indirectly to notify the company and its agents, one can see that in only thirteen states is the commissioner required to give notice of

[39] Mich. II, 4, §§ 8 (revocation for misrepresentation or twisting), III, 1, § 10 (notice to cease issuing policies, because assets deficient). Ore., § 6359 provides that the revocation shall not take effect until the expiration of twenty days after it is made.

[40] Ala., § 8343; Ariz., § 3382; Ark., § 5121 (surety companies); Cal. P. C., § 600 (4 weeks); Colo. L., 1913, Ch. 99, § 9; Conn., §§ 4160, 4255; Fla. L., 1915, Ch. 6847, § 5; Ga., § 2416, 2424; Idaho, § 5084; Ind., § 4709; Ia., § 5650; Kan., §§ 5166, 5353; Ky., § 753; La., §§ 3603, 3667, 3669; Me., Ch. 53, § 166; Mass., Ch. 175, § 5; Mich., §§ 228, 230; Minn., § 3260; Miss., § 5032; Mo., §§ 6311, 6348; Mont. Code, § 4068; Nev., §§ 1299, 1316; N. H., Ch. 169, § 9; N. J., p. 2878, § 124; N. Y., §§ 41, 207; N. C., § 4701; N. D., § 4925; Ohio, § 635; Okla., § 6678; R. I., Ch. 220, § 23; S. C., § 2700; Tenn., §§ 3283, 3292a; Utah, § 1134; Vt., § 5555; Va., § 4180; W. Va., § 49; Wis., § 1917; Wyo., §§ 5238, 5275. The above list includes statutes which do, as well as ones which do not, postpone the taking effect of revocation.

[41] Ariz., § 3381; Ky., § 653; Minn., § 3261; N. H., Ch. 169, § 9; N. J., p. 2861, § 71; N. M., § 2809; Ore., § 6359; Wash., § 7039; Wyo., § 5238.

[42] Ariz., § 3381; Ill., §§ 69, 70; Ky., § 653; Me., Ch. 53, § 113; Miss., §§ 5133, 5134; N. M., § 2809; Ore., § 6359; Wash., § 7039; Wis., § 1917.

[43] McCutcheon *v.* Rivers (1878), 68 Mo. 122. This is the only decision in point which has been found. In view of the arguments of policy in favor of prompt suspension of business by an undesirable company, this literal interpretation of the statute is perhaps justified, despite its harsh consequences.

[44] See statutes cited *supra*, n. 34.

the revocation to either the licensee or its agents. This defect should be remedied.

Statutory prerequisites of obtaining a company license. The statutes very generally prescribe with meticulous care the documents which must be submitted and the steps which must be taken by a foreign company seeking a license to do business in the state for the first time. One might assume (as many courts have assumed) from a perusal of these statutes that the commissioner's function in issuing such a license is purely clerical and hence "ministerial," for purposes of judicial control. How far this assumption is correct will be examined later. Provisions of this type have come down from a period when the object of licensing was rather revenue or the filing of information, than active supervision and regulation.[45]

It is quite generally required that the company shall file a certified copy of its charter or articles of incorporation,[46] and a sworn statement of its financial condition, usually prescribed in great

[45] In contrast with the detailed prescriptions of the American statutes is the corresponding provision of the German Insurance Company Law of May 12, 1901: "Art. 4. Conduct of an insurance business requires the permission (*Erlaubniss*) of the superintending office (*Aufsichtsbehörde*). With the application for the granting of the permission must be submitted the plan of doing business, which shall set forth the purpose and organization (*Einrichtung*) of the enterprise, the territory in which the business is to be carried on, and particularly the arrangements (*Verhältnisse*) from which are to be obtained the continuous ability to meet the future obligations of the enterprise. As part of the plan of doing business are to be submitted, in particular: 1. The contract of association of the company (*Gesellschaftsvertrag*) or its constitution and by-laws (*Satzung*), in so far as the enterprise is based on them. 2. The general conditions of insurance [that is, the standardized clauses of the insurance contract] and the technical bases of the business (*technischen Geschäftsunterlagen*) in so far as the same are requisite in view of the kind of insurance to be carried on." See also, Arts. 7, 9.

[46] No effort has been made to collect all the statutes making this very common requirement of foreign, and, occasionally, of domestic companies. The following sections are typical: Ala, § 8348; Ariz., §§ 3386, 3398; Ark., § 5076; Cal. P. C., § 607; Conn., §§ 4084, 4097, 4280; Del., § 573; Ga., § 2415; Ind., § 4708; Kan., § 5213; Ky., § 634; La., § 3584; Me., Ch. 53, § 105; Md., § 182; Mass., Ch. 175, § 151; Mich. II, 2, § 1; Minn., § 3591; Miss., § 5069; Mo., § 6132; Neb., § 3173; N. H., Ch. 169, § 5; N. J., p. 2855, § 59; N. M., § 2815; N. Y., § 29; N. D., § 4913; Ohio, §§ 9359, 9368, 9522, 9562; Okla., §§ 6683 (1), 6700 (domestic); Ore., § 6328 (2); Pa., § 108; R. I., Ch. 220, § 12; S. D., §§ 9161, 9155 (domestic); Tenn., §§ 3292 (1), 3310 (domestic); Tex. § 4766; Utah, § 1134; Vt., §§ 5553, 5545 (domestic); Va., § 4208; Wash., § 7053; W. Va., § 36; Wis., § 1915; Wyo., § 5256. In S. C. there is apparently no such requirement.

detail,[47] together with other information, either specified,[48] or such as the commissioner may require.[49] Foreign companies are usually required to file an instrument appointing the insurance commissioner as agent or attorney for the service of process in suits against the company commenced in the state,[50] though in some instances the naming of any resident agent for service is sufficient.[51] The capital or assets to be possessed by a foreign, as well as a domestic, company, are usually fixed at a named sum,[52] and in addition, a

[47] The following sections are typical: Ala., § 8348; Ark., § 5076; Cal. P. C., § 607; Conn., §§ 4084, 4097, 4128; Fla. L., 1919, Ch. 7867, § 2, Ch. 7869, § 1; Ga., § 2415; Ind., § 4708; Kan., § 5213; Ky., § 657; La., § 3584; Me., Ch. 53, § 105; Md., § 182; Mass., Ch. 175, § 151; Mich., § 61; Minn., § 3591; Miss., § 5069; Mo., § 6132; Nev., § 3173; N. H., Ch. 169, § 5; N. J., p. 2855, § 59; N. M., § 2815; N. Y., § 29; Ohio, §§ 9368, 9522, 9562; Okla., §§ 6683, 6700 (domestic); Ore., § 6328 (2); Pa., § 108 (a); R. I., Ch. 220, §§ 12, 13; S. D., § 9161; Tenn., §§ 3292, 3310 (domestic); Tex., § 4728 (domestic); Utah, § 1142; Vt., § 5553; Va., § 4205; W. Va., Ch. 34, §§ 18, 36; Wis., § 1915; Wyo., § 5266.

[48] E. g., Md., § 182 (list of agents); Mass., Ch. 175, § 151 (specified information); N. D., § 4913 (similar); Ohio, §§ 9368, 9562; Pa., § 108a (copies of policy forms); Tenn., § 3292 (2); Tex., § 4765; Utah, § 1142 (list of agents); Vt., § 5547 (same); Wash., § 7053; W. Va., §§ 18, 36; Wis., § 1915.

[49] E. g., Ala., § 8348 ("as the insurance commissioner may require for protection of Alabama policyholders"); La., § 3584; Mich. II, 2, § 1; Miss., § 5069; Neb., § 3173; N. Y. L., 1917, Ch. 509, § 1; Okla., § 6683 (1) ("such other information as the insurance commissioner may require"); Pa., § 108a (same); R. I., Ch. 220, § 14; Tex., § 4765; Va., § 4205. This type of inquisitorial power will be discussed *infra*, § 22.

[50] See Ala., § 8352; Ariz., §§ 3386, 3486; Cal. P. C., § 616; Colo. L., 1913, Ch. 99, § 22; Conn., § 4202; Del., § 606; Idaho, § 4949; Ind., § 4708; Ia., §§ 5534, 5638; Kan., § 5213; Ky., § 631; La., § 3583; Me., Ch. 53, § 105; Mass., Ch. 175, § 151; Mich. II, 2, § 4; Minn., § 3591; Miss., § 5069; Mo., § 6310; Neb., § 3150; N. H., Ch. 169, § 4; N. J., p. 2855, § 59; N. M., § 2814; N. Y., § 30; N. D., § 4913 (3); Okla., § 6683 (4); Pa., § 108c; R. I., Ch. 220, § 3; S. C., § 2705; S. D., § 9182; Tenn., § 3292 (3); Tex., § 4773; Utah, § 1141; Wash., § 7044; Wis., § 1915 (2); Wyo., § 5266. One of the chief objects of the earlier insurance legislation was to bring foreign insurance companies, doing business in the state, within the jurisdiction of local courts and thus to aid local policyholders in collecting their claims. Despite the extension of this type of legislation to foreign corporations generally, the provisions as to foreign insurers are distinct and separate in nearly all the states; only in Virginia (§ 4207), it seems, is service made upon the secretary of state in a suit against a foreign insurer.

[51] Del., § 573; Ga., § 2446; Ill., § 68; Md., § 182; Mont. Code, § 4061 (name agent in each county); Nev., § 1273; Ohio, §§ 9369, 9561; Ore., § 6327; Wyo., § 5266 (in addition to service on commissioner).

[52] E. g., Ala., § 8358 (domestic fire company, $100,000 capital); Ark., §§ 4990, 5049; Cal. P. C., § 594 ($200,000 for life, fire or marine); Conn.,

deposit of securities either in the state of admission or in the home state, or in a few instances a bond in lieu thereof, is a common requirement of foreign companies.[53] In several states, certificates of various sorts from the insurance department of the company's home state are required.[54] Through this interchange of certificates between the commissioners a vast duplication of labor is avoided. However, not all the commissioners will accept the certificates of other commissioners as sufficient proof of the statements made therein.[55]

Sometimes the company's president is required to make affidavit as to the company's past conduct in some particular, as that it has issued policies only through resident agents,[56] or that it has paid all of its policy claims in full during the past year.[57] In a few instances, the company is required to agree, before it is licensed, that it will obey the laws of the state, either in general or with

§§ 4084, 4085, 4097; Del., §§ 575, 576; Fla., § 2759, L., 1919, Ch. 7869, § 2; Ind., § 4663; Kan., § 5213; Me., Ch. 53, § 104 ($200,000 for fire or marine); Mass., Ch. 175, § 151 (same as for similar domestic companies); Miss., § 5069; Mont. Code, § 4061; Nev., § 1273; N. H. L., 1891, Ch. 54, § 1; N. J., p. 2840, § 6; N. C., § 4747; N. Y. L., 1913, Ch. 92, § 12 (minimum capital $100,000 to $500,000, depending on kind or kinds of business engaged in); N. D., §§ 4863, 4913 (2), 4870; Ohio, §§ 9366, 9560, 9524; Okla., § 6683; Ore., § 6328; Pa., § 98 (domestic); R. I. L., 1915, Ch. 1257; S. C., § 2708; S. D., § 9351; Tenn., §§ 3292, 3301; Utah, § 1144; Vt., §§ 5556, 5557; Va., §§ 4204, 4247; Wash., § 7054; W. Va., § 36; Wis., §§ 1915, 1897g, 19464 (3); Wyo., § 5245, 5266. An excellent summary of the capital requirements of the various states is given by Commissioner Hardison of Massachusetts in *Proc. N. C. I. C.* (1910), pp. 86–92.

[53] See *infra*, § 17, for the deposit requirements.

[54] Ark., § 5082; Cal. P. C., § 607; Conn., § 4128 (valuation of policy reserves); Del., § 576; Idaho, § 4960; Ind., § 4663 (that the domiciliary state admits Indiana companies on like terms); La., § 3584 (that the company is legally authorized to do business in its home state); Neb., § 3173 (as to capital, and assets); Nev., § 1273; N. D., § 5045 (fraternal; certificate of authority from home state); Ohio, § 637 (as to valuation); Ore., § 6420 (certificate that company's financial statement is correct and that it possesses the required assets); Tex., § 4791 (that assessment company is "legally organized and has the required capital"); Utah, § 1186 (foreign mutual, that it has required assets); Va., §§ 4272 (that assessment company is legally entitled to do business), 4257 (valuation of policies); W. Va., § 18 (same).

[55] See *infra*, § 22, p. 370.

[56] Ala., § 8380; Fla., § 2770; La., § 3593. Designed to prevent evasion of the taxes on premiums.

[57] Idaho, § 4960 (assessment co.); Mo., § 6160 (assessment co.). Similarly S. C., § 2703 ("that it has not violated any of the laws of this state")—a pious confessional!

reference to some particular statute.[58] Aside from any supposed moral virtue of such an agreement, its legal effectiveness may have derived some support from the doctrine of *Security Mutual Life Insurance Co.* v. *Prewitt*,[59] that if a foreign corporation consents, at the time of its admission to do business in a state, to any conditions, it will be bound by them, however unreasonable or oppressive they may be. But since that case has been expressly overruled,[60] it seems more than doubtful if such agreements, wrung from the company under the thumbscrew of total exclusion, can give sanctity to conditions otherwise oppressive and "unconstitutional."

Two states at least have adopted the policy of making a foreign company go through a period of probation in its home state before it will be allowed admission. In Nebraska, a foreign or alien company must have made at least four annual reports to the domiciliary insurance department; [61] in New York, no foreign mutual fire insurance company will be licensed until it has done business for ten years in its home state.[62] There is much to be said in favor of such a policy, especially as applied to mutuals.

A retaliatory statute, often euphemistically called a "reciprocal" or "comity" provision, is found in nearly every state.[63] A company of State B may be subjected in State A to the same conditions, fees, deposits, regulations, and prohibitions, which State B exacts of a similar company of State A as a condition of admission to State B. Such statutes were at first declared unconstitutional, because they violated state constitutional provisions requiring uniformity of

[58] Ala., § 8380; Ariz., § 3391; Ill., § 31 (that removal of suit to U. S. Court shall forfeit license); N. M., § 2815; N. Y., § 56 (solemn agreement not to transact any kind of business which domestic companies are forbidden to transact); S. C., § 2703 (accepts obligations of local laws); Utah, § 1142 (accepts provisions of Utah constitution); Wis., § 1915 (that license shall be revocable).

[59] (1906), 202 U. S. 246, 26 Sup. Ct. 619. But see Barron *v.* Burnside (1887), 121 U. S. 186, 7 Sup. Ct. 931, and Henderson, *The Position of the Foreign Corporation in American Constitutional Law*, pp. 134 *et seq.*

[60] Terral *v.* Burke Construction Co. (1922), 257 U. S. 529, 42 Sup. Ct. 188. See comment by D. O. McGovney, 7 *Iowa Law Bulletin* 258.

[61] Neb., § 3276.

[62] N. Y. L., 1917, Ch. 509, § 1. A careful search failed to reveal any similar provisions, other than these two.

[63] Sometimes the retaliation extends only to the requirements pertaining to deposits, fees, taxes, etc. (e.g., Ala., § 8363; Del., § 97; Ga., Park's Anno. Code, 1914, § 2449); in other instances the retaliation extends to "other obligations or prohibitions" (e.g., Mass., § 159; Ariz., § 3401; and see N. Y., § 33).

taxation,[64] because they delegated legislative powers,[65] because they violated the Golden Rule, and because by crippling outside competition they injured the domestic insuring public.[66] It may be confidently asserted that they were passed at the instigation of domestic insurers, for the purpose of erecting a sort of tariff wall around the state; [67] and that they did not benefit the insuring public, however much they may have increased the state's revenues. At the same time the retaliatory law was a weapon with which to attack the high tariff walls of other states.

These earlier decisions are now thoroughly repudiated and the retaliatory law is constitutionally in good standing.

The license fees, it is said, are not "taxes but merely compensation paid the state for its privilege of doing business"; [68] while the second objection is met by saying that the law of the other state is a "fact" upon which the operation of the local law is made dependent,[69] probably for the superficial reason that the law of another state is treated as a question of "fact" in pleading and in jury trials. In the application of a retaliatory law by State A's commissioner, it makes no difference that no corporations of State A have actually been refused admission to State B, nor even that there are no corporations of State A desiring to engage in that branch of the insurance business anywhere,[70] if only State B's

[64] Clark & Murrel *v.* Port of Mobile (1880), 67 Ala. 217; Western & Southern Life Ins. Co. *v.* Commonwealth (1909), 133 Ky. 292, 117 S. W. 376, expressly overruled by Clay *v.* Dixie Fire Ins. Co. (1916), 168 Ky. 315, 181 S. W. 1123.

[65] Clark *v.* Mobile, *supra*, last note.

[66] Western etc. Ins. Co. *v.* Comm., *supra*, n. 64.

[67] See the vigorous statement to this effect of Commissioner Hartigan of Minn. in *Proc. N. C. I. C.* (1910), p. 24.

[68] State *ex rel.* Baldwin *v.* Insurance Company of North America (1888), 115 Ind. 257, 17 N. E. 574. This reasoning smacks of feudal overlordship.

[69] State *ex rel.* Baldwin *v.* Insurance Company of North America, *supra*, last note; People *v.* Fire Ass'n of Philadelphia (1883), 92 N. Y. 311; Phoenix Ins. Co. *v.* Welch (1883), 29 Kan. 672. Other cases upholding such statutes are: Germania Ins. Co. *v.* Swigert (1889), 128 Ill. 237, 21 N. E. 530; Union Central Life Ins. Co. *v.* Durfee (1896), 164 Ill. 186, 45 N. E. 441; Phila. Fire Association *v.* New York (1886), 119 U. S. 110, 30 L. ed. 342; Talbott *v.* Fidelity and Casualty Co. of New York (1891), 74 Md. 536, 22 Atl. 395; State *ex rel.* Atty.-Gen. *v.* N. Y. Fidelity and Casualty Ins. Co. (1888), 39 Minn. 538, 41 N. W. 108; Goldsmith *v.* Home Ins. Co. (1879), 62 Ga. 379.

[70] In Union Central Life Ins. Co. *v.* Durfee, *supra*, n. 69, it was stipulated that no Illinois company was then engaged in the life insurance business anywhere. Yet the superintendent of insurance was held to be justified in exacting of an Ohio company the fees which an Illinois company *would* have had to pay in Ohio.

statutes *would* exact higher fees, and so forth, of State A's companies if they *should* seek admission.[71] Where both states have retaliatory laws, the troublesome problem of "renvoi" in conflict of laws might be raised;[72] but happily, it seems that neither the commissioner nor the courts have thus far discovered it.

Discretionary power in refusal of licenses. It was pointed out in the next preceding section that the power to refuse a license is a power to affect the legal relations or the legal position of the company and its agents with respect to the state, private individuals contracting with the company, and other persons than the commissioner. This power is to be distinguished from the power of the commissioner to create a privilege or immunity in himself against judicial proceedings to overturn his rulings or decisions or to compel him to make compensation, based on the court's finding that his decision was erroneous.[73] The distinction between these two classes of powers is based upon the kind of proceeding in which the question of the commissioner's error arises, and corresponds closely to the distinction between "collateral" and "direct" attack upon his acts.

The question whether or not the commissioner possesses discretionary power in performing a particular official act is too deeply tinged with considerations of policy and tradition to admit of any definite answer. For example, the lack of adequate procedural safeguards[74] no doubt in part explains the tendency of courts to refuse to recognize his functions as having that "quasi-judicial" character which is a usual concomitant of discretionary power. Furthermore, the commissioner was originally for the most part a tax-collecting and information-gathering official, with powers chiefly clerical, and this tradition has had a persistent effect upon

[71] Germania Ins. Co. *v.* Swigert (1889), *supra*, n. 69; Goldsmith *v.* Home Ins. Co., *supra*, n. 69.

[72] That is, Illinois law requires Ohio corporations to pay the fees required by Ohio law of Illinois corporations. If now, Ohio likewise has a retaliatory law, then Ohio law requires of Illinois corporations the fees required by Illinois law of Ohio corporations, and we are back where we started. The only escape from this vicious circle is to say that the Ohio retaliatory statute is not to be taken into account in applying the retaliatory statute of Illinois to an Ohio corporation, but only the Ohio statute fixing the license fees of foreign companies generally. This is the mode of calculation generally adopted. See cases cited in last four notes.

[73] See Patterson, *Ministerial and Discretionary Official Acts*, 20 *Mich. Law Rev.* 848, especially at p. 872 *et seq.*

[74] See *infra*, §§ 23, 24.

the judicial interpretation of his powers. On the other hand, the technical character of the problems which he has had to decide in applying modern statutes, has unquestionably influenced some courts to decline to enter this unfamiliar field of investigation. At best, then, one can only catalogue some of the factors which are likely to determine the success or failure of a direct attack upon the commissioner's refusal of a company's license.

The language of the statutes conferring and regulating the exercise of the official power affords three criteria for determining whether or not the power is discretionary: first, the mandatory or permissive character of the language;[75] second, the use of words denoting mental operation;[76] third, the type of administrative norm, that is, the degree of definiteness or indefiniteness of the conditions and rules upon which the official action is to be predicated.[77] Much of this discussion will be equally applicable to the problems of revocation which will be considered in the next section.

1. *Mandatory or permissive language of the statute.* Mandatory language is more commonly used than permissive language in the statutes prescribing the circumstances under which the commissioner shall license a company, especially in the western and southern states. Such expressions as "shall issue," "it shall be his duty to issue," "must issue," are frequently used.[78] While there is some authority for the view that such language imposes a duty upon the commissioner which a court will enforce regardless of his refusal to issue the license,[79] yet it is the weakest of the three criteria above mentioned.[80] Where the other criteria of discretionary power are found, the court will not as a rule upset the

[75] See 20 *Mich. Law Rev.*, 876; Goodnow, *Principles of Administrative Law of the United States*, 295; 26 Cyc. 162.

[76] 20 *Mich. Law Rev.*, 877.

[77] 20 *Mich. Law Rev.*, 879; Freund, *The Use of Indefinite Terms in Statutes*, 30 *Yale L. J.*, 437, 451 (1921).

[78] See the statutes cited in notes 82, 83, 85, 86, *infra*.

[79] See Bankers Deposit Guaranty and Surety Co. *v.* Barnes (1909), 81 Kan. 422, 105 Pac. 697 where *mandamus* was granted to compel issuance of a license under a statute so worded; yet the court conceded that in respect to certain matters, the superintendent was granted "great latitude of discretion" (81 Kan. 426). For a recent case emphasizing the mandatory meaning of "shall," see Work, Sec. of Interior, *v.* U. S. *ex rel.* McAlester-Edwards Coal Co. (1923), 262 U. S. 200, 43 Sup. Ct. 580.

[80] In State *ex rel.* Banker's Union *v.* Searle (1905), 74 Neb. 486, 105 N. W. 284, the court regarded a "shall issue" statute as equivocal, and turned to other sections for the solution.

commissioner's decisions, made within the scope of his powers.[81] Where, however, the commissioner "shall issue" on conditions which are sharply defined and call for the exercise of chiefly clerical work, as the payment of fees [82] or the filing of documents,[83] the commissioner has practically no discretionary power. On the other hand, a statute which provides that the commissioner "shall issue" upon conditions which are vague or call for the application of a standard, confers discretionary power in the application of the standard or other conditions.[84] Such statutes are frequently found.[85] Equally common are provisions that the commissioner

[81] State for use, etc., *v.* Thomas (1890), 88 Tenn. 491, 12 S. W. 1034 ("whenever . . . the commissioner is satisfied that the affairs of such company are in a sound condition, he *shall* issue"; *held*, commissioner not liable in damages to one who obtained insurance in insolvent company licensed by him); American Life Insurance Co. *v.* Ferguson (1913), 66 Ore. 417, 134 Pac. 1029 ("if he shall be satisfied that such company is qualified . . . *shall* issue"; held, he had discretionary power in determining that co. did not have "unimpaired" capital); State *ex rel.* Dakota Hail Ass'n *v.* Carey (1891), 2 N. D. 36, 49 N. W. 164 ("on being satisfied with . . . shall issue"; *held*, he has "absolute discretion"); State *ex rel.* Banker's Union *v.* Searle (1905), 74 Neb. 486, 105 N. W. 284 ("if . . . satisfied . . . shall issue"; *held*, he had discretionary power).

[82] Colo. L., 1919, Ch. 136, § 1; Del., § 81; Mont. S., § 4018. See N. M., §§ 2814, 2815; N. D., § 4848; Pa., § 107a.

[83] Ga., § 2418; Ind., § 4790; Ia., § 5484; Kan., § 5262 (bond filed and approved); N. D., § 4908; Ohio, §§ 9349, 646; Pa., § 107b; Utah, § 1140; Wash., § 7053; Wyo., § 5238. See also Fla. L., 1919, Ch. 7869, § 2 (has securities required); Ind., § 4682 (capital subscribed and paid in); Ind., § 4708 (deposits made); Mass., Ch. 175, § 56 ("shall so certify"); Mont. C., § 4049 (capital paid in).

[84] See State to the use, etc., *v.* Thomas, *supra*, n. 81; American Life Insurance Co. *v.* Ferguson, *supra*, n. 81; State *ex rel.* Dakota Hail Ass'n *v.* Carey, *supra*, n. 81 (solvency of company); State *ex rel.* Banker's Union *v.* Searle, *supra*, n. 81 (keeping mortuary fund separate and intact); Western Life and Accident Co. *v.* State Insurance Board (1917), 101 Neb. 152, 162 N. W. 530 (rules and regulations of board).

[85] Cal. P. C., § 595 ("solvent condition"); Ill., § 40 (investments "secure"); Minn., § 3327 ("men of good financial standing"); Mont. Code, § 4089 ("doing business *correctly*"); Mo., § 6137 (solvency of co.); Neb., § 3167 (rules and regulations of board); N. H., Ch. 169, § 6 ("safe reliable company entitled to confidence"); N. H. L., 1891, §§ 1, 3 ("reliable," "worthy of public patronage"); N. Y., § 32 ("safely entrusted to do business"); N. C., § 4728 ("approval" of by-laws); Okla, § 6908 ("solvent condition"); R. I., Ch. 224, § 6 (its guaranty fund is "commensurate" with the business carried on by it); S. C., § 2699 ("safe and solvent"); S. D., § 9325; Tex., § 4730 (shows a condition which entitles it to transact business); Vt., § 5554 ("safe and entitled to public confidence"); Va., § 4177 (solvent and in other respects duly quali-

"shall" issue "upon compliance with the provisions of this chapter" or if the company is "duly qualified under the laws of this state." [86] Such a provision is equivocal, the nature of the commissioner's power of refusal being dependent upon the language of some other section under which the dispute as to compliance or non-compliance arises.[87]

Occasionally the legislature provides that the commissioner "shall refuse" a license on more or less certain conditions.[88] So far as the applicant for a license is concerned, "shall refuse" is no more significant than "may refuse"; though if the *granting* of a license were attacked by some one other than the applicant [89] "shall refuse" might receive a different construction from "may refuse." Of more significance is a provision that the commissioner "shall not refuse" to license a company which has complied with the laws; a Kansas statute of this type was held to have invested the court with power to review the commissioner's action,[90] a power denied by a prior decision.[91]

fied); Wis., § 1916 ("that the interests of the people of the state are not jeopardized").

[86] Ark., § 5031; Cal. P. C., § 595; Colo. L., 1919, Ch. 136, § 1; Conn., § 4281; Ga., §2418; Idaho, § 4960; Ill., § 31; Ind., § 4683; Ia., § 5640; Kan., §§ 5191, 5205, 5206; Mich. II, 2, § 1; Nev., §§ 1278, 1290; N. J., p. 2842, § 9; Ohio, § 9522; Okla., § 6686; Ore., §§ 6326 (2), 6328 (5); Pa., §§ 20, 107; S. D., § 9160; Tex., §§ 4707, 4761; Utah, § 1130; Vt., § 5554 (if "satisfied" that the company has complied); Va., § 4177; Wash., § 7043; W. Va., §§ 18, 55.

[87] American Life Insurance Co. *v.* Ferguson, *supra*, n. 81; Banker's Deposit, etc., Co. *v.* Barnes, *supra*, n. 79.

[88] Del., § 608 (similarity of name); Idaho, § 4985; Ia., § 5633; Mich. II, 2, § 17; Nev. L., 1913, Ch. 158, § 1; N. M., § 2818; N. D., § 4837 (if name of company misleading); Ohio, §§ 9436 ("will best promote the public interest"), 9454 (overhead expense equals 30% of premium income); S. D., § 9179 ("methods hazardous to the public," etc.); Tex., § 4945 (failure to pay taxes or to comply with the law); Utah, §§ 1143 (failure to report as required), 1149 (capital and surplus not paid in); Va., § 4180 (insolvency, non-compliance with law); Wyo., § 5264 (shall withhold the certificate for failure to file annual statement). The foregoing examples illustrate the variety of conditions on which the commissioner "shall refuse."

[89] See Utah Ass'n of Life Underwriters *v.* Mountain States Life Ins. Co. (1921), 58 Utah 579, 200 Pac. 673; Cole *v.* State *ex rel.* Harris (1907), 91 Miss. 628, 45 So. 11; *infra*, § 36, p. 480.

[90] Kansas Home Ins. Co. *v.* Wilder (1890), 43 Kan. 731, 23 Pac. 1061. However, there was another significant change in the statutory language. See *infra*, this section, note 106.

[91] Dwelling House Ins. Co. *v.* Wilder (1889), 40 Kan. 561, 20 Pac. 265.

Permissive language, as "may issue" [92] or "may refuse" [93] is found in a number of statutes, and is indicative of discretionary power.[94] A number of states avoid the use of either mandatory or permissive language by requiring companies to obtain licenses, and then providing: "Before granting a license . . . the commissioner shall be satisfied that," [95] and so forth, or similar language. Such provisions have in several instances been held, in connection with other factors, to confer discretion.[96]

2. *Words denoting mental operation.* The commonest phraseology of this sort is "satisfied," "to the satisfaction of," "evidence satisfactory to the commissioner," and the like, followed by a statement of the conditions in regard to which he is to be satisfied before issuing the license; such statutes are found in nearly every state.[97] The

[92] Idaho, § 4950; Ill., § 42; Me., Ch. 53, §§ 105, 108; Me., Ch. 54, § 9; Mass., Ch. 175, §§ 74, 150; Minn., § 3327; Miss., § 5063 ("may be admitted"); N. Y. L., 1917, Ch. 509, § 1 ("may be permitted"), Ch. 264, § 2; N. C., § 4746 ("may be permitted"); S. C., § 2706.

[93] Conn., § 4070; Kan., § 5435; Ky., § 680; Md. IV, § 154 L; Mo., § 6189; N. Y., § 9, L. 1916, Ch. 590, § 1; Ore., § 6415 (2); W. Va., § 15e (like N. Y.).

[94] Matter of Hartford Life and Annuity Insurance Co. (1882), 63 How. Pr. (N. Y. Sup. Ct.) 54, 61; National Benefit Ass'n *v.* Clay (1915), 162 Ky. 409, 415, 172 S. W. 922. For a full discussion of the cases distinguishing between "may" and "shall" in statutes, see Equitable Life Assurance Society *v.* Host (1905), 124 Wis. 657, at pp. 669–673, 102 N. W. 579. For a recent case emphasizing the use of "may" as an indicium of discretionary power, see State *ex rel.* Methodist Children's Home Ass'n *v.* Board of Education (1922), 105 Oh. St. 438, 138 N. E. 865.

[95] Ala., § 8333; Ky., § 752; La., § 3584; Md. III, § 154A; Mass., Ch. 175, §§ 4, 32, 106, 115, 155; Minn., § 3432; Miss., § 5029; Neb., § 3144; N. J., p. 2841, § 7; Okla., §§ 6674, 6683 (2); Pa., § 108b; S. C., § 2699; S. D., § 9225; Va., 4177.

[96] State *ex rel.* Phoenix Mutual Life Ins. Co. *v.* McMaster (1913), 94 S. C. 379, 77 S. E. 401, aff'd (1915), 237 U. S. 63, 35 Sup. Ct. 504; Cole, Ins. Com'r *v.* State *ex rel.* Harris (1907), 91 Miss. 628, 649, 45 So. 11.

[97] Ala., § 8333, L., 1915, p. 834, § 10; Ariz., § 3378; Conn., §§ 4099, 4128; Fla. L., 1919, Ch. 7869, § 2; Ga., § 2418; Ill., § 40; Ind., §§ 4682, 4708, 4790; Ky., § 752; La., §§ 3584, 3661; Me., Ch. 53, § 108; Md. IV, § 154L; Md. III, § 154A; Mass., Ch. 175, §§ 4, 106, 150, 155; Mich., § 61; Minn., §§ 3327, 3432; Miss., §§ 5029, 5069; Mo., §§ 6137, 6160, 6220; Mont. C., § 4063, S. § 4114; Neb., §§ 3144, 3304; Nev., § 1278; N. H., Ch. 169, § 6, L., 1891, Ch. 56, §§ 1, 3; N. J., p. 2841, § 7, p. 2842, § 9; N. Y. L., 1917, Ch. 4, § 1; N. C., § 4692; N. D., §§ 4837, 4920, 4921; Ohio, §§ 9372, 9376; Okla., §§ 6674, 6683; Ore., §§ 6326 (2), 6328 (2), 6420; Pa., §§ 20, 108b; S. C., § 2699; S. D., § 9225; Tenn., § 3277; Vt., §§ 5531 (if satisfied that the statement filed "is true"), 5554; Va., § 4177; Wash., § 7038; W. Va., § 18 ("if he is satisfied with" certificate of valuation); Wis., § 1916; Wyo., § 5269 (annual renewal). The things of which the commissioner is to be "satisfied" vary from simple observable facts to the expert

power to grant or refuse a license under a statute of this type has many times been treated as discretionary,[98] with varying emphasis upon the word "satisfied," and so forth.[99] While one decision went so far as to say that such language confers "absolute discretion" (that is, apparently meaning unregulated and uncontrolled discretionary power) upon the commissioner,[100] this view is opposed to the one generally adopted.[101] A similar result should follow under statutes which predicate the issuance of a license "if in his opinion," "if in his judgment," "if he deems that," and so forth, which are found in a few instances.[102] Of more doubtful significance are such expressions as: "if he shall find that," and the like,[103] or "if it shall appear that," [104] or "if his findings warrant it." [105] The

conclusions to be drawn from a complex and numerous aggregation of facts; from the payment of fees, for instance, to the soundness of the company's financial condition. It will be pointed out further on that the courts are more inclined to concede discretionary power to the commissioner where actuarial or technical business problems are involved than where only a layman's observation is called for. See *infra*, § 37, p. 497.

[98] National Benefit Ass'n *v.* Clay (1915), 162 Ky. 409, 415, 172 S. W. 922 (*semble*); Cole *v.* State *ex rel.* Harris (1907), 91 Miss. 628, 649, 45 So. 11; State *ex rel.* Foreign Ins. Cos. *v.* Benton (1889), 25 Neb. 834, 41 N. W. 793; State *ex rel.* Banker's Union *v.* Searle (1905), 74 Neb. 486, 487, 492–493, 105 N. W. 284; State *ex rel.* Dakota Hail Ass'n *v.* Carey (1891), 2 N. D. 36, 49 N. W. 164; American Life Insurance Co. *v.* Ferguson (1913), 66 Ore. 417, 134 Pac. 1029 (under Lord's Oregon Laws, 1910, § 4633); State *ex rel.* Phoenix Mutual Life Ins. Co. *v.* McMaster (1913), 94 S. C. 379, 381, 77 S. E. 401; State, for use, etc., *v.* Thomas (1890), 88 Tenn. 491, 12 S. W. 1034.

[99] E. g., in State for use, etc., *v.* Thomas, *supra*, n. 98; State *ex rel.* Dakota Hail Ass'n *v.* Carey, *supra*, n. 98, the word "satisfied" is emphasized.

[100] State *ex rel.* Dakota Hail Ass'n *v.* Carey (1891), 2 N. D. 36, 45, 49 N. W. 164. For further discussion of this case, see *infra*, § 37, p. 508.

[101] The other cases cited *supra*, n. 98, recognized that the commissioner's power could be controlled in case he exceeded the scope of his discretionary power.

[102] Ill., § 97; Kan., § 5432; Me., Ch. 53, § 105; Me., Ch. 54, § 9; Miss., § 5063; Mo., § 6189; Mont. C., § 4089; N. Y., § 9; N. D., § 4837 (misleading name); Ohio, § 9436; Pa., § 158; Vt., § 5554; W. Va., § 15e. As to the New York provision, see Matter of Hartford Life and Annuity Insurance Co. (1882), 63 How. Pr. (N. Y. Sup. Ct.) 54, 61.

[103] Kan., § 5205; Mass., Ch. 175, § 32; Mont. C., § 4049; Nev. L., 1913, Ch. 158, § 1; Okla., § 6686; Ore., § 6365 (8); Pa., §§ 107a, 107b; Tex., §§ 4728, 4707 ("if it shall be found"); Wash., § 7043 ("if found conformable"); W. Va., § 55.

[104] Ky., § 743 S-3; Mass., Ch. 175, § 56; Ohio, § 9454; Utah, § 1149 ("unless it shall appear that"); Vt., § 5521.

[105] Mass., Ch. 175, § 74; Minn., § 3443. Cf. Okla., § 6686 ("if he finds that the facts warrant it").

Kansas court thought "if he shall find" denoted discretionary power,[106] and this appears the better view, though it is arguable that what "appears" or is "found," or whether "his findings warrant it," are questions referred to the decision of the court. On the other hand, such phrases as "in his discretion" [107] or "meets with the approval of" [108] clearly confer discretionary power.

The theory which the courts follow in treating words of mental operation as indicative of discretionary power has never been thoroughly worked out. On the face of it, it would seem absurd to say that merely because the legislature has directed the administrative official to "use his head" in performing his official tasks, he is thereby immunized from judicial control. However, the legislature quite frequently assumes that the application or administration of a statute is a mechanical task, and courts have connived at this "automaton" theory of law administration to avoid troublesome questions of delegation of legislative power. Hence the use of words denoting mental operation does imply a departure from the orthodox type of judge-controlled administration. Moreover, the form in which the question arises is often decisive. If the official is sued by an individual for having made an erroneous decision, he will establish a privilege if it is sufficient to prove that "in his opinion" his decision was correct,[109] whereas if the statute contains no such language it will be immaterial what his *opinion* was; he must plead that the decision was correct (that is, to the satisfaction of the judicial tribunal).[110] Hence it is important to know, for example, whether "if it shall appear that" means "if it shall appear *to the commissioner* that."

3. *Types of administrative norms; unregulated discretion.* It has already been pointed out[111] that the statutes in most states prescribe in considerable detail the terms and conditions upon which

[106] Compare Kansas Home Ins. Co. *v.* Wilder, *supra*, n. 90, with Dwelling House Ins. Co. *v.* Wilder, *supra*, n. 91. The omission of the words "if he shall find" was one of the changes made in the statute, which resulted in a greater degree of judicial control.

[107] N. Y. L., 1917, Ch. 264, § 2; S. C., 26 Stat. at L., 774, § 13.

[108] Ark., § 5053; Kan., § 5262; Mass., Ch. 175, § 49; S. C. 26 Stat. at L., 774, § 13. See also Mass., Ch. 175, § 32 ("certify as reasonable"); Mich., § 70 ("consent").

[109] Seaman *v.* Patten (1805), 2 Caines (N. Y.) 312.

[110] Warne *v.* Varley (1795), 6 Durn. & E. 443. See also Patterson, *op. cit.*, 20 Mich. R. L. 878.

[111] *Supra*, this section, "Statutory prerequisites of obtaining a company license," p. 103.

company licenses may be or shall be issued. These are the *rules* governing the licensing power, and there can be little doubt that, in most instances, a failure of the commissioner to observe these rules is an obvious excess of power.[112] Coupled with these definite terms, or embodied in separate sections, are standards governing the exercise of the licensing power, found more commonly in the eastern and northern states. The standards are frequently technical ones, as the "solvency" of a company,[113] which is a very complex question often involving actuarial principles, or the company's "sound financial condition" [114] or like standards of business management.[115] Other standards have more of an ethical flavor, as of "fairness," "fraud," "good faith," and so forth.[116] The courts generally recognize that in the application of such standards the commissioner exercises a discretionary power. As said by Johnston, J., in *Dwelling-House Insurance Co.* v. *Wilder:* [117]

[112] Many of these statutes are referred to *supra*, notes 82 and 83, and also in note 86.

[113] Cal. P. C., § 595; Me., Ch. 53, §§ 108, 85; Mo., §§ 6137, 6220; S. C., § 2699 ("safe and solvent").

[114] Miss., § 5063; N. C., § 4774; Pa., § 158. Of similar import, it seems, are such expressions as these: Kan., § 5435 ("transacts business in an *unsafe* . . . manner"); Me., Ch. 53, § 85 ("responsible to do business"); N. H., Ch. 169, § 6 ("safe reliable co., entitled to confidence"); N. H. L., 1891, Ch. 56, § 1 ("reliable and worthy of public patronage"); N. Y., § 32 ("may be safely intrusted with a continuance of its authority to do business"); Vt., § 5554 ("safe and entitled to public confidence").

[115] Ill., § 40 (capital, securities and investments remain "secure"); Ill., § 97 (doing business "correctly"); Kan., § 5262 (bond with sureties "approved"); La., § 3584 (assets "well invested and immediately available for the payment of losses"); Mass., Ch. 175, § 32 (has a "*proper* system of accounting"), § 151 (assets "well invested and available for the payment of losses"); Miss., § 5069 (assets "well invested and immediately available"); Mo., § 6160 ("securely invested"); Mont. C., §§ 4131, 4063 (investments "remain secure"); N. H. L., 1891, Ch. 56, § 3 (contracts, plans and methods are worthy of public patronage); N. J., p. 2855, § 59 ("well invested and unimpaired capital"); N. Y., § 32 ("capital securities and investments remain secure"); S. D., § 9225 ("its operations will not be hazardous to the public or its policyholders"); Wyo., § 5269 (same as N. Y., § 32).

[116] Kan., § 5435 ("transact business in an . . . unfair or dishonest manner"); Md. III, § 154A (good faith of subscribers to a mutual co.); Mont. C., § 4049 (assets are "*bona fide* property of the company"), S., § 4114 ("subscribed in good faith"); Neb., § 3304 (not conducting business "fraudulently"); N. M., § 2818 ("equitable terms" of cancellation of fire policy by insured); N. Y. L., 1917, Ch. 4, § 1 (membership list "genuine"); S. C., § 2699 (dealings "fair and equitable"); S. D., § 9225 ("will be honestly managed").

[117] (1889), 40 Kan.. 561 at p. 568, 20 Pac. 265.

From the provisions referred to, it will be seen that he is to determine the character and responsibility of an applying company, or of one already admitted, if there is reason to suspect that it is in an unsound condition. To do this, rigid examinations are authorized, and other safeguards provided. The legislature has prescribed the standards by which an insurance company is to be admitted, or allowed to continue business after admission; but whether the companies come up to those standards or requirements, is to be determined by the superintendent.[118]

A "standard," though indefinite in degree and allowing a great deal of latitude of opinion, is limited *a priori* as to the grounds or circumstances or motives which the commissioner may take into account in reaching his decision, and upon which he may base or defend his action.[119] The commissioner cannot add requirements, however beneficial to the insuring public or however sound in policy they may be, which are beyond the scope of the standards laid down.[120] The same cannot be said of statutes conferring unregulated discretionary power. The most striking example of this type is the New York statute which provides that the superintendent of insurance

[118] *Accord:* Banker's Deposit Guaranty & Surety Co. *v.* Barnes (1909), 81 Kan. 422, 105 Pac. 697 (*semble*); Cole *v.* State *ex rel.* Harris (1907), 91 Miss. 628, 649, 45 So. 11 ("discrimination (by life co.) in favor of individuals of the same class and equal expectation of life . . . in the dividends or other benefits payable"); State *ex rel.* Foreign Ins. Cos. *v.* Benton (1889), 25 Neb. 834, 842–843, 41 N. W. 793 ("unsound condition" of co.; *semble*); State *ex rel.* Bankers' Union *v.* Searle (1905), 74 Neb. 486, 492–493, 105 N. W. 284 (maintenance of separate mortuary fund; involved standards of correct accounting and good business management); State *ex rel.* Dakota Hail Ass'n *v.* Carey (1891), 2 N. D. 36, 44, 49 N. W. 164 ("satisfied with the capital, securities and investments" of co.); American Life Insurance Co. *v.* Ferguson (1913), 66 Ore. 417, 134 Pac. 1029 ("unimpaired paid-up capital"; here, company's title was simulated); State for use, etc., *v.* Thomas (1890), 88 Tenn. 491, 12 S. W. 1034 ("satisfied that the affairs of such a company are in a sound condition"). In Kansas Home Ins. Co. *v.* Wilder (1890), 43 Kan. 731, 23 Pac. 1061, it was intimated, though not decided, that an amendment to the statute making issuance of a certificate mandatory and providing expressly for judicial review made his decision, even on such questions as "solvency," reviewable *de novo*.

[119] See Pound, *The Administrative Application of Legal Standards* (1919), 44 *Am. Bar Ass'n Rep.* 445.

[120] Banker's Deposit Guaranty & Surety Co. *v.* Barnes (1909), 81 Kan. 422, 105 Pac. 697 (added requirement that co. guarantying bank deposits should not guaranty deposits of any bank paying more than 3 per cent interest on deposits); State *ex rel.* Bankers' Union *v.* Searle (1905), 74 Neb. 486, 105 N. W. 284 (apparent discrepancies in accounts shown not to be "fraudulent").

. . . may refuse to issue any such certificate to a domestic or foreign corporation if, in his judgment, such refusal will best promote the interests of the people of the state.[121]

This statute, first enacted in 1873 as applicable to foreign companies only,[122] has been held to confer on the commissioner a "quasi-judicial" discretion; when a company applies for admission, "the matter rests with the superintendent to refuse admission if he thinks best." [123]

An equally broad power is conferred under a South Carolina statute, which reads:

Before granting a certificate of authority . . . the insurance commissioner shall be satisfied by proper evidence that such applicant for license is duly qualified to do business under the laws of this state; that it is safe and solvent; that its dealings are *fair* and equitable; and that *it conducts its business in a manner not contrary to the public interests.*[124]

The validity and effect of this provision were judicially discussed in a case which involved also another provision of similar import:

Before licensing any insurance company to do business in this state, the insurance commissioner shall require each company to deposit an approved bond *or* approved securities, *in the discretion of the commissioner*, as follows . . . (specifying the amount for each kind of company). [125]

The commissioner made a ruling that a bond would be accepted only if the company had invested one fourth or more of its reserve on South Carolina policies in certain securities named in the statute, and refused to license a company which had not made these investments and which offered only a bond. The company sought *mandamus* to compel the issuance of a license; the Supreme Court of South Carolina refused the writ, saying (Gary, C. J.):

It will be seen that the statute contemplates that the insurance commissioner must be satisfied by proper evidence, *in each and every case*, that the applicant possess the necessary qualifications for doing business in this state, and that in each case he must determine whether the public interests would be best subserved by requiring the *particular* applicant to de-

[121] N. Y., § 9, L., 1910, Ch. 634, § 3. Same provision in L., 1916, Ch. 590, § 1. The same language is found in: Ohio, § 9436; W. Va., § 15e.

[122] N. Y. L., 1873, Ch., 593, § 2 (N. Y. Rev. Stats., 1875, II, p. 639, § 3). Extended to include domestic companies in 1910.

[123] Matter of Hartford Life and Annuity Insurance Co. (1882), 63 How. Pr. 54, 56, 61.

[124] S. C., § 2699. (Italics ours). Whether "fair" in this statute is a standard or not is a close question; it seems that it is.

[125] *Ibid.;* S. C. Acts, 1910, p. 772.

posit an approved bond or approved securities. By this construction alone can the discretionary powers conferred upon the commissioner be exercised and made effective. Therefore, the requirement that one applicant should deposit an approved bond and another applicant approved securities is not a denial of the equal protection of the laws.[126]

The language indicates the extreme individualization, the isolation of each case from others, which is involved in the administration of justice without law. Judicial, as well as legislative, abdication reaches its high-water mark.

On writ of error to the United States Supreme Court, the judgment was affirmed, the court holding unanimously that the statutes in question did not deprive the relator of "due process of law" nor deny it "the equal protection of the laws." [127] The report of the latter case, however, unlike the opinion of the South Carolina court, shows that the commissioner did have reasonable grounds for his apparent discrimination against the relator in the application of the statute,[128] so that the United States Supreme Court decision does not uphold the validity of an arbitrary or capricious administrative decision, even when made in the exercise of unregulated discretionary power.

Examples of unregulated power, while not usual, are frequently found.[129] The power to make rules and regulations and to refuse

[126] State *ex rel.* Phoenix Mutual Life Ins. Co. *v.* McMaster (1913), 94 S. C. 379, at p. 381, 77 S. E. 401. (Italics ours.)

[127] South Carolina *ex rel.* Phoenix Mutual Life Ins. Co. *v.* McMaster (1915), 237 U. S. 63, 35 Sup. Ct. 504.

[128] The commissioner, on the stand, stated that a company which had real estate loans in South Carolina could be reached directly on execution and showed an intention to remain permanently in the state, which justified the acceptance of a bond from it.

[129] Conn., § 4070 (retaliatory statute: "reasonable laws" of another state or foreign country as to deposits required on admission of a Conn. co.); Conn., § 4099 ("proper company to do business in this state"); Ky., § 743 S-3 ("rights of policyholders will be protected"); Me., Ch. 53, § 105 ("may, if he deems it advisable"); Me., Ch. 54, § 9 ("if he deems it expedient, he may" license foreign fraternal ass'n); Mass., Ch. 175, § 32 ("reasonable" organization expenses, possibly a standard); *Ibid.*, § 74, ("if his findings warrant it" (?)); Mich. II, 2, § 10 ("consent" of commissioner); Mich., § 76 (retaliatory; if home state admits Mich. cos. on "similar conditions"); Minn., § 3432 (fidelity or surety co., must comply with provisions for security prescribed for foreign life cos., "so far as applicable"); Minn., § 3443 ("if his findings warrant it" (?)); N. J., p. 2857, § 66 (retaliatory; if refusal of license to N. J. co. (by another state) was "unreasonable or unfair"); N. Y. L., 1917, Ch. 264, § 2 ("may in his discretion issue"); N. Y., § 33 ("reasonable laws" of another state; retalia-

a license for non-compliance with such a regulation, is a species of unregulated discretionary power, though such a regulation must be supported by some principle or policy embodied in the statutes.[130] On the other hand, it is often difficult to determine whether such language as "approved" or "subject to his approval" sets up a standard by implication,[131] or confers unregulated discretion.[132] Whether it belongs in the one class or the other is a matter of construing the entire statute to see what norms are laid down for the commissioner's guidance.

Unregulated discretionary power unquestionably involves a menace to the security of individual or private interests subjected to it. It should be conferred only where, because of the experimental character of the legislation, no standards can be formulated. As speedily as possible these provisions should be supplanted by ones of greater definiteness.

As a matter of statutory draftsmanship, the definition of vague administrative norms may be accomplished in two ways. A set of all-inclusive rules of precise meaning may be enacted, each describing accurately a type of conduct or a situation which shall be a sufficient ground for refusal, revocation, or other administrative action.[133] Such a statute would have the advantage of a high

tory); Okla., § 6686 ("if the commissioner finds that the facts warrant it." What facts?); S. C., § 2699 (quoted in text); Vt., § 5522 (mutual company "shall not commence business until it complies with such preliminary requirements for the procurement of a definite amount of subscriptions for insurance or for a guaranty capital *as the insurance commissioner may* prescribe" (italics ours); Wis., § 1916 ("upon being satisfied . . . that the interests of the people of the state are not jeopardized"); W. Va., § 15e (*supra*, n. 121).

[130] Western Life and Accident Co. *v.* State Insurance Board (1917), 101 Neb. 152, 162 N. W. 530 (reserve fund required for guaranteed dividends, by analogy to statute requiring reserve fund on straight life policy. The refusal was upheld). For further discussion of the commissioner's power to make regulations, see *infra*, § 29.

[131] E. g., Kan., § 5262 (approved bond); S. C., § 2699 (approved bond or approved securities); Mass., Ch. 175, § 49 (name of co. "subject to the approval of" the commissioner) seem to be governed by recognized standards.

[132] E. g., N. C., § 4728 (if he shall "approve" of the "by-laws") seems to leave the approval unregulated, since there are probably no settled practices as to what such by-laws (of an assessment society) shall contain.

[133] For example, the Iowa statute authorizes the refusal or revocation of a physician's license on the ground, among others, of "gross unprofessional conduct." The decisions are divided as to the constitutionality of a provision for revocation on such vague grounds. (See Patterson, *Administrative Provisions for Licensing of Chiropractors, Chiropodists and Osteopaths* (1921),

degree of certainty and predictability. On the other hand, it would exclude the possibility of adding to the list, without further legislation, new types of conduct or new situations not foreseen by the legislator when the statue was enacted, and thus would hamper the administration in enforcing experimental legislation applicable to phases of business activity which are continually changing. The other way would be to state the vague norm as a ground for refusal, or revocation, and follow that up with a series of examples of the type of conduct or the situation which would be deemed to fall within the scope of the vague norm.[134] Such a provision should embody all the well-recognized types, coupled with an express statement that this enumeration should not be exclusive, which, if clearly worded, would prevent the courts from applying the rule of statutory construction known as "*expressio unius est alterius exclusio.*" At the same time the examples given in the act would furnish the courts with a basis for the application of their common law juridical technique of reasoning by analogy from concrete examples. No statute of this type has been encountered in insurance legislation. Even if the legislature would state, for example, whether the New York superintendent of insurance, in determining whether or not the refusal to admit a foreign insurer "will best promote the interest of the people of this state," may properly consider the existing state of competition in that particular insurance business and the "public necessity" for an additional enterprise (as is done in the case of banks and railroads) or is confined to a consideration of the conduct and financial condition of the particular applicant, something would be gained. Meanwhile, the courts should not turn a deaf ear to complaints of arbitrariness in the exercise of such powers. They must find by the slow process of inclusion and exclusion the limits of vague administrative norms.

7 Iowa *Law Bulletin* 35, 37). The Iowa statute (Iowa Comp. Code, 1919, § 1316) seeks to avoid this difficulty by declaring:

"The words 'gross unprofessional conduct' as used in this section are hereby declared to mean: . . ." Then follows an enumeration of eleven fairly well defined types of conduct: e.g., "1. The procuring or aiding or abetting in procuring a criminal abortion." The enumeration of these eleven types is apparently meant to be all-inclusive, i.e., no other type could be invoked as a ground for refusal or revocation on the ground of "gross unprofessional conduct."

[134] The American Law Institute has adopted a somewhat similar form for its restatement of the common law. The exhaustive general statements of principles are followed by a non-exhaustive series of concrete examples illustrating applications of the principles.

§ 13. *Renewal or revocation of company license; discretionary powers.* The licensing power of the commissioner may be exercised in three different ways: first, by the issuance or refusal of a license to a company; second, by the renewal of such a license, or the refusal to renew the same; and third, by the revocation or suspension of such a license. It may be noted, first, that both the statutory provisions and the practice vary with respect to these three types of exercise of the licensing power; and secondly, that these differences are formal rather than substantial.

Refusal, renewal, and revocation compared. In most states the statutory grounds upon which refusal of a license may be based are fairly narrow and definite[1] — much more narrow than the grounds prescribed for revocation. Thus, in a few instances, it is even provided that the commissioner "shall issue" if the prescribed fees are paid,[2] though this narrow ground of refusal is usually broadened by other sections which have not been sufficiently correlated.[3] In other instances the issuance of a license is predicated upon the completion of certain fairly definite acts, such as making a deposit or presenting certain documents.[4] Other states couple with the definite requirements some indefinite ones which give the official more latitude.[5] Perhaps the commonest type of statute is that which leaves the whole matter at large by commanding the commissioner to issue a license to a company

[1] *Supra*, § 12, p. 103.

[2] Del., § 81 (tax license); Mont. S., § 4018.

[3] See, for example, Mont. C., § 4089 ("if he is of opinion that such company is doing business correctly" (mutual fire co.)); Mont. S., § 4114 (satisfactory evidence that capital "subscribed in good faith" (domestic life co.)); Tex., § 4730; Va., § 4177. For an illuminating discussion of the principle of correlation in statute making, see Freund, *Standards of American Legislation* (1917), pp. 227–248.

[4] Ind., §§ 4682 (domestic life), 4790 (foreign) (upon "satisfactory evidence" that capital of $100,000 all subscribed and 50% paid in); Ia., § 5484 (on receipt of deposit and statement "shall issue"); Kan., §§ 5205, 5206 (similar); N. H. S., p. 393, § 8 (on compliance with conditions prescribed, "shall" (domestic company)). See also N. J., p. 2842, § 9 (domestic); N. M., § 2814; N. D., § 4848; Ohio, § 646; R. I., Ch. 220, §§ 15, 18; Tex., § 4791; Utah, §§ 1140, 1143; Va., § 4272; Wash., § 7053; Wyo., § 5238.

[5] Ark., § 5053 (financial statement meets with the approval of the commissioner); Miss., § 5063 ("sound financial condition" plus specific requirements); Mo., §§ 6137, 6220 (satisfied of "solvency"); N. H., Ch. 169, § 6 ("safe reliable company entitled to confidence" (foreign company)); Ore., § 6328; Pa., § 108; R. I., Ch. 224, § 6; S. C., § 2699; S. D., § 9325; Tenn., § 3292 (2); Tex., § 4730; Vt., §§ 5521, 5545, 5546, 5553, 5554; Va., § 4177; W. Va., § 18.

which has complied with the laws, or is "duly qualified" under the laws.[6] In only a few states (albeit among these are several of the more important ones, in volume of business done) may the refusal of a license be based on grounds not defined by any legal norm, as "may, if he deems it advisable," [7] "in such manner and on such terms as the insurance commissioner may direct," [8] if satisfied the company's "plans, contracts and methods are worthy of public patronage," [9] "will best promote the interests of the people of the state." [10]

Apparently the statutes of most states are designed to give the commissioner greater latitude in revoking licenses than in refusing them. That the companies themselves may be under this impression is borne out by the fact that of the reported decisions of appellate courts as to the propriety of the commissioner's exercise of his licensing power, more than twice as many have been suits to compel the issuance of a license as have been suits to restrain or set aside the revocation of one. On the other hand, the reported cases are not sufficiently numerous to furnish a basis for generalization, and the proportion just noted may be due to the fact that the commissioners are more vigilant in respect to the issuance of licenses than in respect to their revocation. This seems to be the case. On principle, it would seem that greater latitude should be allowed the commissioner in refusing a license to a company applying for the first time [11] than in respect to renewal or revocation, because the harm done by refusing a company admission will, it is believed, be considerably less than that done by refusal to renew or revocation, which destroys an established business.

As a practical matter the distinction between grounds of refusal and grounds of revocation becomes formal rather than substantial

[6] See *infra*, this section, p. 133; e.g. Ala., § 8333 ("satisfied that . . . company is duly qualified under the laws of this state"); Ariz., § 3378 (similar); Ark., § 5031 (domestic mutual); Ky., § 752; Neb., § 3167; N. D., § 4921; Ohio, § 9349; Okla., § 6674; Ore., § 6326 (2); Pa., §§ 20, 108; R. I., Ch. 220, § 18; S. C., § 2699; S. D., § 9160; Tenn., § 3277; Tex., § 4821; Utah, § 1140; Vt., §§ 5546, 5554; Va., § 4177; Wash., § 7038; W. Va., §§ 18, 38. Nev., § 1278 provides that admission "shall not be denied" if company "makes and tenders a full compliance with the provisions of this act."

[7] Me., Ch. 53, § 105 (foreign co.).

[8] Minn., § 3327 (Lloyds associations).

[9] N. H. L., 1891, Ch. 56, § 3 (assessment life).

[10] N. Y., § 9; W. Va., § 15e.

[11] It is impossible to tell in some of the reported cases whether the commissioner has refused a renewal license or a new one.

in view of the fact that a company which compels the issuance of a license gains only an empty victory if the commissioner may immediately revoke the license on grounds which the company has established as insufficient for refusal. The sensible principle, then, is that the grounds specified for revocation constitute the administrative norms which are to be applied by the commissioner in the exercise of either refusal or revocation, and the courts usually recognize this view.[12] It does not follow, however, that the statutory grounds upon which refusal may be justified will justify revocation on the same ground. In the first place, there may be no power of revocation at all.[13] Moreover, if the issuance of a license is to settle anything, there should be some grounds which would justify refusal but which, the facts remaining the same, would not justify a subsequent revocation. Thus, in *Cole* v. *State ex rel. Harris*,[14] the court refused to *mandamus* the commissioner to revoke a company's license on the very grounds and facts which he had previously considered in determining to issue it, the court saying:

> The court would be placing the commissioner in a very singular position, and the state of Mississippi in an extremely awkward attitude, if it should now hold that the commissioner should be required to revoke the license, on the very grounds, and no other, which the commissioner held insufficient to authorize a denial of the license.[15]

[12] This principle is implicitly recognized in Cole *v.* State *ex rel.* Harris (1907), 91 Miss. 628, 45 So. 11 (commissioner cannot be compelled to revoke for some reasons which he had previously determined to be insufficient grounds for refusal); Matter of Hartford Life and Annuity Ins. Co. (1882), 63 How. Pr. (N. Y.) 54; Dwelling House Ins. Co. *v.* Wilder (1889), 40 Kan. 561, 20 Pac. 265; State *ex rel.* Foreign Ins. Cos. *v.* Benton (1889), 25 Neb. 834, 41 N. W. 793; State *ex rel.* Ins. Co. *v.* Moore (1884), 42 Oh. St. 103. To the same effect are: Gage *v.* Censors (1884), 63 N. H. 92 (refusal of physician's license); *Ex parte* Paine (1841), 1 Hill (N.Y.) 665 (refusal to admit physician to medical society). See Reg *v.* Griffiths (1822), 5 B. & Ald. 731, 106 Eng. Rep. 1358 (removal from office); Rex. *v.* Mayor (1777), 2 Cowp. 523 (same); Rex. *v.* Mayor (1787), 2 T. R. 177 (same); State *ex rel.* Vierra *v.* Lusitanian Portuguese Society (1860), 15 La. Ann. 73 (expulsion from fraternal order).

[13] E.g., State *ex rel.* Banker's Union *v.* Searle (1905), 74 Neb. 486, 105 N. W. 284 (*semble*, power to revoke not implied from power to refuse). See City of Lowell *v.* Archambault (1905), 189 Mass. 70, 75 N. E. 65. Cf. Metropolitan Milk & Cream Co. *v.* City of New York (1906), 113 App. Div. 377, 98 N. Y. Supp. 894 (power to insert conditions in license gives power to make license revocable by condition so inserted).

[14] (1907) 91 Miss. 628, 650, 45 So. 11.

[15] 91 Miss. at p. 650. The court distinctly did not agree with the commissioner's conclusion that the policy in question was not a violation of the anti-rebate law (p. 648).

Equally, the commissioner should not be *privileged* to revoke on grounds which he considered fully in granting the license. Statutes should make this distinction clear. It is true that the short duration of the license (usually one year) would probably enable the commissioner to bring up the question again on application for renewal; but this merely emphasizes the need for assimilating grounds for refusing renewal to grounds of revocation rather than to grounds for refusal of issuance in the first instance.

It has been pointed out [16] that quite generally as to domestic companies, and probably universally as to foreign companies, the statutes require that the license shall be renewed annually. In relatively few states do the statutes prescribe the conditions on which a renewal may be refused. In some states it is provided that the commissioner "on being satisfied that the capital, securities and investments remain secure, as hereinbefore provided, shall furnish a renewal of the certificate as aforesaid." [17] In most states, no grounds for refusal to renew are given, and it is apparently contemplated that the renewal may be had upon the same conditions as the original issuance, except as to the filing of the articles of incorporation and like documents, and the making of deposits. While the precise point does not seem to have been explicitly passed upon, in a number of cases it has been assumed that a renewal might lawfully be refused upon grounds which would justify the denial of an original application.[18]

In practice, the range of the commissioner's inquiry and investigation is much more restricted on renewal than on issuance of a new license; at least, than on the issuance of a license to a newly formed domestic company. One question asked of the commissioners was:

12. Do you renew a company's authority to do business as a matter of course, upon application made therefor, where there is no complaint against the company?

[16] *Infra*, § 12, p. 93.

[17] Ill., Insurance Laws of 1922, Ch. II, § 22. To similar effect are Mo., § 6137; Mont. C., § 4063 (almost identical with Ill. statute); N. Y., § 32. See also Ill., § 97; Kan., § 5435; Me., Ch. 53, § 85; Mo., § 6189; Neb., §§ 3167, 3304; N. H., Ch. 169, § 6; N. Y. L., 1916, Ch. 590, § 1 (foreign assessment life or casualty co.).

[18] Dwelling House Ins. Co. *v.* Wilder (1889), 40 Kan. 561, 20 Pac. 265; Kansas Home Ins. Co. *v.* Wilder (1890), 43 Kan. 731, 23 Pac. 1061; Matter of Hartford Life and Annuity Co. (1882), 63 How. Pr. (N. Y) 54; State *ex rel.* The Dakota Hail Ass'n *v.* Carey (1891), 2 N. D. 36, 49 N. W. 164; American

Of the thirty-four answers received, twenty-three [19] answered "yes," six [20] indicated that the issuance of a renewal license was conditioned upon approval of the company's annual statement (that is, virtually limited to the question of its financial condition), while five [21] answered "no." In view of the categorical nature of the question and of the possibilities of different interpretations, the answers do not necessarily indicate widely divergent practices, and it seems likely that the practice generally is to issue a renewal certificate if the annual statement is complete and regular upon its face and if no complaints have been made against the company.

The practice in this respect should be crystallized into a uniform statute prescribing the procedure of renewal. It would be desirable to exclude as lawful grounds for refusal of renewal questions which have already been passed upon by the commissioner in connection with the first issuance of the license; but in view of the unsettled state of the law as to the power of an administrative official to reverse himself, such a reform must be approached cautiously.

Along with the statutes conferring power to "revoke" licenses, must be considered a number of provisions authorizing the commissioner, under certain conditions, to "notify the company to cease issuing new policies," or to "require it to cease doing business." [22] Where, as in Massachusetts,[23] a definite penalty is attached to a failure to obey such a notice from the commissioner, it would seem that the legal consequences are very little different from those attending the revocation of the license. Where, as in Alabama,[24] the statute does not attach any specific penalty to such disobedience, such a notification by the commissioner would probably have no legal consequences but would be a threat or

Life Ins. Co. *v.* Ferguson (1913), 66 Ore. 417, 134 Pac. 1029; State *ex rel.* Equitable Life Assurance Society *v.* Vandiver (1909), 222 Mo. 206, 121 S. W. 45; People *ex rel.* Hartford Life and Annuity Ins. Co. *v.* Fairman (1882), 12 Abb. N. C. 252, 259, aff'd (1885), 91 N. Y. 385.

[19] Ariz., Ark., Del., D. C., Fla., Idaho, Me., Md., Mass., Mich., Minn., Nev., N. H., N. M., N. C., Ore., Pa., S. D., Vt., Va., W. Va., Wis., Wyo.

[20] Ill., N. Y., N. D., Okla., Utah, Wash.

[21] Colo., Conn. ("no, if not advisable"), Ia., Kan., Neb.

[22] Ala., § 8346; Ark. Dig., 1921, § 5951; Conn., § 4130; Del., § 5575; Md. III, § 178 (4) (a); Mass., § 7 (domestic life co.), § 23 (penalty of not more than $1,000); Nev., § 1293; N. H. L., 1913, Ch. 42, § 8; N. D., § 4923; Pa., § 165; R. I., Ch. 224, § 4; S. D., § 9175; Tenn., § 3287; Tex., § 4824.

[23] Mass., § 23 (forfeiture of not over $1,000).

[24] Ala., § 8346; Idaho, § 4987 (same).

warning of judicial proceedings for an injunction and receiver under other statutes.[25] Yet the extra-legal consequences of such a warning would make the company obey it if possible. At all events, in the following analysis of the statutes, provisions of this type have been classed with those expressly authorizing "revocation," as has another type of statute, to the effect that, under certain conditions, a company shall "forfeit" its right to do business in the state.[26]

Domestic and foreign companies. The power of revocation varies greatly with the type of company involved. In the first place, a number of states do not explicitly empower the commissioner to revoke a domestic company's license under any circumstances.[27] The usual practice in those states is for the commissioner to proceed by an application to a court for an injunction and receivership,[28] especially where the company is in financial difficulties. While this discrimination is probably actuated by the policy of favoritism toward local enterprises, it is not unwarranted in view of the fact that a domestic company's assets are amenable to judicial process (since its home office is in the jurisdiction), and prompt action must be taken to conserve them; whereas the most that the commissioner can do to a foreign concern (aside from deposit laws) is to exclude it from the state. Incidentally the com-

[25] These "notification" provisions usually relate exclusively to domestic companies, and as to such companies the commissioner usually has ample powers to throw the company into a receivership.

[26] Ala., § 8382, is an example. See also Ohio, § 625; Pa., § 127; S. D., § 9175; Tenn., § 3318; Tex., § 4758.

[27] It is difficult to say with certainty what the commissioner's powers are in some states because of the ambiguous provisions authorizing him to "notify the company to issue no new policies," etc., as explained above.

[28] This is apparently the case in: Ala., § 8344; Ark., § 4984; Cal. P. C., § 601; Conn., § 4086; Del., § 575 (but see § 573); Fla. L., 1915, Ch. 6843, § 1 (but see L., 1919, Ch. 7869, § 1); Ill., §§ 25, 70; Kan., §§ 5227, 5413; Ky., §§ 674, 681 c-24; Me., Ch. 53, § 86; Md. I, § 178 (7); Mass., § 6; Mich. I, 3, § 2; Minn., § 3260; Miss., § 5032; Mo., § 6349; Mont. C., §§ 4065, 4164; Nev., § 1301; N. H. L., 1891, Ch. 56, § 2, L., 1913, Ch. 42, § 8; N. J., p. 2854, § 56, p. 2882, § 137; N. Y., §§ 41, 43, 63; N. D., § 4925; Ohio, § 634-2 *et seq.;* Okla., § 6677; Ore., § 6368; Pa., § 51; R. I., Ch. 219, § 4; S. D., §§ 9181, 9217; Tenn., § 3285; Vt., § 5604; Va., § 4242 *et seq.;* Wash., § 7042; W. Va., §§ 20, 39; Wyo., § 5272. The discrimination is most marked in the "Mobile" model fraternal insurance bill adopted in a number of states. Under its provisions, the commissioner may revoke the license of a foreign fraternal society but in case of a domestic fraternal he is merely authorized to apply to the attorney-general who may, if he deems best, institute judicial proceedings.

missioners of western states having but few domestic companies are thus more powerful than those who have to deal with a larger proportion of home companies.

"Fixed premium" and "assessment" companies. In the second place, a marked difference is found in the grounds of revocation for "old line" or fixed premium companies, and those for "mutual," assessment or fraternal orders. The characteristic of an assessment company is that it does not purport to maintain on hand at all times sufficient assets to equal the contingent reserve liability of its outstanding policies as calculated by actuarial formulae. It does not rely upon building up a "sinking fund" to meet its obligations when they mature, but waits until they do mature and then purports to collect sufficient funds to meet them by "levying" assessments upon the "members," that is, the policyholders, in proportion to the amount of insurance which each has taken out. The members are usually under no legal duty to pay such assessments; they may withdraw at any time by allowing their policies to lapse. It is difficult for any enterprise to maintain itself on this plan for more than the period of one generation, because when the death claims become frequent, assessments will become high and the members in good health will tend to drop out. Obviously, then, a company organized on this plan cannot be expected to measure up to the rigid actuarial standards of a "level premium" company. Once we get away from these mathematically determinable standards, the financial soundness of the company is more or less a matter of guesswork. Accordingly, the grounds of revocation of the various types of assessment companies are usually more indefinite than in the case of level premium companies.

"Mutual," "fraternal," and "assessment" companies or associations are everywhere placed on a different footing from the "fixed premium" companies; provisions applicable to the latter are not applicable to the former.[29] A considerable number of states

[29] See, in general, Ala., § 8354; Ark., § 5054; Ariz., § 3493; Cal., P. C., § 602; Colo. L., 1919, Ch. 134, § 1 *et seq.*; Conn., §§ 4160, 4212; Del., § 577; Fla., § 2764; Ga., § 2418; Idaho, §§ 4958, 5175; Ill., § 247; Ind., §§ 4726, 4738, 4764; Ia., §§ 5523, 5718; Kan., § 5168; Ky., §§ 676, 680, 680a, 681c9; La., §§ 3677, 3735; Me., Ch. 53, § 95, and Ch. 54; Mass., §§ 73–94; Mich. II, 4, § 9, II, 2, §§ 16, 76; Minn., § 3265, L., 1915, Ch. 96, § 3; Miss., §§ 5101, 5103, 5172, 5181; Mo., §§ 6167, 6401, 6422; Mont., C., §§ 4092–4112; Neb., §§ 3287, 3303, 3214, 3261; Nev., § 1279; N. H. L., 1913, Ch. 122, § 4; N. M., § 2823; N. Y., §§ 230–249; N. C. S., § 4794; Ohio, §§ 644–5, 9465; Okla., § 6760; Ore., §§ 6352, 6439; Pa., § 88; R. I., Ch. 224, § 11; S. C., § 2768; S. D., § 9382; Tenn. § 3369a

have provided that the test of the solvency of a fraternal society is whether or not its assets are equal to its *matured* liabilities.[30] A number of states have adopted the "triennial amelioration" scheme, whereby, under a special method of computing the reserve which resembles [31] that used in computing the reserve of an ordinary life company, a valuation of the outstanding policies or certificates is made every three years, and the valuation of its reserve liability thus made, when compared with its assets, must show no greater deficiency in assets than existed on some previous date, for example, December 31, 1917.[32] The stronger fraternal societies to-day are reorganizing on the reserve fund plan, with a corresponding increase in rates.[33] The tendency is to refuse to admit non-fraternal assessment life companies.[34]

As examples of the broader grounds of revocation in the case of

(77); Tex., § 4830; Utah, § 3274; Va., § 4276; Vt., § 5636; Wash., § 7262; W. Va., Ch. 55A § 4; Wis. § 1956 (9); Wyo. § 5327. While the description given in the last paragraph is obviously not applicable to those fraternal orders which have adopted the "fixed premium" as their sole method of raising funds, yet these would probably be treated as operating under the special "fraternal" statutes.

[30] This provision is contained in the "Mobile" Bill or Uniform Fraternal Statute; see, e.g., Ala., § 8484; Ariz., § 3493; Conn., § 4210; Ill., § 247; La., § 3735; Tenn., § 3350a (14).

[31] A special mortality table, showing a lower rate of mortality than that shown by the standard tables, is used, and the computation is on the basis of 4% interest instead of 3 or 3½%.

[32] Colo. L., 1919, Ch. 134, § 1 *et seq.* See also Conn., § 4212; La., § 3735; Mo., § 6422; Mont. S., p. 906, §§ 1–33; N. H. L., 1913, Ch. 122, § 23a; Ohio, § 9485; Ore., § 6489; Tenn., § 3369a (120); Tex., § 4850a; Utah, § 3294; Va., § 4295; Wash., § 7282; Wyo., § 5347.

[33] To discuss the merits and demerits of fraternal insurance would be entirely beyond the scope of this volume. Assessment insurance will sometimes work on a small scale, where the bonds of friendship and sympathy are strong. But the "promoters" of fraternal insurance have duped many victims into believing that they can get something for nothing. The newer type of fraternal society, maintaining a fairly adequate reserve fund may do useful service by extending the benefits of life insurance to persons whom the ordinary life companies cannot reach. Another case where mutual insurance seems to have worked successfully is in the case of the "interinsurance" or "interindemnity exchanges," which have sprung up in the last fifteen years. Here manufacturers engaged in similar lines of work contract, through an attorney in fact, to pay assessments to meet losses by fire, employer's liability, etc.; the members are few in number, financially responsible and legally bound to pay assessments.

[34] E.g. Neb., § 3287, provides no assessment life company, other than a fraternal society, shall hereafter be organized in that state.

fraternal societies, may be mentioned the Alabama statute which authorizes revocation if the order "appears to the insurance commissioner to be in an insolvent or *unsatisfactory* condition," [35] and the Nebraska statute which authorizes refusal of a license to a foreign fraternal order if the insurance board "is of opinion that no permit should be granted." [36]

Mandatory or permissive language. Just as in the case of refusal, [37] so in the case of revocation, the statutes vary, even within a single state, as to the use of mandatory or permissive language. Mandatory language is much more commonly used — as that it shall be the commissioner's "duty to revoke" [38] or simply that he "shall revoke." [39] Similar in effect are provisions that the company "forfeits the right to do business" [40] or "shall have its license revoked." [41] On the other hand, a minority group of statutes

[35] Ala., Acts 1900–01, p. 533, § 6 (italics ours). This provision is now superseded by Ala., § 8501 (the Uniform Fraternal Bill).

[36] Neb., § 3303.

[37] *Supra*, § 12, p. 109.

[38] Ariz., § 3382; Ark., § 5023; Cal., P. C., § 608; Ga., §§ 2416, 2433; Ill., §§ 25, 29; Ind., § 4709; Ia., § 5661; Ky., §§ 743m4, 627, 631; La., § 3564; Miss., § 5083; Mo., § 6311; Mont. C., §§ 4029, 4033, S., § 4065a; Nev., § 1309; N. M., §§ 2819, 2840, 2861; Ohio, § 9406; Okla., § 6711; R. I., Ch. 224, § 14; S. C., § 2731; Tenn., §§ 3292a (1), 3369a (62); Tex., § 4755; Utah, §§ 1167, 1168; Wis., § 1917 (2)a.

[39] Ala., §§ 8339, 8343; Cal. Civ. Code, § 453g (1907); Conn., § 4167; Del., §§ 573, 575, 580; Fla., § 2773; Ga., §§ 2430, 2437; Idaho, § 4961; Ill., §§ 44, 69, 70, 80e; Kan., §§ 5353, 5371; Ky., §§ 752, 753; La., §§ 3595, 3603; Mass., § 5; Mich. II, 3, § 11, II, 4, § 6, II, 4, § 7, II, 4, § 12, IV, 1, § 15; Minn., §§ 3260, 3264; Miss., §§ 5026, 5032; Mo., §§ 6178, 6338; Neb., §§ 3158, 3186; Nev., § 1274, L., 1913, Ch. 158, § 2; N. H., Ch. 169, §§ 9, 10, L., 1907, Ch. 111, § 2; N. Y. L., 1917, Ch. 509, § 1, N. Y. § 41; N. D., §§ 4854, 4856, 4925; Ohio, §§ 635, 638, 9384, 9454, 9563, 9582; Okla., § 6677; Ore., §§ 6357, 6359, 6361, 6362; Pa., §§ 50, 156; R. I., Ch. 220, § 5, Ch., 224, § 3; S. C., §§ 2700, 2739, 2745; S. D., §§ 9179, 9184, 9204, 9344; Tenn., §§ 3283, 3302; Tex., §§ 4747 ("shall declare null and void"), 4763, 4824, 4868, 4966; Utah, § 1134; Vt., § 5603; Va., §§ 4180, 4307; Wash., §§ 7039, 7040, 7076; W. Va., Ch. 34, §§ 15a, 49; Wis., §§ 1955 (o) (5), 1946c, 1949; Wyo., §§ 5238, 5275. This list, even, is not exhaustive.

[40] Ala., §§ 8339, 8382; Ohio, § 625 (shall not thereafter transact business); Pa., § 127 (authority terminates); S. D., § 9194 (forfeit its rights and privileges); Tenn., § 3318; Tex., §§ 4758, 4954.

[41] Ariz., § 3466; Idaho, § 4987; Mo., §§ 6140, 6144; N. D., § 4964; Ohio, § 9437; Pa., § 181; R. I., Ch. 224, § 6; S. C., § 2715; S. D., § 9202; Utah, §§ 1157, 1166, 1175; Va., §§ 4223, 4312; Wash., §§ 7077, 7121; W. Va., §§ 13, 60a; Wis., §§ 1915 (2) (a) ("its authority shall cease"), 1919e, 1919f; Wyo., § 5289.

use permissive language, as that the commissioner "may revoke," [42] "shall have the right" or "authority" to revoke.[43]

Do these distinctions have any significance? Is there any intelligent purpose back of them, or are they merely capricious vagaries of legislative draftsmanship? While the use of mandatory language is here, as in the case of issuance of a license,[44] indicative of the absence of discretionary power in refusing to revoke, this criterion is controlled by others, particularly the definiteness or indefiniteness of the conditions upon which revocation is to take place. Even where the ground of revocation is sharply defined, the courts are divided as to the effect of mandatory language. An early Wisconsin case held that the commissioner could be compelled by *mandamus* to revoke a company's license under a statute declaring "it shall be the imperative duty" [45] to revoke in case the company removes a suit to the Federal court; [46] but in a South Carolina case the court refused to *mandamus* under a statute ("shall revoke" if any company has "violated the law") of similar import, though the company had undeniably violated another statute forbidding removal to Federal courts.[47] So under a Washington statute providing that a surety company which failed to

[42] Colo. L., 1913, Ch. 99, § 28; Conn., §§ 4070, 4130; Idaho, § 5045; Ind., § 4691; Ia., §§ 5471, 5470; Kan., §§ 5166, 5376; Ky., § 743m10; La., § 3618; Me., Ch. 53, §§ 110, 138; Minn. L., 1915, Ch. 101, § 7; Miss., §§ 5058, 5075; Mo., §§ 6287, 6347, 6348; Neb., §§ 3148, 3245, 3249, 3281; N. H., Ch. 169, § 6, Ch. 170, § 15; N. Y., § 32, N. Y. L., 1917, Ch. 264, § 2; Ohio, § 9592 (16); Okla., § 6769; Ore., §§ 6328 (5), 6344, 6389; Pa., § 229; S. D., § 9345; Tenn., §§ 3295, 3348a (17), 3350a (14); Tex., §§ 4802, 4899; Utah, § 1147; Vt., §§ 5555, 5621, 5635; Va., §§ 4195, 4250, 4320; Wash., § 7071; W. Va., §§ 15e, 20; Wis., §§ 1916 (3), 1921 (28), 1943a. The Uniform Fraternal Statute uses the term "may revoke," in respect to foreign fraternals.

[43] Ia., § 5532; Me., Ch. 53, § 141; Mich. I, 2, § 11 ("power" to revoke); Miss., § 5085; N. H. L., 1891, Ch. 54, § 1 ("empowered" to revoke); N. D., §§ 4854, 4856 ("is authorized to"); Ore., §§ 6398, 6431 (4), 6432; Pa., § 247; Tenn., §§ 3348a (22), 3369a (145) ("authorized to"); Wis., § 1917 (5).

[44] *Supra*, § 12, p. 109.

[45] Wis. L., 1872, Ch. 64, § 1.

[46] State *ex rel.* Drake *v.* Doyle (1876), 40 Wis. 175. Similar provisions are: Ill., § 31; La., § 3602; Miss., § 5133. These statutes are now unconstitutional; see *infra*, this section, p. 148.

[47] State *ex rel.* Sims *v.* McMaster (1913), 95 S. C. 476, 79 S. E. 405, construing S. C. Civil Code, 1912, §§ 2669–71, 2700. The company showed the commissioner that the removal was inadvertently made and offered to remand to the state court at once. The court said the commissioner "in exercising his discretion" properly took the circumstances into consideration.

pay a judgment on a bond given by it, within thirty days after final determination, should forfeit all right to do business in the state and that the commissioner "shall thereupon revoke" its license, it was held that the commissioner was not required to revoke the license of a company which acted in entire good faith even though it literally violated the law. The court said:

> The statute (Remington's Code, § 6059–196) does not impose an arbitrary duty upon the commissioner, but . . . he is possessed of a sound discretion to inquire and absolve where there is no evidence of want of good faith, and the party charged is acting upon a fair conception "of the principles of law and equity" and his legal rights as they are defined in the general law (p. 131). The revocation of a license is a penalty. Penalties are usually imposed as a summary punishment for the wilful disobedience of some positive statute. They are not favored where good faith is asserted and proved (p. 130).[48]

The two cases last cited show the tendency to read into a statute the requirement of *mens rea*, of "wilful disobedience," though no such requirement is found in the letter of the law.[49]

Where the "shall revoke" is conditioned upon the application of a legal standard of vaguer meaning than these, as "discrimination" in dividends, the commissioner clearly has discretionary power in refusing to revoke.[50] On the other hand, a clear non-compliance with a statutory requirement which may be measured numerically, would seem to leave the commissioner no privilege of refusing to revoke.[51] Probably the use of mandatory language does, irrespec-

[48] American Surety Co. *v.* Fishback (1917), 95 Wash. 124, 130, 131, 163 Pac. 488, 491. The court relied upon § 1 of the Insurance Code of 1911 (§ 6059–1) which provided that insurance companies "shall at all times be actuated by good faith in everything pertaining thereto; shall abstain from deceptive or misleading practices, and shall keep, observe and practice the principles of law and equity in all matters pertaining to such business."

[49] For a general discussion of this tendency, and of its constitutional implications see *Due Process and Punishment* by Clarence E. Laylin and Alonzo H. Tuttle (1922) 20 *Mich. L. R.* 614.

[50] Cole *v.* State *ex rel.* Harris (1907), 91 Miss. 628, 45 So. 11. The statute forbade "any distinction or discrimination in favor of individuals of the same class or equal expectation of life . . . in the dividends or other benefits payable thereon . . ." See also Palache *v.* Pacific Ins. Co. (1871), 42 Cal. 418, 432, holding "shall revoke" was not mandatory in view of other provisions.

[51] State *ex rel.* People's Fire Ins. Co. *v.* Michel (1910), 125 La. Ann. 55, 51 So. 66 (*semble*). Here the statute provided "it shall be the duty of the (commissioner) to immediately revoke the license granted . . . if the whole of said capital stock shall not be paid for in twelve months from the date of the charter."

tive of its consequences in a judicial proceeding, exert moral pressure upon many commissioners to make them more vigilant and relentless in enforcing compliance with the statutory provisions; at the same time such language gives the commissioner a moral justification for his acts, when he faces the insurance company representatives in those informal and personal contacts which are inevitable in such a system of administration.

Words denoting mental operation. Like the statutes as to refusal, the statutes as to revocation usually contain words denoting mental operation, and with like effect.[52] The commonest type is "satisfied," [53] or some variant such as "satisfactory evidence," [54] or "to the satisfaction of." [55] Similar are the provisions "in his opinion," "if he shall be of opinion that," [56] or "in his judgment." [57] Somewhat looser and more indicative of unregulated discretion are such provisions as "may in his discretion," [58] "may deem proper," [59] "shall deem it necessary or advisable," [60] "shall deem it expedient," [61] "if he deems it advisable," [62] "approved by," [63] "with the consent of," [64] "meets with the approval of." [65] Another type of provision impliedly imposes upon the commissioner the duty of investigation as well as reflection, and to that extent is more desir-

[52] See *supra*, § 12, p. 112.

[53] E.g., Ind., § 4709; Mont. C., § 4029; N. Y., § 60; R. I., Ch. 224, §§ 4, 6; S. C., § 2731; Tenn., §§ 3348a (23), 3350a (14); Utah, §§ 1167, 1168; W. Va., § 15e.

[54] Fla. L., 1919, Ch. 7869, § 2; Ill., § 69; Ind., §§ 4682, 4708, 4790; Mich. III, 4, § 6; Mo., § 6160; Ohio, § 9552; Ore., § 6352; Pa., § 156; S. D., § 9184; W. Va., § 15a.

[55] Idaho, § 5036; Miss. § 5064; Wis. § 1946c; Wyo. § 5275.

[56] Ala., § 8343; Ark., § 5054; Fla. L., 1919, Ch. 7869, § 1; Ill., § 97; Ky., § 753; Mass., § 5; Mich. I, 2, § 11; Minn., § 3260; Miss., §§ 5063, 5026; N. J., p. 2857, § 66; N. D., § 4925; Okla., § 6678; S. C., § 2700; S. D., §§ 9179 ("believes that"), 9325; Tenn., §§ 3283, 3295; Tex., § 4824; Va., § 4180; Wash., § 7039.

[57] Ariz., § 3468; Kan., § 5435; N. Y., §§ 9, 32 (as amended by L. 1910, Ch. 9); Ohio, § 9454; S. D., §§ 9325, 9204 ("if . . . he shall determine"). See also Del., § 573 ("shall have reason to believe that"); N. J., p. 2857, § 66 ("if he determines that").

[58] Ariz., § 3449 ("discretionary"); Kan., § 5370; Me., Ch. 53, § 141; Mo., § 6287; N. H. L., 1913, Ch. 127, § 4; N. Y. L., 1917, Ch. 264, § 2; Tenn., § 3348a (5).

[59] Conn., § 4161.

[60] Del., § 576.

[61] Ga., § 2433.

[62] Me., Ch. 53, § 105.

[63] Ariz., § 3426; Kan., § 5262.

[64] Mich. II, 2, § 10.

[65] Ark., § 5053.

able — such as: "appears to," [66] "if he finds that" or "if found that," [67] "if he shall ascertain that," [68] "whenever it is ascertained that," [69] "when he shall have proof that." [70] These provisions must be borne in mind in connection with what is said later on about the absence of procedural requirements.[71] Courts have frequently relied upon such expressions as criteria of discretionary power; yet it may be doubted if they are decisive in very many cases.[72] The statutes of California, for instance, are almost wholly devoid of words denoting mental operation; yet it seems that no greater degree of judicial control is exercised there than elsewhere.

"General" grounds of revocation. The grounds of revocation may conveniently be classified as "general" and "specific." The general grounds of revocation are of two types: 1. The "legal" type. 2. The ethical or "public policy" type.

1. The first is represented by such a general phrase as "violation of law," "violation of any of the statutes of this state," or "failure to comply with any law of this state." Statutes of this type are very common.[73] Occasionally the ground is "wilful violation" or

[66] Ala. Acts, 1900–10, p. 533, § 6 (omitted from Code of 1923); Ark., § 4984; Del., § 577; Ill., § 70; Ky., § 743S3; La., § 3603; Mich. IV, 1, § 13, IV 1, § 15; Miss., § 5026; Mo., §§ 6137, 6220; Nev., § 1293; N. M., § 2809; Ohio, §§ 635, 9437; R. I., Ch. 224, § 14.

[67] Colo. L., 1913, Ch. 99, § 74; Ind., § 4628; Mont. S., § 4065a; Nev. L., 1913, Ch. 158, § 2; Kan., § 5205; Ohio, §§ 9437, 9607 (21); Ore., § 6359; Pa., § 50; Utah, § 1134; Va., § 4223; Wash., § 7040; W. Va., § 49.

[68] Mo., § 6347; Va., § 4307.

[69] Nev., § 1316; Va., § 4312 ("after violation has been ascertained").

[70] Ill., § 80e; Mich. II, 4, § 12 ("satisfactory proof"); Mont. C., § 4032 (same); Ore., § 6361 ("knowledge that"); S. C., § 2748 ("on proof thereof"); Wash., § 7076 (like Ore.). Cf. Nev., § 1293 ("to such an extent as to imply a doubt in his mind as to its solvency").

[71] *Infra*, §§ 24, 25.

[72] See *infra*, § 37.

[73] Ala., § 8343; Ariz., § 3468; Ark., § 4984; Colo. L., 1913, Ch. 99, §9; Conn., §§ 4316 (foreign surety co.), 4130 (domestic life co.); Del., § 576; Fla. L., 1919, Ch. 7869, § 1; Ga., § 2442; Ill., § 31; Ind., § 4709; Ia., § 5471; Kan., § 5166 (any co.); Ky., §§ 743m10, 753; Me., Ch. 53, § 110; Mass., § 5; Minn., § 3260; Miss., §§ 5026, 5032, 5075, 5083; Mo., § 6383 (inter-indemnity exchange); Mont. S., § 4065a; Nev., § 1320 (*semble*); N. H. L., 1913, Ch. 122, § 28; N. J., p. 2856, § 62; N. M., §§ 2819, 2861; N. D., § 4925; Ohio, § 9607 (21); Okla., § 6678; Ore., §§ 6344, 6359; Pa., § 50; R. I., Ch. 224, § 3; S. C., § 2700; S. D., § 9175; Tenn., §§ 3283, 3295, 3350a (14); Tex., § 4284; Utah, § 1134; Va., § 4180; Vt., § 5555; Wash., § 7039; W. Va., §§ 15e, 20; Wis., §§ 1915 (2), 1917 (2), see also Ohio, § 9437 (transacting business "illegally"); Tex., § 4802.

"wilful disobedience," [74] but usually the element of guilty intent or *mens rea* is not expressed and it remains for the commissioner and the courts to decide whether this requirement will be read into the statute.[75] Of the same general character are such grounds as non-compliance with the company's articles of incorporation,[76] or violation of the provisions of a particular chapter embracing many provisions.[77] On the other hand, violation of a particular statute [78] or of a particular section [79] will usually be more conveniently classed as specific rather than general. The distinction is, of course, one of degree.

Superficially similar to the general grounds of revocation are the provisions authorizing or requiring *refusal* of a license to any company which is not "duly qualified under the laws of this state to transact business." [80] In practical operation, however, the latter are more specific than the former, since the conditions precedent and other "qualifications" of a company applying for a license for the first time are more inflexibly defined than the norms which are to govern its conduct after it is admitted,[81] and the investigation made before issuing a license is usually confined to the static features of the enterprise rather than the active conduct. In so far as this latter type of provision is applicable to renewal of a license, however, the two are substantially the same.

[74] Cal L., 1917, Ch. 614; Neb., §§ 3148, 3149; R. I., Ch., 224, § 14.

[75] See *supra*, this section, p. 130, and notes 45 to 49.

[76] Ariz., § 3381; Mass., § 5; Neb., §§ 3148, 3149; Okla., § 6678; Ore., § 6359; R. I., Ch. 224, § 3; S. C., § 2700; S. D., § 9179; Tenn., § 3350a (14); Utah, § 1134; Wash., § 7039.

[77] Del., § 573; Ohio, § 9592 (16). See also next note.

[78] Ind., § 4628; Minn. L., 1915, Ch. 101, § 7; Mont. C., § 4029; Okla., § 6759; Ore., §§ 6389 (13), 6398; Pa., § 247; S. D., §§ 9204, 9326; Tenn., § 3369a (62); Tex., §§ 4785, 4899; 4966; Utah, § 1175; Vt., § 5635; W. Va., § 13; Wis., §§ 1921, 1946.

[79] Ind., § 4709; Kan., § 5206; La., § 3595; Miss., § 5058; Mo., § 6140; N. M., § 2840; Ore., § 6431 (4); Pa., § 156; S. C., § 2731; S. D., §§ 9184, 9194, 9344; Tenn., §§ 3348a (5), 3348a (17), 3348a (22); Tex., § 4755; Utah, § 1157; Vt., § 5576; Va., §§ 4223, 4320; Wis., § 1916 (3), 1919a (7). The distinction between these statutes and the ones cited in the last two notes is often slight.

[80] Ala. G. L., 1915, p. 834, § 10; Ariz., § 3378; Ark., § 5031 ("shall have complied with"); Colo. L., 1919, Ch. 136, § 1 ("fully complied"); Ga., § 2418; Idaho, § 4960; Ill., §§ 31, 42; Ia., §§ 5633, 5640; Kan., § 5205; Ky., § 752; Mich. II, 2, § 1; Minn., § 3432; Miss., § 5029; Mo., § 6216; Neb., § 3144; Nev., § 1278; N. H., Ch. 169, § 6; N. J., p. 2842, § 9; Ohio, § 9607 (21); Va., § 4180. See also citations in note 6, *supra*, this section.

[81] See *supra*, § 12, p. 103.

These "general" grounds of revocation raise a fundamental problem in the interpretation of statutes. What laws are referred to under the head of "violation of law"? To begin with, does the phrase include the "common law" or "unwritten law" of the state? If so, is it not a "violation of law" for the company to fail to pay promptly a policy claim when the same is due? In a number of states the commissioner has taken it upon himself to see that the company carries out its contracts, and has even threatened to revoke its license for failure to comply with its contract obligations.[82] The Supreme Court of Tennessee has gone so far as to declare that "law" includes the common law of the state as well as the statutory law, and that repudiation of a contractual obligation by the licensee was a failure "to comply with the law," a violation or neglect "to comply with any provision of law obligatory upon it." [83] While the decision was limited to the repudiation of a *re-insurance* contract which affected a large number of policyholders, the language of the opinion goes further. The court said:

> This view has in its favor the obvious fact that the legislature intended, in the interest of policyholders in the state, to confer upon the Insurance Commissioner plenary power to revoke the license of any foreign insurance company that might violate, affirmatively or by non-compliance, *any legal obligation affecting their rights.*

It is believed that this decision does not represent the prevailing view. Not only have two other courts restrained the commissioner from revoking a company's license for non-payment of a policy claim [84] but also the prevailing tendency is to construe narrowly the grounds of revocation named in the statute and to refuse to recognize that the commissioner has power to revoke on grounds which are within the purpose or policy of the statute but not within its language.[85] In support of this latter view it may be urged that the extension of the powers of the commissioner into the domain of common law obligations involves an encroachment upon the sphere of judicial action which should be made, if at all, only after careful consideration and then only by specific provision.

Again, it does not clarify the situation to say that only "crimi-

[82] See *infra*, § 20.

[83] North British & Mercantile Ins. Co. *v.* Craig (1900), 106 Tenn. 621 at pp. 634, 635, 645, 62 S. W. 155.

[84] See *infra*, § 20, notes 23 and 27.

[85] See *infra*, § 37. See, for example, State *ex rel.* Coddington *v.* Loucks (1924), 32 Wyo. 14, 228 Pac. 632, where a statute authorizing revocation of an agent's license was strictly construed.

nal" laws are included under "violation of law," because many of the statutes which are specifically applicable to insurance companies and are clearly enforceable by revocation of its license, do not impose fine or imprisonment as a penalty for violation; for example, insolvency. It seems likely, then, that the term "law" means "statutory law," and that there is no general grant of authority to the commissioner to enforce the "unwritten law," that is, that laid down in judicial decisions.

Even as thus limited, a doubt may arise as to whether or not such grounds as "violation of law" include all statutes prohibiting or commanding certain conduct, by insurance companies along with various other classes of corporations or persons. For instance, a statute prohibits corporations carrying on certain kinds of business, including insurance, from contributing to the campaign funds of political parties or of candidates for office.[86] May the violation of such a statute by an insurance company be a proper ground for revocation of its license? Taken literally, it would.[87] It may be argued that if a penalty of fine or imprisonment is attached to the violation of this particular statute,[88] the task of applying a sanction is definitely assigned to the judicial organs, and there are cogent reasons of policy (double punishment, better facilities of a court for sifting and weighing facts, and so forth) for construing this to be the exclusive method. True, many of the requirements of the insurance codes are by express provision made enforceable, both by revocation and by judicial penalty;[89] yet these statutes, unlike the campaign contribution law, are designed exclusively to regulate the insurance business *as such*.

[86] Such statutes are common: e.g., Mass. Gen. Laws, 1921, Ch. 55, § 7.

[87] Mass. Gen. Laws, 1921, Ch. 175, § 5, authorizes revocation of a foreign insurance company's license if he "is of opinion . . . that it has failed to comply with any provision of law . . ." There may be a distinction between "failed to comply" and "violated" but it would be extremely difficult to draw. Tennessee has a statute (§ 3369a (145)) expressly declaring the making of campaign contributions a ground of revocation, apparently on the theory that it constitutes a misuse of "trust" funds.

[88] E.g., Mass. Gen. Laws, 1921, Ch. 56, § 58, provides a fine of $10,000 for violation by a corporation of the section cited in note 86.

[89] E.g., Mich. I, 2, § 8. Refusal of foreign company to submit to examination by the commissioner is punishable by a penalty of $500 plus $500 per month, and also entails revocation of its license. See also Mo., § 6095; N. M., § 2808. In State *v.* Cannon (1923), 125 Wash. 515, 217 Pac. 18, it was held proper for the court both to fine an agent and to revoke his license; the question of double punishment was not discussed.

This distinction is supported by the general phrases describing the powers of the commissioner. In nearly every state the statute which establishes the office of commissioner contains some such language as this:

> . . . which department shall be charged with the execution of all laws now in force, or which shall hereafter be enacted, in relation to insurance and in (relation to) the insurance companies organized or doing business in the state . . .[90]

Taken literally, this would bring within the competence of the commissioner the enforcement of all laws which apply to insurance companies, including, for example, the corrupt practices act referred to above.[91] However, since the object of creating a separate insurance department was to provide a distinct governmental organ for dealing with those problems which relate *peculiarly* to insurance corporations as such, such a provision should be construed as limiting the scope of the commissioner's powers to the enforcement of those statutes which apply *exclusively* to insurers, their agents, and others engaged in that business. Hence, revocation for "violation of law" should be construed to be so limited.

Does authorization to revoke for "violation of law," and the like, empower the commissioner to revoke for any and every violation of any and every statute which relates peculiarly and exclusively to insurance companies? Even this is very doubtful. The fundamental problem in interpretation, referred to above,[92] is this: Given a section of statute law which expresses a command or a prohibition, requiring or prohibiting a certain type of conduct by insurance companies, to whom is the command or the prohibition addressed? The Austinian school of jurists contented themselves with saying that it is addressed to the subject, the person who is to do or refrain from doing the act described; [93] upon such a person it imposes a legal duty. Granted that this much is so the further question arises, who has the power, privilege and (or) duty of administering, of enforcing the duty or command? In this sense, every statute may be said to be addressed to one or more officials of the state.[94]

[90] Ill. Ins. Laws, 1922, Ch. I, § 1 (L., 1893, p. 107, § 1). A similar provision in Connecticut was held to be extensive (rather than restrictive) in American Casualty Co. *v.* Fyler (1891), 60 Conn. 448, 22 Atl. 494, but the case stands alone.

[91] *Supra*, n. 86. [92] *Supra*, p. 135. [93] Austin, *Jurisprudence*, Lecture I.

[94] Goodnow, *Principles of the Administrative Law of the United States*, p. 315, points out this feature of legislation; but his "distinction" between "uncon-

The problem arises when one considers such provisions as the following:

> No oral or written representation or warranty made in the negotiation of a policy of insurance by the insured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive or unless the matter represented or made a warranty increased the risk of loss.[95]

Suppose a foreign life insurance company refuses to pay a policy claim on the ground of an immaterial breach of a non-fraudulent warranty; may the commissioner revoke its license on the ground that "it has failed to comply with any provision of law"? [96] The better view would seem to be that the commissioner may not. The contract liability of an insurance company is a question which courts have *traditionally* dealt with, and any extension of the commissioner's powers into the judicial domain should be made by specific provision and not by a general clause.

Where this *traditional* standard is lacking, the problem becomes even more difficult. For instance, take a statute like the following:

> No company . . . shall make . . . any written or oral statement misrepresenting the terms of any policy of insurance. . . . Violation of this section shall be punished by a fine of not more than one hundred dollars.[97]

It may be conceded for the present discussion that the commissioner is not authorized to assess or collect the fine; that is to be done by a court. Is he, on the basis merely of a statute authorizing revocation for "violation of law," authorized to revoke the license of a foreign company which makes such a representation? If we say that he may revoke for violation of any statute relating *peculiarly* to insurance companies, the answer is, "yes." The courts are

ditional" and "conditional" statutes does not seem helpful. Every statute contains, expressly or impliedly, an "if," and the problem of function is to put one's finger on the official or officials who are to determine, either provisionally or finally, whether the "if" has happened. For a fuller discussion of this problem, in connection with "criminal" statutes, and a full reference to the German literature, see Binding, *Die Normen und ihre Übertretung*, I (4te. aufl., 1922), §§ 2, 3.

[95] Mass., § 186. This section is found in the chapter, carefully redrafted in 1919, by the Massachusetts insurance commissioner, dealing with the conduct of insurers generally. Provisions dealing with the same question, though frequently in a different way, are quite commonly found in the "insurance statutes" of other states.

[96] Mass., § 5.

[97] Mass. § 181.

not in the habit of dealing with this type of misrepresentation; [98] and it is even doubtful if they are better equipped to determine what is a "statement misrepresenting the terms of any policy of insurance" than is the commissioner. There is always the argument, sometimes labeled "*Expressio unius est exclusio alterius*," that in prescribing one method of enforcement (fine by a court), the statute impliedly excludes administrative methods. Yet this argument must not be pressed too far, for both agencies should be available for the enforcement of many provisions of the insurance laws. A Massachusetts statute of 1922 was passed apparently to avoid the application of this principle of construction. It provides that the Superior Court shall have jurisdiction, on information by the Attorney-General at the relation of the Insurance Commissioner, to restrain "violations of this chapter" (Chapter 75, embracing the whole insurance law) and to impose fines, forfeitures or penalties. The concluding sentence is:

> The remedy herein provided shall be in addition to all other remedies otherwise provided by law or by this chapter, and not in substitution therefor.[99]

This provision gives a negative answer, but still does not solve the problem of pointing out the agency of enforcement for each requirement.

The foregoing discussion has shown the desirability of avoiding the use, in drafting insurance legislation, of such phrases as "violation of any law" or "has failed to comply with any law" as grounds for revocation of a company's license. It would not be desirable to attempt to specify minutely the grounds; but enough flexibility may easily be secured by the use of what are hereinafter called "specific" provisions. And above all, every statute prescribing or proscribing new types of conduct should indicate clearly the organ or organs of enforcement.

A second species of "general" grounds of revocation of the "legal" type is violation or non-compliance with the "rulings" or "regulations" of the commissioner. In broad form, this type is rare.[100] Only a few states give the commissioner general authority to make regulations.[101] Until a definite technique for the making

[98] The common law "deceit" involved elements not required by the statute; e.g., reliance, inducement to act, damage, and guilty knowledge, etc.

[99] Mass. L., 1922, Ch. 417, adding new section to Ch. 175 of G. L., 1921.

[100] Ariz., § 3468; Neb., § 3167. No other provisions were found. See *infra*, § 29.

[101] See *infra*, § 29, for a discussion of the power to make regulations.

and publication of regulations by insurance departments is devised, such a power should not be granted. Apparently only one case has turned upon this ground.[102] In that case a refusal to license a foreign company was sustained though the only ground for the refusal was the failure of the company to maintain a reserve fund which was not explicitly required by the statutes applicable to such company but which was required by a "regulation" of the Insurance Board framed on analogy to statutes applicable to similar domestic companies. The particular result was desirable, but it does not appear that the "regulation" was anything more than a policy, followed by the board in dealing with similar cases, and founded on statutory analogies. That is, the "regulation" was not formally published or promulgated, as every exercise of administrative rule-making power should be.

2. The second type of "general" ground of revocation is represented by phrases which have an ethical or a sociological rather than a legalistic connotation. Conspicuous among these is the phrase, "will best promote the interests of the people of this state," added to the New York statute in 1913:

> Whenever in the judgment of the Superintendent of insurance it will best promote the interests of the people of this state he may, after a hearing on notice, revoke the certificate of authority of a foreign corporation to do business in this state. . . .[103]

Such a provision gives the commissioner greater latitude of discretion than if he were authorized to revoke for non-compliance with a "regulation" of the commissioner; for the regulation would have to be within the scope, express or implied, of some statutory requirement; whereas the scope of "will best promote the interests of the people" is not restricted to existing legislation. The commissioner is invited to make new law out of the raw materials of business ethics and social policy. That the delegation of such unregulated power is constitutional can scarcely be doubted.[104] It may prove to be a fruitful source of experimentation in the hands of a cautious commissioner — bearing in mind that an arbitrary,

[102] Western Life and Accident Co. *v.* State Insurance Board (1917), 101 Neb. 152, 162 N. W. 530. The "regulation" is not quoted in the opinion and there is no indication that it was formally adopted and published.

[103] N. Y. L., 1913, Ch. 9, amending § 32 of Insurance Law. See also Ohio, § 9454 (refusal); Ore., § 6344 (revocation "if the acts of the company or its agents are contrary to the public good").

[104] *Supra*, § 12, n. 117.

corrupt or capricious exercise of his power may always be set aside by a judicial proceeding. If this ground does not have the broad scope just suggested, it would seem at least to authorize revocation for violation of any requirement relating exclusively to insurance companies.

Equally ethical but not quite as "sociological" in scope are such grounds as "conducting its business fraudulently." [105] Here the purpose seems to be to protect the interests of persons dealing with the insurance enterprise, rather than the "people of the state"; yet the type of conduct which is prohibited is vague. "Fraudulently" may mean deception or unfair methods of inducing people to insure; or unfair and dishonest methods of settling policy claims; or corrupt use of the funds of the enterprise. In some instances the context points to one or the other of these meanings. Since the provisions are usually made applicable to fraternal or assessment societies, which are (or were, when these statutes were enacted) not required to maintain a reserve fund, probably the latter two meanings are nearest the truth. Thus the commissioner is (or was) given unregulated discretion as to the financial arrangements and claim settlements of these societies. The Uniform Fraternal Bill has fortunately established some more definite standards.

"*Specific*" *grounds of revocation.* The "specific" grounds of revocation set forth in the statutes show extensive and frequent imitation but fall far short of uniformity. Indeed, there is no reason to believe that the spasmodic and haphazard imitation which goes on in the framing of insurance legislation will ever lead to anything approaching uniformity. Only conscious and determined efforts to secure the adoption of "uniform" statutes will do this. Moreover, it is doubtful if uniformity in respect to the grounds of revocation is attainable or even desirable in the near future. Uniformity with respect to administrative procedure would

[105] Ala., § 8501 (Uniform Fraternal Statute); Ark., § 5074 (county mutual); Cal. P. C., § 596b; Conn., § 4160; Del., § 573; Ga., § 2437; Idaho, § 4992; Ia., § 5518; Ky., § 681c (28); La., § 3669; Me., Ch. 53, § 154 (surety co.); Md. III, § 244K (foreign fraternal); Mich. III, 4, § 28 (same); Minn., §§ 3419 (mutual hail), 3502 (foreign fraternal); Mo., § 6328 (same); Neb., § 3304 (refusal to renew license of foreign fraternal); Nev., § 1320 (assessment life); N. H. L., 1913, Ch. 122, § 28 (foreign fraternal); N. J., p. 2878, § 124 (same); N. Y. L., 1911, Ch. 198, § 244 (same); N. C. S., § 4798b (25) (same); Ohio, § 9437; R. I., Ch. 224, §§ 3, 14; S. D., § 9325. Cf. Okla., § 6678 ("dealings with policy holders and claimants which are inequitable or unjust"). A suit to enjoin doing of business is authorized on this ground by Ill., §§ 247, 269 (fraternal); Ind., § 5058; Kan., § 5413; Mont. C., §§ 4157, 4164; Neb., § 3310.

be highly desirable; but these grounds of revocation are subject to the mutations of a ceaseless economic flux. The business of insurance is still in the making.

At this point a summary of the more important types of grounds of revocation will be indicated, and certain ones will be discussed in detail, while others can be more adequately treated elsewhere. A rough working classification of the "specific" grounds is: 1. Assets and financial condition. 2. Violation of visitorial requirements. 3. Removing suits to Federal courts. 4. Non-payment of contract obligations to private persons. 5. Non-payment of obligations to the state. 6. Use of forbidden policy forms. 7. Prohibited methods of doing business. 8. Miscellaneous.

1. *Assets and financial condition.* Perhaps the commonest of all grounds of revocation is "unsound condition." [106] There can be little doubt that this means "unsound *financial* condition." Even as thus interpreted, the phrase is more flexible than "insolvent" [107] or "assets less than liabilities," [108] since the latter sets up a numerical standard,[109] whereas the former gives a looser standard of business safety. It is conceivable that a company may be temporarily "insolvent," in the sense that it could not at once liquidate its assets and pay in cash its matured obligations, owing to peculiarly

[106] Ala., § 8343; Ariz., § 3381; Ark., § 5023; Cal. P. C., §§ 598, 608; Colo., L. 1913, Ch. 99, § 9; Conn., § 4255 (foreign co.); Fla. L., 1919, Ch. 7869, § 1, L., 1915, Ch. 6845, § 5; Idaho, § 4982; Ill., § 70; Ia., § 5471; Kan., § 5166; Ky., § 753; Mass., § 5 (foreign co.); Mich. IV, 1, § 15; Minn., § 3260; Miss., §§ 5032, 5075; Mo., § 6348; Mont. S., § 4065a; N. H., Ch. 169, § 9; N. M., § 2809; N. D.. § 4925; Ohio, § 635; Okla., § 6678; Ore., §§ 6328 (5), 6359; S. C., § 2700; S. D., § 9179; Tenn., §§ 3283, 3295; Utah, § 1134; Wash., § 7039; W. Va., § 49 (but detailed specifications for estimating unsound condition are given); Wyo., § 5275.

[107] Arizona, § 3468; Conn., § 4316 (foreign surety co.); Del., § 573; Ga., § 2437; Ia., § 5471; Kan., § 5166; Ky., § 753; Minn., § 3260; Miss., § 5024 (inter-insurance exchange); Mo., § 6348; Neb., § 3148 (domestic co.); Nev., § 1293 ("doubt" as to solvency); N. J., p. 2856, § 2; Ore,, § 6344; R. I., Ch. 224, § 14; S. D., § 9325 ("not financially sound"); Tenn., § 3350a (14); Utah, § 1134; Va., § 4180; W. Va., § 15e.

[108] Ala., §§ 8343, 4554; Colo. L., 1913, Ch. 99, § 9; Conn., § 4130; Ind., § 4691 (domestic life); Ky., § 753; Mass., § 5 (foreign co.); Miss., § 5032; Mont. S., § 4065a; N. H. L., 1913, Ch. 42, § 8 (*semble*, domestic co.); Okla., §§ 6711 (when funds do not equal liabilities), 6678; Ore., § 6359; S. C., § 2700 (like Okla., § 6711); S. D., § 9179; Tenn., § 3283 (like S. C.); § 3295 (capital impaired); Utah, § 1134; Va., § 4250; Wash., § 7039; W. Va., § 20; Wis., § 1949.

[109] Of course, there may be considerable latitude in evaluating the "assets" and "liabilities"; but such latitude is usually limited by fairly precise statutory provisions.

heavy losses at a particular time, and yet it may not be in an "unsound condition" with regard to its future continuance in business; it is not unlikely that a company may be in a "failing condition," [110] that is, on the verge of insolvency and thus unsafe with regard to future business, though not yet actually insolvent. In this sense, "unsound condition" is equivalent to "assets insufficient to justify its continuance in business." [111] Of like import are "condition hazardous to the public or its policyholders," [112] "affairs in such a condition that its further operation would be a danger to the public." [113]

The Supreme Court of Missouri held that the ground, "further operations would be hazardous to the public" included only financial grounds of revocation, and did not authorize revocation for non-payment of a policy claim where the licensee was a solvent company.[114] On the other hand, the ground "injurious to the public interest," was said by the New York Court of Appeals to include more than financial delinquencies:

> It is complained that a company may thus be solvent, and yet its business may be arrested. That is undoubtedly so. The management, credit and condition of a life insurance company, although solvent, may be such that it might be injurious to the public interest for it to continue its business.[115]

The difference in statutory language is not sufficient to account for the difference between these two views.

Moreover, the interests of the insuring public on the one hand, and those of the existing policyholders or stockholders on the other, may conflict, for example, with reference to allowing a failing company to continue in business in the hope that it may improve its

[110] N. H., Ch. 169, § 9.

[111] Ariz., § 3384; Ark., § 4984; Del., § 573; La., § 3603; Mich. IV, 1, § 13; Pa., § 50; Wash., § 7040.

[112] Ariz., § 3381; Colo. L., 1913, Ch. 99, § 9; Del., § 573; Ky., § 753; Mass., § 5; Miss., § 5026; Mo., § 6348; Mont. S., § 4065a; Neb., §§ 3148, 3149; Okla., § 6678; Ore., § 6359; S. C., § 2700; S. D., § 9179; Tex., § 4824; Utah., § 1134; Wash., § 7039. Also, "condition hazardous to *stockholders*" (Miss., § 5026; Neb. §§ 3148 3149); "condition hazardous to *creditors*" (Neb. §§ 3148 3149).

[113] Del., § 577. Cf. N. Y., § 32 ("will best promote the interests of the people of this state").

[114] State *ex rel.* U. S. Fidelity & Guaranty Co. *v.* Harty (1919), 276 Mo., 583, 208 S. W. 835; *infra*, § 20, note 27.

[115] Atty. Gen. *v.* North American Life Ins. Co. (1880), 82 N. Y. 172, 184. See *supra*, § 12, p. 117, for a discussion of "will best promote the interests of the people of this state."

condition. The present policyholder can better afford to take such a risk than the prospective policyholder who still has his choice of companies. A statute authorizing revocation for "condition hazardous to the public or its policyholders" leaves unsettled the problem of policy involved in balancing these interests.

Other provisions aim at a more precise numerical standard. Thus, a company may be required to cease doing business when its "capital" is "impaired," either a fixed percentage, as twenty per cent,[116] twenty-five per cent,[117] fifty per cent,[118] or unspecified.[119] The meaning of such provisions is not clear. Apparently "capital" means "capital stock," [120] and is thus treated as an asset; whereas "capital stock" is, in modern accounting, listed as a liability. Probably the meaning is that the company is required to maintain a surplus fund, in excess of the assets required to meet its reserve liability, which shall equal a certain percentage of its capital stock liability. If such be the meaning, many of these statutes should be redrafted to conform to modern principles of accounting.[121]

More precise, though establishing a lower standard, are such grounds as "not having assets to meet its reserve." [122] Under such provisions no capital surplus fund would be required.[123] These provisions gain precision from the statutory rules as to computation of reserve liability, which are discussed elsewhere.[124] Finally,

[116] Ala., § 8346; Ariz., § 3381; Ark., § 4984; Del., § 575; Ga., § 2434; Wis., §§ 1915 (2a), 1917 (2a).

[117] Idaho, § 4987; Ill., § 302 (after *judicial* determination); La., § 3603; Miss., § 5048; Mo., § 6348; N. Y., § 41; Ohio, § 9607 (15).

[118] N. Y., § 86 (foreign life). See also Ohio, § 629 (40%); Tex., § 4758 (33⅓%).

[119] Neb., §§ 3148, 3149; Nev., § 1274.

[120] In Ga., § 2434, and N. Y., § 41, the phrase used is "capital stock."

[121] Tenn., § 3295 puts the matter more clearly, and N. Y., § 86 (as amended by N. Y. L., 1911, Ch. 183 and L., 1913, Ch. 304) contains such elaborate provisions for estimating the company's financial condition that there can be little room for doubt on this point.

[122] Ark., § 4984; Conn., §§ 4320–4321 (surety co.); Del., § 573; Fla. L., 1919, Ch. 7869, § 1; Ill., § 190 (life co.); Ia., § 5500; Ky., § 653; Me., Ch. 53, §§ 87, 115; Mich. III, 1, § 10; Minn., § 3262; Miss., § 5172; Mo., § 6348; N. Y. L., 1917, Ch. 264, § 2, L., 1916, Ch. 14, § 324, L., 1915, Ch. 506, § 1. See also Miss., § 5075 ("assets, estimated as prescribed by statute, are impaired"); N. J., p. 2856, § 62 (assets less than required by statute). Cf. Ore., § 6328 (5) ("surplus of its admitted assets over its policy liabilities less than that required").

[123] However, it seems that in most states such a requirement is enforced by the commissioner, probably under other provisions.

[124] See *infra*, § 16, p. 194.

there are provisions allowing revocation for failure to make or maintain deposits of securities, either with the commissioner or with trustees.[125]

Despite the flexibility of many of these grounds of revocation, the controversies which have come before the courts have seldom involved an interpretation of them. The courts have either refused to go back of the commissioner's decisions on financial questions, as was done in a few early cases,[126] or they have tested them by reference to detailed statutory requirements, as interpreted by the court. So, as to provisions requiring that the capital stock be paid-up [127] in *bona fide* assets,[128] as to an apparent conflict between statutes fixing the amount of capital stock required,[129] as to provisions requiring the keeping of a separate "mortuary fund" [130] or the maintenance of deposits,[131] or of a reserve fund.[132] Considering the large amount of business regulated, the number of reported cases involving controversies of this sort is surprisingly small.

2. *Visitorial requirements.* As will be pointed out later on,[133]

[125] E.g., Ga., § 2430 (registered policies); Ind., §§ 4689, 4709; S. D., § 9319. The deposit laws will be taken up *infra*, § 20, p. 219.

[126] State *ex rel.* The Dakota Hail Ass'n *v.* Carey (1891), 2 N. D. 36, 49 N. W. 164 (no reason given for revocation; *mandamus* refused); State *ex rel.* Foreign Ins. Cos. *v.* Benton (1889), 25 Neb. 834, 41 N. W. 793 (court quoted statute allowing revocation for "unsound condition," but made no attempt to interpret it); Dwelling House Ins. Co. *v.* Wilder (1889), 40 Kan. 561, 20 Pac. 265 (*mandamus* refused; duties are "discretionary"); see *infra*, § 37.

[127] State *ex rel.* People's Fire Ins. Co. *v.* Michel (1910), 125 La. 55, 51 So. 66 (*mandamus* refused; capital stock clearly not paid up to extent of 35%, as prescribed in statute); Union Pacific Life Ins. Co. *v.* Ferguson (1913), 64 Ore. 395, 129 Pac. 529 (*mandamus* denied; capital stock was not fully paid up though the stock actually sold had brought in more than the par value of all the stock, fixed at $100,000).

[128] American Life Ins. Co. *v.* Ferguson (1913), 66 Ore. 417, 134 Pac. 1029 (injunction against revocation refused; assets were found to be simulated).

[129] Clay, Ins. Commissioner, *v.* Employers' Indemnity Co. (1914), 157 Ky. 232, 162 S. W. 1122 (injunction against revocation granted, the court disagreeing with the commissioner's interpretation).

[130] State *ex rel.* Banker's Union *v.* Searle (1905), 74 Neb. 486, 105 N. W. (*mandamus* denied; court upheld commissioner's contention that the statute was violated by a lending of part of the "mortuary fund" to the company's agents).

[131] State *ex rel.* Leach *v.* Fishback (1914), 79 Wash. 290, 140 Pac. 387 (*mandamus* denied; court thought commissioner's interpretation was clearly the correct one).

[132] Western Life & Accident Co. *v.* State Ins. Board, *supra*, n. 102.

[133] *Infra*, § 22, p. 365.

the commissioner is given extensive and unregulated powers of examining insurance companies and of requiring reports from them in reference to their investments, receipts and business methods. By way of sanction to these powers it is provided in most jurisdictions that the commissioner may revoke the license of a company failing to comply with these statutory requirements or with the orders of the commissioner made pursuant thereto. At first glance, these grounds of revocation appear to be precise rules, narrowly defining the conduct which authorizes and privileges revocation — as, failure or refusal to submit to examination by the commissioner,[134] failure to file the annual report or statement within the time prescribed,[135] failure to pay the expenses of examination.[136] However, this precision is illusory, since the real controversy will usually be, not about whether or not the company has failed to do or permit what the commissioner prescribes, but whether or not the commissioner was legally empowered to prescribe what he did; and thus the latitude of administrative discretion in these provisions cannot be adequately discussed without considering the broad scope of the commissioner's inquisitorial powers.[137]

Moreover, in some statutes the grounds of revocation are expressly made somewhat indefinite. Thus, in Massachusetts, failure "to perform any legal obligation relative thereto" [138] is a ground of revocation; in Colorado, failure to "furnish other information required"; [139] in Connecticut, failure to answer promptly any in-

[134] Ala., §§ 8339, 8343; Ariz., § 3381; Ark., § 4984; Colo. L., 1913, Ch. 99, § 9; Conn., § 4116 (life cos.); Ga., § 2433; Idaho, § 4984; Ill., § 255; Ind., § 4805; Ky., § 753; La., § 3602; Me., Ch. 53, § 112; Mass., § 5; Mich. II, 2, § 3; Minn., § 3260; Miss., §§ 5026, 5032; Mont. C., § 4033, S., § 4065a; Neb., §§ 3148, 3149; Nev. L., 1913, Ch. 158, § 2; N. Y., § 25; N. D., § 4925; Okla., § 6678; Ore., §§ 6357, 6359; Pa., § 179; S. C., § 2700; S. D., § 9179; Tenn., § 3283; Utah, § 1134; Vt., § 5603; Va., §§ 4180, 4224; Wash., § 7039; W. Va., § 13; Wis., § 1916 (3).

[135] Ala., § 8350; Ark., § 4987; Colo. L., 1913, Ch. 99, § 24; Conn., § 4167 (foreign assessment life); Ga., § 2418; Ia., §§ 5518, 5485; Mass., § 26; Minn., § 3611; Mont. C., § 4058; Nev., § 1328; N. H. L., 1913, Ch. 42, § 6; N. D., § 4927; Ohio, § 9437; Pa., §§ 127, 180, 247; S. D., §§ 9175, 9325; Tenn., § 3318; Tex., § 4786 (required reports).

[136] Colo L., 1913, Ch. 99, § 9; Ia., § 5470; La., § 3618 (15 days after commissioner certifies the bill); Mont. S., § 4065a; Ore., § 6357; Utah, § 1134. California (L., 1917, Ch. 700, § 1) authorizes revocation for refusal to pay *in advance* expenses of examination. [137] *Infra*, § 22.

[138] Mass., § 5; "thereto" refers to the examination of a company. See also Ala., § 8343; N. D., § 4925.

[139] Colo. L., 1913, Ch. 99, § 24.

quiry the commissioner may deem proper; [140] in New Jersey, failure to answer inquiries in writing.[141] On the other hand, some states qualify the ground of revocation by "unreasonably" and like words,[142] thus apparently cutting down the scope of the commissioner's discretion and probably authorizing the courts to inquire into the reasonableness, or at least "the reasonableness of the reasonableness" (that is, the limits of his privilege to determine what is reasonable), of the commissioner's requirements.

While the commissioner has no power to impose penal servitude for perjury, in some states he is given the power to revoke a company's license on account of "false" [143] or "untrue" [144] statements in the company's reports to him, and Michigan adds a criminal flavor by allowing revocation for "fraudulent and intentional concealment." [145] Of course, a false statement might be regarded as a "failure" or "refusal" to give information and thus be a ground of revocation under the provisions mentioned above.

The power to revoke for non-compliance with visitorial requirements appears to be seldom exercised. The writer has come across only one case in which such a revocation was judicially attacked. In *Metropolitan Life Insurance Co.* v. *Clay*,[146] a company succeeded in enjoining revocation of its license on account of its failure to allow the commissioner to carry off lists of its former industrial policyholders, the cost of the investigation having already amounted to from $3,000 to $4,000, and the only object being to secure to a limited number of industrial policyholders [147] the small cash-surrender value which was at one time required to be paid on such policies. The court proceeded "upon grounds of equity."

3. *Removing suits to federal courts.* A number of states have provisions which empower the commissioner, and even make it his "duty" or his "imperative duty," to revoke the license of a foreign

[140] Conn., § 4161 (foreign assessment life co.).

[141] N. J., p. 2878, § 125 (foreign assessment life co.).

[142] Idaho, § 4984 ("refusing or unreasonably neglecting" to submit to examination); Mich., § 63 ("unreasonably neglecting" to submit); N. Y., § 25 ("unreasonably neglecting" to submit to examination).

[143] Ill., § 69; Nev., § 1316.

[144] Miss., § 5085; Nev., § 1328.

[145] Mich. III, 4, § 3. To the same effect: N. D., § 4922; Ohio, § 9437.

[146] (1914), 158 Ky. 192, 164 S. W. 968.

[147] Specifically, those procuring policies between April 1, 1893, and July 1, 1893. In fact, it seems that all the claims were actually barred by limitation and that the real purpose of the commissioner's investigation is not disclosed by the judicial decision.

insurance company which removes to a Federal court a suit brought against it in the state court.[148] It has already been pointed out that the only two cases on the point are in conflict as to whether or not the commissioner may be compelled by a *mandamus* proceeding to perform his "duty" of revocation where in his judgment a revocation would be unjust.[149] These statutes reflect the hostility of state legislatures toward Federal courts, and the popular distrust of those courts. The attack was licensed if not encouraged by the decision in *Doyle* v. *Continental Insurance Co.*[150] and *Security Mutual Life Insurance Co.* v. *Prewitt.*[151] Since these decisions have been happily overruled by *Terral* v. *Burke Construction Co.*,[152] the statutes founded upon them should be expunged from the record.

4. *Non-payment of contract obligations to private persons.* The powers and practices of the insurance commissioner with reference to the collection of claims, whether against the companies or against agents or brokers, are of such importance, both theoretically and practically, as to warrant separate treatment.[153] Here it will be sufficient to note the statutory grounds of revocation

[148] Ariz., § 3382; Cal. P. C., § 608 ("duty to"); Ga., § 2416 ("duty to forthwith revoke"); Ill., § 31 ("imperative duty"); Ky., § 631 ("duty to forthwith revoke"); Minn., § 3592 ("shall immediately"); Miss., § 5133 ("imperative duty" on receiving certified copy of removal proceedings); Mo., § 6311 ("duty forthwith to revoke"); Neb., § 3158; N. H., Ch. 169, § 10; N. D., § 4925; Ohio, §§ 9384, 9563; Tenn., § 3292a (1); Wis., §§ 1915 (2a), 1917 (2a), 1947 (5). The writer has not discovered any such ground of revocation in the current statutes of the other states.

[149] *Supra*, n. 46 and n. 47.

[150] (1876), 94 U. S. 535, 24 L. ed. 148, reversing a decree enjoining the commissioner of Wisconsin from revoking a foreign insurance company's license for removing a suit to a Federal court.

[151] (1906), 202 U. S. 246, 26 Sup. Ct. 619, holding substantially to the same effect as the case last cited. For a valuable discussion of this problem, see Henderson, *The Position of the Foreign Corporation in American Constitutional Law.*

[152] (1922), 257 U. S. 529, 42 Sup. Ct. 188. For comments on this case, see 22 *Columbia Law Review*, 476 (1922); 35 *Harvard Law Review* 881; *McGovney* (1921) 7 *Iowa Law Bulletin* 258. In Central Union Fire Ins. Co. *v.* Kelly (1922) 282 Fed. 772 the court reached the somewhat surprising conclusion that the insurance company's attorneys were "presumed to know the law" that revocation for removal to a Federal court was not permissible, though prior to Terral *v.* Burke Construction Co., *supra*, the matter was in considerable doubt as to foreign corporations not engaged in interstate commerce. See the references just given and Henderson, *op. cit.*

[153] *Infra*, § 20, p. 283.

which relate to the non-payment of policy claims. The narrowest of these grounds (rule) is the failure or refusal of the company to pay a judgment based upon a policy claim, within thirty days, or ninety days, or without limitation as to time;[154] or similarly, failure to satisfy an execution issued upon such a judgment.[155] Statutes of this type do not empower the commissioner to pass upon the merits of the policyholder's claim, but merely provide an additional sanction for the judgment of a court.

On the other hand, several states have gone much further. They have apparently authorized the commissioner to pass upon the merits of an individual claim before any court has given judgment, since they have empowered him to revoke for non-payment of a single policy claim, with more or less indefinite limitations, such as "without just and reasonable grounds," "when due," and so forth.[156] More restricted in scope but equally vague in their ethical

[154] Ala., § 8343; ("failure to pay any judgment against it by a citizen of this state"); Ariz., §§ 3392 (90 days), 3466 (surety co., 30 days); Cal. C. C. (1907), § 453g; Conn., § 4167 (foreign assessment life co.); Fla., § 2773 (3 mos.); Idaho, § 5108 (90 days; surety co.); Ind., § 4726 (30 days); Ia., § 5471 (30 days); La., § 3676 (30 days; assessment co.); Me., Ch. 53, § 118 (30 days); Miss., § 5134 (90 days); Mo., § 6178 (life co., 90 days); Mont. S., § 4189d (surety co., 90 days); Nev., § 1314 (30 days); N. H., Ch. 170, § 15 (fire co.); N. D., § 4964 (30 days); Okla., § 6678 (no time limit); Tenn., § 3283 (same); Vt., § 5621 (30 days); Wis., § 1974.

[155] Idaho, § 4968 (30 days after demand); Minn., § 3264 ("shall forthwith" revoke); Mo., § 6338 (any company, 15 days); Tex., § 4747. Cf. Pa., § 52.

[156] Colo. L., 1913, Ch. 99, § 74 (county mutual, "for failure to settle losses with reasonable promptness"); Conn., § 4160 (foreign assessment life, "which has failed to pay maximum amount named in any certificate of membership when it became due"); Ga., § 2450 (assessment life, failure to pay "*a valid claim*" to the full limit named in the policy); Idaho, § 5084 (same as Colo.); Ky., § 676 ("if commissioner shall be satisfied, on investigation, that any assessment life company has failed or refused to make such payment for 30 days after it became due on proper demand"); La., § 3641 ("shall" revoke certificate of company after second "conviction" of failure to pay a claim in 30 days after written notice of claim, "without just reasonable grounds such as to put a reasonable and prudent business man on his guard"), § 3669 ("shall" revoke, if assessment life company "has failed to pay the maximum amount named in any certificate when it became due"); Mont. C., § 4161 ("shall" revoke for failure of assessment accident company to pay maximum amount of policy in 30 days after it became due and after proper demand); N. J., p. 2881, § 135 (if "satisfied on investigation" that any domestic assessment life company has failed to pay the amount specified in a policy for 30 days after it became due upon proper demand, he shall notify it not to issue any new policies until such indebtedness is paid); N. Y., § 210 (same as N. J.); R. I., Ch. 224, § 4 (same as last two).

standards are such grounds of revocation as "not paying its claims in full," [157] "not carrying out its contracts in good faith," [158] and "habitually forcing a compromise of claims." [159] As these provisions require proof of a habit or practice of not paying claims, non-payment of a single claim would not be sufficient. Provisions of this latter type are usually made applicable only to assessment companies rather [160] than "old line" companies. However, the failure in numerous instances of a company of the latter type to pay its policy claims may be relevant evidence of "unsound condition" or other financial grounds of revocation.

5. *Non-payment of obligations to the state.* It is sometimes provided that the company's license may be revoked for failure to pay taxes,[161] or a judgment for penalties;[162] and Michigan goes

[157] Ill., § 250 (foreign assessment life); Ia., § 5518 (foreign assessment life), § 5575 (fraternal, "failing to fulfill its contracts with its members"); Mo., § 6160 (same as Ill.); Nev., § 1320 ("not carrying out the terms of its contracts," domestic assessment co.); N. J., p. 2878, § 124 (foreign assessment life co.); Ohio, § 9434 (mutual protective association); R. I., Ch. 224, § 6 (assessment co.); S. D., § 9325 ("not paying its policies to the full limit named therein"); Wyo., § 5238 (similar). In several states the commissioner is authorized to start judicial proceedings to enjoin the doing of business by an assessment or fraternal organization, on similar grounds: Ill., § 269; Kan. §§ 5227 (after final judgment), 5413 (same); Ky., § 681c (24); Mont. C., § 4157; N. H. L., 1913, Ch. 122, § 24; Okla., § 6677. Such a provision was contained in the Uniform Fraternal Bill, as recommended by the National Convention of Insurance Commissioners in 1910, and adopted in about one third of the states. Cf. Colo. L., 1913, Ch. 99, § 63 (revocation if mutual company "from any cause" fails to provide for payment of policy claims).

[158] Ky., § 681c (28); Md. III, § 244K; Mich. III, 4, § 28; Miss., § 5202; Mo., § 6428; N. H. L., 1913, Ch. 22, § 28 (foreign fraternal); N. J., p. 2878, § 124; N. Y. L., 1911, Ch. 198 § 244; N. C. S., § 4798b (25); Tenn., § 3350a (I4); W. Va., § 15e. This provision is doubtless found in other states which have enacted the Uniform Fraternal Bill.

[159] Cal. L., 1915, Ch. 608 (P. C., § 596b); Okla., § 6678 (also, if dealings with policyholders not "equitable and just").

[160] See notes 156–159. Since these companies are usually not required to maintain a reserve fund, non-payment of claims is stronger evidence of unsound financial condition than in the case of old line companies. Ind., § 5045 provides that before being licensed, a foreign fraternal society must prove it has paid "all just benefits or claims" in the last two years.

[161] Ariz., § 3404; Ark., § 5023 (judgment for taxes); Colo. L., 1913, Ch. 99, § 16; Kan., § 5177; Ky., § 640; Me., Ch. 9, § 56; N. Y. L., § 34, L., 1917, Ch. 513, § 1; Okla., § 6687; Tenn., §§ 3302, 3303; Wash., § 7071.

[162] Idaho, § 5010 (after 30 days); Mont. C., § 4040; Nev., § 1309 (fire co.); N. D., § 6687; Ohio, § 9592 (16); Pa., § 181 (in 30 days after judgment); S. C., § 2715 (same); Wash., § 7071; W. Va., § 60a; Wis., § 1919e.

further and authorizes revocation for non-payment of a penalty of $25 assessed by the commissioner without judicial proceedings.[163] In addition, it must be noted that payment of license fees is usually made a condition precedent to the issuance of a license. However, the bulk of the state's revenue from the insurance business is derived from taxes on premiums, and the power of revocation or refusal to renew affords an effective sanction for the collection of these taxes[164] and makes the tax on premiums one of the most effective (whatever may be said of its soundness in policy) of tax-gathering devices.

6. *Use of forbidden policy forms.* The regulation of policy forms by the commissioner requires separate treatment.[165] Leaving aside for the moment the question whether the form is to be prescribed by the legislature or by the commissioner, a number of states have authorized the revocation of a company's license on the ground of using forbidden policy forms, or inserting forbidden clauses in policies, apparently in advance of any judicial determination of the non-conformity of the form used to the standard legally established.[166] Here again several states introduce the element of moral culpability by authorizing revocation only for "wilful" violation.[167] Iowa has an unusual but altogether economical provision authorizing revocation by the court in which the company is convicted of violating the standard policy law.[168]

[163] Mich. I, 4, § 13, II, 3, § 11. See *infra*, Administrative Enforcement, § 30, n. 24, for other examples.

[164] Manchester Fire Ins. Co. *v.* Herriott (1899), 91 Fed. 711. See State *ex rel.* National Life Ass'n. *v.* Matthews (1898), 58 Oh. St. 1, 49 N. E. 1034.

[165] *Infra*, § 18, p. 244.

[166] Cal. L., 1917, Ch. 614, § 12 (accident and health policies); Colo. L., 1913, Ch. 99, § 61 (refuse license to fire co. if policy does not provide for cancellation by insured on "equitable" terms); Conn., § 4246 (health and accident); Fla., § 2773 (fire); Ga., § 2455 (assessment co.); Idaho, § 5045 (foreign health and accident co.); Ind., § 4628 (fire co., using co-insurance clause unless at reduced rate); Ia., § 5661 (fire co.); La., §§ 3689, 3693; Miss., § 5101 (assessment life); Mo., § 6194 (policy bearing misleading title); Neb., § 3245; N. H., Ch. 170, § 1 (fire), L., 1913, Ch. 95, § 3 (liability ins. co.), L., 1913, Ch. 226, § 13 (foreign accident co); Ohio, §§ 9577, 9581; Okla., § 6769; Pa., §§ 243, 245; Utah, § 1157; Wis., § 1943a. See also citations in next note.

[167] Mich. III, 2, § 23 (health and accident), IV, 2, § 16 (fire); Minn., § 3564; N. H., L., 1913, Ch. 226, § 13 (foreign accident co.); Pa., § 229; S. D., § 9343; Va., § 4320; Vt., § 5635. Probably "wilful" is inserted to absolve the company whose agent inadvertently used a form approved in another state but not approved in the state where issued.

[168] Ia., § 5494.

7. *Prohibited methods of getting business.* The scope of the commissioner's powers of regulation, originally confined to the maintenance of financial soundness, has been extended, especially within the last two decades, to include the company's methods of "getting business," both in respect to their fairness to the insuring public, and their effect upon competitors. Chief among these types of conduct are "rebating" and "discrimination," which are generally forbidden in the interests of impartial treatment of all applicants for insurance; they are causes for revocation of the company's license in a number of states.[169] Here, too, the element of *mens rea* appears in several statutes.[170] Usually the commissioner is empowered to determine, in the first instance at least, whether or not the conduct amounts to violation of the statute, and to revoke before a judicial determination has taken place.[171] In a few instances, the power of revocation may be exercised only after a judicial conviction;[172] and in Iowa the court revokes the license after conviction.[173]

Second in importance are the prohibitions against "misrepresentation" and "twisting" which are sanctioned by the power of revoking the company's license.[174] These forms of prohibited con-

[169] Ala., § 4607; Ariz., §§ 3408, 3449; Ark., § 5034 (life co.); Colo. L., 1917, Ch. 81, § 1 (life co.); Conn., § 4246 (health and accident); Idaho, § 5036 (life co.); La., §§ 3628, 3657; Me., Ch. 53, § 138; Mich. II, 4, § 6; Minn. L., 1915, Ch. 101, §§ 7, 3461; Miss., § 5064; Mo., § 6140 (permitting agent to do so); Mont. C., § 4029, S., § 4141; Neb., § 3281; N. H. L., 1907, Ch. 111, § 2, L., 1913, Ch. 127, § 4; N. M., § 2840; N. D., § 4856; Ohio, § 9406; Ore., § 6431 (4); S. C., § 2739; Va., § 4222. See also citations in next note.

[170] Cal. P. C., 1917, § 633b ("knowingly" violating anti-rebate laws); Ind., § 4706e; Pa., §§ 152, 246; S. D., §§ 9184, 9330; Tex., §§ 4896, 4954; Utah, § 1167; Vt., § 5575; Wash., §§ 7076, 7077. All require knowledge or wilfulness.

[171] Lyman *v.* Ramey (1922), 195 Ky. 223, 242 S. W. 21, (*agent's* license refused because of rebating; court refused to *mandamus* commissioner, agreeing with his conclusion that the statute had been violated). For further decisions, see *infra*, § 21.

[172] Fla. L., 1919, Ch. 7870, § 1; Ill., § 29; Minn., § 3321. [173] Ia., § 5491.

[174] Ala., §§4601, 4603; Colo. L., 1913, Ch. 99, § 54; Idaho, § 5025 (conviction of "twisting"); Ill., § 25; Ind., § 4714e; Ia., §§ 5499, 5500; Me., Ch. 53, § 141; Mich. II, 4, § 7; Mo., § 6144 (misrepresentation); Neb., § 3281; N. H. L., 1913, Ch. 127, § 4; N. Y., § 60 as amended by L., 1911, Ch. 533, and L., 1913, Ch. 47 (on "conviction"); N. D., § 4854 (conviction of second offence); Ore., § 6341 (4); Pa., §§ 153, 154; S. D., § 9183 ("wilful"); Tenn., § 3348a (20); Utah, § 1166 (misrepresentation and twisting); W. Va., § 15a; Wis., § 1946c. The New York law formerly authorized revocation without prior conviction in court; see People *ex rel.* Burr *v.* Kelsey (1908), 129 App. Div. 399, 113 N. Y. Supp. 836.

duct are perhaps even more indefinitely defined and more ethically flavored than are "rebating" and "discrimination." "Misrepresentation" has a common law cousin in the law of deceit and the equitable doctrines as to fraud. "Twisting" is a trade name for a form of unfair competition, which (the name, not the conduct) has grown up in the last two decades,[175] and which is still but vaguely delimited. In essence, it seems to consist in the agent's inducing a person insured in a rival company to allow his policy to lapse in that company, by means of misrepresentations or incomplete comparisons as to the superior advantages of the policies issued by the agent's company, with the result that the insured does procure a policy in the agent's company.[176] Even if the individual insured loses nothing by the transfer, the practice is wasteful since the initial overhead (agent's first commission, medical examination, and so forth) is needlessly doubled and the insuring public eventually pays the bill. The penalty for twisting or misrepresentation is more frequently inflicted on the agent than on the company.

A few states authorize revocation for using prohibited advertising methods;[177] these provisions are more easily enforceable against the company, since it is easier to show that the company has authorized or participated in advertising than in oral misrepresentations or inducements made by the agent.

8. *Miscellaneous grounds of revocation.* The foregoing list exhausts what may be regarded as the standard or common grounds of revocation. However, there remain other grounds which are so

[175] In Graham, *The Romance of Life Insurance* (1909), p. 248, "twisting" is spoken of as a comparatively recent evil, the opportunities for which were increased by the "disturbed conditions" following the Armstrong investigation in New York in 1905.

[176] Mich. II, 4, § 7. See also N. Y., § 60, cited in note 174. The subjects under this subsection will be treated more fully *infra*, § 21.

[177] Ill., § 25; Ia., § 5500 ("falsely advertising capital"); Neb., § 3169 (permitting deceptive use of name). Many of the statutes as to misrepresentations are broad enough to cover false or deceptive advertisements. This list does not include all the statutes as to false advertisements, but only those which are expressly made enforceable by revocation of a company's license. Many of the others would doubtless be so enforceable where revocation is authorized for "violation of law" or other vague grounds. See § 21.

See also the statutes authorizing revocation of the license of a company which is "conducting its business fraudulently": Conn., § 4316 (foreign surety); Del., § 573 (domestic co.); Ga., § 2437 (domestic co.); Ia., § 5518; N. H. L., 1913, Ch. 122, § 28.

variegated as to be almost capricious. Foremost among these miscellaneous grounds, must be mentioned the retaliatory statutes, referred to above.[178] Aside from the latitude of discretion involved in interpreting the statutes of a sister state or foreign country and comparing the burdens imposed by them upon domestic companies with the burdens imposed upon foreign companies by the domestic statute, an even greater latitude is conferred in some instances by statutes which authorize the commissioner to refuse or revoke a foreign company's license, if domestic companies are not admitted at its domicile upon compliance with "reasonable" laws as to deposits,[179] or if the refusal of the foreign state to license domestic companies was "unreasonable or unfair." [180] This form of retaliation gives the domestic commissioner authority to compare not only the statutory provisions of the other state but also its administrative practices. Nebraska attempts to curb the arbitrary exclusion of its own companies from other states through administrative discrimination, by denying admission to foreign companies if the foreign state refuses to admit all Nebraska companies which have complied with the *statutory* regulations of the foreign state; [181] in this instance the retaliation is directed solely to the administrative practices of the other state.

The writing of insurance within the state through an "unauthorized" (that is, not licensed by the state) agent is another offence which calls for revocation of the company's license in a number of states.[182] The chief object of this provision is to catch all the revenue possible under the tax on gross premiums, which the companies, or some of them, are not unwilling to evade by writing insurance through non-resident agents. If a company licensed in

[178] *Supra*, § 12, p. 106, and citations in n. 63. The power given by these statutes is sometimes used by one commissioner as a club to compel the commissioner of another state to change his policy with reference to exclusion of companies of the first commissioner's state. Within the last few years, one western commissioner gave notice of revocation of all licenses of companies of a state which refuses to admit certain companies of his state.

[179] Conn., § 4070; N. Y. L., 1916, Ch. 590, §§ 1, 33.

[180] N. J., p. 2857, § 66.

[181] Neb., § 3293 (Comp. Stat. (1922), § 7900). After thirty days notice to the other insurance department, the Nebraska department is required to revoke all certificates of companies of the offending state.

[182] Ala., § 8382; Colo. L., 1913, Ch. 99, § 38; Ill., § 44; Kan., § 5353; La., § 3595; Mich. II, 3, § 11, II, 4, § 12; Mont. Code, § 4032 (non-resident agent); N. H. L., 1891, Ch. 54, § 1, p. 568, § 5; Tex., § 4963; Va., § 4222; Wis., § 1919a (7); Wyo., § 5289.

State A and having licensed agents there, is, nevertheless, able to assume risks on property located in State A or on the lives of residents of State A, through an agent located in State B, and to collect the premium in State B, while State A may, without violating the Federal constitution, collect from the insurance company a tax on such premiums,[183] yet the process of collection is rendered more difficult.[184]

A provision designed to prevent evasion of a different sort is revocation of the license of a company which reinsures its risks or consolidates with an unlicensed foreign company.[185] The danger to be avoided is that the business unit which is ultimately responsible for the payment of the policy claims, and the financial soundness of which is of the utmost importance to resident policyholders, will, through the device of reinsuring the risks of a licensed company, remain beyond the control of the state, thus substantially evading the state's supervision.

Some of the other grounds of revocation are as follows: Combining with other insurers to fix rates.[186] These statutes represent the obsolescent theory that rates should be kept low by compelling competition and repressing all movements to eliminate competi-

[183] Equitable Life Assurance Society *v.* Pennsylvania (1915), 238 U. S. 143, 59 L. ed. 1239, 35 Sup. Ct. 829 (apparently a suit by the state to collect the premium taxes). However, State A cannot impose the tax upon the insured who deals outside State A with a company of State B. Allgeyer *v.* Louisiana (1897), 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. 427; Hyatt *v.* Blackwell Lumber Co. (1918), 31 Idaho 452, 173 Pac. 1083, 1 A. L. R. 1663 and note citing many cases accord; St. Louis Cotton Compress Co. *v.* Arkansas (1922), 260 U. S. 346, 43 Sup. Ct. 125, 67 L. ed. 297 (even though the insured is a foreign corporation).

[184] Since the foregoing was written, the Supreme Court of the United States has held that a New Mexico statute which authorized revocation of a foreign insurer's license on the ground that it paid commissions to non-residents for obtaining policies covering risks within the state, violates the Fourteenth Amendment. Mr. Justice Holmes, speaking for the court, was careful to point out that the statute was too broadly worded to be restricted to the object of requiring the company to place its local business through substantially compensated resident agents — an object which he conceded, inferentially, to be legitimate. Fidelity and Deposit Co. of Maryland *v.* Tafoya (1926) 46 Sup. Ct. 331, Adv. Ops. 379.

[185] Ill., § 80e; La., § 3605; Miss., § 5071 (reinsurance without approval); Neb., §§ 3148, 3149; Wis., § 1919f.

[186] Ia., § 5670; La., § 3747; Neb., § 3186; N. H., Ch. 169, § 10; Ohio, § 9563; Ore., § 6361; S. D., § 9202; Wash., § 7076. See *infra*, § 19. Cf. Va., § 4312 (combining to fix commissions).

tion. The newer policy is represented by statutes authorizing revocation for conduct which obstructs the regulation of rates by the state.[187] Assuming a single risk in excess of ten per cent of the capital of the company[188] is a ground of revocation designed to safeguard the "spread" of risks. Failure to furnish in ninety days information as to any policy desired or applied for by any person interested in such policy seems closely related to the payment of policy claims.[189] Paying a commission to any "officer" of the company is of doubtful meaning.[190] To revoke the license of a domestic company because it does business in another state without having procured a license in such other state[191] shows a praiseworthy desire to aid in the enforcement of the other state's laws. Issuing a policy without a valuation of the property insured;[192] failure to make up a deficiency in bonds deposited;[193] selling stock in the company along with insurance;[194] paying stock dividends contrary to the statute;[195] refusal to file copy of each type of policy issued;[196] failure to notify commissioner of fires, or payment of policy claim within less than a week after such notification;[197] failure to maintain a resident agent for service of process,[198] are other examples of the scope of insurance supervision.

[187] Kan., §§ 5370 (failure to file rate schedule or to obey order of commissioner fixing rates), 5371 (suing in Federal court to enjoin order fixing rates before exhausting statutory remedies; this provision does not conflict with Terral *v.* Burke Construction Co., *supra*, n. 152, for the reasons given in Prentis *v.* Atlantic Coast Line (1908), 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. 67); Mo., § 6287. Oregon besides forbidding combinations to fix rates (*supra*, n. 185) makes it a ground of revocation to engage in a "demoralizing rate war."

[188] Conn., §§ 4320–21 (capital and surplus); Neb. § 3249 (in congested district; fire insurance); Va., § 4307. This restriction is found in other states without, however, being made an express ground of revocation.

[189] Cal. P. C., 1915, § 598.

[190] Cal. P. C., § 598; Ark., § 5009; Tex., § 4755.

[191] Colo. L., 1913, Ch. 99, § 28; Utah, § 1147.

[192] Fla., § 2773. [193] Ga., § 2424.

[194] Ala., §§ 4609, 4610; Neb., § 3281; N. H. L., 1907, Ch. 111, § 2; N. M., § 2840; N. D., § 4855; Pa., § 152; S. C., § 2731; S. D., §§ 9330, 9184; Tex., §§ 4896, 4954; Utah, § 1168; Wash., § 181. The policy of this restriction upon the business-getting methods of the insurer seems eminently sound. See *infra*, § 21.

[195] Idaho, § 4961; Tex., §§ 4763, 4868.

[196] Ia., § 5500; Tenn., § 3348a (16).

[197] Miss., § 5058; N. C. R. B., § 4822. See also Me., Ch. 53, § 9, and discussion *infra*, § 20, p. 305.

[198] N. J., p. 2879, § 126 (foreign assessment life co.).

Aside from the grounds thus specifically mentioned in connection with the power of revocation, it must be borne in mind that the commissioner possesses extensive powers of revocation for "violation of" or "non-compliance with," any statute imposing a duty upon insurance companies.[199]

§ 14. *Licensing of agents and other company employees.* The statutory provisions relating to the licensing of the agents of insurance companies raise a number of interesting problems in administrative law. One is as to the distinction between the company's license and the agent's license. Another is as to the function or functions of the agent's license. In addition, there are the usual questions as to the legal consequences of the issuance or refusal of a license, and the grounds of refusal or revocation. Even as to the latter, there are important differences between the company license and the agent's license, in existing legislation.

The distinction between these two has frequently been obscured; in fact, in the earlier statutes, the license issued to the agent was merely a means of certifying the official approval of the company which he represented, and was issued without regard to the character or qualifications of the individual agent. Statutes of this type are still found in a number of states,[1] and even where the agent's license is separately treated, it is not always clear that the purpose is to regulate the conduct of the individual agent as distinguished from the conduct of the enterprise as a whole.[2] Sometimes the statutes make no provision for the issuance of a license or certificate of authority to the company as distinguished from the licenses issued to the agents,[3] and control of the company is affected by a general revocation of all of its agent's licenses.[4]

[199] See *supra*, p. 133.

[1] Ala., § 8353; (but cf. § 8333); Conn., § 4123 (life); Del., §§ 578, 582; Idaho, § 5009; N. M., § 2814; N. D., §§ 4920, 4960, 4970, 4976; R. I., Ch. 220, § 18; Tenn., §§ 3297, 3315, 3350a (9), 3369a (27), 3369a (71); Tex., § 4960 (but see § 4970, general agent must be "of good reputation and character"); Va., § 4235 (license may be refused, however, for "good cause" — whatever that means); Wis., §§ 1976 (1) (but otherwise as to life ins. agents), 1976 (2); Wyo., § 5277. See also Ky. Stats., 1903, § 634.

[2] See *infra*, this section, p. 158, p. 178.

[3] This seems to be the effect of R. I., Ch. 220, § 8, especially § 18, though the provision is quite obscure. On the other hand, Ala. and Va. apparently have no provision for licensing the agents of domestic companies.

[4] See Mutual Life Ins. Co. of N. Y. *v.* Prewitt (1907), 127 Ky. 399, 31 Ky. L. Rep. 1319, 32 Ky. L. Rep. 298, 537, 105 S. W. 463, 37 Ins. L. J. 285, where

This method of regulating the company's conduct of the enterprise as a whole has grave defects. It is mechanically cumbersome. Furthermore, it is likely to lead to the doing of an injustice to the individual agent through the act of some over zealous commissioner in revoking an agent's license for misconduct of the company which is entirely beyond the agent's control.[5] While the revocation of the company's license necessarily ends the privilege (though not necessarily the power) of the agent to transact business for that particular company, it obviously should not affect his privilege of representing other companies; and even where the agent represents only one company, the stigma attaching to the revocation of an agent's license, especially under agency qualification laws requiring an applicant for a license to state whether or not his license has ever been revoked,[6] makes such a revocation more than a perfunctory matter. The revocation of a company's license should be accompanied by a notice to its agents within the state [7] but not by revocation of the agent's license unless the agent has been personally culpable. This distinction was clearly recognized in *Maxwell* v. *Church*.[8] On the other hand, the failure of the agent to obtain a license should be no bar to an action by a licensed company upon a contract made by such agent.[9] The companies' control over their agents do not warrant such a penalty.

the company was successful in a suit to enjoin revocation of its agents' licenses, issued pursuant to Ky. Stats., 1903, § 634. No question of the company's power to bring the suit arose, the court saying that clearly the company's right to do business in the state was involved. (127 Ky. 403.)

[5] As in Maxwell *v.* Church (1901), 62 Kan. 487, 63 Pac. 738, where the commissioner revoked an agent's license because the company permitted the writing of fire insurance on Kansas property through a non-resident agent. This was a ground for revocation of the company's license but not a ground for revocation of an agent's license. On *mandamus*, the Supreme Court set aside the revocation.

[6] See *infra*, this section, p. 168.

[7] See *supra*, § 12, p. 100.

[8] *Supra*, this section, n. 5. In State *v.* Johnson (1890), 43 Minn. 350, 45 N. W. 711, it was held unnecessary to allege that the company was not licensed, in an indictment charging defendant with acting as agent without a license.

[9] See Columbia Ins. Co. *v.* Walsh (1853), 18 Mo. 229, 237; Clark *v.* Middleton (1853), 19 Mo. 53; Union Mutual Life Ins. Co. *v.* McMillen (1873), 24 Oh. St. 67, 79; Thornton *v.* Western Reserve Farmers' Ins. Co. (1858), 31 Pa. St. 529, 532. Also, Clay Fire & Marine Ins. Co. *v.* Huron Salt & Lumber M'f'g Co. (1875), 31 Mich. 346, 354. In each of these cases the statute made no distinction between the company license and the agent's license; the penalty was imposed on the agent, and the court thought the statute did not make the

So long as the agent's license was confused with the company's license, the former provided no means of restricting the entrance into the agency field of such persons as the duly licensed companies deemed qualified. The "agency qualification" laws of recent years grew out of a separation of the agent's license from the company's license. However, it does not follow that because a separate agent's license is required, the function of the license is regulatory. In many instances the agent's license is a revenue measure; in others it combines this feature with that of registration. No doubt one of the chief objects of the requirement is that the state taxing officials may be enabled to check up on the gross premium tax. Another object is to furnish evidence of the authority of the agent to act for the company, readily available to persons suing the company upon policies, as well as to afford a designation of an agent for service of process on foreign companies. In the earlier statutes the agent was required to file his power of attorney to act for the company, and thus the scope of his powers was a matter of public record.[10] In the absence of such a provision, however, the issuance of a license to an agent is not evidence that he possesses any particular power to bind his principal.[11]

While it would be too much to hope that the unspeakable confusion in the judicial decisions as to the powers of insurance agents could be wholly remedied by mere legislative *fiat*, it would seem that the process of standardization with respect to the different types and grades of agents and with respect to the different lines of insurance has gone far enough to afford a basis for classification and for definition of the powers incident to the issuance of a license

contract void as to the company. But see *dicta* to the contrary, construing similar statutes, in Hyde *v.* Goodnow (1850), 3 N. Y. (3 Comst.) 266, 270, and Williams *v.* Cheney (1855), 69 Mass. 215, 222; in neither of these cases was the company licensed, and this presents a different question. (*Supra*, § 11, p. 84.)

[10] Cal. Stats., 1862, Ch. 227, § 1; Ind. Rev. Stats., 1852, I, Ch. 54, § 56; Me. Laws (compiled in 1821), vol. III (supplement of 1831), Ch. 402, § 2 (enacted Feb. 23, 1828); Mass. Laws, Jan. Session, 1827, Ch. 141, § 1; Mich. L., 1855, p. 241.

[11] Eikelberger *v.* Insurance Co. of North America (1920), 107 Kan. 9, 190 Pac. 611 (the agent's license is a mere "regulatory permit" and does not define or alter his powers). Statutory attempts to define the powers of an insurance agent have been narrowly construed by the courts. See Barry, etc., Lumber Co. *v.* Citizens' Ins. Co. (1904), 136 Mich. 42, 48, 98 N. W. 761. Such a statute as Ohio, § 644, which declares a foreign company "shall be bound by the acts of the person named (in the license) within his apparent authority as its acknowledged agent" adds little if anything to the common law rule of agency.

for a particular type and grade of agent. To require the company to state the agent's powers at the time it certifies his appointment would help some; and yet it would not cure the ignorance and indifference (until after a loss has occurred) of the public as to an insurance agent's powers, not would it check the thrifty policy, which many insurance companies pursue, of trying to shift to the ingenuous insured the risks of its agent's misconduct which should properly be rated as risks incident to doing an insurance business. A classification and grading of agents for licensing purposes, with a statutory definition of the powers assigned to each, would probably accomplish more than the blanket provisions of some states, which have defeated their own purpose.[12]

A few distinctions between the grades of employees licensed have crept into the statutes within the last few years. A few states distinguish between agents and solicitors,[13] or between agents and collectors of premiums,[14] or between state agents and local agents.[15] Such distinctions are not common, however, and they have not thus far been used as a basis for classifying the powers of agents in their relations with the insuring public.

The distinction between a revenue license and a regulatory license has, in this connection, two important consequences: If the license is purely a taxing license, the commissioner's discretionary power to refuse it is practically nothing as compared with his power to refuse a regulatory license. In the second place, the distinction is important in determining whether or not the licensing statute impliedly bars a recovery by the unlicensed agent upon contracts made by him; that is, in determining the legal consequences of failure to have such a license.

Legal consequences of failing to obtain or of obtaining license. The legal consequences of transacting business as an insurance agent without having the license required by statute may be conveniently divided into two classes: the direct sanction, and the indirect sanction.

In nearly all the states there are provisions for either civil or

[12] See Barry, etc., Lumber Co. *v.* Citizens' Ins. Co., *supra*, note 11; Wood *v.* Firemen's Fire Ins. Co. (1879), 126 Mass. 316, 319; Lauze *v.* New York Life Ins. Co. (1907), 74 N. H. 334, 68 Atl. 31. The case last cited is an absurd example of the narrow interpretation of such statutes.

[13] Colo. L., 1913, Ch. 96, § 21 (license to personal employees of agent); Mich. II, 3, § 1; Ohio, § 644 (1); Okla., § 6749; Wash., § 7089; W. Va., § 15c.

[14] Mass., § 164.

[15] Ohio, § 654; Okla., § 6725; Tex., § 4970; Wash., § 7089.

criminal penalties. Only one state establishes a civil penalty, recoverable in a common law action of debt.[16] In the other states the penalty appears to be criminal, though the use of such a term as "forfeiture" occasionally leaves the question in doubt.[17] The pecuniary penalties are usually sufficient to make the transaction of business without a license unprofitable if the penalty is collected. The statutes are usually so worded that the negotiation of a single policy is sufficient to incur the penalty.[18] A maximum fine of $1,000,[19] or $500 [20] or even $300 [21] or $250 [22] for writing a single policy would usually be a sufficient deterrent. On the other hand, a fine of $25 per day [23] might under some circumstances be too low to render an occasional violation of the statute unprofitable; and such sums as $50 per offence,[24] $100 per month [25] or even $100 per offence [26] seem of doubtful efficacy.

However, a majority of the states provide imprisonment as an alternative penalty for acting as insurance agent without a license, and thus provide a sufficient deterrent. The term of imprisonment varies from a maximum of one year [27] or six months [28] to as low as

[16] N. J., p. 2867, § 89 ($500 penalty, recoverable in action of debt), p. 2879, § 127 ($250 penalty, same procedure).

[17] N. Y. L., 1914, Ch. 13, § 1.

[18] In the following cases, though the point was not raised, the implication is that the issuance of a single policy would be a violation of the statute: State *v.* Hosmer (1889), 81 Me. 506, 17 Atl. 578; Hyde *v.* Goodnow (1850), 3 N. Y. (3 Comst.) 266; Huntley *v.* Merrill (1860), 32 Barb. 626; Williams *v.* Cheney (1855), 69 Mass. 215; State *v.* Johnson (1890), 43 Minn. 350, 45 N. W. 711.

[19] Ark., § 5119; Del., §§ 578, 580; Ind., § 4714c ($100 to $1,000); Md. I, § 205 ($100 to $1,000); Ohio, § 672; Pa., § 72; R. I., Ch. 220, § 18; Vt., § 5614; W. Va., § 57.

[20] Ala., §§ 4591, 8378; Conn., § 4294; Kan., § 5178; Mass., § 163 ($20 to $500); N. J., p. 2867, § 89; N. Y., § 50; N. C., § 3484 ($100 to $500); N. D., § 4960; Okla., § 6691; Pa., § 63; Wash., § 7088; Wis., § 1976.

[21] La., § 3630 ($100 to $300).

[22] N. J., p. 2879, § 127. See also N. H. L., 1913, Ch. 78, § 2 ($200); S. D., § 9160 (same).

[23] Ia., §§ 5527, 5738.

[24] Ark., § 5048; Me., Ch. 53, § 121; Ore., § 6334.

[25] N. Y., § 50 (for continuance in business).

[26] Ky., § 633 ($50–$100 for each offence); N. M., § 2814; Tenn., §§ 3315, 3350a (9); Utah, § 1140 (6); Va., § 4235. This does not include states in which imprisonment is an alternative penalty.

[27] Del., §§ 578, 580.

[28] Idaho, § 5009; Mo., § 6321; Ohio, § 672; Wash., § 7088. See also Ala. § 8378 (six months for non-payment of penalty).

ninety [29] or thirty [30] days. Others make it a misdemeanor.[31] Prosecutions under these statutes were formerly rendered highly difficult by narrow interpretations of the statutes, as by holding that the taking of applications by an agent within the state, to be forwarded to the company's office in another state for approval and the final issuance of the policy, was not within the penal clause of the licensing statute,[32] or by strict construction of the indictment.[33] Despite these obstacles, prosecutions are fairly numerous and the statutory provisions are fairly effective.

The indirect consequences of failure to obtain a license are more severe. In a few jurisdictions the statute expressly provides that an agreement to pay commissions to an unlicensed agent shall be unlawful,[34] that is, unenforceable in a civil action.[35] In most states, however, the unenforceability of the agreement rests upon the construction of the statute. The rule of construction adopted by Baron Parke in *Cope* v. *Rowlands* [36] has been generally followed. In the absence of an express declaration in the statute that the agreement is unenforceable, the penalty clause for the doing of business without a license will be construed not to invalidate the

[29] La., § 3630 (30–90 days); Mich. II, 3, § 11; Mont. S., § 4023; Neb., § 3292 (3 mos.).

[30] Ala., § 4591 (30 days in jail). See also S. D., § 9160 (60 days); Utah, §1140 (6) (two months); Ore., § 6334 (fifteen days).

[31] Ga., § 2444; Minn. L., 1915, Ch. 195, § 19; Tex., § 4960.

[32] See Williams *v.* Cheney, *supra*, note 18; Hyde *v.* Goodnow, *supra*, note 18; Huntley *v.* Merrill, *supra*, note 18; Thornton *v.* Western Reserve Farmers' Ins. Co. (1858), 31 Pa. St. 529; State *v.* Johnson, *supra*, note 18. The statutes are now worded broadly enough to include such practices, and these decisions would probably not be good law to-day in most jurisdictions. See, for example, N. Y. Consol. Laws, 1909, Ch. 33, § 142: "shall in any manner aid in transacting the insurance business . . . by negotiating for or placing risks. . . ." See also § 91, and Wyatt *v.* McNamee (1906), 52 Misc. 127, 101 N. Y. S., 790, holding the mere *attempt* to obtain applications rendered contract illegal. The Mass. statute (§ 162) is a model of draftsmanship on this point, and clearly prohibits the solicitation described in the text: Roche *v.* Ladd (1861), 83 Mass. 436.

[33] State *v.* Hosmer (1889), 81 Me. 506, 17 Atl. 578 (holding "did solicit applications for insurance to" a certain company, does not sufficiently charge defendant acted as "agent" for the company; also, that the indictment must name the person from whom the risk was solicited).

[34] Minn. L., 1915, Ch. 195, § 18; N. Y., § 91; Ohio, § 644 (4).

[35] See Crichton *v.* Columbia Ins. Co. (1903), 81 App. Div. 614, 81 N. Y. Supp. 363; Wyatt *v.* McNamee (1906), 50 Misc. 348, 98 N. Y. Supp. 749; Stern *v.* Metropolitan Life Ins. Co. (1915), 169 App. Div. 217, 154 N. Y. Supp. 472.

[36] (1836), 2 M. & W. 149, 6 L. J. Ex. 63, 150 Eng. Rep. 707 (stockbroker denied recovery for services rendered because he had failed to procure broker's license from mayor and aldermen of London).

agreement if "the statute . . . is meant merely to secure a revenue to the city . . ." [37] that is, a *revenue* license; whereas, the agreement is unenforceable if "one of its objects [that is, the statute's] be the protection of the public, and the prevention of improper persons acting as brokers," [38] that is, if the license is *regulatory*. In *Cope* v. *Rowlands* the license was held to be regulatory because, while the annual license fee was quite substantial (forty shillings), the statute [39] authorized licensing

> under such restrictions and limitations for their honest and good behavior as [the Mayor and Aldermen] shall think fit and reasonable.

and thus clearly was designed for the "protection of the public."

This distinction has been recognized in a number of American cases. Where the agent's license is a mere revenue device, or a mere formality of registration, the unlicensed agent may recover for services.[40] On the other hand, where the statute prescribes a formal application, in which the applicant must state that he has not wilfully violated any of the insurance laws, that he has not "dealt unjustly with or deceived any citizen," and so forth, even though the statute does not expressly confer upon the commissioner any power of refusal, the license will be deemed regulatory and a recovery for services denied,[41] though revenue is also one of the objects of the license.[42]

[37] 2 M. & W. at p. 158. See Fritschle *v.* New Amsterdam Casualty Co. (1922), 209 Mo. App. 337, 347, 238 S. W. 850; the *dictum* in this case that the insurance broker's license under Missouri statutes is a mere revenue license seems incorrect in principle. The court cites two cases on real estate broker's licenses, which were clearly revenue licenses (Prince *v.* Eighth Street Baptist Church (1886), 20 Mo. App. 332, and Tooker *v.* Duckworth (1904), 107 Mo. App. 231, 80 S. W. 963), and a case allowing an unlicensed physician recovery because of the repeal of a provision expressly denying him recovery: Smythe *v.* Hanson (1895), 61 Mo. App. 285.

[38] 2 M. & W. 158.

[39] 6 Anne c. 16, § 4.

[40] Columbia Ins. Co. *v.* Walsh (1853), 18 Mo. 229, 237; Clark *v.* Middleton (1853), 19 Mo. 53; Thornton *v.* Western Reserve Farmers' Ins. Co. (1858), 31 Pa. St. 529, 532. It seems clear that a mere registration requirement, without any attempt at regulation, should be treated on the same footing as a revenue license; but the point has not been passed upon.

[41] Goldsmith *v.* Manufacturers Liability Ins. Co. (1918), 132 Md. 283, 103 Atl. 627 (broker's license; same principle involved); Goldsmith *v.* U. S. Fidelity & Guaranty Co. (1922), 140 Md. 67, 116 Atl. 852 (*semble*). The first of these cases cites and follows Cope *v.* Rowlands, *supra*, note 36.

[42] In Shehan *v.* I. Tannenbaum Son & Co. (1913), 121 Md. 283, 88 Atl. 146, the Maryland statute was held to be a revenue measure, and a refusal to license a corporation was upheld.

As in the case of an action by an insurance company, the insurance agent's action can be defeated only if the defendant pleads affirmatively and proves that the plaintiff was unlicensed; the plaintiff need not prove his license in order to recover.[43] Similarly, it is no defence to the company that the agent who issued the policy to plaintiff was not licensed.[44] Moreover, a person acting as agent for a foreign unlicensed insurance company in negotiating a contract of insurance may be held liable to the insured for the loss sustained under the policy even though the agent was not licensed and was not eligible to receive a license.[45]

The legal consequences of the issuance of a license to an insurance agent are, presumably, similar to those described above [46] in connection with the company's license. The licensee is privileged and immune from prosecution for the doing of the kind of insurance business which he is licensed to pursue, but not for the doing of any other kind of business. The applicant for a license is required to state the names of the companies which he will represent, and is privileged to represent only the named companies. Life insurance agents, as well as health and accident insurance agents, usually represent only one company, while agents for the other types of insurance usually represent several companies. The practices of the New York and Pennsylvania departments recognize this distinction by providing for the issuance of a license to a life insurance agent, or a health and accident insurance agent, to represent only one company. The agent for other lines is allowed in New York to represent a number of companies, but is required to procure a supplemental license for all companies not named in his original

[43] Scottish Commercial Ins. Co. *v.* Plummer (1880), 70 Me. 540, 544; Crichton *v.* Columbia Ins. Co. (1903), 81 App. Div. 614, 81 N. Y. Supp. 363 (broker's license); Wyatt *v.* McNamee (1906), 50 Misc. 348, 98 N. Y. Supp. 749 (same).

[44] Caledonian Fire Ins. Co. *v.* Shepherd (1916), 111 Miss. 175, 179, 71 So. 314; Union Mutual Life Ins. Co. *v.* McMillen (1873), 24 Oh. St. 67, 79; Clay Fire & Marine Ins. Co. *v.* Huron Salt & Lumber Mfg. Co. (1875) 31 Mich. 346, 354.

[45] Cordy *v.* Hale (1922), 177 Wis. 68, 187 N. W. 663. Here the statute (Wis. Stats. 1921, § 1919f) expressly declared the agent liable if the unlicensed company failed to pay. This case affords a striking example of lack of statutory correlation or administrative coördination. A corporation obtained a charter from the state of Wisconsin which expressly stated that one of the corporate powers was to act as insurance agent, yet another statute denied a corporation the privilege of an insurance agent's license.

[46] *Supra*, § 11, p. 74.

license. The New York statute is not explicit, but the insurance department has ruled that a license issued under Section 142 [47] confers a privilege to represent only the companies named in the application.[48] At all events, the license would not protect the holder in the doing of business in a manner prohibited by other sections of the statute, for example, rebating.

Mechanics of issuance. Only a few states fail to specify any conditions precedent to the issuance of a license.[49] The absence of such conditions, coupled with the absence of a power of revocation or refusal, would indicate that the license is merely for revenue or registration. The payment of a fee, which is usually required, does not of course affect this construction.[50] The requirement that the agent be certified or designated by the company in some way is practically universal.[51] Usually, the requirement is satisfied by a simple authorization of the agent to represent the company; such a statute serves the purpose of registration. In a few states, the company or some executive official is required to certify the applicant's mental and moral fitness for a license.[52] That the com-

[47] N. Y. Consol. Laws, 1909, Ch. 33, Sec. 142, relating to agents for companies other than life or health and accident declares that a licensed underwriter shall not "authorize or permit" any agent to solicit insurance until such agent shall have procured a license, but this does not quite cover the point.

[48] This ruling is printed on the back of the supplemental application blank. It is probably to be sustained in view of the requirement that each company shall certify to the department a list of its agents. (Sec. 142.)

[49] Ala., § 8353; Conn., § 4123 (life ins.); Del., §§ 578, 582; Idaho, § 5009 (other than life); R. I., Ch. 220, § 18; Tenn., §§ 3297, 3315; W. Va., § 15d; Wyo., § 5277.

[50] Payment of fee. See Ariz., § 3414; Del. § 77; Ga., § 2448; Ind., § 4714b; Ia., §§ 5526, 5736–7; Ky., § 681 (payment of *tax*); Md. III, § 184 ($300 for foreign life, $100 for other foreign); Mass., § 163; Minn. L., 1915, Ch. 1951, § 2; Neb., § 3193; S. C., § 2704; S. D., § 9160; Tex., § 4960; Utah, § 1140 (2); Va., § 4235; Vt., § 5609.

[51] Ala., § 8353; Ark., § 5079; Colo. L., 1919, Ch. 607, § 1; Colo. L., 1915, Ch. 96, § 21; Conn., § 4282; Fla. L., 1919, Ch. 7869, § 1; Ga., § 2456; Idaho, § 5014; Kan., § 5179; Ky., §§ 634, 681; La., § 3668; Me., Ch. 53, § 121; Mass., § 163; Mich. II, 3, § 1; Miss., § 5093; Mo., § 6308; Mont. S., § 4023; Neb., § 3193; N. H. L., 1913, Ch. 78, § 1; N. J., p. 2856, § 63; N. Y. L., 1914, Ch. 14, § 1; N. C., R. B., § 4812a; Ohio, § 644; Okla., §§ 6690, 6694; Ore., §§ 6333 (3), 6425 (1); Pa., § 61; S. D., § 9160; Tex., § 4970 (by general agent); Utah, § 1140 (2); Va., § 4235; Wash., § 7089; Wis., § 1976.

[52] Idaho, § 5014; N. Y. L., 1914, Ch. 14, § 1; Pa., § 62. See also Vt., § 5610 (three citizens of state must endorse trustworthiness and competency).

pany itself must be licensed is usually prescribed,[53] and would seem to be implied in the absence of express provisions; for while there are provisions in a number of states for the licensing of agents for unlicensed companies (usually fire), such licenses are issued only on compliance with exceptional conditions.[54]

A relatively small group of states which have taken the lead in establishing agency qualification laws require that a formal written application shall be made to the insurance commissioner. The application must in some states be under oath [55] and must set forth certain details of the applicant's previous history [56] and experience.[57] A few states make the applicant promise to "be good" by prescribing that he shall state that he does not intend to evade the insurance laws,[58] that he does intend to hold himself out in "good faith" as an insurance agent,[59] that he will not "rebate" or divide commissions.[60] While these coerced confessions of faith will probably not be efficacious deterrents to the wicked, they will,

[53] Ala., § 8353; Ark., § 5117; Ill., § 68; Ind., § 4733; Ia., §§ 5526, 5736–7; Ky., § 633; La., §§ 3588, 3668; Mass., § 163; Minn., § 3294 (annual statement of co. approved); Miss., § 5093; Mo., § 6308; Mont., § 4023; N. H., Ch. 169, § 7; N. J., p. 2856, § 63, p. 2878, § 122; N. M., § 2814; N. Y. Consol. Laws, 1909, Ch. 33, § 142; Ohio, § 644; Okla., § 6690; Ore., § 6333; Pa., § 61; S. D., § 9160; Utah, § 1139; Va., § 4203; Vt., § 5608; Wash., § 7088; W. Va., § 56c; Wis., § 1976; Wyo., § 5268.

[54] E. g. Ill., § 80h (affidavit that applicant has been unable to procure insurance desired from any licensed company; bond for $2,000 to secure payment of premium tax). See also N. Y. Consol. Laws, 1909, Ch. 33, § 137, amended by L., 1917, Ch. 510; Ohio, § 660; Tenn., § 3314a (1); Utah, § 1139; Vt., § 5615; Wash., § 7120; Wis., § 1919m. See further *infra*, § 15, p. 190.

[55] Mass., § 163; Mich., § 91; N. H. L., 1913, Ch. 78, § 1; N. Y. L., 1914, Ch. 14, § 1 (the applicant need not make affidavit but the company official who certifies the applicant must make affidavit as to applicant's "character and business standing"); Ohio, § 644; Okla., § 6749; Ore., § 6333 (5); Pa., § 62; Wash., § 7089; Vt., § 5609; Wis., § 1976 (7).

[56] Colo. L., 1915, Ch. 96, § 21 (whether license ever revoked); Idaho, § 5015 (same; also, whether indebted to any co.); Md. IV, § 184B (whether license revoked; that applicant has not wilfully violated or misappropriated or withheld any money due his company); Mich. II, 3, § 10 (whether license revoked in Mich. or any other state).

[57] Cal. L., 1919, Ch. 607, § 1; Colo. L., 1915, Ch. 96, § 21; Idaho, § 5015; Me., Ch. 53, § 124 (occupation last five years); Mass. 163 (same); Mich. II, 3, § 10; N. H. L., 1913, Ch. 78, § 1 (occupation last five years); Ohio, § 644; Okla., § 6749; Ore., § 6333 (5); Vt., § 5610; Wash., § 7089; Wis., § 1976 (7).

[58] Cal. L., 1919, Ch. 607, § 1.

[59] Idaho, § 5014; Ohio, § 644; Vt., § 5610.

[60] Fla., § 596k; Ky., § 633.

where sufficiently specific, inform the ignorant that an agent's license is not to be obtained for the mere purpose of procuring a reduction in premiums on the insurance of the applicant himself or his employer.[61]

The New York application blank is more disingenuous. The following questions appear in the blank:

> 9. Does applicant, as agent, intend to procure insurance on his employer's property or risks and receive commissions thereon?.....
> If so, does applicant intend to allow or give to his employer, directly or indirectly, any portion of such commissions or any benefit therefrom?.....
> 10. Does applicant intend to procure insurance on his own property or risks and receive commissions thereon?.....[62]

These questions are framed to trap the unwary, on the theory that one unfamiliar with the anti-rebate law would not suspect that an affirmative answer would involve any moral turpitude or would lead to the rejection of the application. Occasionally, it works.

The contents of the application are sometimes minutely prescribed in the statute,[63] sometimes partly prescribed with an omnibus requirement of "such other information as may be required" by the commissioner,[64] and sometimes left wholly to the discretion of the commissioner.[65] Under the Maryland statute of the first type, it was held that the scope of the application indicated that the license was a regulatory one,[66] and presumably the commissioner has discretionary power of refusal though the statute does not expressly confer such power. The validity of the New York statute has been upheld against the contention that it confers

[61] The Pennsylvania department's application blank covers this point by a series of questions, such as: "14. Do you understand that it is illegal to pay any person, or share commissions with a policyholder, or any other person, who is not a licensed insurance agent or broker?"

[62] Taken from the "Application for Agent's Certificate of Authority for 1922" under Sec. 142 (other than life or health and accident). The same questions appear in the "accident and health" blank, but not in the "life" blank.

[63] Md. IV, § 184b; Mich. II, 3, § 10.

[64] Ky., § 633; Mass., § 163; N. H. L., 1913, Ch. 78, § 1; Ohio, § 644; Ore., § 6333; Vt., § 5610; Wash., § 7089; Wis., § 1976 (7) (life).

[65] N. Y. Consol. Laws, 1909, Ch. 33, §§ 91 ("shall be upon a form approved by the superintendent of insurance, giving such information as he may require"), 142 ("in such form as the superintendent of insurance shall prescribe"); N. C., R. B., § 4812a (similar to § 142, just quoted). See also Minn. L., 1915, Ch. 195, § 2; Okla., § 6749; Pa., § 62.

[66] Goldsmith *v.* Manufacturers' Liability Ins. Co. (1918), 132 Md. 283, 103 Atl. 627.

arbitrary power of refusal, on the ground that the use of the word "form" implies that a common standard will be adopted by the superintendent.[67] As to the second type, the Massachusetts qualification ("suitable person") is sufficiently broad to authorize an inquiry of much wider scope than that indicated by the items mentioned in the statute,[68] and the rule of *sui generis* would not be applicable to the words "such other information."

Taking the application forms of three states, New York (life), Massachusetts and Pennsylvania, the application blank of the latter is the broadest in range and fullest in detail. In addition to the formal items such as name, address, details of incorporation or partnership of the applicant,[69] present occupation, the inquiries relate to the following matters: Date and place of birth,[70] present nationality,[71] previous occupation for last two years[72] or five years,[73] previous experience in the insurance business,[74] education (schooling),[75] whether applicant's license has ever been revoked by *any* state,[76] whether applicant has ever been "arrested"[77] or indicted for,[78] or convicted of, a crime,[79] whether applicant has been delinquent in paying over premiums to any company for which he was employed,[80] whether applicant intends to devote his entire time to the insurance business,[81] whether applicant understands

[67] Stern *v.* Metropolitan Life Ins. Co. (1915), 169 App. Div. 217, 154 N. Y. Supp. 472 (recovery for services by unlicensed agent denied). This decision, reversing (1915), 90 Misc. 129, 154 N. Y. Supp. 283 (which held § 91 unconstitutional) was affirmed in (1916), 217 N. Y. 626, 111 N. E. 1101 (no opinion).

[68] Name, age, residence, present occupation, occupation for last preceding five years. (Mass., § 163.)

[69] Incorporation, only in Pa. Partnership, in Mass. and Pa.

[70] N. Y. and Pa.

[71] Pa.

[72] N. Y., Pa.

[73] Mass.

[74] Mass., N. Y., Pa. The latter requires a detailed statement.

[75] Pa.

[76] N. Y., Pa. The Mass. application requires "Names of insurance company or companies for which applicant has, within a year, ceased to be an agent, whether by failure to be reappointed or otherwise."

[77] Pa. An arrest for speeding under a motor vehicle ordinance would have to be reported under this broad inquiry.

[78] N. Y.

[79] N. Y., Pa.

[80] Mass., N. Y., Pa. The language here varies considerably, indicating some uncertainty as to the precise scope of the question.

[81] Mass., N. Y., Pa.

that certain practices are illegal,[82] whether applicant was assisted in preparing the answers to the questions, and if so, by whom.[83]

Despite the qualifications as to competency which are established by the agency laws of some states, no insurance department, so far as the writer has discovered, requires applicants to pass written examinations similar to those required of lawyers or doctors. In Idaho applicants are asked questions designed to test their technical knowledge.[84] In other states the license is issued upon the contents of the application; no independent investigation of the applicant's qualifications is made. The administrative policy apparently is that if the company approves him and the application discloses no defects, he will be licensed as a matter of course. This is indicated by the answers to Question 15a of the questionnaire:

15*a*. Do you make any independent investigation of the qualifications of an applicant for a license as insurance *agent*, or do you issue an agent's license as a matter of course upon formal application and the approval of the company whom he is to represent?

Of the thirty-two departments which answered this question, thirty [85] answer "no" to the first part and "yes" to the last. A record of complaints made by the insuring public against agents is sometimes kept and is used in passing upon renewal applications.[86] The enormous number of licenses issued or renewed annually (for instance, 45,000 in Pennsylvania in 1921), makes it impossible for the department to make a thorough investigation of each applicant. It is not so clear, however, that it would be impossible or financially prohibitive to provide the machinery to ex-

[82] The New York blank asks if applicant has read the provisions of the statute as to misrepresentations, rebates, discrimination, and the paying of commissions to unlicensed individuals. The Pennsylvania blank contains five questions, "Do you understand that" these practices are illegal.

[83] Pa.

[84] The Idaho department reports that life insurance agents "are required to answer a number of questions prepared by the department, tending to determine their fitness."

[85] Ariz., Colo., Del., D. C., Fla., Idaho (other than life), Ill., Ia., Kan., Mass., Mich., Minn., Mont., Neb., Nev., N. M., N. Y., N. C., N. D., Ohio, Okla., Ore., Pa., S. D., Utah, Vt., Va., Wash., W. Va., Wis. The answers are in some instances qualified vaguely such as: "investigation if necessary" (Md.), "if application not satisfactory" (Minn.), "if unusual" (Ohio), "if advisable" (Ore.), Conn. reports independent investigation sometimes made and N. H. about the same.

[86] This is done in New York. Arkansas uses "qualification cards."

amine all the *new* applicants each year. If the expensive process of annual renewal were done away with, enough might be saved for the administration of a genuine qualification law. The present scheme fails to keep out the incompetent; at best it eliminates the ones who are caught in illegal practices.

Discretionary power of refusal. While a few states apparently confer no discretionary power of refusal of an insurance agent's license,[87] in most instances such power is conferred in more or less certain language.[88] The employment of words of mental operation in the statute, such as "in his discretion," [89] "satisfied," [90] "convinced," [91] and words of like import,[92] is here, as in the case of company licenses,[93] an *indicium* of discretionary power. Even if discretionary power is not clearly conferred in the part of the statute relating to the issuance of licenses, it may be implied from the provisions conferring discretionary power of revocation.[94] The latter

[87] See Ala., § 8353; Miss., § 5093; N. M., § 2814; Del., § 77; Ga., §§ 935–7; Idaho, § 5009 (other than life); Ind., § 4714b (domestic); Wis., § 1976 (2); Wyo., § 5277.

[88] Ariz., §§ 3408, 3449, 3461; Ark., § 5087; Colo. L., 1915, Ch. 96; § 21; Conn., § 4069; Ga., §§ 2448, 2456; Ia., § 5737; Mich. II, 3, § 8, II, 4, § 6, II, 4, § 7; Minn. L., 1915, Ch. 195, § 5; Mo., § 6287; Mont. C., §§ 4023, 4035; Neb., §§ 3186, 3193, 3194, 3245, 3281; N. H. L., 1913, Ch. 78, § 1; N. J., p. 2856, § 63; N. Y. Consol. Laws, 1909, Ch. 33, §§ 91, 142; N. C., R. B., § 4812a; Ohio, § 644; Okla., §§ 6690, 6694; Ore., §§ 6333 (3), 6425 (1); Pa., § 62; S. C., § 2704; S. D., § 9160; Tex., § 4970 (general agent); Utah, § 1140 (2); Vt., § 5609; Va., § 4235; Wash., § 7089; W. Va., § 15d; Wis., § 1976 (7) (life).

[89] Ariz., § 3449; Idaho, § 5015; Mo., § 6287; N. H. L., 1913, Ch. 127, § 4; N. Y., § 91 (life insurance: "shall have the right to refuse to issue or renew any such certificate in his discretion.").

[90] Colo. L., 1915, Ch. 96, § 21; Idaho, § 5015–16; Ky., § 762a; Me., Ch. 53, § 124; Mass., § 163 ("if he is satisfied that the appointee is . . ."); Mich. II, 3, § 8; Minn. L., 1915, Ch. 195, § 5; Miss., § 5064 ("whenever it shall appear to the satisfaction of"); Mont. C., § 4029; Neb., § 3193; N. H. L., 1913, Ch. 78, § 1; Ohio, § 644; Okla., § 6749 (but cf. § 6690); Pa., § 62; Wash., § 7089; W. Va. L., 1923, Ch. 15, § 15d; Wis., § 1976 (7).

[91] Md. IV, § 184B.

[92] Neb., § 3281 ("found"); N. J., p. 2856, § 63 ("if the facts warrant it"); N. Y. L., 1914, Ch. 13, § 1 ("determines").

For other variants, see Okla., §§ 6690, 6749; Ore., §§ 6333 (3), 6335; S. C., § 2704; S. D., § 9160; Utah, § 1140 (2); W. Va., § 15d.

[93] *Supra*, § 12, pp. 112, 132.

[94] Vorys, Superintendent of Insurance, *v.* State *ex rel.* Connell (1902), 67 Oh. St. 15, 65 N. E. 150 [*mandamus* to compel issuance of license, refused, where grounds of revocation existed. "His refusal being in accordance with the manifest spirit of the statute, and in furtherance of its obvious purpose, was

is pretty clearly conferred by the statutes of a decided majority of the states. The greater clarity as to revocation may be due to the policy of using revocation rather than refusal as the method of regulation of agents.

Suspension. Coupled with the power of revocation in a large number of states is the power of suspension. In some instances the period of suspension is unspecified,[95] or is left explicitly in the discretion of the commissioner [96] (which would seem to be implied under statutes not specifying the duration of suspension); while in others the period of suspension is limited in the statute, either by fixing an upper limit [97] or a lower limit [98] or both.[99] The modern penological distinction between the "first offender" and the "habitual criminal" is reflected in statutes which prescribe a longer period of suspension for the second offence than for the first offence, in case of revocation for the agent's misconduct.[100] The distinction between provisions fixing the minimum period of suspension and those fixing a minimum period during which no license may be issued to an agent whose license has been revoked [101] is not always easy to draw. Theoretically, the distinction is this: that suspension, which is always for a definite period, implies automatic reinstate-

within his discretion, if not within his imperative duty." (67 Oh. St. at pp. 20–21)]. The converse is not true, however; e.g. under N. Y. Consol. Laws, 1909, Ch. 33, § 91, the superintendent is authorized to refuse a license "in his discretion," but is authorized to revoke only on "conviction" (i.e., judicial conviction, it would seem) of the agent.

[95] Ala., §§ 8343, 4561; Ohio, § 9592 (16) (until fine paid); (94) Ore., § 6389; Va., § 4235.

[96] Me., Ch. 53, § 126; Md. IV, § 184C; N. C. R. B., § 4812a.

[97] Cal. L., 1915, Ch. 644, § 1 (not over 3 yrs.); Me., Ch. 53, § 126; Mass., § 163 (not exceeding unexpired term); N. H. L., 1913, Ch. 127, § 4 (not over 3 yrs.); N. C. R. B., § 4812a (not over 1 yr.); Ohio, § 654 (1) (same); Pa., § 80.

[98] Conn., § 4123; Ind., § 4714e (1 yr.); La., § 3655 (3 yrs.); Minn. L., 1915, Ch. 195, § 6 (30 days); Mont. C., § 4029; Tex., § 4954.

[99] See citations in next note.

[100] Ark., § 5087 (3 to 6 months for first offence; 1 yr. for second); Ky., § 762 a–15 (90 days; 1 yr.); La., § 3628 (3 months; 12 months); Neb., § 3194 (30 days to 1 yr.; 2 to 5 yrs.); N. C. R. B., § 4767 (3 to 6 months; 1 yr.).

[101] Ind., § 4714e; N. Y. Consol. Laws, 1909, Ch. 33, § 142 (fire insurance; minimum of one year for licensee and, if licensee is a corporation or partnership, for all members of the partnership or officers of the corporation whom the superintendent determines to have been "personally at fault"); Ohio, §§ 9406, 9589 (3) (3 yrs.); Ore., § 6361, § 6362; S. D., § 9184; Tex., § 4971; Vt., § 5576 (1 yr.); Wash., § 7120 (1 yr.); § 7121 (2 yrs.); W. Va., § 15, 15a, 15d (1 yr.); Wis., §§ 1976 (7) (6 mos. to 3 yrs.), 1955 (5) (3 yrs.); Wyo., §§ 5237 (1 yr.), 5241 (6 mos.).

ment at the end of the period, without a renewal application; while after revocation the agent is unlicensed until he makes application *de novo* and a license is issued to him. Practically, if the period of suspension exceeds the unexpired term of the license, it would seem that the suspended agent would have to apply for renewal at the end of the suspension period. This and many other details of suspension have not been thoroughly worked out.

Duration of license. With very few exceptions [102] the term of the agent's license is fixed in the statute at one year. The date of expiration of the license, or of issuance of a renewal license (the two being treated here as synonymous) is sometimes not specified,[103] but more frequently is, as January 1,[104] March 1,[105] April 1,[106] July 1.[107] The trouble with these fixed dates, especially the earlier ones, is that very often the commissioner is obliged to pass upon the agent's application for a renewal before he has had time to inspect and approve the annual statement of the agent's company for the purpose of renewing its license. The New York statute takes care of this by providing that the agent's license shall expire December 31, but if the renewal application is filed before January 1, the agent may continue to act under the "expired" (*sic*) license until the issuance to him of a new license or until five days after the superintendent shall have notified him of a refusal to renew it.[108] This is a desirable administrative provision.

Grounds of refusal. Since most, if not all, of the grounds of revocation may also be grounds of refusal, the two might be conveniently

[102] Term not specified: Ark., §§ 5048, 5079; Fla. L., 1919, Ch. 7869, § 1.

[103] Term one year, date of renewal not specified: Ark. § 5117 (surety co.); Del., § 82; Ill., § 68; Ia., § 5737 (same as company's license); Kan., § 5185; Mo., § 6308; N. C. R. B., § 4706.

[104] Ala., § 8353 ("in January"); Ind., §§ 4714b, 4791; Md. III, § 184; N. Y. L., 1914, Ch. 13, § 1 (see note 108); Wyo., § 5277.

[105] Colo. L., 1915, Ch. 96, § 21; Ky., § 762a–16; Mich. II, 3, § 12; Minn. L., 1915, Ch. 195, § 2; Miss., § 5099; N. J. L., 2856, § 63; Ohio, § 644; Okla., § 6690 (but cf., § 6749 which says, "expires last day of *April*"); S. D., § 9160; Tex., § 4970; Utah, § 1140 (2); W. Va., § 15d; Wis., § 1976 (7).

[106] Ariz., § 3414; Conn., §§ 4123, 4293; Idaho, § 5006; La., §§ 3588, 3663, 3668; Mont. S., § 4023; N. H. L., 1913, Ch. 78, § 1; Pa., § 62; S. C., § 2704; Vt., § 5608; Wash., § 7089. See also Ore., § 6333 (renewable during March).

[107] Cal. Pol. Code, § 633; Me., Ch. 53, § 121; Mass., § 163. See also Neb., § 3192 (April 30); Va. § 4235 (July 15).

[108] N. Y. Consol. Laws, 1909, Ch. 33, § 142 (fire insurance); also § 91a (accident and health). The section on life insurance, (§ 91) provides that the license "must be renewed annually on the first day of January, or within six months thereafter."

treated together. However, it seems desirable to consider first certain grounds of refusal, and then to proceed to the grounds which are more commonly specified as grounds for revocation.

The statutes of most of the states do not provide that residence within the state shall be a necessary qualification of an applicant for an agent's license.[109] Nevertheless, it was held in Iowa in a case construing a provision authorizing refusal "for good cause shown" that the non-residence of the applicant was "good cause" for refusal since the ruling of the commissioner was in the public interest.[110] In a case upholding the validity of a statutory requirement that brokers be residents, it was pointed out that residence was a test of amenability to punishment.[111] Whether this or the policy of protecting the "home folks" from competition is the real basis for the requirement,[112] it seems constitutionally justifiable.

Another qualification which has not been as fortunate is that the applicant shall devote his entire time to his work as insurance agent. In *Hauser* v. *North British & Mercantile Insurance Co.*[113] a lawyer who had been refused a license as insurance broker on the ground that he refused to state in his application, as required by the statute,[114] that he intended to engage principally in the insurance business or "to conduct such business in connection with a real estate agency," brought *mandamus;* the court gave him judgment, holding the statute unconstitutional on the ground that the requirement was "a purely arbitrary restriction," not "in the public interests" but "obviously in the interests of the class, either of insurance, or of real estate, brokers." It was pointed out

[109] Residence is a necessary qualification in Kan., § 5351; Mich. II, 3, § 1; Mont. S., § 4023; N. H., Ch. 169, § 7; N. C., § 4707; Ohio, § 645 (retaliatory); N. D., §§ 4913 (4), 4926, 4961; Okla., § 6695; Ore., § 6333; Pa., § 178 (fire and marine); R. I., Ch. 220, § 6; S. C., § 2713; S. D., § 9186; Tenn., § 3369a (59); Vt., § 5609; Va., § 4222; Wash., § 7080; W. Va., §§ 36, 60a; Wis., § 1919a; Wyo., §§ 5288, 5289.

[110] Noble *v.* English (1918), 183 Ia. 893, 167 N. W. 629 (*mandamus* refused).

[111] LaTourette *v.* McMaster (1916), 104 S. C. 501, 89 S. E. 398. One reason given by the Iowa Commissioner for refusing to license a non-resident was the difficulty of serving legal process on a non-resident.

[112] Under date of January 8, 1920, the Iowa commissioner reversed the former ruling (Noble *v.* English, *supra,* note 110) and announced that non-resident agents would be licensed, subject to revocation for "irregular practices." This indicates that the "good reason" was also the "real reason."

[113] (1912), 206 N. Y. 455, 100 N. E. 52, affirming s.c. 152 App. Div. 91, 136 N. Y. Supp. 1015.

[114] N. Y. Laws, 1911, Ch. 748.

that this qualification was not a test of competency, and if it was designed to prevent rebating, it was too remotely related to its object. While this case involved a *broker's* license, the reasoning seems equally applicable to the agent's license; indeed, the court in several places speaks of "insurance agent or broker" as if the two were interchangeable in this connection.[115] Both the reasoning and the conclusion seem sound. If the state desires to test the fitness of applicants for an agent's license, it should do so by applying to applicants the examinations or other methods used in the regulation of professions or other vocations. The interesting thing to note, however, is that in 1922 the New York insurance department was still sending out with application blanks for life insurance agent's license, a copy of the ruling of the department, made in 1909, that the "regular practice" of the department "is to issue such licenses only to men who intend devoting their entire time to the business of soliciting life insurance"; that this rule is varied from only when the applicant proposing to devote only part-time presents not only the "strongest recommendations as to competency and trustworthiness" but also "definite assurances . . . that the applicant intends ultimately to engage exclusively" in the business of life insurance, and that the part-time licensee will be merely allowed time to effect a transition from his former occupation.[116] Not even the thunders of a judicial Jove can shake the administrator from his rule of thumb!

[115] E.g.: "What is there in the calling of an insurance agent or broker which demands any special training, or knowledge, not readily to be acquired by any business man?" (206 N. Y. 463.)

[116] The ruling is so worded as not to exclude summarily, but rather to discourage, the part-time applicant. It proceeds further: ". . . the record of the applicant to whom a license may be granted to do business for one year as a part-time man will be carefully scrutinized at the end of the year with respect both to the volume of business transacted during the year and the manner in which it has been transacted. If it should then appear that the results have been such as to indicate either that the applicant has not established himself sufficiently in the life insurance field to warrant the conclusion that he can conduct that business exclusively or that there has been any lack of professional knowledge and efficiency in his dealings with his clients, the license will not be renewed at the end of the first year." The statute declared unconstitutional (*supra*, n. 113) was repealed by N. Y. L., 1913, Ch. 7. A study of the problem of "whole-time agents for life insurance," made several years ago by Edmund Strudwick, Jr. (1917) 70 *Ann. Am. Acad. Pol. & Soc. Sci.*, pp. 150–162) indicates that the question is at least debatable and probably involves important questions of policy. A questionnaire sent by Mr. Strudwick to insurance agencies indicated that a majority saw no objection to the appoint-

At the other extreme from the statutes which are so framed as to allow the commissioner practically no discretionary power of refusal, are statutes which give him unregulated discretionary power or at best set up loose and indefinite standards of competency and moral fitness. One extreme example is the New York statute as to life insurance agents,[117] which provides that the superintendent

> shall have the right to refuse to issue or renew any such certificate [that is, agent's license] in his discretion

without indicating, either expressly or by implication from the contents of the application (which are not prescribed) any norms for the exercise of such discretion. That this does not confer *uncontrolled*, that is, judicially unimpeachable, discretionary power, seems reasonably clear, though there are no New York cases defining the limits of the power. In *Stern* v. *Metropolitan Life Insurance Co.* failure of plaintiff to comply with this section was pleaded as a defence to an action for agent's commissions. The court of first instance sustained a demurrer to the defence, holding the statute was unconstitutional because it conferred an arbitrary and unlimited discretionary power upon the superintendent and thus deprived the plaintiff of his "liberty" of pursuing a lawful calling, without "due process of law." [118] However, this decision was reversed by the Appellate Division on the ground that, in case of doubt, the statute will be given that construction which sustains its validity. Some excerpts from the opinion will show the court's reasoning:

> We may not presume, therefore, in the absence of language indicating a contrary intent, that the Legislature intended to grant to the Superintendent of Insurance unrestricted power or unregulated discretion, or that in refusing a certificate he will act arbitrarily or oppressively.[119] In case

ment of part-time solicitors, and about one third of those questioned thought that part-time solicitors should be retained in rural districts but abolished in urban districts. In the light of this study the *fiat* of the New York department seems hasty and rather arbitrary.

[117] N. Y. Consol. Laws, 1909, Ch. 33, § 91.

[118] (1915), 90 Misc. Rep. 129, 154 N. Y. Supp. 283.

[119] (1915) 169 App. Div. 217, 219, 154 N. Y. Supp. 472. The term "unregulated discretion" is used by the court as meaning "arbitrary," not governed by self-imposed administrative regulations, which is different from the sense in which "unregulated discretionary power" is used by the present writer as meaning "unrestricted by regulations embodied in the statute conferring the power."

it should be, the law will afford relief to the injured person. . . . Furthermore, the express terms of the section in question leave no basis for the claim that the Superintendent is given arbitrary and capricious power, or that he should not act under regulations and conditions applicable to all alike. . . . The requirement that the applicant shall have first secured the approval of the company he seeks to represent is manifestly proper and is one step toward the adoption of a uniform system. The further provision that the application shall be "upon a form" approved by the Superintendent, which form shall give him "such information as he may require" clearly contemplates the adoption of a common standard for all applicants, but retaining in the Superintendent . . . authority to determine whether the applicant conforms thereto.[120]

While the court seems to be grasping at straws in its effort to find a "common standard," the affirmance of the Appellate Division's decision by the Court of Appeals [121] indicates that the problem of unregulated discretionary power has passed from the domain of constitutional [122] to that of administrative law; that is, from the question of the validity of the statute to the question of the "arbitrariness" or "reasonableness" of a particular administrative refusal.

Somewhat more restricted and yet falling short of a recognizable standard is the Massachusetts type of statute which provides that the commissioner shall license "if he is satisfied" that the applicant is a "suitable person." [123] Only one case has been found construing a statute of this type. In that case [124] the court declared that the statute was unconstitutional in so far as it purported to confer unregulated discretionary power on the commissioner, which, the court said, it clearly did by the use of the word "suitable." The court said:

[120] 169 App. Div. 217, 220, 221.

[121] (1916), 217 N. Y. 626, 111 N. E. 1101 (No opinion; the question, is § 91 constitutional, was answered in the affirmative).

[122] See Yick Wo *v.* Hopkins (1886), 118 U. S. 356, 370, 6 Sup. Ct. 106; Harmon *v.* State (1902), 66 Oh. St. 249, 64 N. E. 117 (engineer's license).

[123] Mass., § 163. "Suitable person" is also the language used in: Colo. L., 1915, Ch. 196, § 21; Conn., § 4282; Me., Ch. 53, § 124; N. H. L., 1913, Ch. 78, § 1; Ohio, § 644; Okla., § 6690; Vt., § 5610. A more definite standard is "reasonably familiar with the insurance laws." (Pa., § 62.)

[124] Welch, Ins. Com'r *v.* Maryland Casualty Co. (1915), 47 Okla. 293, 147 Pac. 1046 (*mandamus* to compel the commissioner to issue to the individual plaintiff a license to act as agent in Oklahoma for the corporation plaintiff under Okla. Rev. Laws, 1910, §§ 3429, 3433. Judgment for plaintiffs was affirmed).

. . . the legislature is without power to delegate authority to any person or board to grant or refuse a license at his or its discretion, arbitrarily or capriciously, according to the state of mind of such officer or persons composing such board. . . . The legislature failed to provide any rule controlling the judgment or discretionary power of the insurance commissioner. For reasons satisfactory to himself upon an *ex parte* examination or without any examination, he could say to one applicant, who might be pre-eminently qualified, "I find you to be an unsuitable person. . . ." [125]

The opinion confuses several distinct questions: 1. The constitutionality of unregulated discretionary power; 2. Judicial control of arbitrary exercise of such power; 3. Failure of the statute to provide for notice and hearing before refusal of an application; [126] 4. The failure of the commissioner, in his return to the *mandamus* proceeding, to give any specific reason for the refusal of the license.

In so far as the first question is concerned, the case probably represents a dwindling minority. The Massachusetts statute has been in force since 1887.[127] During all that time its validity has not been tested. The decided tendency of recent decisions upholds similar provisions.[128] Of like significance are statutes authorizing the commissioner to issue if he determines the applicant to be a "proper person," [129] or to refuse "for good cause shown." [130] Valid though they are, these loose phrases may profitably be discarded in favor of more definite standards which will better safeguard individual interests without impairing effective regulation.

[125] 47 Okla. at pp. 299, 300, 301.

[126] The court seems to be in error in its assumption that the statute fails to provide for notice and hearing. Section 2433, which is to be construed with § 2429, provides that the commissioner may "for cause shown" refuse a license. Such language is usually construed to require notice and hearing, by implication.

[127] Mass. Acts, 1887, Ch. 214, § 91. In its present form, the statute dates from 1911.

[128] State *ex rel.* Swearingen *v.* Bond (1924), 96 W. Va. 193, 122 S. E. 539 ("trustworthy and competent"; agent's license); Wilson *v.* Eureka City (1899), 173 U. S. 32, 19 Sup. Ct. 317; 20 Mich. L. Rev. at p. 883; Powell, *Administrative Exercise of the Police Power* (1910), 24 *Harv. L. Rev.* 268, pp. 277–8 (1921); 21 *Columbia L. Rev.* 275, 819; G. F. Redmond & Co. *v.* Michigan Securities Comm'n (1923), 222 Mich. 1, 192 N. W. 688 ("good cause" not too vague ground for revocation of "Blue Sky Law" license).

[129] Idaho, § 5015 (life insurance); Mich. II, 3, § 8 ("fit or proper" person) N. C. R. B., § 4812a; S. C., § 2704 ("fit and proper"). See also Ore., § 6333 (3) ("qualified"); Pa., § 62 ("worthy") S. D., § 9160 ("of good reputation and character"); Tex., § 4970 (same); Utah, § 1140 (2) (same).

[130] Ia., § 5737; Okla., § 6694 (see § 6749); Va., § 4235. See Noble *v.* English, *supra*, n. 110, upholding the validity of this delegation of power.

Grounds of revocation. Among the commoner grounds of revocation is the general ground, violation of, or non-compliance with, "law," the "statutes of this state," or "the provisions of this chapter." [131] The presence of the qualification, "wilfulness," in a number of the statutes just cited injects the element of guilty intent into the ground of revocation. Without such a qualification, however, a revocation for an innocent violation of law would seem to be authorized. These provisions involve similar questions as to the scope of the ground of revocation to those involved under the like provisions as to company's licenses.[132]

It is likewise frequently provided that the agent's license may be revoked on the same grounds as the license of the company he represents.[133] In view of the practice of "blacklisting" agents by insurance departments, and of the stigma attached to revocation of an agent's license, it would seem desirable to distinguish between this ground of terminating the agent's license by calling it "cancellation" or some other name which would set it off from revocation for the agent's personal disqualification or misconduct. Certainly it would be harsh to disbar an attorney at law because of the exclusion from the state of his corporation client.

Aside from the loose qualifications mentioned above ("suitable," "fit," "proper" person),[134] only a few states prescribe incompetency or insufficient knowledge as a ground of refusal or revocation.[135] The emphasis is upon moral rather than mental equipment. A number of states prescribe dishonest or fraudulent conduct, with varying degrees of definiteness, as a ground of refusal

[131] Idaho, § 5016; Ky., § 762–15 ("wilful" violation); Me., Ch. 53, § 126 ("wilfully"); Md. IV, § 184C ("wilfully" violated); Neb., § 3194; N. J., p. 2856, § 63; N. Y. L., 1914, Ch. 14, § 1 ("violations of the insurance law"), Ch. 13, § 1; N. C. R. B., § 4812a ("wilfully"); Ohio, § 654 (1); Okla., § 6749; Ore., § 6334 (3) ("wilful"); S. C., § 2704; Tex., § 4971; Utah, § 1140 (2); Vt., § 5611; W. Va., § 56d. See also Ala., § 8343 (non-compliance by company, as ground for revocation of agent's license.)

[132] See *supra*, § 13, p. 133.

[133] Ala., § 8343; Colo. L., 1913, Ch. 99, § 9; Conn., § 4160; Ky., §§ 752, 753; Mass., § 5; Minn., § 3294; Mont. S., § 4065a; Neb., § 3186; N. C., § 4701; Okla., § 4925; S. C., § 2700; S. D., § 9179; Tenn., §§ 3283, 3302; Tex., § 4899; Utah, § 1134; Wash., §§ 7039, 7076, 7157.

[134] See the statutes cited in notes 123, 129, 130, *supra*.

[135] Minn. L., 1915, Ch. 195, § 5 ("incompetent or unqualified"); N. C. R. B., § 4812a ("sufficient knowledge"); Okla., § 6749; Pa., § 62; Vt., § 5611; W. Va., § 15d. See also Colo. L., 1919, Ch. 607, § 1 (must state experience in application).

or revocation.[136] Closely akin to these are the statutes providing for revocation if the agent fails to pay over money due the company which he represents.[137] The language of these statutes is not always qualified in such a way as to require a finding of moral delinquency, and a vigorous and conscientious commissioner may become the arbiter of private disputes between the company and its agent which would otherwise be settled in court. The distinction between dishonesty and failure to pay a debt is apt to be too subtle for the non-legal mind. It will be pointed out further on that, under a provision far less definite, the New York department has one man devote the bulk of his time to investigating these and like premium claims and compelling their payment.

Closely akin are the twin grounds, misrepresentation and "twisting," which have become fairly common in recent years.[138] Not all the statutes name "twisting," but they are none the less clearly aimed at the practice or practices which go by that name. Just what these practices are is very difficult to put into words, if, indeed, any one has a clear conception of them. "Twisting" is an

[136] Colo. L., 1919, Ch. 607, § 1 (conducts business in dishonest manner); Idaho, § 5016 ("untrustworthy," or if commissioner was "deceived" in the application); Ky., § 762a–15 ("dealt unjustly with any person"); Me., Ch. 53, § 126 ("dealt unjustly with any citizen"); Md. IV, § 184C (same) (also, false statement in application); Minn. L., 1915, Ch. 195, §§ 5, 6 ("untrustworthy," "dishonest in connection with any insurance transaction," not of good moral character); Neb., § 3194 ("fraudulent practices"); N. Y. L., 1914, Ch. 13, § 1, and Ch. 14, § 1 (same); N. C. R. B., § 4812a ("dealt unjustly with or wilfully deceived any citizen"); Ore., §§ 6335 (6), 6425 (4); S. C., § 2704 ("wilfully deceiving or dealing unjustly"); Tex., § 4971; Utah, § 1140 (2); Wash., § 7089; Wis., § 1976 (7).

[137] Ind., § 4791a; Me., Ch. 53, § 126; Md. IV, § 184C; Minn. L., 1915, Ch. 195, §§ 5, 6 ("unreasonably" failed to pay); N. C. R. B., § 4812a; Ore., § 6425 (4); Tex., § 4971; Utah., § 1140 (2); Va., § 4235; Wis., § 1976 (7).

[138] Cal. L., 1919, Ch. 607, § 1, L., 1915, Ch. 644, § 1 ("knowingly or wilfully" misrepresenting); Ind., § 4714d; Ky., § 762a–15 ("wilfully misrepresented"); Me., Ch. 53, §§ 126 ("wilfully misrepresented"), 141 (twisting); Md. IV, § 184C ("wilfully misrepresented"; twisting or attempting to twist by misrepresentation); Mich. I, 2, § 6 (misrepresentation); Minn. L., 1915, Ch. 195, § 5 (misrepresentation or "urged or procured any person . . . to lapse any policy of insurance . . . to the damage of such person"); Neb., § 3281; N. H. L., 1913, Ch. 127, § 4 ("knowingly or wilfully"); N. Y. L., 1911, Ch. 533, and L., 1913, Ch. 47, amending Consol. Laws, 1909, § 60 (first enacted, 1906; revocation after judicial conviction of licensee); N. C. R. B., § 4812a; Okla., § 6759; Ore., §§ 6334, 6431; Pa., § 80; Wash., § 7089; W. Va., § 15a; Wis., § 1976 (7); Wyo., § 5241. Wis., § 1976 (7) provides revocation for misrepresenting the condition of an applicant for insurance.

uncooled business standard which has flowed red-hot from the fires of competition. It is a fusion of misrepresentation of one's own policies and concealment of the merits of one's competitor's. The Minnesota statute emphasizes the further element of *damage* to the policyholder.[139] The New York statute emphasizes the *purpose* or *tendency:*

> Nor shall any such corporation or agent thereof or any other person . . . make any misleading representation or incomplete comparison of policies to any person insured in any such corporation for the purpose of inducing or tending to induce such person to lapse, forfeit or surrender his said insurance.[140]

Since the criteria of motive or purpose are objective, the two statutes probably do not differ substantially in meaning.

How far may the honest agent go in representing the virtues of his policy as compared with those of a rival policy already held by his prospect, and when may he safely stop a comparison once begun, to avoid its being "incomplete"? Must he point out the merits of his rival's and the demerits of his own policy? It is doubtful whether a criminal conviction under such a statute could be sustained. There is an intimation in a New York decision that it is sufficiently definite as a ground of revocation.[141]

Another fairly common ground of revocation is discrimination or rebating.[142] In upholding the constitutionality of such prohibitions the courts have been impressed with the quasi-public charac-

[139] See last note.

[140] Consol. Laws, 1909, Ch. 33, § 60, as amended; see note 138. This section applies only to life, accident, and health insurance.

[141] People *ex rel.* Burr *v.* Kelsey (1908), 129 App. Div. 399, 113 N. Y. Supp. 836 (prohibition denied to restrain superintendent from revoking agent's license under this section, before the amendments which broadened its scope).

[142] Ala., § 4607; Ariz., §§ 3408, 3461 ("knowingly and wilfully"); Ind., § 4706a; Kan., § 5370 (either); Ky., § 762a–15 (rebating); La., § 3628 (rebating or refusal to swear not guilty of rebating); La., § 3655; Conn., § 4123 (upon conviction); Mich., § 109 (rebating); Miss., § 5064; Mont. C?, § 4029, S, § 4141; Neb., § 3281; N. H. L., 1913, Ch. 127, § 4 ("wilfully or knowingly" rebating); N. H. L., 1907, Ch. 111, § 2; N. J. L., 1912, Ch. 162, § 5; N. C. R. B., § 4812a; Ohio, §§ 9406, 9589 (5); Okla., § 6759; Ore., §§ 6362, 6389, 6431; S. D., § 9184; Tex., § 4954; Utah, § 1167; Vt., § 5576; Wash., § 7077; W. Va., § 15; Wis., § 1955 (0) (5); Wyo., § 4237. Mass. (§ 182) and New York (L., 1911, Ch. 416, and Consol. Laws, 1909, Ch. 33, § 89) provide a penalty for discrimination or rebating but do not expressly provide that it shall be a ground of revocation. However, the attorney-general of New York has ruled that a violation of § 89 is sufficient ground for revocation of an agent's license (N. Y. Op. Atty-Gen. (1904) 439).

ter of insurance enterprises and the need for equality of service.[143] Another element of policy behind such provisions is that of preventing unfair competition. More important is the danger to the financial safety of the enterprise by the cutting of rates below the point where an adequate reserve fund may be maintained. The danger of rates being too low is fully as great as the danger of rates being too high.

The interpretation of these statutes by the courts has given rise to some nice distinctions. To offer or give a reduction in premium of fifty per cent to one applying for insurance is clearly a violation of the statute,[144] as is also the paying of a percentage (on policies written) to an indefinite group of policyholders designated as a "Board of Reference," whose duties were purely nominal.[145] A closer case was presented where the agent for a surety company, working on a salary basis as Secretary of an Association of Highway Contractors, an association organized for profit, wrote the surety and liability insurance for the members of the association, charging them the usual premiums but turning his commissions into the treasury of the association, which used it to pay his salary and other expenses. A revocation of this agent's license was upheld.[146]

On the other hand, where a mortgage loan company induced applicants for loans to agree to give the company, which was also an insurance agent, the placing of insurance on the mortgaged property, in return for making the loan, it was held that the agent's license could not be revoked.[147] So, it was held not a violation of

[143] State *ex rel.* Swearingen *v.* Bond (1924), 96 W. Va. 193, 122 S. E. 539; Equitable Life Assurance Society *v.* Comm. (1902), 113 Ky. 126, 67 S. W. 388. See also, upholding the validity of anti-rebate laws, People *v.* Hartford Life Ins. Co. (1911), 252 Ill. 398, 402, 96 N. E. 1049; People *v.* Formosa (1892), 131 N. Y. 478, 30 N. E. 492. See *infra*, § 21, pp. 307 *et seq.* for further discussion.

[144] Vorys *v.* State *ex rel.* Cornell (1902), 67 Oh. St. 15, 65 N. E. 150 (agent's license revoked).

[145] Citizens Life Ins. Co. *v.* Commissioner of Insurance (1901), 128 Mich. 85, 87 N. W. 126 (refusal to renew company's license). But see Julian, Com'r *v.* Guarantee Life Ins. Co. (1909), 159 Ala. 533, 49 So. 234, where a very similar scheme was held not to constitute rebating.

[146] Lyman *v.* Ramey (1922), 195 Ky. 223, 242 S. W. 21. This case is a good example of the muddled condition of some insurance statutes due to cross-references with defective correlation.

[147] Calvin Phillips & Co. *v.* Fishback (1915), 84 Wash. 124, 146 Pac. 181 (Mount. J., dissented). See also State *ex rel.* Coddington *v.* Loucks (1924) 32 Wyo. 26, 228 Pac. 632 (selling stock with insurance policies is not rebating). However, see cases cited *infra*, § 21, pp. 312–313, 329.

the statute for the agent to take a note for the premium payable in eighteen months *without interest* before maturity.[148]

Thus, the commissioner is called upon to make some pretty fine distinctions in applying these provisions. In connection with the case last cited it is interesting to note that some insurance departments have issued "rulings" to the effect that it will be deemed a violation of the anti-rebate law for any agent to accept a premium note which does not bear interest from *date* at a rate not *less* than six per cent.[149] Thus a provision conceived as a prohibition of illegal practices becomes the basis of a detailed administrative regulation of the terms of "private" contracts.[150]

Corresponding to the vague grounds of refusal mentioned above are various indefinite grounds of revocation, such as "for cause shown,[151] "unsuitable person," [152] "unfit," [153] "conducting his business in such a manner as to cause injury to the public or those dealing with him." [154] To complete the picture and indicate the scope of the regulation of agents by the licensing system, it seems well to enumerate some of the "miscellaneous" grounds of revocation which are found in one or more states: Selling corporation stock with insurance; [155] using forbidden policy forms; [156] reinsuring with or for any unlicensed company; [157] paying commissions to a non-resident agent; [158] wilfully over-insuring prop-

[148] McGee *v.* Felter (1912), 75 Misc. 349, 135 N. Y. Supp. 267.

[149] Colo. ruling of May 12, 1920; Ind., March 5, 1920; Iowa, June 12, 1919.

[150] See also the Alabama ruling of November 22, 1920, that an agent who discounts or disposes of a premium note prior to the delivery and acceptance of the policy will lose his license. The statutory basis for this ruling is not stated by the commissioner. In two states, the statute expressly forbids such a practice: Ore., § 6432; Wis., § 1976 (7). The object is apparently to prevent the agent from cutting off (by the transfer of the negotiable premium note to a holder in due course) the insured's power, and possibly his privilege, of changing his mind. For a further discussion of business-getting methods, see *infra*, § 21.

[151] Conn., § 4159; La., §§ 3588, 3591; Mass., § 163; Mich., § 89; N. Y. L., 1914, Ch. 41, § 1; also Ia., § 5737 ("for good cause shown"); N. D., § 6694; Ore., § 6425; Pa., § 62; S. D., § 9160; Wis., § 1976 (7).

[152] Colo. L., 1915, Ch. 96, § 21; Me., Ch. 53, § 124; N. H. L., 1913, Ch. 78, § 1; Ohio, § 644; Okla., § 6749; Vt., § 5611.

[153] Idaho, § 5016; Me., Ch. 53, § 126; N. C. R. B., § 4812a.

[154] Colo. L., 1919, Ch. 607, § 1; Ore., § 6334; Wash., § 7089.

[155] Ala., § 4610; Ariz., § 3408; S. C., § 2731.

[156] Ariz., § 3461; Neb., § 3245; Vt., § 5635; Va., § 4320.

[157] Ark., § 5087; Okla., § 6759.

[158] Ark., § 5087; Miss., § 5120; N. C., § 4767; W. Va., § 539; Wis., § 1955 (0) (5).

erty;[159] failing to conform to provisions as to insurance rates;[160] refusing to testify or to produce papers;[161] and having been convicted of an infamous crime.[162]

From the foregoing summary it will be seen that the commissioner's powers of licensing range over a broad field of human conduct and offer opportunities for many nice distinctions, if not discriminations. Possibilities of arbitrary action lurk beneath vague and unformulated standards. On the whole, however, the exercise of these powers has brought nothing more than an elimination of the obviously unfit.

Licensing of other company employees. In recent years there has been a tendency to extend the licensing system to the employees of insurance companies other than those engaged, as "insurance agents" in the narrow and popular sense, in soliciting applications and writing insurance. Thus, "adjusters," those representatives of the company who investigate claims of losses by insured persons and settle or recommend the settlement of such claims, are required to obtain licenses in a few states. The issuance of such licenses is usually predicated upon vague and indefinite grounds, such as "suitable person,"[163] "trustworthy and competent,"[164] "of good moral character"[165] and "has sufficient knowledge of the business of insurance and his duties as adjuster."[166] The grounds of revocation are equally undefined, such as "unsuitable person,"[167] "for cause shown,"[168] "fraud or serious misconduct."[169] Here again, the standards of conduct are still in the making. Stock-selling agents,[170] inspectors of risks employed by rating bureaus,[171] and

[159] Ky., § 762a–15; Me., Ch. 53, § 126; N. C. R. B., § 4812a.

[160] Kan., § 5370; Mo., § 6297; Neb., § 3186; Ore., § 6341.

[161] Minn. L., 1915, Ch. 195, § 7; N. J., p. 2856, § 63.

[162] Md. IV, § 184C. See also Okla., § 674a ("other bad practices"). In Wash. the court may in some cases revoke the license of a convicted agent: State *v.* Cannon (1923), 125 Wash. 515, 217 Pac. 18.

[163] Me., Ch. 53, § 28; Mass., § 172.

[164] Mass., § 172; Mich. II, 3, § 15, II, 3, § 16; Pa., § 330.

[165] N. C. R. B., § 4762a (7).

[166] N. C. R. B., § 4762a (7). The Oregon and Washington statutes prescribe no qualifications for the applicant for an adjuster's license: Ore., § 6345; Wash., § 7081.

[167] Me., Ch. 53, § 128.

[168] Mass., § 172. See also Ore., § 6345 (revocation for violation of insurance laws).

[169] Mich. II, 3, § 15, II, § 16.

[170] Colo. L., 1913, Ch. 99, § 34; Ore., § 6365 (6); Va., § 4237. See the reference to this point in connection with the formation of new companies, *supra*, § 10, p. 60.

[171] Mo., § 6275.

collectors of premiums,[172] are other classes of persons subjected to the commissioner's licensing power. The hierarchy of insurance company employees may yet attain the philosopher's dream of a fixed ordering of sharply defined classes of individuals, each according to his ordained status.

§ 15. *Licensing of brokers.* The problems relating to the licensing of insurance brokers by the commissioner are similar in most respects to those arising out of the licensing of agents, and much of what has been said in the foregoing section will be applicable here. Hence, only the peculiarities of the broker's license need separate treatment.

With respect to the jural relations of "private" law the chief difference between the broker and the agent is that the latter has, while the former has not, the power to impose duties upon the insurance company in favor of the insured. In some types of insurance agency the agent has the power to approve risks and to execute and deliver policies; and in all types of insurance the agent may in some degree impose duties or liabilities on the company under doctrines of waiver and estoppel. On the other hand, the broker is the agent of the insured, though normally his powers are limited. Perhaps it is more accurate to describe the broker as essentially an independent contractor who acts as "go-between" for both insurer and insured.

This difference in the private law relations of the two classes calls for different degrees and types of regulation in respect to the two. In the first place, the insurance company is not called upon to exercise any scrutiny or selection of the broker, as it is of the man who is to represent it as agent. In the second place, the non-responsibility of the insurer for the broker's acts calls for a higher degree of expertness and trustworthiness in the broker than in the agent, as the risk of the incompetency, carelessness, or dishonesty of the broker falls upon the insuring public. For these reasons the administrative regulation of brokers has been, in those states where it is authorized, somewhat more thoroughgoing than the regulation of agents.

Of the many definitions of an insurance broker that adopted in Massachusetts seems the most concise and accurate:

> Whoever, for compensation, not being the duly licensed insurance agent of the company in which any policy of insurance or any annuity or pure

[172] Nev., § 1276.

endowment contract is effected, or an officer of a domestic company acting under section 165 [1] acts or aids in any manner in negotiating policies of insurance or annuities or pure endowment contracts, or placing risks or effecting insurance, or in negotiating the continuance or renewal of such policies or contracts for a person other than himself, shall be an insurance broker.[2]

The constitutionality of the Massachusetts statute requiring that persons falling under this description shall obtain licenses as brokers, was upheld in *Nutting* v. *Massachusetts*.[3]

A majority of the states do not recognize the class of insurance brokers as distinct from insurance agents in their common law relations with the insured and the insurer. For reasons of policy which need not be gone into here, it has been declared by statute that any person who solicits insurance or transmits an application for insurance to a company, for any person other than himself, shall be deemed the agent of the insurance company unless it can be shown that he receives no compensation for such services.[4] The constitutionality of such a statute has been upheld.[5] In a majority of the states there were, in 1921, no provisions for the licensing of "ordinary" [6] brokers.[7] In several of the states which provide for the licensing of brokers the license is a mere revenue device and does not involve regulation.[8] In such a jurisdiction failure to obtain a license would be no bar to recovery of commission by a broker.[9] On the other hand, under a licensing statute of the regu-

[1] Section 165 authorizes an officer of a domestic company to act without a license for such company in the negotiation of insurance contracts.

[2] Mass., § 162.

[3] (1902), 183 U. S. 553, 22 Sup. Ct. 238, 46 L. ed. 324 affirming Commonwealth *v.* Nutting (1900), 175 Mass. 154, 55 N. E. 895 (criminal prosecution of unlicensed broker).

[4] Wis. Rev. St., 1898, § 1977. Similar statutes are: Ala., § 4590; N. D., § 4959; Ohio, § 9586; Okla., § 6723; Ore., § 6334; R. I., Ch. 220, § 10; S. C., § 2711; Tex., § 4961; Utah, § 1140 (1); W. Va., § 13b.

[5] Welch *v.* Fire Assoc. of Phila. (1904), 120 Wis. 456, 98 N. W. 227.

[6] I.e., distinguished from the "excess line brokers" discussed *infra*, p. 188.

[7] Ala.; Ariz.; Ark.; Del.; Ga.; Idaho; Ill.; Ind.; Ia.; Kan.; Ky.; Mich.; Mass.; Mont.; N. C.; N. D. (1913); Okla.; Ore. (1920); S. C. (1912); S. D. (1919); Tex. (1914); Utah (1917); Va. 1919); Wis.; Wyo. (1920).

[8] Mo., § 6317; Nev., § 1280 (license issued by county license collector). In New Jersey the license appears to have been originally a revenue license, although subsequently provision has been made for revocation of the license on the ground of rebating; N. J. L., 1912, Ch. 162, § 5.

[9] See Fritschle *v.* New Amsterdam Casualty Co. (1922), 209 Mo. App. 337, 347, 238 S. W. 850.

latory type the unlicensed broker may not recover compensation for his services.[10] It is possible, of course, that the broker's licensing statute may have both revenue and regulation in view.[11]

The statutes usually provide for an application, the details of which are not usually prescribed.[12] In several states the Massachusetts device of requiring a statement as to the trustworthiness and competency of the applicant, signed by at least three reputable citizens of the state, has been adopted.[13] The New York department, by administrative ruling, requires each applicant (outside of those from New York City) to furnish three "references," who are usually written to or interviewed. The payment of a fee, usually much larger than that required of agents, is commonly required.

A specific kind or amount of previous experience or training is usually not required by the statutes. An exception is a South Carolina statute which provides that to be licensed as an insurance broker the applicant must have been a licensed insurance agent of South Carolina for at least two years.[14] The constitutionality of this requirement was upheld in *Latourette* v. *McMaster*[15] on the ground that it imposed a test of experience. The soundness of this

[10] Goldsmith *v.* M'f'rs Liability Ins. Co. (1918), 132 Md. 283, 103 Atl. 627; Pratt *v.* Burdon (1897), 168 Mass. 596, 47 N. E. 419. See also Wyatt *v.* McNamee (1906), 50 Misc. 348, 98 N. Y. Supp. 749; Crichton *v.* Columbia Ins. Co. (1903), 81 App. Div. 614, 81 N. Y. Supp. 363.

[11] Shehan *v.* I. Tanenbaum & Co. (1913), 121 Md. 283, 88 Atl. 146.

[12] Cal. L., 1919, Ch. 547, § 1; Colo. L., 1919, Ch. 137, § 1; La., § 3770 (occupation and experience must be stated); Me., Ch. 53, § 124 (sworn statement as to present occupation, occupation for last five years and such other information as commissioner may require); Md. IV, § 184C; Mass., § 166 (same as Me.); Minn. L., 1915, Ch. 195, § 2; N. Y. L., 1915, Ch. 56, § 1 (sworn application giving previous employment and such other information as the superintendent may require to determine the trustworthiness and competency of applicant); Ohio, § 644-2 (details partly prescribed in act); Pa., § 68 (form prescribed by com'r); Vt., § 5610 (details partly prescribed); W. Va., § 53a (details partly prescribed); Wash., § 7089 (prior training and experience, other sources of income, etc.).

[13] Mass., § 166. Similar provisions are found in the statutes of Colo., La., Me., Ohio, Pa., Vt., and W. Va., cited in note 12.

[14] S. C. L., 1916, No. 372, § 2. Pa. (§ 68) requires some experience in underwriting, other than soliciting. To require (as in Wash., § 7089) that the applicant state his previous training is quite different from making one particular kind of training a *sine qua non*.

[15] (1916), 104 S. C. 501, 89 S. E. 398.

decision is highly questionable in view of the attitude of the United States Supreme Court toward similar requirements.[16]

However, the emphasis upon mental competency is much more noticeable in the broker's license statutes than in the agent's license statutes. One very common standard adopted for the issuance of a broker's license is that the applicant shall be "trustworthy and competent." [17] Correspondingly, the applicant for a broker's license is subjected to greater scrutiny as to his experience and technical knowledge than is the agent. In New York the applicants in New York City are required to appear before a representative of the insurance department, who devotes his entire time to this work, and pass a satisfactory oral examination as to each class of business which they intend to transact. In Massachusetts likewise the broker is asked a number of questions designed to test his mental equipment.

Another common ground of refusal to issue the broker's license is embodied in some such language as "intends to hold himself out and carry on business in good faith as an insurance broker," [18] the object of which is to prevent use of the broker's license as a means of evading statutes against rebating. Obviously such a ground of refusal allows considerable latitude to administrative discretion. However, under such a statute the commissioner is not authorized to require that the applicant shall devote his entire time to the business of insurance brokerage.[19]

The grounds of revocation of a broker's license are similar to those prescribed for revocation of an agent's license. The former, however, are somewhat more vague and consequently offer greater scope to administrative discretion.[20]

[16] Smith *v.* State (1914), 233 U. S. 630, 34 Sup. Ct. 681, holding invalid a statute prohibiting any person from acting as railroad conductor without having at least two years' experience as brakeman. See also Wyeth *v.* Cambridge Board of Health (1909), 200 Mass. 474, 86 N. E. 925; State *v.* Rice (1911), 115 Md. 317, 80 Atl. 1026.

[17] Colo. L., 1919, Ch. 137, § 1; La., § 3770; Mass., § 166 (if commissioner is "satisfied" that applicant is "trustworthy and competent"); Minn. L., 1915, Ch. 195, 5; N. H. L., 1905, Ch. 29, § 1; N. Y. L., 1915, Ch. 56, § 1; Ohio, § 644–2; Vt., § 5610; W. Va., § 53a.

[18] Mass., § 166. See also the statutes of Colo., La., cited in n. 17, also Me., Ch. 53, § 124.

[19] Hauser *v.* North British and Mercantile Ins. Co. (1912), 206 N. Y. 455, 100 N. E. 52, discussed *supra*, § 14, p. 173.

[20] Colo. L., 1919, Ch. 137, § 1 (not trustworthy or competent); Conn., § 4292 ("for cause"); Fla. L., 1919, Ch. 7870, § 1 (conviction of rebating or discrimi-

One ground of revocation which has had important consequences is the failure of the broker to pay over to the company the premium which he collects from the insured, or his failure to obtain the insurance requested by the insured after having collected the premium from the insured. This ground is specified in a few instances [21] and is commonly regarded as a justifiable ground under the vague terms of some statutes such as "for cause shown" of the Massachusetts, or "fraudulent practices" of the New York, statute. The Massachusetts department in 1921 reported that this was the commonest reason for revocation of a broker's license. The New York department maintains a Bureau of Complaints the chief business of which is to hear all complaints against brokers for failure either to pay over premiums or to effect insurance for which premiums were collected. Usually revocation of the license is not necessary. Nevertheless, the licensing power is here used as a means of coercing payment of claims of a private nature. The innovation has proved very popular in New York City. In May, 1922, the Bureau of Complaints was revoking, on an average, two brokers' licenses a week in New York City, chiefly for non-payment of such claims. Only about one complaint in ten resulted in a revocation. In the other cases either the complaint was found, after a hearing and investigation, to be unfounded, or the broker was allowed to go with a warning.[22]

Excess line brokers or agents. One of the few examples in insurance regulation of the granting of what appears to be, and doubtless is, uncontrolled or unlimited discretionary power arises in connection with the licensing of a comparatively small class (numerically) of agents or brokers called, in some instances "excess line brokers" or, in Massachusetts, "special insurance brokers." Since the issu-

nation); La., § 3770 (not a "suitable person" to act as such broker); Me., Ch. 53, § 122 (violation of insurance laws); Md. IV, § 184C (8 grounds, same as for revocation of agent's license); Mass., § 166 ("for cause shown"); N. Y. L., 1915, Ch. 56, § 1 (guilty of "fraudulent practices"; "has demonstrated his incompetency or untrustworthiness to transact the insurance brokerage business"); Ohio, § 644–2 ("for cause shown," "not trustworthy or competent," "not a suitable person to act as such broker"); Pa., § 68 ("for cause"); R. I., Ch. 221, §§ 2 ("suitable person"), 3 ("for cause"); Vt., § 5611 ("not a suitable person"); W. Va., § 53a (like Ohio). For a discussion of similar grounds of revoking agent's licenses, see *supra*, § 14, p. 176.

[21] Conn., § 4292; Md. IV, § 184C; Minn. L., 1915, Ch. 195, § 5; R. I., Ch. 221, § 4.

[22] These statements are based upon a personal interview with the head of the bureau and on an inspection of his files. See also *infra*, § 20, p. 300.

ance of an agent's or broker's license authorizes the licensee to solicit and place insurance only in insurance companies licensed to do business in the state, it happens not infrequently that a particular application will involve such a large risk (for example, fire insurance on a large factory) that even by distributing the risk among various licensed companies, the entire risk cannot be covered. The applicant for such insurance might meet this situation by himself placing the excess, over and above that assumed by licensed companies, in unlicensed companies having offices in adjoining states. The state could not prevent him from doing this, nor could it impose any burdensome taxation upon such a practice.[23]

However, to license a resident broker or agent with the privilege of placing such excess insurance in an unlicensed company is desirable, not only because it gives a resident insured the benefit of the service of an agent or broker in settling the technical details of his coverage, but also because it enables the state to collect through the excess line agent or broker a tax on the premiums of such insurance which, as shown by the cases last cited, could not be collected from the insured himself. On the other hand, the granting of such "excess line" license must be limited to a small number of brokers of a high degree of trustworthiness and responsibility; otherwise it might well happen that through this side door entrance irresponsible insurers would be enabled to do business in the state without being subjected to the supervision of the insurance department, and that thus the elaborate system of regulations designed to protect the insuring public would be ineffectual.

A large number of states, including some which do not permit the licensing of "ordinary" brokers to solicit business for licensed companies, make provision for the licensing of agents or brokers to place such excess risks in unlicensed companies.[24] The issuance of

[23] Allgeyer *v.* La. (1897), 165 U. S. 578, 17 Sup. Ct. 427, 41 L. ed. 832; St. Louis Cotton Compress Co. *v.* State (1922), 260 U. S. 346, 43 Sup. Ct. 125; Hyatt *v.* Blackwell Lumber Co. (1918), 31 Idaho 452, 173 Pac. 1083. See also N. Y. Life Ins. Co. *v.* Dodge (1918), 246 U. S. 357, 38 Sup. Ct. 337, 62 L. ed. 772. It would seem, therefore, that the following statutes, requiring an individual procuring insurance for himself to obtain a license or pay a tax, are unconstitutional: Mich. Comp. L., 1915, § 9158; Minn., § 3331; Mo., § 6316.

[24] Cal. P. C., § 596; Conn., § 4283; Kan., §§ 5471, 5472; Ky., § 698; La., § 3605; Me., Ch. 53, § 125 and Laws of 1917, Ch. 53; Mass., § 168; Mich. II, 3, § 13 (issued by auditor of state); Minn., § 3331; Miss., § 5072; Mo., §§ 6313, 6314; Neb., § 3161, 3162; N. Y. Consol. Laws, 1909, Ch. 33, § 137; Ohio, §§ 660–664; Tenn., § 3314 al; Vt., §§ 5615, 5616; Wash., § 7120; Wis., § 1919m.

such a license does not give the foreign company in which such insurance is placed the legal position of a licensed company.[25] To guard against deception of the public it is sometimes provided that the policy issued by such a company must be stamped with a conspicuous statement that the company is not under the supervision of the insurance department.[26] A broker or agent who places insurance with the foreign unlicensed company without having obtained an excess line license will be liable to the insured for the full amount of loss under the policy, at least if the foreign company proves to be insolvent when the policy was issued.[27]

The conditions precedent to the issuance of such a license are usually prescribed in the statutes. While it would appear from the small amount of business involved that the applicant for such a license would normally be a regularly licensed agent or broker, apparently only a few states expressly provide that the licensee must be a licensed agent or broker for licensed companies.[28] The size of the fee required in most states indicates that revenue as well as regulation is one of the objects of this license.[29] The applicant is required to give a bond to the insurance commissioner for the payment of the gross premium tax on insurance effected by him under the authority of such license.[30] In addition the licensee, or the applicant for insurance, is required to make an affidavit or report to the insurance commissioner to the effect that he was unable

[25] Friedland *v.* Commonwealth Fire Ins. Co. (1911), 143 App. Div. 570, 128 N. Y. Supp. 705, aff'd (1913), 207 N. Y. 705, 101 N. E. 1102. A Pa. statute (§ 70) distinctly so provides.

[26] See N. Y. L., 1911, Ch. 322; Tenn., § 3341; Wash. § 7120 (policy must be stamped as registered under provisions of this section).

[27] Burges *v.* Jackson (1897), 18 App. Div. 296, 46 N. Y. Supp. 326, aff'd (1900), 162 N. Y. 632, 57 N. E. 1105; Shepard *v.* Davis (1899), 42 App. Div. 462, 59 N. Y. Supp. 456. Some statutory provisions impose this and other penalties: Okla., § 6693; Ore., § 6334 (5); Pa., §§ 64, 73; S. D., § 9159.

[28] Kan., §§ 4571–4572; Me., Ch. 53, § 125; Mo., §§ 6313, 6314; N. H., Ch. 169, § 15; Wis., § 1919m.

[29] Ill. Anno. Stats., 1913, § 6322; Ky., § 698 ($25.00); Md. I, § 167; Mass., § 168 ($20.00); Mich. II, 3, § 13 ($25.00); Miss., § 5072 ($20.00); Neb., § 3161 ($100.00); N. Y. Consol. Laws, 1909, § 137 ($25.00 to $200.00); Wash., § 7120 ($100); Wis., § 1919m ($15.–$50).

[30] Ky., § 698; La., § 3605; Me., Ch. 53, § 125 ($500.00); Mass., § 168 ($2,000); Mich. II, 3, § 13; Minn., § 3331 ("in such sum as he shall deem reasonable"); Miss., § 5072 ($2,000.00); Mo., §§ 6313, 6314; Neb., § 3161; N. J., p. 2864, § 82; N. Y. Consol. Laws, 1909, § 137; N. C., § 4769; Ohio, § 664 ($2,000); Wash., § 7120 ($500–$2,000, fixed by commissioner); Wis., § 1919m ($1,000).

after diligent effort to procure the amount required to protect property, from insurance corporations authorized to transact business in the state.[31]

The statutes do not always clearly indicate that the commissioner has discretionary power in the issuance of such a license.[32] The requirement that he must have approved the bond [33] confers only a limited discretionary power. In some states the commissioner is given power to approve or disapprove the company in which the broker places the excess insurance.[34] In Massachusetts the issuance of the license is qualified by such general grounds as "suitable person" who is "trustworthy and competent" and in Maine by the clause "if he deems it advisable"; such provisions clearly infer wide discretion.[35]

However, the absence of such provisions is not indicative of the absence of discretionary power in view of the power of revocation conferred expressly by the statutes. In Connecticut and Massachusetts such a license is declared to be "revocable at the pleasure of" the insurance commissioner.[36] In nearly all the other states the statute provides that the license is "subject to revocation at any time" or similar phraseology.[37] While it is not entirely clear, it would seem that such language is designed to confer upon the commissioner the same degree of discretionary power which is conferred by the Connecticut and Massachusetts provisions, namely, not only unregulated but also uncontrolled discretionary power.

[31] N. Y., § 137. See also the statutes of Kan., Ky., La., Mass., Mich., Minn., Neb., N. C., Ohio, Tenn., Wash., and Wis., cited in n. 24. In N. Y., Neb., and Ohio, the affidavit of both the licensee and the insured are required. In Tenn. and Wash., only the affidavit of the insured.

[32] The language is "may issue" in Conn., Ill., Ky., Me., Miss., Neb., N. J., N. Y., Ohio, Vt., Wash., and Wis.; it is "shall issue" in Md., "duty to issue" in Tenn.

[33] Ky., La., Neb., N. Y., N. C. See n. 24 *supra*, this section.

[34] Me., Ch. 53, § 125 (commissioner may require broker to substitute another company if he believes the one chosen by the broker is not "responsible and reliable"). See also Conn., § 4283. In the other states such approval is not explicitly required.

[35] See statutes cited in n. 24 *supra*, this section.

[36] Conn., § 4283; Mass., § 168; Vt., § 5616.

[37] See the statutes of Kan., Ky., La., Mich., Miss., Neb., N. H., N. J., N. Y., N. C., Ohio, Wis., referred to in the preceding n. 24. In Cal. the license is revocable if the solvency of the surety on the licensee's bond "has become doubtful." In Md. (I, § 167) and Minn. (§ 3331) there are no provisions for revocation of such a license. In Wash. (§ 7120) revocation on specified grounds is authorized.

While no case has been found upholding this construction, one can well imagine the court sustaining such an interpretation as constitutional on the theory that the license confers an exceptional privilege to do what is normally a criminal offence, and therefore, the state may impose such conditions as it sees fit upon the issuance or revocation of such a privilege. The New York statute limits the number of such licenses to two hundred which is indicative of arbitrary power.[38]

The propriety of such a grant of unlimited discretionary power to effect a man's privilege to pursue a vocation may well be questioned. The argument that the state may wholly prohibit such practices and may, *a fortiori*, subject such practices to any form of regulation which it sees fit, even including the arbitrary whim of an administrative official, while supported by some respectable authority, is essentially fallacious. The fact is that if such practices may be engaged in by obtaining a license, persons will apply for such licenses and will rely thereupon in building up a business, which will be destroyed by arbitrary withdrawal of the privilege. On the other hand, it may be argued that in this particular instance the injury will be comparatively slight because the holders of such licenses will usually be ordinary licensed brokers or agents, and the revocation of the "excess line" license will not impair the business of representing duly authorized companies.

§ 16. *Assets, investments, and financial operations.* It has been pointed out [1] that the most important grounds of revocation are those relating to the company's financial condition. These powers are, indeed, the backbone of the regulatory organism. The chief object in view in creating separate insurance departments and in delegating to them extensive powers of regulation and investigation was to protect the public against financially unsound enterprises; and this remains the chief *raison d'être* of the insurance commissioner. It is therefore important to note the nature of the administrative powers conferred upon the commissioner with reference to the company's financial condition. To draw a complete picture of this part of the work of an insurance department would

[38] See People *ex rel.* Schwab *v.* Grant (1891), 126 N. Y. 473, 27 N. E. 964, holding that in view of the policy of limiting the number of auctioneers, embodied in previous legislation, the refusal of an auctioneer's license lay in the uncontrolled discretion of the official.

[1] *Supra*, § 13, p. 142.

take us far afield into the details of actuarial science. In order to determine the latitude of administrative discretion in passing upon the financial methods and operations of insurers we should have to determine not only the permissible variations in practice which actually prevail in the various departments, but also the extent to which such variations are important to the welfare and success of the insurer as well as the protection of the insured. Only an experienced actuary could give a judgment which would be worth anything upon such technical questions. Moreover, the tasks described under this section and under the one relating to examinations and annual reports comprise by far the major portion of the work of any insurance department and give it the general complexion of a data-gathering and report-compiling, rather than a dispute-deciding, administrative agency. It seems best, therefore, to limit the present discussion to a brief review of the extent to which the statute fixes the rules or standards by which this work is to be done, with such references to the scope of administrative discretion as come readily to hand.

Roughly speaking, the financial soundness of any insurance enterprise (exclusive of assessment enterprises) is a function of three quantities: first, the amount of its reserve liability, that is, the amount of wealth which the insurance company should have on hand at a particular time in the regular and orderly process of accumulating funds to meet the probable amount of losses under its outstanding policies;[2] second, the value and stability of its assets including not merely a minimum fluctuation in value but also a high degree of fluidity; third, the expenses of doing business aside from the amount expended in payment of losses. This last item has been greatly exaggerated by some legislators, especially the item of salaries paid to the chief executive officers of insurance companies. The foregoing analysis does not have the exactitude of an actuarial formula but it will serve to explain the functional significance of the commissioner's various powers in relation to assets and financial condition.

These powers may be conveniently divided as follows: first, computing reserve liability; second, computing value of assets; third, approval of investments; fourth, approval of salaries or other expenditures; fifth, compelling domestic companies to make good

[2] The unearned premium reserve of fire insurance companies, for instance, does not conform technically to this description, but a rough generalization seems sufficient for the present purpose.

impaired capital stock; sixth, approval of consolidation or reinsurance; seventh, approval of increase or reduction of capital stock.

1. *Computing reserve liability.* The power to compute the reserve liability of the insurer is important from an administrative point of view chiefly in respect to level premium life insurance companies and in respect to casualty, surety and employers' liability companies.

The statutes everywhere contain some provisions with reference to the computation of the reserve liability of level premium life insurance. Usually the commissioner is expressly authorized or required to make such computation. Even in the absence of such an express authorization a requirement that such company shall maintain reserve funds in accordance with standards laid down in the statute, coupled with such grounds of revocation of the company's license as "unsound condition[3], would seem clearly to impose such a duty upon him. The statutory rules for the guidance of the commissioner in making this computation appear to leave him but little latitude for the exercise of his judgment on questions of policy. The Massachusetts statute may be taken as typical of the basic requirement of such statutes:

> The net value on the last day of December of the preceding year of all outstanding policies of life insurance . . . shall be computed upon the basis of the "American Experience Table" of mortality, with interest at three and one-half per cent per annum. . . .[4]

One might well imagine from a reading of this provision that an intelligent clerk with the aid of an adding machine and assistants could apply this statutory rule without the slightest hesitation. Such is not the case. The mathematical certainty of a complicated statistical table and a numerical rate of interest is illusory. This is clearly brought out by the judicial decisions and administrative rulings on the question of the valuation of whole life policies upon a preliminary term basis. To understand this controversy, which has agitated the life insurance world for several decades, one must understand that a major portion of the first premium of a life insurance policy is absorbed by the commission paid to the agent and other overhead expense. Thus, very little, if anything, is left during the first year for the reserve fund of such a policy. Hence, if the company is to be required to set aside the amount of reserve

[3] See *supra* § 13, p. 142. [4] Mass., § 9.

estimated in accordance with the actuarial table, it must draw upon its surplus or other resources. A new company, during its earlier years, frequently has not a sufficient surplus for this purpose and therefore, if required to accumulate the full amount of reserve on all new policies from the very outset, it must cease doing business before it has got fairly started. To avoid this disastrous result a number of companies devised a scheme of issuing policies for a preliminary term of one year with an option in the insured to continue them in force at the end of the year without a further physical examination and without an increase in premium on account of the greater age of the insured. It was then contended that the reserve liability of such policies during the first year should be computed as if they were policies of term insurance only, the result being, of course, that the reserve would be much smaller than for the first year of a whole life policy.

This contention was presented to the commissioner of Massachusetts and by him rejected. An insurance company brought *mandamus* to compel him to change his valuation of its reserve liability. The court pointed out numerous sections of the Massachusetts statutes which conferred discretionary power upon the commissioner to determine the company's financial soundness and denied the relief prayed for. [5] The following quotation from the opinion shows the court's interpretation of the statute:

> The valuation of policies for the purpose of determining the reserve liability is only one of the processes necessary to determine the company's financial condition. It involves an application of the statutory rule to each policy, in connection with the methods and practices in the transaction of the business that exist either as a part of the science of life insurance or otherwise outside of the stipulations of the policy. New forms of policies may be adopted which were not known when the statutory rule was established, and new questions may arise depending in part upon the principles of life insurance as a science and in part upon the practices of the company, as well as upon rules of law, in determining how the statutory rule shall apply to these policies. In the present case, even if the contracts referred to are to be considered technically as the petitioner contends, the statute is silent as to whether the value of the option to continue the insurance at the end of the year without an examination, and at the premium fixed for an age a year younger than the assured would have then attained, is not to be considered in determining the reserve liability of the company under the contract . . . We are of opinion that, at least so long as he (the commissioner) acts in good faith, intending to obey the law, we cannot,

[5] Providence Savings Life Assurance Society *v.* Cutting (1902), 181 Mass. 261, 63 N. E. 433.

by a writ of mandamus, compel him to change his conclusions, either of law or fact, in the valuation of the policies or assets of a life insurance company.[6]

On the other hand, the opposite conclusion was reached by the Supreme Court of Vermont in a slightly earlier case.[7] The Vermont statute as to the basis of reserve liability was substantially similar to that of Massachusetts. The court, however, thought that the statute merely fixed two of the factors involved in computing reserve liability, and that, so long as these two factors were used in the computation, a company which was not actually unsound in accordance with actuarial experience, could not be excluded. The court reviewed at length the opinions of prominent actuaries and concluded that since the method of computation contended for involved merely a postponement of the accumulation of the required reserve under a particular policy, it involved no danger to the solvency and safety of the company. Having, as it thought, established this conclusion, the court solved the ambiguity in the statute by reference to two outstanding public policies or social interests. First, the court emphasized the importance of having insurance risks widely distributed over a large territory and thus the desirability of admitting the insurers of other states upon liberal terms. Secondly, the court emphasized with considerable fervor the importance of preventing the old and established companies from obtaining a monopoly of the life insurance business by the application of a rule which would make it impossible for new companies to survive.[8] The decision is an interesting example of the balancing of social interests in the interpretation of a doubtful statute.

This conclusion was adhered to in Vermont in a case decided after the Vermont statute had been amended to conform identically to the Massachusetts statute.[9] It seems that in other states where a similar question was presented to the commissioner six different solutions were arrived at and applied in the valuation of new poli-

[6] 181 Mass. 261, at pp. 264, 265. In 1923 the Massachusetts department reversed its former stand and recognized the preliminary term method of valuation. See W. U. R. Mass. 30 (1923).

[7] Bankers' Life Ins. Co. *v.* Howland (1900), 73 Vt. 1, 48 Atl. 435.

[8] "Should the State Encourage the Formation of New Companies?" was the subject of an illuminating address by the Vermont commissioner before the National Convention of Insurance Commissioners in 1914.— *Proc. N. C. I. C.* (1914) p. 139.

[9] Bankers' Life Ins. Co. *v.* Fleetwood (1904), 76 Vt. 297, 57 Atl. 239.

cies, and a majority of the states in 1919 had statutes which permitted the commissioner to choose any one of these six methods.[10] The application of the apparently mechanical statutory rule thus calls for a *deus ex machina*.

On the other hand where the statute has explicitly laid down a rule for computing the minimum reserve during the early policy years, the commissioner is not authorized to depart from that rule even in cases where its application results in the maintenance of a (scientifically) deficient reserve. Thus, the New York statute provides that the assumed rate of mortality during the first five years shall be a fixed percentage of the mortality shown by the American Experience Table, that is, fifty per cent during the first year, sixty-five per cent during the second year and so on. The superintendent of insurance found that the application of these rules to policies bearing small premiums resulted in the allowance of a sum for expenses in excess of the assumed mortality gains,[11] and upon the principle that the statute was not designed to permit such excess, he refused to apply the statutory rule. However, his threatened revocation of a license upon this ground was enjoined in *Travelers' Insurance Co.* v. *Kelsey*.[12]

So much for the implicit discretionary powers under statutes purporting to fix reserve liability. Turning now to the commoner examples of explicit grants of such powers, we find that in a number of states the commissioner is expressly authorized to choose which one of two named mortality tables he will use in computing the reserve liability of life insurance companies.[13] Probably the purpose of this provision is to authorize the commissioner to accept the mortality table chosen by the particular company in question, rather than to authorize him to require a company to change from one basis to another. If such be the correct interpretation, the

[10] *65th Mass. Life and Misc. Ins. Report* (1919), p. XIII. For a discussion of the merits of the various methods of valuation see an article by H. L. Rietz, Professor of Mathematics, State University of Iowa, in (1917) 7 *Amer. Econ. Rev.* 832.

[11] "Mortality gain" arises because the actual deaths occurring among a large group of policyholders of less than five years standing will be much less than the estimated number of deaths, due to the fact that the mortality tables adopted show a higher mortality rate below age fifty than is normally experienced on selected risks.

[12] (1909), 134 App. Div. 89, 118 N. Y. Supp. 873.

[13] Ala., § 8347; Ga., § 2438; Ia., § 5483; Kan., § 5296; Ky., § 653; La., § 3643; Me., Ch. 53, § 87; Mont. C., § 4117; N. H. L., 1913, Ch. 42, § 4; N. M., § 2844.

statute should be drawn so as to show clearly that the choice lies with the company and not with the commissioner. In Maryland the statute names the mortality table but adds that the commissioner may value on a higher basis than the one named.[14] In North Carolina the commissioner is authorized to make the computation upon the basis of either the American Experience Table or the Actuaries' table "or according to any other recognized standard of valuation as he may deem best for the security of the business and the safety of the persons insured." [15]

The work of "valuing" (that is, computing the reserve liability on) the policies of a large life company calls for a large staff of clerical assistants, and hence most of the smaller insurance departments are obliged to accept the valuation either of the company itself, or of some other insurance department, usually that of the company's domiciliary state. The statutes of some states confer upon the commissioner an undefined degree of discretionary power in the acceptance or rejection of the valuations made by the actuaries of the insurers. Thus, it is provided that he "may" accept such a valuation "on satisfactory proof of its correctness" [16] or "upon such proof as he may determine." [17] Other states provide that he "shall" accept the valuation "upon satisfactory proof of its correctness." [18] From the standpoint of judicial control it would seem that the latter provisions are substantially the same as the former, since the words denoting mental operation qualify the mandatory effect of "shall."

Similarly, a number of states give the commissioner discretionary power to accept or reject the valuation of the insurance department of another state, sometimes qualifying this power with the requirement that the acceptance must be reciprocated by the other insurance department.[19] On the other hand, several states apparently make it the duty of the commissioner to accept the valuation made by the domiciliary department of a foreign life company.[20]

[14] Md. III, § 178 (3).

[15] N. C., § 4777.

[16] Colo. L., 1915, p. 272; Miss., § 5076.

[17] Ind., § 4687; N. H. L., 1913, Ch. 42, § 4 ("shall determine").

[18] Ia., § 5483; Mont. C., § 4117.

[19] Ala., § 8347; Ariz., § 3432 (reciprocal); Cal. P. C., § 628 (reciprocal); Colo. L., 1915, p. 272; Conn., § 4111; Ill., § 190 (if standard equally high); Mass., § 9 ("may" if basis of computation produces values "at least as great"); Minn., § 3248; Mo., § 6131; Neb., § 3231; Nev., § 1277; N. Y. Consol. L., 1909, § 84 ("may" if made on basis herein required); N. C., § 4787.

[20] Ark., § 4984; Del., § 573; Ky., § 756; Md. III, § 178 (3); Mich. III, 1, § 10 ("must" if reciprocated).

Life insurance policies are valued upon the assumption that the persons insured are normally healthy risks, and the mortality tables chosen are supposed to show the experience in relation to such risks.[21] Some companies, however, undertake to insure certain types of "substandard" or extra-hazardous risks, and in respect to such subnormally healthy persons the commissioner is authorized to vary the standard of valuation. The Massachusetts statute, which is the most comprehensive, provides that when the commissioner is satisfied that a company is assuming risks that cannot be properly measured by the mortality tables specified in the statute, he "may compute such extra reserve as in his judgment is warranted by the extra hazard assumed" and "in his discretion" may prescribe such other mortality tables "as he may deem necessary properly to measure such additional risks." [22] Similar provisions, not as broad in respect to the language denoting mental operations, are found in other states.[23] This grant of discretionary power has not yet assumed great importance because of the relatively small amount of business done on a substandard basis.

Another variation from the standard which is permitted in a few states is found in the provisions authorizing the commissioner to adopt a different mortality table in valuing policies of alien companies issued to policyholders in foreign countries.[24]

The problem of valuing the policies of casualty and surety companies is a difficult one. It is extremely hard to find a classification of risks, and the experience of such companies apparently has not been gathered over a long enough period to furnish a basic table of the expectancy of liability under such policies. Accordingly, we

[21] It is well known that the American Experience Table of Mortality shows higher death rates below age 50 than the companies actually expect.

[22] Mass., § 9.

[23] Ariz., § 3432; Ark., § 5008; Conn., § 4111; Idaho, § 5048; Ill., § 190; Kan., § 5173; Neb., § 3231; N. J., p. 2847, § 24; N. Y. Consol. L., 1909, Ch. 28, § 84; Okla., § 6710; Ore., § 6423; R. I., Ch. 223, § 1; Tex., § 4754; Wash., § 7137; W. Va., § 8; Wis., § 1950 (1) (f).

By a letter of Aug. 9, 1911, the New York superintendent adopted Hunter's "Tables of Rates of Disability, and of Mortality among Disabled Lives," combined with the American Experience Table, as the basis for computing such risks (N. Y. Rulings (1916), p. 131), thus conforming the New York practice to that adopted by Mass., § 9.

[24] Conn., § 4111; Kan., § 5173; N. Y. Consol. L., 1909, Ch. 28, § 84; Okla., § 6710; Ore., § 6423; R. I., Ch. 223, § 1; W. Va., § 8; Wis., § 1950 (1) (f). Under date of Sept. 17, 1906, the New York superintendent approved basic tables for risks in both tropical and semi-tropical countries. (N. Y. Rulings (1916), p. 130.)

are not surprised to find that in respect to the computation of such reserves the commissioner is given wide discretionary power. Even here, however, the legislature does not concede the futility of statutory rules. The Massachusetts statute, which is typical, sets forth lengthy and detailed rules for the computation of such reserves and then tacks on at the end a clause as follows:

> Whenever, in the judgment of the commissioner, the liability or compensation loss reserves of any insurer calculated in accordance with the foregoing provisions are inadequate, he may require such insurer to maintain additional reserves based upon the estimated individual claims or otherwise. [25]

Maryland goes the full length of prescribing that the reserve of a casualty or surety company "shall be determined by the facts and circumstances of each particular claim" and that the company shall maintain such reserve "as may in the aggregate be deemed reasonable and fairly sufficient by" the commissioner.[26] Thus, in respect to these newer types of insurance risks, the commissioner is not merely applying an accepted formula but is correcting by empirical methods the formula to be applied.

Of some importance to life insurance companies is the power of the commissioner to refuse his approval of a change of the standard of valuation previously adopted by the company.[27] On the other hand, the provisions commonly found authorizing the commissioner to value policies in groups and use approximate averages,[28] are designed merely to facilitate the mathematical process of computation and cannot conceivably be the basis of any important exercise of discretionary power.

In conclusion it must be emphasized that, year in and year out, the computation of the reserve liabilities of insurance companies is a placid routine task, rippled here and there by some problem of detail, but seldom churned by the rapids of a policy-determining controversy.

2. *Computing value of securities.* In less than half the states the

[25] Mass., § 12. Similar statutes are Neb., § 3235 (Board may formulate rules if those laid down in statute are found to be "impracticable").

[26] Md. III, § 178 (13). See also N. Y. L., 1915, Ch. 506 providing that the reserve of a mutual workmen's compensation company shall be "prescribed by the superintendent."

[27] Neb., § 3231; N. J., p. 2847, § 24; N. Y. Consol. L., 1909, Ch. 28, § 84 (as to standard for industrial policies).

[28] E.g., Idaho, § 5048; Ill., § 190; Mich. III, 1, § 10; Mo., § 6131; Neb., § 3231; N. Y. Consol. L., 1909, Ch. 28, § 84.

commissioner is expressly empowered to compute the values of the securities held by insurance companies, and in many of these the statutory provision is quite indefinite and is limited to a particular kind of security.[29] However, even in those states where no express provision is made for such computation [30] the commissioner is, it would seem, impliedly authorized to make such a computation under the general provisions as to revocation of a company's license upon broad financial grounds, such as "unsound condition," "assets insufficient to justify its continuance in business" and the like. The commissioner could hardly pass upon the financial soundness of an insurance company without making some assumption or computation, however perfunctory, of the value of its assets.

One who is familiar with the latitude of discretion and the perplexing problems of policy involved in determining the "value" of public utility properties for the purpose of rate regulation can readily understand that the valuation of any kind of property calls for the exercise of some judgment and permits of some latitude of decision. However, it would be quite fallacious to assume that the problems of valuation in insurance regulation are the same, from an administrative point of view, as those encountered in public service regulation. The contrast is significant. To value the property of a public utility company, one must attach a definite figure to real estate which is used in carrying on a monopoly and is unique in the community where it is located, so that it has no actual market value; and one must attach a definite figure to rolling stock, machinery and equipment purchased at different price levels and subject to varying stages and degrees of depreciation. Moreover, the commission must keep in mind the policy of placing the valuation sufficiently high to attract investors. On the other hand, the valuation of the securities of an insurance company is not undertaken

[29] Ala., § 8357; Cal. P. C., § 621, C. C., § 422; Conn., § 4260; Ind., §§ 4619, 4687 (under deposit laws); Ia., § 5532; Ky., § 648a-3; Me., Ch. 53, § 124; Md. I, § 203; Mass., § 11; Minn., § 3269, and L., 1915, Ch. 208; Miss., § 6120; Nev. L., 1913, Ch. 11, § 1; N. H. L., 1913, Ch. 42, § 16; N. J. L., 1913, Ch. 284, § 1; N. Y. Consol. L., 1909, § 18; N. C., § 4737, R. B., § 4780 (by commissioner, state treasurer, and attorney general); Ore., § 6424; Pa., § 36; Wash., § 7067; W. Va., § 8a; Wis., § 1951 f.

[30] In the following states there are apparently no express provisions authorizing the commissioner to make such computation: Ala. (with minor exceptions), Ariz., Ark., Colo., Del., Fla., Ga., Idaho, Ill., Kan., La., Mich., Mo., Mont., Neb., N. D., Ohio, Okla., R. I., S. C., S. D., Tenn., Tex., Utah, Vt., Va., Wyo.

for the purpose of fixing its premium rates, nor does such valuation affect appreciably the rates charged or the company's income. Even more important is the fact that the assets of an insurance company are, for the most part, government bonds, first mortgages on improved real estate and other high grade securities which have a relatively stable and definite market value as compared with the properties of a public utility. Hence, it is perhaps not surprising that the task of computing these values has been passed over in silence in most insurance legislation.

In a number of states a statutory rule is laid down for the guidance of the commissioner in evaluating bonds or other evidence of debt "if amply secure and not in default as to principal or interest" [31] as follows:

> If purchased at par, at the par value; if purchased above or below par, on the basis of the purchase price adjusted so as to bring the value to par at maturity and so as to yield meantime the effective rate of interest at which the purchase was made; provided that the purchase price shall in no case be taken at a higher figure than the actual market value at the time of purchase. . . . [32]

The proviso above quoted leaves open the question how the "actual market value" shall be determined. With respect to bonds listed on the stock exchanges the exchange quotations would be an obvious standard. With respect to "other evidences of debt," such as first mortgage notes, the method of computation is not so obvious. The usual practice seems to be to value such notes, if not disapproved as investments, at their face value.

Following a provision of the type last quoted in many states there is a clause as follows:

> Provided further that the superintendent of insurance shall have full discretion in determining the method of calculating values according to the foregoing rule, and the values found by him in accordance with such method shall be final and binding. . . . [33]

What is the effect of this clause from the standpoint of judicial control over administrative action? It might be thought that it confers uncontrolled discretionary power because of such phrases as "full discretion" and "shall be final and binding," were it not

[31] N. Y. Consol. L., 1909, Ch. 33, § 18.

[32] N. Y. Consol. L., 1909, Ch. 33, § 18; Mass., § 11.

[33] N. Y. Consol. L., 1909, Ch. 33, § 18. To the same effect are: Conn., § 4260; Me., Ch. 53, § 134; Mass., § 11; N. J. L., 1913, Ch. 284, § 1; Ore., § 6424; Pa., § 36; Wash., § 7067; W. Va., § 8a; Wis., § 1951f.

for the qualification "according to the foregoing rule," which makes the discretionary power a regulated one and thus subjects it to judicial attack on the grounds of abuse of discretion or excess of power.

In practice the commissioners have exercised a limited amount of discretion in determining the values of securities, such as government and corporation bonds, which have a ready sale in the bond markets. For a number of years the New York and Massachusetts insurance departments, with the coöperation of many but not all of the other insurance departments, have published a list of the values of such securities, compiled by the Investors' Agency, a private concern.[34] The list values, however, do not always correspond to the stock exchange quotations. In December, 1918, the insurance commissioners adopted a resolution that the values quoted on the stock exchange at that time and reported in the various financial publications did not represent the "proper" values and that the Investors' Agency be instructed to average the "actual market values" as of November 30, 1918, with the value set forth in the last list of security values published by authority of the convention, with a proviso that in no case should the value be fixed at less than the actual market value of December 31, 1918.[35] Apparently the resolution was designed to fix the values of such securities in the commissioner's list at a figure above that of the actual market quotations. Whether this was good policy or bad policy at the time is not to be decided here. For us its significance is that even the valuation of securities may involve questions of policy or judgment.

One more example of this sort will illustrate the same point. In 1913 the convention of insurance commissioners adopted a "rule" called the "Burlington Rule" to the effect that special deposits in excess of the corresponding liabilities should not be allowed

[34] See *Proc. of N. C. I. C.* (1910), p. 47; 1911, I, p. 18; 1919, pp. 9, 10. In 1919 the expense of making up and publishing this list of security valuations was about $8,000 of which sum N. Y. paid $3,200, Mass., $1,000, Pa., $750, Conn., $500, and the other states lesser amounts, ranging as low as $5.00 from Utah. This item of expense is borne by the states having the largest number of domestic companies, and the other states almost invariably accept the valuations made in the former states. The expert who has for many years been employed to compile this list is the same one who was employed by the Armstrong Committee in the well-known insurance investigation of 1905. Since 1910 the work has been under the supervision of a standing committee of the National Convention. (*Proc.* (1910), p. 170.)

[35] *Proc.* (1919), pp. 9, 10.

as assets in annual statements of insurance companies. The significance of this rule is this: that if a New York company, for example, is required by the laws of Nebraska to deposit $50,000 in securities with the Nebraska department in order to be admitted to do business in Nebraska, and the company has outstanding policies in Nebraska upon which the reserve liability is $30,000, the Massachusetts insurance department, in ascertaining the financial condition of this company, admitted to do business in Massachusetts, will not allow the excess of $20,000 as a part of the assets of the company. The adoption of this "rule" was strongly opposed by a number of the commissioners. It is said by one who was present at the meeting that in the discussion, no question was made respecting the authority of the commissioners under the law to allow such assets.[36] There is no evidence, so far as the present writer knows, that the application of this rule was ever the decisive factor in a determination that a particular company was insolvent or financially unsound.

3. *Approval of investments.* The commissioner's powers as to approval of investments run parallel to, and seem often to coincide with, his powers as to valuation of securities. However, the distinction is that the former relates to determining whether or not a particular security shall be counted at all in determining the company's assets, while the latter relates to determining the value of approved assets. It seems reasonably clear that the former calls for a higher type of judgment and admits of greater latitude of discretion than the latter.

The statutes as to investments of insurance companies have been classified into two types: (1) Those which permit the companies to invest in all securities not definitely prohibited, as in Connecticut and West Virginia. (2) Those which prohibit the company from investing in securities not definitely authorized, as in New York and New Jersey.[37] Under either type of statute the choice of investment within the limits of the statute rests with the company, not

[36] *Proc.* (1919), p. 179, address by ex-commissioner Vorys of Ohio. The record of the meeting at which the "rule" was adopted shows that the recommendation of the Committee was adopted unanimously; doubtless the speaker refers to the public hearing which was held by the Committee at Hartford, Conn., in 1913. See *Proc.* (1913), pp. 35, 43.

[37] *The Investment Laws Relating to Insurance Companies*, by Clarence W. Hobbs, Mass. Commissioner of Ins., address delivered before the National Convention of Ins. Commissioners in Sept., 1921, p. 17 (same in *Proc.* (1921), p. 170).

with the commissioner, it seems; the commissioner does not dictate what particular investments shall be made.

A number of states have, however, given the commissioner some discretion in relation to the approval of investments aside from that necessarily involved, to a limited degree, in the application of the specific provisions. It is usually not clear from the language of such statutes whether the investment by the company is subject to approval or subject to disapproval by the commissioner; that is, whether the commissioner must approve of the purchase before it is made or whether he may disapprove of securities already purchased and compel the company to dispose of them. The former type is indicated by a Georgia provision, which, after naming certain permissible investments, declares that all except policy loans must be "first approved by the insurance commissioner of Georgia." [38] On the other hand, the latter type is indicated by a California statute which authorizes the commissioner to order the sale of any investments "which seem injudicious to him." [39]

It is hardly conceivable that a power of the former type is intended to be exercised by an order of individual application, unless it be in passing upon the initial assets of a new company as in the Nevada and South Dakota statutes.[40] Usually the approval of such securities would be by administrative ruling, naming the classes of securities or perhaps the names of the governments, municipalities or corporations whose bonds would be approved, and so forth. If such be the design of these statutes, some provision should be made for more systematic procedure in the making of such rulings. However, it seems that in most instances, the statute means, when it says "approved by the commissioner" that the investments are subject to disapproval by him.

The scope of the powers of approval or disapproval vary considerably. Illinois, for instance, specifies certain investments and adds "or any such other stocks or securities as may be approved by the insurance commissioner"; [41] Minnesota provides that all authorized investments shall be "approved by the insurance commissioner." [42] Nebraska, in addition to specific classes of securities, provides that the securities authorized by the laws of the domicil-

[38] Ga., § 2408. See also Nev. L., 1913, Ch. 158, § 1; S. D., § 9210.

[39] Cal. P. C., § 421. To the same effect is Ariz., § 3400.

[40] See n. 38, *supra*.

[41] Ill., § 176.

[42] Minn., § 3313.

iary state of a foreign or alien company "may be recognized as legal investments in the discretion of the insurance board." [43]

Occasionally a company which has invested a named amount or a fixed proportion of its assets in the kinds of securities named in the statute is authorized to invest the remainder of its assets in securities "approved by" the insurance commissioner.[44] Oregon has a general clause, "which investment he may approve or reject." [45] The provisions for approval or disapproval by the commissioner are in general limited to particular types of securities or at least to particular kinds of companies.[46] The exercise of these powers will usually take the form of a "ruling" by the commissioner as to a particular security or type of security.[47] In view of the importance of these rulings not only to the companies and their policyholders but also to persons offering securities for sale, it would seem desirable to have this rule-making power more systematically organized.

The provisions as to ownership of real estate by insurance companies present some points of interest. It is commonly provided that a company may own, for an indefinite time, only such real estate as is requisite "for its convenient accommodation in the transaction of its business," [48] or "for its immediate accommoda-

[43] Neb., §§ 3176, 3235. See also Tex., § 4772 (must be approved by commissioner "as being substantially of the same grade" as those named in the Tex. statute).

[44] N. C., § 4731; Okla., § 6705; Wash., § 7054 (1) authorize securities approved by the commissioner as alternatives to those specified.

[45] Ore., § 6358.

[46] Ala., § 8347 (collateral securing stock subscription note); Ind., § 4699; Ia., § 5532 (approval of municipal bonds and real estate mortgages outside of Ia.); Me., Ch. 53, § 164 (of all investments of assessment accident company, by governor and council); Mass., § 65 (purchase money mortgage); Mich. II, 1, § 10 (foreign bonds); Minn., § 3313 (realty mortgages and public utility bonds and stocks); Nev., § 1311 (assessment life company); N. Y. Consol. L., 1909, Ch. 33, § 20 (before acquiring real estate in N. Y.), *ibid.*, § 16 (surety company may, "subject to the consent of" the superintendent, invest in stock of alien surety company); N. C., R. B., § 4792 (municipal bonds); Pa., § 161f (foreign bonds); Wash., § 7062 (shall not invest in certain securities "except with the approval of the insurance commissioner").

[47] E.g., N. Y. rulings (1916), p. 55 (notes issued by City of N. Y. in anticipation of sale of municipal bonds, approved), *ibid.*, p. 59 (all surplus funds in certificates of Pa. Steel Freight Car Trust); *ibid.*, p. 60 (investment in railway equipment notes).

[48] Idaho, § 4966; La., § 3570; N. Y. Consol. L., 1909, § 20; Mass., § 63 (6). Also Colo. L., 1913, Ch. 99, § 27 (convenient transaction of its business).

tion in transacting business." [49] Such provisions obviously permit of some latitude of interpretation. The New York superintendent at one time refused to approve the purchase by a life insurance company of real estate to be used as a hospital for its employees suffering with tuberculosis. Upon *certiorari* to review this decision the court reversed the superintendent upon the ground that the large number of employees (some 14,000), and the enlargement in recent years of the moral duties of the employer as to the proper comfort, health, and safety of his employees, brought the proposed investment within the scope of "convenient accommodation in transaction of its business." [50]

Another provision calling for the application of an indefinite standard is the one, found almost everywhere, to the effect that the commissioner may extend the time for disposing of real estate beyond the limit fixed by the statute, if "the interests of the company will suffer materially by a forced sale thereof." [51] In two states the commissioner is authorized to extend the time "upon proper showing"; [52] in Maryland "if in the judgment of the insurance commissioner it is advisable so to do." [53] The two last provisions seem distinctly inferior to the more common one in that they make no reference to the kind of factor which the commissioner is to take into consideration in exercising his power. The emphasis upon "the interests of the company," in a case where the interests of policyholders may possibly be antagonistic, is unique. Usually it is assumed that the interests of "the company" are to be subordinated to those of the policyholders if there is any conflict.

4. *Control over expenses and dividends.* If the maintenance of sufficient assets to equal the amount of its reserve liability on out-

[49] Mich. II, 1, § 10.

[50] People *ex rel.* Metropolitan Life Ins. Co. *v.* Hotchkiss (1909), 136 App. Div. 150, 120 N. Y. Supp. 649. In National Reserve Life Ins. Co. *v.* Moore (1923), 114 Kan. 456, 219 Pac. 261, the company sued its president to obtain a declaratory judgment as to the propriety of investing its funds in an office building. The court defined the powers of the directors relating to such investments.

[51] Del., §§ 591, 574; Idaho, § 4966; Ill., § 55; Ind., § 4701; Ia., § 5530; Kan., §§ 5199, 5232; La., § 3570; Mass., § 66; Mich. II, 1, § 10; Minn., §§ 3291 ("will be materially prejudiced"), 3491; Mont. C., §§ 4054, 4125; Nev., § 1288; N. H. L., 1913, Ch. 42, § 18; N. J., p. 2845, § 18 (by chancellor); N. Y. Consol. L., 1909, Ch. 33, § 20; N. D., § 4862; Ohio, §§ 9360, 9537; Okla., § 6706; Ore., § 6371; Pa., §§ 163, 186c; S. D., § 9322; Tenn., § 3348a31; Tex., § 4735; Wis., § 1902; Wyo., § 5260.

[52] Neb., § 3177; Wash., § 7068.

[53] Md. I, § 203.

standing policies is a sole and sufficient test of its financial soundness, so long as the company maintains the required reserve, the commissioner need not be concerned about its expenses and dividends to stockholders (if any) in so far as it is his purpose to protect the public against unsound insurance enterprises. However, the maintenance of the reserve is not the sole and sufficient test of financial soundness, because as to some types of companies the calculation of the reserve is based upon arbitrary formulas [54] or upon standards not sufficiently tested [55] and because further, any company by making reckless expenditures may cause the depreciation of its assets below the required reserve. Again, the allowance for the expenses of initial agency commissions is linked with the problem of preliminary term valuations of the reserve on life policies.[56] Thus, the expenses of a company touch its financial soundness at numerous points.

Nor is financial soundness the only object of regulation of expenses. Since the Armstrong investigation in New York aroused popular indignation against the accumulation of large amounts of "surplus" (that is, assets over and above the capital and reserve and other liabilities) which may be used to pay large salaries and dividends to stockholders, there has been a decided tendency to extend the scope of insurance regulation so as to protect the interests of the policyholders in the surplus of life insurance companies. The legal rights of policyholders in the surplus of such a company are determined by the provisions of their contracts with the company or, in some instances, by statutory provision.[57] Since the amount of the policyholder's dividend on a particular policy is not specified in the policy and varies somewhat with the prosperity of the company and other conditions, it may be materially affected by the amount of salaries and other expenses, and by the stock dividends, if any, paid out by the company. The attempt to con-

[54] For example, the reserve for workmen's compensation insurance is in part a function of the premium collected. Hence, if the premium collected is insufficient, the reserve may be inadequate though the company is fully complying with the statute as to reserve.

[55] E.g., in casualty, surety and liability insurance; see *supra* this section, p. 200.

[56] *Supra* this section, p. 194.

[57] E.g., Mass., § 140 expressly provides that domestic ("mutual") life companies must annually apportion policy dividends from the surplus. The term "mutual" is used in so many different senses that only the context of a statute will show which is intended.

trol expenses and dividends is therefore an attempt to secure the policyholders not merely safety, but also (since the policy dividends are practically reductions of the premium charged) a fair rate of premium.

However, a majority of the states do not confer upon the commissioner any considerable degree of discretionary power over expenses and dividends as such.[58] One type of provision gives the commissioner the power of approval or disapproval over the dividends to be paid by "mutual" companies,[59] which are allowed greater latitude in the payment of dividends than are stock companies.[60] Another type of statute requires the approval by the commissioner of the commissions paid to salesmen for selling stock in an insurance company being formed.[61] The French law of 1905 provides for an administrative regulation fixing the amount of initial expenses of a new company and the plan of amortizing the same.[62] Since such a company obviously has no reserve, some such provision should be made to safeguard its initial capital.

In a few states the commissioner is authorized to extend the time limit placed by the statute upon contracts of service between the company and its officers or employees.[63] Another dispensing power of the commissioner is with reference to the upper limit upon the amount of surplus or "contingency reserve" which a company is allowed to accumulate.[64] Similarly in New York he may authorize variations from the statutory limits upon the commissions which may be paid to agents.[65]

[58] E.g., Mass., § 72, prescribes the maximum percentage of dividends on stock to be paid by any stock company, but confers no explicit discretionary power upon the commissioner. Functionally, control over dividends and expenses is a part of the commissioner's rate-making powers; and indirectly, through his rate-making powers, he is in a position to control expenses and dividends. See *infra*, § 19.

[59] N. Y. L., 1916, Ch. 393, § 1 (dividends to members of Mutual Employers' Liability Co. "shall not take effect nor be distributed until approved by the superintendent of insurance after such investigation as he may deem necessary"); *ibid.*, Ch. 14, § 325 (mutual automobile fire); *ibid.*, Ch. 13 (mutual automobile casualty).

[60] See N. Y., § 117, prescribing definitely the limits on stock fire insurance company dividends.

[61] See *supra*, § 10, p. 63; Colo. L., 1915, Ch. 96, § 32; N. Y. L., 1913, Ch. 52, § 66.

[62] Law of 1905, § 9 (3); Pannier, *De l'Autorisation et de la Surveillance des Sociétés d'Assurance sur la Vie*, p. 400.

[63] Ariz., § 3395; Neb., § 3182.

[64] Mont. C., § 4137; Neb., § 3259; N. Y. Consol. L., 1909, § 87.

[65] N. Y. Consol. L., 1909, § 97.

Aside from these express provisions, however, the commissioner has considerable implied power over expenses and dividends by reason of his general licensing powers.[66] In connection with the report of a committee which investigated a large life insurance company which was proposing to distribute its surplus among its stockholders to the exclusion of its policyholders, the commissioners in convention resolved that they would "devise some plan" to secure to the participating policyholders their full rights in the surplus of the company.[67]

5. *Compelling domestic companies to make good impaired capital stock.* The powers of the commissioner to compel an insurance company (usually a domestic one) to "make good" the impairment of its "capital stock" when the same becomes reduced to the extent of (usually) twenty per cent thereof, are of interest in two ways. As a matter of the "substantive law" of insurance regulation, such provisions establish a rule that a company having capital stock must maintain "net assets" over and above its reserve liability, at least equal to a certain percentage (for example, eighty per cent) of its capital stock liability. The statutes, even in a state like New York with well-drawn insurance legislation, often speak loosely of the company's "capital stock" being "impaired"— obviously an elliptical statement.[68] The Massachusetts statute speaks of "capital" "impaired," [69] but elsewhere defines the phrase more accurately.[70] As a matter of administrative law such statutes contain two interesting features: first, the power of the commissioner to determine the amount of the impairment of the capital stock; and second, his power to affect the legal relations between the company and its stockholders by ordering or authorizing the cancellation of stock certificates and the issuance of a reduced amount of stock to any stockholder who, after notice, fails to pay in his proportionate share of the amount necessary to make good the impairment.

The commissioner's orders are usually made effective by provisions authorizing him either to revoke the company's license or to notify it to cease doing business, [71] or to bring suit for an injunc-

[66] See State *ex rel.* Ins. Co. *v.* Moore (1884), 42 Ohio State 103.

[67] *Proc.* (1910), pp. 215–218, p. 247.

[68] N. Y. Consol. L., 1909, Ch. 33, § 41. [69] Mass., § 6.

[70] Mass., § 69 — "If the net assets of the company do not amount to more than three-fourths of its capital. . . ."

[71] Ala., § 8346; Ark., § 4984 (notify to cease doing business); Del., § 575 (same); Ga., § 2434; Idaho, § 4987 ("forfeits"); Ind., § 4691; Ia., § 5646; Kan.,

tion against doing business and for the appointment of a receiver.[72] In either event, the determination of the extent of the "impairment" is a complicated question of reserve liability, value of assets, approval of assets, and other facts calling for the exercise of a sound discretion. In many states the commissioner is explicitly authorized to make such determination.[73]

Some jurisdictions, after providing for notice to the company of the commissioner's determination,[74] leave it to the company officials to work out of their financial difficulties. Other statutes go further, and provide that the directors "may," after notice to a stockholder and his failure to pay his share of the deficiency, "forfeit" or cancel his stock and issue to him a reduced amount of stock, the reduction being equal to his share of the deficiency.[75] Such a provision confers upon the directors a privilege and a power to cancel the shares of stockholders and their assignees,[76] provided new reduced certificates are issued upon the basis of the commissioner's order. Since the apportionment of the deficiency would seem, normally, to be a clerical task, the directors really act under the orders of the commissioner, whose determination of the amount of the deficiency is the decisive factor. The New York statute makes this clear.[77] A few states go even further and authorize the

§ 5169; Minn., § 3261 (foreign company); Miss., § 5048; Mo., § 6347; Nev. L., 1913, Ch. 158, § 2; N. C., § 4733; N. D., §§ 4865, 4866.

[72] Ala., § 8345; Conn., § 4086; Me., Ch. 53, § 89; Mass., § 6; Mich. I, 3, § 2; Minn., § 3261 (domestic company); N. Y. Consol. L., 1909, § 41; Okla., § 6679; Wash., § 7040.

[73] Ill., § 70 ("to such an amount as the state insurance superintendent may, under his hand and official seal, certify to be proper"); La., § 3572; Mich. IV, 1, § 13; Mo. C., § 4065 ("whenever it appears to"); Neb., §§ 3145, 3146; N. Y. Consol. L., 1909, § 41; Pa., § 187; S. D., § 9217; Wis., § 1969.

[74] Ala., § 8346; Me., Ch. 53, § 89; Mo., § 6347; N. C., § 4733; Okla., § 6679; Ore., § 6367; Wash., § 7040. In the following states also there are provisions for notice as shown by the statutes cited in notes 71 and 75: Ala., Ariz., Cal., Ill., Mass., Mich., Mont., Neb., N. Y., N. D., S. D., Tex.

[75] Ariz., § 3383; Ark., § 4984; Cal. P. C., § 600; Kan., § 5169; La., § 3573; Mass., § 69; Mich. IV, 1, § 14; Neb., §§ 3145, 3146; N. H. S., p. 399, § 11; N. Y. Consol. L., 1909, § 42; N. D., §§ 4865, 4866; Pa., § 187; Tex., § 4867.

[76] In Palache *v.* Pacific Ins. Co. (1871), 42 Cal. 418, a transferee of stock was refused a new stock certificate for the full amount of the stock transferred because an "assessment" of 75%, made pursuant to a requisition of the insurance commissioner, was unpaid. The transferee sued the (fire) insurance company; judgment for defendant was affirmed. The court upheld the commissioner's action. The constitutionality of the proceeding was not discussed.

[77] N. Y. Consol. L. 1909, Ch. 33, § 42; — ". . . the directors may . . . issue to him new certificates for such number of shares as he may be entitled to in

commissioner to issue or supervise in detail the issuance of, the new reduced certificates.[78]

While there can be no such thing as "impaired capital stock" of a strictly "mutual" company[79] and hence an attempt to proceed against such a company under the provisions above cited would fail, similar provisions in a number of states authorize the commissioner to issue a requisition upon the officers of a mutual company to "make good" a "deficiency," estimated by the commissioner, in its "assets or capital" "if it appears" to him that they are "insufficient to justify its continuance in business."[80] Since there are no fixed amounts of, either reserve liability or capital stock liability, of the type of mutual company referred to in these statutes, the exercise of this power obviously calls for what might be variously termed guess work, expert intuition, or "sound discretion."[81] The power to issue a requisition upon the company or its stockholders for the repair of a deficiency seems to have been seldom exercised.[82] Probably voluntary reorganization or reinsurance will be preferred by the stockholders if the company is worth saving.

6. *Approval of consolidation or reinsurance.* Closely related to the powers of the commissioner over the reorganization of a failing company are the powers of approval or disapproval of the reinsur-

the proportion that the ascertained value of the assets of the corporation as determined by the superintendent bears to its original capital, the corporation paying for any fractional parts of shares." That the superintendent's determination is conclusive and the power to make it so is not unconstitutional is indicated by the decisions as to similar statutes as to deficiencies of bank capital. See Martin *v.* Bennett (1923, Ga.), 291 Fed. 626, upholding the conclusiveness of the bank superintendent's assessment against stockholders.

[78] Ill., § 70 (if "he shall be of the opinion that the interest of the public will not be prejudiced by permitting such company to continue business with a reduced capital"); Mont. C, § 4066 (commissioner determines amount of certificate to be issued to each shareholder); N. H. S., p. 398, § 10 (commissioner "shall issue a requisition on stockholders"); S. D., § 9217; Wis., § 1969 ("under the direction of the commissioner"); Wyo., § 5273.

[79] People *ex rel.* Long Island Mutual Fire Ins. Corp. *v.* Payn (1898), 26 App. Div. 584, 50 N. Y. Supp. 334.

[80] N. Y. Consol. L., 1909, Ch. 33, § 43. Similarly Md. IV, § 154V.

[81] See Isaacs, *Judicial Review of Administrative Findings* (1921), 30 *Yale L. J.*, 781.

[82] The only reported litigation appears to be Palache *v.* Pac. Ins. Co., *supra*, n. 76. The N. Y. attorney-general has ruled that this section (§ 42) applies only to shares "upon which payment has not been made." Rep. Att'y-Gen. (1897), pp. 254, 257. If this cryptic ruling means that the power conferred by this statute can be exercised only against stockholders who have paid nothing on their shares, it is obvious why the statute has been seldom resorted to.

ance by a company of all or a large proportion of its risks in another company, and over the consolidation of one company with another by a transfer or an amalgamation of assets. Obviously, in either of these proceedings, there is considerable opportunity for a failing company to defraud its policyholders, unless the transfer of assets is safeguarded and supervised to protect their interests. Accordingly, we find that a number of states have conferred upon their commissioners various sorts and degrees of supervision over consolidation and reinsurance.[83] Sometimes the statute requires the approval of the superintendent either for reinsurance of an individual risk or major fraction thereof.[84] Usually, however, the provisions relate to reinsurance of all or substantially all of a company's risks. Since this will involve, usually, a transfer of all or a very large proportion of its assets as premiums for the reinsurance, the need of regulation of reinsurance is practically the same as of regulation of consolidation.

Most of these laws make it fairly clear that the commissioner's power is one of approval and not of disapproval or rejection; that is, that his affirmative approval is a prerequisite to the legal completeness of the reinsurance or consolidation.[85] Thus, the New York statute just cited reads:

[83] In general: Ariz., § 3484 (fraternals); Cal. P. C., §§ 634, 604 (court approval of reinsurance by receiver of company); Colo. L., 1913, Ch. 99, § 64; Conn., §§ 4141–4145; Conn., § 4199 (fraternals); Del., § 583; Fla. L., 1919, Ch. 7875; Idaho, §§ 4994, 5078; Ill., §§ 80a–80e, 208af; Ia., §§ 5578, 5728, 5729; Kan., § 5180; Ky., § 681c–14 (fraternals); La., § 3605; Me., Ch. 53, § 135, Ch. 54, § 8 (fraternals); Md. III, § 159A; Mass., §§ 19A, 20; Mich. I, 3, § 2, III, 4, § 14 (fraternals); Minn., §§ 3423, 3464, 3517–3519; Miss., §§ 5065, 5186 (fraternals); Mo., §§ 6141, 6131; Neb., §§ 3147, 3228, 3318 (fraternals); N. H. L., 1913, Ch. 122, § 14; N. J., p. 2849, §§ 32, 33, p. 2853, §§ 48, 50; N. Y. L., 1917, Ch. 299, § 1, L., 1916, Ch. 345, § 1, Consol. L., 1909, §§ 22, 63, 129; N. C., §§ 3497, 4777; S. C., § 4798b (13) (fraternals); N. D., § 4891; Ohio, §§ 9351, 9355, 9555; Okla., §§ 6713, 6969; Ore., §§ 6370, 6376; Pa., §§ 126, 140 (b), S. D., § 9167; Tex., § 4737; Utah, § 1174; Va., § 4310; W. Va., § 15h; Wis., §§ 1908m, 1955 (21–26).

[84] See the statutes of Ala. (§ 8436), Del., Fla., La., Mass. (§ 20), Minn. (§ 3464), Miss. (§ 5065), N. D., Ohio (§ 9351), Okla. (§ 6713), S. D., cited in the last note.

[85] Ariz., § 3484; Conn., §§ 4141–4145; Del., § 583; Fla. L., 1919, Ch. 7875; Ill., § 208af; La., § 3605; Me., Ch. 54, § 8; Md. III, § 159A; Mass., §§ 19A, 20; Mich. I, 3, § 2; Minn., § 3464; Miss., § 5065; Neb., § 3147; N. J., p. 2849, § 32; N. Y., § 22; N. C., § 3497; N. D., § 4891; Ohio, § 9355; Okla., § 6969; Ore., § 6376; Pa., § 126; S. D., § 9167; Va., § 4310; Wis., § 1908m. See also the statutes cited in notes 87 and 92. But see Ala., § 8436 (disapproval power).

Such reinsurance shall be submitted in advance to, and have the approval of, the superintendent of insurance.

The Massachusetts provision, "shall be subject to the approval of the commissioner" is not as clear.[86] The New Jersey section is emphatic and unequivocal as to the consequences of failure to obtain the official approval:

. . . and the contract for such reinsurance shall be utterly invalid and of no force until it shall have been submitted to the Secretary of State [Insurance Commissioner] and by him approved, which he shall only do after due inquiry . . .[87]

In an action brought in New Jersey by the reinsured against the reinsurer it was held to be a good defence that the contract of reinsurance had not been approved by the Secretary of State under this statute.[88] Whether the same result would follow under the New York type of statute is not clear. The New York courts are strongly inclined to hold that the power to enforce such provisions is vested exclusively in the attorney-general and superintendent of insurance,[89] and not in a private litigant.

On the other hand, since the making of a contract of reinsurance of all the risks of a company does not relieve the original insurer of its obligations to policyholders who do not assent to the transfer of obligation to the reinsurer,[90] not even the approval of the commissioner would affect the legal rights of such policyholders, at least in the absence of notice and hearing.[91] Perhaps it is with a view to affecting the rights of policyholders that Connecticut has made elaborate provisions for the consolidation of insurance com-

[86] Mass., § 20.

[87] N. J., p. 2849, § 32, same as P. L., 1877, p. 200.

[88] Iowa Life Ins. Co. *v.* Eastern Mutual Life Ins. Co. (1900), 64 N. J. L. 340, 45 Atl. 762.

[89] See Russell *v.* Pittsburgh Life and Trust Co. (1909), 132 App. Div. 217, 116 N. Y. Supp. 841; Raymond *v.* Security Trust and Life Ins. Co. (1906), 111 App. Div. 191, 97 N. Y. Supp. 557.

[90] People *v.* Empire Life Ins. Co. (1883), 92 N. Y. 105; Relfe *v.* Columbia Life Ins. Co. (1881), 10 Mo. App. 150, 168; *In re* Manchester, etc., Ass'n (1870), L. R. 5 Ch. App. 640.

[91] See International Life Ins. Co. *v.* Sherman (1923), 262 U. S. 346, 43 Sup. Ct. 574, holding that a decree of Federal court in receivership proceedings to the effect that the rights of "certificate holders" of an insurance company be barred unless they comply with the terms of reorganization within twenty days, was void as to persons not served and brought into court in the usual way. *A fortiori* it would seem the commissioner has no such jurisdiction.

panies.[92] A domestic life company is to petition the commissioner for "approval" of its consolidation with another company. Thereupon the commissioner notifies all the policyholders of the petitioner, both by mail and by advertisement in a newspaper for three weeks. He is then to request the assistance of two insurance commissioners from other states, as experts, to hear the case.[93] After a full hearing these three "if satisfied that the interests of the policyholders of such companies are properly protected and that no reasonable objection exists thereto," may approve the consolidation or reinsurance and order such distribution of the surplus assets "as shall be just and equitable." Apparently the approval is designed to extinguish the rights of policyholders against the original insurer and substitute therefor similar rights against the reinsurer; for if it be true that the assets of an insurance company which is going out of business are a "trust fund" for the benefit of unmatured policyholders,[94] then the distribution of assets provided for by the statute would be nugatory unless it would cut off the claims of policyholders against these assets. The clause, "said commission (of three) shall guard the interests of policyholders of the company," suggests that such was the design of the framers; and the elaborate provisions for hearing, for compelling the attendance of witnesses, and for the representation of policyholders at the hearing, strengthen this conclusion. No case has been found construing a statute of this type. It seems doubtful whether such an administrative commission can, constitutionally, be empowered to cut off the claims of non-assenting policyholders, even though full procedural safeguards are prescribed. Upon principle, however, it appears that such statutes should be upheld, since the procedure thus provided will protect the interests of policyholders not only as well as, but probably better than, would a judicial proceeding.

The provisions as to reinsurance are sometimes mere "registra-

[92] Conn., §§ 4141–4145. Similar provisions are Ia., §§ 5725–5728; Minn., §§ 3517–3519; Mo., § 6141; Neb., § 3228; N. D., § 4891; Ohio, § 9355; S. D., § 9167; Wis., § 1955 (21–26). The Uniform Fraternal bill contains a provision for approval of mergers by the commissioner, without, however, a provision for notice by the commissioner to the insured. The merger is required to have the approval of the "legislative or governing bodies" of each of the societies involved. See, for example, Ala., § 8468, and other citations in n. 97, *infra*.

[93] In Ia., Minn., N. D., Ohio, S. D., and Wis., the Board to hear the consolidation petition is composed of the governor or his appointee, the attorney-general, and the insurance commissioner.

[94] See People *v.* Empire Mutual Life Ins. Co. (1883), 92 N. Y. 105.

tion" requirements, that is, that a company shall report to the commissioner any reinsurance of its risks.[95] Far more frequently, however, the use of "approval" or "consent" is an indication that the statute, whether it relates to reinsurance or to consolidation, confers a power of regulation. In many jurisdictions this power is unqualified by any norm or limitation upon the "approval" or "consent" of the commissioner — as in New York and Massachusetts sections above quoted.[96]

In other states the law gives only vague and general qualifications. Thus, the common provision as to merger of fraternal societies (an operation often fraught with danger to one or both) is that the commissioner shall approve if he finds that such merger "is just and equitable to the members of each of the said societies." [97] The Connecticut type of statute, already referred to, qualifies the provision thus:

> If satisfied that the interests of the policyholders of such companies are properly protected and that no reasonable objection exists thereto.[98]

Illinois, staunch supporter of the Union, prescribes that the director of trade and commerce shall approve, being satisfied that the consolidation or reinsurance scheme is "not inconsistent with the laws and constitution of this state and of the United States, and that no reasonable objection exists thereto." [99] Does Illinois conceive that there can be any "reasonable objection" to a scheme which is in harmony with the Federal Constitution?

In all these instances the discretionary power of the commissioner is either unregulated or is, at best, qualified only by vague general standards. Obviously, the exercise of such power allows considerable latitude of judgment upon difficult business problems. A company which is seeking consolidation or total reinsurance is

[95] E.g., Minn., § 3293 (reinsurance of any risk, other than life, to be reported); Utah, § 1174.

[96] N. Y. Consol. L., 1909, Ch. 33, §§ 22, 63, 129; Mass., § 19A, 20. Other examples of unqualified provisions are: Ala., § 8436; Idaho, § 4994; Me., Ch. 53, § 135, Ch. 54, § 8; Mich. I, 3, § 2; Minn., § 3494; Miss., § 5065; Neb., § 3147; N. J., p. 2853, §§ 48, 50; N. C., §§ 3497, 4704, 4777; Ohio, §§ 9351, 9555; Okla., § 6713; Ore., § 6376; Pa., § 126; Va., § 4310; W. Va., 15h.

[97] Ala., § 8468; Ariz., § 3484; Ky., § 681c–14; Mich., § 196; Miss., § 5186; N. H. L., 1913, Ch. 122, § 14; N. C., S., § 4798b (13); N. D., § 5071; Ohio, § 9474; Ore., § 6479; Pa., § 34; Tenn., § 3369a (100); Tex., § 4841; Utah, § 3284; Va., § 4286; Wash., § 7272; Wyo., § 5337.

[98] See statutes cited in n. 92, this section.

[99] Ill., § 208af.

likely to be in an unhealthy or failing condition, if not actually insolvent. The commissioner must weigh the relative advantages of continuing under the existing arrangement and of entering upon the new one. That there are limits to the factors which he may impunitively consider in reaching his decision seems clear; and yet it would be difficult for a court to put its finger upon an "abuse of discretion" or excess of power. In a few states, the power of approval appears to be limited to cases of non-compliance with specific provisions.[100]

The constitutionality of these grants of unregulated discretionary power has been passed upon in only one reported case. The New Jersey statute, which qualifies approval by the clause

> upon satisfactory evidence that the interests of policyholders are fully protected and that the consent of two thirds of them has been had in writing as aforesaid.[101]

was attacked in an action brought by the reinsured against the reinsurer, upon the ground that the statute unlawfully delegated legislative power. The court (two judges dissenting) upheld the grant of power, saying:

> . . . it is neither legislative nor judicial; it is administrative . . . what it [the statute] calls upon the commissioner to do is not to legislate by laying down a new rule, but to enforce a prescribed rule; not to adjudicate unless his exercise of judgment is to be called a judicial act, but to perform a duty of ascertainment; to determine, by an examination of values and mathematical relations, whether a safe financial situation exists and whether a certain document has been properly signed.[102]

7. *Approval of increase or reduction of capital stock.* Functionally akin to the powers discussed in the last two subsections, the powers of the commissioner as to approval of increase or reduction of the capital stock of an insurance corporation are of interest from an administrative point of view, chiefly because of the faint and flickering norms provided by the legislatures for the guidance of the administrative officials. Many states, indeed, do not expressly confer any such power upon the commissioner,[103] yet probably the

[100] Colo. L., 1913, Ch. 99, § 64 (if "in his judgment" law violated); Idaho, § 5078 (same); Md. III, § 159A; Mass., §§ 19A, 20; Wis., § 1908m.

[101] N. J., p. 2849, § 32, same as P. L., 1877, p. 200. Similarly Tex., § 4737.

[102] Iowa Life Ins. Co. *v.* Eastern Mutual Life Ins. Co. (1900), 64 N. J. Law 340, at pp. 346, 347–8, 45 Atl. 762.

[103] In the following states no discretionary power is expressly conferred in the insurance legislation; in a few, there are registration provisions, as noted: Ala.; Ariz., § 3429 (registration); Cal.; Colo.; Conn.; Del.; Fla.; Idaho, § 4944

commissioner is authorized to exercise some degree of control over such steps under the authority of the sections as to financial conditions in general. Possibly in some states the general incorporation law affords the only check upon increase or reduction of capital stock.

It is often not clear just what effect the approval, provided for by the statute, is to have upon the proceeding; whether the approval is a necessary step (a "condition precedent," to borrow the language of conveyancing), an "operative fact," in the creation of the legal relations arising from an increase or reduction, or whether the official disapproval either vitiates the entire proceeding, or, without vitiating it as to collateral legal relations, subjects the company to revocation of its license or judicial proceeding. Thus, the Massachusetts act,[104] as to increase, provides that the company shall take certain steps to issue new certificates of stock, shall offer them to its present shareholders first, shall sell the remainder to other persons, and "within thirty days after the issue of such certificates, submit to the commissioner a certificate setting forth the proceedings thereof and the amount of such increase." Then,

> if the commissioner finds that the increase was made in conformity to law, he shall endorse his approval therein; and upon filing such certificate so endorsed with the Secretary of State . . . the company may transact business upon the capital as increased, and the commissioner shall issue his certificate to that effect.

Of what earthly use is an increase to a company if it may not "transact business" upon the increased capital? From this angle, the increase of stock is not complete, is still inchoate, until the commissioner has approved. On the other hand, if the commissioner does not approve, how is the corporation to "unscramble the eggs" if it has sold the new shares to existing shareholders or to outsiders, as explicitly provided by the statute? It may be that the increase is complete as to the rights of shareholders without the approval, but the company may be punished if the official disapproves.[105] At all events, some expert draftsmanship is needed.

(increase; registration); Nev.; N. H.; N. J., p. 2842, §§ 13, 14; N. M., § 2856; N. Y.; Ohio., § 9345; Pa., § 132; S. D., § 9221; Tenn., § 2270.

[104] Mass., § 70.

[105] The provision as to decrease is similarly worded: Mass., § 71. Similar doubts are raised by Wash., §§ 7043, 7135. For examples of better draftsmanship, in which the official approval is clearly required to precede the issuance of new stock certificates, see: Tex., § 4727; Vt., § 5523; Wis., § 1908a; Wyo., § 5258.

If the "approval" were merely perfunctory, the ambiguity of the statute would not be serious, but such is not the case. Thus, the Massachusetts statute, as to reduction of capital stock, reads that if the commissioner finds that the reduction is made in conformity to law and that "it will not be prejudicial to the public," he shall endorse his approval thereon.[106] The Kentucky statute, as to increase, conditions the approval thus: ". . . is satisfied that the rights of persons doing business with the company will not be prejudiced." [107] This language is more restrictive of the considerations which may be taken account of when arriving at a decision, though it is still far from a dependable guide. A little nearer the mark comes the Missouri statute: "the same will not be prejudicial to the interests of policyholders." [108] "In conformity to law," when coupled with specifications of the steps to be taken, leaves the official little more than a routine discretion.[109] On the other hand, a mere provision for "approval" or "permission," without qualification, may mean the same as these latter, or may confer an unregulated discretionary power.[110]

§ 17. *Deposits of securities by insurance companies.* The deposit laws have provoked much controversial discussion. The requirement that a company must deposit with a state official securities or other assets of a fixed minimum value has proved extremely burdensone to large companies doing business in a number of states. Moreover, it is argued that deposits afford only illusory protection to policyholders, since it has been demonstrated by

[106] Mass., § 71. For similar qualifications of the power of approval, see: Ark., § 5012; Idaho, § 989; Ill., § 74; Ky., § 688 (reduction "may be made without prejudice to the public"); Minn., § 3314 (if he is "of opinion that injury to the public will not result"); Miss., § 5050; N. C., § 4735; N. D., § 4867 (reduction); Okla., § 6681 (reduction); Wis., § 1970 (reduction). See also S. D., § 9222 (reduction, to such amount as he may certify to be "proper" and "justified by the assets of the company"); Vt., § 5523 ("will promote the general good of the state").

[107] Ky., § 626. See also Ore., § 6375 ("interests of policyholders or creditors may be prejudiced thereby"; reduction); Pa., § 138 ("consistent with the interests of policyholders and creditors"; reduction).

[108] Mo., § 6327 (increase or reduction).

[109] La., §§ 3574 (reduction), 3577 (increase); Me., Ch. 53, § 64; Mass., § 70 (increase); Minn., § 3290; Miss., §§ 5033, 5049 (increase); Mo., § 6326 (if proceedings are "regular"); N. C., §§ 4732, 4734; Wash., § 7043.

[110] Unqualified power of approval: Ga., § 2397; Mont. C., § 4052; Neb., § 3151 (conformable to law *and approved* by board); Tex., § 4863 ("in his discretion"; not a doubtful case); W. Va., § 158.

experience that a company may fail, with resulting loss to its policyholders in one way or another, even though it has complied with the deposit laws. No doubt a strong company, soundly and efficiently managed but without deposits, is better for the insured than a weak company with deposits. Moreover, the deposit requirements as to alien companies have hampered the entrance of American insurance companies into foreign countries which apply similar deposit requirements by way of retaliation, as in France.[1]

On the other hand, the deposit laws furnish a definite and easily administered check upon "blue-sky" insurance enterprises. Assets may be simulated, reports of assets may be falsified, but the security deposited with an official can be counted and verified with ease and certainty. To that extent the promoters of insurance enterprises must have some other assets than hope and promises. Another reason for the deposit laws, with respect to foreign or alien companies, is that they bring within the jurisdiction of local courts assets which may be seized in payment of policyholders' claims. The deposit laws are simply another illustration of the inexorable fact that sound and honest enterprises must suffer burdensome restrictions in order that unsound and dishonest ones may be proscribed.

With the general policy of deposit laws, however, we are not immediately concerned. On the administrative side, they give rise to two rather unique types of problems. The first and more general problem is: What are the legal relations of the official depositee with respect to the securities deposited, toward the insurer, its policyholders and general creditors? A second and more specific problem is: What safeguards are provided against possible dishonesty or embezzlement by the official depositee or his subordinates? In addition to these problems there are examples of the usual types of discretionary official power in regard to approval of deposits, acceptance of bonds or other substitutes for deposits, withdrawal and replacement of deposits, and final disposal of deposits of an insolvent or withdrawing company.

Deposit laws have assumed two distinct forms: compulsory and optional. The "compulsory" deposit laws require a deposit of securities, or some statutory equivalent therefor (such as a bond, deposit in another state, or deposit by an alien company with resident trustees) as a condition precedent to being granted the privilege of doing business in the state. The "optional" deposit laws,

[1] Proc., N. C. I. C. (1919), pp. 311, 316.

usually applicable only to life insurance companies, authorize, but do not compel, companies to deposit securities with some official for the benefit and protection of "registered" policyholders; and the official, before the delivery of the policy to the insured, stamps upon it his official certificate that it is registered and protected by the securities deposited.[2] This latter type of law seems chiefly designed to foster local enterprises by giving them a sort of official recommendation. The compulsory type is the one referred to in the following discussion, unless otherwise indicated.

1. *Amount of deposit.* Turning now to the details of the deposit laws, one finds that the statutes usually prescribe in round numbers the value or amount of the securities to be deposited by each type of company.[3] It will be noted that in the New Jersey and Virginia

[2] E.g., N. Y., § 73. In 1910, New York abolished this registration of policies. N. Y. L., 1910, ch. 697.

[3] Ala., § 4563 ($200,000), L., 1897, p. 1377, § 9 ($100,000); Ariz., § 3424; Conn., § 4102 (alien fire); Fla., § 2759 ($100,000); Ga., §§ 2419 ($25,000, fire or marine), 2426 ($100,000); Idaho, §§ 4940 ($100,000, mutual life), 4973 ($200,000, alien fire or marine); Ill., § 37 ($200,000, alien fire co.); Ind., § 4613 (¼ of capital stock); Ia., § 5478 (same); Kans., § 5206 ($100,000, domestic life); Ky., §§ 648 ($100,000, domestic life), 657 (same, foreign life); La., §§ 3585 ($200,000), 3643 ($100,000, domestic life); Md. I, § 157 ($100,000, domestic life); Mass., §§ 155, 48, 51 ($100,000 to $500,000, depending on kind of insurance); Mich., II, 2, § 5 ($100,000, foreign life), II, 2, § 8 ($200,000, alien fire); Minn., § 3309 ($100,000); Miss., § 5073; Mo., § 6128 ($100,000, domestic life); Mont. C., § 4061 ($100,000, alien fire); Neb., § 3174 ($200,000, alien co.); Nev., § 1275 ($200,000, alien co.); N. H. L., 1913, Ch. 42, § 1 (⅓ of capital); N. J. L., 1913, Ch. 121, § 1 ($50,000, but commissioner may require additional deposits up to $100,000); N. Mex., § 2868 ($10,000, fire co.); N. Y. Consol. Laws, 1909, § 27 (alien co., $500,000, fire, $200,000, life or casualty), § 71 ($100,000, or $250,000, depending on kinds of insurance written); N. C. R.B., § 4792 ($5,000, domestic assessment co.); N. D., § 4847 (not exceeding $100,000); Ohio, § 9346 ($100,000, domestic life); Okla., § 6683 ($100,000, foreign life or surety); Ore., § 6387 ($25,000, foreign or alien fire); Pa., §§ 158,183 ($200,000, alien cos.); S. C., § 2701 ($20,000, life co.); S. D., §§ 9351 ($100,000, life), 9210 (¼ of capital, domestic fire); Tenn., § 3293 ($200,000, alien cos.); Tex., § 4870 (foreign fire, 25% of Tex. premiums preceding year, not over $50,000); Utah, § 1144; Va., § 4211 ("to be fixed by the commission" between $10,000 and $50,000); Wash., § 7054 ($200,000, alien); W. Va., § 41 ($200,000, alien); Wis., § 1915 (4) ($200,000, alien); Wyo., §§ 5251, 5266 ($100,000, all companies). This list is typical but far from exhaustive. In a few states, domestic companies are not required to make deposits but may do so to meet the laws of other states. Mass., § 185; Ala., § 8367; R. I., Ch. 219, § 17; Pa., § 46; S. C., § 2727; Vt., § 5549.

In New York, on December 31, 1924, the aggregate total par value of de-

statutes, cited in the last note, the commissioner is given discretionary power, within limits, to fix the amount of the deposit, but that usually the amount which the commissioner must and may require is fixed. Still, the application of these simple requirements is complicated by the retaliatory laws, which are practically everywhere made expressly applicable to deposit requirements. To illustrate, a New York company entering Arizona must deposit the same amount in Arizona which an Arizona company is required to deposit in New York, or would be required to deposit if any Arizona companies were to apply for admission in New York.[4] Under the "optional" deposit laws, it is commonly provided that the securities deposited must equal the reserve liability upon outstanding "registered" policies.[5] Here the determination of the amount of the deposit calls for the exercise of some degree of discretionary power.[6]

2. *With whom deposited.* No uniformity is found, even within the statutes of a single state, with respect to the official depositee. Even within a single jurisdiction, the deposit of one type of company is made with the state treasurer, of another type with the insurance commissioner, and of a third type with private trustees.[7] The statutes may be grouped thus: (1) where the insurance commissioner is the official depositee and permanent custodian of the securities; [8] (2) where some other official is the depositee and permanent custodian, usually subjected to certain powers of disap-

posited securities of all companies (182 in number) was $50,695,650. N. Y. Insurance Report (1925), Pt. II, Life Insurance, p. lvi.

[4] Union Central Life Ins. Co. *v.* Durfee (1896), 164 Ill. 186, 45 N. E. 441; Germania Ins. Co. *v.* Swigert (1889), 128 Ill. 237, 21 N. E. 530. See *supra*, § 12.

[5] Ala., §§ 8526, 8528; Ark., § 4996; Cal. P. C., § 634; Colo., 1915, Ch. 96, § 41; Ga., § 2428; Idaho, § 4972; Ill., § 208b; Ia., § 5483; Kan., § 5496 (compulsory); Ky., § 648a1; La., § 3684 (compulsory); Miss., § 5076; Mo., § 6117; Mont. C., § 4117; N. H. L., 1913, Ch. 42, § 4; N. M., § 2859; S. D., § 9318; Tex., § 4750.

[6] See *supra*, § 16, for discussion of calculation of life insurance reserves.

[7] See the citations in the four following notes of Ala., Ark., Idaho, Ill., Ky., Md., and N. H.

[8] Ala., § 8410; Ark., § 4996; Colo. L., 1913, Ch. 99, § 11; Del., §§ 575, 592; Fla., §§ 2759, 2779 (state treasurer is *ex officio* insurance commissioner); Idaho, § 4940; Ill., §§ 181, 196; Ind., § 4613; Ia., §§ 5478, 5695, 5719; Ky., § 680; Md. III, § 193; Minn., §§ 3274, 3309; Mo., §§ 6124, 6128; Mont. S., § 4114, C., § 4117; Neb., § 3178; N. H. L., 1913, Ch. 42, § 1; N. J., p. 2841, § 8; N. Mex., § 2817; N. Y. Consol. L., 1909, § 26; N. C., R. B., §§ 4792, 4780; N. D., § 4847; R. I., Ch. 219, § 31; S. C., §§ 2701, 2727; S. D., §§ 9210, 9351; Tex., § 4750; Utah, § 1132; W. Va., § 41; Wis., § 1915 (4); Wyo., § 5252.

proval and control by the commissioner; [9] (3) where the securities are delivered to the insurance commissioner and are by him placed with the state treasurer or other official for safe keeping; [10] (4) where the securities are delivered to unofficial trustees, approved by the commissioner.[11] These last provisions are applicable to alien companies and are of slight interest in this connection.

The diversity of provisions as to the official depositary is, however, of some importance. As a fiscal custodian, the state treasurer doubtless has advantages over the insurance commissioner in most states, since he has the vaults and the organization for handling large sums of money. However, the confusion involved in a divided responsibility, and the specialized training of the commissioner or his deputies in dealing with insurance companies and their investments, point to the commissioner as the logical agency of control. Especially is it desirable that the withdrawal and substitution of deposits should be supervised and controlled by the commissioner, rather than by the state treasurer.[12] In several states the treasurer, though he is given custody of the deposits, is distinctly forbidden to permit the withdrawal of any securities without the approval of the insurance commissioner.[13] This division of labor seems the best one.

3. *What must be deposited?* While the types of securities acceptable for deposit are usually prescribed with considerable precision, the statutes not infrequently grant to the commissioner or other official some discretionary power of approval, as by the use of

[9] With state treasurer unless otherwise specified: Ala., §§ 8351, 8355; Ariz., § 3402; Ark., § 4995; Conn., §§ 4102, 4112, 4164; Ga., §§ 2419, 2427; Idaho, § 5104; Ill., § 36; Kans., § 5176; Conn., § 648; La., §§ 3585, 3633, 3643 (state treasurer), 3680 (state auditor); Me., Ch. 53, §§ 74, 106, 164; Md. I, §§ 157, 183; Mass., §§ 155, 185; Mich. I, 2, § 11, II, 2, § 5; Miss., §§ 5073, 5076; N. H. S., p. 397, § 8, L., 1895, Ch. 81, § 2; N. C., § 4709 (ins. commissioner *or* treasurer); Okla., §§ 6683, 6684; Ore., § 6371 (9); R. I., Ch. 219, § 7; Tenn., §§ 3292 (2), 3293, 3303; Tex., §§ 4749, 4769; Vt., § 5549; Va., §§ 4201, 4211.

[10] Ala., § 8518 (optional deposit); Cal. P. C., §§ 618, 634; Nev., §§ 1311, 1315; N. H. L., 1913, Ch. 42, § 4; N. C. R. B., § 4780, Ohio, §§ 640, 9565; Ore., § 6387; Pa., § 47; Wash., § 7069.

[11] E.g., Ala., § 8356; Conn., § 4104; Me., Ch. 53, § 106; Mich. II, 2, §§ 5, 8, 9 (bank or trust co.); Minn., § 3598; N. J., p. 2856, § 61; N. Y., § 26; Ohio, § 9566; Wash., § 7054.

[12] As the treasurer does under Ala., § 8367; Ariz., § 3402; Md. I, § 157; N. H. S., p. 397, § 8; Tenn., § 3308.

[13] Kans., § 5176; Ky., § 648; Md. I, § 205 (foreign life cos.); Mich. III, 3, § 10; N. H. L., 1913, Ch. 42. § 4 (domestic life); Ohio, § 640; Pa., § 47.

"approved by" the commissioner,[14] or of "satisfactory to" the commissioner,[15] or of other words of mental operation.[16] In those laws which require deposit of "approved securities," [17] it is not clear whether "approved" means "approved by the commissioner" or approved by the statute, that is, falling within the classes of securities named as permissible deposits. At all events, the application of the statutory descriptions of securities and the ascertainment of their values calls for the exercise of judgment by the official, as pointed out in the preceding section.[18]

The provisions for "deposit" of real estate with the commissioner are of some interest.[19] The prevailing device to accomplish this result is a deed of the realty to the commissioner, as in Alabama, Iowa, Kentucky, and Texas; Missouri provides for a mortgage upon the realty securing a note for the full value of the land, executed by the company to the commissioner. It has been demonstrated in one case at least that this device is not sure to furnish dependable security.[20]

The burden of deposit laws on foreign corporations is frequently alleviated by an alternative provision for the acceptance of a certificate of deposit executed by the commissioner or fiscal officer of another state (for example, the domiciliary state, of a company in-

[14] Ala., §§ 8351, 8515; Ark., §§ 4995, 5038; Me., Ch. 53, § 164 (by governor and council); Nev., §§ 1311, 1315; N. C. R.B., §§ 4713, 4792; Tenn., § 3350a(1); Tex., § 4749.

[15] Ala., § 8355; Okla., § 6684; Tenn., § 3293.

[16] Ga., § 2427 (securities "deemed" by the commissioner "equivalent to cash"); Ind., § 4619 (in the estimation of); N. Y. L., 1914, Ch. 102, § 1 (securities of alien companies "may be acceptable at such valuation and on such conditions as the superintendent may direct"); S. C., § 2708 (commissioner "to be the judge of the validity of such securities"); Tenn., § 3296 ("to be certified as safe and worth this amount"); Utah, § 1132 ("value and sufficiency to be determined by" the commissioner); Wyo., § 5252 (same).

Of the securities on deposit in New York on December 31, 1924, aggregating $50,695,650, all but $390,000 were bonds of the United States or of the State of New York or of a city or county. N. Y. Insurance Report (1925) Pt. II, Life Insurance, p. lvi.

[17] Neb., § 3174; N. M., § 2859; Ore., § 6387; S. C., § 2701 (but § 2708 provides that the commissioner is "to be the judge of the validity of such securities and bond").

[18] *Supra*, § 16, pp. 200, 204.

[19] Ala., § 8519; Ark., § 4996; Ga., § 2429; Ia., § 5532; Ky., § 648a (3); Mo., § 6120; Tex., § 4750.

[20] Relfe *v.* Columbia Life Ins. Co. (1881), 10 Mo. App. 150; a mortgage for $400,000 produced only $284,500 on foreclosure sale.

corporated in one of the United States) in lieu of an actual deposit. These provisions do not commonly allow the commissioner any choice as to whether or not a deposit in another state shall be allowed as a substitute for a local deposit; the option is normally the company's.[21] Occasionally, the nature and contents of the certificate of the other official are described in such indefinite terms that the commissioner is allowed considerable latitude in accepting the same. For instance, in Michigan the qualification upon acceptance is, "if it shall appear" from such certificate that the deposits in the other state are available to satisfy judgments of policyholders "in any manner corresponding to" that provided by the Michigan deposit law.[22]

Similarly, a bond is sometimes named as an alternative requirement. Where the language is simply "bond or securities" or the like,[23] it is not clear whether the choice of alternatives rests with the company or with the commissioner. A South Carolina statute left no doubt upon this point, since it prescribed that before licensing a company the commissioner should require it to deposit with him "an approved bond or approved securities, in the discretion of the commissioner, as follows — . . . . " [24] The statute contained no qualifications upon the commissioner's choice as between bond and securities. Purporting to act pursuant to this law, the commissioner informed a number of foreign companies that a corporation which had not invested at least one fourth of its reserve, upon policies held in South Carolina, in securities named in the statute, would be required to deposit South Carolina securities (state or municipal bonds or local mortgages) and would not be allowed to deposit a bond as substitute. A company which tendered a bond and was refused a license brought *mandamus*. The South Carolina court denied relief with the jejune comment that the commissioner

[21] Ala., § 8351; Ariz., §§ 3399, 3402; Ark., § 5076; Colo. L., 1917, Ch. 80, § 1; Conn., §§ 4102, 4103, 4171, 4172; Ga., § 2426; Idaho, §§ 4971, 4973, 4974; Ill., § 37; Ind., § 4687; Ia., § 5481; Kan., §§ 5222, 5223; Ky., § 680; Md. I, § 183; Mass., § 155; Minn., § 3309; Miss., §§ 5073, 5076; Mo., §§ 6134, 6135; Mont. C., § 4118; N. Y., § 26, and L., 1910, Ch. 634, § 9, L., 1916, Ch. 590, § 2; N. C., § 4711; Ohio, § 9367; Okla., § 6683; Ore., § 6328; S. D., § 9351; Tenn., § 3292 (2); Tex., § 4771; W. Va., § 42. However, a question may arise as to whether the deposit in the other state is for the benefit of *all* policyholders or only of local policyholders. See *infra*, this section, p. 233.

[22] Mich. II, 2, § 5.

[23] Cal. P. C., § 623; Fla., § 2779a; Ore., § 6387; Tex., § 4870.

[24] S. C., 26 Statutes at Large, 774, § 13, now S. C., §§ 2701, 2708.

was granted discretionary powers and had exercised them.[25] On writ of error in the United States Supreme Court, it was argued that the statute and the commissioner's ruling denied the company "due process" and "the equal protection of the laws." Particularly was it urged that the commissioner had discriminated against the relator by licensing, upon the filing of a bond, a New Jersey company which did not at that time have one fourth of its South Carolina reserve invested in the named securities. Mr. Justice Day, who delivered the opinion of the court affirming the judgment, took pains to point out that there was no arbitrary discrimination in the commissioner's rulings, because the New Jersey company had made arrangements to invest in real estate mortgage loans in South Carolina an amount in excess of the one-fourth; that these loans would bring property within the state which might be reached upon execution, and also indicated the company's purpose to remain permanently in the state — "a fact which was entitled to significance." [26] While the opinion is sketchy in its analysis, it goes behind the screen of official discretion sufficiently to explain away the evidence of arbitrariness, and thus indicates that the unqualified discretionary power is not uncontrollable. At the same time it stops distinctly short of reviewing the commissioner's decision by deciding the whole case for him.

4. *Income from deposited securities.* It is usually provided that the company may collect the interest or income upon the securities deposited. Whether the official depositary has discretionary power to prevent this collection or to impound the income, is not always clear. The Massachusetts provision is that the company "shall be entitled to the income thereto,"[27] and the New Jersey section is mandatory.[28] Under a Rhode Island statute that the company "may be permitted to collect and receive the interest and

[25] State *ex rel.* Phoenix Mutual Life Ins. Co. *v.* McMaster (1913), 94 S. C. 379, 381, 77 S. E. 401.

[26] South Carolina *ex rel.* Phoenix Mutual Life Ins. Co. *v.* McMaster (1915), 237 U. S. 63, at pp. 71, 73, 35 Sup. Ct. 504, 59 L. ed. 839. As a side light on this case, the respondent, commissioner McMaster, strongly urged the wisdom of laws requiring investment in local securities in an address before the Nat'l. Conv. of Ins. Comm'rs in 1911, particularly for the purpose of "decentralizing money power." (*Proceedings*, 1911, p. 61.) Is this "filling in details" or "policy determining"?

[27] Mass., § 185. So, Ala., § 8367.

[28] N. J., p. 2842, § 10 ("shall permit"). See also N. Y. Consol. L., 1909, Ch. 33, § 14 ("shall be permitted").

dividends on its securities so deposited" it was held that "a discretion was meant to be reposed in" the official depositee and that he was privileged to refuse to permit the company to collect the interest, if done "for the protection of policyholders." [29] A similar holding might be expected under most of the other statutes as to collection of income on deposits.[30] Under the New York provision the right of the company to receive the income on its deposits ceases as soon as the company becomes insolvent, and, in the absence of any direction, the official depositary is privileged to collect the interest and hold it upon the same trust as the principal.[31]

5. *Withdrawal or exchange of deposited securities.* The legislation as to withdrawal of deposits usually confers upon the official somewhat more explicitly a discretionary power of refusal. In Massachusetts, for instance, the company "may from time to time, with the consent of" the state treasurer, when not forbidden by the law under which the deposit was made, change in whole or in part the securities composing the deposit for other "approved" securities of equal par value.[32] In New York it is merely stated that securities "may be exchanged for other securities receivable as provided in this chapter." [33] This does not explicitly confer discretionary power, yet it leaves us entirely uninformed as to the basis of substitution. The attorney general has ruled that "substitution should be allowed so long as par value and market value equal designated amount of deposit," [34] thus apparently adopting a stricter interpretation of official discretion than is indicated by the Massachusetts requirement. It is not necessary that the substituted securities should be equal in value to those withdrawn, if the latter are in excess of the amount named in the statute. Hence,

[29] Moies *v.* Economical Mutual Life Ins. Co. (1879), 12 R. I. 259.

[30] Ark., §§ 4995, 5003; Cal. P. C., § 618; Del., § 597; Fla., § 2779b; Ga., §§ 2417, 2429; Ill., § 68; Ind., § 4616; Ia., § 5489; Kan., § 5298; Me., Ch. 53, § 76; Md. I, § 157; Mich. III, 1, § 14; Minn., § 3274; Mo., § 6121; Mont. S., § 4114; Neb., § 3178; N. H. S., p. 398, § 8; N. C., § 4709; N. D., § 4851; Ore., § 6360; S. D., § 9118; Tex., § 4749. Under Va., § 4212, the interest on the deposit is payable to the state treasurer whenever the company fails to pay a judgment on a policy claim.

[31] People *v.* American Steam Boiler Ins. Co. (1895), 147 N. Y. 25, 41 N. E. 423.

[32] Mass., § 185; Ala., § 8367 is the same with the omission of the word "approved."

[33] N. Y. Consol. L., 1909, Ch. 33, § 14.

[34] N. Y. Rulings (1916), p. 54 (September 17, 1901).

the New York superintendent was held not personally liable for permitting the withdrawal of United States bonds and the substitution of New York City bonds which were of less value but still in excess of $100,000, the amount prescribed.[35]

The statutes in the remaining jurisdictions may be grouped under one or the other of these two types. Some merely provide for an "exchange" of securities as does the New York section,[36] or, a little more explicitly, for an exchange or substitution of securities "of equal value," "like amount," and so forth,[37] without expressly declaring that the commissioner's approval is a condition of withdrawal. On the other hand, in a majority of the deposit laws, following the Massachusetts type, such approval, consent, or assent, is declared to be necessary.[38] While there is reason to believe that a judicial attack upon the commissioner's refusal to permit withdrawal and substitution might be easier and more sweeping under the first two types than under the last type, yet under each in practice the commissioner must apply the standards of approval of investments and valuation of securities, heretofore discussed.

The withdrawal of deposits without replacement or substitution of others may take place only when the company is permanently withdrawing from the transaction of business in the state and has made the required arrangements to take care of its outstanding obligations and unmatured liabilities. The sections dealing with the administration of permanent withdrawal grant to the commissioner or official depositary a considerable degree of discretionary power. Sometimes the official is directed to surrender the deposit to the company upon being "satisfied" that the company's outstanding liabilities are either settled, extinguished, paid, and so

[35] Raymond *v.* Security Trust and Life Ins. Co. (1906), 111 App. Div. 191, 97 N. Y. Supp. 557.

[36] Ariz., § 3402; Kan., § 5298; Mo., § 6121; Neb., § 3178; N. D., § 4850; Ohio, § 9347 ("shall permit"); Ore., § 6360 (1); R. I., Ch. 219, § 18; S. D., § 9163; Vt., § 5549; Wash., § 7069.

[37] Ark., §§ 4995, 5003; Del., § 597; Ia., § 5481, 5488; Nev., §§ 1311, 1315; N. H. S., p. 397, § 8; Tex., § 4749.

[38] Ala., § 8367; Cal. P. C., § 618; Ga., § 2427 ("equally acceptable" — to commissioner?); Idaho, § 5104; Ill., § 195; Ind., §§ 4616, 4646c; Ky., § 648; Me., Ch. 5, § 76 (certificate of governor and council); Md. I, § 157 ("under such rules and regulations as he shall direct"); Minn., § 3274; Mont. S., § 4114; N. H. L., 1895, Ch. 81, § 2; N. J., p. 2842, § 10 ("with his assent"); N. C., § 4709, R. B., § 4780 (approval of commissioner, treasurer and attorney-general); Ohio, § 640; Pa., § 47; R. I., Ch. 219, § 20; S. C., § 2727; Tenn., § 3308.

forth, or reinsured.[39] The language is frequently indistinct as to the scope of the outstanding liabilities which must be satisfied; presumably, they extend to claims of the beneficiaries of the deposit, who, as will be pointed out later, are either citizens of the state, or citizens of the United States.[40] Occasionally the scope of the obligations to be satisfied is pointed out more precisely, as, liability to any policyholder in the United States.[41] Nor is it always restricted to policy claims, since it sometimes extends to "all its debts and liabilities of every kind." [42] Whether the effect of such provisions is to extend the class of beneficiaries of the deposit to include general creditors of the company, in addition to policyholders, is not clear.

In some instances the power to permit withdrawal of securities is qualified by performance of a definite requirement, such as by paying surrender value or reinsuring,[43] or the filing of a bond,[44] or reinsurance contract,[45] or by the leaving on deposit indefinitely of securities of a named value.[46] Publication of notice in a newspaper of the company's intention to withdraw from the state is another requirement sometimes found.[47] Such a publication is designed to aid the commissioner in getting a complete record of outstanding claims. In a few instances, the withdrawal may take place only upon the order of a court.[48] To determine whether all outstanding liabilities have been satisfied is not a simple matter, especially in the case of a life insurance company, where even lapse of time will not always be conclusive. The nature of the proof which the commissioner shall require on this point is sometimes prescribed, as "conclusive evidence" [49] or affidavit of the company's officer.[50]

[39] Mass., § 185; "under no obligation to policyholders or other persons in the United States for whose benefit such deposit was made."

[40] *Infra*, this section, p. 236.

[41] Ala., § 8367; Kan., § 5180; N. Y., § 72; Mo., § 6191.

[42] Ala., § 8406; Ill., § 20; Mo., § 6191.

[43] Del., § 631 (surety co.); N. H., p. 2866, § 86 (fidelity co.).

[44] S. D., § 9163.

[45] N. D., § 4850 ($25,000 must be left).

[46] Kan., § 5180; Mo., §§ 6191, 6342; Nev., § 1315; N. Y., § 72.

[47] E.g., Ala., §§ 8405, 8416; Ky., § 648; Minn., § 3274; N. H. L., 1913, Ch. 42, § 12; N. Y., § 72.

[48] Cal. P. C., § 620b (1915). [49] Mich. I, 2, § 11.

[50] N. Y., § 72 (domestic life co.). Similarly, Cal. P. C., § 620. The attorney-general of New York has ruled that a partial withdrawal of the deposit is not permissible under this section. N. Y. Op. atty.-gen. (1908) 448. In some states partial withdrawal is allowed, e.g., Ohio, § 655; Ore., § 6362 (2).

The New York section, which is exceptionally complete, requires verified application of the company's chief officers, publication at least twice a week for six months in the official state newspaper, and that the superintendent shall deliver up the securities:

> . . . upon being satisfied by an exhibition of the books and papers of such corporation and an examination made by himself or some competent person to be appointed examiner by him and on oath of the president or principal officer and the secretary or actuary of such corporation that all its debts and liabilities of every kind are paid and extinct that are due or may become due upon any contract or agreement made within the United States. [51]

This provision goes perhaps as far as may be expected in the way of safeguards against improvident withdrawals; and yet one doubts if a publication in the official newspaper at Albany may be assumed to notify the company's policyholders in other states of the Union. The law is struggling here, as elsewhere, with the problem of making a proceeding *in rem* both efficient and just.

Where the deposit is made under an administrative ruling, without express statutory authority, it has been held that the company may withdraw the deposit whenever it ceases doing business in the state, without making provision for outstanding liabilities,[52] but this decision seems incorrect, as the deposit constituted at least a private or voluntary trust, which should have been administered by the court.[53]

6. *Disposal of deposit on insolvency of company.* What is to be done with the deposit when the company becomes insolvent or is not paying its claims? There are two ways of making the deposit available for the payment of the company's obligations, one involving judicial intervention, the other, purely administrative. The former is the more prevalent. In most states the sale of deposits and distribution of the proceeds of the sale among claimants is carried on under the order of the court, by a receiver appointed by the court or by the commissioner under the court's direction.[54]

[51] N. Y., § 72.

[52] Blake *v.* Old Colony Life Ins. Co. (1913), 209 Fed. 309, C. C. A.

[53] American Casualty Ins. Co.'s Case (1896), 82 Md. 535, 560, 570, 34 Atl. 778. See also Hayne *v.* Metropolitan Trust Co. (1897), 67 Minn. 245, 69 N. W. 916; Lancashire Ins. Co. *v.* Maxwell (1892), 131 N. Y. 286, 30 N. E. 192 (excess over required amount not withdrawable; but see N. Y., § 27, passed subsequently).

[54] Conn., § 4268; Ga., §§ 2420, 2421; Idaho, § 4949; Ia., § 5487; Ky., § 649; Mass., § 185; Mo., § 6344; N. J., p. 2842, § 11; N. Y., §§ 76, 77; N. C., § 4709; N. D., § 4849 (title to securities "shall vest in the state"); Ohio, § 641; Pa.,

While in some states the commissioner is explicitly required to turn over the deposit to the receiver for distribution,[55] in the absence of such a provision, there is an apparent conflict in the judicial decisions as to whether or not the court may order the commissioner to turn the deposit over to its receiver. Perhaps the cases may be reconciled thus: where the statute does not point out explicitly the mode in which the commissioner is to subject the deposit to the satisfaction of the claims of the beneficiaries, a court of equity has implied power to administer and effectuate the trust by appointing a receiver to take over the deposit and distribute it in accordance with the deposit law;[56] but where the statute makes provision for a particular mode of distribution, the court cannot order the securities turned over to a receiver, either one appointed at the suit of a general creditor [57] or even one appointed at the suit of the commissioner himself.[58] Where neither the commissioner nor the policyholders are parties to the receivership proceedings, the distribution of the assets may be very imperfectly made.

To what extent is the deposit subject, in the hands of the depositee, to levy upon execution or attachment, or to garnishment, at the suit of one who is the beneficiary under the deposit law? The legislation sometimes makes provision for thus subjecting the deposit to ordinary judicial process.[59] Such a remedy has been in-

§§ 48, 49; S. C., § 2727 (suit by creditors against the state); S. D., §§ 9164, 9183; Vt., § 5549; Va., §§ 4213, 4215.

[55] See the statutes of Conn., Ga., Idaho, Ia., Ky., N. J., N. Y. (§ 76, "optional" deposit), Pa., cited in the last note; Attorney-General *v.* North American Life Ins. Co. (1880), 80 N. Y. 152 ("optional" deposit law).

[56] Robinson *v.* Mutual Reserve Life Ins. Co. (1908), 162 Fed. 800; Phillips *v.* Perue (1921), 111 Tex. 112, 229 S. W. 849; Hayne *v.* Metropolitan Trust Co. (1897), 67 Minn. 245, 69 N. W. 916.

[57] Ruggles *v.* Chapman (1874), 59 N. Y. 163; People *ex rel.* Ruggles *v.* Chapman (1876), 64 N. Y. 557; Lancashire Ins. Co. *v.* Maxwell (1892), 131 N. Y. 286, 30 N. E. 192 (*semble*); Vandiver *v.* Poe (1912), 119 Md. 348, 87 Atl. 410, 46 L. R. A. (N. S.) 187 and note; State *v.* Matthews (1901), 64 Ohio St. 419, 60 N. E. 605 (assignee for benefit of creditors not entitled to deposit).

[58] Cooke *v.* Warner (1888), 56 Conn. 234, 14 Atl. 798 (seems irreconcilable in principle with Robinson *v.* Mutual Reserve Life Ins. Co., *supra*, n. 56); McMurray *v.* Commonwealth (1924), 249 Mass. 574, 144 N. E. 718 (which supports the distinction urged in the text).

[59] Del., § 643; Ga., § 2420; Idaho, § 5104; Tex., § 4770 ("held liable to pay the judgments of policyholders"). Provisions which merely authorize a creditor of the company to bring suit to enforce the trust are designed to effect a *pro rata* distribution of the deposit; e.g., Ohio, § 641; S. C., § 2727; S. D., § 9164.

voked in several cases without express provision and without any intimation of its impropriety.[60] Such a rule seems unsound. If the deposit is to be regarded as a part of the general assets of the company, subject to the claims of all creditors, then the rule of "first come, first served" may be applied as in ordinary cases. However, the deposit is commonly spoken of as a "trust fund," and it is certainly anomalous to allow one of the numerous beneficiaries of the "trust" to gain an advantage over his fellows by a prior levy or attachment. At the time when any particular claimant seeks to levy upon the deposit and to collect the full amount of his claim, it is not known and cannot be known without extensive investigation, whether or not the deposit will be sufficient to satisfy all the claims of its beneficiaries in full. Hence, a payment of one claim in full may turn out to have been a preference.[61] Provisions allowing any one claimant to sue upon the bond deposited are subject to like objections where the bond is for a fixed maximum.[62]

The administrative disposal of the deposit for the purpose of satisfying claims of its beneficiaries is one way of obviating some of these objections. In a number of states there are provisions, of varying kinds, for the disposal of the securities by the commissioner.[63] Where, as in Florida, Indiana, Michigan, and Virginia, the commissioner is empowered to sell without an order of court for the purpose of paying an individual claim, he is in a position to exercise his power of revocation or his power to apply for a receivership, if he is of the opinion that the company is insolvent and will be unable to pay all claims in full. Hence, he may readily obviate the possibility of an improvident payment of a single claim. Under provisions authorizing the commissioner, in exceptional cases, to turn the deposit back to the company for payment of claims,[64] he

[60] Piedmont and Arlington Life Ins. Co. *v.* Wallin (1880), 58 Miss. 1; Universal Life Ins. Co. *v.* Cogbill (1878), 30 Gratt. (71 Va.) 72; but see Rollo *v.* Andes Ins. Co. (1873), 23 Gratt. (64 Va.) 509 (official depositee not garnishable).

[61] N. Y., § 13 provides the deposit shall be held in trust "without preference or priority for or on account of any cause or causes whatsoever to any beneficiary entitled to share therein."

[62] S. C., §§ 2701–8.

[63] Conn., §§ 4135–4138; Del., § 598; Fla., § 2779c; Ind., § 4629; Me., Ch. 53, § 82; Mich., §§ 79, 126; N. Y., § 77 ("optional" deposit); Va., § 4213. In New York the superintendent converts the securities into money under the order of the court.

[64] Ariz., § 3402; Neb., § 3180.

is, or should be, in a position to see that the money is distributed equitably.

Of the states which allow the commissioner to sell securities for the purpose of distribution among claimants, apparently only two authorize the commissioner to pass upon the claim presented,[65] and even in these, it is doubtful. Otherwise, the claim must be reduced to judgment [66] or otherwise ascertained under judicial supervision.[67]

7. *For whose benefit deposited.* American administrative law strikingly reveals its poverty of concepts in the attempts of both courts and legislatures to force the deposit transaction into the legal category of private trust. The legislation very generally uses the word "trust," or the phrase "held in trust," in referring to these deposits. Thus, a New York statute reads:

> The securities deposited pursuant to this section shall be held by the Superintendent in trust for the benefit and protection of and as security for the policyholders of the corporation.[68]

The Massachusetts statute provides for "a suit in equity . . . to enforce, administer or terminate the trust created by such deposit." [69] The cases likewise are numerous in which it has been declared that the deposit is "held in trust," is a "trust fund," and the rules and reasoning applicable to an ordinary private trust have been applied to the solution of deposit problems.[70] Some statutes,

[65] Ind., § 4617; Me., Ch. 53, § 82 ("claims properly authenticated"). In 1925, the New York superintendent urged that such powers be granted him. N. Y. Insurance Report (1925), Pt. I, p. 29.

[66] Fla., § 2779c; Mich., § 126; Va., § 4213.

[67] E.g., Conn., §§ 4135–4138, claims passed upon by three commissioners appointed by the court.

[68] N. Y., § 71. Similarly are: Ala., §§ 8355, 8411; Ark., § 5007; Cal. P. C., § 618; Conn., § 4102; Del., § 628; La., § 3585; Minn., § 3595; Nev., §§ 1311, 1315; N. J., p. 2856, § 60; N. M., § 2817; N. C., § 4711; Ohio, § 9346; Ore., § 6360; R. I., Ch. 219, § 17; S. C., § 2727; Tenn., § 3308; Tex., § 4750; Utah, § 1144; Vt., § 5549.

[69] Mass., § 185; similarly are: N. C., § 4709; Pa., § 49; S. C., § 2727; S. D., § 9164; Va., §§ 4213, 4215.

[70] Cooke *v.* Warner (1888), 56 Conn. 234, 239, 14 Atl. 798; The American Casualty Ins. Co.'s Case (1896), 82 Md. 535, 560, 570, 34 Atl. 778; Relfe *v.* Columbia Life Ins. Co. (1881), 10 Mo. App. 150, 165; People *v.* American Steam Boiler Ins. Co. (1895), 147 N. Y. 25, 41 N. E. 423; Lancashire Ins. Co. *v.* Maxwell (1892), 131 N. Y. 286, 30 N. E. 192. See also other cases cited in notes 56 and 57, *supra;* 46 L. R. A. (N. S.) 187 and note.

on the other hand, declare that the deposit is for the "benefit" or "protection" of policyholders, without explicitly stating that they are trust funds.[71] Such provisions suggest a trust, yet are equally consistent with a pledge or similar bailment relation. Another idea running through most of the statutes is that of security. Thus, the New York statute, above quoted,[72] uses the word "security," and this language is frequently found. Even in the absence of such language, it is hard to conceive of the deposit transaction as being anything other than a security transaction, and despite the variations in wording, sometimes as between the language of different sections in the same state, it is believed that the legal relations created are essentially the same everywhere.

A private trust must, in most jurisdictions, have a definite beneficiary. Although it has been asserted that the policyholders of the company are "a class of beneficiaries described with particularity" and that the trust created by the deposit statute is "as perfect a trust as can be created by deed or will," [73] the concept of "trust" seems to have been stretched. No doubt the legislature may amend the law as to beneficiaries of a trust and authorize the creation of a trust, not charitable or falling within the recognized exceptions to the rule, which does not have a definite beneficiary. If it has done so, however, a new type of trust has been created, and the analogies of private trust must be accepted with caution.

The sections designating the beneficiaries of the deposit are frequently ambiguous. Thus, in many instances, the language is simply that the deposit is for the benefit and protection of "policyholders," or "the insured in such company," or like phrases.[74] It

[71] Colo. L., 1915, Ch. 96, § 41; Del., § 592; Fla., § 2779a; Ia., § 5487; Kan., §§ 5222, 5223; Mich. II, 2, § 8; Mont. C., § 4162; N. H. S., p. 397, § 8; N. J., p. 2865, § 84; N. D., §§ 4848, 4849; Ore., § 6371 (9) ("shall be kept for the benefit and security of"). See also Va., § 4214 (citizens and property owners of Va. "shall have a lien thereon for the amounts due" and shall be entitled "to be paid ratably out of the proceeds"); N. D., § 4849 (*on insolvency* of company, securities vest in state; prior thereto, apparently a bailment).

[72] See *supra*, n. 68.

[73] Cooke *v.* Warner (1888), 56 Conn. 234, 239, 14 Atl. 798.

[74] Ala., §§ 8357, 8411; Ark., § 5007; Cal. P. C., § 618; Colo. L., 1915, Ch. 96, § 41; Del., § 628 ("holders of obligations of" surety co.); Fla., §§ 2759, 2779a, 2779d; Ga., §§ 2420 ("persons insured"), 2426; Idaho, § 4969; Ind., § 4617; Ky., §§ 648, 648a (3), 680; La., § 3646; Md. I, § 157; Mich. II, 2, § 5; Minn., § 3309; Mo., §§ 6128, 6133; Mont. C., § 4162; Neb., § 3178; Nev., §§ 1311, 1315; N. H. S., p. 397, § 8, L., 1913, Ch. 42, § 4; N. Y. L., 1916, Ch. 590, § 2,

must not be hastily assumed, however, that such a statute makes literally *all* the policyholders of the company beneficiaries. The scope of this general language will frequently be narrowed by other clauses as to the administration and disposal of the deposit; and, perhaps having in view the difficulty of administering a fund for the security of policyholders scattered across the continent, the courts tend to hold that deposits are for the benefit of citizens or residents of the state only. Thus, in the recent case of *Phillips* v. *Perue*,[75] while the statute (Art. 4930) declared the deposit to be for the benefit of "the holders of the obligations" of such company, without restriction, yet Art. 4935 authorized the state treasurer to satisfy out of the deposit claims established by final judgment as a loss of the company "incurred in this state," and Art. 4932 authorized withdrawal of the deposit upon the giving of a bond equal to its liabilities "in this state"; hence it was held that the deposit was for the exclusive benefit of Texas citizens. So in *Northwestern Title Ins. Co.* v. *Fishback*[76] the law requiring a deposit of a domestic title insurance company failed to name the beneficiaries, yet the court inferred from the circumstance that the deposits were graded into eight classes, the amount depending upon the population of the county in which the company did business, that the deposit was for the exclusive benefit of the holders of title insurance upon land situated in Washington. Similarly, a deposit in New York by a Virginia company, made under a retaliatory law of New York requiring a deposit "for a like purpose," was held to be for the exclusive benefit of New York residents,[77] since the Virginia statute was considered as requiring a deposit of a foreign company for the exclusive benefit of Virginians.[78]

Even the use of the phrase "all policyholders" [79] does not preclude the possibility that, by the context, a deposit may be limited to "all policyholders in this state." Where, as in the New York statute, the deposit is required of a foreign company only in case it has not made a deposit in its own state, it would seem that "all

Consol. L., 1909, § 71; N. D., § 4848; Ohio, §§ 9347, 9348; R. I., Ch. 219, § 17; Tenn., § 3350a1; Utah, § 1131; Vt., § 5549; Wyo., § 5251.

[75] (1921) 111 Tex. 112, 229 S. W. 849.

[76] (1920) 110 Wash. 350, 188 Pac. 469.

[77] Providence and Stonington S. S. Co. *v.* Virginia Fire and Marine Ins. Co. (1882), 11 Fed. 284.

[78] Rollo *v.* Andes Ins. Co., *supra*, n. 60.

[79] Ark., § 4996; Ga., § 2427; Me., Ch. 53, §§ 74, 164; Mich. III, 1, § 4; Miss., § 5076; N. J., p. 2842, § 10; N. Y., § 26; Tex., § 4750.

policyholders" is not thus restricted.[80] In some instances, the beneficiaries are left wholly unspecified.[81]

In a few states, and usually with reference to less important types of insurance companies, the law limits the beneficiaries to "citizens" or "residents" of the state in which the deposit is made.[82] Another type of local beneficiaries is that designated by a Mississippi statute which directed that the deposit should be applied "to all losses incurred on any policy issued by said company in this state to any of its citizens." [83] A Mississippian went to New Orleans and there procured a policy upon his life from the agent of a Virginia company which had made a deposit in Mississippi. His personal representative was held not entitled to subject the Mississippi deposit to the payment of a judgment upon such a policy, because the policy, while issued to a citizen of the state, was not issued "in this state." [84] A third type of local beneficiary is, in the case of property insurance, the holders of policies covering property located in the state.[85] The "registered policy" deposits are, of course, limited to the holders of registered policies.[86]

In a large number of statutes the beneficiaries include "all its policyholders in the United States." [87] Such language is reasonably

[80] See Morgan *v.* Mutual Benefit Life Ins. Co. (1907), 189 N. Y. 447, 453, 82 N. E. 438.

[81] Ia., § 5487; N. C., § 4709; Ore., § 6387 ("such deposit or bond to be held and conditioned upon the faithful performance . . . of all contracts and other requirements within this state"). See Ga., §§ 2419, 2423, for a typical ambiguous provision; and Northwestern Title Ins. Co. *v.* Fishback *supra*, n. 76, for the method of construing such a section.

[82] Ark., § 5024; Idaho, § 5104 ("holders of company's obligations in this state"); Kan., § 5268; La., § 3633; N. J., p. 2865, § 84; N. M., § 2868; Tex., § 4870; Va., § 4214. See also Ore., § 6360 ("upon such trust as shall be designated by the company and approved by the commissioner"); S. C., §§ 2701, 2708 (judgment creditors).

[83] Miss. Code, 1880, § 1080.

[84] Piedmont and Arlington Life Ins. Co. *v.* Wallin (1880), 58 Miss. 1.

[85] Ark., §§ 5024, 5051; La., § 5633; Va., § 4214. See Northwestern Title Ins. Co. *v.* Fishback, *supra*, n. 76.

[86] E.g., Ala., § 8518; Cal. P. C., § 634; Del., § 592; Mo., § 6124; N. C. R. B., § 4780; N. Y., § 73.

[87] Ala., §§ 8355, 8516; Conn., § 4102; Idaho, § 4975; Ill., §§ 440, 196; Kan., §§ 5222, 5223; La., § 3585; Me., Ch. 53, § 106; Md. I, § 183; Mass., §§ 155, 156, 185; Mich. II, 2, §§ 5, 8, Minn., § 3595; Miss., § 5073; Mo., § 6135; Neb., § 3174; Nev., § 1275; N. J., p. 2856, § 60; N. M., § 2817; N. Y., § 27; N. C., § 4711; Ohio, § 9565; Okla., § 6683; Ore., § 6371 (9) (all persons both within and without the state); S. D., § 9351; Tenn., §§ 3292 (2), 3293; Tex., § 4769; Utah, § 1144; Wash., § 7054; W. Va., § 41; Wis., § 1919 (4); Wyo., § 5266.

unambiguous, though the famous insular cases have a parallel in three rulings of the New York attorney-general defining "United States" as including Porto Rico and the Philippines.[88] A number of these same states, following Massachusetts and Connecticut, have beclouded the extent of the policyholders' preferential claim upon the deposit by adding, to the clause defining the beneficiaries, "and creditors in the United States." [89] Do these provisions allow general creditors to share in the deposit on a parity with policyholders? A few miscellaneous beneficiary provisions may be noted.[90]

From the foregoing analysis of the beneficiary clauses, it seems clear that, whether or not the class of beneficiaries of the deposit may be brought within the accepted conception of a definite beneficiary which obtains in the law of private trusts,[91] the former resemble more nearly the beneficiaries of a charitable trust (for example, the students in a college or the patients of a hospital) than they do the rather limited classes of beneficiaries (relatives, eldest male sons, and so forth) commonly found in private trusts. True, at any particular moment, the exact persons who are policyholders in the United States or in a particular state, may be ascertained, yet they are changing from time to time, and are surely as indefinite as the recipients of local charity. Must we draw from our musty store-house of concepts the legal transaction of the valiant knight who went to fight in the Wars of the Roses, or of the 19th century millionaire who wished to protect his wealth from the dissipations of his wayward children? Is there not danger that we may sour our new wine by placing it in these old bottles?

In the absence of express provision, which is rare,[92] the holders of death or loss claims (matured claims) share in the distribution

[88] N. Y. Rulings (1916), pp. 49, 51 (Op. of Att'y-Gen. of Sept. 17, 1903, March 27, 1912, and July 20, 1915).

[89] See the statutes of Conn., La., Me., Mass., Minn., Miss., N. M., N. C., Okla., Tenn., and Utah, cited in n. 85, *supra;* see also Ore., § 6371 (9): "All persons both within and without the state of Ore., transacting business with such company."

[90] Mo., § 6160 (deposit to secure the expenses of prosecutions or examinations of a foreign assessment life company); Ore., § 6360 (upon such trust as shall be designated by the company and approved by the commissioner); S. C., §§ 2701, 2708 (judgment creditors).

[91] See Ames, *Failure of the Tilden Trust* (1892) 5 *Harv. L. R.*, 389–402, Ames' *Lectures on Legal History* (1913), p. 285.

[92] Va., § 5519 (death claims have preference); S. C., §§ 2701, 2708 (judgment creditors).

of the fund on an equal footing with the holders of unmatured policies who are entitled to their reserve or cancellation value, and both have priority over all other creditors in reference to the deposit fund; not is there any distinction made, in reference to the two former classes, between those who have and those who have not reduced their claims to judgment.[93]

8. *The deposit as a "trust."* Who is the "trustee" of this deposit trust? Not the state, it seems, for the ordinary judicial remedies would be unavailable against the state.[94] While a North Dakota provision declares that the deposit in case of insolvency, "shall vest in the state" [95] and four states expressly authorize suits against the state to enforce the trust,[96] which indicate that the state is the trustee, in the remaining jurisdictions it appears reasonably clear that the commissioner or other official depositee, is the "trustee." And yet it is far from clear, in many instances, that he acquires that legal title or power of disposal (as distinct from the position of a bailee), which we traditionally associate with the equitable trust. Where the deposit is made in "cash" (currency) as permitted by the laws of a few states,[97] the deposit carries with it such a power of disposal. While the New York department has ruled that cash will not be accepted for deposit,[98] in most states there is nothing which restricts the deposit to securities which are registered or payable to order. In several, a company which chooses to deposit registered securities is required to give the official depositee a power of attorney to transfer the same.[99] In such a case, or in the case of a bond or mortgage note, payable to bearer or endorsed in blank, the commissioner, or even a subordinate, would have the legal power to transfer an indefeasible title

[93] The American Casualty Co.'s Case (1896), 82 Md. 535, 560, 570, 34 Atl. 778; Smith *v.* Nat'l Credit Ins. Co. (1896), 65 Minn. 283, 68 N. W. 28; Relfe *v.* Columbia Life Ins. Co. (1881), 10 Mo. App. 150; Falkenbach *v.* Patterson (1885), 43 Ohio St. 359, 370, 1 N. E. 757; Pennebaker *v.* Tomlinson (1874), 1 Tenn. Ch. 594; Universal Life Ins. Co. *v.* Coggbill (1878), 30 Gratt. (71 Va.) 72.

[94] Universal Life Ins. Co. *v.* Coggbill, n. 93, Rollo *v.* Andes Ins. Co. (1873), 23 Gratt. (64 Va.) 509.

[95] N. D., § 4849.

[96] N. C., § 4709; Pa., § 49; S. C., § 2727; Vt., § 5549.

[97] Ark., § 4996; Del., § 575; Fla., § 2779a; Idaho, §§ 4940, 4972; Kan., § 5296; La., § 3585 ("sum"); Mont. C., § 4061; N. M., § 2868; Tex., § 4750; Vt., § 5549 ("nation's funds").

[98] N. Y. Rulings (1916), pp. 44, 47 (Op. Att'y-Gen., May 25, 1893).

[99] Fla., § 2779a; Va., § 4211.

to a purchaser for value without notice. If this be so, the commissioner must be regarded as a "trustee" rather than a bailee. The New York department has consistently refused to accept for deposit any securities which are not fully registered.[100] The registration is made in the name of the superintendent in trust for the policyholders.[101] Occasionally we find statutory language which indicates that not mere possession but also property in the legal sense shall be vested in the commissioner.[102] In most jurisdictions, however, the use of the word "deposit" is consistent with either a bailment or a trust. Despite early and unfounded doubts,[103] it now seems settled that a suit against the insurance commissioner to subject the deposit to the claims of policyholders is not objectionable as a suit against the state.[104]

Yet the official depositee is not on the same footing as a private trustee. This is well brought out by the case of *Firemen's Ins. Co.* v. *Hemingway*.[105] The official depositee, the state treasurer, paid out of the deposit judgments obtained by policyholders who had procured their policies through agents outside the state. The court held that these payments were erroneous, since the deposit was to be subject only to the payment of claims upon policies issued within the state of Mississippi, but that, nevertheless, the treasurer was not personally liable for making such payments, saying:

> The responsibility and delicate duties imposed upon him by law, are of a two-fold character, partly ministerial and partly quasi-judicial; the reception and payment out of the fund is ministerial; that of determining the question of insolvency, of to whom payment should be made, when not ascertained by a judgment or decree of some court, is in its nature judicial, and for a mistake on this subject, honestly made and free from fraud, as I believe was the case, I cannot see that he should be any more liable than a referee or any other person exercising judicial or quasi-judicial functions.

It could hardly be denied that a private trustee or a private bailee would be personally liable for honest misdelivery of property to the wrong person.

[100] N. Y. Rulings (1916), p. 45 (1915).

[101] See the form of registration in Robinson *v.* Mutual Reserve Life Ins. Co. (1908), 162 Fed. 800.

[102] N. Y., § 73 (securities "shall be legally transferred by it to the superintendent"); Ohio, § 9346 ("duly made and assigned to the superintendent in trust"). See also Mass., § 185 (state treasurer "shall take and hold in trust"); Del., § 592 (commissioner "shall legally transfer to his successors").

[103] Rollo *v.* Andes Ins. Co., *supra*, n. 94.

[104] Universal Life Ins. Co. *v.* Goggbill, *supra*, n. 93, and in a number of cases cited in the preceding notes, the suit was allowed without objection.

[105] (1878), Fed. Cas. No. 4797.

What of the company's interest in the securities deposited? Under a private trust, the creator of the trust no longer has any interest in the property, unless he names himself as one of the beneficiaries. Arguing "in this curious kind of way," a number of courts have declared that the company has no interest which can be subjected to the claims of its creditors who are not policy-holders.[106] Similarly, the New York ruling is that the company may not assign the deposit or any part thereof.[107] Yet it seems entirely clear that the trust is really a security transaction and that the company, if not an owner (as pledgor) of the deposit, has at least an equity of redemption which should be available for the payment of general creditors. That the company may collect the interest while solvent,[108] shows that the company has a beneficial interest in the deposit. There are good reasons for the decisions cited above, but they are reasons arising from the peculiar position of the official trustee, and not applicable to a private trustee whether of an ordinary trust or of a security trust. Obviously, the company cannot by assigning its interest cut off or impair the rights of the beneficiaries in the trust.[109]

The conclusion to be drawn from the foregoing analysis is that the deposit transaction conforms rather to the characteristics of a security transaction than of a strictly private trust; and that even in respect to the former it possesses peculiar features. It may be suggested that the deposit be called a "public pledge" in order to connote its peculiar incidents, and that deposit laws be drafted with a view to indicating somewhat more clearly the legal relations involved.

9. *Safeguards against official dishonesty.* Turning now to the second of the problems mentioned at the beginning of this section, we find that the problem of possible official peculation has been squarely faced in only a few jurisdictions. True, there are so far as the present writer knows, no instances of criminal misappropriation of deposit funds by officials; yet the enormous value of the securities deposited in many states leads one to believe that human

[106] Cooke *v.* Warner, *supra*, n. 70; Ruggles *v.* Chapman, *supra*, n. 57; People *ex rel.* Ruggles *v.* Chapman, *supra*, n. 57; Piedmont, etc., Ins. Co. *v.* Wallin, *supra*, n. 84; Phillips *v.* Perue, *supra*, n. 73; Rollo *v.* Andes Ins. Co., *supra*, n. 94.

[107] N. Y. Rulings (1916), p. 51 (Op. Att'y-Gen., July 11, 1894).

[108] See *supra*, this section, p. 226.

[109] Lovell *v.* St. Louis Mutual Life Ins. Co. (1884), 111 U. S. 264, 274, 4 Sup. Ct. 390, 28 L. ed. 423; Relfe *v.* Columbia Life Ins. Co., *supra*, n. 93; Hayne *v.* Metropolitan Trust Co. (1897), 67 Minn. 245, 69 N. W. 916.

virtue should not be the sole safeguard. First, what are the opportunities for misappropriation of deposit funds? In states where cash or negotiable securities payable to bearer are deposited [110] the opportunity is obvious. Nor is the problem identical with that arising from the handling of state funds by the state treasurer or other fiscal official, because these special deposit funds are apt to be less frequently withdrawn than are the state's revenues, from which appropriations are continually being paid, and thus the opportunity for discovery is correspondingly less. In those instances where the securities are registered in the name of the official depositee, or are accompanied by a power of attorney to make a transfer,[111] the opportunity for misappropriation by the official trustee exists only if a purchaser for value from the trustee is not charged with notice of the intended breach of trust. Furthermore, the opportunity for misappropriation by subordinates of the official depositee, which exists in the case of cash or bearer securities, is obviated by having the securities registered.

With a view to minimizing these possible dangers, a few states have prescribed a method for dealing with deposits. One of the commoner requirements is that the securities be placed in an iron box to which there are two keys, both of which must be used in order to open the box. One key is kept by the company's representative, the other by the commissioner. The box is placed in a safe deposit vault.[112] Occasionally the deposit is to be placed in a safe deposit vault of a trust company,[113] but as there is no check upon withdrawal by the official depositee, such restriction only inhibits peculation by subordinates.

New York has several interesting safeguards which do not seem to have been widely copied. No transfer of securities held by the superintendent "shall be valid" (that is, shall confer ownership upon the transferee, it seems[114]), "unless countersigned by the

[110] Cash deposits are authorized in only a few states: Ark., § 4996; Del., § 575 (5% of capital); Fla., § 2779a; Idaho, § 4972; Kan., § 5296; La., § 3585 ("sum" of $200,000); Mont. C., § 4061 ("sum"); N. M., §§ 2816 ("sum,") 2868 (money); Tex., § 4750; Vt., § 5549 ("funds").

[111] See *supra*, p. 238.

[112] Colo. L., 1913, Ch. 99, § 11; Del., § 598; Idaho, § 4969; Miss., § 6341; Mo., § 6341; Utah, § 1132; Wyo., § 5252.

[113] N. C. R. B., § 4713; Tex., § 4751; Wash., § 7069.

[114] See Hayne *v.* Metropolitan Trust Co., *supra*, n. 109, holding, under a similar statute, an attempted transfer by the commissioner without the approval of the state treasurer to be "void."

treasurer of the state or his deputy, and upon notice of at least five days to the corporation depositing such securities." Furthermore, the treasurer is to keep a detailed record of transfers, and to notify the company by mail within five days after every transfer; and the total amount of transfers countersigned by him shall be stated in his annual report.[115] Another safeguard is, that every insurance company is required, "once or more during each calendar year," to cause its securities to be examined by one of its representatives, who shall compare them with the superintendent's records and, if found correct, execute a receipt or certificate setting forth the kinds and amounts of securities then in the possession of the superintendent.[116] Apparently, failure to comply with this requirement, would constitute a misdemeanor.[117] These provisions, taken with the administrative ruling that only registered securities will be accepted for deposit, minimize the danger of successful embezzlement.

Who would be legally liable for a misappropriation, if one were to occur? The non-suability of the state, a traditional doctrine which has been abrogated in whole or in part in only about ten states, precludes the ordinary judicial remedies even if there is, in theory, any liability.[118] On the latter point, there is, naturally, very little authority. In one case, in which the validity of the deposit laws was attacked as in violation of a provision of the state constitution prohibiting the giving of state aid or credit to any individual or corporation, the court denied the contention with the remark that the state "incurred or assumed no responsibility, except as depositary." [119] In a later case the same court declined to comment upon the state's liability.[120]

In several jurisdictions the insurance laws contain special provisions which indicate that the state shall be liable for the loss of

[115] N. Y., § 15. Somewhat similar are: Md. I, § 205; N. C. R. B., § 4780; Wash., § 7069.

In New York, during the fiscal year 1923–24, the value of securities transferred was $2,689,901.88. N. Y. Annual Report of the State Treasurer for the Fiscal Year ending June 30, 1924, p. 32.

[116] N. Y., § 51. [117] *Ibid.*, § 53.

[118] Maguire, *State Liability for Tort* (1916), 30 *Harv. L. R.* 20 at p. 25. See also Davie, *Suing the State* (1884), 18 *Am. L. R.* 814; Borchard, *Government Liability in Tort* (1924), 34 *Yale L. J.* 1.

[119] Att'y-Gen. *v.* North American Life Ins. Co. (1880), 82 N. Y. 172 at pp. 182–3.

[120] Lancashire Ins. Co. *v.* Maxwell (1892), 131 N. Y. 286, 292, 30 N. E. 192.

deposits, though the scope or basis of such liability is not defined, nor is the mode of enforcement pointed out. Thus, it is declared beneficently that the state "shall be responsible for the safe-keeping and return of" the deposits,[121] that "the faith of the state is pledged that they shall be returned," [122] that the state "shall be liable . . . for the safe custody and return." [123] In only two of these states [124] is provision made generally for judicial enforcement of claims against the state. Do the statutes in the other states authorize a judicial remedy or are they benevolent predictions of what the legislature will do by special appropriation? Clearly, the former interpretation is the only one which gives these provisions any significance. Assuming that the state is judicially suable and legally liable, what is the scope of the liability? Is it an insurer, and thus liable for accidental destruction, burglary, and so forth, or is it a bailee bound to use only ordinary care? Is it liable for the peculations of the official depositary or his employees, or is the principle of *respondeat superior* still inapplicable against the state? Virginia alone has settled the scope of liability with reasonable certainty:

> The state shall be responsible for the safe-keeping of all bonds or other securities deposited with the Treasurer of the State, and if said bonds or any part thereof shall be lost, destroyed, or misappropriated, the state shall make good such loss to the company making the deposit.[125]

Unless this statute "in derogation of the common law" is to be strictly construed to the point of strangulation, it imposes an insurer's liability upon the State of Virginia. On the other hand, Rhode Island, like the cautious Scotchman who would "make sicker," has declared in its deposit statute that "nothing in this chapter shall be so construed as to render this state liable for the value of any stocks or other securities deposited. . . ." [126]

To the states above cited which have specific provisions declaring state liability for loss of deposits, may be added those in which there are general provisions for suits against the state. The details of these provisions are beyond the scope of this discussion. Most

[121] Wash., § 7070. Similarly Idaho, § 5704 and Ore., § 6371 (9) ("shall be held responsible for the safety of").

[122] Ga., § 2419.

[123] Ky., § 648a–1.

[124] Idaho Const., § 9; Wash., § 886; see 30 *Harv. L. R.* 25. The Idaho provision has been held not to include tort claims (injury to property by negligence of state's agents): Davis *v.* State (1917), 30 Idaho 137, 163 Pac. 373.

[125] Va., § 4211.

[126] R. I., Ch. 219, § 22.

of them are limited to claims founded upon "contract," which would ordinarily exclude a claim for misappropriation or loss of deposited securities. However, if the state is regarded as a bailee of deposits, it may be held liable for misappropriation or negligent loss of deposits, on the basis of contract as well as of tort.

The liability of the official depositee need not detain us further than to note that in a few instances he and his bondsmen are expressly made responsible,[127] a result which would probably be reached in the absence of such statutes.[128] The commissioner's bond never exceeds $100,000[129] and frequently ranges as low as $10,000.[130] The deposit of a single company will often exceed even the larger of these two sums.[131] The criminal penalties for official embezzlement[132] have only a deterrent effect; they do not provide restitution for the company and its policyholders if the deposit is misappropriated.

§ 18. *Policy forms.** Whether or not Sir Henry Maine was justified in making his famous generalization, that the progress of legal development had been from status to contract,[1] the liberty of choice which he postulated has been greatly restricted by the tendency toward standardization of contracts.[2] In large measure this process of standardization has been brought about by business practices independently of legal sanctions. In the case of contracts between insurer and insured, however, the state has undertaken to furnish the service of standardizing, or at least supervising the work of standardizing, the policy forms in several of the most popular branches of insurance. So far has the movement progressed in these fields that the question is no longer: "Shall the state re-

[127] E.g., Ore., § 6360; Pa., § 47; Utah, § 1132; Wyo., § 5252.

[128] F. J. Goodnow, tit. "Officers," 29 Cyc. 1455.

[129] Ohio, § 616; Wis., § 1967.

[130] Pa., § 15; Va., § 4171.

[131] See *supra*, this section, note 2.

[132] Va., § 4218 makes it a felony to dispose of deposited securities otherwise than in the manner provided by statute. Misappropriation of securities with criminal intent would be a serious offence in every state.

* The substance of this section appeared in (1925) 25 *Columbia Law Review*, 253–276. Copyright 1925, by the Trustees of *Columbia Law Review*. Reprinted here by permission.

[1] Maine, *Ancient Law* (1861), c. 5, end. Dean Roscoe Pound denies that Maine's theory fits the facts of either Roman or English legal development. Pound, *Interpretations of Legal History* (1923), pp. 53–61.

[2] Isaacs, *The Standardizing of Contracts* (1917), 27 *Yale L. J.*, 34.

strict the individual liberty of the insurer and insured by prescribing the terms and legal incidents of a relation voluntarily assumed?"[3] or even "Has the legislature the power to impose such restrictions?" but rather "*How* shall the state control the standardization of insurance policy forms?"

Before considering the "how," the "why" should be examined. It is believed that the reasons for compulsory uniformity of insurance contracts lie in the fact that insurance has become a popular, a "democratic," institution. It seems not unlikely that the individual insurers who congregated in Lloyd's Coffee House in the later seventeenth and early eighteenth centuries were at the mercy of the adroit ship captains who came seeking insurance against the perils of distant seas. The insured, the ship-owner, needed no protection against overreaching. The decisions of even as enlightened a judge as Lord Mansfield reflected the tendency to protect the helpless insurer by strict enforcement of the warranties inserted in the policy for his benefit.[4] The doctrine that a contract of insurance was a contract *uberrimae fidei* was more often invoked to defeat recovery by the insured than to impose liability on the insurer. Moreover, the business of Lloyd's was, as it still is, done by individuals rather than corporations. The opportunities for individual bargaining were correspondingly greater.

Toward the close of the nineteenth century the situation had become reversed. It was the insured rather than the insurer who most frequently needed protection. Life insurance and fire insurance were no longer regarded as luxuries for the well-to-do; they became necessities for the middle classes. Traveling agents invaded the rural districts and "sold policies" to the farmers just as other agents sold lightning rods; and these policies often proved worthless.[5] The newer forms of insurance, accident and health insurance, and the so-called "industrial life" insurance,[6] reached a portion of the community who were not experienced in large and complex

[3] Pound, *op. cit.*, note 1, p. 62.

[4] See Vance, *The History of the Development of the Warranty in Insurance Law* (1911), 20 *Yale L. J.*, 523.

[5] See 2 Gephart, *Principles of Insurance* (1917), p. 188, quoting from A. Dean, *The Rationale of Fire Rates.*

[6] The term "industrial life" insurance refers to small policies, usually for a few hundred dollars, the premiums of which are payable weekly or monthly. For a discussion of the need of administrative control over the forms of this type of policy, see Blount *v.* Fraternal Assn. (1913), 163 N. C. 167, 170, 79 S. E. 299.

financial transactions. The companies multiplied their warranties, "ingeniously worded and obscurely printed; and, singularly enough, these new conditions were always in the interest of the insurer, and not of the insured." [7] The adjustment of loss claims was turned over to lawyers and professional claim adjusters, who were more astute in applying the technical doctrine of warranties than in preserving the public good will. The emotional drive for state regulation of policy forms may be ascribed to such causes.

Meanwhile, the far flung agency lines of corporations could move only through strict regimentation of the legal powers of the agents and rigid standardization of the quality of the article sold. The insurance company developed an organization of inspectors, in life and fire insurance particularly, which made it less dependent upon the warranties of the insured. Thus the economic bargaining power of the insured diminished and that of the insurer increased. It is noteworthy that state regulation of insurance policy forms has not yet touched the field of marine insurance, where equality of bargaining power still prevails.

One might ask, why did not competition do the work? That there has been competition a-plenty in all the popular lines of insurance cannot be doubted. But competition assumes that the purchaser is able and willing to discriminate between the articles offered by different competitors, and that is just what the purchasers of insurance could not or would not do. Moreover, people could not accept complacently the sacrifice (that is, denial of recovery due to cunningly worded policies) of the widows and the destitute upon the consuming altars of competition. Nor could custom do the work, as it did in shaping the marine insurance policy. Perhaps the growth of the insurance business was too rapid and artificial for the slow encrustations of custom. Still, custom has itself received an artificial stimulus, and it has guided the hand of the governmental agent in writing the terms of the insurance contracts.[8] Perhaps custom might have done more but for the prevailing clamor, *fiat lex.*

[7] Winslow, J., in Bourgeois *v.* Northwestern National Ins. Co. (1893), 86 Wis. 606, 610, 57 N. W. 347. See also the article by F. C. Oviatt, *The Standard Fire Insurance Policy* (1905), 26 *Ann. Am. Acad. of Pol. & Soc. Science*, 179.

[8] E.g., through the work of the National Board of Fire Underwriters and similar organizations. See the New York statute, cited *infra*, n. 25. As early as 1866, the National Board of Fire Underwriters drew up a uniform policy, but was unable to get it generally adopted. See Gephart, *op. cit.*, n. 5, p. 143.

All that is really a matter of long ago. The bone of contention has been not the "why" but the "how." Even in a generation of astute and conservative constitutional lawyers, one finds in the constitutional struggles scarcely a voice questioning the validity of some sort of state regulation of insurance policies. It must be said in fairness that the insurance companies have not, so far as the judicial reports show, vigorously opposed state regulation, but have rather shown a tendency to coöperate. The earliest attacks upon standardizing legislation were made by policyholders, not by insurers.

Coming now to the methods of regulation employed, we find three types: 1. Legislative prescription of the exact wording of the policy; 2. Administrative prescription of the exact wording of the policy; 3. Legislative prescription of typical provisions or standards, to be administered by a single official having approval, disapproval, and dispensing powers.

1. *Policies prescribed by the legislature.* The flood of standardizing legislation began in 1873 when Massachusetts adopted the standard fire policy.[9] The statute prescribed in detail the words and paragraphs, commas and periods, of the document to be labeled the "Massachusetts Standard Fire Policy." The only blanks left for individual liberty were the name of the company, the amount of the premium, the amount of insurance, the name of the insured, the description of the property insured, and the beginning and expiration of the risk. The statute was naïvely silent as to additional "riders" or clauses relating to unstandardized risks. While the only penalties for failure to use the standard form were the denial of the privilege of using the "Massachusetts" label,[10] and the inconvenience of being obliged, under penalty, to file all variations with the insurance commissioner,[11] the rigidity of the standardization did not at once inspire imitation. The next state which attempted regulation of the fire policy form did not follow the Massachusetts model.[12] Nor did Massachusetts lose her fertility of invention. The use of the standard form has been made compulsory in that commonwealth, and correspondingly the form itself

[9] Mass. L., 1873, Ch. 331, §§ 1, 2.

[10] Section 3 prescribed a penalty of $1,000 for using a policy labeled "Massachusetts Standard Policy" if the policy did not "conform" to the statutory wording.

[11] *Ibid.*, § 4.

[12] This was the statute of Michigan, adopted in 1881, which is cited *infra*, n. 17.

has been made less rigid. Not only are foreign companies allowed to print, with the approval of the insurance commissioner, provisions required by their charters or deeds of settlement, but also any company may attach riders or slips, "adding to or modifying those contained in the standard form," without obtaining such approval.[13] With these or similar modifications, the Massachusetts type of statute has been adopted in a number of states, including some which have adopted more nearly the New York phraseology.[14]

One advantage of this type of regulation is that a man may open the statute book and find there the exact wording of the contract which he is free to make. He need not write a busy insurance department at the state capitol in order to learn the terms of his policy of insurance.[15] Moreover, the publicity of the statute, such as it is, will increase the probability that the insured will conform to its terms. Again, this type of statute reduces to a minimum the delegation of legislative or discretionary power to the insurance commissioner.[16]

On the other hand, this method cannot hope to avoid over-standardization. Variations for special or non-standard risks which may be discovered or developed cannot be taken care of until the next meeting of the legislature — unless the principle of rigidity is departed from. This has been done in one way or another in all of the states which have adopted the method of legislative prescription.

2. *Policies prescribed by the insurance commissioner.* The method of delegation to an administrative official of the power to prescribe a standard fire policy made its appearance at an early stage in the development of standardizing legislation. Michigan, the second state to attempt the task, adopted a statute of this

[13] Mass., § 99.

[14] In Gephart, *op. cit.*, n. 5, at pp. 143, 144, it is said that of the seventeen states which had prescribed a standard fire policy, fifteen had adopted the New York form.

[15] The statutes commonly provide that a policy issued in non-conforming terms shall nevertheless be binding upon the company in accordance with the terms prescribed in the statute. See, for example, Mass. Gen. Laws (1921), Ch. 175, § 193. See also N. Y. L., 1917, Ch. 440, § 3, as amended by L., 1922, Ch. 268: "No other or different provision, agreement, condition or clause shall be in any manner made a part of such contract or policy or indorsed thereon or added thereto or delivered therewith, except . . ."

[16] "To a minimum," rather than "to nothing," because the statutes always permit more or less substantial variations from the statutory wording.

type in 1881 [17] which remained ostensibly the law of that state until declared unconstitutional in 1905.[18] New Hampshire, which in 1885 enacted the third example of standardizing legislation, likewise delegated the power of prescription to the commissioner.[19] The New York law of 1886, which followed next in order, was also a delegation of such power.[20] Minnesota,[21] Pennsylvania,[22] and Wisconsin [23] chose the New York type of statute. Thus the legislatures obviously preferred administrative prescription to legislative prescription.

Two features of these delegation statutes should be noted in considering the decisions as to their constitutionality. The first is the inclusion or omission of a standard to guide the insurance commissioner in his task. The second is the inclusion or omission of provision for the promulgation, or communication to the insurers and to the insuring public, of the form of policy officially adopted.

The New York statute contained a form of delegation not commonly used. It directed the superintendent of insurance to "prepare and file in the office of the Secretary of State" on or before a certain date, "a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be endorsed thereon or added thereto," *unless* the New York Board of Fire Underwriters [24] should prepare and file such a form a month earlier.[25] The use of any other form of policy for insuring New York property was forbidden under penalty, except that certain variations within narrow limits were made permissible.[26] The form adopted was apparently prepared exclusively by the New York Board of Fire Underwriters.[27] At all events the form so adopted was incorporated by reference into subsequent legislation,[28] and continued to be the prescribed form down to 1917, when the legislature adopted by reference the form of fire

[17] Mich. L., 1881, No. 149.

[18] King *v.* Concordia Fire Insurance Co. (1905), 140 Mich. 258, 103 N. W. 616.

[19] N. H. L., 1885, Ch. 93, § 3.

[20] N. Y. L., 1886, Ch. 488.

[21] Minn. L., 1889, Ch. 217.

[22] Pa. L., 1891, No. 18, p. 22.

[23] Wis. L., 1891, Ch. 195, p. 224.

[24] An organization of fire insurers incorporated some twenty years earlier.

[25] N. Y. L., 1886, Ch. 488, § 1.

[26] *Ibid.*, §§ 2, 3. The variations were not to be inconsistent with the standard policy provisions.

[27] See *New York Insurance Report* (1887), Pt. I, p. 25.

[28] See N. Y. Insurance Law (L., 1909, Ch. 33), § 121.

policy approved in 1916 by the National Convention of Insurance Commissioners.[29] The original law of 1886 provided no standards to guide the commissioner and made no provision for promulgation of the form prescribed. Yet its constitutionality was never questioned.[30]

The Pennsylvania statute had a less happy fate in store for it. With the exception of the alternative permitting preparation of the standard form by the board of fire underwriters, it was substantially identical with the New York statute.[31] No guides or standards were given the insurance commissioner; and while he was directed to certify to each fire insurance company doing business in the state a copy of the official form,[32] the method of promulgation was defective.

The constitutionality of the statute was attacked by a policyholder. In an action by the insured to recover on a fire policy, the plaintiff's evidence of parole "waiver" of proofs of loss was excluded on the ground that the conditions of the policy could be waived only in the manner permitted in the standard form prescribed by the commissioner. In the supreme court, a judgment for the defendant was reversed on the ground that the statute was unconstitutional as an unwarranted delegation of legislative power.[33] Said Judge Williams:

> It will not do to say that the preparation of the form was an unimportant matter of detail, or an act partaking of an executive or administrative character. It was the sole purpose of the act. . . . Take out the form prepared by the insurance commissioner and to be found in some pigeon hole in his office, and the act is without meaning or effect.[34]

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[29] N. Y. L., 1917, Ch. 440, § 3: "The printed blank form of a contract or policy of fire insurance adopted by the National Convention of Insurance Commissioners at its meeting held in the city of New York on the twelfth day of December, 1916, shall be filed by the superintendent of insurance in his office . . . and shall be known and designated as the 'Standard fire insurance policy of the state of New York.' . . ." Only the permissible variations (under ten headings) are prescribed in the statute, and these are narrow.

[30] See Hicks *v.* British Am. Assur. Co. (1900), 162 N. Y. 284, 56 N. E. 743, where the compulsoriness of use of the standard form was assumed by both majority and dissenting judges. However, in Nalley *v.* Home Insurance Co. (1913), 250 Mo. 452, 157 S. W. 769, it was said that a statute prescribing the form which should be adopted by the insurance companies of the state was unconstitutional as a delegation of legislative power.

[31] Pa. L., 1891, No. 18.

[32] *Ibid.*, § 1.

[33] O'Neil *v.* Insurance Co. (1895), 166 Pa. St. 72, 30 Atl. 943.

[34] *Ibid.*, p. 79.

To which might be retorted, take out the Interstate Commerce Commission's schedules of rates, and what is left of the Transportation Act of 1920? The Pennsylvania legislature was too honest. It did not pretend to know what should go into a standard fire policy.

It is true that the bald delegation of power in the Pennsylvania statute went further than most of the delegations of power with which the court was familiar. It is believed, however, that the "real" reasons for the decision are to be found in the court's attitude toward crude legislation and crude administration. In the first place, the "pigeon-hole" argument contained in the last sentence of the excerpt quoted is obviously aimed at the lack of any provision for effective promulgation of the commissioner's policy form. That this is a cause of considerable inconvenience in New York, for example, cannot be doubted, for only by communicating with the insurance department can one learn authoritatively the provisions of the standard policy.

A second reason was the lack of any provision for hearings or investigation by the commissioner before he should prescribe the form. Without consulting either insurer or insured, he was to retire into his sanctum and evolve a standard form by a process of pure thinking. A third reason, though one which the court, of course, disavowed, was the court's dislike of the form which the commissioner had prescribed. The trial judge criticized it unsparingly:

> The conditions put in that policy go beyond almost any policy that ever was exhibited in the courts before. Numerous provisions were put in that the court had declared void because they were so unjust and inequitable.
>
> It seems to be framed in the interest of dishonest companies and insurance brokers, and puts an honest insurance company and honest officers of a company at a very great disadvantage . . . [35]

Concerning this comment, the supreme court said:

> This is a very serious arraignment of the "standard policy," to which we refer without comment of our own for the purpose of showing the *impolicy* of such delegation of legislative power as might make it possible to fasten upon the people of the commonwealth a form of contract open to such grave objections.[36]

How many constitutional issues of this sort have been settled by what the men at one end of the capitol thought of the men at the other?

[35] 166 Pa. St., pp. 73, 74, 80. [36] *Ibid.*, p. 80 (italics ours).

The Minnesota and Wisconsin statutes were the next to fall beneath the knife. In each the delegation of power was not, as in the Pennsylvania and New Hampshire acts, unregulated. The commissioner was directed, with the assistance of the attorney-general of the state, to prepare and file in his office a form of fire policy which "shall, as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy, so called and known," with certain minor clauses specified.[37] The commissioner was required to distribute among the fire insurance companies printed copies of the form adopted.[38]

At first all went well. The Wisconsin statute was spoken of in terms of high commendation by Judge Winslow,[39] a judge who had no illusions as to the significance of grants of administrative power.[40] And in *Anderson* v. *Manchester Fire Assur. Co.*,[41] the majority of the court affirmed a judgment for the defendant on the ground that parol waivers were ineffective under the Minnesota standard form. Counsel for the plaintiff did not urge the invalidity of the statute. However, Judge Canty, in a dissenting opinion, raised the point, and because of this a rehearing was granted.

At this critical juncture came the Pennsylvania decision in the *O'Neil* case.[42] It was cited in reargument and a majority of the court declared the Minnesota law unconstitutional as a delegation of legislative power.[43] In vain was it pointed out that the statute set up a recognized standard, the New York form, to guide the commissioner. The court thought the statute required that official to follow the New York model only as to "type and style" and order of arrangement, and left him the "power to insert in the standard form such provisions as he saw fit." [44] It was argued:

> Again, if the Insurance Commissioner had no discretion, and was to act merely as a copyist of the New York form, why was it deemed necessary

[37] Minn. L., 1889, Ch. 217, § 1; Wis. L., 1891, Ch. 195, § 1.

[38] *Ibid.*, § 3 of each act.

[39] Bourgeois *v.* Northwestern National Ins. Co., *supra*, n. 7.

[40] See his article, Winslow, *A Legislative Indictment of the Courts* (1916), 29 *Harvard Law Rev.*, 395.

[41] (1894), 59 Minn. 182, 60 N. W. 1095.

[42] See O'Neil *v.* Insurance Co., *supra*, n. 33.

[43] Anderson *v.* Manchester Fire Assur. Co., *supra*, n. 41. The argument that the regulation of policy forms was not a proper exercise of the police power, which was urged by Judge Canty, at page 191, was distinctly rejected by the majority of the court, at page 195.

[44] *Ibid.*, p. 194.

to provide for him the assistance of the Attorney-General, in his onerous duties of copying the same? [45]

Having demonstrated that the act purported to endow the commissioner with some other powers than those of a proof-reader, the court thought the matter was settled:

> . . . Then the legislature must, at least, have intended to give the Insurance Commissioner power to exercise his judgment in determining which of the provisions of the New York form were applicable to Minnesota, and which were not, and this would be an unconstitutional delegation of power.[46]

The opinion is permeated with naïve Victorian theories of administrative powers. Between mechanical copying and unbridled caprice the court could not perceive the middle ground of administrative standards. It is interesting to note in this connection that statutes authorizing the courts to decide cases by the common law of England in so far as "applicable" to American conditions have been applied by courts without any qualms that they gave the courts unbridled and capricious legislative powers.[47] Finally, the court thought there was no *need* for such a delegation of power to the commission, since the policy was a matter of "general law" and no emergency called for immediate modification of it between legislative sessions.

Again it was the insured who gave the death blow to the Wisconsin statute, on very similar facts, in *Dowling* v. *The Lancashire Ins. Co.*[48] The coincidence that in all three of these cases the standard form was urged to defeat a parol "waiver" of the conditions of the policy, and thus, in effect, to defeat a just recovery, makes one feel that the judges had better reasons than they gave.[49] The "reasons" given by the Wisconsin judge were no less banal than in the pre-

[45] 59 Minn., p. 193. [46] *Ibid.*, p. 194.

[47] See Pope, *The English Common Law in the United States* (1910), 24 *Harvard Law Rev.* 6, 19–30; (1920) 8 *California Law Rev.* 340. In the following cases, a statute adopting the common law of England in so far as "applicable" was applied without objection: See Williams *v.* Miles (1903), 68 Neb. 463, 469, 94 N. W. 705, 96 N. W. 151; Chilcott *v.* Hart (1896), 23 Colo. 40, 45 Pac. 391; Teller *v.* Hill (1903), 18 Colo. App. 509, 512, 72 Pac. 811; Chicago, Wilmington, etc., Coal Co. *v.* People (1904), 114 Ill. App. 75, 104. But see the dissenting opinion in Seeley *v.* Peters (1848), 10 Ill. 130, 148. For a general discussion of the problem, see Pound, *Introduction to the Philosophy of Law* (1922), Ch. III.

[48] (1896), 92 Wis. 63, 73, 65 N. W. 738.

[49] Sometimes (to reverse Dean Pound's comment) the commonwealth must suffer for John Doe's sake.

ceding cases. It was argued that if the commissioner failed to prescribe a form of policy before the time when the use of such form became compulsory, the fire insurance business of the state would have to stop. Of course, contingencies can be imagined which would cause everything to stop; chaos is always lurking on the other side of the thin screen of civilization. *Reductio ad absurdum* has been a popular logical tool for constitutional problems. The court further pointed out that no one could predict with certainty what form the commissioner would prescribe.

The New Hampshire statute was the most shameless of all in its delegation of power. It named no standard, either as to style or as to content, of the policy form.[50] The commissioner prepared a form,[51] but grave doubts arose as to the validity of the statute. In 1891 the statute was revised by declaring that the form of policy "now in force in this state" (apparently, the one previously prescribed by the commissioner) be "continued until the insurance commissioner shall change it." [52] "Thus," says the New Hampshire judge, "all doubts were removed." [53] The legerdemain, it seems, is in the change from a power to prescribe a policy to a power to change, without restriction, one already prescribed (by reference only) by the legislator. The distinction seems naïve.

The Michigan statute was noteworthy, if not unique, in that, instead of referring to some concrete customary form as the standard to which the administrative body should conform, it enumerated certain ideal abstract principles which were to guide the commission in its labors: "*First*, fairness and equity between the insurers and the assured; *Second*, brevity and simplicity; *Third*, the avoidance of technical words and phrases; *Fourth*, the avoidance of conditions, the violation of which by the assured would, without being prejudicial to the insurer, render the policy void or voidable at the option of the insurer; *Fifth*, the use of as large and fair type as is consistent with a convenient size of paper or parchment; *Sixth*, the placing of each separate condition in separate paragraphs, and the numbering of paragraphs." [54]

[50] N. H. L., 1885, Ch. 93, § 3: "The insurance commissioner shall provide a standard form of policy and contract for companies insuring property in this state, and no licenses shall be granted, and no company allowed to do an insurance business, unless it shall conform to the regulations of the insurance commissioner." That was all.

[51] See *New Hampshire Report of Insurance Commissioner* (1885), pp. 5, 73.

[52] Judge Peaslee, in Franklin *v.* Insurance Co. (1899), 70 N. H. 251, 47 Atl. 91.

[53] *Ibid.*, p. 258.

[54] Mich. L., 1881, No. 149, § 2.

The usefulness of "fairness and equity" as administrative standards may well be questioned; and yet the delegation of power was no bolder than in the New York statute of 1886. At all events, the Michigan law was likewise declared to be an unconstitutional delegation of power.[55] In the same year a South Dakota act, almost identical with the Minnesota and Wisconsin ones, was pronounced invalid on the same ground.[56]

It cannot be said that the foregoing decisions have been entirely discredited, and yet there has been a turning of the tide. In 1908, a Massachusetts act which, after setting forth in detail certain prescribed and prohibited clauses, forbade the use of life policy forms which had been disapproved by the commissioner, was upheld.[57] In 1914, the Nebraska court upheld the validity of a statute very similar to the Minnesota and Wisconsin ones. The act directed the state insurance board to prepare a standard form of fire policy "as nearly as applicable in the form known as the New York standard, as now or may hereafter be constituted." [58] The statute did prescribe many of the terms and conditions of the standard policy, and the court took pains to point out that it differed in that respect from the Pennsylvania statute.[59] The court thought the duties of the Board were confined to the narrow range of correlating the New York form with the Nebraska statutory provisions. However, the part "or may hereafter be" was declared invalid as a delegation of legislative power to the future New York legislatures.[60] In 1916, Idaho intimated that such delegation of power would not be invalid.[61]

In 1922 Colorado upheld a statute which empowered the Industrial Commission to "approve and prescribe" a standard or universal form, "as nearly as possible" for every contract or policy of

[55] King *v.* Concordia Fire Insurance Co., *supra*, n. 18.

[56] Phenix Insurance Co. *v.* Perkins (1905), 19 S. D. 59, 101 N. W. 1110.

[57] N. Y. Life Insurance Co. *v.* Hardison (1908), 199 Mass. 190, 85 N. E. 410. *Accord:* See State *ex rel.* United States Fidelity & Guaranty Co. *v.* Smith (1924), 184 Wis. 309, 199 N. W. 954, 959, upholding the constitutionality of a similar Wisconsin statute, and distinguishing the earlier Wisconsin case of Dowling *v.* The Lancashire Ins. Co. (*supra*, n. 48) briefly on the difference between delegation of a power to prescribe and delegation of "the proper administration of statutes relating to standard provisions in policies."

[58] Neb. L., 1913, Ch. 154, § 100.

[59] State *ex rel.* Martin *v.* Howard (1914), 96 Neb. 278, 288, 147 N. W. 689.

[60] *Ibid.*, p. 291.

[61] See Carroll *v.* Hartford Fire Ins. Co. (1916), 28 Idaho 466, 477, 154 Pac. 985.

workmen's compensation insurance.[62] The constitutionality of this statute was attacked in *Travelers Insurance Co.* v. *Industrial Commission.*[63] The court distinguished the four cases [64] holding invalid a delegation of power to fix a standard fire policy, apparently on the ground that the Workmen's Compensation Act was optional, and hence the employer was free to reject the entire compensation scheme if he did not like the form prescribed. As for the insurer, he could write the risk or not, as he chose. So is "freedom of contract" reduced to a choice between not entering into a relation, or entering into it on such terms as the law prescribes. However, the court added, significantly, a statement that strict separation of powers is impossible and that administrative officials must be allowed to exercise two or even all three functions.

Despite this turning of the tide, the older current of authority has left its effect upon the prevailing legislation. Provisions empowering the commissioner to prescribe policy forms are scarce. A Texas statute is the only one found which authorizes administrative prescription of an entire policy form. It directs the insurance board of that state to "make, promulgate and establish uniform policies" (of fire insurance) and to "prescribe all standard forms, clauses and endorsements used in connection with insurance policies," the use of which is made compulsory.[65] In 1923, the Texas board exercised a disapproval power under this statute.[66] In Oklahoma, where the state has gone into the hail insurance business, a statute authorizes the commissioner of hail insurance to "prepare proper forms of application, policy of insurance . . ." [67] Since the state is here acting in a proprietary capacity, the legislature's power to delegate would seem to be unquestionable.[68]

The commissioner is more frequently granted the power to prescribe certain additions to the policy form. Thus, a Vermont statute requires coöperative fire companies to print on the backs of their policies "such other matter as the commissioner may prescribe." [69] This seems substantially the same as a Tennessee pro-

[62] Colo. L., 1919, p. 708, § 22.

[63] (1922), 71 Colo. 495, 208 Pac. 465.

[64] *Supra*, notes 33, 41, 48, 56.

[65] Tex., § 4871.

[66] See Weekly Underwriter Rulings (1923), Tex. 23, an opinion of the assistant attorney-general upholding the power of the board "to make and promulgate" uniform policies under this section; but actually in this instance it appears that the board merely expressed its disapproval of a form.

[67] Okla., § 6843.

[68] United States *v.* Grimaud (1911), 220 U. S. 506, 31 Sup. Ct. 480.

[69] Vt., § 5541.

vision that the words describing the kind of policy, printed on the policy, shall be "such words as the commissioner shall approve." [70]

The New York enactment as to the riders, permits and indorsements, which may be added to the standard fire policy, is better from an administrative point of view than any thus far adopted. After authorizing the superintendent to examine the documents of fire companies and rate-making organizations "for the purpose of determining the number and extent of use of any riders, indorsements, clauses, permits, forms, or other memoranda attached to and made a part of any fire insurance contract," it declares:

> . . . *after such examination and inspection* such superintendent of insurance may determine that the use of any such rider . . . is so extensive that there should be in his judgment a standard form thereof, and he shall thereupon prepare, and file in his office such standard form of rider . . . and thereafter no fire insurance corporation shall attach . . . any rider . . . covering substantially the same agreement provided for by such standard rider . . . except it be in the precise language of the form so filed. . . .[71]

The superintendent may likewise determine the use of such standard rider to be no longer necessary, and by notice to the fire companies, dispense with its use.[72] This section furnishes an admirable scheme for keeping administrative regulation *au courant* with insurance practice, of infusing commercial usage into the law. On the other hand, it is defective: 1. In omitting any express provision for hearing all insurers before adopting a standard rider; 2. In omitting any method of promulgation, publication or notification of the standard rider adopted. The "pigeon-hole" argument applies.

Administrative prescription is a desirable method for forms requiring frequent change. It also saves time for an overworked legislature. On the other hand, it is very difficult to formulate desirable administrative standards without prescribing in the statute the substance of the wording of the policy. So far as the writer can judge, legislative prescription has been fully as satisfactory as administrative prescription. In either case, business custom has been the moving finger.

Aside from express statutory authority, the insurance commissioner is in a position to control the wording of policy forms through

[70] Tenn., § 3348a 16. See also W. Va., § 68, requiring fire companies to use the New York forms, "with such changes and additions as the insurance commissioner may deem proper."

[71] N. Y. L., 1922, c. 268, § 121, subd. 10 (italics ours).

[72] *Ibid.*

the exercise of his licensing and inquisitorial powers. The terms of the company's contract must be looked at to determine the kind of business it is doing and the reserve funds which it should maintain, and the commissioner, with these ends in view, may direct changes in policy forms. In other instances, the commissioners seem to have assumed the power to eliminate provisions of policies which they deem objectionable, entirely apart from statutory authorization. An example is a ruling of the Kansas superintendent in 1920, ordering that all liability companies in the state eliminate all clauses limiting the liability of the insurer to the amount of money actually paid by the insured in satisfaction of a judgment, and that they contract that the insurer be liable whenever final judgment is rendered against the insured.[73] A careful search of the Kansas statutes in force in 1920 has failed to disclose any provision making such a clause unlawful, or any provision giving the superintendent power to prescribe, approve or disapprove forms of liability insurance policies.

3. *Administrative control through approval, disapproval and dispensing powers.* The third method is the one most commonly used to control the use of forms in life, health, and accident insurance. To understand the working of this method a survey of the relevant statutory provisions is requisite.[74]

a. Registration provisions. In nearly all the states there are statutes requiring the filing of all policy forms in use by a particular type of company (usually, life, health, and accident) with the commissioner.[75] Of similar import are the laws requiring filing by fra-

[73] See the ruling of the Kansas department of October 31, 1920, as reported in the Weekly Underwriter Rulings. The only ground assigned for the ruling was that the forbidden clause "may defeat the very purpose for which the assured paid his premium."

[74] The terminology and classification of the following pages are derived partly from Freund, *Standards of American Legislation* (1917).

[75] The insurance commissioner is the depositee:
Ala., § 8386 (reciprocal), § 8432 (mutual other than life); Ariz., § 3452 (life); Cal. L., 1917, Ch. 614, § 1 (accident and health); Colo. L., 1913, Ch. 99, § 47 (life), § 61 (fire), § 75 (5) (foreign assessment casualty); Conn., § 4073 (fire, with sec. of state), § 4158 (foreign assessment life), § 4201 (foreign fraternal), § 4234 (health and accident); Ga. Ann. Code (Park, 1914), § 2450 (assessment life); Idaho, § 5037 (life); Ill. Rev. Stat. (Smith, 1921), § 208 W. (life); Ind., § 4622d (life); Iowa, §§ 5492, 5504, 5518 (life), § 5721 (interinsurance exchange); Kan., § 5240 (life); Me., Ch. 53, § 11 (accident and health); Mass., §108 (accident and health), § 132 (life); Mich. III, 2, § 6 (life); Minn., §§ 3480 (life), 3522 (accident and health), L., 1917, Ch. 276, § 2 (war insurance); Mo., § 6239 (fire);

ternal or mutual associations of their by-laws, which are frequently incorporated by reference in the contracts between insurer and insured.[76] The commissioner is sometimes empowered to compel the filing or presentation of other policy forms, in his discretion.[77]

These requirements have a two-fold significance. They indirectly compel insurers to adopt uniform provisions for the contracts made by them. Even if an insurer wanted to dicker with John Doe about the wording of the "general" portions of his policy, the necessity of filing a copy of each individual bargain would be a prohibitive inconvenience. Registration means stereotyping. In the second place, these registration provisions are a valuable adjunct to the commissioner's other powers. He may have an implied power of disapproval as an incident to such other powers. For example, if a health insurance "rider" is attached to a life insurance policy form, the question arises whether the particular life insurance company using this form is authorized to write combination health and life insurance.[78] Again, the scope of the insurer's promise determines the amount of reserves which it is required to maintain, and the kind of business which it is doing determines whether it has the required capital.

b. Standardizing provisions. It is difficult to summarize the statutory provisions in such a way as to indicate the scope of the commissioner's discretionary power in approving or disapproving policy forms. Obviously a statute such as that in Wisconsin, which

Neb., § 3275 (all forms); N. H. L., 1913, Ch. 95, § 2 (liability), Ch. 226, § 1 (accident and health); N. J., p. 2870, § 97 (life); N. Y. L., 1913, Ch. 155 (accident and health), Consol. L. (1909), Ch. 28, § 101 (life), L., 1916, Ch. 14, § 327 (mutual automobile fire); N. C., § 4759 (fire), § 4773a (life), § 4805b (accident and health); Ohio, § 9423 (life); Okla., § 6734 (life); Ore., § 6429 (life); Pa., § 257 (mutual), § 166 (life); S. D., § 9342 (life and casualty), § 9403 (workmen's compensation); Tenn., § 3348all (life); Tex., § 4759 (life); Utah, § 1158 (life); Vt., § 5624 (health and accident); Wash., Codes & Stat. (Remington, 1915), § 7229 (life), § 7233 (accident and health); Wis., § 1960 (accident and health). This *compulsory* registration of *all policy forms* must not be confused with the *optional* registration of *individual policies* under the "registered policy" laws, e.g., N. Y. Consol. L., 1909, Ch. 28, § 75. A special deposit is made to secure payment of such registered policies.

[76] E.g., Minn. L., 1917, Ch. 183, § 1; Miss., §§ 5101, 5102; N. D., § 5622 (fraternal with Sec. of State); Ohio, § 9517 (fire); Okla., § 6914 (farmers' mutual life); S. D., § 9253 (county mutuals); Tenn., § 3350 (assessment life and casualty); Tex., § 4766 (foreign life); Wis., § 1958–16 (2) (foreign fraternal).

[77] E.g., Mass., § 191.

[78] See N. Y. Insurance Department Rulings (1916), p. 113, approving such a combination policy.

authorizes the commissioner to "prepare and file" a standard form of fire policy, yet sets forth the exact and complete wording of the form he is to prepare, makes him a legislative amanuensis.[79] On the other hand, a Pennsylvania statute empowering the commissioner to make "rules and regulations" in connection with his approval powers, would seem to confer more latitude.[80]

The provisions as to life policies, and as to accident and health policies, are pretty narrow and detailed. Thus, by the statutes of New York and Massachusetts (which are typical) life companies are forbidden to issue any policy unless it contains "in substance the following"; then come some ten paragraphs setting forth the required clauses.[81] For example, it must have a provision for thirty days of grace in payment of premiums; for incontestability after two years; that the policy and application shall constitute the entire contract; for adjusted insurance if the insured has misstated his age, etc. In each act exceptions are made which give considerable latitude of discretion to the commissioner:

> Any of the foregoing provisions or portions thereof not *applicable* to single premium or non-participating or term policies shall to that extent not be incorporated therein; and any such policy may be issued or delivered in this state which in the opinion of the superintendent of insurance contains provisions on any one or more of the foregoing requirements *more favorable* to the policyholder than hereinbefore required.[82]

Such phrases as "in substance," "applicable," and "more favorable" obviously convey considerable discretionary power.

The provisions as to accident policies are much more detailed. Thus, the New York law, which occupies more than ten printed pages of the statute book, requires the inclusion of certain "standard provisions," which must be so labeled, and must "be in the words and in the order hereinafter set forth." [83] And the use of "contradictory" provisions is forbidden.[84] The Massachusetts statute requires only the "substance" of the statutory provisions,

[79] Wis., § 1941x.

[80] Pa., § 230 (c) ("approved by the commissioner under such reasonable rules and regulations as he shall make"). See also Mich. III, 2, § 22. The Ala. statute as to mutual companies other than life (§ 8432) merely provides that the form of policy shall be "approved" by the commissioner, without indicating the basis of approval.

[81] Mass., § 132; N. Y. L., 1911, Ch. 369 (now § 101 of the Insurance Law).

[82] See N. Y. statute cited in last note (italics ours). The language of the Mass. statute, cited in last note, is practically identical.

[83] N. Y. L., 1913, Ch. 155 (now § 107 of the N. Y. Insurance Law).

[84] *Ibid.*, subd. (e).

and contains the "more favorable" clause of the life insurance statute,[85] thus giving greater latitude of interpretation. The statutes of other states as to required provisions are similar,[86] and the "more favorable" clauses are equally broad.[87]

In passing upon the constitutionality of the Massachusetts act (as to life policies) the supreme court of that state decided it was not an unlawful delegation of legislative power, on the ground that it confided to the commissioner merely the "management of details." [88] On the other hand, the New York superintendent has taken a somewhat more liberal view of the discretionary power conferred by the almost identical provision in New York:

> The power thus given to me to approve forms of life insurance policies implies the power to disapprove all such forms *as may seem to me unjust* to the policy-holder or which unduly restrict or limit the right to enforce the same against the company.[89]

As examples of specific rulings in New York, may be mentioned the refusal to approve a clause limiting the period for bringing an action on the policy, in the event of death of the insured, to less than the six years allowed by the New York statute of limitations.[90] Likewise, a clause making the policy incontestable from date of issue was denied approval on the ground that a number of courts (New York not included) had declared such clauses to be "against public policy." [91] Yet a clause making the policy incontestable after one year was approved as "more favorable to the insured" than the two-year incontestability prescribed in the statute.[92] Again, policies

[85] Mass., §108.

[86] E.g., Ariz., § 3453; Colo. L., 1913, Ch. 99, §§ 43, 44, 47; Ind., § 4622d; Iowa, § 5504; Mich., III, 2, § 3; Minn., § 3471 (nineteen pages of requirements); Neb., § 3238; N. J., p. 2828, § 94; N. M., § 2828.

[87] E.g., Ariz., § 3453; Colo. L., 1919, Ch. 135, § 3; Idaho, §§ 5037, 5042; Ind., § 4622e ("shown to the satisfaction of the commissioner to as safely safeguard the policy-holders as do the laws of the state"); Iowa, § 5504; Neb., § 3238; Ore., § 6426.

[88] N. Y. Life Insurance Co. *v.* Hardison, *supra*, n. 57. *Accord*, State *ex rel.* United States Fidelity & Guaranty Co. *v.* Smith, *supra*, n. 57, upholding the validity of a similar Wisconsin statute conferring approval powers.

[89] N. Y. Rulings (1916), p. 288 (italics ours).

[90] *Ibid.* [91] *Ibid.* (1916), p. 304, (1916), p. 305.

[92] *Ibid.* (1916), p. 305. The provision for incontestability from date of issue was "more favorable" to the insured, on its face, though if it increased the number of fraudulent claims it would eventually be less favorable to the policy-holders as a group. Similar reasoning might have been applied to the "one-year" clause. These two rulings illustrate the nice balancing of conveniences often involved in the administration of the "more favorable" clauses.

containing "return premium" features were disapproved as "misleading and deceptive." [93] Without giving further examples, it may be stated that there is considerable divergence between the judicial theory of Massachusetts and the administrative practice of New York.[94]

The rulings of the commissioners under these statutes have seldom been judicially attacked. In Wisconsin an order disapproving the sale of "railroad accident" tickets was upheld on the ground that the statute required the entire contract to be set forth in the document delivered to the insured, and it was not enough to refer, in the accident ticket, to a lengthy form on file elsewhere.[95] A Minnesota ruling was sustained on direct attack as clearly in accordance with the statutory requirement.[96]

c. Corrective provisions. In addition to the affirmative requirements are found in many jurisdictions prohibitions aimed to prevent the use of deceptively worded or printed policies — usually, of accident or health insurance. Thus, the Massachusetts and New York statutes require that "the exceptions of the policy be printed with the same prominence as the benefits to which they apply"; [97] and the New York statute provides that any portion which purports, by reason of the circumstances under which a loss is incurred, to reduce any indemnity promised therein "shall be printed in bold face type and with greater prominence than any other portion of the text of the policy." [98] Connecticut goes New York one better and requires that the "disadvantageous" provisions be printed in red ink.[99] To checkmate the game of the accident insurance agent,

[93] N. Y.Rulings (1907), p. 275.

[94] Even in Massachusetts the commissioner's "management of details" is pretty far-reaching, as for example, in his detailed regulations as to the contents of the "laundry bundles" policies. (Weekly Underwriter Rulings (1923) Mass. 37). See also the elaborate set of rules for forms of accident policies issued by the Wisconsin commissioner in 1923 (*ibid.* (1923), Wis. 8) which are set forth in the report of State *ex rel.* United States Fidelity & Guaranty Co. *v.* Smith, *supra*, n. 57, the case which relied on the Massachusetts decision to support the constitutionality of the Wisconsin statute. The court made no comment upon the obvious discrepancy between "facts" and "theory."

[95] State *ex rel. v.* Smith, *supra*, n. 57.

[96] Commercial Accident Ins. Co. *v.* Wells (1923), 156 Minn. 116, 194 N. W. 22.

[97] N. Y. L., 1913, Ch. 155, § 101 (b) (6); Mass., § 108 (e). To the same effect are: Ga. Ann. Code (Park, 1914), § 2455; Idaho, § 5042; La., § 3667; Me., Ch. 53, § 11; Mo., § 6144; Neb., § 3240.

[98] N. Y. L., 1913, Ch. 155, § 101 (b) (6).

[99] Conn., § 4176. Same in N. C., § 4791a.

the state not only employs men to read the insured's policy for him; it also tries to help him read it for himself.

A more ambiguous requirement was one in Missouri that the policies of an assessment life insurance company must "show that the liabilities of the members (insured) are not limited to fixed or artificial premiums." [100] An Illinois assessment life company submitted to the Missouri superintendent of insurance seven policy forms, each of which contained a stipulation for a fixed premium in large type on the first page; one contained a clause printed in small type on the back of the policy under the heading "Benefits, Stipulations and Conditions," to the effect that if the premium was insufficient to meet the requirements of the policy, the company reserved the right to "call for the difference"; while in the other six policies a similar clause was inserted in the application in exceedingly fine type — 380 words in a space $\frac{7}{8}$ inch by $9\frac{3}{4}$ inches. The superintendent refused this company a Missouri license, and the supreme court of Missouri refused the company a writ of *mandamus*, on the ground that the policies were actually deceptive and did not conform to the spirit and intent of the statute.[101] Of course, the policies (including applications) did "show that the liabilities are not limited to fixed or artificial premiums" in a narrow and literal sense. The case is a commendable example of liberal and sociological interpretation of statutes. It is curious, however, that Judge Woodson supports this conclusion by the metaphysical idea of "liberty of contract," to which he gave a novel meaning — speaking of:

> . . . a great State organized and existing to protect the life of her citizens and to secure unto them the rights of liberty and property, *which includes the right to contract upon equal footing*.[102]

The last sentence of this quotation expresses a conception of "liberty of contract" quite different from that usually expressed by courts. In the constitutional struggles at the close of the nineteenth century, "liberty of contract" was thought to be invaded rather than protected by statutes designed to remove inequality in bargaining power.[103]

d. Approval and disapproval provisions. The distinction between "approval" and "disapproval" powers is important, not

[100] Mo., Rev. Stats. 1909, § 6955.

[101] State *ex rel. v.* Revelle (1914), 260 Mo. 112, 168 S. W. 697.

[102] *Ibid.*, p. 119. (Italics ours.)

[103] See Pound, *Liberty of Contract* (1909), 18 *Yale L. J.* 454.

only from the standpoint of administrative practice, but also with respect to the collateral consequences of failure to obtain approval. The New York law requires approval of the form by the superintendent as a condition precedent to the use of a life policy form:

> . . . no policy of life or endowment insurance shall be issued or delivered in this state unless and until a copy of the form thereof has been filed with the Superintendent of Insurance and approved by him. . . .[104]

If, without having obtained such approval, a company uses a policy form, it seems that the provisions of the policy which are in conflict with the statutory provisions are unenforceable.[105] Under this provision, the New York Department has issued a number of regulations as to the mechanical details of submitting forms for approval,[106] and has made a large number of rulings [107] as to the contents of policy forms. The administrative effect of the "approval" provision is shown in a minor ruling which states:

> . . . The Department is of the opinion that there is no valid reason why the use of such riders should be permitted . . .[108]

The burden is thus on the insurer, at least in the case of a provision out of the ordinary, to convince the department that that form should be "approved."

The Massachusetts statute confers a power of disapproval, together with a power to dispense with the provision requiring that the policy be on file thirty days:

> No policy of life or endowment insurance shall be issued or delivered in the commonwealth until a copy of the form thereof has been on file for thirty days with the commissioner, unless before the expiration of said

[104] N. Y., § 101. See also N. Y. L., 1913, Ch. 155, § 107 (1) (permanent disability clause in life policy). Similarly, Ala., § 8408 (mutual other than life); Ill. Rev. Stat. (Smith, 1921), § 208 W.; Ia., §§ 5492, 5511; Kan., § 5240 (by atty.-gen.); Minn. L., 1917, Ch. 276, § 2; Miss., § 5156; Mo., § 6239 (fire); Neb., § 3275 (all policy forms); N. M., § 2830; N. C., S., § 4773a; N. D., § 6635b (life), § 6037 (accident and health); Okla., § 6768 (fire); Pa., § 228 (casualty), § 230c (accident and health), § 245 (workmen's compensation); Tex., § 4760 (industrial life, health and accident).

[105] See N. Y., § 107 (i); also Hopkins *v.* Conn. Gen. Ins. Co. (1918), 225 N. Y. 76, 121 N. E. 465. In this case, however, it was held that a rider which was not inconsistent or in conflict with § 107 was enforceable against the insured though not submitted for approval. See *infra*, p. 267.

[106] N. Y. Rulings (1916), pp. 279–281; e.g., the corrected proofs of policy forms are to be submitted to the department before "formal submission" in order that printing expense may be saved, if possible.

[107] *Ibid.*, pp. 282–318.

[108] *Ibid.* (1916), p. 294.

thirty days he shall have approved the form of the policy in writing, nor if the commissioner notifies the company in writing, within said thirty days, that in his opinion the form of the policy does not comply with the laws of the commonwealth, specifying his reasons therefor; provided that such action of the commissioner shall be subject to review by the supreme judicial court.[109]

The limitation of the power of disapproval to thirty days after filing is omitted from the Massachusetts provision on accident and health policies, which is otherwise substantially identical with the one just quoted.[110] Unless some affirmative action is taken by the insurance department, either within thirty days, in case of life policies, or at any time, in case of accident and health policies, or workmen's compensation, the policy stands approved. The Massachusetts form of disapproval provision, more frequently without the limitation to thirty days, has been widely imitated.[111]

The disapproval provision has some distinct advantages over the approval requirement, for this particular function. For one thing, the mass of policy forms submitted annually makes it difficult for any but the larger departments, such as New York, to check over and affirmatively approve all forms submitted, within a reasonable length of time; and even New York has the disapproval power as to accident and health forms, which are more variegated and difficult to check, because the standardized and prohibited provisions are more numerous.[112] "Approval" is apt to mean that policy forms are gone over hastily by clerks who compare them mechanically with the statute and with a pretty rigid set of official regulations (witness the extensive and stiff rulings of the New York department).[113] Variations and innovations are held up or thrown

[109] Mass., § 132. The provision as to group life policies is identical. Mass., § 134.

[110] Mass., § 108. The provision as to workmen's compensation policies is identical. Mass., Ch. 152, § 55.

[111] Ariz., § 3452 (life); Cal. L., 1917, Ch. 614, § 1 (accident and health); Colo. L., 1913, Ch. 99, § 43 (in 30 days); Conn., § 4234; Idaho, § 5037 (in 30 days); Ind., § 4622d; Me., Ch. 53, § 11; Mich. III, 2, § 6; Minn., § 3480; N. H. L., 1913, Ch. 95, § 2 (liability), Ch. 226, § 1 (accident and health); N. J. Comp. Stat. (1910), p. 2870, § 97; N. Y. L., 1913, Ch. 155, § 107 (accident and health); N. C., S., § 4805b (accident and health); Ohio, § 9423; Okla., § 6734; Ore., § 6429 (in 30 days); Pa., §§ 166, 257; S. D., §§ 9342, 9403 (in 30 days); Tenn., § 3348a 11; Utah, § 1158; Vt., § 5624; Wash., §§ 7229, 7233 (in 30 days); Wis., § 1960–1 (in 30 days).

[112] See *supra*, p. 260.

[113] N. Y. Rulings (1916), pp. 279–318.

out. The originator of a new type of policy provision has the burden of convincing an overworked policy examiner that his innovation does not "contradict" or "conflict" with statutory prescriptions or prohibitions, or that it is "more favorable to the insured." [114] The life insurance policy is not an everyday commercial contract, and the reasons for uniformity are less cogent than the reasons for uniformity in fire policies. Restriction of freedom of contract is not an "end in itself"; other things being equal, that system of administration is best which best conserves the factor of individual initiative. Hence, the disapproval scheme, because it does not require the official to make a definite commitment, is preferable. The limitation of disapproval to thirty days after filing, as in Massachusetts, must place a heavy burden on departments having small staffs of policy examiners. As against the advantages suggested, disapproval has the disadvantage that it perhaps tends to encourage official laziness; it is easier to do nothing.

e. Enforcement provisions. The methods of enforcing administrative rulings on policy forms may be divided into direct and indirect. The direct include judicial and administrative. The former include actions for forfeitures or penalties and prosecutions for misdemeanors.[115] The administrative penalty is usually revocation of the license of a company using a disapproved or unapproved policy form, either by express provision [116] or upon general grounds, such as "violation of law," and so forth.

However, the indirect methods of enforcement are such as to render a resort to these direct means seldom necessary. The New York courts took the position that the statutory form of policy (fire) was to be read into an oral insurance contract.[117] The New

[114] See the discussion of standardizing provisions, *supra*, p. 260.

[115] E.g., Mass., § 189 (forfeiture, $50–$200), § 190 (fine of not more than $500).

[116] Cal. L., 1917, Ch. 614, § 12 (accident and health); Colo. L., 1913, Ch. 99, § 61 (fire); Conn., § 4246 (accident and health); Fla., § 2773 (fire); Ga. Ann. Code (Park, 1914), § 5661 (fire); La., §§ 3689, 3693; Mich. III, 2, § 23; Minn., § 3564; Miss., § 5101 (assessment life); Mo., § 6194 (policy bearing misleading title); Neb., § 3275; N.H., Ch. 170, § 1 (fire), L., 1913, Ch. 226, § 13 (foreign accident company), Ch. 95, § 3 (liability); Ohio, §§ 9577, 9581; Okla., § 6759; Pa., §§ 229, 243, 245; S. D., § 9343; Utah, § 1157; Va., § 4320; Vt., § 5635; Wis., § 1943a. In many of these statutes, the revocation is restricted to cases of "wilful" violation.

[117] Hicks *v.* British Amer. Assur. Co., *supra*, n. 30. But this is possible only where there are standardizing provisions which can be read into the policy. Where no such provisions are found, the insured could recover on an

York provision both as to life [118] and accident and health [119] policies is that a policy issued in violation of this section "shall be valid but shall be construed as provided in this section" and when any provision "is in conflict with any provision of this section," the legal relations of the parties are to be governed by the statutory prescriptions.[120] The Massachusetts court held at one time that a policy, issued in violation of the standard fire policy law, was to be construed according to its terms, and not as if it were in the standard form,[121] but the Massachusetts statute now contains a provision similar to the New York ones.[122]

Under such statutes, or under judicial decisions of like tenor, the order of the commissioner disapproving a particular clause or portion of a policy is, in practical operation, self-enforcing, since the objectionable provision of the policy is ignored in any litigation between the parties to the contract; hence, the order of disapproval may itself be judicially attacked, without waiting for the institution by the commissioner of one of the direct proceedings for enforcement.[123] In the case cited the court went so far as to say that the commissioner's order, directing the discontinuance of such clauses, had the effect of rendering unenforceable all such provisions inserted in policies issued prior to the disapproval order. To give such a retroactive operation to the disapproval order seems bad in policy. Perhaps the court adopted the theory that the commissioner's disapproval is merely declaratory of what the statute required all along; but this fiction should not be allowed to work

unapproved policy only according to its terms. See Blount *v.* Royal Fraternal Assn., *supra*, n. 6.

[118] N. Y. L., 1922, Ch. 275, § 1 (§ 101).

[119] N. Y. L., 1913, Ch. 155, § 107.

[120] For an interpretation, see Hopkins *v.* Conn. Gen. Life Ins. Co., *supra*, n. 105, where a rider excepting war risks was held not "in conflict" with the statute and therefore enforceable though not filed and approved. This case was followed by an amendment which requires that all riders of life policies be filed and approved. N. Y. L., 1922, Ch. 275, § 1 (§ 101).

[121] See Hewins *v.* London Assurance Corp. (1903), 184 Mass. 177, 183, 68 N. E. 62.

[122] Mass., § 193. See Austin *v.* Dixie Fire Ins. Co. (1919), 232 Mass. 214, 216, 122 N. E. 285.

[123] Commercial Accident Ins. Co. *v.* Wells, *supra*, n. 95. See Blount *v.* Fraternal Assn., *supra*, n. 6, holding the plaintiff has the burden of showing the commissioner has not approved the form. See also Brown *v.* Hartford Fire Ins. Co. (1925), 108 Okla. 90, 234 Pac. 352, holding that a variant clause approved by the commissioner superseded that prescribed by the statute.

injustice and it would seem better to recognize that the commissioner makes a rule for the future, rather than discovers a rule for the past.

The powers of the commissioner over policy forms are quite actively exercised in most jurisdictions where such powers are given. In the questionnaire sent to all the insurance commissioners in 1921, the question was asked, "How many forms have you disapproved during the past year, and what percentage is this of the total number submitted to you for approval?" Only twenty commissioners had sufficient data to answer this question, and the results varied greatly. New York reported about 150 disapproved each year when first submitted, and perhaps a dozen finally. The Iowa examiner estimated that he rejected 600 in a year, or about 16½ per cent of the total number submitted; and Oklahoma and Wyoming reported rejections of about fifteen per cent. Minnesota reports that nearly all have to be changed, and Vermont "many." The remaining fifteen states reported that the rejections were only a small percentage of the total submitted.[124]

To say that administrative control over insurance policy forms has accomplished more good than harm is to give it faint praise. To say that it was inevitable, given the American business and political environment, is not too much. It can scarcely be doubted that judicial theories as to delegation of power, and legislative incompetency in drafting administrative statutes, caused it to lag considerably behind the social demand for it. Much remains to be done before it will be completely adapted to the tasks in hand.

§ 19. *Rates and premiums.* Administrative control over the rates and premiums of insurers is a comparatively recent development, and is still embryonic. It is not surprising that the farmer, the merchant, and the manufacturer, having throttled the railroads and other public utilities, should have turned their attention to the chief organizations of large capital lying outside the field of strict public utilities. It is not surprising that they should have assumed, as doubtless they did, that the problem of fixing insurance rates is essentially similar to that of fixing the rates to be charged for other public services. However, far less progress has been made in insurance rate-making than in public utility rate-making. The

[124] Ariz.; Colo. (40, or 5%); Conn.; District of Columbia (2, or 7%); Idaho (10, or 1%); Mich. (2%); Mont. (10, or 2%); Neb.; N. D. (10%); Ohio; Pa.; S. D.; Utah (2); Wash.; Wis.

reason lies in administrative obstacles rather than in legislative apathy or in constitutional prohibitions. Still, some advance has been made since the United States Supreme Court in 1914 upheld the constitutionality of a Kansas statute authorizing the Superintendent of Insurance to fix fire insurance rates.[1] The opinion by McKenna, J., is a realistic approach to the problem of police power, as shown in the following passage:

> We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which therefore has led to the assertion that the business of insurance is of monopolistic character and that "it is illusory to speak of a liberty of contract." [2]

This decision, together with an earlier decision in a lower Federal Court to the same effect,[3] cast doubt, to say the least, upon the soundness of another earlier decision that the state had no power to regulate the rates charged by surety and fidelity companies.[4] The Supreme Court's holding has been followed by subsequent decisions in state courts.[5] While the constitutional battles have chiefly centered about the issue of state power to regulate, there can be little doubt that, given such power, it may be exercised by an administrative board or official; that is, the question of delegation of power seems to have been settled by the public utilities decisions.

The type of regulation involved in these cases was administrative fixing of a uniform rate or system of rates. Prior thereto there had been attempts to control rates by a method quite the opposite, namely, by requiring competition in rates, i.e., by a provision that companies combining to fix rates should be punished by revocation of the company's license. This ground of revocation is still preserved in a few states.[6] It seems that in the absence of a specific

[1] German Alliance Ins. Co. *v.* Lewis (1914), 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1101 (suit to enjoin enforcement); affirming (1911) 189 Fed. 769.

[2] 233 U. S. at p. 416.

[3] Citizens' Ins. Co. *v.* Clay (1912), 197 Fed. 435.

[4] American Surety Co. *v.* Shallenberger (1910), 183 Fed. 636, declaring invalid Neb. Laws, 1909, Ch. 27, § 1.

[5] Insurance Co. of North America *v.* Welch (1916), 49 Okla. 620, 154 Pac. 48 (fire, tornado and plate glass ins.); State *ex. rel.* Waterworth *v.* Harty (1919), 278 Mo. 685, 213 S. W. 443 (fire ins.).

[6] See *supra*, § 13, p. 155, and n. 185; Hartford Fire Ins. Co. *v.* Raymond (1888), 70 Mich. 485, 38 N. W. 474 (revocation of license upheld).

provision the commissioner has no power to revoke the license of a company which becomes associated with others for rate-fixing purposes merely on the ground that he regards the combination as contrary to public policy.[7] The policy against such combinations is sometimes enforced by judicial means rather than administrative, as illustrated by the recent case in which one hundred or more members of a tariff association were fined in an aggregate of more than $8,000,000.[8]

The solicitude of the state for reasonably low rates has extended only to fire and one or two minor forms of insurance. With respect to life insurance, competition on the one hand and legal reserve requirements on the other have tended to maintain diversity of rates within safe limits. The chief concern here has been not the abstract or basic rate but the concrete or individual rate. It has already been pointed out that many states prescribe revocation of a company's license [9] and revocation of an agent's license [10] for rebating or discrimination between individual risks. In addition, many states provide fines or other penalties for the company or agent guilty of such conduct.[11]

With respect to fire insurance rates, the evil chiefly to be corrected is rather a discrimination in classification of risks than favoritism to individuals. Thus, the New York provision prohibits the making of any rate or schedule of rates which

> discriminates unfairly between risks within this state of essentially the same hazards or . . . discriminates unfairly between risks in the application of like charges or credits or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of protection against fire.[12]

The power of the commissioner to fix fire insurance rates usually appears in the guise of the power to remove discriminations in rates; for example, the basic rate for an entire city may be comparatively too high.[13] Perhaps this is for the reason that there are

[7] Liverpool, etc., Ins. Co. *v.* Clunie (1898), 88 Fed. 160. The statute named other specific grounds of revocation.

[8] Aetna Ins. Co. *v.* Robertson (1922), 131 Miss. 343, 94 So. 7.

[9] See *supra*, § 13, p. 152; also *infra*, § 21.

[10] *Ibid.*, § 14, p. 180; also *infra*, § 21.

[11] Conn., §§ 4121, 4122; Fla., 1919, Ch. 7870, § 1; Ind., §§ 4677a-b-c; Kan., § 5372; Ky., § 656; Mass., §§ 120, 182, 194.

[12] N. Y. L., 1922, Ch. 660, § 1. Similar provisions are found in many other states. See *infra*, n. 15.

[13] Thus in 1923, the Indiana commissioner, after a full hearing, made

practically no statistical standards of actuarial experience upon which to base the rate for a particular risk or type of risk.[14] Thus, the New York statute provides that whenever it is made to appear to the satisfaction of the superintendent that such discrimination exists he may, after a full hearing, order such discrimination removed but no increase shall be made in the rates unless he is satisfied that the increase is justifiable.[15]

This provision was involved in a suit to review an order of the New York superintendent to the effect that buildings in which a particular automatic sprinkler, which had been approved by the Board of Standards and Appeals of the City of New York, but which the inventor had refused to submit to a test in the underwriters' laboratory at Chicago, should be allowed a reduction in rates on account of such sprinkler equal to that allowed by the fire companies for the use of other automatic sprinklers which *had* been approved by the underwriters. The intermediate appellate court upheld the superintendent's order, holding that the statute authorized him to determine *de novo* whether discrimination existed and not merely to review the action of the rating bureau to ascertain if it had acted unfairly.[16] However, the New York Court of Appeals more properly held that the superintendent was empowered merely to see that no unfair discrimination was practiced by the rating bureau, and since the inventor had refused to submit his sprinkler to the fair tests which the bureau required of other sprinklers, it could not be said that the bureau had unfairly discriminated in refusing to grant a reduced rate because of the installation of such sprinkler. Pound, J. (speaking for the Court), said:

specific findings as to the Indianapolis water works and fire department and ordered a reduction in the basic fire rate for Indianapolis. W. U. R. (1923), Ind. 13. This order was later rescinded when the Indiana rating bureau changed the class rating for Indianapolis. W. U. R. (1923), Ind. 23.

[14] 2 Gephart, *Principles of Insurance*, 324.

[15] N. Y. L., 1922, Ch. 660, § 1. To the same effect are Colo. L., 1919, Ch. 138, § 9; Ky., §§ 762a, 1012; Mich. I, 4, § 12; Minn. L., 1915, Ch. 101, § 2; Mo., § 6279; Ohio, § 9592 (11); Ore., § 6789 (5); S. C. L., 1917, No. 183; Vt. L., 1919, No. 148, § 4; W. Va., § 76b; Wis., § 1921 (30) (liability insurance rates); Wyo. L., 1921, Ch. 142, § 16 (11). The Michigan statute just cited establishes a commission, consisting of the state banking commissioner, the attorney-general, and the commissioner of insurance, with power to hear complaints of discrimination and to order the same removed.

[16] People *ex rel.* N. Y. Fire Ins. Exchange *v.* Phillips (1922), 203 App. Div. 13 196 N. Y. Sup. 202.

The jurisdiction of the Superintendent of Insurance does not extend to the decision as an original proposition of the merits of rival automatic sprinklers. It extends only to the question whether all are treated alike and treated fairly. If equality and fairness to all is found, no discrimination can be said to exist.[17]

The Massachusetts statute on removal of rate discriminations confers no power to enforce the orders made, but merely authorizes recommendations. A person aggrieved by a rating of a fire insurance company or of a board making fire insurance rates may file a written complaint with the Insurance Commissioner,[18] who refers it to a special Board of Appeal on Fire Insurance Rates, consisting of two citizens appointed by the Governor for a term of three years, and the commissioner or his designated deputy, *ex officio*.[19] After notice in writing to all parties whom it deems interested, and due hearing, the Board

shall make a finding as to whether the established rate is excessive, unfair or discriminatory, and shall make such recommendation as it deems advisable.[20]

No method of enforcing this recommendation is mentioned, and the circumstance that the finding is to be recorded and open to public inspection supports the conclusion that the Board's powers are sanctioned only by the pressure of opinion.

A South Carolina statute appears on first reading to resemble the New York, or compulsory type, rather than the Massachusetts, or advisory type. After authorizing the commissioner to "review" a fire rate, "for the purpose of determining whether the same is discriminatory or unjust," it declares that he "shall have power to order the discrimination removed and require substituted a rate which is not discriminatory or unjust." [21] However, the act provided no legal sanction for the commissioner's orders. Accordingly, when the statute was attacked (rather ineptly) on the ground that it conferred legislative and judicial powers on the commissioner, and thus infringed upon the principle of separation of powers embodied in the state constitution, the court dismissed this contention with the remark:

[17] People *ex. rel.* N. Y. Fire Ins. Exchange *v.* Phillips (1923), 237 N. Y. 167, 172, 142 N. E. 574.

[18] Mass., § 104.

[19] Mass., Ch. 26, § 8.

[20] Mass., § 104. Similar advisory power is conferred by Va., § 4199.

[21] S. C. L., 1916, No. 371, § 6.

The duties of the Insurance Commissioner are not legislative or judicial, but merely ministerial. . . . The right of the state to review insurance rates is not in issue.[22]

Thus, because of the reluctance of courts to imply legal sanctions for administrative orders where none are expressed,[23] an administrative order without an express legal sanction is merely advisory.

The policy of preserving free competition in rate-making by severely punishing combinations to establish rates for two or more companies means that each fire insurance company must maintain its own rating organization and fix its rates independently. This policy is embodied in statutes which forbid the employment of, or membership in, rating bureaus.[24] While it is possible to forbid the use of bureaus for the fixing of rate schedules and at the same time to allow the insurers to employ a common agent to prepare maps and furnish other data as to risks,[25] such a distinction is apt to prove illusory. The state must choose squarely between prohibition and regulation of rating bureaus. That prohibition may lead to excessive competition is recognized in at least two states where prohibition is coupled with severe denunciation of engaging in a "demoralizing" rate war.[26]

The hostile sentiment towards all forms of business combination, as crystallized in the prohibition of rate-fixing organizations, is rapidly giving way to the pressure of economic forces which will not be denied. The duplication of expense involved in the inspection and classification of risks by each company independently (fire companies particularly) is wasteful. Moreover, it is difficult to see how the chaotic condition of fire insurance rates can be replaced by intelligent technical standards save through concerted action of the insurers. While this does not necessarily mean, nor has it meant, a combination of all insurers into a single rating bureau, it does mean that the smaller companies, which can ill afford this large item of overhead expense, must join or employ rating bureaus if they are to survive in competition. While it does not

[22] Henderson *v.* McMaster, Ins. Com'r. (1916), 104 S. C. 268, 273, 88 S. E. 645.

[23] See State *ex rel.* Ives, *v.* Kansas Central R. R. Co. (1891), 47 Kan. 497, 28 Pac. 208.

[24] Ia., § 5660; La., §§ 3744, 3747; Neb., § 3186; N. H., Ch. 169, § 10. See also *supra*, note 6.

[25] As in S. C. L., 1916, No. 371, § 1.

[26] Ore., §§ 6361, 6389, also 6396, 6397 (demoralizing rate wars forbidden); Wash., §§ 7076, 7119, 7157, 7158 (same).

necessarily mean complete uniformity in the rates charged by all companies, since there is nothing to prevent different rating bureaus from attaching different premium values to the various factors of risks (for example, the reduction in rate to be allowed for installation of automatic sprinklers or the difference in rate on manufactured or unmanufactured furs in storage),[27] yet such competition in rates as exists will be voluntary and will perhaps tend to disappear with the trend toward uniform standards.

Beginning with the New York statute of 1911 [28] a number of states have adopted the policy of recognition and regulation of rating bureaus. The National Convention of Insurance Commissioners, at its meeting in Burlington, Vermont, in July, 1913, appointed a special committee of nine commissioners to investigate the making of fire insurance rates and report its recommendations for legislation. This committee held seven different series of meetings between October, 1913, and December, 1914, at which representatives of insurance companies and persons engaged in rate-making were present. A majority of the committee recommended four model bills for the investigation of rating bureaus and the prevention of discrimination in rates, and four members recommended a bill giving the commissioner power to order the removal of a discriminatory rate.[29]

On the administrative side, these statutes exhibit features which may be of interest in connection with the general problem of regulating business combinations. Their characteristic provisions are in substance as follows:

1. *Registration.* Every rating organization or individual engaged in the business of suggesting or making rates to be used by more than one insurer is required to file with the Superintendent of Insurance a copy of the articles of agreement or incorporation, and

[27] See Matter of Groh's Sons (1917), 101 Misc. 611, 167 N. Y. Sup. 883.

[28] N. Y. L., 1911, Ch. 460. New York as far back as 1867 recognized as legal combinations to fix rates, for in that year it incorporated the New York Board of Fire Underwriters, "to maintain uniformity among its members in policies or contracts of insurance." N. Y. L., 1867, Ch. 746. See the lengthy opinion of the New York department defending the policy of recognition of rating bureaus: W. U. R. (1923), N. Y. 1 (dated Dec. 26, 1922). In Huebner, *Property Insurance* (1922), 288, it is said that the tendency is "distinctly towards legislation permitting coöperative rating under the supervision of the state."

[29] See *Proc. N. C. I. C.* (1915) (adjourned meeting), pp. 16–25. See the opinion of Wood, J., in Nat'l Union Fire Ins. Co. *v.* Dickinson (1917), 128 Ark. 367, 194 S. W. 254, for a review of the spread of Rating Bureau statutes.

by-laws, under which it operates, a list of the insurers represented by it, and such information concerning its operations "as may be required by the Superintendent." [30] Both rating organizations and insurers shall file with the superintendent "whenever he may call therefor" rating manuals and plans, schedules of rates, and other information. [31] Several states require merely that the insurer file with the commissioner any variation from rating bureau rates without conferring any power of approval or disapproval.[32] Several states require insurers to file with the commissioner their basic classifications of risks.[33] A pure registration provision is found in the Massachusetts statute requiring the filing with the commissioner of the rates and classification of risks used in accident and health insurance.[34]

2. *Publicity requirements.* The documents and material filed in the superintendent's (commissioner's) office are public records and are open to the inspection of any person, in the absence of express restriction.[35] Publicity of the operation and records of the rating bureau is quite another matter. The New York law requires the rating organization to furnish on demand to any person upon whose property or risk a rate has been made "full information as to such rate," and a copy of the schedule used, if any. A penalty of from $25 to $1,000 is attached to a wilful violation of this requirement.[36] Publicity of a different sort is obtained through a provision that the superintendent shall "make public" the results of his exami-

[30] N. Y. L., 1922, Ch. 660, § 1. See also Ohio, §§ 9592 (4), 9592 (13); S. C. L. 1918, No. 183, § 1; Vt. L., 1919, No. 148, § 1; W. Va., § 76b; Wis., § 1921 (5).

[31] *Ibid.* Similarly Kans., §§ 5363–5365; Mich. I, 4, § 9; Okla., § 6741.

[32] Colo. L., 1919, Ch. 138, § 9; Kans., §§ 5363–5365; Mich. I, 4, § 11; Minn. L., 1915, Ch. 101, § 2; Ore., § 6389 (8); Pa., § 200; S. C. L., 1917, No. 183, § 4; Wash., § 7118; W. Va., § 76b.

[33] E.g., Colo L., 1919, Ch. 138, § 12; Ore., § 6389 (1); Wyo. L., 1921, Ch. 142, § 16. Wis., § 1946 requires that all writings of the rating bureaus be stamped by a chief examiner, whose duty it is to report violations to the commissioner. See also N. Y. L., 1922, Ch. 660, § 2.

[34] Mass., § 108 (6). Similarly, Vt. L., 1921, No. 164 (workmen's compensation).

[35] It is expressly so provided in some instances; e.g., Okla., § 6746. But Wis. forbids publicity of records: §§ 1921 (19), 1946 (13), 1946 (16).

[36] N. Y. L., 1922, Ch. 660, § 1. Similarly, Ky., § 762a (5); Mich. I, 4, §§ 8, 13 (§ 200); Ohio, § 9592 (5); Ore., § 6389 (1) (vague provision) and § 6389 (11) (like N. Y.); Pa., § 202; S. C. L., 1918, No. 183, § 9; S. D. L., 1919, Ch. 231, § 4; Vt. L., 1919, No. 148, § 6 (vague); W. Va., § 76b; Wis., § 1946 (7).

nation of a rating bureau and report to the legislature in his annual report its methods of operation.[37]

3. *Visitorial powers.* Closely related to registration provisions are the clauses giving the superintendent discretionary power to visit, supervise and examine rating bureaus "as often as he deems it expedient." [38] In New York, such examination must be made at least once in every three years.[39] The power to require "other information" of rating bureaus is a mild form of visitorial power.[40]

4. *Power to compel rating bureaus to hear complaints.* A noteworthy provision of the New York law is the requirement that a rating organization shall provide "such means as may be approved by the Superintendent of Insurance" whereby any person "affected by such rate" may be heard before the Rating Committee or executive head of the Bureau, on an application for a change in the rate.[41] The peculiar status of the rating bureau as a quasi-governmental regulatory agency is here emphasized. Yet in another sense the procedure is a form of compulsory arbitration. Of course, the rating bureau is arbitrator and after the formal hearing may adhere to its original decision. The usefulness of such a provision is difficult to estimate. New Jersey has a similar provision for compelling a fire company or its agent to accord the "person affected" a hearing on a proposed change in rate.[42]

5. *Power of approval or disapproval.* The commissioner is in some states authorized to "disapprove" the agreements under which rating bureaus operate if such agreements are "contrary to

[37] N. Y. L., 1922, Ch. 660, § 1.

[38] N. Y. L., 1922, Ch. 660, § 1. Similarly, Colo. L., 1919, Ch. 138, § 7; Mich. I, 4, § 9; Minn. L., 1915, Ch. 101, § 1; Mo., § 6273; Ohio, § 9592 (7); Ore., § 6389 (4); Pa., § 27; S. C. L., 1917, No. 183, § 2; S. D. L., 1919, Ch. 231, § 1; Vt. L., 1919, No. 148, § 2; Wash., § 7119; W. Va., § 76b; Wis., § 1946 (8); Wyo. L., 1921, Ch. 142, § 16.

[39] See New York statute cited in last note. Similarly, Ohio, § 9592 (7); Ore., § 6389 (4); Pa., § 27; S. C. L., 1917, No. 183, § 2; S. D. L., 1919, Ch. 231, § 1; W. Va., § 76b; Wis., § 1946 (8).

[40] See N. Y. L, 1922, Ch. 660, § 1; Colo. L., 1919, Ch. 138, § 6; Mich. I, 4, § 9; Minn. L., 1915, Ch. 101, § 1; Mo., § 6274; Ohio, § 9592 (6); Ore., § 6389 (3); Pa., § 29 (but information as to a specific risk may be required only on specific complaint); S. C. L., 1917, No. 183, § 1; S. D. L., 1919, Ch. 231, § 1; Wis., § 1946 (5); Wyo. L., 1921, Ch. 142, § 16 (7).

[41] N. Y. L., 1922, Ch. 660, § 1. Similarly, N. C. R. B., § 4714a; Ore., § 6389 (11), Vt. L., 1919, No. 148, § 6; Wis., § 1921 (19).

[42] N. J. L., 1913, Ch. 85, § 1. See also Ohio, §§ 9592–9595; Pa., §§ 196 *et seq.*

law or public policy." [43] The breadth of discretion conferred by such a clause has few parallels. The agreement filed, however, stands until disapproved. Similarly, Colorado authorizes the commissioner to "suspend" the classifications of fire rating bureaus, and likewise to "suspend" all rules and regulations for writing fire insurance "except such as are in force in all other states." [44] Where the power to suspend is merely preliminary to a hearing and order fixing new rates to take the place of those suspended, a different type of administrative power is involved.[45] In none of these statutes is it specified what rating schedule or rate shall be used after the suspension occurs. The New York statute by providing for a refund of the overcharge, if any is found by the superintendent, indicates that the existing rate continues in force.[46]

A dispensing power which apparently amounts to a power of disapproval is found in the New York section which requires the rating organization to apply to every risk a rate based upon a schedule formally adopted and filed with the superintendent, "except where the class of risks or the local conditions may in the opinion of the Superintendent of Insurance justify flat or non-schedule rating." [47] This dispensing power is to take care of unusual risks which do not fit into the standard classifications. Apparently, the non-schedule rate filed is a lawful one until disapproved.

The common example of power of approval is the New York section which, after declaring that fire insurers shall comply with the rates adopted by the rating bureau to which they belong, by way of exception permits the insurer, upon thirty days' notice filed with the superintendent, to add or deduct a uniform percentage of the scheduled rates, "subject to the approval of the Superintendent

[43] Ky., § 762a (12). Similarly, Minn. L., 1915, Ch. 101, § 5 (unqualified power of disapproval); Ohio, § 9592 (14); S. C. L., 1917, No. 183, § 11 (same); Wis., § 1943-b; Wyo. L., 1921, Ch. 142, § 16.

[44] Colo. L., 1919, Ch. 138, § 6. By S. D. L., 1919, Ch. 231, § 5, the commissioner's "approval" of flat reductions or increases in rates is required, and such approval may be withdrawn at any time. Similarly, Pa., § 246.

[45] E.g., Mich. I, 4, § 3.

[46] N. Y. L., 1922, Ch. 660, § 2. Mich. I, 4, §13, provides that an order removing discrimination shall be suspended if suit is brought to set aside the order.

[47] N. Y. L., 1922, Ch. 660, § 2. See also W. Va., § 76b; Wis., § 1946 (9). Mich. I, 4, § 11, requires insurers to file all deviations from schedule, with the reasons therefor, with the commissioner.

of Insurance."[48] Here both filing and approval must occur before the modified rate may be lawfully exacted by the insurer.[49]

Another instance is found in the Missouri statute which reads that no fire rates shall be raised until the insurer has given ten days' notice to the superintendent and "his approval obtained." [50] That this is a power of approval, that the proposed increase could not be lawfully exacted until after the official approval, was the basis of the opinion in *State ex rel. Waterworth* v. *Harty, Superintendent.*[51] The opinion of Blair, J. (concurred in by the other two judges only as to the result), shows a curious misunderstanding of the nature of the power involved and of the limitations upon judicial review of administrative action laid down by Mr. Justice Holmes in *Prentis* v. *Atlantic Coast Line Railroad Co.*[52] Blair, J., says:

> The approval of the Superintendent is essential to the transformation of the "proposed" rates into "existing" rates. This approval is the final act in the process of making increased fire insurance rates. This final act in the process of rate making this court is asked to compel the Superintendent to perform.

After pointing out that rate-making is a legislative process, the learned justice proceeds:

> In *Prentis* v. *Atlantic Coast Line* (*supra*), it was said: "litigation cannot arise until the moment of legislation is passed." It is clear from the principles announced . . . that the courts of this state are prohibited from participating in the process of establishing a system of rates for application to future charges in a business subject to such regulation.[53]

It may be conceded for the moment that the Missouri section which sought to impose upon the court the duty of determining *de novo* the proper rate to be applied [54] conflicts with the separation of powers clause of the Missouri constitution, narrowly interpreted.

[48] N. Y. L., 1922, Ch. 660, § 2. Wis., § 1921 (5), declares that articles of agreement and by-laws of rating bureaus shall not be effective until approved by the commissioner.

[49] The approval of the commissioner must precede the taking effect of rate schedules under the terms of Ore., § 6459 (1) (casualty); Vt. L., 1921, No. 164 (workmen's compensation); Wis., §§ 1921 (21) and (22), 1921 (7).

[50] Mo. L., 1915, p. 313, § 5.

[51] (1919), 278 Mo. 685, 213 S. W. 443.

[52] (1908), 211 U. S. 210, at p. 226, 29 Sup. Ct. 67.

[53] 278 Mo. 685, at p. 694.

[54] § 15 of the Mo. statute. See *infra*, § 37, p. 490, for discussion of this problem.

Yet the opinion creates the impression that a refusal to approve, because it is negative, would never be judicially reviewed or controlled, even if the refusal resulted in forcing the continuance of a confiscatory rate or were otherwise arbitrary or unreasonable. It is believed that such is not the law.

The characteristic of these approval and disapproval provisions is that they commonly omit any reference to notice and hearing before the commissioner. No such provision was contained in the Missouri statute just discussed. In *State ex rel.* v. *Harty*,[55] the superintendent gave the insurers a hearing, and the point was not raised. To omit the requirement of notice and hearing from "approval" clauses would seem to be a denial of "due process" no less than a similar omission in respect to the power to alter or fix rates.

6. *Power to alter or fix rates.* Aside from these approval and disapproval powers, the superintendent in New York has no power to fix a particular fire rate except for the purpose of removing a discrimination in rates, as above set forth.[56] Only two states [57] have yet ventured into the troublesome and expensive business of fixing complete schedules of fire rates. The reasons are not far to seek. Aside from the fact that rate-making calls for a type of expert who can not easily be attracted to the state's employ, the expense of rate-making would be almost prohibitive. An investigating commission appointed in Pennsylvania some years ago reported that an office force of 300 to 500 clerks and a field force of 300 to 400 men would be required by the state to fix fire insurance rates for Pennsylvania alone.[58] While these figures are probably exaggerated, it is said to cost the fire companies of New York about $1,000,000 a year to maintain the four rating bureaus which determine the rates for that state.

In addition to the powers already mentioned, however, there is another which has proved very popular with the commissioners, especially in the western and southern States. This is the power to order a blanket reduction (or increase, occasionally) in rates, under the name of an "adjustment." The New York provision reads thus:

It shall be the duty of the Superintendent of Insurance after due notice and a hearing before him to order an adjustment of the rates of any fire

[55] See *supra*, n. 51.

[56] See *supra*, p. 271, and n. 15.

[57] Okla. (§ 6740) and Texas (§§ 4876a–4895).

[58] 2 Gephart, *Principles of Insurance* (1917), pp. 135, 136.

insurance risk or class of risk whenever the profit derived from such rate over a period of time not less than five years immediately preceding such adjustment is excessive, inadequate, unjust, or unreasonable.[59]

In Kansas the statute authorized a blanket reduction without regard to previous experience.[60] Under such a provision, the Kansas superintendent in 1909 ordered a reduction of twelve per cent on all mercantile fire rates, without notice or hearing, though the same was requested. In 1910 he ordered all residence rates reduced fourteen per cent. The companies, after operating under the reduced rates, claimed a loss of $384,802 in two years under the first, and of $1,500,000 in four years under the second, reduction. The official having refused to revoke his order, the Supreme Court of Kansas enjoined him from enforcing the reduction on the ground that it was confiscatory.[61] The blanket reduction in rates appeals to the type of ambitious and earnest politician who frequently lands the job of commissioner, especially in the west and south. It is a matter of guess-work and emotionalism; it looks safe and fair to all alike; and it appeals to the voters who want results. Dramatic values must not be overlooked in any realistic appraisal of administrative powers.

This frank characterization of the rate-fixing methods of some commissioners is not utterly disparaging. The determination of what is a reasonable rate, in the case of unstandardized fire rates, is unavoidably an expression of "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions. . . ." [62] Moreover, if we delegate legislative powers to administrative officials, we must not be shocked if their behavior re-

[59] N. Y. L., 1922, Ch. 660, § 2. To the same effect: Okla., § 6743. The following statutes authorize a *reduction* only, under somewhat similar circumstances: Colo. L., 1919, Ch. 138, § 12; Ky., § 762a (11); Mich. I, 4, § 3; Mo., § 6283; S. C. L., 1917, No. 183, § 14, as amended by L., 1920, No. 436. See also N. D. L., 1920 (S. S.), Ch. 66 (workmen's compensation).

[60] Kan., §§ 5363–5365. See Mich. I, 4, § 3, authorizing the commissioner to suspend an "excessive" rate and fix a "reasonable" one as substitute therefor.

[61] Aetna Ins. Co. *v.* Lewis (1914), 92 Kan. 1012, 142 Pac. 954; the companies waived the failure to give notice and hearing. In 1923, the Missouri superintendent, after a hearing, found the rates charged from 1918 to 1922 were yielding an excessive profit and ordered a 15% reduction in all fire, lightning, hail and windstorm rates. See W. U. R. Mo. 5 (1923). This ruling has been judicially attacked.

[62] Holmes, J., in Chicago B. & Q. Ry. Co. *v.* Babcock (1907), 204 U. S. 585, 598, 27 Sup. Ct. 326.

sembles that of our legislators on similar occasions (for example, in the blanket reductions of passenger railroad fares some years ago).

Finally, it must be noted that the insurers themselves have adopted the blanket increase of rates. During or near the close of the World War, fire insurance companies very generally put into effect a surcharge of ten per cent on all rates. The National Convention of Insurance Commissioners at its meeting in April, 1919, adopted a resolution favoring an immediate removal of this surcharge. A warm discussion ensued as to whether or not the companies should be given a hearing before the resolution was adopted. Some commissioners thought the continuance of the surcharge so clearly unjustified that any evidence the companies might present could not possibly alter their views. Mr. Hardison of Massachusetts favored a hearing, and the resolution was finally referred to a committee, with instructions to hear the companies and report at the next meeting.[63] In September, 1919, the committee reported that the evidence presented by the companies was unsatisfactory, and the recommendation that the surcharge be removed was unanimously adopted.[64]

7. *Standardizing provisions.* The statutes on rate control contain only vague standards. "Discriminates unfairly" is one which has already been noted.[65] "Increase is justifiable" is another.[66] A third provision is this:

> The schedules, rules and methods employed in computing the rates charged for fire insurance shall be reasonable.[67]

The New York statute contains only two standardizing provisions which limit the scope of the superintendent's discretion in reference to fire insurance rates. One is the following clause:

> In determining the question of reasonableness of rates the Superintendent of Insurance shall give consideration to the conflagration hazard both within and without this state.[68]

[63] *Proc. N. C. I. C.* (1919), pp. 40–42, 67–88. [64] *Ibid.*, pp. 160–167.

[65] N. Y., § 141; *supra*, this section, n. 12. So, in Mich. I, 4, § 10; Pa., § 246; Wis., § 1946 (8).

[66] *Ibid.* Similarly, Ohio, § 9592 (11); Ore., § 6389 (5); Vt. L., 1919, No. 148, § 4; W. Va., § 76b; Wis., § 1946 (10).

[67] N. Y. L., 1922, Ch. 660, § 2. Similarly, Mich. I, 4, § 3 ("just and reasonable"); Okla., § 6743; Vt. L., 1919, No. 148; Wis., § 1946 (11).

[68] N. Y. L., 1922, Ch. 660, § 2. Similarly, S. C. L., 1917, No. 183, § 14; Wyo. L., 1921, Ch. 142, § 17. But Mich. I, 4, § 3, apparently authorizes the commissioner to consider only local conditions and data.

The second is, the superintendent shall determine the excessiveness or inadequacy of a rate or class of rates by reference to the profits derived therefrom over a period of not less than five years immediately preceding such adjustment.[69] This at least has the merit of requiring the superintendent to consider the data over a considerable period of time and thus precludes him from ordering a decrease because of a few prosperous or lucky years.

The Michigan law directs the commissioner to consider "local conditions, relative hazards, and all other elements entering into fire insurance rating"; and that he "may take as a basis the rates of any reputable company or bureau in the state." [70] Such language does not guide him very far along the road.

Whether or not a particular rate is excessive will depend upon whether the premium collected over a considerable period will provide not only adequate protection and safety but also more than a fair profit to the underwriter. The latter of these two factors may be fixed arbitrarily at a certain percentage on the investment. However, when it is borne in mind that the reserve on fire insurance risks is computed by taking a fraction of the premium collected, and that no system has yet been devised by statistical compilations of past experience for determining accurately what the probable fire loss will be in connection with a particular class of risks, and that the graph of the conflagration loss of the entire country, plotted by years, fluctuates upward and downward violently, it may be seen that these statutes give the commissioner very meagre directions as to the method of determining rates.

8. *Power to prevent inadequacy of rates.* The chief concern of American legislators and commissioners has been to prevent the insurers from charging excessively high rates. There is reason to believe that the danger of excessively low rates, which impair the safety of the enterprise, is more to be feared.[71] In only a few states, however, is the commissioner authorized to order a general increase of rates on the ground that the existing rates are inadequate. The New York statute is one example.[72] A Maryland statute authorized

[69] N. Y. L., 1922, Ch. 660, § 2, as amended by L., 1923, Ch. 436, § 2. Similarly, S. C. L., 1917, No. 183, § 14 ("excessive or unreasonable"); S. D. L., 1920 (S. S.) Ch. 66 ("excessive"); Wyo. L., 1921, Ch. 142, § 17.

[70] Mich. I, 4, § 3.

[71] See 2 Gephart, *Principles of Insurance* (1917), 43, 125, 293.

[72] N. Y. L., 1922, Ch. 660, § 1, quoted *supra*, p. 279. Similarly, Okla., § 6743.

the commissioner to order an increase of any rates found by an actuary's report to be "insufficient or insecure." [73]

Several states require the approval by the commissioner of the adequacy of rates of workmen's compensation insurance.[74] The New York statute not only requires approval before the rates are put into effect, but also authorizes the superintendent to withdraw his approval "if in his judgment such premium rate or schedule is inadequate to maintain the necessary reserve." New York has conferred similar powers as to mutual automobile fire insurance corporations [75] and mutual automobile casualty corporations.[76] In the case of mutual companies, the commissioner must not only prescribe an adequate rate but also forbid the payment of excessive dividends to policyholders.[77]

No attempt has been made to prevent life insurance companies from charging excessive premiums. The requirements as to reserve funds necessarily prevent the charging of excessively low rates, and competition is left to do the rest. The French Life Insurance Act of 1905 authorizes the administrative official to order an increase of the rates charged by life insurance companies, but not a decrease.[78]

§ 20. *Payment of private contract claims.* The insurance commissioner's control over the payment of private contract claims by insurers, agents, and brokers is one of the most suggestive phenomena in this field of administrative practice. The extent to which the commissioners, or some of them, do actually "enforce" or control the settlement of controversies which have been for centuries regarded as exclusively within the jurisdiction of the courts of law, is interesting in three ways. In the first place, it demonstrates the pressure of popular opinion against the procedural barriers of judicial litigation and thus points toward the possi-

[73] Md. I, § 179. See Kafka *v.* Wilkinson (1904), 99 Md. 238, 57 Atl. 617, in which this statute was declared unconstitutional because of defective title.

[74] Cal. P. C., § 602b (1915); Mass., Ch. 152, § 52; Mich. V, 1, § 3; N. Y. L., 1914, Ch. 16, § 1; Pa., § 246 (commissioner may withdraw approval); S. D. L., 1919, No. 148, § 6; Wis., §§ 1921 (7), 1921 (23); Vt. L., 1921, Ch. 164 (like N.Y.)

[75] N. Y. L., 1922, Ch. 418, § 1.

[76] *Ibid.*, § 2.

[77] See the N. Y. Insurance Law, §§ 325, 345, as set forth in McKinney's Consolidated Laws of New York, Annotated, 1923 Supplement. These statutes show the intimate relation between the power to fix rates and the power to restrict dividends and expenses. (*Supra*, § 16, p. 209.)

[78] Art. 6; Pannier, *op. cit.*, p. 374.

ble development in the future of a new set of tribunals which will eventually oust the courts of all or a part of their traditional jurisdiction over the settlement of insurance claims.[1] The specialization of function in the case of workmen's compensation claims gives a clue to what may occur in the matter of insurance claims.

In the second place, the attempt to ascertain to what extent the commissioner is acting within his statutory powers in seeking to control the settlement of insurance claims without resort to judicial litigation brings out the uncertainty of the distinction between "public law" and "private law," between "police power" regulation of those engaged in the insurance business and the regulation of their conduct in the settlement of contractual obligations. To draw the line between protecting the theoretical possibility that the insured may collect his claim when it matures, as by requiring the maintenance of a reserve fund or sound methods of finance, and enforcing the actual collection of his claim when it does mature, is difficult for the administrative official and almost too much for the layman.[2]

In the third place, the commissioner's control over the settlement of claims is an example of the difference between the theoretical possibility of judicial control over administrative action and the actual practicability of such control from the standpoint of persons engaged in the insurance business. Theoretically it is believed that

[1] See Winslow, *A Legislative Indictment of the Courts* (1916), 29 *Harvard L. R. 395*. Similar pressure in the latter half of the sixteenth century manifested itself in England, but the attempts to create a separate tribunal for the settlement of controversies between insured and insurer failed because of the hostility of the common law courts. See *infra*, Appendix A, § 39, History of Insurance Regulation in England, and references. History occasionally repeats itself, but the conditions to-day are sufficiently different from those prevailing in Elizabeth's reign to invalidate any *a priori* argument that the same thing is bound to occur again.

[2] In an address delivered in 1922, Mr. James Wood, the head of the New York Bureau of Claims, urged this point as the moral justification for the activities of his department. He said: "Although there are no specific provisions in the various state statutes to that effect, the public seems to think, and, I believe, rightly so, that it is as much the province of the various state insurance departments to perform the duties enumerated (investigating complaints, settling disputed questions, and furnishing insurance information generally) as to look after the solvency of the companies. The public sees no reason to distinguish between protection from loss through the companies becoming insolvent and protection from loss through the failure of a company to settle a claim as the insured thinks it should be settled." (The excerpt is taken from a copy of the address given to the author by Mr. Wood.)

the commissioner would in most jurisdictions be enjoined from exercising his legal powers, such as the power of revocation of license, and the inquisitorial powers, to compel the payment of a particular individual's claim against an insurer, an agent, or a broker. Practically, the persons engaged in the insurance business hesitate long before invoking the judicial remedies because the publicity attendant upon such a suit may well impair the good will of the insurer or the broker to an extent far in excess of the amount of the particular claim, and because the commissioner, in the exercise of his discretionary powers, may find countless subtle ways of affecting adversely those who antagonize him and refuse to do what he regards as fair and just. This is only another way of saying that the commissioner's extra-legal or informal methods of control may be of more importance than his control through the exercise of regulated discretionary power.

From the foregoing it is not to be assumed that the commissioners recklessly disregard the legal limitations upon their powers and defy the courts, nor is it by any means suspected that they use their powers corruptly or fraudulently. Many of the statutory regulations invite, if they do not distinctly authorize, some measure of administrative control over the settlement of insurance claims. Furthermore, the commissioner's rôle as the *parens patriae* of the insuring public, a rôle seldom assigned to him by express statutory provision but inevitably thrust upon him by his relations with the insuring public,[3] leads easily from that of adviser to prosecutor, and from prosecutor to judge. That he should request or suggest the payment of a (to his way of thinking) just claim is only human; and that the insurer or broker should be able to distinguish the King's request from his command would be little short of divine.

The data on the control over the collection of private contract claims will be presented in the following order: first, the statutory provisions which are sufficiently broad to authorize some measure of control; second, the judicial decisions as to the power and propriety of such control; and third, such evidences as to administrative practices as the writer has been able to gather.

1. *Statutory provisions as to payment of claims.* — a. *Claims against insurance companies or associations.* First we may note the provisions authorizing revocation of license on financial grounds.[4] Such phrases as "unsound condition," "failing condi-

[3] See *infra*, § 32, Relations to the Public.

[4] *Supra*, § 13, pp. 142, 143.

tion," "assets insufficient to justify its continuance in business," and "condition hazardous to the public or its policyholders," which are commonly found, are broad enough to make relevant the continued non-payment of policy claims, and possibly even of a particular policy claim, in determining whether or not a particular company should be allowed to continue doing business in the state. True, if the company presents a *bona fide* ground for disputing the claim, it can hardly be said that the refusal to pay the claim is any evidence of non-compliance with financial requirements. Yet the commissioner would not, it would seem, be going beyond his powers in asking a company to explain why it has not paid an apparently valid claim, for were it misrepresenting its true condition in its annual report, one of the first manifestations of its insolvency would be an attempt to evade the payment of policy claims. Experience has shown that the financially weaker companies or associations tend to contest claims. Even if the commissioner scrupulously regards the bounds of his power, the very fact that he may properly inquire the reason for the non-payment of claims enables him to exert more or less pressure upon the insurers.

Provisions of the type just discussed are found in practically every jurisdiction [5] and are usually applicable to "old-line" or reserve fund companies. In a few jurisdictions, provisions of more limited scope (as to classes of insurers included) refer more directly to non-payment of policy claims as a ground of revocation of license. Thus, an assessment company's license may in some instances be revoked for "not paying its claims in full," [6] "not carrying out its contracts in good faith," [7] and "habitually forcing a compromise of claims." [8] Statutes of this type are designed to make the *habitual* non-payment of policy claims (and possibly other private contract claims) a ground of revocation; the failure or refusal to pay a *single* claim would *not* be a sufficient ground for revocation. Here again, however, the refusal to pay a single claim would be some evidence of habitual non-payment of claims, sufficient to authorize an inquiry by the commissioner as to the reasons for the refusal. The insurer's "reasons" might not impress the commissioner, in which event he might, or might not, exert pressure to have the claim paid.

In a few instances (usually restricted to assessment insurers) the revocation is authorized for non-payment of a single policy

[5] See *supra*, § 13, and notes.
[6] *Ibid.*, n. 157.
[7] *Ibid.*, n. 158.
[8] *Ibid.*, n. 159.

claim, "without just and reasonable grounds," "when due," and so forth.[9] The language quoted is broad enough to authorize the commissioner to pass upon the merits of the claim. Whether the courts would concede discretionary power to the commissioner in making a decision upon a question with which the courts have traditionally dealt is more than doubtful.[10] The constitutionality of such provisions would be questionable if the commissioner's decision as to the merits of a claim were not subject to full judicial review.

The statutes authorizing revocation of a company's license for failure to pay a court's judgment based upon a policy claim,[11] or for failure to satisfy an execution issued upon such a judgment,[12] do not authorize the commissioner to pass on the merits of a policy claim, but merely provide an additional means of enforcing the judgment.

In addition to the licensing powers, the visitorial or inquisitorial powers of the commissioner may be brought into play to coerce the payment of policy claims. The commissioner is, in a distinct majority of states, given unregulated discretionary power to examine insurance companies.[13] Such phrases as "whenever he determines it to be prudent" or "as often as he deems it expedient" [14] leave the commissioner wide latitude in imposing the expense and bother of an examination upon an insurer. While the possibility of judicial control exists, there is not wanting evidence that some commissioners are disposed to use their inquisitorial and visitorial powers for the attainment of objects which are not authorized by any statute.[15] So long as the commissioner has unregulated discretionary power to impose the expense and annoyance of an examination upon an insurance company, the company may well conclude that it is cheaper to pay a particular claim than to incur the commissioner's hostility.

In Massachusetts, insurance companies are required to report the claims which have been sued upon, and if from this report the commissioner "is of the opinion that a company is unfairly delaying the settlement of claims or is unduly engaging in litigation,"

[9] *Supra*, n. 156.

[10] See *infra*, § 37, Scope of Judicial Control, where it is suggested that the courts are more inclined to review the merits of the commissioner's decision where the question is one with which judges commonly deal.

[11] *Supra*, § 13, n. 154.

[12] *Ibid.*, n. 155.

[13] *Infra*, § 22 (2) (b), p. 347.

[14] *Ibid.*, p. 347.

[15] *Ibid.*, p. 352.

he shall make a special report of his findings thereon to the legislature.[16]

b. *Claims against agents or brokers.* The statutes of some ten states authorize the revocation of an agent's license for failure to pay over money due the company which he represents.[17] These statutes do not require a showing of moral delinquency on the part of the agent, and the commissioner in administering this ground of revocation would be called upon to decide whether or not the money is "due" the company — a question of private contract law. Moreover, the provisions do not explicitly require that the delinquency of the agent should be "habitual"; hence the commissioner would apparently be authorized to revoke for non-payment of a single claim. In practice, however, the provision probably would be invoked by the company only against an agent who had been discharged for repeated delinquency in remitting his collections. Similarly, in a few states, a broker's license may be revoked for failure to pay over to the company the premium which he has collected from the insured or for his failure to obtain the insurance requested by the insured after he has collected the premium from the insured.[18] These provisions may be used to enforce against a broker not only his obligations to the company but also his obligations to the applicant for insurance.

In addition to these provisions aimed specifically at non-payment of claims, a slightly larger number of states authorize revocation of an agent's license for dishonest or fraudulent conduct.[19] Some of these provisions, such as "dealing unjustly with any citizen of this state," [20] are broad enough to authorize revocation for the agent's breach of any obligation to the insured. The grounds of revocation of a broker's license are frequently the same, and in some instances are even more indefinite, as "for cause," "not a suitable person," and so forth.[21]

It must further be noted in this connection that "violation of law" or "non-compliance with law" is quite commonly a ground for revocation of either a company's [22] or an agent's [23] license. The

[16] Mass., § 28.

[17] *Supra*, § 14, n. 137. Minn. (L., 1915, Ch. 195, §§ 5, 6) requires "unreasonable" failure to pay.

[18] *Ibid.*, § 15, n. 21.

[19] *Ibid.*, § 14, n. 136.

[20] S. C., § 2704; and substantially the same ("dealt unjustly with any citizen") are: Ky., § 762a (15); Me., Ch. 53, § 126; N. C. R. B., § 4812a.

[21] *Supra*, § 15, n. 20.

[22] *Ibid.*, § 13, n. 73, 74.

[23] *Ibid.*, § 14, n. 131.

significance of these provisions has already been discussed [24] and will be alluded to again.

2. *Judicial decisions as to payment of claims.* Only three reported cases have been found in which the insurance commissioner attempted to revoke a license on the ground of repudiation of a private contract obligation. This does not necessarily mean that the threat of revocation is not used to coerce the performance of such obligations; it probably signifies that the insurance companies do not invoke judicial control over the commissioner's actions in this respect, except as a last resort. Nevertheless, the decisions represent the trend of judicial theory.

In *Metropolitan Life Insurance Co.* v. *McNall* [25] a New York company sued in a federal court in Kansas to enjoin the Kansas superintendent of insurance from revoking, or carrying into effect his revocation of, the plaintiff's license to do business in Kansas. The case was heard upon application for a preliminary injunction on the verified bill of complaint and supporting affidavits, so that the defendant's side of the case was not presented. The plaintiff, it is alleged, had been induced to issue two policies to a woman suffering from *angina pectoris*, upon the basis of an application and medical examination which fraudulently misrepresented and concealed her physical condition. She died within six months and the company refused to pay anything on the policies. Thereupon the superintendent (apparently at the request of the beneficiary's attorneys) wrote plaintiff a letter stating his conclusion that certain sums were due on the policies, without going into details as to any possible defenses, and concluding:

> Permit me to say that the letters concerning your company in this state are becoming entirely too frequent, and that if you desire to remain in Kansas, and transact business, you would better adjust this loss.[26]

The threat contained in this last sentence is obvious, and yet it can hardly be called a notice of a hearing to be held on the question of revocation. The company replied, setting forth its contention as to the fraud of the insured, and protesting that only once before had the superintendent complained of its failure to pay a policy claim, and in that case the claim had been paid before his letter was received. The company's letter contained this significant statement:

[24] *Supra*, § 13, p. 133.
[25] (1897), 81 Fed. 888.
[26] 81 Fed. 888, at p. 889.

The amount of the claims in these two cases is small, and our defense of them will probably cost more than the amount. The fraud attempted, however, was so aggravated that we believe it to be our duty to contest the case in the public interest.[27]

Promptly upon receipt of this letter, the superintendent issued a letter stating that he had revoked the company's license for non-payment of these claims. No mention was made of the company's charges of fraud. On the same day the superintendent published notice of the revocation in the official state paper.

Apparently the plaintiff did not urge the absence, or at least the insufficiency, of notice and hearing, as a ground for setting aside the revocation. The Kansas statutes contained no provision for notice and hearing. The superintendent contended that he was authorized to revoke the license of a foreign insurance company without giving any cause therefor. Without deciding whether the state could, under the Federal Constitution, grant such authority to the superintendent, the court held that the Kansas legislature had not conferred such authority. The Kansas statutes then in force authorized revocation for unsound condition, for non-payment of fees, and for refusal to pay a policy claim within three months after final judgment thereon. This last provision was taken to indicate that the superintendent had no authority to prevent a company from contesting a claim in the courts. The court also relied upon a proviso of the statutes declaring that the superintendent should have no authority to revoke the license of any company which "is solvent and complies with all the laws of the state." Without discussing the question whether non-payment of a policy claim was a non-compliance with the laws of the state, the court declared:

The cause assigned for the act of the defendant is no cause recognized by law.[28]

A preliminary injunction was accordingly granted, and this was apparently the end of the case. The question whether the superintendent *could* be authorized to pass upon the validity of policy claims was not involved, since the question of separation of powers was not raised.

This question was, however, distinctly raised in the later case of *State ex rel. United States Fidelity and Guaranty Co.* v. *Harty*,[29] an

[27] 81 Fed. 888, p. 890. [28] *Ibid.*, p. 894.
[29] (1919), 276 Mo. 583, 208 S. W. 835.

application by a foreign surety company for a writ of prohibition to restrain the Missouri superintendent of insurance from revoking its license. The relator had by a contract made with the International Insurance Company guaranteed the payment of a deposit made by that company in a bank, which later became insolvent. The International Company filed an action in the circuit court to recover on its contract; and while this action was still pending it filed a formal complaint with the superintendent of insurance, alleging the breach of contract and that the repudiation of its obligation by the surety company was so flagrant as to "make further operations on its part in the State of Missouri hazardous to the public." [30] The complaint concluded with a prayer that, after notice and hearing, the superintendent revoke the surety company's license.

The superintendent thereupon ordered the surety company to appear and show cause. The surety company, after having in vain moved to dismiss the complaint for want of jurisdiction, applied for a writ of prohibition. Its petition, after alleging the foregoing facts, stated further that it, the relator, was fully solvent and had offered to deposit in a solvent bank sufficient funds to pay the amount of the claim, subject to the final judgment in the circuit court. It was further alleged that the superintendent was about to revoke its license for non-payment of an unadjudicated claim, in violation of the "separation of powers" provision of the Missouri constitution.

The return of the superintendent did not concede that non-payment of this claim was the sole ground for the threatened revocation. He contended that he proposed to investigate not only the merits of the complaint but also the general financial condition, business methods, management, and affairs of the relator, and that the non-payment of this claim merely brought to his attention a repudiation of its obligations by relator so unwarranted as to make its further operations in this state hazardous to the public.[31] The case was decided on a demurrer to the return and the Supreme Court declined to go into the merits of the claim against relator.

The court, with one dissent, awarded the final writ of prohibition. It pointed out that while the statute gave the superintendent much latitude in determining the extent and character of the information upon which he was authorized to proceed, it must, at least, be of such a nature as to indicate that the company was un-

[30] 276 Mo. 583, at p. 589. [31] 276 Mo. 583, at p. 593.

sound financially. The court thus treated "hazardous to the public or to its policyholders," the statutory ground for revocation,[32] as being no broader than "unsound condition," and in effect held that non-payment of a single claim was alone not sufficient evidence of financial unsoundness even to authorize an investigation by the superintendent. At the same time the court was evidently moved by the consideration that

> Such a construction is not in accord with the purpose of the law, and if pursued, would result in the transformation of the Insurance Department into a collecting agency.

The question of usurpation of judicial power was briefly disposed of by the statement:

> The determination of this matter (the relator's liability to pay the claims in question) may well be left to the courts where the law has placed it.[33]

The case indicates clearly that the commissioner cannot, in Missouri at least, use financial grounds of revocation as a pretext for coercing the payment of a single private contract claim, if judicial control is invoked. On the other hand, the decision does not go so far as to hold that the legislature could not empower the commissioner to revoke a license for non-payment of a single claim found by him to be meritorious. Moreover, the case does not decide whether the commissioner would be restrained from making an investigation if there were any other evidence of financial unsoundness than the non-payment of the claim.

In *North British and Mercantile Insurance Co.* v. *Craig*[34] the court, while conceding that repudiation of a contract obligation would not be sufficient cause for revocation of the license on financial grounds such as "unsound condition," held that such repudiation was a sufficient ground for revocation as a violation of, or a neglect to comply with, "any provision of law obligatory upon it"; and this in spite of the fact that another section of the statute, like the one cited in the McNall case,[35] expressly authorized revocation

[32] Mo. Rev. Stats., 1909, § 7078.

[33] 276 Mo. 583, at p. 599. See also State *ex rel.* Missouri Pacific Railroad Co. *v.* Public Service Commission (1924) 303 Mo. 212, 259 S. W. 445, holding unconstitutional a provision authorizing the public service commission to determine a shipper's claim for a refund of an excessive railroad rate, on the ground that the legislature could not confer a judicial function on the commission. But see Pennsylvania R.R. Co. *v.* Clark Coal Co. (1915) 238 U. S. 456.

[34] (1901), 106 Tenn. 621, 62 S. W. 155. [35] *Supra*, this section, n. 25.

for failure to pay a policy claim within thirty days after final judgment thereon.[36] It may be, of course, that the court thought this statute was not applicable to a claim based on a policy of reinsurance, as in the Craig case, but the distinction was not made.

In the Craig case, the plaintiff, a British insurance company licensed in Tennessee, sued to enjoin the insurance commissioner from revoking its license on the ground that it had repudiated and sought to cancel a contract of reinsurance made by it. The plaintiff contracted to reinsure all the fire risks of the Traders' Fire Insurance Company, on condition that certain payments were made at designated times; otherwise, the agreement was to be "void." However, in its letter to the commissioner, it neglected to mention the condition, and the commissioner notified the policyholders of the Traders' Company that plaintiff had (unconditionally) reinsured the risks. Later the plaintiff purported to "cancel" the reinsurance because the consideration therefor had not been paid. The commissioner notified plaintiff that it had "waived" its option to terminate the contract by a letter written to the agents of the Traders' Company after the condition of the contract had been broken; and further notified plaintiff that unless liability on the Traders' policies in Tennessee were acknowledged within ten days, plaintiff's authority to do business would be revoked. Thereupon this suit was brought. A demurrer to the bill was overruled below, and the case came up on the allegations made in the bill.

The Tennessee statutes authorized revocation of a foreign insurer's license if the commissioner was "of the opinion that" it was in an "unsound condition"; or if it "has failed to comply with the law," or "if it shall violate or neglect to comply with any provision of law obligatory upon it." [37] The commissioner boldly contended that these last two phrases

> . . . embrace all law, and every provision of all law that is applicable to foreign insurance companies in this state, the present Act, and other statutes and *the common law as well*.[38]

The court expressly sustained this contention. It pointed out that protection of policyholders was the paramount object of the insurance legislation, and continued:

> The Court deems it but little less than certain that the common law obligations of a foreign insurance company that go to the general integrity

[36] See 106 Tenn. at p. 637.

[37] Tenn. L., 1895, Ch. 160, §§ 5, 12; set forth 106 Tenn. 634–36.

[38] 106 Tenn. 621 at p. 645. Italics ours.

of its business and affect all policyholders in the same way, are likewise comprehended in the language, "the law," and "any provision of law obligatory upon it"; and, consequently, that breaches of those obligations, persisted in after notice, are among the contemplated grounds of revocation.[39]

On the merits of the plaintiff's common law liability as reinsurer, the court said:

whether or not there had in fact been such a violation, however, was a matter to be determined, in the first place, by the Insurance Commissioner according to his official judgment and discretion, the Court having no power to consider it in this proceeding.[40]

The general tenor of the opinion is directly contrary to that of the two cases previously discussed, and indicates that the commissioner not only may investigate breaches of common law obligations and revoke on that ground but also that he has discretionary power in passing upon the merits. No suggestion is made that the commissioner would be usurping the power of the courts. On the other hand, the effect of the decision is qualified by the fact that the contract in question was one of reinsurance, which, as the court points out in the excerpt quoted, goes "to the general integrity of its business," and by the court's statement that "the complainant owed the Tennessee patrons of the Traders' Company, in the aggregate, the common law duty of good faith in reference to the contract of reinsurance," [41] thus imputing bad faith to the plaintiff. It does not follow from this decision, then, that the Tennessee court, under these same statutory provisions, would refuse to enjoin revocation of a company's license for a *bona fide* refusal to pay a single unadjudicated claim based on an ordinary policy.

While no pronouncement as to the "weight of authority" can be based upon three cases, it is believed that the reasoning of the first two cases will appeal to the majority of courts and that they represent the views which will be generally accepted if similar litigation arises in future.

[39] 106 Tenn. 621 at p. 646. [40] *Ibid.*, p. 649.

[41] *Ibid.* It is remarkable that the court assumed without discussion that the reinsurer was under any "common law" duty whatever to the policyholders of the Traders' Company. There was no evidence of novation, and the contract as it appears in the record was solely between the insurer and the reinsurer, in which case it is usually held that the insured has no legal rights whatever against the reinsurer. Vance, *Insurance* (1904), p. 65. However, that point does not affect the holding on the question of administrative power.

3. *Departmental practices.* To what extent do the insurance departments actually control the settlement of claims against companies, agents, and brokers? It is believed that every department investigates the merits, from the standpoint of "private" or judicially enforced law, of such claims, and exercises more or less control over their settlement. The evidence in support of this conclusion will now be presented.

The first exhibit is a letter from the "Claim Adjuster" of an insurance department, written in 1921 in response to an inquiry from the present writer and here printed with the permission of the individual who wrote it. It states the commissioner's side of the case and at the same time indicates why he is able to compel obedience to his decisions.

The Claim Adjuster devotes his entire time to the settlement of differences between policyholders and insurance companies. He acts as a sort of a judge, hearing both sides of the case. When the policyholder appears poor and ignorant, he acts as his attorney. When insurer and insured agree upon the facts, a finding is made, and this in 95 per cent of the cases is accepted by all concerned. Claimants are always told that if they are dissatisfied with the finding of the Department that they have recourse to a court of law. We are oftentimes not so lenient with the company. It is no uncommon thing to inform a company that it will settle a case according to our opinion, or else authority to do business in this state will be revoked. You understand, of course, that the Department has no legal authority to revoke the license of a company because it does not settle its claims according to our interpretation, but the present Superintendent of Insurance appears to be a natural born fighter for his ideas of right and justice, and does not hesitate to go out on a limb to prevent an imposition on a citizen of this state. Should it become necessary to cancel the authority of a company, the company could then resort to a mandamus procedure in the —— Court of the County wherein the office of the Superintendent of Insurance is maintained.[42] At this hearing the condition of the company which impelled the cancellation of its authority would be brought to the attention of the public, and advertised through the public press, so that the purpose of the Superintendent would have been accomplished. I might add that such a drastic action has never been brought about.

I will give you some cases which have been recently handled and which will give you an idea of the work done:

A man at —— carried a $5000 accident insurance policy and a $1000 accident insurance policy. The accident which killed him was within the terms of the larger policy and liability was not denied by the company, but the company claimed that under the second policy its

[42] *Mandamus* would probably not be the only available remedy. See the cases cited *supra*, notes 25 and 29. — Ed.

liability was limited to $100, and sent the beneficiary its draft for $5100 in full settlement of both policies. The company refused to make settlement by any other method until this Department ordered the $5000 claim paid and gave the party an opportunity to litigate the claim under the disputed policy. This company refused to do this until confronted with a threat that its authority would be revoked.

Many cases arise because agents embezzle money. Some companies attempt to make an applicant for insurance believe his only recourse is against the agent himself. This Department has refused to tolerate any company which sought to exempt itself from the responsibilities imposed on the principal, for the acts of his agent.

Another small case which indicates the character of the work done deals with a health and accident policy. The terms of the policy provide that the company is liable for loss of time caused by a disease originating after the policy is in effect. The facts revealed that the insured had infected teeth at the time the policy was taken. After the policy was in effect the bad teeth caused rheumatism. From rheumatism came a mitral regurgitation which caused disability. The company claimed the disabling disease had its inception prior to the date of the policy. The department held that the condition of the claimant's teeth was so far removed from the disability which incapacitated him that it was not contemplated by the policy and the insurer was liable.

The case mentioned in the third paragraph is one which strongly arouses one's sympathy for the steps taken by this department. The company was withholding payment of an undisputed claim for $5000 in order to force a compromise on another claim of $1000 by the same claimant, which the company contested. Such abuses stimulate the emotional drive for a radical readjustment of the legal machinery available for the enforcement of policy claims. On the other hand, the case referred to in the fifth paragraph raises considerable doubt as to whether an administrative official with the means and methods of investigation of the Claim Adjuster is the proper authority to pass upon the merits of a question involving considerable medical skill. It may be noted, however, that in this last case it is not stated that any steps were taken to coerce the company to pay the claim without judicial litigation.

Is this sample typical of the practices of the other departments? It is believed that the department just referred to went further than most of the others in coercing the payment or compromise of claims. The answers to the questionnaire so indicate. It is noted elsewhere [43] that all of the thirty-five departments which responded stated that it was the practice to give, upon request, advice to

[43] *Infra*, § 32.

persons having claims against companies, agents, or brokers. The further question was asked:

20 (*c*). What steps, if any, do you take toward bringing about a settlement of such claims?

Each of the thirty-five departments answered that some steps were taken. Most of the answers were so indefinite as to indicate that perhaps many of the commissioners realized that the question was "loaded." One merely replied "necessary," and another merely "if claim is merited." [44] Eighteen indicated that the merits of the claim and the reasons for its non-payment were taken up with the insurance company.[45] Two indicated that a formal complaint was sometimes lodged with the commissioner by the claimant.[46] The replies from nine departments indicated that an independent investigation was frequently made by an employee of the department.[47] The Pennsylvania commissioner, with his usual picturesqueness, said:

My investigators (three of them with several assistants cover three zones of the State) mix in everything from alleged poison cases to divorces.

In four states a "formal" hearing is sometimes held.[48]

The answers are equally indefinite as to what is done by the department if it has investigated and found that, in its opinion, the claim is a meritorious one. Only eighteen of the answers were responsive to this point. Four departments indicated that they simply endeavored to bring the parties together to effect a settlement.[49] Five others purported to go no further than giving an opinion on the merits (probably the legal issues) of the claim.[50] Four went a trifle further and "urged" or "advised" the company to settle the claim.[51] The pressure exerted by such urging or advice

[44] Vt. and S. D., respectively.

[45] Ariz. (usually), Ark., Colo. (also personal interview with claimant), Del., Fla., Kan., Mass., Mich., Minn., Mont., Neb., Nev., N. M., N. Y., Okla., Ore., W. Va., Wis. (ask company to state its position).

[46] Ariz., N. Y. See also the formal complaint filed with the Missouri Superintendent in the case of State *ex rel. v.* Harty, *supra*, n. 29.

[47] D. C. ("full investigation" made), Idaho (usually determine all facts), Kan., Me. (very thoroughly), Mich., Ohio, Pa., Utah ("obtaining full evidence"), Wash. ("personal investigation"), Wyo. ("complete investigation").

[48] Kan., Neb., N. Y. (frequently), Okla. ("to determine the facts").

[49] Conn., Md., N. M., W. Va. [50] D. C., Idaho, Mich., N. H., Utah.

[51] Ia. (if only a question of law involved), Ohio (if no dispute as to facts), Wis. (if company's position is untenable), Wyo. ("recommendation" as to settlement).

coming from an official who can do as much for the weal or woe of an insurance company as the commissioner can, may well be imagined. Only six departments stated flatly that they required or compelled a settlement of the claim.[52] It may well be that other departments go quite as far in exceptional cases.

To the extent that the insurance departments pass upon the merits of these claims and coerce a payment or settlement thereof by the exercise, actual or threatened, of such legal powers as revocation of license, they undoubtedly encroach upon the domain of social control which has been zealously guarded by the courts as their traditional sphere of action. Yet it would be going too far to say that the insurance departments are at present ousting the courts of their jurisdiction, for, in general, in only the more flagrant cases of abuse are coercive measures resorted to, and there appears to be a disposition to allow the parties to litigate their dispute in the courts if they so desire.

The least desirable feature of these departmental practices is that they are carried on *sub rosa* and without statutory recognition. If they are to be continued at all, some effort should be made to define their scope by legislation and to prescribe the procedural safeguards which too often, it seems, are not observed by the insurance departments.

Should these practices be recognized at all? That is a difficult question to answer. The present writer is inclined to the affirmative. Leaving aside the question of expense, it would be desirable to have the insurance department act as a sort of clearing house — a grand jury, if you please — for separating the genuinely debatable claims from those which are wholly without merit, on the one hand, and those which are so clearly meritorious that a refusal to pay amounts to an abuse of power, an unfair advantage obtained because of the cautious and slow judicial procedure and the crowded condition of court calendars. After all, there is nothing eternal and immutable in the particular method of settling such claims by a judicial hearing. It is a problem of social control which must be solved by a balancing of interests and not by the logical application of traditional concepts. The insurance commissioner can eliminate

[52] Kan., Mass. (where there appears a "breach of law" on the part of the company or the agent or broker, require settlement by revocation of license), N. Y. (discussed *infra*), N. C. ("if just"), N. D. ("if claimant presents proof of merits of his claim"), Va. ("require company to show why settlement is withheld").

the abuses arising from the refusal to pay meritorious claims more effectively than can the courts, even though they be armed with the statutes, found in a number of states, allowing them to impose penalties for vexatious delay in settlement.

Again, the commissioner is in a position to prevent much needless litigation by advising the claimant, as he does in many instances, that the claim is in his opinion without merit. The Massachusetts department stated that the policyholders were wrong nine times out of ten, and the New York official stated that only one complaint in ten resulted in the revocation or refusal of a license. The Pennsylvania commissioner made a similar statement. Thus in these three departments at least, the official is pretty conservative.

Finally, the commissioner may effect a compromise of the claim; a court of law does not make compromises. In legal theory a plaintiff whose claim is doubtful gets all or nothing; and while the jury may *sub rosa* give a compromise verdict, as every lawyer knows, this is confined to cases where the amount is uncertain and is not possible in the case of a claim based upon an insurance policy for a fixed amount. Because the court is an instrumentality for pronouncing upon "rights" and "duties" and for establishing guides for future decisions, it cannot "split the difference." Yet as a matter of social adjustment it is often far better that the actual doubtfulness of the claim should be reflected, and a speedy settlement effected, by the compromise on the amount to be paid. The figure advised by the insurance department, after a full investigation, might well be sanctioned by some moderate penalty, such as the payment of an attorney's fee by the claimant if he fails to recover more than the amount advised by the official, or the payment of an additional sum by the defendant who refuses to accept the compromise and is unsuccessful in a judicial proceeding which he forces the claimant to undertake. These are mere examples of the way in which the commissioner's activities might be correlated with the existing judicial system.

The practices of the Massachusetts and New York departments, which were particularly investigated (in 1920 and 1922, respectively), shows the administrative system at its best. If an insured or a beneficiary complains to the Massachusetts commissioner that a company has not paid his claim, the commissioner or his deputy writes a letter to the company and asks for a statement of its side of the case. Sometimes a hearing is held in the office of the insurance department, at which both sides are

represented by lawyers. While in only about one case out of ten is the policyholder's claim upheld by the department, the companies seldom refuse to pay the claim if the commissioner or his deputy so recommends. The deputy who usually attends to such claims stated that the only club which the department had to force a settlement was the section, cited above,[53] requiring the commissioner to report to the legislature that a company is "unreasonably and unfairly delaying the settlement of claims." However, the commissioner in his formal answer to the questionnaire stated that settlement of the claim would be enforced by revocation of license "if a breach of law" appeared. The Weekly Underwriter Service in 1923 published seven "rulings" of the Massachusetts department on policy claims and related topics.[54]

The New York department has a more systematic method of attending to claims. Before 1912, they were handled by an examiner who devoted part of his time to this work. In that year, contemporaneously with the adoption of a new broker's license law, a "Bureau of Complaints" was established in New York City. The most common complaints are those against brokers, especially cases where the broker has failed to pay over to the insurer the premium which he has collected from the insured. When the insurer notifies the insured that the policy is cancelled for non-payment of premiums, the "insured" makes an informal complaint to the bureau of complaints. A preliminary investigation is made by calling in the broker to tell his story. If the claim appears to be well founded, a "formal" notice is sent by registered mail to the broker, stating the name of the complainant and the general nature of the claim, for example, "failure to account for premiums." A time and place are named, at which the broker is notified to appear and show cause why his license should not be revoked. A hearing is held at which both parties are represented; testimony is taken under oath and subject to cross-examination. A stenographic record of the proceedings, including the testimony, is taken, and a copy of the record and exhibits, together with the recommendations of the bureau head, are sent to the superintendent at Albany.

[53] *Supra*, this section, n. 16.

[54] W. U. R. (1923) Mass. 5, 7, 20, 27, 31, 33, 50. These represent a considerable proportion of the Massachusetts rulings published that year. The number of policy claims settled by the department that year was probably much greater.

The Albany office goes over the report and determines what should be done. If the charges are sustained, the broker's license may be revoked, or he may be placed "on probation" and allowed to go with a warning. Despite the fact that only one complaint in ten results in a revocation, on the average two broker's licenses are revoked per week in New York City. There are about 10,000 licensed insurance brokers in New York City.

The activities of the bureau of complaints in New York City have wider ramifications, however, than the enforcement of the broker's duty to transmit premiums for the insured. The extent to which the "incompetency or untrustworthiness" of the New York statute [55] is construed to cover delinquencies of brokers is illustrated by two complaints culled by the writer from the records of the bureau in 1922. In one, an applicant for a license was notified to show cause why his application should not be denied because he had failed to keep his agreement to pay his former partner (in the insurance brokerage business) $300, to be applied in payment of the debts of the partnership. Here the machinery of the insurance department was being used to collect a claim in favor of one (the other partner) who was neither insurer nor insured. In the other case, a broker was notified to show cause why his license should not be revoked because a brokerage corporation, of which the licensee was an officer, had not paid its debts, and the notice stated that the licensee, as an officer of the corporation, was "to an extent responsible for the policy of the corporation." The reader may judge for himself whether by such conduct the licensee "has demonstrated," as the statute reads, "his incompetency or untrustworthiness to transact the insurance brokerage business . . . by reason of anything done or omitted in or about such business under the authority of such certificate."

Of the complaints against insurance companies, it was stated that about two-thirds are rejected. In fact, one of the chief functions of the Bureau is to explain to ignorant policyholders why they have not valid claims. The insurers, especially the industrial health and accident companies which have to deal with small claims by ignorant or illiterate policyholders, generally welcome this phase of the department's activities.

On the other hand, the companies' claim adjusters are sometimes guilty of gross fraud. Thus, in one case a small life insurance company employed a professional "adjuster" for a casualty company

[55] N. Y. L., 1913, Ch. 12, superseding § 143 of the Insurance Law.

to settle its claims. The adjuster paid the attorney for a widow, a policy claimant, a fee to bring about a settlement of a $3000 claim for about one-tenth of that amount. On complaint by the widow, the insurance department investigated and found there was no defence whatever to the claim. No threat to revoke the company's license was made, but an account of the affair was inserted in the report of an examination of the company made shortly afterward. The president of the company, when he received the preliminary draft of the examiner's report, paid the widow's claim in full out of his own pocket and the account of the incident was accordingly kept out of the report as filed. This incident, while it was said to be rare, illustrates the use of inquisitorial powers to coerce payment of claims. Only if the company's excuse for non-payment is "flimsy" or "raw," it was said, are such measures resorted to.

Ordinarily, the head of the Bureau said, the department merely aims to compel the company to give proper attention to the claim. This sort of pressure is normally sufficient. The higher officials of the companies usually display alacrity in settling when the claim is called to their attention by the department. Thus, one company had inexcusably delayed for three or four weeks the payment of the surrender value to certain policyholders who had surrendered their policies. Upon receipt of a sharp letter from the department, a high official of the company came over and explained that the subordinate who handled these matters had been censured; the claims were promptly paid.

That the policy of the New York bureau of claims is to pass upon questions of law (and chiefly, of those, the clearest cases) rather than questions of fact, is shown by the following quotation from the address delivered in 1922 by the head of the Bureau before a convention of claim adjusters:

> Where questions of fact are raised, the Department does not attempt to usurp the functions of a court by deciding such questions, and we give the complainant to understand that we have no authority to decide such questions and that his proper redress is through the courts rather than through this Department.

A similar policy was indicated by several other departments.[56] Thus, the functions of the judge are encroached upon to a greater extent than the functions of the jury. Probably the insurance departments are better equipped to decide issues of "law" than to sift disputed issues of fact. However, the New York bureau (and

[56] See *supra*, this section, n. 51.

probably others, too) is not governed solely by recognized legal rules, but rather by standards of business ethics, as is shown by the following excerpt from the same address of the bureau chief:

> When, however, after investigation, we are of the opinion that the company has not settled the claim in accordance with the provisions of the policy-contract or in accordance with good business ethics, we explain to the company why, in our opinion, the claim should be paid, and the company usually does so. I used the phrase "in accordance with good business ethics," for this reason. It is impossible to settle all cases equitably by any hard-and-fast rule. It has been impossible to get up a policy contract which, if rigidly adhered to, in settlement of all cases, will result in justice to all.

Revocation of license is the final threat which is, in extreme cases, resorted to. Thus, an Illinois company doing business in New York refused to pay a number of claims which the bureau head felt should be paid. Accordingly the company was notified to show cause why its license should not be revoked. Who can say that habitual non-payment of just claims does not come within the statutory ground of revocation, "whenever in the judgment of the superintendent of insurance it will best promote the interest of the people of this state"? [57] At all events, the president of this company came on for the hearing, and, as usual, blamed it all on his subordinates. He arranged to pay all the claims except one, which he refused to pay because the insured had been four days late in paying the monthly premium. He was notified to pay this claim by 10 A.M. of a certain day or lose the license. At the hour appointed the money, in gold, was in the office of the bureau, awaiting the widow.

The foregoing sketch by no means exhausts the interesting features of the work of the New York bureau of claims. The volume of claims handled is sufficiently large and their novelty is sufficiently varied to merit an independent study. There is so much merit in the system that one would hate to see it abolished, and yet there is enough danger in the system to make one wish that it were better regulated. One thing is clear: that the dramatic values of many of these claims make it desirable that the head of such a bureau should not be an impetuous sentimentalist.[58]

Restraining hasty payment of claims. The last few decades have witnessed a remarkable reversal of policy in the settlement of

[57] N. Y. L., 1913, Ch. 9, amending § 32 of the Insurance Law.

[58] No reflection upon any particular official is intended.

claims by insurance companies. Formerly the company's policy was determined by the legal department, which tended to contest as many claims as there was any hope of defeating by the use of any legalistic weapons. Partly this was actuated by a desire to save money, and partly by a desire to vindicate the company's rights and deter the litigation of fraudulent claims, as stated in the letter from the Metropolitan Life Insurance Co., quoted in the McNall case.[59] But the sales departments of the companies found that the contesting of claims was bad for a company's business reputation. The "struggle for right" [60] has given place to the struggle for good will.

At present many companies are paying claims which might be successfully resisted in law.[61] Indeed, the pendulum has swung to the other extreme. To a considerable extent insurance companies, especially the newer ones, are paying claims without sufficient investigation. Speedy payment of policy claims is regarded as a business-getting asset more valuable than the amount lost by paying claims which might have been shown, upon full investigation, to have been fraudulent or unfounded. The dangers of this excessive zeal, while less than the dangers of fraudulent or legalistic refusal or delay of payment, are not to be overlooked. In those fields in which competition has reduced premium rates to the lowest minimum consistent with safety, it means that the honest and prudent policyholders are, in effect, obliged to assume the moral risks of the dishonesty or carelessness of those who present unfounded claims. The social implications of this tendency are in line with the broader social theory that every man is his brother's keeper. In the second place, the tendency of this new practice in the settlement of claims is to remove the legal impediments which have heretofore been regarded as powerful deterrents upon attempts to collect fraudulent or unfounded claims. Despite the fact that the losses due to moral hazards are estimated at only a small fraction of the total amount paid out on policy claims,[62] it is not clear that

[59] Quoted *supra*, this section, p. 290.

[60] See Jhering, *Der Kampf ums Recht*, translated as *The Struggle for Law*, by John J. Lalor (Chicago, 1915).

[61] See the article by Henry C. Lippincott, Manager of Agencies of the Penn Mutual Life Ins. Co. in (1905), 26 *Ann. Am. Acad. Pol. & Soc. Sci.*, pp. 206–7.

[62] See Hardy, *Risk and Risk Bearing* (1923), note 292, and note 1. He estimates the fire losses due to incendiarism at about ten per cent, including not only incendiarism by the insured but also incendiarism by others. He also urges the importance of "constant watchfulness" to prevent an increase in the number of fires due to moral hazards.

the legal impediments (denial of recovery) do not exercise a substantial deterrent effect. In popular ethics anything is fair in dealing with an insurance company.

The insurance departments have become aware of the tendencies of this reversal in business practice. The dangers of hasty settlements of claims were discussed in the National Convention of Insurance Commissioners in 1919.[63] The Washington commissioner gave an illustration of the practice. A mutual company which had insured the interest of the landlord in a crop of growing wheat paid the insured's claim within fifteen days after the loss occurred, on the basis of 110 acres of wheat, and promptly announced in a local newspaper its speedy settlement of the claim. Another company, a stock company, which had insured the interest of the tenant in the same wheat, made a careful survey and found that only ninety acres of wheat had been destroyed by the fire. And, he added, within fifteen days another fire occurred on the land of the man with whom the mutual company settled so speedily.[64] However, the insurance companies opposed a proposed statute drawn to require delay in paying policy claims, on the ground that it would prejudice them in the eyes of the public.[65]

Maine has a statute which forbids the payment of any fire loss of more than $100 in less than forty-five days after the proof of loss was executed, unless the insurance commissioner consents to such payment.[66] The Maine commissioner was asked by other commissioners how he administered the approval provision of this statute. He replied that while he sometimes wrote or telephoned the insured, he acted chiefly upon his personal knowledge of the local insurance agent who had written, and was approving, a settlement of the claim. To which the Pennsylvania commissioner retorted that he would have to have "a very wide knowledge" to rely on the personality of every local agent in Pennsylvania.[67] In 1923, the Maine department issued a ruling that it would no longer honor the requests of "general" agents for approval of payment of claims in less than forty-five days, and that only a written request of an official of the insurance company or of a "special"

[63] *Proc. N. C. I. C.* (1919), p. 112.

[64] *Ibid.*, p. 113.

[65] *Ibid.*

[66] Me., Ch. 53, § 9. The statute also provides that the company shall begin adjustment of such loss within twenty days after notice given. For violation of the statue, the commissioner may suspend the company's license for a period not to exceed one year.

[67] *Proc. N. C. I. C.* (1919), pp. 114, 115.

agent (that is apparently a special investigator or claim adjuster) would be honored.[68] This means that the commissioner is striving to eliminate the predominant influence of the "sales" departments of insurance companies, over the settlement of claims. Unless the insurance department can arbitrarily refuse approval in all cases (which it probably cannot if judicial control is invoked) or can carefully investigate the merits of each claim (which would require a considerable force of investigators), it can at best act as only a mild deterrent on the hasty payment of claims.

Mississippi and North Carolina have statutes similar to that of Maine, but the period of required delay, one week, is in these instances so short as hardly to deter the hasty and ill-considered payment of claims.[69] In addition to these two statutes, hasty payment of claims is indirectly deterred by the provisions in some states whereby the commissioner or the state fire marshal (usually the same person) are authorized or required to investigate the causes of fires in which incendiarism is suspected.[70]

Between the Scylla of paying too soon and the Charybdis of not paying soon enough, the insurance companies will eventually steer a course of sound business ethics.

In conclusion, a word of caution must be added as to the implications to be drawn by a conservative reader from the foregoing account. It by no means follows that the enforcement of all private contract claims is to be taken from the courts and handed over to a bureaucratic régime. Insurance is one of those contracts which require the highest degree of stability and security that the social organization can give to it. Designed to eliminate uncertainty by the transfer or spread of risk, it must not fail of its high purpose by the introduction of juridical risks, of frustrations due to abuse of a cautious judicial procedure and a legalistic technique of enforcement. Moreover, no one has yet proposed that the courts should be completely ousted of their jurisdiction over insurance contracts. The evidence supports the conclusion that the insurance

[68] W. U. R., Me., 1 (1923).

[69] Miss., § 5058, requires the company, on receiving notice of a fire loss, to notify the insurance commissioner at once, and not to pay the claim in less than one week after such notification, without the permission of the commissioner. The penalty for violation is a fine of ten dollars to be imposed by the commissioner. Similar is N. C. R. B., § 4822.

[70] E.g., Ala. Code, 1907, §§ 4584–87, authorizing the commissioner to order the sheriff to summon a jury of three property holders to investigate the cause of any fire destroying *insured* property.

departments confine their activities chiefly to clear cases of flagrant abuse.

§ 21. *Business-getting methods.* The picture of the commissioner's functions would not be complete without a sketch of the types of conduct which have been, under the newer legislation, brought within the purview of the state's regulatory power. The earlier insurance statutes were designed to collect taxes and to make the foreign insurance company amenable to domestic judicial process. Some were designed to safeguard the financial soundness of the enterprise; but this phase of regulation was not seriously and continuously attempted until about the middle of the last century. Deposit requirements came later, and so did the regulation of policy forms. A still later phase of this development (bearing in mind that the control over payment of policy claims is *sub rosa* and irregular) is the regulation of the "marketing" or "business-getting" methods of insurers, agents, and brokers. Some reference to this type of regulation has been made in previous sections dealing with the licensing powers.[1] The following discussion is partly a résumé, with some additional materials.

The restrictions upon business-getting methods may be grouped under four headings: 1. Rebating and discrimination. 2. Misrepresentation and twisting. 3. Advertisements and circulars. 4. Miscellaneous examples of unfair methods.

1. *Rebating and discrimination.* Several "evils" are aimed at by the statutes forbidding rebating and discrimination. In the first place, the anti-rebate laws are sometimes designed to prevent an individual from obtaining an agent's or broker's license merely for the purpose of insuring his own property or that of some company or organization which he represents. Thus, in *Lyman* v. *Ramey*,[2] the licensee was using his license to obtain surety and liability insurance for an Association of Highway Contractors of which he was secretary; the agent's commissions were turned into the treasury of the association and used to pay the salary and expenses of the licensee as secretary. A revocation on this ground was upheld. The precise evil of such a practice is not clear. Probably it is felt that to permit it would be unfair to the full-time agents, would lower the morale of the profession, and would deprive the insured of that expertness and counsel which the full-time agent is supposed to give. Certainly many of the most lucrative com-

[1] See § 13, p. 152; § 14, p. 179. [2] (1922), 195 Ky. 223, 242 S. W. 21.

missions would not go to the full-time or "professional" insurance agents if such practices were permitted. Possibly the insurance agent "bloc" is responsible for this legislation.

A second evil is the charging of inadequate rates. An insurer which gives rebates on an extensive scale may not collect enough to build up an adequate reserve. However, if the reserve liability is calculated on the basis of the "gross" or nominal premium rather than the actual premium, as reduced by the rebate, and if the insurer is required to maintain this amount of reserve,[3] then either the enterprise is financially sound, in which case there is no evil, or the reserve prescribed is inadequate, in which case the reserve requirement should be set at a higher figure. So, in life insurance, where the reserve is not measured by the premium charge, a company which maintains this reserve is solvent even if it rebates in order to gain new business. Moreover, most of the rebating and discrimination is done by agents. The rebate comes out of the agent's commission; the amount remitted by the agent to the company is a percentage of the nominal rate and is the same regardless of the amount actually paid by the insured. It is the amount received by the insurance company which determines the financial soundness of the company. Of course, if the company makes up the deficit from its surplus, this depletion of the surplus will lead toward insolvency. Furthermore, it is not unlikely that policies issued at rebated initial premiums will show a larger proportion of lapses after the first year (when the rebate will no longer be given) and thus a life insurance company's financial strength will be weakened by the practice of rebating.[4] Still, the practice of rebating does not necessarily mean insolvency; and the financial dangers of rebating are more apparent than real.[5]

[3] E.g., N. Y., § 118, requires fire companies to maintain a reserve, "calculated on the gross amount without any deduction of any account." This reasoning is not applicable to life insurance.

[4] However, in Equitable Life Assurance Society *v.* Commonwealth (1902), 113 Ky. 126, 131, 67 S. W. 388, the court sustained the constitutionality of an anti-rebate statute on the ground that it was designed to protect the solvency of the company. The court did not go into an analysis of the problem. In Commonwealth *v.* Morningstar (1891), 144 Pa. St. 103, 22 Atl. 867, the court sustained a similar statute as being "clearly within the police powers of the state," without giving any clue to the evil it was designed to correct. The same thing occurred in Metropolitan Life Ins. Co. *v.* People (1904), 209 Ill. 42, 48, 70 N. E. 643.

[5] In People *v.* Formosa (1892), 131 N. Y. 478, 484, 30 N. E. 492, the court, in upholding the constitutionality of an anti-rebate law, said: "We are not

A third notion behind these restrictions is that of "unfair competition." The agent who offers rebates will cut into the business of the one who holds out for the full premium. But why is this "unfair" to the latter, in a competitive system? If one company should engage in uniform wholesale price-cutting for the purpose of driving out competitors and charging higher monopolistic rates, the evil would be serious. But that would not be "rebating"; and moreover, there is no demonstrable danger of a monopoly. If the rebating agent misrepresents that the non-rebating agent is charging excessive or extortionate rates, that would be "unfair"; but the rebating agent probably will take the other tack and assert that he is giving the insured a special favor — which is true. It has also been suggested that rebating by agents will lead to the charging of extortionate commissions in the majority of instances, in order to make up for the loss due to giving rebates. Here again it seems the attempt to limit the agent to a "fair" commission is inconsistent with the idea of competition.

It is believed that two social ideals are at the bottom of the anti-rebate and anti-discrimination laws. The "one-price" idea, firmly rooted in the retail marketing traditions of the American people, is one. It is more convenient to purchase a standard article like insurance without having to "shop around." Most insurance contracts are not made through "higgling in the market place," as Mr. Justice McKenna said.[6] The second ideal is that of equality. All insured persons should be treated the same under like circumstances. It is "unfair" to make one man pay more for a thing than another. The articulation of this idea is one more reason for likening an insurance company to a public utility. In some of the northern states this idea of equality has been carried so far as to forbid any discrimination between applicants for life insurance of the same age on the ground of race or color, regardless of whether the mortality experience shows an actuarial basis for charging negroes a higher premium than whites.[7] Such provisions were

able to perceive the purpose or the wisdom of this act." An American life insurance company official told the writer that in England, where there is no anti-rebate law, rebating in writing life insurance is quite common.

[6] *Supra*, § 19, p. 269.

[7] The Medico-Actuarial Investigation of 1912, an investigation in which some forty life insurance companies participated, and which was based on their actual experience, disclosed that the death rate among negroes of the "professional" classes (teachers, ministers, etc.) was 137% of the expected mortality (the normal) and among other classes of negroes the ratio was 147% of the norm.

probably motivated by post-bellum sentimentality, though they have their justification in the general tendency toward "mutualizing" life insurance — that is, abolishing all distinctions between risks except age and normal health.

The language of statutory provisions varies somewhat with respect to the specific practices (for example, stock-selling) which are included or excluded (for example, splitting commissions with other brokers), but the general language is the same. The Massachusetts statute may be taken as typical:

> No company, no officer or agent thereof and no insurance broker shall pay or allow, or offer to pay or allow, in connection with placing or negotiating any policy of insurance . . . or the continuance or renewal thereof, any valuable consideration or inducement not specified in the policy or contract, or any special favor or advantage in the dividends or other benefits to accrue thereon; or shall give, sell or purchase, or offer to give, sell or purchase, anything of value whatsoever not specified in the policy. . . . No such company, officer, agent or broker shall at any time pay or allow, or offer to pay or allow, any rebate of any premium paid or payable on any policy of insurance. . . .[8]

The amendments to these statutes and the number of exceptions indicate the difficulty of defining the marketing practices which are designed to be prohibited. From a technical standpoint, this legislation is "corrective" rather than "standardizing";[9] and yet in substance these provisions are so administered as to make the marketing practices of insurers lie in a rigid Procrustean bed. Some examples of this will be given later.

What business practices are prohibited by these statutes? A discussion of this question will reveal the scope of the commis-

For examples of such statutes, see Ohio, § 9401 (discrimination against persons of African descent forbidden); N. Y., § 90 (same).

[8] Mass., § 182. The following section forbids the receiving of rebates or special favors, and § 184 makes certain exceptions: the payment of commissions to duly licensed *bona fide* agents on policies procured by such agents; payment of "dividends" to policyholders out of the surplus of mutual companies; the furnishing of information or advice to the insured for the purpose of reducing the risk of loss; and the payment to the insured of a cash surrender value on the lapse or surrender of the policy. The New York statute (now § 65 of the Insurance Law; enacted by L. 1911, Ch. 416, and amended by L. 1912, Ch. 225, and L. 1913, Ch. 25) prohibits selling of stock of an insurance corporation along with the sale of a policy, and excepts splitting of fees and the giving of an article of the value of not more than one dollar, for advertising purposes.

[9] See Freund, *Standards of American Legislation* (1917), p. 137, for this distinction. He uses the term "discretionary" for "standard-creating" legislation, but the term "standardizing" seems better for the present purpose.

sioner's regulatory powers, since the grounds of revocation or refusal of the license of either a company, an agent, or a broker, usually either include violation of these statutes specifically, or are broad enough to cover it by implication. In reviewing the judicial interpretations of the "anti-rebate" or "anti-discrimination" laws, we shall not confine the discussion to cases in which the method of enforcement was refusal or revocation of a license, but shall include also the more numerous civil actions for penalties, criminal prosecutions, and ordinary civil litigation between the parties to an insurance transaction or their assigns. In this last class of cases the pronouncement of the court as to the meaning of the statute and the legality of the particular conduct in question is frequently weakened by a further holding that the illegality of the conduct does not affect the right of the plaintiff to recover. With this latter problem (whether the illegality of the transaction bars a recovery) we are not concerned in the present discussion.

What is the difference, if any, between a "rebate" and a "discrimination"? In most of the decisions the two are used interchangeably. It is believed, however, that two distinctions exist. In the first place, a "rebate" is an inducement or advantage given to the insured which is not specified in the policy. Thus, a Maine case held that an indictment for rebating was fatally defective because it failed to allege that the "rebate of premiums" allowed by defendant was not stipulated in the policy.[10] Similarly, an answer asserting the illegality of the note sued on was held to be defective because it failed to allege that the advantage or inducement given to the insured was not specified in the policy.[11] That certain reductions in premium were not stipulated in the policy was relied upon as an essential ingredient in their illegality.[12] On the other hand,

[10] State *v.* Schwarzschild (1891), 83 Me. 261, 22 Atl. 164. The decision seems somewhat technical as a matter of procedure but in substance it is believed to be sound.

[11] McGee *v.* Felter (1912), 75 Misc. 349, 135, N. Y. Supp. 267, construing N. Y. Ins. Law, § 89.

[12] State Life Insurance Co. *v.* Strong (1901), 127 Mich. 346, 351, 86 N. W. 825, where the court said: "not being included in the policy, individuals could not inform themselves as to the rates charged others; and the business could not be so readily investigated and regulated by the department of insurance." See also Smathers *v.* Bankers Life Insurance Co. (1909), 151 N. C. 98, 103, 65 S. E. 746; Citizens Life Insurance Co. *v.* Com'r. of Insurance (1901), 128 Mich. 85, 89, 87 N. W. 126. In the last case the benefit or advantage (reduced premiums) was extended to half the policyholders or more, yet it was held to be a "rebate."

a benefit which is expressly stipulated in the policy and is extended to all policyholders on equal terms is no rebate and is not discriminatory.[13]

In the second place, a "rebate" can consist only of some benefit offered to induce the insured to take out insurance, whereas a discrimination may include a *refusal* to insure an applicant, on some arbitrary ground. Furthermore, it is easier to prove rebating, which involves only an improper inducement in a particular case, than discrimination, which involves showing that other applicants were treated more or less favorably than the particular one in question.[14]

On the other hand, to make out a case of rebating it must be shown that the benefit or advantage actually induced or motivated the insured to take out the policy. It is not necessary to prove that it was the *sole* inducement; but assuredly it must be the attraction but for which the insured would not have closed the transaction. Thus, it is not enough to show that a sale of the stock of an insurance company to the insured was consummated at the same time that a policy of insurance was issued to him, unless it is shown that the former was an inducement to the application for the latter.[15]

However, the cases are not in harmony as to what constitutes sufficient evidence of inducement. Thus, the Washington court held that it was not discrimination or rebating for the insured to agree to give his insurance business on certain property exclusively to a particular agent in exchange for the making of a loan, by the agent to the insured, secured by a mortgage on that property.[16] This decision seems wrong on the facts. On the other hand, other courts have been more ready to imply that an advantage given the

[13] Rothschild *v.* New York Life Insurance Co. (1901), 97 Ill. App. 547, 556 (provision for division of accumulated surplus among survivors at end of twenty years); Julian *v.* Guarantee Life Ins. Co. (1909), 159 Ala. 533, 49 So. 234 (reduction of premium for services to be rendered by insured; case seems wrong on the facts).

[14] Illinois Life Ins. Co. *v.* Kennedy (1914), 191 Ill. App. 29.

[15] First National Life Assurance Society *v.* Farquhar (1913), 75 Wash. 667, 672, 135 Pac. 619; State *ex. rel.* Coddington *v.* Loucks (1924), 32 Wyo. 26, 228 Pac. 632. The Missouri superintendent, however, has apparently ruled to the contrary. W. U. R. Mo. 1 (1923).

[16] Calvin Phillips & Co. *v.* Fishback (1915), 84 Wash. 124, 128, 146 Pac. 181. Mount, J., dissented in an opinion which seems unanswerable.

insured contemporaneously with the issuance of the policy was an inducement in fact.[17]

Whether or not a particular advantage was an "inducement" is a question for the court to decide by inference; first, from the normal reaction which the judge thinks such an advantage would produce in the normal insurant; and second, from the evidence, if any, showing the peculiar susceptibilities of the particular insurant to such an advantage. Thus, in a Michigan case, the agent "bought a few drinks" for the applicant at the time he solicited the insurance. In discussing the question whether or not this was a "rebate," the court pointed out that the applicant drank occasionally and had at one time been a bartender. The court, while deprecating "this crude and decadent method of lubricating solicitation of business," held there was no rebate or discrimination.[18] This case illustrates the second of the two factors above mentioned. The first is represented by a case in which the advantage consisted merely in taking an interest-bearing note of the insured for the first premium. The court held that, there being no evidence that the note was not worth its full value, the court could not say "as a matter of law" that this was giving a valuable consideration "as inducement to insurants." [19] On the other hand, to make a loan to the insured over and above the amount of premium, even though it be secured by real estate mortgage, as an inducement to procure his insurance, has been held illegal.[20] In most instances the advantage has been a substantial reduction in the amount of premium payable; the normal reaction of the average individual to the stimulus of money is an implicit datum of these decisions.[21]

From whom must the "inducement" come, if it is to be a "rebate"? It has been held in two cases that it is not a rebate if the

[17] People *v.* Commercial Life Ins. Co. (1910), 247 Ill. 92, 98, 93 N. E. 90 (option to purchase company's stock); State Life Ins. Co. *v.* Strong (1901), 127 Mich. 346, 351, 86 N. W. 825 ("advisory board" contract made contemporaneously); Smathers *v.* Bankers Life Ins. Co. (1909), 151 N. C. 98, 103, 65 S. E. 746 (same); Key *v.* National Life Ins. Co. (1899), 107 Ia. 446, 78 N. W. 68 (agreement to make a loan to insured); Mechling *v.* Philadelphia Life Ins. Co. (1913), 53 Pa. Super. Ct. 526, 532 (same).

[18] Northern Assurance Co. *v.* Meyer (1916), 194 Mich. 371, 378, 160 N. W. 617.

[19] Ellis *v.* Anderson (1912), 49 Pa. Super. Ct. 245, 253.

[20] Key *v.* National Life Ins. Co. (1899), *supra*, note 17; Mechling *v.* Philadelphia Life Ins. Co., *supra*, note 17.

[21] See the cases cited in the following notes, especially those on the "advisory board" contracts.

agent gives or deducts for the insured the amount of his commission for writing the policy.[22] The Rhode Island statute prohibited life insurance companies or their agents from making "any distinction or discrimination as to the premiums or rates charged"; nevertheless, the court held there was no discrimination if the *company* received from the agent as premium the same amount which it received from other applicants of the same age.[23] While the statute was narrower than the ones commonly found, it is believed the cases rest upon the broader ground that the object of these statutes is merely to require the company to collect adequate funds to maintain its reserve. That this is not the sole object of these statutes is shown by the decisions elsewhere that the agent who deducts his first commission, or a part thereof, is guilty of "rebating" [24] or "discrimination."[25] The same result is reached if the agent, though taking the applicant's note for a part of the premium, agrees at the same time that he will never enforce payment of the note.[26] These decisions which are probably in conflict with the Rhode Island cases, seem correct interpretations of the statutes involved.

A more difficult problem is involved where the insured gives or purports to give something in exchange for the advantage given by the insurer or its agent. In such a case the advantage may be an "inducement" *but for* which the applicant would not have taken out the policy; and yet if the insured gives something in return of equivalent value, it certainly cannot be said that there is any "rebating," and, where the bargain is made in the ordinary course of business, there can hardly be any illegal "discrimination." Thus, an attorney was induced to procure insurance by the ad-

[22] Quigg *v.* Coffey (1894), 18 R. I. 757, 30 Atl. 794; Interstate Life Assur. Co. *v.* Dalton (1908), 165 Fed. 176, 91 C. C. A. 210, 23 L. R. A. (N. S.) 722 and note. In the latter case the court rather twisted the facts in order to sustain the decision of the lower court.

[23] 18 R. I. 757 at p. 759.

[24] Vorys *v.* State *ex rel.* Connell (1902), 67 Oh. St. 15, 65 N. E. 150; People *v.* Formosa (1892), 131 N. Y. 478, 30 N. E. 492; Commonwealth *v.* Morningstar (1891), 144 Pa. St. 103, 22 Atl. 867; Metropolitan Life Ins. Co. *v.* People (1904), 209 Ill. 42, 70 N. E. 643; People *v.* American Life Ins. Co. (1915), 267 Ill. 504, 108 N. E. 679; Heffron *v.* Daly (1903), 133 Mich. 613, 95 N. W. 714.

[25] Rideout *v.* Mars (1911), 99 Miss. 199, 54 So. 801 (*semble;* the statute was broad enough to cover either); People *v.* Hartford Life Insurance Co. (1911), 252 Ill. 398, 405, 96 N. E. 1049.

[26] Biggs *v.* Reliance Life Insurance Co. (1917), 137 Tenn. 598, 607, 195 S. W. 174 (*semble*).

vantage of having the premiums paid for by the legal services which he rendered and was to render the insurer, which were well worth the amount of the premium; it was held that there was no "discrimination."[27] So, it is neither rebating nor discrimination to allow an agent a commission on a policy issued to him on his own life [28] or to issue a policy in payment for service in inducing another person to take a policy in the same company, if it is shown that the services are of a value fairly equivalent to the premium.[29]

The problem of equivalency has been most frequently raised in the cases involving the "Advisory Board" type of business-getting method. This device, the use of which has been attempted in a number of southern and western states, is substantially as follows: A new life insurance company, or one whose volume of business is small, offers to prospective policyholders a percentage of the premiums paid on policies issued by the company in that state over a fixed period of years. This percentage is to be divided among the policyholders, within this class, in proportion to the amount of insurance taken out by each. The class of policyholders entitled to this benefit is limited either to those who take out the policies before a fixed date (for example, during the first ten years) or to those who take out the policies first written up to a certain amount (for example, $15,000,000). In return therefor the insured, in addition to paying his annual premium, agrees to become a member of a special "advisory board" or "board of reference," or to become a "special agent" or a "local inspector," and to render certain services to the company, such as advising the company as to the fitness and desirability of applicants for insurance, of applicants for appointments as agents, of applicants for the reinstatement of policies which have been allowed to lapse, and as to the fairness of claims presented against the company by policyholders. In some instances the insured agrees to furnish annually the names of ten persons in his community who would, in his opinion, make desirable risks on which to issue policies. The nature of the services to be performed by the insured varies somewhat in different instances but the differences have not been important in

[27] Otis *v.* Provident Savings Life Assurance Society (1912), 173 Ill. App. 70.

[28] People *ex rel.* Hughes *v.* Penn. Mutual Life Ins. Co. (1906), 126 Ill. App. 279.

[29] Equitable Life Assurance Society *v.* Commonwealth (1902), 113 Ky. 126, 124, 67 S. W. 388. See, however, the Montana commissioner's ruling that a fire insurance agent may not accept merchandise or any thing other than cash in payment of premiums. W. U. R. Mont. 1 (1923).

the litigation which has arisen. The object of this scheme is fairly plain. It is designed to offer to the earlier insurants of the new or small company a reduction in rates which will enable it to compete with the attractions of the older companies which have demonstrated their ability to survive the dangers of the first few years and have accumulated an impressive surplus. It is also designed to enlist the good will and coöperation of these earlier policyholders in building up the company's business and protecting its interests.

With one exception the courts have held that this marketing device is illegal, either on the ground that it is a "discrimination" if the special benefits are stipulated in the policy [30] or on the ground that it constitutes "rebating" if the benefits are stipulated for in a collateral arrangement outside the policy.[31] The only case in which such an agreement has been upheld was *Julian* v. *Guarantee Life Insurance Co.*[32] in which the benefits were stipulated in the policy. The court held there was no rebating because the services to be rendered by the insured were "of evident value and utility to the safe conduct of the business of the company," and that the mere fact that the insured might not be called upon to render any services whatever was no reason for pronouncing the agreement a subterfuge.[33] In short, the court declined to apply the equivalency theory, and contented itself with finding that the agreement in question satisfied the "bargain" theory. The courts in the other cases above cited [34] refused to be satisfied with finding merely that there was a

[30] Cole *v.* State *ex rel.* Harris (1907), 91 Miss. 628, 648, 45 So. 11 (*semble;* but here the court declined to overturn a ruling of the insurance commissioner approving such policies); Leonard *v.* American Life and Annuity Co. (1913), 139 Ga. 274, 275, 77 S. E. 41.

[31] State Life Ins. Co. *v.* Strong (1901), 127 Mich. 346, 351, 86 N. W. 825; Citizens' Life Ins. Co. *v.* Commissioner of Ins. (1901), 128 Mich. 85, 91, 87 N. W. 126; Security Life Annuity Co. *v.* Costner (1908), 149 N. C. 293, 63 S. E. 304 (*semble;* but illegality no defence to action by insurer against insured to recover on premium note); Smathers *v.* Bankers Life Ins. Co. (1909), 151 N. C. 98, 103, 65 S. E. 746 (enforcement by insured of "advisory board" contract denied); Urwan *v.* Northwestern National Life Ins. Co. (1905), 125 Wis. 349, 358, 303 N. W. 1102 (but illegality no bar to recovery by insured of premiums paid); McNaughton *v.* Des Moines Life Ins. Co. (1909), 140 Wis. 214, 122 N. W. 764 (*semble;* but illegality no defence to action by beneficiary on the policy); Laun *v.* Pacific Mutual Life Ins. Co. (1907), 131 Wis. 555, 111 N. W. 660 (*semble;* but no recovery of premiums by insured after policy issued, distinguishing Urwan *v.* Ins. Co.).

[32] (1909) 159 Ala. 533, 49 So. 234.

[33] 159 Ala. 533 at p. 537.

[34] *Supra*, notes 30, 31.

"bargain," and brushed aside the contention that the services of the insured were the equivalent of the monetary benefits promised. The latter view is clearly the correct one, since the object of the statutes is not to require a peppercorn consideration for a contract, but to prevent the making of a gift under the guise of a contract.[35] The Alabama court further held that the "advisory board" provisions[36] were not discriminatory because the "class" of policyholders who were to receive the benefit included all of those who took out similar policies, within the limits named in the contract — in this case, all policyholders taking insurance within ten years or within a total of $10,000,000 of insurance. The reasoning is question-begging, since it would permit the insurer to discriminate with impunity simply by multiplying the number of "classes" of policyholders.

No purely analytical or logical test will suffice to determine what is "rebating" or "discrimination"; the final step of deciding whether a particular practice is or is not a violation of the statute is a balancing of considerations of public policy, or, as they have been called, "social interests." The "advisory board" decisions illustrate this point. Analytically, it can scarcely be denied that the first thousand policyholders in a newly formed life company receive less protection value per $1,000 of insurance than do the second thousand; for while the protection is the same by a purely legalistic standard (that is, the amount of money which the insurer obligates itself to pay), the early insurants take the grave risk that the new company may not survive the dangerous first years. Hence it is quite arguable that to allow the early policyholders a reduction in premium is no "discrimination." Indeed, it would be perfectly lawful for a new company to charge lower rates during its first few years, provided the required reserve was maintained, and increase its premium charges later.[37] Thus, logically, the "discrimination" in favor of earlier insurants is no discrimination at

[35] See also Thomson *v.* McLaughlin (1913), 13 Ga. App. 334, 337, 79 S. E. 182 (agreement by agent not to collect premium in exchange for purely nominal services of insured in procuring new business, held illegal and hence no defence to action on premium note given by insured).

[36] The term "advisory board" is used generically to describe all contracts of this type, whether in the particular instance the term is used in the contract or not. This usage is confirmed by the language of several statutes, e.g., Ala., § 4608; N. M., § 2841; Tex., § 1168, prohibiting "advisory board contracts."

[37] However, the new company must usually pay higher commissions to agents, and this would prevent it from lowering its premium charges if it is to build up a reserve.

all but is merely adjusting the premium charge to fit the actual protection which the insurant receives. Again, the scheme of enlisting the good will and active coöperation of the policyholders is in itself unobjectionable, if it really works. The "services" of one who aids the company in procuring new business are so intangible that it would be difficult to say that they are not, if actually given, equal in value to the small monetary benefit which the insurer gives in exchange for them.

The real objections to the "advisory board" scheme are that it is deceptive, and that it will not work. It is deceptive because, like most other "cheap insurance" schemes, it leads the average policyholder to believe that he is getting something for nothing. He is led to think that he is among the "favored few," and cupidity outruns caution. It will not work because the new company must pay at least as high commissions to "regular" (that is, vocational) agents as any other company — usually higher. The special benefit to the new policyholders must therefore come out of the reserve fund or surplus or other assets, and to this extent render the company *relatively* less safe than other companies, even if not technically insolvent. While in the cases above mentioned this point was not stressed,[38] it is believed that the courts sensed it. Another reason why the scheme will not work is that the companies probably will not attempt to enforce, even if they can, the insured's obligation to give the services specified in the contract. The fact that the company in most instances reserved merely the option of demanding such services was a factor which led the courts to suspect a subterfuge.[39]

How is an "infant" life insurance company ever to survive its swaddling clothes if it be not allowed to adopt some unusual scheme for attracting insurants away from the older and safer companies? The "infant industry" argument was addressed to the Supreme Court of Georgia in one case in which the legislature, while prohibiting rebating and discrimination generally, excepted from the operation of the statute, for a period of about three years, all life insurance companies then in process of formation.[40] In declaring

[38] However, in Smathers *v.* Banker's Life Ins. Co., *supra*, n. 31, the court pointed out that the effect of the scheme was to withdraw a portion of the company's assets for the benefit of this "favored" few, thus lessening the protection to other policyholders. 151 N. C. 98, at p. 103.

[39] See Smathers *v.* Ins. Co., *supra*, n. 31.

[40] Provided the company did a non-participating business only.

the exception unconstitutional as an arbitrary discrimination and a denial of the "equal protection of the laws," the court said:

> The infant industry suggestion, as a basis for giving an undue advantage to one company, or a few companies, does not impress us. It is too familiar as the argument of individuals or corporations which desire special privileges and unjust discriminations to be granted in their favor.[41]

Can it be that the learned judge had read the Democratic plank on tariff-protected industries?

Another illustration of the conflicting social policies involved in the application of these statutes is found in a ruling of the Massachusetts commissioner made in 1923. A company insuring a manufacturer against workmen's compensation claims wanted to furnish goggles to such of the manufacturer's employees as were engaged in work that sometimes caused injuries to the eyes from dust or flying particles — injuries for which the manufacturer, and hence the insurer, would have to pay. The commissioner ruled that to do so would be a violation of the anti-rebate law quoted above.[42] No doubt the prevention of injuries would benefit the insurer more than the insured. "Insurance engineering," or the study of preventive methods and devices, has received much attention from insurers in recent years, and it is not unlikely that in course of time the transfer of loss-bearing to a specialist (the insurer) will be followed by a similar transfer of the task of preventing losses.[43] However, the way to do it is by contract provision and not by irregular gifts. The goggles are of small value, but it might be difficult to draw the line if the insurer began making gifts of more substantial value.

To avoid the embarrassment of having to draw the line in particular cases, the commissioners have adopted hard and fast rules as to the extension of credit for premiums and the charging of interest on such credit. The language of most statutes is broad enough to render illegal even the extension of credit, as a "benefit or advantage" to the insured not stipulated in the policy.[44] Such a construction would, however, be not only contrary to respectable

[41] Lumpkin, J., in Leonard *v.* American Life and Annuity Co. (1913), 139 Ga. 274, 279, 77 S. E. 41.

[42] W. U. R. Mass. 10 (1923). The statute, § 182, of Ch. 175 is quoted *supra*, p. 310.

[43] Thus, companies insuring against liability due to (passenger) elevator accidents commonly furnish a regular inspection service as a part of the benefits stipulated in the policy.

[44] The policies in most forms of insurance recite or require cash payment.

and well-reasoned judicial authority,[45] but also contrary to the settled usages of the insurance business. The legality of extending credit is therefore generally recognized.

For how long a period may credit be extended? The Alabama department in 1923 ruled that credit must not be extended beyond sixty days from date of policy or renewal, on pain of revocation of license.[46] Elsewhere there appears to be no fixed limit. However, the insurance departments have quite generally ruled that interest must be charged on premium notes. Some of these rulings have been referred to.[47] In 1923 more than half the reported rulings on business-getting methods were devoted to this point. In some states it was ruled that the premium note must bear interest from the date when the policy (or renewal thereof) took effect.[48] In others the requirement was that the interest be charged from sixty days after delivery of the policy or the taking effect of the renewal.[49] In Virginia a different rule was adopted for fire and marine insurance, to conform to the credit practices prevailing in those branches of the insurance business; credit may be extended, without charging interest, until the fifteenth day of the second month succeeding the month in which the policy was issued.[50] The elaborate set of rules worked out by the Virginia commissioner in 1923, after four attempts, shows how far the process of rigid standardization has been carried.[51] The power of the commissioner to make such requirements has not been passed upon in any reported case. In *McGee* v. *Felter* [52] it was held that the taking of a note payable in eighteen months *without* interest was no violation of the statute against rebating and discrimination, in the absence of evidence that the omission to charge interest was an inducement in the procurement of the policy. The court said:

[45] Ellis *v.* Anderson (1912), 49 Pa. Super. Ct. 245, 253; the court points out the serious inconvenience which would be caused insurants by such a construction. See also Illinois Life Ins. Co. *v.* Kennedy (1914), 191 Ill. App. 29, a memorandum decision to the same effect.

[46] W. U. R. Ala. 7 (1923). This ruling may be meant to require merely the charging of interest after 60 days.

[47] *Supra*, § 14, n. 149.

[48] W. U. R. Ala. 4 (1923); Tenn. 3 (1923).

[49] W. U. R. Cal. 6 (1923) (interest at 6%); Fla. 1 (1923) (interest at 8%); Mich. 1 (1923) (no interest rate prescribed); Okla. 2 (1923) (interest at 6%); Va. 4 (1923) (interest at 6%; but see Va. 5 (1923) slightly modifying the rule as to life insurance premiums).

[50] W. U. R. Va. 6 (1923). [51] W. U. R. Va. 8 (1923).

[52] (1912), 75 Misc. 349, 355, 135 N. Y. Supp. 267 (action on premium note).

There is nothing in the law which compels one to insist upon or accept interest.[53]

The language and the holding seem inconsistent with the departmental rulings mentioned above, in none of which is any distinction made as to whether or not the waiving of interest would be an "inducement" in a particular case. Possibly the rulings are justified on the assumption that any monetary benefit is an "inducement" to the normal insurant. The statutes, however, are corrective, that is, aimed at particular abuses. It remains to be seen whether the commissioners are empowered by this corrective legislation to require rigid standardization.[54]

Two other 1923 rulings show the same rigidity. In Texas it was ruled that a fire company which writes a large risk at a lower rate (per $1,000 of insurance) than a small one of the same classification, is guilty of rebating.[55] The Missouri department ruled that companies which write automobile fire policies and include in the same or in a separate policy theft, property damage (liability), liability (for personal injuries), or collision insurance, at less than the normal rates, are guilty of illegal discrimination.[56] In other words, the distinction between retailing and wholesaling is not recognized as a proper basis of differentiation in rates.

2. *Misrepresentation and twisting.* In the development of the law of marine insurance which took place in the eighteenth century, misrepresentation by the insured received much greater attention than misrepresentation by the insurer.[57] Indeed, so great was the emphasis placed upon the duty of the insured to make a full and frank disclosure of all the circumstances affecting the risk and to aid the insurer in obtaining the relevant data for his decision to accept or reject the risk, that "concealment" or mere non-disclosure of relevant facts known to the insured at the time of making application barred a recovery by the insured.[58] That this doctrine

[53] 75 Misc. 349 at p. 355.

[54] See also Northern Assurance Co. *v.* Meyer (1916), 194 Mich. 371, 378, 160 N. W. 617 (action on premium note) in which it was held not to be rebating to extend credit for the period between the date of the application and the date of delivery of the policy, without exacting interest.

[55] W. U. R. Tex. 4 (1923). [56] W. U. R. Mo. 3 (1923).

[57] Pawson *v.* Watson (1778), 2 Cowp. 785, decided by Lord Mansfield, is the leading case.

[58] Carter *v.* Boehm (1766), 3 Burr. 1905, 1 Bl. 593, another opinion by Lord Mansfield, is the leading case. It was not a case of marine insurance but was the basis of subsequent holdings in marine insurance cases. It involved, however, the same situation as the marine insurance transactions, namely, rela-

has had an ill-starred career in the field of fire, life, and other types of insurance and is now virtually moribund, is some evidence that the factual situation has changed. The chief factors of this change have been: the use of insurance by an element of the population which is less capable of looking out for its own interests than were the shrewd traders of the eighteenth century; the standardization of insurance policies which has narrowly restricted the insured's choice of terms and correspondingly dulled his sense of responsibility for the wording of the policy; the growth of the business organization of insurance enterprises and the consequent decentralization of responsibility within the organization; and finally, the insurer's practice of carefully inspecting the risk (in fire insurance and life insurance) and forming a judgment independent to a large extent of the information furnished by the insured. To-day, then, misrepresentation by the insurer or his agent is an evil which demands more serious attention than misrepresentation by the insured.[59]

The earliest American statute aimed at this evil was enacted in Massachusetts in 1853.[60] It provided a maximum fine of $1,000 or a maximum imprisonment of six months for any person "who shall procure any payment or any obligation for the payment of any premium of insurance, by false and fraudulent representations." No reference was made to the revocation of a license on this ground. The same is true of the present Massachusetts statute as to misrepresentation by an insurer, its agent, or a broker.[61] In other states likewise misrepresentation by an insurer or agent is a penal offense, though revocation of license is not expressly authorized on this ground.[62] In some of these states, at least, it would seem that

tively greater inaccessibility to the insurer than to the insured of first-hand information regarding the object insured (an East Indian fort).

[59] Bearing in mind that the evil of misrepresentation by the insured is fairly well corrected by the rule denying recovery on the policy. Misrepresentation by the insured in filing proofs of loss is a criminal offense in some states.

[60] Mass. L., 1853, Ch. 376.

[61] Mass., § 181. This statute is more explicit than the earlier one, in that it expressly names "company," "officer," "agent therefor," and "broker" and includes "written or oral statement," and it omits the element of fraud. The penalty has been reduced to a maximum fine of $100.

[62] Ark., § 5030 (false representation by agent, a felony, punishable by 1 to 3 years in the penitentiary); Del., § 603 (misrepresentation by life company); Ia., §§ 5548, 5549 (misrepresentation of terms of policy by company, officer, or agent, a misdemeanor); Miss., § 5078 (fraudulent misrepresentations by agent; fine or imprisonment); Neb., § 3190 (but see § 3194 — revocation of agent's

revocation for misrepresentation would be authorized as falling within the scope of such broad grounds as "fraudulent practices," "violation of law," "untrustworthiness," and so forth.[63] It is submitted that in this instance the administrative sanction is a more effective means of securing the interests designed to be protected than is the judicial sanction. A criminal prosecution is slower and causes much greater inconvenience to the injured party, the insured, than does a proceeding to revoke the license. The fine assessed may be an inadequate deterrent; revocation of license carries with it not only criminal penalties for continuing to do business but also severe civil penalties.[64] A civil action for restitution of the premiums paid [65] is utterly inadequate to give the insured the protection he was led to expect. In short, the administrative sanction is believed to be a better means of prevention.[66] Hence those states have done wisely which have expressly made misrepresentation a ground of revocation of a company's,[67] an agent's,[68] or a broker's license.[69]

The fierce competition among insurance agents or agencies and the gullible readiness of a large proportion of the insuring public to believe that they can get something for nothing is responsible for such misrepresentation as goes on. Dividends are frequently misrepresented in the life insurance business. Dividends (that is, policy dividends) are paid to policyholders annually or at regular periods from the surplus of the company, which arises due to causes which need not be gone into here. Because of the uncertainty of those causes (for example, the relation between the actual mortality rate of the company's policyholders and the expected mortality rate, which ratio might be affected by an epidemic) the company cannot legally promise to pay dividends in the future, and the payment of dividends rests largely in the discretion of the directors. Yet a company which has been prudently managed and has thus paid large dividends to its participating policyholders, will natur-

license for "fraudulent practices"); N. J. L., 1912, Ch. 303, § 1 (fine or imprisonment); N. C., § 3486, S., § 4775b.

[63] For a discussion of these grounds see *supra*, §§ 13, 15.

[64] *Supra*, §§ 11, 14.

[65] As in Kettlewell *v.* Refuge Assurance Co. (1908), 1 K. B. 545.

[66] The writer has been unable to find any reported case of a criminal prosecution for misrepresentation by an insurer, agent, or broker.

[67] *Supra*, § 13, n. 174. [68] *Supra*, § 14, note 138.

[69] Cal. L., 1919, Ch. 547; Me., Ch. 53, §§ 140, 141; Md. IV, § 184C; Minn. L., 1915, Ch. 195, §§ 5, 6; N. H. L., 1913, Ch. 127, § 4.

ally want to use that fact as a selling point. How may it do so? The case of *State ex rel. Mutual Benefit Life Insurance Co.* v. *McMaster*[70] indicates how it may not. The company issued a pamphlet for distribution among "prospects," which the commissioner objected to as in violation of a South Carolina statute,[71] forbidding misleading circulars, and so forth. The pamphlet set forth in tabular form the benefits which would accrue to the holders of their policies under a scheme called the accelerative endowment plan, on the assumption that the dividends, which had been steadily increasing over a period of twelve years, would continue to be the same as in 1912, when they were considerably higher than in any previous year. However, the company carefully placed after the words "Accelerative Endowment Plan" the words "(Not guaranteed)," and stated that the company did not publish any "estimates" of future dividends because they were necessarily contingent upon business conditions, and hence could not be predicted in advance; and that the tabular showing of benefits was based on the assumption that the dividends would be maintained without change. The court refused to require the commissioner to approve the pamphlet, saying:

> The proposition for which the petitioner contends, is not tenable, for the reason that the statement in the circular, is based, not only upon the scale of dividends for the year 1912, but upon the assumption that there will not be a decrease in the scale of dividends, during the two periods mentioned in the circular, to wit: 27 and 37 years. This assumption is unreasonable and tends to mislead the public, for the reason, that the scale of dividends is based upon a single year, and upon the further fact, that the scale for that year, resulted in a considerable increase in the dividends, over any previous year.[72]

The company's statement that it did not "estimate" future dividends was belied by its own estimate. To the uninitiated and the

[70] (1912), 92 S. C. 324, 75 S. E. 547.

[71] S. C. 25 Stat. L. 1110 (1908): "No life insurance company doing business in this state . . . shall issue or circulate, or cause or permit to be issued or circulated, any estimate, illustration, circular or statement of any sort, misrepresenting the terms of any policy issued by it, or the benefits or advantages promised thereby, or the dividends or shares or (of?) surplus to be received thereon, or shall use any name or title of any policy or class of policies, misrepresenting the nature thereof." Statutes of equally inclusive scope and detail are quite common. See, for example, N. Y. Ins. Law, § 60, as amended by L. 1911, Ch. 533, and L. 1913, Ch. 47. The New York law is substantially identical with the one just quoted.

[72] 92 S. C. 328–9.

gullible it was misleading. That no action for deceit would lie for the making of a representation so carefully guarded is obvious. That it was found to be illegal shows how far we have travelled from the "duty of disclosure" of the insured to the "duty of disclosure" of the insurer.

The practice of "twisting" has already been discussed.[73] In one sense it is another phase of the duty of full disclosure which rests upon the agent or broker. In inducing a person already insured in another company to surrender his policy for the purpose of taking a policy in *his* company, the agent must not only not misrepresent the policy of his rival,[74] but also, under some statutes, he must not make any "incomplete comparison" of his own with the rival policy.[75] Does "incomplete comparison" require not only the disclosure by the agent to his prospect of all the "facts" relevant to the respective merits of the two policies, but also a full and impartial statement of the advantages and disadvantages of the two policies? If so, the art of insurance salesmanship will have to undergo a violent change, and the scope of competitive activities will be severely narrowed. Probably, as penal legislation, such a statute would not be given this drastic interpretation. Yet the indefiniteness of the business standard will inevitably make the statute difficult to apply. Thus far the writer has not come across any reported judicial or administrative decision involving "twisting."

It is submitted that the difficulty in interpreting these "twisting" statutes is due to the circumstance that the statutory language does not disclose the real evil which they are designed to correct, namely, that the enterprising insurance agent will make two commissions blossom where only one grew before. For instance, in the industrial life, health, and accident business, where the practice of twisting has been most serious, the agent gets a strong personal hold on the insurants who pay small premiums weekly or monthly or quarterly. The initial commission — that is, the commission on a

[73] *Supra*, § 14, p. 179. In Graham, *The Romance of Life Insurance*, pp. 248–9, George T. Dexter, a vice-president of the Mutual Life Insurance Co., is quoted as giving six bad consequences of twisting. Most of these are mentioned in the text.

[74] E.g., Mass., § 181; Cal. L., 1919, Ch. 607, § 1; Ind., §§ 4714d, 4714e; Me., Ch. 53, § 140; Md. IV, § 184C; N. H. L., 1913, Ch. 127, § 4; N. C. S., § 4775b.

[75] N. Y. Ins. Law, § 60, as amended by L., 1913, Ch. 47. This language is quite common: e.g., Idaho, § 5025; Mich. II, 3, § 10; Neb., §§ 3277–3281; N. J. L., 1912, Ch. 303, § 1.

new application — is much higher than on a renewal or a continuation of a policy. Hence if an agent who has built up a business for the A company goes over to the employ of the B company, he can induce a considerable number of his patrons to lapse their policies in A company and take out new policies in B company — for which the agent will receive initial commissions much larger than the ones he would have received had these insurants remained with A company. If B company makes an effort to lure this agent away from A company, it is called "poaching" — a practice which aroused the ire of the commissioners a good many years ago.[76]

The individual insured does not pay this additional commission and neither the agent nor B company has any immediate direct interest in stopping the practice. However, regardless of the way in which it is brought about, the lapsing or surrender of policies and the consequent increase in the number of initial commissions payable augment the already burdensome load of overhead expense which the policyholders must pay. Moreover, anything which weakens the habit of regular and punctual payment of premiums weakens the effectiveness and safety of insurance. The chief evil of "twisting," then, is not the unfair methods by which it is consummated, but the effects which it tends to produce upon premium rates and distribution of surplus. The Minnesota statute is worded with this evil in view; it provides for revocation of the license of a broker who "has urged or procured any person . . . to lapse or surrender any policy or contract of insurance . . . to the damage of such person." [77] Yet it does not quite cover the point, for the individual policyholder may get as good a policy as the one he surrendered, and thus not be directly "damaged"; and yet the undesirable consequences of "twisting" would remain the same. These undesirable consequences can be better eliminated by cooperation between companies and between agents than by statutory enactment.

3. *Advertisements and circulars.* The insurance commissioner's control over advertising and circulars is in one sense a phase of his control over misrepresentations. However, there are several reasons why the former merit special attention. They are usually prepared by the home office or by some high official of the company, and hence, unlike the oral misrepresentation, they represent a company offense rather than an agent's offense. Thus, the circular involved in *State ex rel. Mutual Benefit Life Insurance Co.* v.

[76] See *infra*, § 22, p. 352.

[77] Minn. L., 1915, Ch. 195, § 6.

McMaster,[78] was prepared and issued by the company. Again, many of the statutes as to misrepresentations are confined to statements about the terms or benefits of policies, and do not cover statements as to the company's assets or financial condition. In the third place, statutes have frequently been drawn so as to apply explicitly to advertisements and circulars.[79] Fourthly, many of these statutes go beyond the suppression of misrepresentations and set up patterns or standards to which company advertising must conform. In other words, these statutes are not all merely "corrective"; many are "standardizing."

The former type is represented by statutes which prohibit falsely advertising assets,[80] or advertising a capital larger than the company actually possesses, paid up and properly invested,[81] or advertising assets not actually owned by it in its exclusive right, available for the payment of claims.[82] The latter type is represented by the New York requirement that every advertisement or public announcement and every sign, card, or circular issued by any company doing business in the state, "shall exhibit" certain things and shall "correspond with" the company's last annual statement to the insurance commissioner.[83] Similar statutes prescribing the contents of advertising matter are found elsewhere.[84] In some instances revocation of license is expressly authorized for violation of these statutes.[85] In most instances, no express provision is made, and the problem of administrative enforcement would depend upon the existence, and interpretation, of such "general" grounds of revocation as "violation of law," "fraudulent practices," or "will best promote the interests of the people of this state." [86]

None of the statutes above cited requires the filing of the advertising matter with the commissioner either before or after publica-

[78] *Supra*, note 70.

[79] See citations in the following notes.

[80] Idaho, § 5020; La., § 3598. See also Ala., §§ 4593, 4594.

[81] Ia., §§ 5499, 5500; Neb., § 3190; N. J. L., 1912, Ch. 303, § 1; N. Y., § 47 ("available for the payment of losses and claims, and held for the protection of policyholders and creditors"); N. C., § 4812.

[82] Ore., § 6347; Wash., § 7085.

[83] N. Y. L., 1913, Ch. 205 (§ 48).

[84] Idaho, § 5022; La., § 3599; Mass., § 18; Minn., § 3290; Miss., § 5035; Mont. C., § 4064; Neb., § 3191; N. C., § 3492; Ohio, § 9588; Okla., § 6697; Wash., §§ 7086, 7087; Wyo., § 5270.

[85] Ill., § 25; Ia., § 5500, Neb., § 3169 (permitting deceptive use of name).

[86] *Supra*, § 13, pp. 133–141.

tion,[87] and none confers a power of approval or disapproval. Yet as the official charged with the punishment of violations of these statutes, the commissioner may exercise a sort of informal approval power. Thus in *State ex rel. Mutual Benefit Life Insurance Co.* v. *McMaster*,[88] the company applied for a writ of *mandamus* to compel the commissioner "to grant to the petitioner permission to circulate a certain pamphlet, which the respondent (commissioner) had ruled was in violation of law." The statute as to misleading circulars [89] contained a prohibition but no approval nor disapproval provisions. The licensing statute authorized issuance if the commissioner was satisfied "that its dealings are fair and equitable, and that it conducts its business, in a manner not contrary to the public interests." [90] This ground was surely broad enough to cover misleading circulars; yet no mention is made of any refusal or revocation of a license. The court did not discuss the question, did the commissioner have power to refuse "permission" to circulate this pamphlet? If he did not have such power, the court was passing upon a moot controversy — a thing which courts will rarely do even if, as here, both parties are willing. The court confined itself to "the question raised by the pleadings," which was whether or not the circular was misleading.[91] The case gives some support to the theory of an implied approval or disapproval power. Obviously such a power will be only sporadically effective unless accompanied by a requirement of filing or submission. It seems that the evil of misleading advertisements by insurance companies is not sufficiently serious to justify the labor involved in such a scheme.

In most of the states companies are required to publish annually a synopsis of their annual reports to the commissioner. In so far as this is done by the commissioner or under his direction,[92] he has a power of approval of this type of advertisement.

Official rulings as to advertising methods are apparently infrequent. The only one which the writer has come across is a Michigan ruling requesting that insurance companies in their advertisements

[87] In some instances the commissioner is empowered to require the filing of advertising matter "for his inspection" (e.g., Mass., § 191), but this inquisitorial power does not imply an approval or a disapproval power.

[88] (1912), 92 S. C. 324, 75 S. E. 547.

[89] S. C. 25 Stat. L. 1110.

[90] S. C. 26 Stat. L. 772.

[91] 92 S. C. 328.

[92] *Infra*, § 32, n. 9.

do not mention the banks or building and loan associations with which they are associated.[93]

4. *Miscellaneous Methods.* The sale of stock in the company along with insurance is a ground of revocation of the company's license in some ten states,[94] and sometimes, of the agent's license.[95] Since the scheme is usually devised by the company, the penalty should fall chiefly upon it. In other states the selling of stock, bonds, or other securities of a corporation "in connection with" insurance is prohibited, though revocation is not expressly authorized.[96] Whether a violation of these statutes is a ground of revocation will depend upon the effect given to other provisions naming the grounds of revocation. In *State ex rel. Coddington* v. *Loucks* [97] the court held that revocation of an agent's license for selling stock "as an inducement" to purchase life-insurance policies, was not authorized under a statute empowering the commissioner to revoke on the ground of giving or offering rebates. The case is opposed to well-considered cases in other jurisdictions,[98] and seems clearly wrong on the facts.[99] The possibility of sustaining the revocation on "general grounds" was not involved.

What constitutes a selling of stock "in connection with" the sale of insurance? The only decision on this point which has been found is *Utah Association of Life Underwriters* v. *Mountain States Life Insurance Co.*,[100] in which the court reversed and annulled the license granted by the commissioner. Two circumstances were stressed as showing that the stock of the insurance company was sold "in connection with" its policies: first, that the application for stock was made a part of the application for insurance, both being contained in the same printed form; and second, that no stock of the company had been sold to persons who had not likewise taken insurance, except seven qualifying shares issued to directors.[101]

[93] W. U. R. Mich. 1 (1923). [94] See citations *supra*, § 13, n. 193.

[95] See Ariz., § 3408; S. C., § 2731.

[96] E.g., Mass., § 121; N. Y. L., 1913, Ch. 25 (§ 65 of the Insurance Law); Wyo., § 5235.

[97] (1924), 32 Wyo. 26, 228 Pac. 632.

[98] *Supra*, this section, n. 17.

[99] The answer of the respondent (commissioner) alleged that relator had offered stock "as an inducement to purchase life insurance policies in said company." As the answer was demurred to, this allegation was admitted and the anti-rebate law was clearly violated.

[100] (1921), 58 Utah 579, 200 Pac. 673, construing Utah, § 1168, one of the statutes referred to *supra*, this section, n. 94.

[101] 58 Utah at p. 588.

The plan of selling its stock along with its policies offers many attractive features to a newly formed life insurance company which desires to build up its business quickly. It opens up a market for its securities where they will be more quickly absorbed than through the usual investment channels; it is attractive to agents and thus enables the company to build up rapidly an effective agency organization; and it tends to enlist the energy of policyholders in the increase of the company's business. On the other hand, the evils of such a scheme are substantial. It may lead to fraud and misrepresentation by exposing the ignorant insurant, in an exceptional degree, to "the wiles of the experienced life insurance solicitor." [102] The possibilities of abuse in the scheme are illustrated by the form of contract in the case last cited. It contained an ingenious suggestion that the stock might be paid for out of the "dividends" due the insured on his participating life insurance policy.[103] The ignorant insurant might readily be led to believe that the company could thus lift itself by its own boot-straps.

Even if the scheme were carried out without misrepresentation, it would be socially undesirable. Life insurance is an "investment," that is, an investment yielding a low return. On the other hand, stock of a corporation, especially of a newly formed one, is apt to be a "speculation." These two things should not be confused in the public mind. If both are sold at once, the "merits" of the insurance will not be properly considered by the insured.[104] It does not follow, of course, that the only way to prevent these evils is to forbid altogether the sale of stock in connection with insurance, as in the statutes above cited. By requiring that all the printed matter used by an insurance company in promoting the sale of its securities shall first be submitted to the commissioner and approved by him,[105] the harmful tendencies of such a practice will be minimized.[106]

One other business-accelerating device has come under the ban. The offering of prizes or bonuses to agents for a large volume of business written in a given period is a favorite method of stimulating the agency force. In a few states this practice is explicitly forbidden.[107] Here again it is not the immediate object — the

[102] 58 Utah at p. 589. [103] *Ibid.*, p. 586.

[104] *Ibid.*, p. 585.

[105] E.g., N. Y. L., 1913, Ch. 52 (now § 66 of the Insurance Law).

[106] In New York, however, the sale of stock with insurance is prohibited altogether; see *supra*, n. 96.

[107] E.g., Wis., § 1950S.

spreading of life insurance among the people — which is to be suppressed, but the incidental abuses. The feverish competition of such contests will lead to misrepresentation by the agent, or to rebating.[108] Policyholders who are induced to take out insurance under the pressure of such contests are not likely to keep up the insurance after the first year. Any practice which tends to increase the proportion of lapsed or surrendered policies is harmful. If a life insurance company received from all premiums paid only the percentage which it receives from the initial premium (deducting the agent's commission), it would speedily become insolvent. Besides all this, we prospective victims are entitled to have our peace and privacy protected against such *n*th power efficiency in business getting.

The problem of regulating the business-getting methods of insurance companies involves much more serious administrative difficulties than the regulation of assets and financial condition. The latter can be effectively checked from the annual reports and the home-office records of a limited number of companies. On the other hand, business-getting methods involve oral transactions by a larger number of agencies with a myriad of insurants, which are nowhere fully recorded. Not even the largest department has a sufficient force of inspectors to investigate on their own initiative the legality of these oral transactions, and the enforcement of the statutes as to misrepresentation and rebating by agents in individual cases must be left to private initiative.

[108] Thus, in Biggs *v.* Reliance Life Ins. Co. (1917), 137 Tenn. 598, 195 S. W. 174, the agent was a contestant for an automobile offered by his company to the agent who should write the greatest amount of insurance during that month. The supervisor of agents advised him to write insurance on Biggs' life even though he "had to take a long chance on the collection" of the premium. The agent agreed never to sue on the premium note which Biggs gave. The agent paid the company; Biggs died, and his administrator collected the insurance.

CHAPTER IV

INQUISITORIAL AND VISITORIAL POWERS

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§ 22. *Reports and examinations.* The inquisitorial and visitorial powers of the insurance commissioner form an important part of the procedure by which he carries out the functions of his office. In so far as his investigations and the data obtained from reports are the basis for some further action to correct evils or compel conformity to standards, these powers resemble the powers to compel hearings which are treated under the general head of procedure.[1] However, from another point of view the inquisitorial and visitorial powers are functional and not merely the means to some further end. It was formerly, and still is to a lesser extent, one of the chief objects of the statutory and administrative provisions to obtain in compact and accessible form detailed and reliable infor-

[1] *Infra*, § 25.

mation as to the financial condition of insurers, for the information of the insuring public.[2] While it is easy to exaggerate the extent to which the public resorts to and relies upon the data gathered by the insurance departments, nevertheless the publicity given to financial statements and examinations indicates that, in part, the exercise of the commissioner's inquisitorial and visitorial powers is an end in itself. To indicate this twofold character, these powers and duties have been placed between the powers treated functionally and those treated as adjective or procedural.

The powers which fall under the general heading of inquisitorial and visitorial may be grouped under two sub-headings. The first embraces the provisions as to annual reports of insurers. While these resemble registration requirements, they confer far more latitude of administrative discretion. The second and more important phase is the power to "examine" insurers.

1. *Annual reports of insurers.* The annual reports or statements filed by insurers with the insurance commissioner form one of the most important parts of the regulatory machinery. The checking of these reports for inaccuracies and inconsistencies absorbs a large proportion of the time of every department. From the data thus presented by the insurer, the commissioner is able to make a fairly prompt though rather superficial estimate of its financial soundness. Of course, the annual report is a self-serving declaration; and the penalties for perjury can hardly be regarded as a sufficient deterrent to a group of men who plan a dishonest enterprise or who are desperately trying to save a failing one. Moreover, beneath summaries and categorical answers lie honest differences of opinion which can be only revealed by a thorough examination of the company's books and assets. That the annual statement is extensively relied upon is due partly to the fact that insurance company officials are not often found to falsify their reports, partly to the prohibitive expense of making full examinations of all companies annually.

a. Time of filing; power to extend time. The time for filing annual statements is almost universally fixed in the statutes, usually in January or February; an exception is made in case of foreign (alien) companies, which are allowed to file their statements, as to business done outside the United States, at a later period, often as late as July 1. In the same state different times will be prescribed

[2] See former Commissioner Hardison (of Massachusetts) in *Proc. N. C. I. C.* (1919), p. 190.

for the filing of reports of different types of companies,[3] in some instances three or more dates being named. While there may be reasons of administrative economy for having the reports come in at different times, it is far from clear that the variations are systematically arranged with this object in view. True, the earlier dates are usually assigned to mutual and local companies, whose reports will generally be less voluminous than those of foreign or other "old line" companies; yet fraternals are usually assigned a later date (March 1). The language of the statutes on this point is needlessly diverse,[4] needlessly prolix and repetitious [5] and often overlapping and obscure as to the types of companies referred to.[6] If diversity really serves any purpose, it should be used to spread the checking of annual statements over a longer period and thus to avoid the excessive burden of work in the spring. A uniform date for all states has been urged.[7]

Suppose for some reason the commissioner desires to extend the time of filing the annual report of a single company, or the reports

[3] Cf. Ariz., §§3404, 3456, 3468; Ark., §§4992, 5073; Cal. P. C., §611 and C. C., § 4538; Conn., §§4079, 4110, 4128; Del., §§ 574, 630; Ga., §2418; Idaho, §§ 4995, 4996, 5060; Ill., §§67, 68, 97, 185; Ind., §§ 4632, 4644, 4685; Ia., §§ 5482, 5632, 5685; Ky., §§ 630, 691; Me., Ch. 53, § 91, Ch. 54, § 91; Mich. I, 2, §§ 4, 7, III, 4, § 23; Minn., § 3294; Mo., §§ 6129, 6136; Mont. C., §§ 4058, 4089; Nev., §§ 1292, 1327; N. H., Ch. 168, § 17, L., 1913, Ch. 42, § 3; N. J., p. 162, § 9, p. 2857, § 65, p. 2874, § 128; N. Y. L., 1910, Ch. 634, § 16 (§ 44); N. C., §§ 4698, 4745, 4777; N. D., §§ 4846, 4915; Ohio, §§ 9363, 9590; Pa., §§ 127, 250; Tex., §§ 4729, 4778, 4821; Vt., § 5592; W. Va., §§ 7, 35; Wis., §§ 1920, 1921, 1950W; Wyo., §§ 5264, 5321. In the following statutes, semi-annual reports are required: Ga., § 2418 (Jan. 1 and July 1); Neb., § 3178 (list of securities); N. C., § 4719 (gross receipts); S. C., § 2702 (premium receipts).

[4] E.g., six different ways of designating what is substantially the same date: (1) "January 1st, or sixty days thereafter" (Ark., § 4992; Ga., § 2418; Ind., § 4685; Kan., § 5200; Mo., § 6129; Ore., § 6413); (2) "during February" (Ark., § 5047); (3) "on or before March 1st" (Ark., § 5066; Ore., § 6326 (3); S. D., § 9352); (4) "January 1st, or within two months thereafter" (Kan., § 5212; S. D., § 9172); (5) "Within sixty days from December 31" (Mo., § 6188; N. D., § 4973; Okla., § 6901); (6) "Before the last day of February" (Okla., § 6686).

[5] Mass. (§ 25) and N. Y. (§ 44) have a single provision as to the date of filing; but only eleven states emulate their example: Colo., Fla., Ga., Md., Minn., N. M., Tenn., Utah, Vt., Va., Wash.

[6] Cf. Ind., §§ 4632, 4685; Ky., §§ 651, 691; Mo., §§ 6129, 6188; Nev., §§ 1292, 1327; N. C., §§ 4698, 4777; N. D., §§ 4846, 4915; Ohio, §§ 9363, 9430, 9374, 9567, 9590. The Ohio statutes are particularly atrocious.

[7] Former Commissioner Hardison (of Massachusetts) in *Proc. N. C. I. C.* (1919), p. 15.

of a certain class of companies; has he the power to do so? This is no mere academic query. In 1919, the commissioners were very anxious to have the insurers use a newly prepared table of security values in making their reports in the ensuing year. However, the table could not be printed and distributed ready for use in time to enable the company to get in its report at the date named in the statute. All commissioners present were asked to state whether or not they could extend the time of filing. Seventeen reported they had no discretionary power to extend the date, but of these, twelve announced that they would extend the date anyhow, though technically a violation of the statute.[8] Only six reported that they had discretionary power.[9]

Fifteen states confer on the commissioner discretionary power, more or less limited, to extend the time of filing.[10] Of these, only three allow him unlimited discretion,[11] one provides merely for "good cause shown," [12] and the rest have limitations on the length of time for which the extension may be made, varying from fifteen days [13] to sixty days [14] and as high as six months.[15] On the other hand, North Dakota truculently forbids the commissioner to receive any such annual statement after the date fixed in the statute, unless accompanied by the penalties prescribed for delinquency.[16] No doubt an unexplained failure to report is suspicious; yet it seems preferable to give the commissioner some opportunity to relieve against hardship where good grounds are shown.

[8] Ark., Colo., Conn., Ind., Kan., Md., Mich., Mo., N. H., N. Y., Vt., Wis. The others declined any extension: Cal., D. C., Ia., N. C., R. I.

[9] Ala., Ill. (life companies), Me., Ky., Mass., Va.

[10] Ala., § 8350 (but not in § 8512); Conn., § 4103 (alien fire); Ill., § 187 (life); Ky., § 627; Me., Ch. 53, § 91; Mass., § 25; Minn., § 3294; N. H., Ch. 169, § 12; N. J., p. 2859, § 70; Okla., § 6686; Ore., § 6326 (3) (?); S. D., § 9175 (?); Tenn., § 3299; Va., § 4229; Wis., § 1971.

[11] Ala., Conn. (alien fire), Ill. (life).

[12] Okla.

[13] Me., Minn. (other than fire).

[14] Ky., Va., Wis.

[15] N. J.

[16] N. D., § 4915. See also Ore., § 6326 (3) ("in the discretion of the commissioner a penalty of $10 per day shall attach for delinquency in filing such statement"), § 6424 (4) (license shall terminate in case of failure to make report within time prescribed); S. D., § 9175 (cease to do business if delinquent); Tex., § 4802 (28) (forfeiture of charter for delinquency); Va., § 4229 (for failure to make report when required, $100 to $1,000 fine; commissioner must "publish such failure as soon as it occurs, at the expense of the company in such newspaper and for such length of time as he may prescribe").

b. Contents of report. The contents of the annual reports vary with respect to the different types of companies. The specifications of the Massachusetts statute, for instance, contain thirty-eight headings for fire or marine companies, eighty-three for life companies.[17] These headings give only a faint idea of the voluminous character of these reports. The statement of a large life company will occupy a hundred or more closely tabulated pages of full folio size, crowded with numerals. Not even higher astronomy can match the wearisome mass of these figures.

In some statutes, the contents of the report are set forth in great detail in the statute, as in the Massachusetts provision.[18] In others, it is merely directed in a general way that the statement shall exhibit its "condition," "assets and liabilities," and like general phrases.[19] In some instances the commissioner is expressly given discretionary power in preparing the form of the statement;[20] in others, he is directed simply to furnish blanks.[21] The National Convention of Insurance Commissioners has been striving for many

[17] Mass., § 25.

[18] Ariz., § 3470; Cal. P. C., §§ 612, 613; Colo., L., 1913, Ch. 99, § 15; Conn., § 4079; Del., § 574; Fla., § 2758; Ga. C. § 2415; Idaho, § 5001; Ill., §§ 67, 68, 185; Ind., § 4685; Ia., §§ 5482, 5632, 5685; Kan., §§ 5200, 5212; Ky., § 651; La., § 3586; Mass., § 25; Minn., § 3296; Miss., § 5163; Mont. C., §§ 4058, 4130; Nev., § 1292; N. H. L., 1913, Ch. 42, § 3; N. D., §§ 4846, 4916, 4931; Ohio, §§ 9363, 9370, 9430; R. I., Ch. 220, § 15; S. D., §§ 9216, 9352, 9359; Tex., §§ 4765, 4813, 4873; W. Va., §§ 7, 35; Wis., §§ 1920, 1954; Wyo., § 5264.

[19] Ala., § 8350; Ariz., §§ 3404, 3468; Ark., §§ 4992, 5047; Conn., §§ 4099, 4110; Ill., § 40; Ind., § 4632; Ia., § 5514; La., §§ 3647, 3674; Me., Ch. 53, § 91; Md. I, § 201; Mich., I, 2, § 7; Minn., § 3294; Miss., §§ 5082, 5100; Mo., §§ 6129, 6164, 6188; Neb., §§ 3181, 3304; Nev., §§ 1319, 1327; N. J., p. 2859, § 70; N. M., § 4816; N. Y. Consol. L., § 44; N. C., § 4698; Ohio, § 9439; Okla., §§ 6686, 6824; Ore., § 6326 (3); Pa., § 127; Tenn., § 3299; Utah, § 1143; Vt., § 5591; Va., § 4229; Wash., §§ 7046, 7071.

[20] Ala., § 8434; Ariz., §§ 3404, 3493; Ark., § 4992; Cal. P. C., § 615; Conn., §§ 4100, 4103; Idaho, § 5001; Ill., §§ 40, 67, 68; Ind., § 4686; Ia., § 5525; Kan., § 5175; Ky., § 627; Me., Ch. 53, § 91; Md. I, § 201; Mass., § 25; Mich. I, 2, § 7; Miss., §§ 5082, 5117; Mo., § 6092; Mont. C., §§ 4072, 4130; Neb., §§ 3181, 3304; Nev., §§ 1295, 1319, 1327; N. H., Ch. 169, § 12, L., 1913, Ch. 42, § 3; N. J., p. 2859, § 70; N. Y. Consol. L., 1909, § 44; N. C., §§ 4698, 4708; Ohio, §§ 659, 9439; Okla., §§ 6686, 6943; Ore., § 6424 (1); Pa., §§ 127, 180; R. I., Ch. 219, § 25, Ch. 220, § 15; S. C., § 2714; Tenn., § 3299; Tex., §§ 4729, 4821; Utah, § 1143; Va., § 4229; Wash., § 7071; W. Va., § 42; Wis., §§ 1915 (5), 1971; Wyo., § 5281, 5321.

[21] Ariz., § 3388; Ark., § 4984; Conn., §§ 4063, 4128, 4163; Del., § 573; Ky., § 755; La., § 3674; Minn., § 3294; N. M., § 2807; N. D., § 4915; Ohio, § 9430; S. D., §§ 9116, 9352; Tex., § 4803; Vt., § 5591.

years to attain uniformity among the states in the annual statement blanks required for each type of company.[22] Several states have adopted the "Convention" blanks by express statutory provision, either the form last adopted by the Convention before the enactment of the statute,[23] or the one "adopted from time to time." [24]

It is not always easy to determine from the statutory provisions the scope of the inquisition authorized. The exercise of inquisitorial powers by administrative officials has more than once been the cause of bitter struggles in the history of Anglo-American law.[25] Thus, the question is of more than academic interest. It is often not clear, for example, whether the power to prescribe the *form* of the annual report is merely a power to fix the physical features of the blank form furnished (such as arrangement and classification of items on the same page, size of type, and so forth) or a power to determine the scope and content of the questionnaire.

Of course, the distinction between form and content is merely one of degree, and no fixed line of demarcation is possible. Thus, in California, where the contents of the annual reports are set forth in the statute in great detail,[26] the statute further empowers the commissioner to prepare such blank "as seems to him best adapted to elicit from the companies a true exhibit of their financial condition."[27] Does this authorize him to go into details of the company's business not specifically falling under the statutory headings but such that he deems the same relevant to the general topics indicated by the statute? So, in Connecticut, a statute requiring "a statement of its affairs and operations" [28] is followed by a section requiring that the report be made "on such blank forms as he may prescribe." [29] Does this not authorize him to determine the contents and scope of the questionnaire, limited only by the vague language of the act? A Kansas section authorizes him to amend or add to the blank form (elsewhere prescribed in great detail),[30] "as shall seem best adapted to elicit from said companies a true exhibit

[22] See *Proc. N. C. I. C.* (1919), p. 129, and pp. 32, 125, 174.

[23] Ala., § 8348.

[24] Colo. L., 1913, Ch. 99, § 15; Fla. L., 1919, Ch. 7869, § 1, Ch. 7867, § 2; Idaho, § 5001; Ia., § 5550 (permissive); Neb., § 3181; Wash., §§ 7046, 7071; Ore., § 6326 (3). Also, Ala., § 8343 ("such as are in general use").

[25] See Wigmore, *Evidence* (2d ed., 1923), § 2250.

[26] Cal. P. C., §§ 612, 613.

[27] Cal. P. C., § 615.

[28] Conn., § 4099 (steam boiler).

[29] Conn., § 4100.

[30] Kan., §§ 5200, 5212.

of their condition in respect to the several points enumerated in the insurance laws."[31] This resembles the California provision but seems narrower, as the scope of the inquiry is expressly limited to the enumerated "points." Other statutes giving power to change, amend or revise the forms of reports, are somewhat ambiguous, but probably refer to administrative mechanics rather than the scope of the inquiry.[32] Yet a Missouri provision, "in such manner and form as he shall prescribe," [33] unaccompanied by details, necessarily gives great latitude of discretionary power.

In some thirteen states there are provisions, of more or less limited application (as to the type of company) which explicitly give the commissioner power to prescribe the scope and contents of the annual report. Conspicuous among these is the New York general provision, which requires every insurance corporation, domestic, foreign or alien, to file a sworn statement, "showing its *condition* on the thirty-first day of December then next preceding, which shall be in such form and *shall contain such matters*, as the superintendent shall prescribe." [34] While another section [35] prescribes under seventeen headings the matters which must be contained in the annual reports of life insurance companies, these specifications do not limit the power of the superintendent as given in section 44, since section 103 states that these seventeen items are required "in addition to any other matter which may be required by law or pursuant to law by the superintendent of insurance to be stated therein"; moreover, as to fire companies and marine companies, no such details are given.[36] Maine, which does not give details of the annual reports, requires a statement "setting forth its condition as required by blanks furnished by the commissioner." [37] Oregon exacts such a detailed exhibit of its condi-

[31] Kan., § 5175.

[32] Ia., § 5525; Ky., § 627; Mont. C., § 4072; Nev., § 1295; Wis., § 1971.

[33] Mo., § 6164.

[34] N.Y., § 44, (italics ours). Similarly, Ala., § 8434; Md., I, § 201; Mich. I, 2, § 7, II, 2, § 3; Miss., § 5082; Mo., § 6188; N. C., § 4698; Okla., § 6686; Tenn., § 3299; Tex., § 4942g. Ex-Superintendent Vorys (of Ohio) pointed out that the distinction between statutes of the New York type and statutes which prescribe the contents of the annual report in detail and authorize the commissioner to prescribe or change the form of the report, has an important bearing on the legality of the so-called "Burlington Rule." *Proc. N. C. I. C.* (1919), pp. 184–186.

[35] N.Y., §103.

[36] N. Y. Consol. L., 1909, Ch. 28, Arts. 3, 4.

[37] Me., Ch. 53, § 91. Similarly, Neb., § 3304; N. H., Ch. 168, § 17.

tions and transactions as the commissioner "shall reasonably prescribe." [38]

The Massachusetts statute confers power upon the commissioner to add to the statutory questionnaire:

> He [the commissioner] shall embody therein, so far as appropriate to the several companies, the substance of the forms provided for in this section, with any additional inquiries he may require for the purpose of eliciting a complete and accurate exhibit of the condition and transactions of the companies.[39]

A number of other statutes authorize the commissioner to require, in connection with the annual report, "such other information as the commissioner may deem necessary," [40] "such interrogatories as he may deem necessary to explain the same," [41] and like phrases.[42]

Besides these broad inquisitorial powers, the commissioner is frequently given a *carte blanche* to require the companies to answer inquiries at other times than the one fixed for its annual statement, as in the Massachusetts provision:

> The commissioner may at other times require any such statements as he may deem necessary.[43]

The New York provision is not quite a *carte blanche*, but the limitations are only those which would probably be read into the Massachusetts statute by implication:

> The superintendent may also address any inquiry to any such insurance corporation or its officers *in relation to its doings or condition*, or any other matter connected with its transactions.[44]

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[38] Ore., § 6326 (3).

[39] Mass., §25.

[40] Conn., § 4110.

[41] Me., Ch. 53, § 153.

[42] Ala., § 8434; Ariz., §§ 3468, 3493; Ark., § 5066; Colo. L., 1913, Ch. 99, § 24; Conn., § 4161; Fla. L., 1919, Ch. 7869, § 1; Idaho, § 5001; Ill., §§ 68, 186a; Ind., § 4686; Ia., §§ 5482, 5514; Kan., § 5525; Ky., § 627; La., §§ 3586, 3647; Mich. I, 2, § 7, III, 4, § 23; Miss., § 5106; Mo., § 6129; Mont. C., § 4130; Neb., § 3181; Nev., § 1327; N. H. L., 1913, Ch. 42, § 13; N. Y. Consol. L., 1909, § 44; N. C., § 4708; N. D., § 4846 (41); Ohio, § 9375; Okla., § 6824; Ore., § 6326 (3); Pa., § 250; S. D., § 9352; Tex., § 4765; Utah, § 1143; Vt., § 5591; Va., § 4229; Wash., § 7071; W. Va., § 7; Wis., § 1920.

[43] Mass., § 25. Similarly, Ala., § 8434; Ariz., § 3493 (fraternals); Ill., § 186a; Ia., § 5635; Mo. § 6095; N. H., p. 567, § 4, Ch. 169, § 12; Tex., § 4942h.

[44] N. Y., § 44 (italics ours). Similarly, Cal. P. C., § 598; Conn., § 4080; Del., § 573 (on application of five policyholders); Idaho, § 5084; Ill., §§ 67, 193; Ky., § 627; La., § 3601; Md. I, § 201; Mich. I, 2, § 8, II, 2, § 3; Mont. C., § 4059; Neb., § 3304 (fraternals); N. H. L., 1913, Ch. 42, § 13 ("standing"); N. J., p. 2859, § 70, p. 2878, § 125; S. D., § 9173.

Besides these broad inquisitorial powers, there are provisions authorizing the commissioner to address inquiries to any company at any time, on a particular topic.[45] A North Carolina provision requires every "person" in the state to give the commissioner a statement as to the policies held by him, the premiums paid, and "such other information as the commissioner may call for," for the purpose of determining the amount of taxes due.[46]

It may be noted that the French law of 1905 as to life insurance companies gives the Minister of Commerce authority to prescribe, on the advice of the consultation committee, the time and contents of the annual reports of insurance companies,[47] and directs the companies to communicate to the Minister, in addition to the annual report, at any time and in such form and within such period as he shall determine, all documents and explanations which seem necessary to him (the Minister).[48]

The American statutes provide ample sanctions for these powers of inquisition. A fine or other penalty is often provided for refusal to file the annual report [49] or to answer inquiries.[50] Besides, revocation of license may be grounded on such refusal, either by specific enactment,[51] or under the general provisions such as "non-compliance with," or "violation of," law.

[45] Cal. P. C., § 598 (1915) (on application of person interested, may require information as to a particular policy desired by such person); Del., § 585 (reinsurance); Idaho, § 5015 (agent's qualifications for license); N. H., p. 567, § 4 (writing insurance through non-resident agents); N. M., § 2816 (reinsurance); N. Y., § 160 (commission paid on canal transportation insurance); N. C., § 4696 (policies issued).

[46] N. C., § 4720. [47] Arts. 8, 11; Pannier, *op. cit.*, pp. 396, 423.

[48] Art. 11 (3); Pannier, *op. cit.*, p. 424.

[49] Ala., § 8350 ($250); Ark., § 4987 ($100 per day); Del., § 580; Ill., §§ 67, 68 ($500 per month), § 189 ($100 per day); Ind., § 5485 ($300); Kan., § 5201 ($500 per month); Ky., § 627 ($500 per month); Me., Ch. 53, § 91 ($5 per day); Md. I, § 205 ($100–$1,000); Mich. I, 2, § 8, II, 2, § 3 ($500 *per month*); Minn., § 3611 ($100 per day); Miss., § 5112 ($100 per day; misdemeanor); Nev., § 1295 (felony; $500–$1,000, or not over one year); N. J., p. 2861, § 71 ($100 per day forfeiture); N. Y., § 45 ($500 plus $500 per month); N. D., § 4925 ($100 per day); Ohio, § 9591 ($500 per month); Okla., § 6687 ($500); Pa., § 127 ($100 per day); S. D., § 9176 ($100 per week); Tenn., § 3318 ($100 per day); Va., § 4229 ($100–$1,000); Wash., § 7071 ($25 per day); Wis., § 1920 ($500 per month).

[50] Cal. P. C., § 597a ($2,000, failure to furnish list of policies); Ill., §§ 67, 68 ($500 per month); Ia., § 5664 ($1,000, *or 30 days to 6 months*); Mich. I, 2, § 8, II, 2, § 3 ($500 per month); N. Y., § 45 ($500 per month).

[51] *Supra*, § 13, p. 166 and n. 134.

2. *Examinations of companies.* The inquisitorial powers of the commissioner are not limited, however, to the addressing of formal written inquiries to the insurance companies. If it were, his power to obtain information would be necessarily restricted by the degree of honesty and impartiality possessed by those persons who answer his questions. The commissioner is in every state authorized to "examine" insurance companies, which includes the inspection of their books, papers and securities, and the oral questioning of their officers and agents. This power to examine is much broader than the power to require answers to interrogatories, is much more effective as a check on the insurers, and is also much more extensive and difficult, and much more open to abuse. For these reasons, the power to examine demands somewhat detailed treatment.

a. By whom examination may be made. The power to order an examination made must be carefully distinguished from the power to make the examination. Fortunately, it seems clear from the statutes everywhere that the former power may be exercised only by the insurance commissioner, that is, the head of the insurance department, or by some one higher in authority than himself; this power seems to be non-delegable. Since the almost universal rule is that the insurance commissioner alone has the power to order an examination, only the exceptions need be noted. In Arizona, the corporation commission,[52] in Idaho, the department of commerce and industry,[53] in Illinois, the department of trade and commerce,[54] in Nebraska, the state insurance board,[55] in Rhode Island, the governor,[56] has power to order an examination. A check upon the commissioner's power is provided in three states by the requirement that his orders shall be subject to the approval of the Executive Council,[57] the governor,[58] or the State Board of Examiners.[59] Since the expenses of examinations are usually paid by the companies, the power to examine is not necessarily limited by the amount of appropriations available.

The power to make the examination is necessarily delegated. One would not expect the commissioner to spend his days with his nose in a ledger. The important questions are, to whom and how?

[52] Ariz., §3378.
[53] Idaho, § 4977.
[54] Ill., Ch. 24½, § 56; Ch. 73, § 70.
[55] Neb., §3144.
[56] R. I., Ch. 219, § 2; but see Ch. 220, § 23, and Ch. 224, § 14.
[57] Ia., § 5475 (only as to examinations of foreign companies).
[58] N. M., § 2808.
[59] Utah, § 1133 (beyond the borders of the state).

May the commissioner delegate his power to some person not regularly employed as a member of his staff? The answer is frequently not clear. Under provisions which merely authorize the commissioner to appoint "some competent person," [60] an "examiner" or "examiners," [61] "expert examiner," [62] "one or more persons for that purpose," [63] "any other suitable person," [64] "agent," [65] "some disinterested person," [66] and like persons,[67] it seems clear that he is not restricted to regular salaried members of his staff, but may appoint some one, not a state employee regularly, as his deputy or examiner, *quoad hoc*. In a few instances, such an appointment is expressly authorized by the statute.[68] In two states, the commissioner is required to examine domestic companies "personally." [69] This may mean merely that a personal examination, by visitation rather than by written inquiries, shall be made; or it may mean that the power to examine domestic concerns is non-delegable, as "personally" is frequently used in the statutes in contrast with "or

[60] Ala., § 8334 (domestic company, "together with" commissioner or his deputy), § 8335 (foreign company), L., 1915, p. 834, § 10; Ariz., § 3378; Colo. L., 1913, Ch. 99, § 12; Conn., §§ 4065, 4086; Idaho, § 4977; Ky., § 752; La., § 3580; Mass., § 4 (foreign company); Mich. IV, 1, § 13; Miss., § 5031; N. M., § 2808; N. Y. § 39 (cf. § 25: "proper person"); N. C., § 4692 (foreign); N. D., § 4921 (foreign); Okla., § 6676; Ore., § 6357 ("fair, impartial and competent"); S. C., § 2699 (foreign); Tenn., § 3280 (foreign); Utah, § 1133; Vt., § 5601 (foreign); Wash., § 7038 (foreign).

[61] Ark., §§ 4979, 4984; Cal. L., 1919, Ch. 178, § 7; Fla. L., 1919, Ch. 7871, § 1; Md. III, § 178 (6); Mich. I, 2, §§ 2, 6, II, 2, § 3; Neb., § 3144; Ohio, § 622.

[62] Ga., § 2433; Ia., § 5470; Kan., § 5163 ("skilled and competent").

[63] Ill., § 70; Kan., § 5166 (similar); Ohio, § 625; R. I., Ch. 220, § 23; Wis., § 1968 (2); Wyo., § 5272.

[64] Ind., § 4690; Ia., §§ 5486, 5646; Mo., § 6089; S. D., § 9118; Tex., § 4942j.

[65] Miss., § 5023; N. H., p. 567, § 3 ("accredited representative"); N. D., § 4963 (same); Okla., § 6675 ("authorized representative"); Pa., § 179 ("accredited representative"); Va., § 4178 ("assistants"); W. Va., § 12 (same; foreign).

[66] Mont. C., § 4089; Ohio, § 9615.

[67] Del., § 573 (may employ "expert assistance"); Neb., § 3144 (may employ disinterested expert accountant to audit books); Nev., § 1290 (may employ expert to correct books); N. H. L., 1913, Ch. 122, § 24 (assistant); N. J., p. 2861, § 72 ("such persons . . . as he may deem advisable"); N. C., § 4697 (may employ expert actuary or accountant); Wis., § 1916 (3) ("proper person"); Mass., § 4. Similarly, Ala., § 4588 ("deputy or examiner"); Ariz., § 3378; Colo., § 3546; Ky., § 752; Mont. (Rev. C., 1921), § 166.

[68] Colo. L., 1913, Ch. 99, § 12; Ky., § 756; Minn. L., 1915, Ch. 208, §§ 2, 4; Okla., § 6901.

[69] N. H., Ch. 168, § 16; Vt., § 5600.

by his deputy or examiner." [70] Statutes which merely provide that the commissioner shall "make or cause to be made" an examination [71] leave one in some doubt as to the extent of the power to delegate.

Usually, the power to delegate his power of examination is to be implied from the commissioner's power to "appoint" examiners or from a provision that the examination shall be made by the commissioner "or" some one or more of the persons described above. It is frequently provided that the deputy, examiner, or other appointee of the commissioner shall have the same powers to administer oaths, examine witnesses, and inspect books and records, which the commissioner himself has. Thus, the Massachusetts law provides that the commissioner "or the person authorized by him" shall have free access to all the company's assets, books and papers, and may summon and examine under oath "any person who, he believes, has knowledge of the affairs, transactions, or circumstances being examined or investigated"; and refusal to appear and testify, or obstruction of the examination in any other way, is punishable alike whether the examination is made by the commissioner or by "the person authorized by him." [72] The New York provision is equally explicit.[73] Numerous statutes resemble these two, in that the examiner appointed by the commissioner is given the same powers which are given to the commissioner, though the penalty for refusal or obstruction is not as clear.[74] In a few instances it is stated in so many words that the person appointed by the commissioner "shall have the same powers." [75]

[70] E.g., Mass., § 4: "He shall personally, or by his deputy or examiner."

[71] Me., Ch. 53, § 84; Tex., § 4907a.

[72] Mass., § 4. The penalty is maximum fine of $1,000 or maximum imprisonment of one year. Similarly, as to powers of appointee: Ala., § 4588; Ariz., § 3378; Colo. (Anno. Stats. 1912), § 3546; Ky., § 752; Mont. (Rev. Code 1921), § 166.

[73] N. Y., § 39. Refusal or obstruction is made a misdemeanor by the general penalty provision, § 53. Examiners appointed by the department have authority to administer oaths. N. Y. Op. Atty-Gen. (1916), p. 259.

[74] Ark., § 4979; Idaho, § 4928; Ill. (Smith, 1921), Ch. 73, § 39; Ind. § 4690, Ia., § 5469; Kan., § 5166; La. (Wolff, 1920), p. 934, § 14; Me. (R. S., 1916), p. 877, § 112; Miss., § 5031; Neb. (Comp. Stats., 1922), § 7745; N. J., p. 2861, § 72; N. M., § 2808; N. C. (1919), § 6275; N. D., § 4921; Ohio, §§ 623, 626; Okla., § 6676; Ore., § 6357; Pa., § 28; S. D., § 9119; Tenn., § 3281; Utah, § 1133; Va., § 4178; Wash., § 7038.

[75] Fla. L., 1919, Ch. 7871, § 1; Md. III, § 178 (6); Mich. I, 2, § 6, II, 2, § 3; Minn. L., 1915, Ch. 195, § 15; Mo., § 6095. Ia. limits these to the "regu-

In Massachusetts there is a difference in the language employed as to the persons who may examine domestic companies and those who may examine foreign companies. The commissioner may examine foreign companies either personally or "by some competent persons whom he may appoint therefor." [76] As to domestic companies, the language is: "He shall personally, or by his deputy or examiner," make an examination.[77] While "his examiner" may possibly mean an unofficial examiner appointed for a particular examination, the language is indicative of a requirement that such examinations be made only by an official examiner, that is, a permanent salaried employee of the department. On the other hand, New York makes no distinction between foreign and domestic companies with respect to the persons who may be authorized to make examinations,[78] and it is believed that a majority of the statutes elsewhere make no such distinction.

From the standpoint of territorial sovereignty the distinction is of some importance. Examinations of domestic companies are made within the territorial borders of the state, since the company's home office is located within the state; while examinations of foreign companies will usually, though not always, require that the official go beyond the borders of the state. Within the state the commissioner wields the power of a territorial sovereign, and if he may lawfully delegate his powers to an unofficial examiner (that is, one not regularly employed by the state) grave problems of administrative oppression are raised. While such delegation of administrative power to unofficial persons is not unknown in Anglo-American law (for example, the simple rule that a private citizen is privileged to make an arrest for a felony committed in his presence, or is privileged to act as a member of a *posse comitatus* when called upon by the sheriff), yet it is exceptional. No reported case has been found in which the legality of such delegation has been passed upon. On the other hand, in going beyond the borders of the state the commissioner or his deputy or salaried examiner loses that bundle of privileges and immunities which are annexed to the

lar" examiners (Ia., § 5470). Ohio empowers only the superintendent or his official deputy to subpoena witnesses (Ohio, § 623).

[76] Mass., § 4.

[77] Mass., § 4. Similarly, Ala., § 8334; N. C., § 4692; N. D., § 4921 ("or by his deputy or chief clerk"); Ore., § 6365 (7); Pa., § 25 ("or by his deputy, actuaries or examiners"); S. C., § 2699 ("or by deputy"); S. D., § 9115 ("deputy"); Wash., § 7038 (same as Mass.).

[78] N. Y., §§ 25, 39.

power of an official of a territorial sovereign, just as much as does the unofficial examiner appointed by him; hence, there is good reason in principle for distinguishing between domestic and foreign companies in respect to the persons who may be authorized to make an examination, aside from the practical reasons, such as the saving of time and expense of state employees.

However, territorial sovereignty is behind these extra-territorial examinations. No American state can make it a crime for a company or an individual to obstruct an examination conducted by one of the state's officials beyond the borders of the state; but any state may, and most states do, provide revocation of license as a penalty for refusal of a foreign insurance company to submit to examination by the persons duly authorized. Revocation of license is a penalty more to be respected, usually more disastrous in dollars and cents, than the judicial penalties commonly imposed. Hence, a foreign company, admitted to do business in State A, will rarely refuse to submit to an examination by an official of State A merely because the examiner is performing his duties in the territory of State B, a government from which he derives no official power. Thus does territorial sovereignty become extra-territorial; yet only to the extent that pressure may be exercised through the corporation. As to persons not subject to such control (for example, witnesses not connected with the company), the examiner in a foreign state has neither official power nor indirect control.

The problem of the employment of private actuaries or accountants to make examinations has received the attention of the National Convention of Insurance Commissioners, and such employment has been generally discredited.[79] While it is doubtless true that many of the smaller departments cannot pay large enough salaries to attract and keep competent examiners, yet the employment of private accountants or actuaries is open to grave objections. In the first place, if the private accountant or actuary is empowered to make the examination alone, official power is delegated to a person not an official. This is undesirable. Furthermore, the large fees collected by these private firms (in one case, a private firm collected $15,000 for examining a moderate-sized life insurance company) open the door to various forms of corruption, such as the division of fees between the commissioner, who designates the person to make the examination, and the private accountant or actuarial firm, who or which obtains the contract.

[79] See *supra*, § 9, p. 53, n. 25.

Moreover, in times past this unlimited power has been abused in other ways. An executive official of a life insurance company, having its home office in Chicago, relates the following incident: A number of years ago a stranger came into the home office and presented an authorization from the insurance superintendent of a state several hundred miles away, empowering him to examine the company's records as to gross premium receipts from that state. The official detailed a clerk to produce the books and records required for the examination, and invited the stranger to go to work. The latter said he had some business to attend to, and suggested he would return after luncheon. He appeared in the afternoon and started to work, but finally revealed that he was wholly unacquainted with that kind of work. Then he became confidential.

"I am not a regular employee of the insurance department," he explained, "but ———, the superintendent, is a good friend of mine and when I told him that I had to make an expensive trip to Chicago on business, he offered to give me a commission to examine your books, so that I could get my expenses paid."

The official had a clerk draw off the items in question and hand the summary to the "examiner." Later, the company paid this "examiner's" bill for expenses.

The method of delegation of power to examine is usually left unspecified. Neither New York nor Massachusetts has any provision on this point. Arkansas requires that the appointment be "in writing," [80] and Missouri states that an appointment by the superintendent under his seal is sufficient evidence of authority.[81] An authorization to examine an insurance company is somewhat like a search warrant, and should be issued with corresponding formality. Certainly it is desirable that the examiner be required to present a properly authenticated warrant of authority before he may demand access to the books and securities of an insurance company. In Illinois, a formal warrant is issued on a printed form by the head of the department of trade and commerce, countersigned by the superintendent of insurance, addressed to one of the chief examiners, calling for a "full report of the true condition of ——— company." It seems that examiners are usually provided with written credentials of some sort. No reported judicial decision has been found in which the validity of such warrant has been attacked under constitutional prohibitions against unlawful searches and seizures.

[80] Ark., § 4984. [81] Mo., § 6095. Similarly, Ohio, § 623.

b. Grounds for ordering examination. With respect to the grounds upon which, or circumstances under which, an examination of an insurance company may be ordered, the statutory provisions may be roughly divided into four groups. In the first three, the commissioner is empowered to order an examination on his own initiative; in the fourth, he either may or must order an examination or exercise some part of his inquisitorial powers, upon the complaint or request of some other person:

1. The first group has indefinite provisions which confer executive discretion, or unregulated discretionary power, in ordering an examination. The Massachusetts and New York provisions illustrate this type. Massachusetts directs that the commissioner "shall examine" a domestic company "whenever he determines it to be prudent," [82] and a foreign company "whenever he determines it to be prudent for the protection of policyholders in the commonwealth." [83] The New York provision, as to both classes of corporation, says merely "as often as he deems it expedient," [84] and the section relating to foreign companies, "whenever he deems it necessary." [85] Other phrases are: "for probable cause," [86] "at any time," [87] and miscellaneous variations of the foregoing.[88] While

[82] Mass., § 4. Similarly, Ala., § 8334; Ky., § 752; Miss., § 5030; N. M., § 2808; N. C., § 4692; N. D., § 4921; Okla., § 6675; S. C., § 2699; Vt., § 5600; Wash., § 7038.

[83] Mass., § 4. Similarly, Ala., § 8335; Ariz., § 3420; Ky., § 752; Miss., § 5031; Neb., § 3144; N. J., p. 2878, § 123; N. C., § 4692; N. D., § 4921; Okla., § 6676; Pa., § 25; S. C., § 2699; Vt., § 5600; Wash., § 7038.

[84] N. Y., § 39. Similar wording in: Conn., § 4065; Ga., § 2433; Idaho, § 4977; Ill., §§ 70, 193; Ia., § 5646; La., § 3602; Mich. IV, 1, § 13; Mont. C., § 4065, S., § 178c; N. J., p. 2861, § 72; Wis., § 1968 (2); Wyo., § 5272. The resolution of the New York legislature of July, 1905, authorizing the famous Armstrong Investigation, recited in its preamble that the "inquisitorial powers" of the superintendent of insurance were limited to an examination "with a view to their solvency chiefly." This view is contrary to that taken in Bell *v.* Louisville Board of Fire Underwriters, *infra*, this section, n. 122, and seems incorrect.

[85] N. Y., § 25. Similar wording in: Cal. L., 1917, Ch. 700, § 1; Idaho, §§ 4983, 4984; Me., Ch. 53, § 111 (plus "for the protection of policyholders"), § 84 ("as he regards necessary"); Mich. II, 2, § 3; Minn. L., 1915, Ch. 208, § 2; Nev. L., 1913, Ch. 158, § 2; Okla., § 6675; Pa., § 25; Tex., § 4802, 4824; Va., § 4178 (same as Me.); Wis., § 1916 (3).

[86] Ark., § 4984; Ga., § 2433.

[87] Conn., § 4086; Ind., § 4690; Ia., § 5486; Mich. I, 2, § 6; R. I., Ch. 220, § 23; S. D., § 9119; Tex., § 4942j; W. Va., § 3 ("from time to time").

[88] Ala., § 8390 ("whenever he deems it proper"; inter-insurance exchange); Ind., § 4805 ("whenever, in his judgment, such examination is required for the

there are slight deviations between such a word as "necessary," on the one hand, and such words as "prudent," "expedient," "advisable," and "proper," on the other, it is doubtful if the legality of any investigation by the commissioner could be made to turn upon such a difference. These variations in wording may be taken to illustrate the process of imitation in legislation. The Massachusetts provision as to foreign companies has been a slightly more popular model than the New York phraseology.

2. A number of statutes say nothing whatever about the grounds for ordering an examination, merely providing that the commissioner may make one or cause one to be made.[89] Such provisions may confer the same kind of discretionary power given by the first type of provision; on the other hand, the section in question may be limited by other provisions in which grounds are specified, or by the purpose of the examination, as where it is limited in scope to particular subject-matter or particular objects.[90] Moreover, in so far as they omit the indicia of discretionary power, these provisions leave open the possibility that a court may decide, when called upon to exercise control over the commissioner's actions, that whether or not the examination in the particular case is proper is a question for the court.

3. The third type of provision preserves the initiative of the commissioner but requires the existence of more definite grounds for ordering the examination than those mentioned under the first group. Among the typical provisions under this head are: "whenever he has reason to doubt its solvency," [91] "whenever he shall have reason to suspect . . . that the affairs of the company are in

interests of the policyholders of such company"); Ia., § 5468 ("at any time he may deem it advisable"); La., § 3580 ("if in the judgment of the commissioner there should arise a necessity"); Miss., § 5023 ("whenever he shall deem it proper"); Mo., § 6303 ("whenever in his discretion the safe management and best interests of the policyholders may demand"); Neb., § 3144 ("when the board deems it advisable"); Nev., § 1300 (same as Ia., § 5468), § 1319 ("at any time in his discretion"); Ohio, § 9615 ("whenever he deems it advisable"); Ore., § 6357 ("whenever he deems it advisable in the interests of the policyholders or for the public good"); Tex., § 4907a ("at such other times as he deems proper").

[89] Ariz., § 3420; Ark., § 4979; Cal. P. C., § 596; Fla. L., 1919, Ch. 7871, § 1; Mo., § 6095; Ohio, § 625; Ore., § 6365.

[90] E.g., Ariz., § 3420 (policies); Cal. P. C., § 596 (policy written in unauthorized company).

[91] Conn., § 4115; La., § 3649; Md. IV, § 178 (6); Minn. L., 1915, Ch. 208, § 2; Wyo., § 5239.

an unsound condition." [92] Such provisions predicate the existence of reasonable grounds for ordering an examination, and in a judicial proceeding to restrain or annul the commissioner's order, it would seem that the court would inquire into the grounds for the order and require a showing that some plausible grounds existed. Thus, the language just referred to does not confer unregulated discretionary power. Another example of the present type is found in provisions authorizing an examination of a company for violation of law. A distinction must be made between "belief" of the commissioner that the company has violated the insurance laws [93] and the existence of "information" or "notice" of, or "reason to believe," the violation of the insurance laws generally [94] or of a particular provision,[95] since the former appears to confer a greater degree of discretionary power than the latter. The provisions authorizing the examination upon notice or information communicated to the commissioner are closely related to those prescribing complaint or request of a policyholder as a ground for examination, but the two are not identical. A third example is found in statutes which authorize an examination either if the commissioner suspects or doubts the company's annual sworn statement,[96] or for the purpose of verifying such statement.[97] Here again it would probably be required that a commissioner, if hailed into court, should show some plausible ground for doubting the correctness of the annual statement. A few miscellaneous examples may be noted.[98] Perhaps the ground "for probable cause" is to be classified

[92] Ill., §193; Kan., § 5166; Mich. I, 2, § 11; N. H. L., 1891, Ch. 56, § 2 ("reason to *believe*"). See also Ore., § 6416 (1) ("whenever it appears . . . that the solvency . . . is impaired").

[93] Ala., § 8335; Ind., § 4706e (rebate law); La., § 3594 ("in his judgment has good reason to believe").

[94] Del., § 584; Kan., § 5166 ("has *reason* to suspect"); Minn. L., 1915, Ch. 208, § 2; Miss., § 5121; N. H. L., 1891, Ch. 56, § 2; Ohio, § 9433; Ore., § 6416 (1).

[95] Fla., § 2771; Ill., § 45; Kan., § 5353; Ky., § 756 (when facts show a *prima facie* case); Mont. C., § 4033; N. H., p. 567, § 3; N. M., § 2822; N. D., § 4963; Pa., § 179.

[96] Ark., § 5120; Ill., § 193 ("good reason to doubt"); Kan., § 5166 ("reason to suspect"); Md. IV, § 178 (6) ("reason to doubt"); Mich. I, 2, § 11 ("reason to suspect"); Wyo., § 5239 ("not fully satisfied with").

[97] Ia., § 5514; N. D., § 4973; Okla., § 6901.

[98] Ky., § 677 (assessment life, failure to pay claim in 30 days); Md. I, § 179 (actuary's report that rates are insufficient).

in this group rather than in those conferring unregulated power, though for indefiniteness of scope it belongs above.[99]

4. Policyholders may demand the examination of their company under the provisions found in many jurisdictions. Only domestic companies fall within the scope of these clauses in Massachusetts and a few other states.[100] In New York no such limitation is stated.[101] The class of persons who may file a request for such examination is not, however, limited to policyholders. In Massachusetts, it includes "stockholders, creditors, policyholders or persons pecuniarily interested therein." [102] New York is somewhat narrower: "Any stockholder, policyholder or judgment creditor."[103] Both Massachusetts and New York require affidavits by the applicants; but the former requires merely "affidavit of their belief with specifications of the reasons therefor," [104] while the latter requires a statement of facts "within the knowledge of" the petitioner or some person whose affidavit he presents.[105] The New York provision recognizes the request of "any" complainant, whereas the Massachusetts law requires "five or more." [106] Perhaps the difference between New York and Massachusetts, in this respect, is due to the difference in discretionary power in the two cases.

Thus the Massachusetts section declares that the commissioner "shall" make an examination "upon the request or complaint of five or more of the stockholders," and so forth.[107] The New York provision likewise uses the language "shall make," but the mandatory effect of such language is nullified by the qualification, "Whenever any stockholder . . . shall . . . notify the superintendent of

[99] *Supra*, p, 347.

[100] Mass., § 4. Similarly, Ala., § 8334; N. H., Ch. 168, § 16; N. C., § 4692; N. D., § 4921; Okla., § 6675; Tenn., § 3279.

[101] N. Y., § 40. See also Nev., § 1274.

[102] Mass., § 4. Similarly, Ky., § 752; La., § 3580; Md. III, § 178 (6); Miss., § 5030; N. M., § 2808; N. C., § 4692; N. D., § 4921; Okla., § 6675; Tenn., § 3279. In Ala. (§ 8334) only "stockholders . . . or . . . persons peculiarly interested therein" are named in the statute.

[103] N. Y., § 40.

[104] Mass., § 4. Similarly, the provisions of Ky., La., Miss., Minn., N. H., N. M., N. C., N. D., and Utah, cited elsewhere in this subsection.

[105] N. Y., § 40. See also Md. III, § 178 (6) (stating "*prima facie* case").

[106] Mass., § 4; so in Ala., § 8334; Del. § 573; Ky., § 752; La., § 3580; Miss., § 5130; Mont. S., § 4065; N. H., Ch. 168, § 16, and L., 1891, Ch. 56, § 2; N. M., § 2808; N. C., § 4692; N. D., § 4921; Okla., § 6675; Utah, § 1133.

[107] Mass., § 4. Similar mandatory language is found in Ala., Del., Ky., Miss., N. H., N. C., N. D., Okla., and Ore.

facts . . . which *in the judgment of* the superintendent make such examination advisable."[108]

In Louisiana, the direction to examine on request of such persons is similarly qualified by the phrase "whenever he deems it prudent to do so," which makes the ordering of an examination, even though formally requested, discretionary with the commissioner.[109] Several states have provisions for examination on request or complaint of one or more "citizens,"[110] and it is commonly provided that the commissioner shall examine at the request of the company to be examined.[111] Rhode Island provides for examination on request of the governor.[112]

If the answers to the questionnaire are to be taken literally, most of these provisions for examination at the request of others are dead letters, since a special examination is rarely made save on the initiative of an official of the department.[113]

From the foregoing summary it may be seen that the commissioner is, in a distinct majority of the states, given unregulated discretionary power to make examinations of insurance companies. While it is always precarious to generalize negatively in respect to statutes, it is believed that the statutes of only five states fail to give the commissioner such power.[114]

The commissioner need give no reasons for ordering an examination. He need not notify the company that he proposes to make an examination. No statute provides for any such notice, or for a hearing upon the question whether or not the examination should be made. "Due process" does not require that the exercise of an

[108] N. Y., § 40. Italics ours.

[109] La., § 3580. See also Minn. S., § 4065 ("may examine"); Nev., § 1274 ("belief of commissioner"); N. M., § 2808 ("with consent of the governor"); Tenn., § 3279 (like La.).

[110] Miss., § 5121; Nev., § 1274, and L., 1913, Ch. 158, § 2; N. C., § 4694; Wis., § 1968 (2) (on filing of written charges by "any responsible person").

[111] E.g., Ind., § 4693; Mont. C., § 4154; N. H. S., p. 396, § 3, p. 397, § 10, and L., 1913, Ch. 42, § 10. So, under registered policy laws and guaranty reserve fund sections.

[112] R. I., Ch. 219, § 2.

[113] None of the 27 commissioners who responded stated that any special examination had been undertaken during the previous year upon complaint of a policyholder. Mass. reported two examinations at the request of the company examined, N. H. one, Utah one, Va. one, W. Va. two in five years, Wyo. one, and Conn. two in ten years. The other answers indicated that special examinations were always undertaken upon official initiative.

[114] Del., Kan., Minn., N. H., Utah.

inquisitorial power be preceded or accompanied by any such procedural safeguards.[115] Such a requirement would be impractical. To give notice and hearing before ordering an examination would make the exercise of that power slower and less effective in detecting fraud or dishonest management; a suspected company must be taken by surprise, lest it juggle or transfer its assets, as has been done in one or two instances, according to insurance department officials. An executive official of a life insurance company expressed the view that the commissioner must be given power to examine without warning.

The answers to the questionnaire indicate that a majority of the commissioners do not as a rule give a company notice and an opportunity to be heard before making a special examination of it; however, a surprisingly large number reported that such notice and hearing are usually given.[116] Such notice is more frequently given before a periodical or routine examination.[117]

A striking example of the way in which this unregulated power of examining a company and of publishing the results of the examination may be used to accomplish objects not authorized by statute is found in the proceedings of the Convention of Insurance Commissioners in August, 1911. A series of resolutions, growing out of the extensive investigation of settlements of health and accident claims, were taken up in executive session. One of these was aimed at companies which "poach" upon the agency forces of companies already examined, by pointing out to the agents the undesirable publicity which the examined companies had received, and thus inducing the agents to transfer their affiliations and many of their customers to the company not yet examined. The resolution declared that "such company so poaching will be immediately examined and full publicity given to the facts"; to which the

[115] See Dunham *v.* Ottinger (N. Y. Sup. Ct., 1926), 217 N.Y. Supp. 565, 5781, "Blue Sky" investigation); Master of Hirschfield *v.* Hanley (1920) 228 N. Y. 346.

[116] Q. 6: "Do you invariably give a company notice and an opportunity to be heard before making a special examination of it?" A.: "No": Ariz., Conn., Idaho, Ill., Kan., Mass., Mich., Minn., Mont., Neb., N. M. (sometimes), N. Y., N. C., N. D., Okla., Pa. (not if suspicious), Vt., Va., Wash., W. Va., Wyo. (21). "Yes": Ark., Colo., Del., D. C. (usually), Fla., Ia., Me., N. H., Ore., S. D., Utah, Wis. (usually) (12).

[117] The same question was asked as to a periodical or routine examination. In addition to the states enumerated above as answering "Yes" (except Ia. and Me.) are to be added: Nev., N. Y., N. C., Okla., Pa., Va., and W. Va. The totals are: "Yes," 17; "No," 15.

chairman, Superintendent Hotchkiss, of New York, added significantly:

"I think when that is generally known to the companies that threaten to steal agency forces of the companies criticised, there won't be much poaching." [118]

Mr. Barton (of Nebraska) objected that this was not the "proper remedy," and added: "It seems to me that to punish a company by making an examination does not set a very high standard."

"Well, that is one way of getting at a company that indulges in these outrageous practices," retorted Mr. Hotchkiss; and a little later he added: "New York did exactly what we are doing here." [118]

Despite the lone opposition of Mr. Barton, the resolution was adopted.[119] When it is borne in mind that no state has, or had then, a statute making it unlawful to "poach" another company's solicitors, it is obvious that the power of examination may be used to enforce a commissioner's ideas of what the conduct of a company ought to be, even though there would be no statutory ground for revocation of the company's license.

Nevertheless, it must not be assumed that the power to examine is beyond judicial control. While but one case has been found in which such control was invoked, in that case the company was successful. The Kentucky commissioner in about 1913 began an investigation of the records of the Metropolitan Life Insurance Co. for the purpose of ascertaining which of its industrial policyholders were entitled to a cash surrender value under a statute of April 1, 1893, which was amended on July 1, 1893, in such a way as to cut off the claim for surrender value within eight weeks after the lapse of the policy. This examination had cost between $3,000 and $4,000, and the commissioner was threatening to carry off and make public the company's lists of former industrial policyholders — a valuable business secret — when the company sued to enjoin the commissioner. The injunction was denied in the lower court. On appeal, the company was successful. The appellate court pointed out that only those industrial policyholders whose policies were procured between April 1 and July 1, 1893, could possibly have a claim, and that the amount of these claims was negligible

[118] *Proc. N. C. I. C.* (1911), pp. 119–121.

[119] *Ibid.*, p. 125. See also the statement of the South Dakota commissioner, that he sent an examiner to the office of a life company to compel it to refund the amount of a premium note taken from an applicant who was later refused insurance. *Proc. N. C. I. C.* (1910), pp. 201–2.

and could not possibly affect the company's solvency — the ground upon which the commissioner claimed to be making the examination. The statutory ground for examination in Kentucky, "whenever he deems it prudent for the protection of policyholders in this commonwealth," [120] was not mentioned in the opinion. The court held the commissioner's action to be oppressive:

> This court has always been, and is now, inclined to a broad and liberal construction of the statutes defining the inquisitorial powers and rights of the commissioner; but those powers must be asserted and acted upon without oppression. . . . The court is of the opinion, therefore, that upon broad grounds of equity, under the facts shown by the pleadings, and under the law as construed herein, the investigation and compilation so proposed to be made and used, is neither necessary nor justified under the powers conferred by law upon the commissioner of insurance. . . .[121]

However, the same court in an earlier case held that the inquisitorial power was not limited to grounds which would justify revocation of license or other regulatory measures by the commissioner. A suit was brought by the commissioner to compel a board of fire underwriters to submit their books and records to examination. The petition alleged that complaint had been made that the fire rates fixed by defendant board were excessive, and that therefore the commissioner "deems it prudent for the protection of policyholders of this commonwealth to make said examination." [122] A judgment for defendant was reversed, the court holding that the inquisitorial powers of the commissioner were not limited to cases of suspected insolvency or violation of law, because the phrase "whenever he deems it prudent" is broader than these grounds. To defendant's contention that the commissioner had no statutory power to fix or regulate fire insurance rates, the court replied:

> This contention ignores the right of appellant to make the examination upon the ground alone that he deems it prudent for the protection of policyholders, and if it should enable him to discover that the association is violating the law in the matter of preventing free competition in the insurance business, notwithstanding his want of authority to regulate rates, he could not better protect the policyholders and the public generally than to report the fact to the Attorney-General for such action as he might deem proper, or to the Governor or General Assembly, for such legislation as would correct the evil.[123]

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[120] Ky., § 752.

[121] Metropolitan Life Ins. Co. *v.* Clay (1914), 158 Ky. 192, 197, 198, 164 S. W. 968.

[122] Bell *v.* Louisville Board of Fire Underwriters (1912), 146 Ky. 841, 843, 143 S. W. 388.

[123] 146 Ky. 841, at p. 849.

This interpretation of the statute gives the insurance department a roving commission not unlike that of a legislative investigating committee — except that, in the former instance, the insurers pay the expenses.

c. Periodical or routine examinations. The grounds upon which an examination may be ordered by the commissioner, just discussed, are those which relate to "special" examinations; that is, examinations undertaken because of suspected insolvency, mismanagement or other irregularities. Besides these optional provisions, many states require the commissioner to make an examination of each company at least once within a limited period of time. These periodical examinations are limited to domestic companies, and frequently to a particular type of domestic company, such as a mutual or assessment company, doing chiefly a local business, and requiring comparatively a short time for examination because of the small volume of its assets and transactions. The provisions for periodical examinations are of interest because they mean a periodically recurrent expense to the companies, and because they demand a considerable force of examiners in states where the provisions are not narrowly restricted to particular types of domestic companies, as in Massachusetts and New York.

The commonest period within which an examination must be made by the insurance department is three years.[124] In other statutes the period is fixed at two years,[125] one year,[126] four years,[127] or five years.[128] In fourteen states there are apparently

[124] In this and the four notes next following, the statute includes all domestic companies, unless otherwise indicated in parentheses following the citation: Ariz., § 3495 (fraternal); Conn., § 4220 (some); Idaho, § 4977 (life); Ky., § 681 c-24 (fraternal); La., § 3580; Md., § 244g (fraternal); Mass., § 4; Neb., § 3144; N. H. L., 1913, Ch. 122, § 24 (fraternal); N. J., p. 2861, § 72 (life); N. Y., § 39 (life or casualty); N. C., § 4692; Okla., § 6675; Ore., § 6357; Pa., § 25; Tenn., § 3278.

[125] Ala., § 8334; Ia., §§ 5468, 5573 (fraternal); La., § 3651 (life); Me., Ch. 53, § 84 (mutual fire); Md. III, § 154 (mutual employers' liability); Minn. L., 1915, Ch. 208, § 2 (all except township mutual); Miss., § 5029; N. Y. L., 1916, Ch. 14, § 327 (mutual automobile); S. C., § 2699; Tex., § 4907a (mutual fire).

[126] Cal. C. C., § 4531 (assessment); Me., Ch. 53, § 84 (stock companies); Mich. IV, 1, § 13 (fire); Nev., § 1319 (assessment life or accident); Ohio, § 625 (life); Tex., § 4802 (assessment accident), § 4823 (coöperative life); Wash., § 7038.

[127] Conn., § 4114 (life); Ky., § 752; Md. III, § 178 (6); W. Va., § 11 (life).

[128] Conn., § 4086 (fire); Idaho, § 4977 (other than life); N. Y., § 39 (all, other than life or casualty); N. D., § 4921; Vt., § 5600.

no provisions requiring periodical or routine examinations to be made.[129]

Are the departments of the states, requiring such examinations, sufficiently equipped to undertake them? It has been asserted that they are not:

> Nor is there an insurance department in any one state sufficiently well equipped to supervise in actuality all insurance companies operating within its state lines. There are not a great many states that can rightfully boast of ability to supervise efficiently their own corporations in the sense of being able to make periodic examinations and valuations of all the home companies in a manner that would merit general credence and acceptance from other well-equipped insurance departments.[130]

It is true that the examination of a large life insurance company, such as the Metropolitan Life, which requires the work of fifteen men for a period of fourteen months or more, imposes a heavy burden upon the New York department. However, that department employs some fifty examiners. In the states having smaller examining forces, there are usually no large domestic companies, or the requirement of a periodical examination is limited to assessment or mutual companies, which require a relatively short time for examination. The effectiveness of the examinations made by the departments is not to be measured by reference solely to the examination of the larger companies, but rather with reference to the thoroughness and frequency of examination of the smaller and newer companies, which are more likely to get into difficulties. Thus, the insuring public is better protected by the commissioner's examinations than is indicated in the statement just quoted.

Since the statutes provide no means of compelling the commissioner to make a periodical examination, except impeachment or removal from office, a commissioner who is inadequately provided with assistants may postpone the examination with impunity.

The answers to the questionnaire indicate that, in 1920–21, a decided majority of all the examinations of insurance companies which were undertaken in thirty states were periodical or routine, as opposed to special, examinations.[131]

[129] Ark., Colo., Del., Fla., Ga., Ill., Ind., Kan., Mo., Mont., N. M., R. I., S. D., Va.

[130] Graham, *The Romance of Life Insurance* (1909), p. 123.

[131] The answers are as follows, the number of periodical examinations being given first, and the number of special examinations (on the ground of suspected insolvency) second: Ariz. (5–0); Ark. (3–2); Colo. (1–0); Conn. (9–0);

d. Scope and objects of examination. It is difficult to distinguish, in the statutory language, the scope and object of an examination from the grounds of examination, already discussed, and from the subject-matter of examination (that is, who and what may be examined). However, in theory the distinction seems clear and fairly important. If a question arises as to the relevancy of a particular question asked by the commissioner or examiner, or as to the relevancy of a particular document called for by him, it will be necessary to determine what is the legitimate scope of the investigation. The indefiniteness of most of the statutory provisions as to scope and object is in keeping with the vagueness of the grounds for ordering an examination. The Massachusetts statute, for instance, specifies four classes of objects or purposes:

To ascertain (1) its financial condition, its ability to fulfill its obligations,[132] (2) whether it has complied with the law,[133] (3) and any other facts relating to its business methods and management,[134] (4) and the equity of its dealings with its policyholders.[135, 136]

The New York provision as to domestic and foreign corporations does not specify the scope or object of the examination.[137] The section relating exclusively to foreign corporations authorizes an examination of "its affairs and conditions," and this language has

Del. (3–0); D. C. (17–1); Fla. (0–1); Idaho (8–3); Ia. (88–31); Kan. (30–3); Md. (6–0); Mass. (32–1); Mich. (3–14); Minn. (38–1); Mont. (3–2); Neb. (4–3); N. M. (2–0); N. C. (3–0); N. D. (8–0); Ohio (46–0); Okla. (1–16); Ore. (0–3); Pa. (10–no data); S. D. (8–0); Vt. (3–0); Va. (6–1); Wash. (18–0); W. Va. (18–0); Wis. (60–2); Wyo. (2–1).

[132] Similarly, Ala., § 8334; Cal. P. C., § 597; Colo. L., 1913, Ch. 99, § 12; Conn., §§ 4086, 4114; Fla. L., 1919, Ch. 7871, § 1 (securities); Ky., § 752; La., § 3580; Me., Ch. 53, § 84; Md. III, § 178 (6); Minn. L., 1915, Ch. 208, § 2; Mont. S., § 4065; Neb., § 3144; Nev., § 1272; N. J., p. 2861, § 72; N. M., § 2808; N. C., § 4692; N. D., § 4921; Okla., § 6675; Pa. § 25; R. I., Ch. 219, § 2; S. C., § 2699; Tex., § 4802; Tenn., § 3278; Vt., § 5600; Va., § 4178; Wash., § 7038; W. Va., § 11.

[133] Similarly, in the statutes, cited in the last note, of Ala., Cal., Conn. (§ 4114), Ky., La., Md., Minn., Mont., Neb., Nev., N. M., N. C., N. D., Okla., Pa., R. I., Tenn., Vt., Wash., W. Va.; also Mo., § 6095.

[134] Similarly, the statutes, cited in n. 132, of Mont., Neb., N. J., Okla., Pa., and Wash.; and also Ariz., § 3378; Ind., § 4690; Ia., § 5486; Mo., § 6095; S. D., § 9119; W. Va., § 3; Wyo., § 5239.

[135] Similarly, in Ariz., § 3378; Conn., § 4064 (failure to pay claims when due); Neb., § 3144; Okla., § 6675; Pa., § 25; Wash., § 7038; Wyo., § 5239 (whether carrying out contracts in good faith).

[136] Mass., § 4. Identical provisions are: Okla., § 6675; Pa., § 25.

[137] N. Y., § 39.

been widely copied.[138] Another type of provision indicates that the scope of the examination is the "business" of the company.[139] An equally broad scope is given by the phrase, "affairs, transactions and conditions." [140]

The language of these provisions as to the scope of an examination has been quoted in tedious detail because it illustrates the indefiniteness of the limitations upon the questions which the examiner may ask or the documentary evidence which he may require. The contrast between an insurance investigation and a judicial investigation in ordinary civil litigation is, of course, striking. In the latter, the issues are fixed pretty narrowly by the pleadings, and evidence not strictly relevant to these issues is excluded. In the former, on the other hand, it would be difficult to point out that a particular question or piece of documentary evidence was not relevant to the object or purpose of the examination. Only in cases of patent irrelevancy or remoteness, it would seem, could the inquiry be prevented. Such a case was presented in *Metropolitan Life Insurance Co.* v. *Clay*,[141] where a copy of the lists of all industrial policyholders over a long period of years, out of which the commissioner sought to select a very small number who would be entitled to a small cash surrender value, was held to be irrelevant to an examination to ascertain the financial solvency of the company. However, it is clear that the scope of an examination is not limited to assets and liabilities.[142]

e. Subject-matter of examination: who and what may be examined. The commissioner, or examiner designated by him, is, in

[138] N. Y., § 25. Similarly, Ark., § 4984; Del., § 573; Ga., § 2433; Me., Ch. 53, § 84; Minn. L., 1915, Ch. 208, § 2; Mo., § 6095; N. H. L., 1913, Ch. 42, § 7; Tenn., § 3278; Vt., § 5600; Va., § 4178; Wash., § 7038; Wis., §§ 1916 (3), 1968 (2); Wyo., § 5272. In the following sections the word "affairs" alone is used: Ind., § 4805; Ia., § 5468; Kan., § 5166; Ky., § 752; La., § 3580; Md., III, § 178 (6); Mich. I, 2, § 6, II, 2, § 3; N. J., p. 2861, § 72; N. M., § 2808; N. C., § 4692; N. D., § 4921; Ohio, §§ 9433, 9615; Ore., § 6357; R. I., Ch. 219, § 2; S. C., § 2699; S. D., § 9119; Tex., §§ 4823, 4907a.

[139] Colo. L., 1913, Ch. 99, § 12; Fla. L., 1919, Ch. 7871, § 1; Idaho, § 4978; Ill., § 70; Kan., § 5166; Mich. I, 2, § 6, II, 2, § 3; Minn. L., 1915, Ch. 208, § 2; Miss., § 5031; Ore., § 6357; Wyo., § 5272.

[140] Ala., § 8338; Ariz., § 3378; Miss., § 5031; N. H. L., 1913, Ch. 122, § 24; Ohio, § 623; R. I., Ch. 220, § 23; Tenn., § 3281; Utah, § 1133; Va., § 4178.

[141] (1914), 158 Ky. 192, 164 S. W. 968; see *supra*, this section, p. 353, for a fuller statement of this case.

[142] Bell *v.* Louisville Board of Fire Underwriters (1912), 146 Ky. 841, 143 S. W. 388.

nearly all jurisdictions, authorized to inspect the books, papers, records, documents, files, and so forth, of the company being examined,[143] and likewise the books, records, and papers of its officers or agents.[144] To expedite the examination of these writings, the commissioner is authorized in Massachusetts and several other states to require a domestic company to keep its books, records, accounts, and vouchers in such manner that he or his representatives may readily verify its annual statements.[145]

While inspection of the assets and securities of the company would seem to be a necessary part of any effective checking up on its financial soundness, apparently only a few states expressly authorize the examiner to inspect the assets and securities of the company being examined,[146] unless such authority may be implied from the general language, "books, papers, documents," and so forth, of the sections just cited.

Reference has already been made to the powers of the commissioner as to computation of values of securities and approval of investments.[147] A detailed account of the methods employed in examining the securities and other property of an insurance company would be beyond the scope of the present volume.[148] The practice of the New York, Massachusetts and Illinois examiners is to count all the securities of the company; the New York examiners seal the

[143] Ala. § 8338; Ariz., § 3378; Ark., § 4984; Cal. L., 1917, Ch. 700, § 1; Colo. L., 1913, Ch. 99, § 12; Conn., §§ 4065, 4086; Del., § 573; Fla. L., 1919, Ch. 7871, § 1; Ga., § 2433; Idaho, § 4978; Ill., § 45; Ind., § 4690; Ia., §§ 5469, 5486; Kan., § 5166; Ky., §§ 752, 756; La., §§ 3580, 3594; Me., Ch. 53, § 84; Mass., § 4; Mich. I, 2, § 6; Minn. L., 1915, Ch. 208, § 2; Miss., § 5023; Mont. S., § 4065; Neb., §§ 3144, 3171; Nev. L., 1913, Ch. 158, § 2; N. H., Ch. 167, § 10; N. J., p. 2861, § 73; N. M., § 2808; N. Y., §§ 25, 39; N. C., § 4692; N. D., § 4963; Ohio, § 625; Okla., § 6676; Ore., § 6357; Pa., § 28; S. D., § 9119; Tenn., § 3281; Tex., §§ 4802, 4942; Utah, § 1133; Va., § 4178; Wash., § 7038; W. Va., § 13x.

[144] See statutes cited in last note of: Ala., Ariz., Colo., Conn. (§ 4065), Del., Fla., Ga., Idaho, Ill. (§ 70), Ind. (§ 4805), Kan., Ky., La. (§ 3580), Mass., Minn., Miss., Mont., Neb. (§ 3171), N. H., N. M., N. Y., N. C., Ohio, Pa., Tenn.

[145] Mass., § 4. Similar provisions are found in Ala., § 8438 (mutual, other than life); Ariz., § 3378; Neb., § 3144; Nev., § 1272; Okla., § 6674; Ore., § 6370 (2); Pa., § 25; S. C., § 2699; Wash., § 7038.

[146] Ind., § 4690; Ia., § 5486; Mass., § 4; Neb., § 3171; Nev. L., 1913, Ch. 158, § 2; N. Y., § 25; S. C., § 2699; S. D., § 9119; Tex., § 4942j.

[147] *Supra*, § 16, pp. 200–207.

[148] For a full discussion, see S. H. Wolfe, *The Examination of Insurance Companies.*

vaults over night while the count is being made. Of course, the mere counting of the securities, even without any attempt to appraise their value, is, in the case of a large life insurance company, a lengthy process. A story is told of a commissioner from a southwestern state who came into the home office of a life insurance company in New York City and announced that he wanted to "count the securities" of the company. He was told that ten men were then engaged in checking up the company's bond investments and had been so engaged for several weeks.[149]

Not even the largest insurance departments attempt to appraise all of the mortgage loans upon real estate held by an insurance company. The New York department appraises all new loans (that is, those made since the last examination of this company) on real estate in the state where the amount exceeds $10,000, and likewise all loans upon which the interest payments are delinquent, as shown by the company's books. In case the real estate is located in another state, a request is sent to the commissioner of that state to have the property appraised. Another practice, used in Illinois, is to "sample" the real-estate loans by selecting every fiftieth piece for appraisal; the appraisal being made upon a printed form, verified by the oath of two appraisers living in the vicinity of the property appraised. Sometimes the borrowers are written to for the purpose of verifying the genuineness of the loans. Apparently no attempt is made to determine whether or not the mortgagor has good title to the realty mortgaged, except by ascertaining that, along with each loan, there is an abstract of title or a certificate showing good title. The appraisal of bonds and other securities which are quoted on the stock exchange is made largely a mechanical task by the use of the table of security values published by the New York and Massachusetts departments.

The examiner is usually authorized to examine under oath the officers and agents of the company.[150] However, in many jurisdic-

[149] Graham, *The Romance of Life Insurance*, p. 127.

[150] Ala., § 8338; Conn., § 4116; Del., § 573; Fla. L., 1919, Ch. 7871, § 2; Idaho, § 4978; Ind., §§ 4690, 4706e; Ia., § 5486; Kan., § 5166; Ky., §§ 752, 756; La., § 3580; Me., Ch. 53, §§ 83, 84; Mich. I, 2, § 6; Minn. L., 1915, Ch. 208, § 2; Miss., § 5023; Mont. S., § 4065; Neb. § 3144; Nev., § 1272; N. H., Ch. 167, § 10; N. J., p. 2861, § 73; N. M., § 2808; N. Y., §§ 25, 39; N. C., § 4692; N. D., § 4963; Ohio, § 626 (only the superintendent or his deputy authorized by sealed warrant); Okla., § 6676 (including unofficial examiner); Ore., § 6365 (7); Pa., § 28; S. D., § 9119; Tenn., § 3281; Utah, §§ 1133, 3296, 3298; Vt., § 4178; Wash., § 7038; W. Va., § 13; Wis., 1923, § 200.05; Wyo., § 5272.

tions, the examiner is not limited to these persons but may examine other persons generally. Thus, Massachusetts authorizes him to examine "any person who, he believes, has knowledge of the affairs . . . being investigated," [151] and New York authorizes examination of "all persons deemed to have material information regarding the company's property or business." [152] Other states, without expressly conferring discretion, authorize the examination of "any other persons," [153] or "other persons." [154] In some instances the examiner may make inquiries of policyholders, and so forth.[155] New York further requires that any other person shall produce any book or paper in his custody "deemed to be relevant to the examination." [156] Several states require a policyholder to submit his policy to the examiner, when called upon.[157]

f. Expenses of examination. An important, and in some respects a unique, incident of the power to examine insurance companies is the requirement, found in a large number of states, that the company examined shall pay all or some part of the expenditures involved therein. This practice, it has been said, "may be justly compared to that refinement of torture whereby the youthful miscreant was compelled to cut the switch with which he was to be thrashed." [158] However, the requirement is no joking matter. It not only constitutes a very considerable burden upon the insurance companies, but also makes the threat of an examination an effective means of carrying out the commissioner's directions to the company.

[151] Mass., § 4. [152] N. Y., § 39. Same, Mich., I, 2, § 6.

[153] Ala., § 8338; Ark., § 4984; Ga., § 2433; La., § 3580; Md. III, § 178 (6); Miss., § 5031; Mont. S., § 4065; Neb., § 3144; N. M., § 2808; N. C., § 4692; Ohio, § 623 ("witnesses"); Okla., § 6676; Pa., § 28; Tenn., § 3281; Tex., § 4501 ("any person within this state"); Utah, §§ 3296, 3298, 1133; Vt., § 5602; Va., § 4178; Wash., § 7038; Wis., § 200.05 ("witnesses").

[154] Ia., § 5486; Ky., §§ 752, 756; Minn. L., 1915, Ch. 208, § 2; Ore., § 6335 (7) ("any person who is or has been connected with such company"); S. D., § 1919 ("others if necessary); Wyo., § 5272 (same). The reason for distinguishing these from the provisions in the last note is that the word "other," following "officers, agents," etc., may be limited by the rule of *ejusdem generis*.

[155] Fla. L., 1919, Ch. 7871, § 1; Miss., § 5023.

[156] N. Y., § 39. Similarly, Conn., § 4065; Idaho, § 4978; Mich. I, 2, § 6; Ohio, § 623. See also Ind., § 4805.

[157] Ariz., § 3420; Cal. P. C., § 596; Idaho, § 4976; Neb., § 3171. The powers of the commissioner to compel persons to testify or to submit documents to examination are discussed *infra*, § 30.

[158] S. H. Wolfe, in 26 *Ann. Am. Acad. Pol. & Soc. Sci.* (1905), p. 322.

Only three states provide that the expenses of examination shall normally be paid by the state.[159] Massachusetts and nine other states require only foreign companies to pay the expenses of examination.[160] Several states provide only for payment of expenses by domestic companies;[161] it is not clear in these jurisdictions who pays the expenses of examining foreign companies, though it is hard to believe that foreign companies would be treated more favorable than domestic companies.

New York requires that all companies shall pay the expenses of examination unless remitted by the superintendent.[162] The other states generally require that all companies pay the expenses of examination.[163] In a few states, where an investigation is made by the commissioner on the complaint of a private citizen, the complainant is required to pay the expenses of the investigation if no violation of law by the company is disclosed.[164]

As to the items of expenditure which must be paid, the chief point of interest is the compensation of the examiner. Twelve states, including Massachusetts and New York, require that the company pay the necessary expenses, but not the compensation, of official state employees engaged in the examination.[165] A recent

[159] Ohio, § 627 (except where made at request of company, or of a foreign company which compels Ohio companies to pay expenses); Pa. (except examination of foreign company for violation of non-resident agent law . . . § 179); Wash., § 7120 (except in case of companies not required to pay taxes on premium income).

[160] Mass., § 4. Similarly, Colo. L., 1913, Ch. 99, § 12; Conn., §§ 4064, 4115, 4160; Me., Ch. 53, §§ 111, 154; Miss., § 5031; Ore., § 6357; Pa., § 179 (see last note); S. C., § 2699; Utah, § 1133; W. Va., § 12. The general provision in Ala. (§ 8337) applies only to foreign companies; but special provisions applicable to particular types of companies cover both foreign and domestic, §§ 8390, 8402, 8495.

[161] Nev., §§ 1272, 1300; N. H. L., 1913, Ch. 42, §§ 4, 10; Ohio, § 9615 (live stock); Tex., §§ 4802, 4823, 4907a.

[162] N. Y., § 7; likewise Va., § 4178.

[163] Ariz., §§ 3378, 3379; Ark., § 4986; Cal. P. C., § 597; Del., § 573; Fla. L., 1919, Ch. 7871, § 1; Ga., § 2433; Idaho, § 4980; Ill., § 70; Ind., § 4805; Ia., §§ 5470, 5668; Kan., § 5167; Ky., § 752; La., § 3616; Md. III, § 176B, § 244g; Mich. I, 1, § 6; Minn. L., 1915, Ch. 208, § 3; Mo., § 6096; Mont. S., § 4065; Neb., § 3144; N. J., p. 2861, § 72, p. 164, § 16; N. M., § 2808; N. C. S., § 4715; N. D., §§ 4921, 4963; Okla., § 6676; R. I., Ch. 220, § 23, Ch. 244, § 14; S. D., § 9120; Tenn., § 3282; Vt., §§ 5600, 5601; Wis., § 1968 (5) (retaliatory provision); Wyo., § 5280.

[164] Ala., § 8381; Ga., § 2493; Miss., § 5121; N. C., § 4694.

[165] Ariz., § 3379; Idaho, § 4980; Ky., § 752; Mass., § 4; Miss., § 5121; Mont. S., § 4065; N. J., p. 164, § 16; N. M., § 2808; N. Y., § 7; Okla., § 6901; Ore., § 6357; Vt., § 5601; Wis., § 1968 (5).

Arizona case construed a statute of this type. The state sued to recover expenses and part time compensation of two state examiners employed by the Corporation Commission, to examine an inter-insurance exchange at Seattle, Washington. Recovery of compensation was denied because the statute authorized collection of "expenses" only and thus excluded compensation.[166]

The company examined is commonly required to pay the compensation as well as the expenses of a special examiner, who is not a regular salaried employee of the department.[167] In other jurisdictions the items of expense which may be charged are left ambiguous, as by the use of such phrases as "proper charges," [168] "reasonable expenses," [169] and similar phrases.[170]

The aggregate amount paid by the companies examined in a single year is considerable. In New York in 1921–22, it was $96,000; in Idaho, $25,000; in Iowa, $41,404; in Nebraska, $15,789; other totals are given in the note.[171] Eight states reported that they had no data.[172] In some instances the expenses are paid directly to the private firm making the examination and no record of such payments is preserved in the insurance department.

How are the expenses of the examination, estimated in accordance with statutory provisions, to be determined? A number of states make no provision as to the method by which the expense bill shall be fixed.[173] Probably in these jurisdictions the expense bill is finally settled only by a judicial proceeding, as is expressly provided by the statutes of a number of states.[174]

[166] State *v.* Lumbermen's Indemnity Exch. (1922), 24 Ariz. 306, 209 Pac. 294, construing Ariz., § 3380.

[167] See citations in n. 163 of Del., Fla., Idaho, Ia. (§ 5470), Ky., La., Mich., Minn., Mo., Mont., N. J. (p. 164, § 16), N. M., S. D., Vt. (§ 5601). Also Ala., § 8337; Miss., § 5121; Neb., § 3157.

[168] Ala., § 8337; Okla., § 6676; Vt., § 5600.

[169] Ill., § 70; N. J., p. 2861, § 72; Utah, § 1133.

[170] Ark., § 4986 ("actual expenses incurred"); Ga., § 2433; Ia., § 5668; Me., Ch. 53, § 111; Nev., § 1272; S. C., § 2699 ("reasonable cost"); Tenn., § 3282; Wyo., § 5280.

[171] Ariz., $4040; Ark., $400; Conn., $500; Fla., $100; Kan., $9,333; Me., $297; Md., $14,000; Mass., nothing; Mich., $7,927; Minn., $7,556; Mont., $3,575; Nev., nothing; N. H., nothing; Ohio, nothing; Pa., nothing; S. D., $1,000; Wash., nothing; W. Va., $300; Wis., $3,206; Wyo., $2,000.

[172] Colo., Del., N. M., N. C., Okla., Ore., Utah., Va.

[173] Ala., § 8337; Ark., Cal., Colo., Conn., Del., Ga., Ill., Ind., Me., Mass. (except $30 for first examination of foreign life company, § 14), Miss. (§§ 5031, 5076), N. D., Ore. (See citations in n. 163.)

[174] The judicial proceeding is a suit to collect the expense bill, except in the case of La.; Ala. § 8383 (very limited scope); Ia., § 5470; La., § 3617 (court

Administrative methods of determining or fixing the amount of the expense bill are provided in seventeen states; in ten of these the insurance commissioner alone approves or certifies the amount of the expense.[175] In New York the expense bill is approved by the superintendent of insurance, is "audited" by the comptroller, and paid upon the comptroller's warrant drawn upon the state treasurer.[176] A New York case held that the word "audited" in the statute meant more than a mere perfunctory inspection of the bill, and that the comptroller was authorized to reduce to $720 a bill for $9,800 which had been approved by the superintendent.[177] Apparently such a check upon the commissioner's power is not without its uses.

A number of states attempt to limit the compensation to be paid to examiners. In many instances, the maximum fixed was low when the law was passed, and has become absurdly low by the increase in price levels.[178] It is difficult to strike a happy medium between unreasoning parsimony and exorbitant generosity.

g. Penalty for refusal to submit to examination. Without a detailed examination of the provisions of each state, it would be impossible to say whether or not all of the inquisitorial powers of the commissioner are fortified by sufficiently drastic legal penalties to make then effective. The problem of enforcement of the commissioner's orders, in general, will be taken up in a later section. At present it will suffice to summarize briefly the various means by which the commissioner's powers of examination are made effective.

review at suit of company, of commissioner's estimate); Miss., § 5122; Mo., § 6096; Mont. S., § 4065; N. M., § 2808; N. C., § 4695.

[175] Ala., § 8390; Fla. L., 1919, Ch. 7871, § 1 ("such compensation as the said treasurer [*ex officio* insurance commissioner] may decide to be reasonable"); Idaho, § 5185; Ia., § 5668; Kan., § 5173; La., § 3617; Md. III, §§ 176B, 178 (6); Mont. S., § 4065; N. H. L., 1913, Ch. 122, § 24; N. J., p. 2861, § 72; R. I., Ch. 220, § 23.

[176] N. Y., § 7. Similar provisions for approval by another executive official in addition to the commissioner are found in: Ala., § 8336 (governor approves *per diem* compensation); Ariz., § 3380 (state auditor); Mich. I, 1, § 6 (board of state auditors); Minn., § 3267 (governor); Mo., § 6096 (state auditor); Neb., § 3157 (state auditor).

[177] Matter of Thomas Murphy (1881), 24 Hun. 592, reversing s. c. (1880), 60 How. Pr. 258. The judgment of reversal was affirmed in (1881), 86 N. Y. 628.

[178] E.g., Ind., § 5049 ($10 per day; fraternals); Kan., § 5167 ($10 per day); N. C. S., § 4715 ($25 domestic company, $50 foreign company); N. D., § 4973 ($5 per day, accident and health); Ohio, § 9615 ($5 per day, live stock); Okla., § 6901 ($10 per day, mutual accident and health); Tenn., § 3282 ($10 per day).

The commonest type of penalty, judicially imposed, is fine or imprisonment.[179] In several states the refusal of a company to submit to examination is a sufficient ground for the commissioner to apply to a court for an injunction and receivership.[180]

Apparently, only one state, Nebraska, has taken advantage of the method of compelling a witness to divulge information which was upheld in *Interstate Commerce Commission* v. *Brimson* [181] — that is, a proceeding brought by the commissioner in a court of record praying for an order of the court that a certain witness be compelled to submit to examination.[182] However, the Massachusetts statutes provide for the issuance of subpoenas by a clerk of a court of record or a justice of the peace, to examine witnesses in cases pending before any persons authorized by law to examine witnesses,[183] and this would probably authorize a punishment for contempt by the court from which the subpoena was issued.

The chief administrative penalty for refusal to submit to examination is revocation or suspension of the company's license by the commissioner.[184] A few states purport to give the commissioner the contempt powers of a court, and authorize him to punish by fine or imprisonment a person who refuses to submit to his examination.[185] A Connecticut statute which declared that the commis-

[179] Ala., § 4588 (misdemeanor, fine $100–$500); Ariz., § 3420 ($100); Ark., § 4987 (failure to give information); Cal. P. C., § 598 ($500); Colo. L., 1913, Ch. 99, § 12 ($500 or 3 mos.); Conn., § 4294 ($500); Del. § 580 ($1,000 or 1 yr.); Idaho, § 4976 ($100); Kan., § 5201 ($500 per mo.); Ky., § 752 ($1,000 or 1 yr.); La., § 3581 ($100–$300); Me., Ch. 53, § 84 ($200); Md. I., § 205 ($100–$1,000); Mass., § 4 ($1,000 or 1 yr.); Minn. L., 1915, Ch. 84, § 2 (misdemeanor); Miss., § 5086 (same); Mo., § 6095 ($500 or 3 mos.); Mont. S., § 4065 (misdemeanor); N. J., p. 2867, § 89 ($500); N. M., § 2808 ($500 or 3 mos.); N. Y., §§ 39, 53 (misdemeanor); N. C., § 3494 (same); Pa., § 179 ($500); R. I., Ch. 219, § 3 (fine and imprisonment).

[180] Mich. I, 3, § 2; Neb., § 3147; Ore., § 6417; S. C., § 9181; Vt., § 5604; Wash., § 7042; see also La., § 3602 (forfeiture of domestic company's charter); R. I., Ch. 219, § 3 (same).

[181] (1894), 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047.

[182] Neb. § 3144. [183] Mass., Ch. 233, § 1.

[184] Ala., § 8339; Ark., § 4984; Ga., § 2433; Idaho, § 4978; Ill., § 44; Ind., § 4805; Ia., § 5474; Ky., § 752; La., § 3602; Me., Ch. 53, § 112; Md. III, § 178 (6); Mass., § 5; Miss., §§ 5026, 5032; Neb., §§ 3148, 3149; Nev. L., 1913, Ch. 158, § 2; N. H. L., 1913, Ch. 122, § 26; N. Y., § 25; N. C., §§ 4701, 4705; N. D., § 4921; Okla., § 6676; Ore., § 6357; S. C., §§ 2700, 9179; Tenn., § 3283; Utah, § 1134; Vt., § 5603; Va., § 4180; Wash., § 7039; Wis., § 1916. In Mass. and Va., only foreign companies.

[185] Mo., § 6095; N. M., § 2808; Ohio, § 623; Wash., § 7038.

sioner "shall have the same power to examine and compel the attendance of witnesses, and to require and compel the production of records . . . or other documents, as is now possessed by the Superior Court,"[186] was held not to confer upon the commissioner the power to commit any person to jail for refusal to be sworn and answer his questions, because the word "contempt" was not used in the statute, and it was added:

> Generally, moral influence is deemed sufficient to command respect and obedience where the legislature grants authority to a commission to make such examinations.[187]

The case is an interesting example of the extremely narrow construction given to administrative powers.

h. Publication of reports of examinations. The publicity incident to an unfavorable report of the examination of an insurance company is one of the most effective of the indirect sanctions annexed to the commissioner's powers. Through the exercise of, or even the threat to exercise, his power to publish his findings, he is in a position to achieve his ends without resort to revocation of license or judicial proceeding.[188]

Although nearly all the statutes authorize that the examination be made by an examiner other than the commissioner, many states make no provision regarding the report of the examiner to the commissioner.[189]

New York prescribes three features of the examiner's report which are worthy of note. (1) It shall be sworn to by the examiner. (2) Its contents are limited to (*a*) "only facts appearing upon the books, papers, and so forth, of the corporation, or ascertained from the sworn testimony of its officers or agents or other persons examined under oath concerning its affairs," and (*b*) "such conclusions and recommendations as may reasonably be warranted by the facts so disclosed." (3) The report, when filed, shall be "presumptive evidence" of the *facts* stated therein, in any proceeding by the people against the corporation, its officers or agents.[190]

[186] Conn. L., 1877, Ch. 140, § 1.

[187] Noyes *v.* Byxbee (1877), 45 Conn. 382, 385 (*habeas corpus* to secure release of one who refused to answer questions put by commissioner).

[188] See the remarks of Supt. Hotchkiss of N. Y., quoted *supra*, this section, p. 353.

[189] E.g., Mass., §§ 4, 16. So, it seems, in all the other states except the nine mentioned in the next note.

[190] N. Y., § 39. Similar in one or more of these features are: Ariz., § 3378;

The report of the examiner, when filed, is a part of the public records of the department and is, therefore, open to inspection by persons directly interested, unless a statutory provision authorizes the commissioner to withhold the report from publicity.[191] Such a provision is found in New York; the superintendent may withhold any such report from public inspection "for such time as he may deem proper."[192] The New York law further provides that the superintendent shall grant a hearing to the corporation before filing the report.[193] A similar provision was incorporated in the uniform fraternal bill, which has been adopted in a number of states.[194]

In Massachusetts, although there is no such authorization in the statutes, it is the practice of the department to send the company a copy of the examiner's report, accompanied by a form letter, notifying the company that it may have a hearing if it so desires, before the report is filed, and that, unless the company is heard from within two weeks, the report will be filed as a public document. The New York department sends with the examiner's report a similar form letter, asking the company to signify at once if the report is satisfactory, and stating that, if objections are filed by the company, a hearing will be given on a date to be fixed, on only those matters which have been objected to. The Illinois practice is about the same. The answers to the questionnaire indicate that, out of thirty-six departments, only sixteen do not withhold from

Conn., § 4065; Idaho, § 4979 (same as N. Y.); La., § 3602; Mo. § 6353; Mont. S., §178c; N. D., § 6357. See also Md. III, § 178 (6).

[191] See the opinion of the attorney-general of New York in N. Y. Insurance Report (1886), I, pp. xvii–xx; Mass., Op. Atty-Gen. (1907), p. 381; and see *infra*, § 27, as to publicity of records generally.

[192] N. Y., § 39. Similarly, Ariz., § 3378; Cal. P. C., § 597, and L., 1917, Ch. 700, § 1; Conn., § 4065; Ga. L., 1912, p. 119, § 3 (not over 60 days); La., § 3602; Mich. I, 2, § 6; Mo., § 6372 (investigation of stock-selling); Ore., § 6357; Va., § 4180. See also Minn. L., 1915, Ch. 195, § 14 (all investigations "may in his discretion be private)." However, the New York provision does not necessarily authorize the superintendent to discriminate between applicants for copies of the report; see the opinion of the attorney-general, cited in n. 191.

[193] N. Y., § 39. Similarly, Ariz., § 3378; Conn., § 4065; La., § 3602; Mich., § 11; Mo., § 6372; Mont. S., § 178c; Ore., § 6358.

[194] *Proc. N. C. I. C.* (1910), p. 144, § 27. So in Ala., § 8500; Ia., § 5586; Ky., § 681c–27; Mo., § 6427; N. H. L., 1913, Ch. 122, § 27; N. Y. L., 1911, Ch. 148, § 243; N. C. S., § 4798b (24); N. D., § 5086; Ohio, § 9489; Ore., § 6493; Pa., § 42; Tenn., § 3369a–132; Tex., § 4854; Utah, § 3299; Va., § 4300; Wash., § 7286; W. Va., Ch. 55a, § 27; Wyo., § 5352.

publication the results of an examination, while the remaining twenty do so for varying periods of time.[195]

The insurance laws do not stop with opening the examination report to the inspection of the public. As a means of communicating the results of the examination to the insuring public, it is frequently provided that the commissioner may publish the report or a part thereof. Thus, the New York provision is that the superintendent may publish the result of the examination, as contained in the report, in one or more newspapers, "if he deems it prudent for the interest of the public to do so." [196] These provisions, while they benefit the public, incidentally give the commissioner an opportunity to favor his journalistic friends.

i. Acceptance of report of another commissioner in lieu of examination. If the insurance companies doing business in a large number of states were actually examined at frequent intervals by the insurance departments of all of those states, the burden of meeting their requirements and of paying their expense bills would be truly oppressive. A pessimistic picture was drawn some years ago of the burden of multiple supervision:

> Life insurance in America pays for supervision by forty or more different bodies, and receives complete and thorough supervision from none. Part of this money is paid to politicians pure and simple.[197]

[195] "Q. 8: Do you withhold from publication the results of any examination, and if so, under what circumstances and for how long a period?" "Yes": Ark. (2 weeks); Colo. (until after hearing); Idaho (if necessary); Ill. (until after hearing); Ia. (30 days); Kan. (reasonable time); Md.; Mass. (until after hearing); Mich. (10 days); Minn. (until after hearing); Mont. (same); Neb.; N. Y. (see text); N. D. (until after hearing); Okla. (same); Pa.; S. D. (until after hearing); Va. (same); Wis. (until the company ratifies); Wyo. (30 days). "No": Ariz. (never have, but may); Conn. (not as a rule); Del.; D. C.; Fla.; Me.; Nev.; N. H.; N. M.; N. C.; Ohio; Ore.; Utah; Vt.; Wash.; W. Va. (not as a rule). Of the "yes" states, only Mich., N. Y., and Va. have provisions authorizing such withholding; while of the "no" states, three (Ariz., Conn., and Ore.) have provisions authorizing such withholding.

[196] N. Y., § 39. Similarly, Ariz., § 3378; Ark., § 4984; Cal. P. C., § 597, and L., 1917, Ch. 700, § 1; Conn., § 4065; Del., § 573; Ga. L., 1912, p. 119, § 3; Ia., § 5471; La., § 3602 (in official journal); Md. III, § 178 (5); Mich. I, 2, §§ 6, 11; Mo., § 6372; Mont. S., § 178c; N. M., § 2809; Ohio, § 626; Ore., § 6357; R. I., Ch. 220, § 23; Utah, § 1134; Wyo., § 5272. See also Colo. L., 1913, Ch. 99, § 13; Conn., § 4086; Ind., § 4805 (synopsis of examination); Md. IV, § 178 (6) (duty to publish contents of report of every examination).

[197] Graham, *The Romance of Life Insurance* (1909), p. 123. This was written shortly before the National Convention of Insurance Commissioners first appointed a special committee to act as a clearing house for the exchange of reports of examinations. See *infra*, n. 203.

But things are not as bad as they seem. There are several avenues of escape from duplicate examinations. First may be mentioned the legal methods. A large number of states expressly authorize the commissioner to accept in lieu of his own examination the report of the examination of another insurance department as to all or a part of the subject-matter of an examination of a company of the latter state.[198] A New Jersey statute required the commissioner to refuse to accept the certificate of a commissioner of a state which refuses to accept the certificate of the New Jersey commissioner as "conclusive" as to the results of the New Jersey examination.[199] In the absence of such express statutory authorization, the commissioner would be within his powers, in most instances, in acting upon the report of another commissioner, since he is not required to examine foreign companies periodically, and the grounds of revocation of license are usually sufficiently broad to authorize him to rely upon such evidence. Though Massachusetts has no provision for accepting the report of another commissioner, the statute authorizes revocation of a foreign company's license, "if the commissioner is of opinion, upon examination *or other evidence*, that" grounds for revocation exist.[200]

A second method of avoiding duplications of examinations is the joint examination by several insurance departments at the same time. Since in most jurisdictions the commissioner is empowered to appoint an unofficial examiner to investigate foreign companies, several commissioners may, by mutual agreement, designate the same firm of accountants or actuaries to examine a particular company. This practice has been popular in the western and southern states,[201] where the departments are insufficiently manned to undertake extensive investigations. Of course, certain phases of the examination are not identical for all of the states participating — for example, the gross premium receipts for taxa-

[198] Ala., § 8342; Ariz., §§ 3435, 3486, 3497; Ark., § 4984; Cal. L., 1917, Ch. 666, § 7; Conn., § 4086; Del., § 573; Ga., § 2436; Idaho, §§ 4966; 5187; Ind., § 4735; Ky., §§ 681c-16, 681c-26; La., § 3602; Me., Ch. 53, § 111; Md. IV, § 178 (6); Mich. II, 2, § 5, III, 1, § 10; Minn. L., 1915, Ch. 208, § 3; Mo., § 6095; Nev., §§ 1273, 1274; N. H. L., 1913, Ch. 122, § 26; N. Y. L., 1911, Ch. 198, § 243 (fraternals); Va., § 4179.

[199] N. J., p. 2861, § 73.

[200] Mass., § 5. See *infra*, § 26, p. 408.

[201] Ala., § 8434 (enacted, 1919) provides that "as far as practicable such examinations . . . should be made in coöperation with the insurance departments of other states."

tion purposes, and reserve liability under deposit requirements. In general, a considerable saving is effected. Still, duplication of such joint examinations occurs. Thus, a middle-western life insurance company was in recent years obliged to pay $15,000 for a joint examination by Tennessee and Mississippi, shortly after it had been subjected to a joint examination by Illinois and Wisconsin.

The exchange of reports of examinations through a committee of the National Convention of Insurance Commissioners is an extra-legal method of avoiding multiple examinations, in the sense that it is not prescribed or recognized in the statutes. Thirty years ago the commissioners were frequently unwilling to coöperate in the matter of examinations.[202] In 1909, the National Convention of Insurance Commissioners named a special committee on examinations, which drew up a set of resolutions, inviting each commissioner to send to the committee a list of the companies which he would like to have investigated, upon receipt of which the committee undertook to supply him with a copy of the last examination of each company. If, in the judgment of the committee, another examination was expedient, the committee would undertake to have a complete or partial new examination made by the home department, or, if the home department declined, by two or more commissioners selected by the committee.[203] The committee also collected 288 reports of examinations.[204]

Thirty-three departments agreed to coöperate along the lines suggested; sixteen made no response. When the resolutions were adopted, the South Dakota commissioner stated, "I am very jealous of my privilege, under the law, of scrutinizing those companies especially that are seeking to enter the state." [205] No further opposition was voiced, but several speakers intimated that the officials of some western states, in which there are but few domestic companies to examine, disliked to give up the political patronage incident to the examination of foreign companies. The Oklahoma commissioner favored the scheme because it would lessen the pressure brought upon the department "from professional examiners

[202] See Dwelling House Ins. Co. *v.* Wilder (1889), 40 Kan. 561, 20 Pac. 265, where it is reported that the Kansas superintendent refused to pay any attention to a statement from the Massachusetts commissioner that a Massachusetts company was financially sound.

[203] *Proc. N. C. I. C.* (1910), pp. 167, 168.

[204] *Ibid.*, p. 169.

[205] *Ibid.*, p. 189.

who want the *per diem* and the expenses."[206] The Illinois and Massachusetts representatives expressed indignation at the practice of some western commissioners of sending persons, often incompetent, to make "fake examinations" of companies recently examined by the home department. One such examiner, it was said, spent about three hours in examining an Illinois concern, and collected $123.[207] Finally, the resolutions were adopted unanimously;[208] and a resolution that each commissioner, before undertaking an examination outside of his state, should request the committee on examinations to coöperate with him, was opposed only by South Dakota.[209]

As a result of this resolution, the committee on examinations has been made a standing committee.[210] The answers to the questionnaire indicate that nearly all of the departments accept the report of the examination made by the home department as a basis for licensing a foreign company applying for admission for the first time.[211] The answers likewise indicate that, while the examination of foreign insurance companies has not been eliminated, it has been considerably lessened.[212] Thus, through the medium of the National Convention, a body having no official status, a measure of unity and coöperation is replacing the diversity incident to forty-eight sovereign states.

In conclusion, the work of examining insurance companies has been subjected to more criticism than any other phase of the commissioner's activities. That there have been abuses no one can deny. Two disinterested observers have taken opposite views of

[206] *Proc. N. C. I. C.* (1910), p. 203.

[207] *Ibid.*, pp. 191, 193. [208] *Ibid.*, p. 207.

[209] *Ibid.*, pp. 205, 206, 208.

[210] See *Proc. N. C. I. C.* (1922), p. vii.

[211] The departments answering affirmatively were: Ariz., Ark., Colo., Conn. (usually), Del., D. C., Fla., Idaho, Ill., Ia., Kan., Me., Md., Mass., Mich., Minn., Mont., Neb., Nev., N. H., N. M., N. Y., N. C., N. D., Ohio, Okla., Ore., Pa., S. D., Utah, Vt. (in part), Va., Wash., W. Va., Wyo. Only Wis. answered "no."

[212] The first number in parentheses is the number of domestic companies examined in the year 1920–21, the second number, foreign companies: Ariz. (0–5); Ark. (4–1) Colo. (1–0); Conn. (9–0); Del. (0–3); D. C. (11–7); Idaho (1–10); Ill. (all domestic); Ia. (only 3 foreign); Kan. (21–9); Mass. (34–1); Mich. (75–0); Minn. (33–6); Mont. (3–9); Neb. (6–1); N. H. (1–0); N. M. (2–0); N. Y. (all domestic); N. C. (3–1); N. D. (8–1); Ohio (46–0); Okla. (14–6); Ore. (0–3); Pa. (53–1); S. D. (8–0); Vt. (3–0); Va. (7–2); Wash. (16–2); W. Va. (18–0); Wis. (8–23); Wyo. (1–2).

the efficiency of examinations. An executive of a middle-western life insurance company stated to the writer confidentially that the examinations made by insurance departments were, on the whole, more efficient and thorough than those made by the national bank examiners. On the other hand, Mr. Thomas B. Donaldson, commissioner of Pennsylvania, said in 1921:

> There is a lot of hocus-pocus about examinations. The large companies need no examining by departments except as a moral influence. We, in this state, are now devoting our time to bolstering up the "weak sisters."

CHAPTER V

ADMINISTRATIVE METHODS AND MACHINERY

A. Administrative Procedure

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B. Enforcement of Administrative Determinations

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§ 23. *Complaint.* The statutory provisions as to the procedure of the insurance departments establish no system of pleading or other formal method for framing the issues, upon which the exercise of administrative powers is dependent, similar to those used in courts of record in America and England. The issues are raised by the evidence or by correspondence with the person or company affected. Only in a few instances is there any provision for a complaint by a policyholder or a citizen against a company or other person accused of violating the insurance laws. Reference has already been made to the provisions whereby the commissioner is permitted or required to make an examination of a company upon the complaint of policyholders, stockholders, creditors, and so forth.[1] In addition, several southern states provide for a special examination or investigation upon complaint of a citizen, who files a bond to cover the expenses of the investigation if the complaint proves to be unfounded.[2] Since failure to sustain the charges involves payment of costs, it would seem that the complaint should contain a specification of the charges; however, no such requirement is expressed, nor is the investigation limited to the scope of the complaint. Reference has likewise been made to the petition

[1] See *supra*, § 22, p. 350.
[2] Ala., § 8381; Ga., § 2493; Miss., § 5121; N. C., § 4694.

by a company for the approval by the commissioner of its plan of consolidation or reinsurance with another company.[3]

Provisions for complaint against a company are most frequently found in reference to the exercise of the commissioner's powers over the making of insurance rates.[4] The character of this complaint is usually left undefined. In some instances, it is provided merely that it shall be "written"; [5] in several instances a sworn complaint is required; [6] in only two instances are the contents of the complaint specified in any detail. The Minnesota law provides that no action shall be taken by the commissioner in reference to a fire rate except upon sworn complaint, "showing in substantial detail the grounds for complaint with such data as will reasonably enable the commissioner of insurance to determine whether there is probable cause" for such action.[7] The Georgia provision requires an affidavit to the best of the complainant's knowledge or belief that the company has violated the anti-pooling statute.[8] In several instances the commissioner's power to order an alteration in rates may be exercised only where a formal complaint is filed.[9]

In several statutes, provision is made for complaint against a broker or agent before revocation of his license. Thus, the New York law provides that any person aggrieved may file with the superintendent "a verified complaint setting forth facts from which it shall appear that any such certificate [of a broker] ought to be revoked." [10] This apparently requires that the complaint state "a cause of action." A Minnesota statute authorizes the commissioner to require that a complaint against a broker or agent be sworn to, "when he deems it advisable." [11] A California provision exemplifies the ambiguous character of some statutes on this point. It provides for revocation of an agent's license "if it is brought to the attention of the insurance commissioner that" ground for revocation exists.[12]

[3] See *supra*, § 16, p. 215.

[4] Colo. L., 1919, Ch. 138, § 6; Ga., § 2467; Ia., § 5670; Ky., §§ 762 a–10, 762 a–11; Mass., § 104; Mich. I, 4, § 3; Minn. L., 1915, Ch. 101, § 6; Mo., § 6283; N. C. R. B., § 4814 a (5); Pa., § 205; S. C., § 2735; S. D., § 9204; Tex., § 4984.

[5] See the citations in last note of: Colo., Ky., Mass., Mo., S. C.

[6] See the citations in note 4 of: Ga., Ia., Minn.

[7] See citation in note 4 of Minn. [8] Ga., § 2467.

[9] See citations in note 4 of: Colo., Minn.

[10] N. Y. L., 1915, Ch. 56 § 243.

[11] Minn. L., 1915, Ch. 195, § 9.

[12] Cal. L., 1919, Ch. 607, § 1.

A rare example of strictness in specifying the contents of the complaint is found in an Indiana statute which authorizes complaint by any person (of violation of the law forbidding insertion of a co-insurance clause in a fire policy) to be filed in writing, "and detailing the charge clearly." [13] Connecticut requires the commissioner upon complaint of a policyholder or stockholder to sue a director of a company to recover the loss caused by the director's consenting to an unauthorized investment.[14] There are several indefinite provisions for complaint against a company or agent on the ground of rebating or discrimination in life insurance premiums.[15]

A Massachusetts provision authorizes the commissioner to make a special report to the legislature at its next session, if "upon complaint," and after investigation, he is of the opinion that a company is unreasonably and unfairly delaying the settlement of policy claims.[16] Such a provision is in the twilight zone between administrative power to affect private interests and administrative gathering of useful information.

In addition to these special provisions for complaint in particular cases, there are a few, and only a few, general provisions as to complaint. Thus, Nebraska and Oregon require that every company, agent or broker, having knowledge of violations of the provisions of the insurance laws, shall report the same promptly to the administrative authority.[17] In Wisconsin the commissioner is required to investigate "written charges" by "any responsible person." [18]

The meagreness of the statutory provisions as to complaint by a person aggrieved is indicative of the informality of the complaints upon which the commissioner takes action. The answers to the questionnaire indicate that with one exception, the insurance departments have no standardized forms for filing complaint against a company, an agent or a broker.[19]

[13] Ind., § 4626. But *cf.* Fla., § 2773 (on "complaint thereof" commissioner shall revoke license of company issuing forbidden form of policy).

[14] Conn., §4152.

[15] La., § 3628 ("whenever he shall have received notice"); Mich., § 39, ("written complaint"); Mo., § 6279 (same); S. C., § 2739; Wis., § 1921–34.

[16] Mass., § 28. See also Pa., § 52 ("whenever proof shall be submitted to the commissioner" of failure to pay judgment).

[17] Neb., § 3198; Ore., § 6391. See also Ohio, § 617.

[18] Wis., § 1968. Similarly, W. Va., § 60 a (required to investigate complaints in writing under oath). See also S. D., § 9187.

[19] "Q. 23–a: Have you any forms for filing complaint against a company or an agent or a broker"? *No:* Ark., Colo., Conn., Del., D. C., Fla., Idaho, Ia.,

§ 24. *Notice of proposed official action.* Notice and hearing are the staple procedural safeguards against arbitrary or oppressive administrative action. When these two are mentioned in conjunction, "notice" means a notification of at least the time and place of hearing, and "hearing" means the presentation of data before the official or body having power to make a decision, or at least before some one designated by such official or body to obtain the necessary information. These procedural safeguards are drawn from the model of judicial procedure, of which they are the distinguishing characteristics, in contrast with executive justice or legislative procedure. It matters little for our purpose that these procedural features appeared, historically, as more or less accidental phases of a scheme to minimize resort to the blood feud and other forms of self-help as methods of redressing private injuries. The ceremonial *in jus vocatio* of the Romans [1] and the Royal Writ of the Norman kings have developed into a formal system of notice and hearing because experience has shown that contentious litigation can thus be disposed of with least sacrifice of individual and social interests. The survival of legal institutions is more important than their origins.

It does not quite follow that these procedural safeguards are either necessary or sufficient safeguards in the exercise of each and every administrative power. In respect to powers which could only slightly or remotely affect private interests (for example, registration provisions of some types) these safeguards would be needless hindrances. With respect to inquisitorial powers, the necessity for surprise precludes the giving of a warning notice. With respect to ministerial powers, the data for action will usually be so simple and unequivocal (for example, mere payment of a fee for the issuance of a license) that procedural requirements would not only impede the performance of routine or clerical tasks, but also would be a waste of time because the administrative action or refusal to act decides nothing finally; the court, in a proceeding for judicial review, will decide the whole question anew.

Kan., Me., Md., Mass., Mich., Minn., Mont., Neb., Nev., N. H., N. M., N. Y., N. C., N. D., Ohio, S. D., Utah, Vt., Va., Wash., W. Va., Wis., Wyo. — 32. *Yes:* Okla. For an exceptional case in which the complaint filed before the commissioner was incorporated in a judicial report, see State *ex rel.* United States Fidelity & Guaranty Co. *v.* Harty (1919), 276 Mo. 583, at pp. 588–589, 208 S. W. 835.

[1] Girard, *Manuel Elémentaire de Droit Romain* (6 ième éd., 1918), p. 26; Twelve Tables, I.

Furthermore, where the administrative official is both prosecutor and judge, in the enforcement of laws which require an obvious weighing of social interests against individual interests, notice and hearing are apt to become illusory safeguards. For these reasons a treatment of notice and hearing as exemplified in the administrative law and practice of the insurance commissioner tends to fall apart into analysis of the procedural limitations governing the exercise of particular powers. A classification of administrative powers which will bring out the theoretical needs and actual differences is the *desideratum*. At the same time, there is enough in common to justify discussing the commissioner's procedure as if it were a unit.

The assumption that "notice" always means "hearing" as a necessary corollary, must be taken with some qualifications. There are types of administrative powers, the exercise of which must, under existing statutes, be preceded by notice to the persons affected thereby without the necessity for a hearing. Again, "notice" may mean a notification to the public, a notification to all persons interested to protest or to request a hearing, before action is taken. The statutory provisions are frequently ambiguous as to the nature of the notice as well as its purpose. For these reasons, it seems best to treat notice separately from hearing.

The present section will therefore be devoted to a summary of the "notice" provisions, classified with reference to the types of administrative powers. Under each such subdivision, the following questions will be considered: To what extent do the statutes provide for notice? What is the purpose of giving the notice so provided for? What is the form of notice? To what extent must it specify the details of the charges or questions to be investigated? To whom must it be given, and how long in advance of the hearing or proposed action? Provisions which omit altogether any provision for either notice or hearing will be taken up in the next section. Provisions which unambiguously mean a notification of administrative action already consummated will be treated later.[2]

1. *Inquisitorial powers.* It has already been pointed out that the statutes authorizing examinations of insurance companies by the commissioner, whether special examinations or periodical examinations, do not require the giving of any notice to the company of his intention to make such an examination.[3] There can be no

[2] See *supra*, § 22, n. 164.

[3] See *supra*, § 22, p. 351.

question that the failure to make such a provision does not impair the constitutional validity of these statutes. It has likewise been noted that in a substantial minority of the states, notice of an intended examination is usually given. That the administrative practice is at variance with statutory provisions is no indication that the latter should be amended. There have been instances in which an insurance company, upon learning of a proposed examination, has attempted to borrow or transfer to its office sufficient assets to make up the deficiency in its reserve funds. The bare possibility of such an evasion makes it necessary that the commissioners should not be hampered by procedural requirements in their work of discovering such fraud and trickery.

On the other hand, provision is made in a number of jurisdictions for the giving of notice to a company before the formal filing and publication of the report of an examination.[4] While the filing of a report and the incidental publicity do not affect the legal status of the company, they have important practical consequences. It is, therefore, highly desirable that a company's reputation should not be blasted by an adverse report of an examiner (in some instances, an actuarial or accounting firm) without giving the company an opportunity to be heard. The notice in these cases usually includes a copy of the examiner's report, including not only his findings of fact but also his recommendations. It is thus adequate to the purpose.

2. *Powers of approval or disapproval.* The statutes granting powers of approval or disapproval rarely contain any requirements as to notice or hearing. Thus, the numerous laws requiring approval, or authorizing disapproval, of forms of insurance policies contain no mention of notice to the company before a final decision —refusal to approve, or disapproval, as the case may be. The practice of the departments in such cases is to write the company a letter that the particular form, or a part thereof, is disapproved for specified reasons. In the only two reported cases in which such disapproval provisions were involved, no reference was made to the absence of procedural requirements in the statutes.[5]

The exercise of an approval or disapproval power has direct legal consequences, since the clause or rider which is disapproved will probably be treated as legally inoperative in any action brought

[4] See *supra*, § 22, p. 367.

[5] New York Life Ins. Co. *v.* Hardison (1908), 199 Mass. 190, 85 N. E. 410; Commercial Acc. Ins. Co. *v.* Wells (1923), 156 Minn. 116, 194 N. W. 22.

against the insurer by a policyholder.[6] Moreover, such a decision may be of considerable importance to a particular company. These are reasons why notice and hearing should be provided. On the other hand, by far the greater proportion of the work of checking over the policy forms submitted is mere "management of details," as the Massachusetts court said[7] and the rigid requirement of notice and hearing before each disapproval, would render the performance of the duties imposed upon the insurance department practically impossible.

One example of an elaborate provision for notice before exercise of a power of approval is found in the statutes relating to consolidation and re-insurance.[8] The Connecticut law, for example, provides for notice by mail to all the policyholders of the company, plus a publication in three daily newspapers for three weeks, in Hartford, New Haven and New York City, of the proposal to consolidate or re-insure.[9] On the other hand, the Iowa legislation leaves it optional with the special board (the commissioner, governor and attorney-general) to decide without notice, or to give notice to the policyholders, before approving consolidation or re-insurance.[10]

Approval and disapproval provisions are likewise found in the statutes as to insurance rates.[11] Here again the outstanding characteristic is the absence of any requirement of notice before such orders take effect. One exception is the Colorado statute which requires fifteen days' notice to all parties interested before suspension of rules and regulations as to fire insurance rates,[12] as well as before the making of an order for removal of discrimination in rates.[13] Another is the Minnesota statute which prescribes in considerable detail the notice which must precede an order removing a discrimination in fire rates. It must be in writing, setting forth the complaint and the data on which the complaint is based, and must be sent by registered mail or special delivery to the company or bureau concerned ten days in advance of hearing.[14] Several other

[6] See *supra*, § 18, p. 267.
[7] See New York Life Ins. Co. *v.* Hardison, *supra*, n. 5.
[8] See *supra*, § 16, p. 215.
[9] Conn., § 4167.
[10] Ia., § 5728.
[11] See *supra*, § 19, sub-sec. 5, p. 276.
[12] Colo. L., 1919, Ch. 138, § 6.
[13] *Ibid.*, § 11.
[14] Minn. L., 1915, Ch. 101, § 6.

states require notice before such an order is made.[15] It seems that the notice in these cases is given for the purpose of allowing a hearing.

The disapproval of an agreement between companies or between rating bureaus, which establishes a system of fire rates, must be preceded by notice in a few states.[16] Wisconsin provides notice by the commissioner to parties interested before reviewing the rates charged for liability insurance.[17] In all these cases the purpose of the notice is, apparently, to afford a hearing.

The provision for notice by the commissioner of his disapproval of a policy form, to be given within thirty days after the filing of the form in his office, is commonly found in such statutes.[18] The Massachusetts and New York statutes of this type provide for no hearing before the commissioner, but declare expressly that the action of the commissioner shall be subject to review by a court.[19] This is an example of a notice requirement which does not provide for administrative hearing.

Occasional examples of notice requirements are found in statutes defining the commissioner's powers over the company's financial condition.[20] However, such instances are extremely rare. The commissioner is usually permitted to exercise his judgment as to the company's assets and liabilities upon inspection of the annual report and examiner's report, without giving the company notice prior to his decision. While the data of the decision are normally furnished by the company affected and therefore beyond dispute, it would seem that a hearing should be given on the interpretation of the data.

3. *Refusal of license.* The commissioner is nowhere required to give a foreign company notice of his intention to refuse it a license. The application for a license will usually contain considerable documentary evidence,[21] from which he may draw his conclusions as to

[15] Ky., § 762 a–10 ("*due notice to all parties interested*"); Mich. I, 4, § 12 (15 days, to all parties interested); Mo., § 6279; S. C., § 2739 ("summon the company").

[16] Ky., § 762 a–12; Minn. L., 1915, Ch. 101, § 5 ("due notice"); Pa. § 205 (same).

[17] Wis., §1921–34.

[18] *Supra*, § 18, p. 264.

[19] Mass., §§ 108, 132; N. Y. L., 1913, Ch. 155 (§ 107).

[20] N. J., p. 2847, § 24 ("due" notice of disapproval of method of computing reserve of life company); N. C., § 4737 (10–20 days' notice of disapproval of loan or realty mortgage as investment).

[21] See *supra*, § 12, p. 103. The statutes frequently make provision for "such examination as he may make or such evidence as he may require" before

whether or not it is qualified under the statute applicable to it. While a formal application for a company license is sometimes established by departmental ruling, the application is dealt with informally; in the course of correspondence between the commissioner and the company, certain points of disagreement or objection will be developed, and rather than have a flat refusal, the company will usually withdraw if it is unable to meet the commissioner's objections. Thus, in an informal and very indefinite way, the company is given a sort of notice of the commissioner's intended action. Nevertheless, the privilege of doing business in a state is a business asset so valuable, and the questions involved in determining whether or not it will be granted are so complex and two-sided, that some provision should be made for a hearing upon the commissioner's objections, if requested by the company, before the license is finally refused. While no reported case has passed upon the validity of these provisions, it would seem doubtful whether or not they are constitutional, in view of the omission of a notice requirement. This point will be further developed in connection with the discussion of hearing.

Even more objectionable is the omission to provide for notice (and hearing) before the commissioner refuses to renew the annual license of a company. With a single exception, no such requirement is found in the statutes. A Missouri section requires the superintendent to cite the company to appear, giving "reasons therefor," before refusing a renewal of a foreign life insurance company's license.[22] A Vermont statute provides for three weeks' public notice of a hearing upon an application for incorporation of an insurance company.[23]

A requirement of notice before refusal of an agent's license is not quite as rare as in case of refusal of a company's license, but is still exceptional. Only two states provide for notice to the applicant before refusal of either an original license or a renewal license.[24] The New York law makes no provision for notice before refusal to license an applicant applying for the first time. However, if an application for renewal is filed in proper time, the applicant may

the commissioner licenses an insurance company (e.g., Mass., § 4; similarly, Ala., § 8338), but these provisions may mean an *ex parte* investigation without notice. In other instances (e.g., N. Y., § 9, as amended by N. Y. L., 1910, Ch. 634, § 3) nothing is said about either notice or investigation.

[22] Mo., § 6189.

[23] Vt., § 5518.

[24] Ore., § 6335 (15 days, naming time and place); Wash., § 7090 (same).

continue to do business under his old license for the first six months of the year, unless the superintendent gives him five days' notice of his refusal to renew; and the method of service is specified, namely, personally, or by mail, and, if by mail, the notice "shall be deemed complete if deposited in the post office, postage prepaid, directed to the applicant at the place of residence or business specified in his application." [25] The New York law has a similar provision as to refusal or renewal of a broker's license.[26] No other examples were found.

4. *Revocation of license.* (*a*) *Company's license.* It will be shown in the next section that there are numerous statutes which authorize revocation of a company's license without providing for either notice or hearing.[27] The present discussion will therefore be limited to the cases in which notice is required. It was suggested above that notice is sometimes precedent to a hearing, or opportunity to be heard, before the commissioner, and sometimes not. An attempt has been made to classify the notice requirements accordingly.

A considerable number of statutes (though chiefly limited to the favored fraternals) provide for notice of a hearing to be had before the commissioner.[28] In most of these instances the statute does not prescribe or even indicate the kind of notice (whether written or oral), the contents of the notice, or how it shall be communicated to the company. A conspicuous exception to this rule is found in the Uniform Fraternal Bill which has been adopted in a number of states. Before revoking the license of a foreign fraternal society, the commissioner is required to:

[25] N. Y. L., 1914, Ch. 14, § 1 (§ 91 a).

[26] N. Y. L., 1915, Ch. 56 (§ 143).

[27] See *infra*, § 25, sub-sec. 4, p. 398.

[28] Ariz., § 3499 (fraternal); Ark., § 4979 (for cause shown); Cal. P. C., § 596 b (1915), Cal. L., 1917, Ch. 770, § 633 b; Colo. L., 1913, Ch. 99, § 13 (except on financial grounds); Fla. L., 1919, Ch. 7869, § 1; Idaho, § 5190 (foreign fraternal); Ind., § 4626; Ia., § 5718; Kan., § 5371; Ky., § 681 c–28 (fraternal), § 743 m–10; Me., Ch. 53, § 118, Ch. 54, § 23 (fraternal); Mich. II, 4, §§ 8, 12, III, 4, § 28 (fraternal); Minn., § 3562 (fraternal); Miss., §§ 5064, 5172; Mo., §§ 6383, 6428 (fraternal); Mont. S., § 4065 a (except on financial grounds); Neb., § 3148; N. H. L., 1913, Ch. 122, § 28 (fraternal); N. Y. L., 1913, Ch. 9 (§ 32), Ch. 182 (§ 182), also L., 1911, Ch. 198 (§ 244) (fraternal); N. C. S., § 4798 b (25) (fraternal); N. D., §§ 4854, 4856; Ohio, § 9556–10; Okla., § 6769; S. C., § 2700 (except on financial grounds); S. D., § 9179 (same); Tenn., § 3348 a (23); Va., § 4180; W. Va., § 15 e; Wis., § 1955 (o) 5.

Notify the society of his findings, and state in writing the grounds of his dissatisfaction and after reasonable notice require said society, on a date named, to show cause why its license should not be revoked.[29]

In a number of states the foreign fraternal society is the only insurer which is favored with compulsory notice and hearing before revocation of its license.

A number of provisions require simply "reasonable notice," [30] or "due notice." [31] In a few instances, other than the fraternal statutes, a specification of the charges, or a statement of the reasons, must be included in the notice.[32] The length of time which must intervene between notice and hearing is commonly not prescribed; in some instances, ten days,[33] fifteen days,[34] or thirty days [35] is prescribed. It is occasionally required that the notice shall name the date of the hearing.[36] It would seem that such a requirement would be implied from the general provision for notice, as otherwise the notice would be useless. The omission to explicitly prescribe that the notice shall state at least the time and place of the hearing is indicative of the careless disregard of procedural safeguards in connection with revocation of an insurer's license.

But a large number of statutes prescribe notice to the company before revocation of its license, without saying anything about a hearing before the commissioner. It is frequently difficult to determine from the language used whether the notice mentioned is a notice of intention to revoke, or a notice of a revocation already consummated. The Massachusetts section authorizing revocation of a foreign company's license declares:

Unless the ground for revocation or suspension relates only to the financial condition or soundness of the company or to a deficiency in its

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[29] Uniform Fraternal Bill, § 28, *Proc. N. C. I. C.* (1910), p. 144. This provision is found in the following statutes cited in the last note: Ky., § 681 c–28; Me., Ch. 54, § 23; Mich. III, 4, § 28; Minn., § 3562; Mo., § 6428; N. H.; N. Y., § 244.

[30] Cal. L., 1917, Ch. 770, § 633 b; Idaho, § 5190; Kan., § 5371; Mich. III, 4, § 28; Miss., § 5172; Mo., § 6383; N. Y., § 244; Ohio, § 9556–10.

[31] Ia., §5718.

[32] Okla., § 6769; S. C., § 2700; Tenn., § 3348 a–23 (revocation for misrepresentation of policy); W. Va., § 15 e.

[33] Ind., § 4626; Va., § 4180.

[34] Colo. L., 1913, Ch. 99, § 13; Mich. II, 4, § 8; Mont. S., § 4065 a; N. D., §§ 4854, 4856; S. D., § 9179.

[35] Me., Ch. 54, § 23; S. C., § 2700; W. Va., §15 e.

[36] N. Y., § 244; Okla., § 6769; Tenn., § 3348 a–23; W. Va., § 15 e.

assets, he shall notify the company not less than ten days *before* revoking or suspending its license; and he shall specify in the notice the particulars of the alleged violation of law or of its charter or grounds for revocation or suspension.[37]

Immediately following this is a provision for judicial review by petition to the supreme court, to be filed within ten days; the court is authorized to determine *de novo* whether or not the grounds for revocation exist. Here the notice requirement has apparently two objects in view: first, to enable the company to remove the grounds of objection; second, to enable the company to obtain a judicial stay of execution on the commissioner's revocation before the revocation takes effect. It is easy to confuse this kind of notice (of intention to revoke) with a notice of an administrative hearing.[38] One or both of the two objects first mentioned is apparently the aim of the notice requirements in several other states.[39] A Georgia provision may be taken as typical of the ones requiring notice of financial deficiencies. When the amount of bonds deposited by a company is reduced below the legal requirements, the commissioner

shall give notice to the company depositing, and require more bonds to be deposited, so as always to maintain the original amount; and if the company so notified by the insurance commissioner fails to comply within thirty days, the license to do business shall be revoked . . .[40]

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[37] Mass. § 5 (italics ours). Similar provisions are: Ariz., § 3381; Minn., § 3260; Tenn., § 3284; Wash., § 7039.

[38] As was done in North British Mercantile Ins. Co. *v.* Craig (1900), 106 Tenn. 623, at pp. 627–8 and 639, 62 S. W. 155.

[39] Ala., § 4551 (10 days, specifying particulars); Ariz., § 3378 (3 mos.); Ga., § 2424 (30 days, to make good impaired deposit), § 2430 (notify company to make good registered policy deposit), §2434 (90 days, to make good impaired capital); Idaho, § 4961 (10 days, stating specifically the reason; for paying illegal dividends); Ill., § 25 (illegal advertisements), § 45 (demand for examination of books; writing insurance through non-resident agents); Md. III, § 178 (9) (60 days to make good impaired capital); Mich. II, 3, § 11 (10 days; failure to pay penalty assessed by commissioner), IV, 1, § 13 (30 days, to make good deficiency in assets); Miss., § 5048 (3 months, to make good impaired capital), § 5083 (30 days, by registered letter or other actual written notice; violation of local investment statute); Mo., § 6339 (30 days; failure to obey court decree); Nev. L., 1913, Ch. 158, § 2; Nev., §§ 1274, 1293 (60 days to pay losses or cease doing business); N. J., p. 2879, § 126 (30 days to comply with law requiring resident attorney for service of process); N. C., § 4733 (3 months, to make good deficient assets); Okla., § 6678 (10 days; possible hearing implied); Tex., § 4785 (30 days to enable company to comply with law as to investment in Texas securities); Utah, § 1134 (15 days; non-financial grounds).

[40] Ga., § 2424.

As no judicial review is provided for, the notice here is evidently designed merely to give the company time to make good the deposit.

(*b*). *Agent's license.* Notice requirements are found relatively more frequently in connection with revocation of the agent's, than of the company's license; in some instances the requirement is to be implied from the language "for good cause *shown*";[41] in other instances, simply "notice,"[42] or "reasonable notice"[43] or "due notice."[44] Occasionally, the length of time between notice and hearing is specified.[45]

The most elaborate provision for notice is that found in the Maryland statute which requires written charges to be served upon the agent in person, by registered mail, or by leaving the notice at his last known address.[46] In a few instances it is required that the notice shall specify the charges or grounds of the intended revocation.[47] Notice of a hearing to be had is likewise required in statutes authorizing revocation of a broker's license.[48] The discrimination in favor of agents and brokers is partly to be explained by the fact that the statutes empowering revocation of agent's or brokers' licenses are more recent enactments than those relating to companies' licenses; and partly by the fact that the data of the decision to revoke a company's license are more frequently in documentary form and thus less open to dispute. However, the distinction (except possibly as to financial grounds) seems unjustifiable.

[41] Fla. L., 1919, Ch. 7868, § 1; Idaho, § 5016; Mass., § 163; Mich. II, 3, § 8; N. H. L., 1913, Ch. 78, § 1.

[42] Cal. L., 1919, Ch. 607, § 1 ("cite him to appear and show cause why"); Ind., § 4714 b; Wash., § 7090.

[43] Me., Ch. 53, § 122.

[44] Ky., §762 a–15; Neb., § 3194.

[45] Ind., § 4714 e (10 days); Me., Ch. 53, § 126 (same); Md. IV., § 184 C (same); Mich. II, 4, § 8 (15 days); N. C. R. B., § 4812 a (10 days); Okla., § 6749 (c) (same); S. C., § 2704 (30 days); W. Va., § 15 d (same).

[46] Md. IV, § 184 C. In 1922, Mass. adopted a provision declaring that notice by registered mail, sent postpaid to the last business or residence address of the licensee appearing on the commissioner's records, "shall be deemed sufficient" notice of revocation of an agent's or broker's license. Mass. L., 1922, Ch. 69, adding § 174 A to Ch. 175 of G. L., 1921.

[47] Ind., § 4706 e (rebating), § 4714 e (misrepresenting policy); Me., Ch. 53, § 126; N. C. R. B., § 4812 a; W. Va., § 15 d.

[48] Cal. L., 1919, Ch. 547, § 1 ("cite him to appear and show cause why"); Me., Ch. 53, § 122 ("reasonable"); Mass., § 166 ("for cause shown"); Neb., §3194 ("due").

5. *Miscellaneous orders.* Notice requirements are rarely found in connection with administrative orders other than those revoking licenses. Taking a leaf from the public utility statutes, the legislatures have usually provided for notice before the making of an order altering fire insurance rates.[49] The New York law on this subject provides for an order removing discrimination in rates "after a full hearing," but says nothing as to notice; clearly, a notice requirement is to be implied.[50] Occasional miscellaneous examples of notices of one type or the other, are found.[51]

6. *Enforcement proceedings.* Ordinarily, the commissioner is not required to give a notice and hearing before instituting judicial proceedings for the recovery of a penalty or for an injunction and receivership. The uniform Fraternal Bill is thus exceptional in declaring that no proceeding to enjoin a domestic fraternal society from carrying on further business and to obtain the appointment of a receiver, shall be commenced by the attorney-general until after notice has been duly served on the chief executive officers of the society and an opportunity to show cause given.[52]

Massachusetts requires three months' notice to a domestic company before the commencement of a suit for injunction and receivership on the single ground that its capital is impaired twenty-five per cent.[53] The object of this notice is to enable the company to make good the deficiency in its capital or assets rather than to set a time for a hearing. The New York statutes require thirty to ninety days under similar circumstances.[54]

[49] See, e.g., Mass., § 5371 ("reasonable notice"); Mich. I, 4, § 3 ("due notice" to all parties interested); N. C., § 4814 a (5) (7 days; recommendations as to rates); Tex., § 4890 (30 days notice).

[50] N. Y. L., 1922, Ch. 660, § 1.

[51] Ga., § 2467 (20–40 days; hearing on charge of pooling rates); Ia., § 5484 (30 days' notice to life company to make valuation of policy reserves earlier than statutory date); N. Y. L., 1915, Ch. 617, § 2 (§ 94) (5 days' notice and hearing before requiring list of policyholders to be filed, for use in election of directors of company).

[52] Uniform Fraternal Bill, § 24, *Proc. N. C. I. C.* (1910), p. 143. See Ariz., § 3495; Ky., § 681 c; N. H. L., 1913, Ch. 122, § 24. However, New York Insurance Law, § 242) and other states which followed the "New York Conference" modifications of the "Mobile Bill," subject fraternal societies to the same procedure which applies to other domestic insurers.

[53] Mass., § 6. If the suit is brought on other grounds (non-compliance with law, insolvency, attempted preference of policyholders, condition hazardous, etc.) no such notice is required.

[54] N. Y., §§ 41, 43.

7. *Hearing without notice.* The meaning of provisions that the commissioner may take certain action "after investigation," [55] or "upon investigation or examination," [56] is not clear. If "investigation" or "examination" implies a hearing at which the persons affected may be represented (which seems an unwarranted implication in many cases) notice is impliedly required. The notice requirement is more clearly implicit in those provisions which prescribe a hearing, without mentioning notice,[57] since the hearing requirement would be illusory if no notice of it were given.

§ 25. *Hearings.* Provisions requiring a hearing before the insurance commissioner or his appointee before he may take administrative action affecting the legal relations of insurers, their agents, or other persons, are conspicuous by their absence. Speaking generally, hearing requirements are found only in connection with the power to revoke licenses, and the power to disapprove or alter fire insurance rates. Even in respect to the revocation of licenses, numerous statutes are found which say nothing whatever about a hearing before the commissioner.

To generalize negatively about statutory provisions is somewhat risky, because of the inadequacy of statutory titles and indices. Nevertheless, if a complete picture of the administrative provisions in insurance legislation is to be drawn, some effort must be made to indicate the extent to which procedural safeguards are absent from the insurance commissioner's powers. In the first place, such an investigation seems necessary in order to depict the faulty draftsmanship of insurance statutes, and the resulting dangers to private interests through hasty or arbitrary official action. In the second place, while it can not be asserted that the "due process" clauses of state and federal constitutions require a hearing before the exercise of *every* administrative power, certainly, some kinds of admin-

[55] Ill., § 250; N. Y. L., 1914, Ch 108, § 1.

[56] Ia , § 5471. Similarly, Ala., § 8333; Mass., § 4. See *supra*, note 21.

[57] Ark., § 5087 (revocation of company's license); Colo. L., 1919, Ch. 137, § 1 (revocation of broker's license); Ia., § 5670, (hearing on charge of combining to fix rates); Mich. II, 3, § 8 ("after a hearing," refuse agent's license); Minn. L., 1915, Ch. 195, § 9 (hearing on request, revocation of agent's or broker's license); N. Y. L., 1914, Ch. 14, § 1 (§ 91 a) (revoke agent's license after investigation and a hearing), L., 1913, Ch. 12 (§ 143) (revoke fire broker's license after investigation and a hearing), L., 1913, Ch. 26 (§ 141) (after "full hearing," order discrimination in fire rates removed); Ohio, § 644 (revocation of agent's license), § 644–1 (solicitor's license), 644–2 (broker's license).

istrative acts must be thus safeguarded, and failure to provide these safeguards will make the statute unconstitutional, or the administrative act impeachable on judicial attack. In the third place, a close scrutiny of these negative examples may afford some basis for a classification of the administrative acts which should, and those which should not, be preceded by a hearing.

1. *Inquisitorial powers.* No state requires that the commissioner shall give a company a hearing upon the question whether or not he shall order an examination of it to be made.[1] It seems obvious that such a requirement would enable the dishonest insurer to cover up its deficiencies while the hearing was going on. No doubt in many instances, even where a special examination is ordered, it is practicable to let the company be heard before the order is made, without endangering the efficiency of the examination; and the answers to the questionnaire indicate that a considerable number of the insurance departments usually give a company notice and an opportunity to be heard before making a special examination. However, to require that such notice be given in all cases, or to attempt to separate the cases where it might safely be required, from the cases in which it would be impracticable to require it, is not feasible. In the case of a periodical examination, since the statute is mandatory, there is nothing upon which to hold a hearing. The answers above mentioned indicate that the company is usually notified in time to prepare for a periodical examination.[2] Were it not for the circumstance that the company examined is required to pay the expenses of examination, in many states, and that the commissioner practically fixes the expense bill, there would be little danger in the unlimited discretionary power of the commissioner to order an examination.

To publish the report of an examination in a newspaper, or even to throw it open to public inspection, may mean a serious injury to the company. While it is true that the examination itself is a sort of hearing before the examiner, yet where the examination is made by some one other than the commissioner himself, there may be good reasons for requiring that the company shall be given a hearing before the commissioner prior to the filing or publication of the report; and it is gratifying to note that such a hearing is required by the statutes of most of the states, and is commonly given by the departments.[3] By these requirements and practices,

[1] See *supra*, § 22, p. 351.
[2] *Ibid.*, p. 352.
[3] *Ibid.*, p. 367.

American insurance administration is saved from the criticism directed at the well-known English case of *Local Government Board* v. *Arlidge* [4] in which the House of Lords held that a higher administrative authority need not disclose to the individual concerned, prior to the final hearing before the higher authority, the report by its inspector of a hearing held before him.

2. *Approval or disapproval provisions.* As in the case of notice requirements, provisions for a hearing before the exercise of powers of approval or disapproval are extremely rare. One example found in about a dozen states is the requirement of a full hearing before the approval of the consolidation or re-insurance of a company.[5]

Though powers of approval or disapproval of policy forms are commonly found,[6] no provision for a hearing is found in any of them.[7] The nearest approach to such a requirement is that found in the New York law empowering the superintendent to prescribe the use of standard riders on fire policies "after such examination and inspection" of the books and papers of fire companies and rating bureaus; [8] a kind of informal hearing will be given during the examination or inspection, but this is not the same as a hearing before the superintendent on the question, what form or forms of riders shall he prescribe? The Massachusetts legislature apparently omitted the hearing requirement deliberately, since it provided for a statement of the commissioner's reasons for disapproval, and for a review of the commissioner's action by the supreme court.[9] These provisions are not commonly found elsewhere. If, as seems the case, the disapproval of a policy provision makes that provision unenforceable in a civil action against the insurer, the commissioner's disapproval has immediate legal consequences, and should be preceded by a hearing before him, for which judicial review is not a substitute. In the only case involving an actual disapproval, it did not appear whether or not a hearing had been given the insurer, and no reference to this point was made in the court's opinion.[10]

[4] (1915), A. C. 120, reversing (1914) 1 K. B. 160.

[5] Conn., § 4142 is the type. For other citations, see *supra*, § 16, p. 215, note 87.

[6] See *supra*, § 18, p. 267.

[7] See, e.g., Ariz., § 3452; Idaho, §§ 5037, 5042; Ill., § 208–w; Ind., § 4622 d; Mass., §§ 108, 132; Mich. III, 2, §§ 6, 12; N. Y. L., 1911, Ch. 369 (§ 101), L., 1913, Ch. 155 (§ 107), L., 1922, Ch. 268 (§ 121); Pa., § 217.

[8] L., 1922, Ch. 268 (§ 121).

[9] Mass., §§ 108, 132.

[10] Commercial Accident Ins. Co. *v.* Wells (1923), 156 Minn. 116, 194 N. W. 22. The Minnesota statutes (§§ 3480, 3522) contain no requirement of hearing.

With respect to the powers of the commissioner over the company's financial condition a hearing is rarely required.[11] Usually the exercise of these powers will involve the interpretation rather than the ascertainment of facts, the interpretation and application of statutes to undisputed data, and the exercise of a judgment based upon actuarial and business standards. Thus in *People* ex rel. *Metropolitan Life Insurance Company* v. *Hotchkiss*,[12] the facts were undisputed and the sole question was whether or not a tuberculosis hospital for the company's employees was "requisite for its convenient accommodation in the transaction of its business."

The New York and Massachusetts sections empowering the commissioner to make a valuation of the company's securities, which shall be "final and binding" contain no provisions for a hearing.[13] If the effect of these provisions is to preclude judicial review of the commissioner's findings, the absence of procedural requirements may become a serious defect in times of fluctuating security prices.

Hearing requirements are most frequently found in connection with powers of disapproval or approval of rating agreements,[14] or disapproval of a particular rate as discriminatory,[15] or other powers as to rates.[16] These powers, however, have not been the subject of litigation, and apparently have been less frequently exercised, than the power to order a general reduction in rates, as to which a hearing is frequently not required.[17]

The Missouri statute of 1915 required the approval by the superintendent of any proposed increase in fire insurance rates, without requiring a hearing before him.[18] However, the superintendent

[11] E.g., approval of assessments of dividends of mutual automobile company "after such investigation as he may deem necessary," as to assessments (N. Y. L., 1916, Ch. 14, §§ 325, 326); approval of dividends of mutual workmen's compensation insurance company, "after such investigation as he may deem necessary" (N. Y. L., 1916, Ch. 393, § 1 (§ 190)); prescribing reserves of workmen's compensation insurance company (N. Y. L., 1915, Ch. 506 (§ 191)).

[12] (1909), 136 App. Div. 150, 120 N. Y. Supp. 649 (*certiorari* to review superintendent's disapproval).

[13] Mass., § 11; N. Y., § 18.

[14] Colo. L., 1919, Ch. 138, § 6; Kan., § 5371; Ky., § 762 a–12; Minn. L., 1915, Ch. 101, § 5; Pa., § 205.

[15] Colo. L., 1919, Ch. 138, § 11; Kan., § 5371; Ky., § 762 a–10; Mich. I, 4, § 12; Minn. L., 1915, Ch. 101, § 6; Mo., § 6279; N. J. L., 1913, Ch. 85, § 1; N. Y. L., 1922, Ch. 660, § 1 (§ 141); N. C. R. B., § 4814 a (4).

[16] Cal. P. C., § 602 b (1915); Ia., § 5670; Mich. I, 4, § 3; N. C. R. B., § 4814 a (5); S. C., § 2739; Tex., § 4894; Wis., § 1921–34.

[17] See *infra*, this section, p. 406. [18] Mo. L., 1915, p. 313, § 5.

granted the companies a hearing upon such an application for an increase, and in *State* ex rel. *Waterworth* v. *Harty*,[19] the court refused to review his action, and upheld the constitutionality of the statute, without any discussion of the procedural point. The court held, however, that the provision for a review by the court of the fairness or adequacy of the proposed rates, was unconstitutional. With this latter provision eliminated, it seems difficult to see how the disapproval power can stand without the procedural requirement. It is familiar law that notice and hearing, when constitutionally indispensable, must be given as a matter of right and not merely as a matter of grace. In *People* ex rel. *New York Fire Insurance Exchange* v. *Phillips*,[20] a hearing was given by the superintendent, as required by the statute, before ordering the removal of a discrimination in the fire insurance rate.

3. *Refusal of license.* With a single exception, no statute requires the granting of a hearing to a company before the refusal to issue or renew its license.[21] On the other hand, numerous statutes might be cited which authorize the refusal of a license without saying anything as to a hearing.[22] The Massachusetts provision is that the commissioner before granting a license to any company "shall be satisfied by such examination as he may make and such evidence as he may require" that the statutory requirements are met. [23] Such language does not give a hearing as a matter of right. The New York legislation simply authorizes the refusal of a license to a domestic or a foreign company, "when in his judgment such refusal will best promote the interests of the people of the state." [24]

What is the significance of this conspicuous absence of procedural safeguards? An examination of the cases in which the refusal to issue a license to a company has been directly attacked, shows only one case in which it is reported that a hearing before the commissioner was given.[25] On the other hand, in some twenty cases,

[19] (1919), 278 Mo. 685, 213 S. W. 443.

[20] (1922), 203 App. Div. 13, 196 N. Y. Supp. 202.

[21] The exception is Mo. § 6189, requiring a hearing before refusal to renew a foreign life company's license. See also Vt., § 5518, public hearing before incorporation of company.

[22] See e.g., Ill., § 40, La., §§ 3584, 3582; Md. IV, § 154 L; Miss., §§ 5063, 5069; N. D., § 4921; Okla., § 6674; S. C., § 2700; Va., § 4177; Wis., § 1948. In numerous other instances the statutory prerequisites do not include a hearing provision. See *supra*, § 12, p. 103, and statutes cited. [23] Mass., §4.

[24] N. Y. L., 1910, Ch. 634, § 3, § 9; likewise L., 1916, Ch. 590, § 1.

[25] American Casualty Co. *v.* Fyler (1891), 60 Conn. 448, 22 Atl. 494 (*mandamus*).

nothing is said in the report which indicates that a hearing was given, and no court has even suggested that the omission of this requirement makes the statute unconstitutional.

It is true that the refusal of a license to a company not previously licensed is not as serious an impairment of intangible business assets as either the revocation of a license or the refusal to review a license previously granted. In the latter case the company will lose whatever it had invested in building up an agency organization and good will in the state from which it is excluded. On the other hand, the legal fiction of corporate entity should not obscure the fact that the corporation applying for admission is only a group of citizens who are entitled, or should be, to engage in business in any state of the United States, provided they comply with the laws of the state — and the hearing will give them the opportunity to demonstrate that they have so complied.

It may be argued, too, that the questions arising upon an application for an original license are such that no hearing is necessary.

A company applying for a license is required to submit a copy of its charter, of its last annual statement, and usually a copy of the report of the last examination of its affairs made by, or under the direction of, some insurance department. Differences of opinion as to the existence of facts which appear from writings are less likely to develop than differences of opinion as to the interpretation of these facts. Hence, the question usually involved in the refusal of a license is one falling within the discretionary power of the commissioner. Thus, in *In re Hartford Life and Annuity Insurance Company*,[26] the superintendent refused a certificate to a company which was issuing a form of assessment certificate. The superintendent had sent an examiner to the company's home office and had scrutinized his report, but no (other?) hearing was given. The court held that this was all that was needed and that the propriety of permitting the company to issue the assessment certificates was a matter "solely within the discretion of the superintendent."

In *Dwelling House Insurance Company* v. *Wilder*,[27] it appeared that the defendant, the commissioner, had refused to make an examination of plaintiff's affairs; that is, he refused to give it any hearing whatever. However, no disputed questions of fact were involved, and the court held the refusal was within his discretionary powers. So, in *State ex rel. Phoenix Mutual Life Insurance Company*

[26] (1882), 63 How. Pr. 54. [27] (1889), 40 Kan. 561, 20 Pac. 265.

v. *McMaster*,[28] the statute required no hearing, and it does not appear that any was given. However, the facts were undisputed, and the commissioner was given an executive discretion to refuse to license a company which did not deposit securities.[29]

One must not hastily assume, however, that the mere circumstance that there are no disputed issues of fact involved in the refusal of a license necessarily leads to the conclusion that a hearing need not be given before the refusal is final. Questions of judgment and discretion are as much debatable, indeed, far more debatable, than questions of "fact." The commissioner deals largely in figures. Figures do not lie, but much depends upon the interpretation given them. It would seem desirable to require that a hearing be given a company, foreign or domestic, upon questions of this type.

A closely related class of refusals is that in which the commissioner's action depends upon the interpretation (as distinguished from the mere application to particular facts) of a particular statute.[30] Here again, there is no "question of fact for the jury"; and yet the issues involved are subject to debate and to error, to an even greater extent. Granting that the commissioner's interpretation of the statute is subject to complete judicial review, the refusal of a license is of sufficient consequence to necessitate some safeguard against hasty and ill-considered action.

In a limited class of cases the non-compliance by the applicant

[28] (1913), 94 S. C. 379, 381, 77 S. E. 401.

[29] See also the following cases in which it does not appear that a hearing was given: State *ex rel.* Bankers Union *v.* Searle (1905), 74 Neb. 486, 105 N. W. 284 (refusal based on fact that company loaned part of its funds to agents); Western Life & Accident Co. *v.* State Ins. Board (1917), 101 Neb. 152, 162 N. W. 530 (refusal based on failure to maintain reserve fund for guaranteed dividends); State *ex rel.* Ins. Co. *v.* Moore (1884), 42 Oh. St. 103 (refusal based on company's statement showing no reserve fund); State *ex rel.* Foreign Ins. Cos. *v.* Benton (1889), 25 Neb. 834, 41 N. W. 793 (refusal based on failure to make special deposit).

[30] People *ex rel.* Traders Fire Ins. Co. *v.* Van Cleave (1899), 183 Ill. 330, 55 N. E. 698; People *ex rel.* Gosling *v.* Potts (1914), 264 Ill. 522, 106 N. E. 524; Bankers Deposit Guaranty and Surety Co. *v.* Barnes (1909), 81 Kan. 422, 105 Pac. 697; Nat'l Benefit Ass'n. *v.* Clay (1915), 162 Ky. 409, 172 S. W. 922; Union Pac. Life Ins. Co. *v.* Ferguson (1913), 64 Ore. 395, 129 Pac. 529; Wallace & Co. *v.* Ferguson (1914), 70 Ore. 306, 140 Pac. 742; Metropolitan Casualty Ins. Co. *v.* Basford (1913), 31 S. D. 149, 139 N. W. 795. See also Bankers Life Ins. Co. *v.* Fleetwood (1904), 76 Vt. 297, 57 Atl. 239 (preliminary term method of valuation of life policies involved); Bankers Life Ins. Co. *v.* Howland (1901), 73 Vt. 1, 48 Atl. 435 (same).

with the statutory requirements is so obvious, both as to the "facts," the interpretation of the statute, and the application thereof, that a hearing would serve no useful purpose. This is true in the case of refusal for total failure to pay a gross premium tax,[31] or failure to insert in the charter submitted provisions explicitly required by the statute,[32] or paying an officer of the company a salary in excess of $50,000, the amount specified in the statute as the maximum.[33] However, the companies do not ordinarily litigate such one-sided controversies.

As for the administrative practices, the answers to the questionnaire indicate that, aside from informal correspondence, no hearing of any sort is commonly given before refusal to issue a license to a company applying for admission for the first time. Thus, the practice of the New York department is to refuse the license, without a hearing, if the application, report of examination, the annual statement, supplemental information attached thereto, and correspondence with the home department do not show that the company is in a satisfactory condition. If the New York department participated in the examination of the company, a hearing would, of course, be given before the report is filed. Of the remaining departments, some fifteen answered that a formal hearing was not usually had upon an application for a license.[34] It has already been pointed out that, out of thirty-six states responding, only Wisconsin stated that it did not accept the report of an examination by the home department as sufficient basis for the admission of a foreign company.[35]

While notice and hearing requirements are more frequently found in statutes authorizing refusal of an agent's license, than of a company's license, yet the omissions are noteworthy. Thus, the

[31] Manchester Fire Ins. Co. *v.* Herriott (1899), 91 Fed. 711; State *ex rel.* Nat'l Life Ass'n. *v.* Matthews (1898), 58 Oh. St. 1, 49 N. E. 1034.

[32] State *ex rel.* Lumberman's Accident Co. *v.* Michel (1909), 124 La. 558, 50 So. 543.

[33] State *ex rel.* Equitable Life Assur. Soc. *v.* Vandiver (1909), 222 Mo. 206, 121 S. W. 45.

[34] "Q. 10 a: In every case where you make an independent investigation before admitting a foreign company to do business, do you have a formal hearing at your office, the company's representatives being present?" *No:* Ariz., Ark., Colo., Conn., D. C., Fla., Idaho, Ia., Kan., Mass., Mich., N. Y., N. C., Pa., Utah, Va. (16). *Yes:* Ill. (if requested), Minn. (same), Neb. (same), N. D. (same), Ohio (if license is refused), Vt., W. Va., Wis. (if necessary) (8).

[35] *Supra*, § 22, p. 371.

New York statute declares that the superintendent "shall have the right to refuse to issue or renew any such certificate in his discretion."[36] In *Stern* v. *Metropolitan Life Insurance Co.*, the constitutionality of this provision was attacked and the lower court declared it invalid as a violation of the "due process" clause.[37] However, the Appellate Division sustained the constitutionality of this provision, without referring to the absence of procedural requirements;[38] and this holding was affirmed by the Court of Appeals.[39] The statute was attacked obliquely in a suit for commission by an unlicensed agent, and it is possible that a different holding might result upon a direct attack by one applying for a license.[40]

The Pennsylvania statute provides for notice of refusal but no hearing before the commissioner; the applicant may bring judicial proceedings to review the commissioner's refusal.[41] Unless the court reviews the commissioner's findings *in toto*, unless no discretionary power is conceded him, it would seem a violation of "due process" to authorize refusal without requiring a hearing before the commissioner. In several other states no provision is made for a hearing upon refusal of an agent's license.[42]

However, hearing requirements are frequently found. Thus, the New York superintendent is required, before refusing to issue or renew a *fire* insurance agent's license, whether for a domestic or a foreign company, to make "due investigation" and hold "a hearing either before himself or before any salaried employee of the insur-

[36] N. Y. L., 1909, Ch 301 (§ 91), as to life insurance agents.

[37] (1915), 90 Misc. Rep. 129, 154 N. Y. Supp. 283, citing Yick Wo *v.* Hopkins (1885), 118 U. S. 356, 370, 6 Sup. Ct. 1064, 36 L. ed. 220, and People *v.* Klinck Packing Co. (1915), 214 N. Y. 121, 108 N. E. 278.

[38] (1915), 169 App. Div 217, 154 N. Y. Supp. 472, relying upon People *ex rel.* Lieberman *v.* Van De Carr (1905), 199 U. S. 552, 26 Sup. Ct. 144, 50 L. ed. 305, s. c., 175 N. Y. 440, 67 N. E. 913.

[39] (1916), 217 N.Y. 626, 111 N. E. 1101 (no opinion); the question, "Is § 91 constitutional?" was answered in the affirmative.

[40] In Bratton *v.* Chandler (1922), 260 U. S. 110, 43 Sup. Ct. 43, McKenna, J., in upholding a realty broker's license law, said it was necessary to construe the ambiguous language of the statute in such a way as to require that the applicant for a license be given a hearing and an opportunity to meet all the adverse evidence procured by the licensing official.

[41] Pa., § 62; similarly, § 68 (broker's license).

[42] Conn., § 4284; Md. IV, § 184 B; Mass., § 163; Ohio, §§ 644, 644-1; Utah, § 1140.

ance department designated by him whose report he may adopt." [43] Why the persons desiring to be fire insurance agents, or accident and health insurance agents, should be more tenderly safeguarded than those desiring to become life insurance agents in New York, is not clear. The Oregon statute likewise contains an extended provision for notice and hearing upon refusal to grant or renew an agent's license; the commissioner is required to give fifteen days' notice to the applicant, designating the time and place of the hearing, and to preside personally at the hearing, and subpoena and swear witnesses.[44]

It is somewhat difficult to determine what is the administrative practice on this point, because refusals of agents' licenses are somewhat rare. The New York department reported that a hearing is not invariably given; only "if there is some doubt." Eleven other insurance departments reported that a hearing is not invariably given before refusal of an agent's license.[45] However, a large number of answers indicated, in a general way, that notice and hearing are invariably given the applicant if requested.[46] The answers likewise indicated that the hearing in such cases is usually quite informal, though apparently the applicant is usually notified by a registered letter to appear in person. Only six departments report that "formal" hearings (that is, with sworn testimony, and formal examination of witnesses) are ever held in such cases.[47]

The litigation over refusal of an agent's license has apparently never turned upon the omission to give notice and hearing, or even upon a disputed question of fact. The questions involved have been either, for example, a clear violation of the anti-rebate law,[48] or the legality of refusal to license an agent upon grounds which justified the revocation of his company's license,[49] or the legality of a regulation made by the commissioner that non-residents would

[43] N. Y. L., 1914, Ch. 13 (§ 142). The same provision is found in the statute as to refusal of license to accident and health insurance agents, L., 1914, Ch. 14, § 1 (§ 91 a).

[44] Ore., § 6335. See also Wash., § 7090. Hearing is also provided for by Mich.II, 3, § 8. Cf. Idaho, § 5015 ("investigation" required).

[45] Conn., Fla., Idaho, Ia., Mass., N. D., Ohio, Okla., Pa., Vt., Wash. (not if applicant is on the "black list") (11).

[46] Ariz., Ark., Colo., Kan., Me., Md., Mich., Minn., Mont., Neb., N. H., N. M., N. C., Ore., S. D., Utah, Va., W. Va., Wis., Wyo. (20).

[47] Mich., Minn., N. Y., S. D., Wash., W. Va.

[48] Vorys *v.* State *ex rel.* Connell (1902), 67 Oh. St. 15, 65 N. E. 150.

[49] Maxwell *v.* Church (1901), 62 Kan. 487, 63 Pac. 738.

not be licensed.[50] In *Welch* v. *Maryland Casualty Company*,[51] the Oklahoma statute declared that the commissioner "may for cause shown, refuse to license such agent." [52] The court declared this provision unconstitutional because it established no standards governing the exercise of the commissioner's discretionary power. However, the court mentioned incidentally the absence of a procedural requirement, saying:

> For reasons satisfactory to himself (commissioner) upon an *ex parte* examination or without any examination, he can say to one applicant, who might be preëminently qualified, "I find you to be an unsuitable person," etc.[53]

A hearing is not commonly provided for in the statutes covering the issuance of a broker's license.[54] The New York department states, however, that the applicant is always given an opportunity to be heard, and that if he resides in New York City, a formal hearing is held at the New York office of the insurance department. In Massachusetts, no hearing is given before refusal, which is usually based upon failure to pass an examination. In Pennsylvania, the applicant is notified of the refusal and his only hearing is obtained by a judicial proceeding. In Vermont, likewise, no hearing is given on refusal. In other jurisdictions it seems that an opportunity to be heard is given.[55] The constitutionality of these statutes omitting hearing requirements has never been judicially attacked so far as the reported cases show.[56]

4. *Revocation of license.* (*a*) *Company's license.* To generalize negatively with respect to hearing requirements in connection with revocation of company licenses is difficult for several reasons. In the first place, the revocation is usually authorized only for cause, and the requirement of cause may sometimes be taken to imply a requirement of notice and hearing. However, the omission of hearing requirements is defective draftsmanship, even if not fatal to the constitutionality of the statute. Hence, statutes which

[50] Noble *v.* English (1918), 183 Ia. 893, 167 N. W. 629.

[51] (1915), 47 Okla. 293, 147 Pac. 1046.

[52] Okla. Rev. L., 1910, § 3433.

[53] 47 Okla. 293, 300, 301.

[54] Mass., § 166; N. Y. L., 1913, Ch. 12 (§ 143): Ohio, § 644–2; Pa., § 68; W. Va., § 53; Vt., § 5611.

[55] Colo. (formal notice; open hearing); Conn., Me., Md. (formal hearing), N. H., N. C., Va., W. Va.

[56] The only cases on refusal of broker's license are cited *supra*, § 15.

contain no express requirement for hearing will in the present discussion be treated as negative examples. In the second place, provisions for revocation are scattered throughout the insurance legislation of many states, and nothing short of a decision of the supreme court of that state can settle with any degree of trustworthiness the question whether or not these particular provisions are covered by some general provision for hearing. In the present summary, no attempt has been made to construe together the statutes of a particular jurisdiction; sections which omit hearing requirements are cited, and those which contain requirements are likewise cited. At least, the former are examples of defective correlation of statutes.

Some one hundred and sixty separate sections which authorize the commissioner to revoke either a domestic or a foreign company's license, as the case may be, without requiring a hearing, have been collected.[57] One or more provisions of this type was found in every state except Arkansas. Occasionally, the language of the statute expressly excludes the giving of a hearing, as for example, the New York statute which declares that the superintendent "shall forthwith" revoke the license of a foreign mutual fire company on financial grounds.[58] As a rule, however, the language is noncommittal. Since it is usually held that if notice and hearing are necessary to satisfy the "due process" requirements of state and federal constitutions, the hearing must be a matter of right, "must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor of grace," [59] the mere omission to provide that notice and hearing shall be given is no less objectionable than a positive prohibition.

A number of states have provisions of general scope for notice and hearing.[60] These provisions must be read in connection with

[57] The citations are given in the notes 62 to 82.

[58] N. Y. L., 1911, Chs. 161, 765 (§ 149). Similar language is commonly found in the provisions for revocation for removal of a suit to the federal court. *Supra*, § 13, n. 148.

[59] Central of Ga. Ry. *v.* Wright (1907), 207 U. S. 127, 138, 52 L. ed. 134, 142 (assessment of tax).

[60] Ark., § 4979; Cal. L., 1915, Ch. 608 L., 1917, Ch. 770 (P. C., § 633 b), P. C., § 602 b (1915); Colo. L., 1913, Ch. 99, § 13; Fla. L., 1919, Ch. 7869, § 1; Ia., § 5718; Kan., § 5371; Ky., § 743 m–10; Neb., § 3148 (domestic company); N. Y. L., 1913, Ch. 9 (§ 32) (foreign company generally), L., 1913, Ch. 182 (§ 182) (surety company); S. C., § 2700 (on non-financial grounds); Va., § 4180 (hearing before corporation commission); W. Va., § 15 e. See also Ill., § 45

the ones which omit the hearing requirement. The Uniform Fraternal Bill requires notice and hearing before the revocation of the license of a foreign fraternal society.[61] In addition, provision is made for hearing in connection with revocation on special grounds, or as to a particular case.[62]

Turning now to the provisions which omit the hearing requirement, we find that one type is represented by the Massachusetts statute which provides for judicial review of the revocation in lieu of a hearing before the commissioner.[63] There is reason to believe that judicial review is not always a sufficient substitute, from the standpoint of constitutionality, for an administrative hearing. Certainly if the court, when such review is sought, accords the commissioner's findings any degree of conclusiveness, as a majority of courts do, including the supreme court of Massachusetts, the two are not synonymous or interchangeable, and in effect no hearing of any kind will be required upon questions falling within the discretionary powers of the commissioner.

There is a certain class of grounds for revocation which are so simple, indisputable and easily ascertainable, that failure to provide a hearing will seldom or never work a substantial injustice. Such, for example, is failure to file the company's annual report with the commissioner,[64] or refusal to submit to examination upon

(examination of company's books before revocation); Ia., § 5471 ("upon investigation or examination").

[61] Uniform Fraternal Bill, § 28, *Proc. N. C. I. C.* (1910), p. 144. See Ariz., § 3499; Idaho, § 5190; Ky., § 618 c–28; Me., Ch. 54, § 23; Mich. II, 4, § 9; Minn., § 3562; Miss., § 5202; Mo., § 6428; N. H. L., 1913, Ch. 122, § 28; N. Y. L., 1911, Ch. 198 (§ 244); N. C. S., § 4798 b (25).

[62] Ark., §§ 5087, 5088 (unlawful re-insurance); Ind., § 4628 (inserting co-insurance clause in fire policy), § 4706 e (rebating), § 4714 e (misrepresentation); Me., Ch. 53, §138 (rebating or discrimination), § 141 (misrepresentation or twisting), § 118 (non-payment of judgment within 30 days); Mich. II, 4, § 3 (fraudulent concealment of facts in reports), II, 4, § 8 (15 days' notice and "full hearing"; misrepresentation or twisting); Miss., § 5064 (rebating or discrimination), § 5172 (mutual fire company); Mo., § 6383 (inter-insurance exchange); Neb., § 3281 (rebating, discrimination, misrepresentation of policy, or twisting); Ohio, § 9556–10 (inter-insurance exchange); Okla., § 6769 (use of forbidden policy forms by fire company); S. D., § 9204 (unlawful combination); Tenn., § 3348 a–23 (misrepresentation).

[63] Mass., § 5. Similarly, Minn., § 3260; Ore., § 6359; Utah, § 1134. In Ala. (§ 8343), notice is required before revocation on financial grounds, but neither administrative nor judicial hearing is provided for.

[64] Conn., § 4167; Mont., § 4058; N. J., p. 2878, § 125 (failure to answer commissioner's inquiries); N. C. R. B., § 4822 (failure to report fire); Wis., § 1955 (o) 6 (failure to submit policy forms on demand).

the request of the commissioner,[65] or upon the filing by some person, with the commissioner, of a certified copy of a petition for removal of a suit to a federal court.[66] In these instances, since the facts are brought immediately to the attention of the commissioner, and the violation of law will usually be clear and unequivocal, the omission of a hearing requirement is not serious.

In another class of cases, the ground of revocation is easily ascertainable from the records of some other official, and there can be little room for debate about either the facts or the application of the statute to them. Such, for example, is failure to pay a judgment,[67] failure to make a semi-annual report to the Governor,[68] and perhaps the removal of a suit to a federal court[69] (now happily obsolete). Of like import, are the provisions authorizing revocation upon judicial conviction of a violation of the insurance laws.[70] Since even a court will take judicial notice, in some instances, of the action of other departments of the government, there seems to be no impropriety in the commissioner adopting a similar procedure.[71]

With respect to revocation on financial grounds, the omission of notice and hearing appears of doubtful expediency. On the one hand, if the commissioner is convinced from the annual report and the report of an examination that the company is insolvent or in a failing condition, the delay incident to notice and hearing will mean that a certain number of persons will have procured worthless insurance in the company, if it turns out that the license is eventually revoked and the company's affairs liquidated. On the other hand, while the financial soundness of a company is a matter of

[65] Ala., § 8339 ("shall immediately revoke"); Idaho, § 4984; Ky., § 752; La., § 3602; Mass., § 5; Mont., § 4058; Nev. L., 1913, Ch. 158, § 2; N. C., § 4755.

[66] Neb., § 3158. See also Ind., § 4689 (failure to deposit required reserve); Nev., § 1274 (failure to produce certificate showing $200,000 cash capital).

[67] Conn., § 4167; Idaho, § 4968; Miss., § 5058 (fine unpaid), § 5134; Mo., § 6178; Mont., § 4040; Nev., § 1309; N. H., Ch. 170, § 15; Pa., § 181 (judgment for penalties). These provisions (except Miss. and Pa.) are aimed at non-payment of judgments on policy claims.

[68] Ga., § 2418.

[69] Ga., § 2416; Ill., § 33; Ky., § 743 m–4; Miss., § 5133; N. H., Ch. 169, § 10; R. I., Ch. 220, § 5.

[70] Ill., § 29; N. Y. L., 1913, Ch. 47 (§ 60).

[71] See Oetjen *v.* Central Leather Co. (1918), 246 U. S. 297, 301, 38 Sup. Ct. 309, 62 L. ed. 726, 731, in which the Supreme Court took judicial notice of the action of the Department of State in recognizing the Carranza government in Mexico, although no proof was presented.

figures and written data, certain debatable questions of judgment will arise upon which the company's representatives should have an opportunity to be heard. The Massachusetts statute not only requires no hearing where the revocation is on financial grounds, but also provides that the revocation shall take effect immediately, without the ten days' notice.[72] A number of other statutes, following this example in spirit, if not verbatim, have omitted to provide for hearing where the revocation is on financial grounds.[73]

The provisions authorizing revocation of a foreign company's license because of the treatment accorded in its home state to companies incorporated in the state in which it is seeking a license (that is, retaliatory laws) involve little opportunity for disagreements as to the facts or data, but may involve considerable diversity of opinion as to the interpretation of the statutes of the home state. However, hearing is not required in such cases.[74]

The extension of the grounds of revocation to new types of misconduct has raised a more serious problem than existed under the older types of statutes, in which revocation was confined to financial grounds and violation of simple statutory requirements. Thus, not only differences of opinion as to the interpretation of "facts," but also disagreements as to the "facts" themselves will arise in the application of statutes, omitting the hearing requirement, which authorize revocation for rebating and discrimination,[75] misrepresentation of the terms of a policy or twisting,[76] the making of untrue statements in the annual report,[77] and the non-payment of a policy claim when due, or within a fixed period thereafter, without requiring that it shall have been reduced to judgment.[78] The Cali-

[72] Mass., § 5.

[73] Ala., § 8343 (ten days' notice, but nothing about hearing); Ariz., §§ 3381, 3384; Cal., P. C. § 603; Conn., § 4130; Ga., § 2434; Ill., § 70; Ind., § 4691; Ia., § 5650; La., § 3603; Me., Ch. 53, § 115; Md., § 178 (13); Mich. I, 2, § 11; Minn., § 3260; Miss., § 5075; Mo., § 6348; Mont. S., § 4065 a; Nev. L., 1913, Ch. 158, § 2; N. M., § 2809; N. Y. L., 1911, Chs. 161, 765 (§ 149), L., 1915, Ch. 506 (§ 191), Consol. L., 1909, § 41; Ohio, § 635; Ore., § 6359; Utah, § 1134.

[74] See, e.g., Neb., § 3293; N. H. L., 1891, Ch. 54, § 1; N. J., p. 2856, § 66; N. Y., § 33.

[75] Ala., § 4607; Colo. L., 1917, Ch. 81, § 1; Idaho, § 5036; La., § 3628; Mont., § 4029, S., §§ 4141, 4142; Utah, §§ 1166, 1167; Vt., § 5576; Wash., §§ 7076, 7077; W. Va., §§ 15, 15 a. Likewise, Ala., § 4610 (selling stock with insurance, etc.).

[76] Ala., § 4603; Ill., § 25. [77] Miss., § 5085; Nev., § 1316; N. C., § 4703.

[78] Ky., § 676; La., §§ 3641, 3669; N. J., p. 2881, § 135; N. Y., § 210. See also Me., Ch. 53, § 9 (paying fire losses in less than 45 days after fire).

fornia provision which authorizes revocation for failure to pay in advance the expense of examination [79] and the provisions for revocation because of insuring through a non-resident agent,[80] or reinsurance in an unauthorized company,[81] or using forbidden policy forms,[82] without requiring a hearing, seem scarcely less objectionable.

In a number of jurisdictions revocation on general grounds, such as unsound financial condition and violation of the insurance laws in general, is authorized without a hearing requirement.[83] In Massachusetts and several other states these provisions are applicable only to foreign companies, but in most instances, the same provision is applicable to both foreign and domestic companies.

While the holding in *Paul* v. *Virginia* [84] has given rise to the impression that a state may impose any conditions it pleases, however arbitrary, upon a foreign insurance company doing business within its borders, there is reason to believe that the supreme court has receded from the extreme position there taken.[85] The revocation of a foreign insurance company's license deprives it of the in-

[79] Cal. P. C., § 597.

[80] Ala., § 8382 ("shall immediately revoke"); Kan., § 5353; La., § 3595; Mich. II, 4, § 12; Mont., § 4032; N. H., p. 568, § 5.

[81] Ill., § 80 e; La., § 3605; Miss., § 5071; N. H., p. 568, § 5.

[82] La., § 3689; Minn., § 3534 ("wilful violation"); Miss., § 5101; S. D., § 9344; Utah, § 1157; Va., § 4320. In the following examples, likewise, revocation on specific grounds is authorized without any hearing requirement: Md. I, § 216; Mich. I, 4, § 13 (fire rates); Neb., § 3186 (combine to fix rates); N. J., p. 2878, § 124 (conducting business fraudulently); Tex. § 4785 (local, investment statute).

[83] Ala., § 8343; Colo. L., 1913, Ch. 99, §§ 9, 24, 38 (but see § 13); Conn., § 4130; Del., §§ 573, 575, 576, 577, 580; Fla.L., 1915, Ch. 6845, § 5, and Comp. L., 1914, § 2773; Ind., §§ 4691, 4709; Ia., § 5650; Kan., § 5166; Ky., § 753; La., § 3603; Me., Ch. 53, §§ 110, 115, (but see §§ 118, 138, 141); Md., § 178 (13); Mass., § 5; Mich. I, 2, § 11; Minn., §§ 3260, 3262; Miss., §§ 5032, 5075; Mo., §§ 6140, 6144, 6160, 6338, 6339, 6348; Neb, §§ 3149, 3169; Nev. L., 1913, Ch. 158, § 2; N. J., p. 2856, § 62; N. M., §§ 2809, 2819, 2820, 2840, 2861; N. Y. L., 1917, Ch. 513, § 1, L., 1911, Chs. 161, 165 (§ 149), L., 1915, Ch. 506 (§ 191), Consol. L., 1909, § 41; N. C., §§ 4701, 4703, 4705; N. D., § 4925; Ohio, §§ 635, 9437, 9454; Okla., § 6678; Ore., § 6359; Pa., § 50; R. I., Ch. 220, § 23; S. C., § 2700; S. D., § 9179; Tenn., §§ 3283, 3369 a–62; Tex., § 4802; Utah, § 1134; Vt., § 5555; Wash., § 7039; Wis., § 1917 (2); Wyo., §§ 5275, 5238.

[84] (1868), 75 U. S. 168, 19 L. ed. 357.

[85] See Henderson, *The Position of the Foreign Corporation in American Constitutional Law* (1916); Terral *v.* Burke Construction Co., cited *supra*, § 13, n. 152.

tangible values of an agency organization and good will, and to this extent deprives the company of "vested rights"; if so, no state may authorize that a company be so deprived arbitrarily; and it is highly questionable whether the judicial review of the revocation, which is expressly authorized or impliedly permitted by most states, is an effective substitute for an administrative hearing.

However, while revocation of a company's license has frequently been the subject of litigation, in no reported case has the statute been attacked on the ground that the omission to require a hearing before revocation was a violation of "due process." In several of these cases a hearing was given; [86] in a considerably larger number of cases, the report does not disclose that any hearing, or even opportunity for hearing, was given. In most of these latter cases, the facts were undisputed, and the propriety of the revocation depended upon the application of the statute to the facts,[87] or the interpretation of conflicting provisions.[88] The only reported case in which it clearly appears that an order of revocation was made without either an administrative hearing or an adequate judicial review, is *State* ex rel. *The Dakota Hail Association* v. *Cary, Commissioner of Insurance of North Dakota.*[89]

The administrative practices appear to be far from uniform. The answers to the questionnaire indicate that a majority of the departments invariably give a company notice and a hearing before

[86] Mutual Life Ins. Co. *v.* Prewitt (1907), 127 Ky. 399, 105 S. W. 463, 31 Ky. Law. Rep. 1319, 32 Ky. Law. Rep. 298; Hartford Fire Ins. Co. *v.* Raymond (1888), 70 Mich. 485, 38 N. W. 474; State *ex rel.* Sims *v.* McMaster (1913), 95 S. C. 476, 79 S. E. 405; Equitable Life Assur. Soc. *v.* Host (1905), 124 Wis. 657, 102 N. W. 579. See also American Life Ins. Co. *v.* Ferguson (1913), 66 Ore. 417, 134 Pac. 1029, in which it is reported that the commissioner made an "investigation" and apparently the facts were undisputed.

[87] Kansas Home Ins. Co. *v.* Wilder (1890), 43 Kan. 731, 23 Pac. 1061; State *ex rel.* Peoples Fire Ins. Co. *v.* Michel (1910), 125 La. 55, 51 So. 66; Travelers' Ins. Co. *v.* Kelsey (1909), 134 App. Div. 89, 118 N. Y. Supp. 873; Calvin Phillips & Co. *v.* Fishback (1915), 84 Wash. 124, 146 Pac. 181.

[88] Clay *v.* Employers Indemnity Co. (1914), 157 Ky. 232, 162 S. W. 1122; State *ex rel.* Leach *v.* Fishback (1914), 79 Wash. 290, 140 Pac. 387; American Surety Co. *v.* Fishback (1917), 95 Wash. 124, 163 Pac. 488. See also Liverpool, etc., Ins. Co. *v.* Clunie (1898), 88 Fed. 160; State *ex rel.* Drake *v.* Doyle (1876), 40 Wis. 175.

[89] (1891), 2 N. D. 36, 49 N. W. 164. Here the court said it mattered not what capital or securities the company had if the commissioner was not "satisfied" with them. The opinion is atrocious.

revoking its authority to do business in the state.[90] The Pennsylvania commissioner answered:

depends on circumstances. If a fraud outfit, we cancel at once and notify them. Otherwise, summon them.

The notice is usually given by letter, requesting the company to appear and show cause. Apparently, it is customary to state the charges or reasons for the proposed revocation.[91] The hearing is usually an informal one; only seven departments indicated that a hearing of sworn testimony was at all frequent.[92]

(*b*). *Agent's license.* The statutes authorizing revocation of an agent's license more frequently than not contain provisions requiring a hearing.[93] The Oregon and Washington provisions for hearing are the most elaborate; the commissioner is required to hold the hearing personally at his office, to subpoena witnesses, and to examine them under oath.

In about an equal number of instances, the commissioner is authorized to revoke an agent's license, without a hearing being required. Where the revocation follows a judicial conviction,[94] the omission is not serious. In the other cases, however, the absence of procedural safeguards gives opportunity for arbitrary and oppressive action.[95]

[90] "Q. 13 a: Do you invariably give a company notice and hearing before refusing or revoking its authority to do business in the state?" *Yes:* Ariz., Ark., Colo., Conn. (if requested), Del., D. C., Fla., Idaho, Ill., Ia., Kan., Me., Md., Minn., Mont., Neb., Nev., N. H., N. Y. (on refusal to renew or revocation), N. C., Ohio, Ore., S. D., Utah (unless insolvent), Vt., Va., Wash. (except on financial grounds), W. Va., Wyo. — (29). *No:* Mass., Mich. (not in all cases), N. M. (sometimes do), N. D. (unqualified negative), Okla. (same), Pa. (depends on circumstances), Utah (not if insolvent), Wash. (financial grounds), Wis. — (10).

[91] This was indicated by the reports from Ia., Kan., Nev., Ore., Wash., Wis., Wyo.

[92] Ill., Ia., Mich., Ohio., Pa., S. D., Utah.

[93] In the following statutes hearing is required: Cal. L., 1919, Ch. 607, § 1; Colo. L., 1915, Ch. 96, § 21; Fla. L., 1919, Ch. 7868, § 1; Idaho ,§ 5016; Ind., §§ 4706 d (sworn testimony), 4714 b, 4714 e (sworn testimony); Ky., § 762 a–15 Me., Ch. 53, §§ 124, 126, 138, 141; Md. IV, § 184 C; Mass., § 163; Mich. II, 3, § 8, II, 4, § 8; Minn. L., 1915, Ch. 195, § 9 (summary hearing), §§ 11, 15, (sworn testimony); Miss., § 5064; Neb., §§ 3194, 3281; N. H. L., 1913, Ch. 78, § 1, Ch. 127, § 4; N. Y. L., 1914, Ch. 13 (§ 142) (fire ins. agent); Ohio, §§ 644, 644–1; Okla., § 6749 c; Ore., § 6335 (under oath); S. C., § 2704; Tenn., § 3348a–23; Wash., § 7090 (under oath); W. Va., § 15 d.

[94] See Idaho, § 5025; N. Y., § 91 (life ins. agent).

[95] As in Colo. L., 1917, Ch. 81, § 1; La., §§ 3628, 3655 (rebating or discrimi-

Only one case has been found in which the constitutionality of such provisions was attacked. A Georgia statute provided that the license of an agent "may be revoked at any time by the insurance commissioner in his discretion." [96] The commissioner notified a firm of fire insurance agents to show cause why their license should not be revoked because they offered rebates, in violation of the Georgia statutes. The lower court refused to enjoin the revocation, but the supreme court granted the injunction, holding that the statute was unconstitutional because it deprived the plaintiffs of a business valued by them at $50,000, without "due process of law." The omission of a provision for notice and an opportunity to be heard was emphasized.[97] It is true that the statute specified no grounds for revocation, and in this respect it differed from most of the provisions cited above, which authorize revocation only for cause; still the court in its opinion cited a case holding invalid a provision for revocation of an optometrist's license for "grossly unprofessional and dishonest conduct" without a hearing.[98]

The answers to the questionnaire indicate that in a majority of the states a notice and hearing are given before revocation of an agent's license.[99] The notice is usually given by registered letter,

nation); Miss., § 5120 (generally); Mont., § 4029 and S., §§ 4141, 4142 (rebating or discrimination); N. H. L., 1913, Ch. 2226, § 13; N. J., p. 2856, § 63; N. Y. L., 1913, Ch. 47 (§ 60) (misrepresentation or twisting); N. C., § 4767; Okla., § 6690 (but see § 6749 c); Pa., § 62 (court review provided); R. I., Ch. 220, § 23; Tex., § 4971; Utah, § 1140; Va., § 4235; Wis., § 1968 (3); Wyo., § 5237 (discrimination or rebating). In People *ex rel.* Burr *v.* Kelsey (1908), 129 App. Div. 399, at pp. 402–03, 113 N. Y. Supp. 836, it was *said* that the requirement of notice and hearing would be "implied" because of the serious consequences of revocation.

[96] Ga. L., 1912, p. 119, § 7.

[97] Riley *v.* Wright (1921), 151 Ga. 609, 613, 107 S. E. 857.

[98] Mott. *v.* State Board of Optometry (1918), 148 Ga. 55, 95 S. E. 867. See also Gage *v.* Censors of N. H. Eclectic Med. Soc. (1884), 63 N. H. 92, 56 Am. Rep. 492; People *v.* McCoy (1888), 125 Ill. 289, 17 N. E. 786 (dentist's license).

[99] Ariz., Ark., Colo., Kan., Me., Md., Mich., Minn., Mont., Neb., N. H., N. M., N. C., Ore., S. D., Utah, Va., W. Va., Wis., Wyo., stated that notice and hearing were given before both refusal and revocation. In Conn., Fla., Idaho, Ia., Mass., N. D., Ohio, and Okla., notice and hearing are given before revocation, but not before refusal. In Pa., a hearing is not given in either event. The New York department reports that a hearing is given only "if there is doubt." Wash. reports no hearing if the agent or applicant is on the "black list." Vt. reports no hearing.

and the hearing is commonly an informal one; rarely is testimony under oath heard.[100]

(c) *Broker's license.* The broker's license statutes, being of comparatively recent origin, usually provide for a hearing before revocation.[101] Only a few examples of revocation without the requirement of a hearing are found.[102]

The answers to the questionnaire indicate that in every state, except Pennsylvania, which licenses brokers, a hearing is given before revocation of the license.[103]

5. *Miscellaneous orders.* Reference has already been made to the requirements of notice and hearing before approval of a company's application for consolidation or re-insurance.[104] A number of states have the provision of the Uniform Fraternal Bill requiring that a domestic society fraternal be given an opportunity to show cause before a suit is brought to dissolve it.[105]

A conspicuous example of a provision involving the exercise of an important power without a hearing requirement, is found in the statutes authorizing the commissioner to order a general reduction in fire insurance rates based upon the showing of the underwriting profits in the annual statements of the companies.[106]

The constitutionality of a statute of this type was upheld in *Citizens Insurance Company* v. *Clay*[107] without any reference to the absence of procedural requirements. Under a similar statute the Kansas superintendent ordered a general reduction in fire insurance rates without giving any notice or an opportunity for a hearing on two separate occasions; the orders were set aside because

[100] A formal hearing is indicated only in: Mich., Minn., N. Y., S. D., Wash., W. Va.

[101] Cal. L., 1919, Ch. 547, § 1; Colo. L., 1919, Ch. 137, § 1; Conn., § 4292 ("due proof after notice"); La., § 3770; Mass., § 166; Minn. L., 1915, Ch. 195, §§ 9, 11, 15; Miss., § 5064; Neb., § 3281; N. H. L., 1905, Ch. 29, § 1, L., 1913, Ch. 127, § 4; N. Y. L., 1913, Ch. 12 (§ 143) (due investigation and a hearing either before him or before any salaried employee of the insurance department designated by him whose report he may adopt); Ohio, § 644-2; W. Va., § 53.

[102] Pa., § 68 (court review); R. I., Ch. 221, § 3; Tenn., § 3330. See also the provisions as to excess line brokers, *supra*, § 15, e.g., Mich., § 94; Neb., § 3161.

[103] Colo., Conn., Me., Md., Mass., N. H., N. Y., N. C., Vt., Va., W. Va.

[104] See *supra*, § 16, p. 215.

[105] Ariz., § 3495; Idaho, § 4992; Ky., § 681 c-24; N. H. L., 1913, Ch. 122, § 24.

[106] Colo., L. 1919, Ch. 138, § 12; Ky., § 762 a-11; Mo., § 6283. The N. Y. statute (L., 1922, Ch. 660, § 2), requires notice and hearing in such case.

[107] (1912), 197 Fed. 435 (suit to enjoin enforcement of Ky. L., 1912, Ch. 5).

confiscatory without any reference to the failure to give a hearing.[108] In *German Alliance Insurance Company* v. *Lewis*[109] the attorneys for the insurers waived the omission of the superintendent to give notice and hearing and based their attack solely upon the ground that the regulation of fire insurance rates was not a proper exercise of the police power. In *American Surety Company* v. *Shallenberger*,[110] the statute authorized the insurance board to hold hearings, compel the attendance of witnesses, and inspect books and papers of surety companies, "for the purpose of gaining information to enable them to fix maximum rates." No reference was made to the failure to provide that the surety companies should have an opportunity to be heard before the rates were put into effect. In *Insurance Company of North America* v. *Welch*,[111] a statute authorizing a board to fix fire and tornado insurance rates was upheld without reference to the absence of procedural requirements; the statute expressly authorized judicial review of the rates so fixed. Thus, it will be seen that the constitutionality of a provision authorizing the fixing of rates without a hearing of the insurers, has never been directly passed upon.

While it is true that in the statutes just referred to, the data are taken from the companies' own statements, nevertheless, a hearing should be given upon the interpretation of the figures thus presented. The National Convention of Insurance Commissioners in 1919 debated at considerable length the question, whether or not a resolution favoring a reduction in fire rates should be adopted without giving the fire insurance companies an opportunity to be heard.[112] Eventually, a hearing was given.

A single example of the exercise of this type of power will suffice. Under date of April 26, 1920, the Arkansas commissioner issued a ruling that since the tabulation of five years' experience of the fire companies showed an underwriting profit of 11.21%, whereas the statute[113] allowed only 5%, a reduction of 6.21% in all fire insurance rates be made, to take effect May 15. On May 13 he postponed the taking effect of the order until June 13, and at the request of the companies and of the general counsel for the National Board of Fire Underwriters, granted a hearing at his office on

[108] Aetna Ins. Co. *v.* Lewis (1914), 92 Kan. 1012, 142 Pac. 954.
[109] (1914), 233 U. S. 389, 34 Sup. Ct. 612.
[110] (1910), 183 Fed. 636. [111] (1916), 48 Okla. 620, 154 Pac. 48.
[112] *Proc. N. C. I. C.*, 1919, pp. 40, *et seq.*
[113] Ark. L., 1919, No. 163, § 8.

June 4 and 5. On June 5 he issued a second order, stating he saw no reason to change his former opinion, and ordering the reduction to take effect by June 13.[114] A hearing which is granted after the official has firmly made up his mind and taken a definite stand, with incidental publicity, is little better than no hearing at all.

§ 26. *Grounds of decision or ruling.* The grounds upon which the commissioner is empowered to make decisions have been considered in detail in connection with the functions of the commissioner.[1] It is proposed now to examine three problems which fall roughly under the general heading of this section: 1. The character of the evidence upon which official action may or must be predicated. 2. The commissioner's duty to give reasons or statutory references in support of his decisions. 3. The extent to which the commissioner is influenced by the rulings and practices of his predecessors.

1. The character of the evidence upon which the commissioner's decisions may be predicated is usually left to the discretion of the commissioner. Even where he has general power to swear witnesses, it does not follow that he is obliged to do so. The language of many statutes is broad enough to give him a free hand. Thus, the Massachusetts statute as to licensing foreign companies reads:

> Before granting licenses or certificates of authority to a company . . . the commissioner shall be satisfied, *by such examination as he may make and such evidence as he may require*, that. . . .[2]

Similarly, the Massachusetts statute as to revocation of the license of a foreign company is:

> If the commissioner is of opinion, *upon examination or other evidence*, that a foreign company is in an unsound condition. . . .[3]

A number of other jurisdictions have statutes with language substantially identical.[4] Such phrases as "satisfactory proof" [5] or

[114] Substantially the same thing happened in Wisconsin in 1923. See W. U. R. Wis. 1 (1923).

[1] *Supra*, Chapters III and IV.

[2] Mass., § 4. Italics ours. Similarly, Ky., § 752.

[3] Mass., § 5. Likewise, Ala., § 8333 ("such examination and evidence as he sees fit to make and require").

[4] Ala., § 8343; Ariz., § 3381; Colo. L., 1913, Ch. 99, § 9; Ind., § 4691; Kan., § 5166; La., § 3669; Minn., § 3260; Miss., § 5032; Mont., § 4065 a; N. J., p. 2878, § 124; N. M., § 2809.

[5] Ill., § 44 (revocation, company's license); Mich. II, 4, §§ 6, 7, 8 (revocation agent's license).

"after a hearing," [6] or "in such way as he shall deem best" [7] are varieties of unregulated power to determine the kind of evidence.[8]

On the other hand, there are quite a number of instances in which the character of the evidence is restricted within fairly definite limits. Conspicuous among these is the unique New York clause which restricts the revocation of a foreign company's license on financial grounds:

> Whenever it appears to the superintendent, from any statement made to him or from an examination made by him or by an examiner appointed by him, that the capital stock . . . is impaired. . . .[9]

If "statement" means the sworn annual report of the company or a similar special report, and if "examination" means the formal investigation which commonly goes by that name, the superintendent is somewhat restricted as to the kind of evidence upon which he may act. For instance the report of an irate policyholder that he could not collect his claim against a company would not, it seems, fall under either of these heads.

Other statutes prescribe that the commissioner may act only on the certificate of another commissioner,[10] or on the company's sworn statement or statements,[11] or his own records,[12] or the certificate of a public officer of his own state.[13] Even a limitation such as, the facts established at a hearing,[14] after "examination," [15] or "investigation" [16] constitutes some slight limitation on the data which the commissioner may properly bring within the orbit of his reflective processes. However, it would be desirable to find a formula of less inclusive scope.

2. In the absence of express statutory prescription, the commissioner is under no duty to give the reasons for his decision at the time he makes it. It is sufficient if he has reasons to support the

[6] E.g., Ohio, §§ 644, 644–1, 644–2; Wis., § 1955 (o) 5. [7] Conn., § 4284.

[8] See also Ariz., § 3378; Mo., § 6348 ("any knowledge or information in his possession"); N. Y., § 244 ("upon investigation," revoke fraternal society's license).

[9] N. Y., § 41.

[10] Ala., § 8342 (must accept it as "true and correct"); Nev., § 1273.

[11] Colo. L., 1913, Ch. 138, § 12 (fire rates); Del. §§ 575 (license renewal), 577 (license revocation); Ky., § 762 a–11 (fire rates).

[12] Ark., § 5002 (registered policy deposit).

[13] Fla., § 2773 (unpaid judgment); Idaho, § 4968 (same); Ill., § 33 (removal of suit to U. S. court); Minn., § 3264 (unpaid judgment); Neb., § 3158 (like Ill., § 33).

[14] Cal. L., 1915, Ch. 608, § 596 b.

[15] Ga., § 2437; Idaho, § 4982; Ill., § 70; Ia., § 5518.

[16] Ia., § 5471; Mo., § 6160.

decision when judicially attacked. Indeed, the presumption of official regularity [17] will usually shift to the complainant the burden of proving that the reasons or grounds for the decision were insufficient. Despite this tactical advantage which the commissioner has, of the many cases in which the decision has been attacked, only two leave us in the dark as to the reasons given by the commissioner for his decision.[18]

By far the greater number of statutes contain no reference to the giving of reasons for his decisions. In a limited number of cases, reasons must be given. Conspicuous among these are the provisions of the Uniform Fraternal Bill, sponsored by the National Fraternal Congress, an association of representatives of fraternal societies. The revocation or refusal of a foreign fraternal society's license must be accompanied by an official statement of the reasons therefor:

> When the superintendent refuses to license any society, or revokes its authority to do business in this state, he shall reduce his ruling, order or decision to writing and file the same in his office, and shall, upon request, furnish a copy thereof, *together with a statement of his reasons*, to the officers of the society . . .[19]

In view of the tenuous standards of financial soundness applicable to fraternal societies, this requirement is calculated to make an impulsive official hesitate.

In addition, similar requirements are found, comparatively infrequently, in statutes governing disapproval of policy forms,[20] the refusal or revocation of an agent's license,[21] and miscellaneous instances.[22]

[17] See Gross's *License* (1894), 161 Pa. 344, 29 Atl. 25; Wigmore, *Evidence* (2nd ed.), § 2534.

[18] State *ex rel.* Dakota Hail Ass'n. *v.* Cary (1891), 2 N. D. 36, 49 N. W. 164; American Casualty Co. *v.* Fyler (1891), 60 Conn. 448, 22 Atl. 494, 25 Am. St. Rep. 337.

[19] N. Y. L., 1911, Ch. 198 (§ 237). Similar provisions are found in many other states, e.g., Ariz., § 3486; Idaho, § 5161; Ky., § 681 c–16; La., § 3728; Mich. III, 14, § 16; Minn., § 3554; Miss., § 5188; Mo., § 6313; N. H., Ch. 122, § 16. See also Mont., § 4147.

[20] Idaho, § 5037; Me., Ch. 53, § 11; Mass., §§ 108, 132; Mich., § 150; N. H. L., 1913, Ch. 226, § 1.

[21] Me., Ch. 53, § 126; Mich. II, 3, § 8; Minn. L., 1915, Ch. 195, § 11; Ore., § 6335; Wash., § 7090. Cf. Okla., § 6749 (3), "shall render its decision in writing."

[22] Idaho, § 4961 (company license revocation); Ill., § 179 a (refusal to approve increase of capital); Mont., § 4137 (approval of company having surplus in excess of statute).

While it is difficult to generalize as to the practices, it is believed that the commissioners generally give reasons for their decisions. The very informality of the decision makes it hard to stop short with a bare announcement of the conclusion reached. Again, most commissioners lean heavily on the attorney-general and his assistants, who are usually ready to give a reason, whether it be the real or the ostensible one. Finally, the practice of publishing, through a private concern, a weekly report of the more important rulings of insurance departments tends to give the commissioner's rulings somewhat the air of a judicial opinion. A perusal of the "Weekly Underwriter's Insurance Department Rulings" for the past few years shows that reasons, good or bad, are commonly given. This is not a conclusive test, however, because the "Weekly Underwriter" aims to publish only those rulings which are of interest to other commissioners and other companies than the ones involved, and the rulings in which reasons are given are obviously more useful for this purpose.

Nevertheless, the statutes leave much room for improvement in this respect. No statute requires the commissioner to point out the particular section or sections of the statutes upon which he relies for authority to make the ruling. A study of the Weekly Underwriter's volume of rulings for the year 1923 shows that out of 204 rulings, specific statutory citations were given in 125. This includes a number of opinions from the attorney-generals which are sent out as insurance department rulings, and which uniformly give citations. Of the remaining seventy-nine rulings, three cited judicial decisions only, and two referred by name to a statute. Of the seventy-four in which neither statute nor decision was cited, twenty-nine dealt with subject matter sufficiently specific so that it was fairly obvious what statute (for example, anti-rebate law) was referred to. In forty-five instances it was far from clear to the present writer what statute the ruling was based upon. Some of these were letters of "advice" or warning of a very informal character; nevertheless, it is not easy for an insurer to distinguish between the commissioner's request and his command. Thus, in about one third of the rulings published during 1923, no statutory reference is given, and in nearly one fourth of them the omission was somewhat confusing. The departments which most frequently issued rulings without statutory references were those of Kansas, New Mexico, Ohio and Texas.

It is believed that a salutary effect would be accomplished by statutory requirements: first, that the commissioner shall cite in his ruling the section or sections on which it is based; and second, that he should state concisely his reasons for every ruling either adversely or favorably affecting private interests.[23]

3. The extent to which the commissioner is influenced by the rulings and practices of his predecessors in office obviously cannot be reduced to any mathematical basis. No doubt prior rulings of the attorney-general, preserved in that official's annual report, exercise very great influence in reference to questions of interpretation. The publication of an official collection of departmental rulings, such as the "New York Rulings on Life Insurance" (1916), undoubtedly tends to stabilize the action of subordinates. The "Weekly Underwriter" rulings are available to most commissioners, and are sent to most of the insurance companies. Thus, a body of departmental precedents, heterogeneous and amorphous, is being built up. Finally, one may conjecture that a new and inexperienced commissioner will turn to his hold-over subordinates or to the files and correspondence of his predecessors for guidance.

In an endeavor to gain some light on the extent to which this actually goes on, the following question was put:

> In passing upon questions calling for the exercise of your discretion, to what extent do you follow the traditions and practices of your predecessors in the office?

A question of this sort is necessarily vague and tends to elicit the personal reaction of the individual rather than an objective statistical summary. Of the twenty-seven answers, nineteen were affirmative. Of these, fifteen answers were "yes, if reasonable," or with similar qualification,[24] while four were unqualified.[25] Four commissioners indicated that no or very little attention was paid to the rulings and practices of predecessors,[26] and four indicated that sometimes they were followed.[27] At all events, it is clear that the commissioner is not bound by his or his predecessor's previous

[23] See Tod *v.* Waldman (1924), 266 U. S. 113, 45 Sup. Ct. 85, in which Mr. Chief Justice Taft criticized the record in an immigration case because it failed to specify the findings or reasons for the decision.

[24] Ariz., Ark., Colo., Fla., Kan., Mass., Minn., Neb., N. H., Ohio, Okla., Pa., S. D., Utah. W. Va.,

[25] D. C., Ia., Mich., Ore.

[26] Idaho, N. C., Vt., Wash.

[27] Conn., Md., Mont., Wis.

application or interpretation of a statute which is deemed by the court, in judicial attack, to have been erroneous.[28]

§ 27. *The decision or ruling: form; record; publicity; communication.* Many of the commissioner's powers are, as has already been pointed out, exercised by the writing of informal letters or the giving of advice, rather than by a clear-cut decision or ruling. Thus, refusal of a license to a foreign company rarely comes in the form of a definitive ruling, but rather in the form of a letter pointing out defects in the company's application and suggesting that these must be remedied before a license will be granted. A company which feels itself unable to comply with the suggestions will usually either not make a formal application or will withdraw one already made.[1] Even in the case of a foreign company already licensed, the commissioner, after advising it that it is not, in his opinion, complying with the statutes, will usually allow it to withdraw voluntarily rather than suffer a definite revocation of its license. For the most part, then, the commissioner makes predictions or threats rather than formal administrative acts.

In view of this indefiniteness and informality of the commissioner's "proceedings," it is somewhat difficult to interpret the statutes requiring him to keep a "permanent" record thereof. Thus, the Massachusetts statute, which has been widely copied, reads:

> He shall preserve in permanent form a record of his proceedings, including a concise statement of the result of official examinations of companies.[2]

What "proceedings" must be preserved? The statute indicates one class, namely, the summaries of the reports of official examinations. Must all oral communications, by way of advice or statutory

[28] State *ex rel.* Leach *v.* Fishback (1914), 79 Wash. 290, 140 Pac. 387 (commissioner reversed prior interpretation of statute as to deposit requirements); State *ex rel.* Fishback *v.* Globe Casket and Undertaking Co. (1914), 82 Wash. 124, 143 Pac. 878 (suit to enjoin doing business which former commissioner had advised was not "insurance business").

[1] See *supra*, § 11, p. 90. The grounds or reasons for the decision are treated *supra*, § 26. The making of regulations is treated *infra*, § 29.

[2] Mass., § 16. Similar statutes are: Ala., § 4569; Ariz., § 3389; Ark., § 4984; Cal. P. C., § 608; Colo. L., 1913, Ch. 99, § 9; Del., § 573; Ind., § 4805; Kan., § 5172; Ky., § 759; Md. IV, § 178; Miss., § 5025; Mo., § 6100; Neb., § 3153; N. M., § 2807; Okla., § 6673; S. D., § 9116; Tenn., § 3300; Utah, § 1130; Wash., § 7047; Wis., § 1972 b. See also, Ohio, § 671 ("shall keep a full record of his proceedings"); Me., Ch. 53, § 83; Va., § 4182.

interpretation, be recorded in permanent form? It is believed that no commissioner rigorously records all of his "proceedings," using that term in the broadest sense. However, probably most of his important "rulings" or opinions on statutory construction are preserved in his files of correspondence.

In the second place, what is a "permanent form" of record? Does the filing and indexing of copies of letters written by him along with the letters received by him on the same subject, constitute a "permanent record?" Or does the language require a bound book, similar to the records of a court? If the latter is meant, it is believed that the requirement is not generally observed. The following question was submitted:

> Q. 17.— Do you keep a formal record of each ruling which you make on a question calling for the exercise of your discretion (e.g., approving or refusing a broker's or an agent's license) in a book or books kept for that purpose, or are such rulings preserved in your correspondence and other memoranda?

Sixteen commissioners answered that the correspondence and other memoranda were the only "records" preserved;[3] several of these indicated that the memoranda of a particular proceeding are kept in a separate file or filing jacket.[4] In six other states apparently no formal or book record is kept.[5] In only eight states does it appear that a formal record is generally kept;[6] five of these preserve the rulings in a separate book.[7] In two others, a formal record is kept of some proceedings.[8] Of course there is no sanctity about the time-honored method of preserving judicial records; but the separation between the record of the court's rulings (judgments, rulings on motions, and so forth) and the memoranda (pleadings, motions, affidavits, stenographer's notes, and so forth) upon which they are based, lends a certain definiteness and sharply focused responsi-

[3] Fla., Me., Md., Mass., N. M., N. Y., N. D., Ohio, Ore., Pa., Utah, Vt., Va., Wash., W. Va., Wyo.

[4] So in Mass., Pa., and W. Va.

[5] Ark., Kan., Mont., N. H., N. M., N. C., Okla. The answers from these departments were ambiguous; all but Mont. answered simply "yes" to the whole question, without stating whether the answer was to the first part or the last. Montana answered simply: "Records are preserved."

[6] Ariz. (corporation commission), Colo., D. C., Idaho, Ia. (rulings of general interest and license revocation), Minn., Neb., Wis.

[7] Idaho, Ia. (see last note), Minn., Neb., Wis.

[8] Conn., Mich. (rulings on company requirements kept formally; on agents' licenses, in correspondence).

bility to judicial action which are conspicuously less observable in the commissioner's proceedings. The commissioner's records are more like those of the companies with which he deals.

In addition to the general provisions just discussed, occasionally a special provision requires the filing of the result of a particular official proceeding.[9] The Uniform Fraternal Bill, in particular, requires that a record be made of the refusal or revocation of a foreign fraternal society license.[10]

The scope of the "record," as well as the practical accessibility of the writings coming under that head, are of considerable relevancy in determining to what extent the commissioner's files and correspondence are open to public inspection. It seems that at common law not even public documents were open to the inspection of persons generally, but only of those persons having a peculiar "interest" in the records, such as the need for the use of the public document in private litigation, or for the enforcement of official duties.[11] Moreover, even where, by statute, a general right of access to public records is given, not all writings filed with a public official will be treated as "public records." [12]

The attorney-general of New York has ruled, independently of any express statutory provision, that the correspondence of the superintendent of insurance is not a public document, and that access thereto is discretionary with the superintendent.[13] On the other hand, a court may hold that, apart from express statutory provision, the language of a particular statute and the purpose for

[9] Ill., §§ 179 a (decrease or increase of capital stock), 208 b (registered policies); Ind., §§ 4706 d, 4706 e, 4714 e (make and file written findings; revocation of agent's license); Minn. L., 1915, Ch. 195, § 11 (refusal or revocation of agent's or broker's license); Mont., § 4137 (approval of excess surplus fund); N. D., § 4892 (consolidation petition); Okla., § 6756 (state insurance board); Ore., § 6335 (revocation of agent's license); Wash., § 7090 (same).

[10] See Conn., § 4201; Idaho, § 5161; Ky., § 681 c–16; La., § 3728; Mich. III, 4, § 16; Minn., § 3554; Miss., § 5188; Mo., § 6313; N. H. L., 1913, Ch. 122, § 16.

[11] Rex. *v.* Justices of Straffordshire, etc. (1837), 6 Ad. & Ell. 84, 99; State *ex rel.* Clay County Abstract Co. *v.* McCubrey (1901), 84 Minn. 439, 87 N. W. 1126.

[12] Round *v.* Police Commissioner (1908), 197 Mass. 218, 83 N. E. 412 (pawnbroker's report of transactions, made to police commissioner, not open to public inspection; *mandamus* denied).

[13] N. Y. Rulings (1916), p. 31 (opinion of Mar. 1, 1897). This opinion is not printed in the official report of the attorney-general for 1897, hence the ground for his opinion is not accessible to the writer.

which the record is kept, requires that the records be open to public inspection.[14]

Most of the statutes cited above [15] requiring the commissioner to preserve a record of his proceedings, are silent as to the publicity of these records. A nice balancing of interests is involved in determining this point. On the one hand, the interests of every citizen in seeing that the insurance statutes are diligently and impartially enforced, demands that the commissioner's office files be as an open book. On the other hand, this theoretical claim of the citizens (since citizens rarely bestir themselves in such matters) is met by the demand of the companies that valuable business secrets be not disclosed, and that premature or hasty statements be not spread broadcast to the irreparable damage of a sound enterprise. On the whole, it is difficult to see how the business of the commissioner could be satisfactorily conducted if every letter he wrote were at once open to the public gaze. Revocations of licenses and other official acts having jural consequences would, it seems, be open to the inspection of any person desiring to avail himself of the same in private litigation — for example, to defeat recovery of a premium by an unlicensed company or agent. For these reasons, it seems desirable to separate the records of such official acts from the other records or memoranda of the office.

By express statutory provision in a number of jurisdictions, privacy of the records and papers of the commissioner's office is either directed or permitted, usually subject to his discretionary power. Thus, privacy is permitted in a number of jurisdictions by statutes making it the duty of the commissioner to furnish a certified copy of any record in his office, "when he deems it not prejudicial to the public interest." [16] Such language is unfortunately ambiguous; it can rarely be prejudicial to the *public* interest to have a company's business secrets, or an inaccurate or premature report of its financial condition, spread abroad, however much it may prejudice the company's policyholders or stockholders. It would seem better to specify what may or may not be withheld. Thus, a Colorado statute provides that the names and addresses of

[14] The attorney-general of New York in 1886 ruled that the superintendent could not refuse copies of the reports of examinations of insurance companies to any persons, regardless of whether or not he approved the purpose for which they were to be used. N. Y. Insurance Report (1886), I, pp. xvii–xx.

[15] *Supra*, this section, n. 2.

[16] Ark., § 4984; Del., § 573; Md. IV, § 178; N. D., § 172; Pa., § 19.

the members of an inter-insurance exchange (obviously, a valuable business secret to competitors) are not to be a part of the public records.[17] A California statute goes even further and declares that the disclosure of such names and addresses "shall constitute a breach of official duty." [18] If the commissioner fails to approve the proposed merger of two or more fraternal societies, he is commanded by the statutes of many states not to disclose the fact that an application therefor was made, or the contents of such application.[19] Other examples of official data which must be withheld from publicity are: reports by persons who have insured local property in foreign companies;[20] the report of the examiner to the Virginia Corporation Commission;[21] the details of the company's annual statement relating to the insurance written, the premiums received and the losses paid for each kind of insurance;[22] and the report of the examination of a fraternal society, prior to a hearing thereon if requested by the society.[23] As to other insurance companies, the withholding of the report of an examination is merely permitted, not required.[24]

On the contrary, a number of states declare that the "records," [25] "records, books and papers on file," [26] "reports" received by him [27] shall be "public records"; and in some of these the conclusion that they are open to "public inspection" is not left to implication, but is expressly stated.[28] In addition, we find provisions for publicity of particular kinds of data.[29]

The failure of statutes authorizing revocation of a company's

[17] Colo. L., 1913, Ch. 99, § 81 (8) (h).

[18] Cal. L., 1917, Ch. 666, § 7 (except under order of court.)

[19] Ariz., § 3484; Conn., § 4199; Ky., § 681 c–14; Mich. III, 4, § 14; Miss., § 5186; N. H. L., 1913, Ch. 122, § 14; N. Y. L., 1918, Ch. 330, § 236; N. C. S., § 4798 b (13).

[20] Md. III, § 166; Miss., § 5090.

[21] Va., §4180.

[22] Wis., § 1946–16 (2).

[23] See *supra*, § 22, p. 367.

[24] *Ibid.*

[25] Colo. L., 1913, Ch. 99, §§ 3 (c), 13 (except report of examination); Ky., § 760; Tenn., § 3342.

[26] Ga. L., 1912, p. 119, § 1; Idaho, § 4918; Ill., § 7; Mo., § 6089; Neb., § 3143; Okla., § 6672; S. C., § 2697; Utah, § 1129.

[27] Miss., § 5025 (also "records"); N. C. R. B., § 4700; Va., § 4182.

[28] So in Ky., Miss., Mo., § (6094), N. C., Tenn., Va.

[29] Kan., § 5368 (schedules of fire rates); Mich. I, 4, § 2 (same); Mo., § 6274 (same); N. C. R. B., § 4814 a (5).

license to require the giving of notice of such revocation to the persons affected thereby (the company and its agents) has been commented upon.[30] Publication in a newspaper of notice of a consummated revocation is frequently required.[31] The statutes as to agent's or broker's licenses more frequently prescribe the giving of notice to the agent that his license has been revoked.[32] Notice of the commissioner's disapproval of a policy form is commonly required to be given.[33] Provisions are less commonly found for notice to the company of a rate reduction or other official action on rates.[34] Aside from these special provisions, there is no general provision for the promulgation or communication to persons affected, of official action taken. Some such provision should have a place in a general code regulating the commissioner's administrative practices.

§ 28. *Administrative review.* In general, no machinery or method is provided for administrative review — that is, review by another administrative official or board — of the official acts of the insurance commissioner. No appeal lies from the commissioner's rulings, except to the courts.[1] No doubt this circumstance has had considerable influence in broadening the scope of judicial review.

In a few jurisdictions, some such administrative review exists. Thus, in Arizona and Virginia, the Corporation Commission occupies a position somewhat similar to that of a reviewing body.[2] Again, in those states (Idaho, Illinois, Nebraska) which have adopted the new type of centralized administration, the director or

[30] See *supra*, § 11, p. 100.

[31] See *supra*, § 11, p. 102.

[32] See Cal. L., 1919, Ch. 607, § 1, Ch. 547, § 1; Colo. L., 1919, Ch. 137, § 1; Idaho, § 5016; Ind., §§ 4706 d, 4714 e; La., § 3770; Mass., §§ 163, 166; Mich. II, 3, § 8 (refusal), II, 4, § 8 (revocation); Minn. L., 1915, Ch. 195, § 8 (good provision); N. H. L., 1913, Ch. 78, § 1, L., 1905, Ch. 29, § 1; N. Y. L., 1914, Ch. 14, § 1 (§ 91a) (refusal to renew; good provision); L., 1913, Ch. 7 (§ 142) (same), L., 1913, Ch. 12 (same, plus good provision for notice of revocation).

[33] See *supra*, § 18, p. 265; and Ariz., § 3452; Idaho, § 5037; Ill., § 208 w; Ind., § 4622 d; Mass., § 108 (specifying reasons), §§ 132, 134 (same); Mich. II, 4, § 8, III, 2, §§ 6, 12; N. H. L., 1913, Ch. 95, § 2 and Ch. 226, § 1.

[34] Ky., § 762 a–11, § 762 a–12; Mich. I, 4, § 12.

[1] See *infra*, Ch. VIII, Judicial Control.

[2] See *supra*, § 4. The situation in the two states is not the same, however. In Arizona, the corporation commission is given positively all the official power; in Virginia, it divides official powers with the commissioner. See, for instance, Va., § 4235. A similar method of appeal exists in New Mexico. Appeal of Title Guaranty & Trust Corporation (1925), —— N. M. ——, 240 Pac. 988.

head of the department (for example, of Trade and Commerce) exercises, either nominally or actually, a reviewing power over the commissioner's acts.[3]

In general, no systematic procedure is prescribed for the review by the commissioner of the acts of his subordinates. In the smaller departments, where the commissioner has but few subordinates, no such procedure is necessary. In the larger departments, such as New York, only the head of the department is authorized to make decisions having legal consequences — for example, revocation of a license, disapproval of a policy, of an investment, and so forth — and thus all official decisions emanate, ostensibly, from the commissioner. In reality, of course, many matters are virtually decided by a deputy or division chief, whose recommendations are adopted usually as a matter of course. As to many matters of routine, subordinates are allowed to sign the commissioner's name without his having been consulted on the particular matter in hand. The extent to which this goes on is difficult to estimate.

In respect to examinations, however, subordinates are, under statutes empowering official delegation, invested with powers to make decisions, for example, to summon, swear and interrogate witnesses.[4] And it is in relation to examinations that we find provisions for official review. Thus, before filing or making public the report of an examination, the commissioner is commonly required to give the company notice and an opportunity to object to the examiner's report.[5] With respect to other delegated functions, however, the opportunity for administrative review is not presented. Thus, the New York sections requiring that before revocation of an agent's [6] or broker's [7] license a hearing be given before some salaried employee of the department "whose report he may adopt," contain no requirement that the report be disclosed to the individual affected or that he be given an opportunity to be heard

[3] See *supra*, § 5, p. 36.

[4] *Supra*, § 22, p. 343.

[5] *Supra*, § 22, p. 367.

[6] N. Y. L., 1914, Ch. 14, § 1 (§ 91 a) (accident) L., 1913, Ch. 7 (§ 142) (fire). See Ore., § 6345, which contains a similar provision as to revocation of an adjuster's license. Va., § 4235, provides for an appeal to the state corporation commission from an order revoking an agent's license. Wis., § 1970 (p) (2), provides for a "rehearing" to be held before the commissioner within ten days after receipt of any order of the commissioner. This appears to be the only provision for a rehearing before the commissioner to be found anywhere.

[7] N. Y. L., 1913, Ch. 12 (§ 143).

before the superintendent in reference to the conclusions to be drawn from the report.

It has already been pointed out that the official secrecy as to a subordinate's report of a hearing held before him, which was permitted in the noted case of *Local Government Board* v. *Arlidge*,[8] is not commonly permissible where the "hearing" takes the form of an "examination," or at least where it relates to a company's financial condition. In an effort to get a somewhat more extensive view of this problem, the following question was asked:

Q. 19.— In cases where an investigation is conducted by some member of your staff upon a question involving your discretion, is his report to you of the result of such investigation open to inspection by the persons affected thereby before your final decision on the case?

All but a few of the answers were affirmative. Seventeen answered unreservedly "yes";[9] and three others added "as a rule."[10] Four answered unqualifiedly "no."[11] The Pennsylvania commissioner said it depended on the kind of a man he was dealing with; if a "trickster," no. Such an answer is really "no"; for how can the commissioner separate the sheep from the goats? The difficulty of answering such a question categorically is illustrated by the answers obtained from the New York City office of the New York department. The chief examiner of companies stated that his report would probably be open to inspection; but the head of the complaint bureau, who investigates complaints against brokers and agents, stated that in his opinion, his report to Albany of any hearing before him would be treated as confidential correspondence, not open to inspection by the individual affected. In view of the conflict of opinion and of the absence of judicial rulings, the writer believes that the solution of this problem is yet to be found.

§ 29. *Power to make rules and regulations.* A comparison of the statutory provisions with the rule-making activities of the commissioner shows considerable diversity between the "law in books" and the "law in action." In only a comparatively few of

[8] (1915), A. C. 120, reversing (1914) 1 K. B. 160. But see Bratton *v.* Chandler (1922), 260 U. S. 110, 43 Sup. Ct. 43 (applicant for realtor's license must be given public hearing with opportunity to meet adverse evidence).

[9] Ark., Colo., Fla., Ia., Me., Mich., Minn., Mont., Neb., N. H., N. C., N. D., Ore., S. D., Vt., Va., Wyo.

[10] Ariz. ("usually"), Mass., Nev.

[11] Kan., Wash., W. Va., Wis. Ohio answered, "no, except by permission"; Okla., "not as a rule."

the jurisdictions do the statutes confer any general power of making regulations to "fill in the details" of statutory rules. Yet practically every insurance department makes "rulings," "rules" or "regulations," which are either sent out by the department or are distributed by private agencies, as guides to the future course of action of the department.

At the outset of this discussion we are met with a question of definition or terminology. In the exercise of his discretionary powers, as well as in the interpretation and application of statutory prescriptions, the commissioner is daily required to express an opinion as to the norm to be observed in a particular case. Every administrative decision, like every judicial decision, is a *datum* for analogical reasoning as to future decisions, and if the decision is rationalized by the addition of a norm, that norm becomes, in a weak degree, the "law" for the situations which it covers, until abrogated by administrative action or nullified by judicial pronouncement. Such an administrative decision, or official opinion, accompanied by a statement, whether more or less articulate, of a "norm," may be termed a "ruling." On the other hand, most insurance departments go further than this, and make "regulations," which either fill in the gaps obviously left open for administrative discretion, or constitute an official interpretation of statutory provisions which are apparently complete. The difference between "rulings" and "regulations" is one of degree. The latter purposely, the former only incidentally, lay down a norm for the guidance of those interested in future decisions. The latter are likely to prove more permanent than the former. The difference between the two has never been firmly drawn in either statutes, judicial decisions or departmental practice.[1]

Since every exercise of discretionary power, — licensing, approval or disapproval, and so forth, — involves, or may involve, the making of a "ruling," no attempt will be made to gather here

[1] The *Weekly Underwriter* has made a theoretical distinction between "formal" and "informal" rulings. "Informal" rulings are the communications of the commissioner in response to an individual inquiry and dealing with a concrete case; they are published (omitting names) because the reasons for the ruling are of interest to others. "Formal" rulings are those addressed to a class, e.g., all fire insurance companies. In Texas, a number of foreign insurance companies and their agents sued to enjoin enforcement of a general ruling threatening revocation of licenses for paying commissions to non-residents; the injunction was denied without discussion of the legal effects of such a ruling. Scott *v.* T. V. Smelker & Co. (1926, Tex. Civ. App.) 280 S. W. 297.

the examples of statutes under which such rulings are issued. Certain official powers, for example, the power to prescribe rates and the power to evaluate investments, almost inevitably involve the power to make "regulations," especially where the work of the department calls for the frequent exercise of the power. Whether these "regulations" are written down and published or are merely issued as instructions to subordinates cannot alter their essential characteristics though it may determine their accessibility to outsiders. In only nine states is any rule-making power expressly conferred, as to subject-matter more or less indefinite in scope. In six of these the word used is "regulations" or "rules";[2] in the others, "ruling" alone is used,[3] though the purpose is apparently to confer power to make "regulations." Thus, the Minnesota statute authorizes revocation of the license of any agent or broker for "violation" of "any lawful ruling" of the commissioner; it seems clear that "regulations," in the sense discussed above, are intended.

The scope of the regulations authorized by the statutes cited in the last two notes is not prescribed, so far as subject matter is concerned, but in several the power to make regulations is confined to a particular exercise of administrative powers, such as the revocation of an agent's or broker's license,[4] or the certificate of incorporation of a domestic company.[5] The New York statute does not confer power to make "regulations" explicitly but refers to "regulations" obliquely in language which probably confers such power, at least so far as the requirements to be met by companies are concerned.[6] The Idaho statute relates chiefly to matters of office practice, but the language may be broad enough to authorize regulations directly affecting individual interests:

> [The Commissioner] is empowered to prescribe regulations not inconsistent with law for the government of his department, the conduct of its employees and clerks, the distribution and performance of its business, and the custody . . . of its books and records.[7]

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[2] Ga., § 2390; Idaho, § 263; Mich. II, 2, § 3; Neb., § 3139; N. Y., § 25; Va., § 4177.

[3] Md. IV, § 184 c; Minn. L., 1915, Ch. 195, §§ 5, 6; Ore., § 6326 (1) ("rulings, instructions, and orders").

[4] See the statutes of Md. and Minn. cited in last note.

[5] Ga., § 2390.

[6] N. Y., § 25. The reference in the Ga. statute is likewise oblique.

[7] Idaho, § 263. The "commissioner" referred to here is the "commissioner of commerce and industry," not the director of insurance, who is the former's subordinate. This circumstance strengthens the view that only regulations as to office practice are authorized.

The Nebraska and Oregon provisions alone unquestionably confer rule-making power within the limits of the statutory regulations. The Nebraska statute is quite comprehensive:

> It [Department of Trade and Commerce] shall have power to make all needful rules and regulations for the purpose of carrying out the true spirit and meaning of this chapter and all laws relating to the business of insurance.[8]

This, the only rule-making statute which has thus far been judicially construed, has been held to empower the administrative authority to add to the statute a regulation as to a type of contract not explicitly covered by the statutory rules. Plaintiff, a company organized as an "assessment" company under the laws of Colorado, guaranteed to those policyholders who paid premiums for five years dividends in the form of paid-up insurance for the sixth year. No extra assessments to meet these paid-up insurance claims were provided for in the policies. The Nebraska statutes classified companies into "assessment" and "mutual"; the former were not, while the latter were, required to maintain a reserve fund. The insurance board ruled that domestic assessment companies issuing such guaranties of dividends must maintain, as to such guaranties, a reserve fund similar to that of "mutual" companies, and applied this rule to the plaintiff. The court upheld the refusal to license plaintiff because of non-compliance with this "regulation," saying (after quoting the statute):

> These powers may be exercised to compel a foreign insurer to provide a reserve fund required of a similar domestic insurer.[9]

In this case, the "regulation" fell clearly within the purpose of the statutes, though not strictly within its language. No American statute has been found empowering the commissioner to make regulations distinctly adding new requirements not mentioned by the statute, such as the power conferred upon the administrative authority under the German insurance law.[10] Under the guise of supplemental regulations, the commissioner in the United States

[8] Neb., § 3139; same in Neb. Comp. Stats., 1922, § 7745. See also Ore., § 6326 (1).

[9] Western Life & Accident Co. *v.* State Insurance Board (1917), 101 Neb. 152, 154, 162 N. W. 530.

[10] *Reichsgesetz über die privaten Versicherungsunternehmungen vom 12 Mia.*, 1901, § 64. (In force at the close of 1922.) The administrative official is empowered to impose a fine up to 1,000 marks for violation of such a "regulation."

may not add to the statutory requirements, however wise or expedient his regulations may be.[11]

In addition to these general rule-making powers, there are a somewhat larger number of instances of rule-making power as to specified subject-matter. The distinction between rules as to office administration and rules affecting private rights is illustrated by a comparison of the statutes authorizing the commissioner to make rules as to the safe-keeping of official records,[12] and those empowering him to regulate the access of company officials to deposited securities.[13] The latter affect private interests, while the former probably do not. A New York statute, giving a power to make regulations as to the access of policyholders to the lists of policyholders of a mutual company for the purpose of conducting a campaign for the election of directors,[14] apparently affects private interests substantially.

The rule-making power is in several instances extended to the subject of policy forms.[15] The making of rules as to the method of ascertaining the amount of company deposits, and as to the approval and valuation of securities deposited, involves more discretion than the rules as to access to deposits, mentioned above.[16] Similarly, in some instances the official may make rules for the computation of the reserve of a liability insurance company if the statutory method is found impracticable.[17] Virginia confers the power to make rules as to the evidence to be required in licensing a company.[18]

[11] See, for example, Bankers' Deposit Guaranty & Surety Co. *v.* Barnes (1909), 81 Kan. 422, 105 Pac. 697; Guy L. Wallace & Co. *v.* Ferguson (1914), 70 Ore. 306, 140 Pac. 742, 141 Pac. 542; Mutual Life Ins. Co. *v.* Prewitt (1907), 127 Ky. 399, 105 S. W. 463, 31 Ky. L. Rep. 1319, 32 *Ibid.* 298, 537; Equitable Life Assurance Society *v.* Host (1905), 124 Wis. 657, 102 N. W. 579; Travelers Ins. Co. *v.* Kelsey (1909), 134 App. Div. 89, 118 N. Y. Supp. 873; Liverpool Ins. Co. *v.* Clunie (1898), 88 Fed. 160. That an attempted delegation of power to make rules which are to supersede statutory requirements is unconstitutional, see McKenney *v.* Farnsworth (1922), 121 Me. 450, 118 Atl. 237 (regulation of fisheries).

[12] Ky., § 760; Mo., § 6094.

[13] Ark., §§ 4995, 5004; Ill., § 272 f.

[14] N. Y. L., 1915, Ch. 617, § 2.

[15] Mich. II, 2, § 22; Minn. L., 1915, Ch. 84, § 3; N. Y. L., 1913, Ch. 51 (§ 220) (assessment life, etc.); N. C. S., § 4805 b.

[16] N. J., p. 2842, § 10 (ascertaining value of mortgaged realty); N. Y., § 27. (deposits in general).

[17] Ariz., § 3435; Neb., § 3235. See *supra*, § 16, p. 200.

[18] Va., § 4177.

In a sense, the power to prescribe a rate, which is of general application and not confined to an individual case, is a rule-making power.[19] In a few instances the power to prescribe rates is expressly conferred in terms of a rule-making power.[20]

As a rule the commissioner's powers to make regulations are not subject to the approval of any other official. In this respect the American system is in sharp contrast with the French system; under the life insurance law of 1905 the power of the Minister to make rules respecting life insurance companies is subject to the approval (or disapproval) of: (1) the President of the Republic; (2) the Conseil d'Etat; (3) the Advisory Committee of twenty-one, made up of actuaries, company officials, and other persons. (See Art. 9.) The only thing in American practice corresponding to this is the power of the commissioner to make regulations as to the management of domestic companies which are in the hands of a receiver, "subject to the approval of the court." [21]

The method of enforcement of a regulation of the commissioner is, apart from express provision, presumably the same as that for the enforcement of the statutory rules. In a few instances, revocation of license is expressly authorized, for non-observance of regulations.[22] Apparently only one statute [23] has raised the vexing problem whether a statute making violation of an administrative regulation a crime, is constitutional.[24]

In conclusion, it may be pointed out that the chief weaknesses of the present statutes, in respect to official rulings and regulations are: 1. A failure to recognize that the administration of the voluminous insurance legislation inevitably calls for the making of official regulations for the guidance of persons interested. 2. A failure to distinguish between individualized "rulings" and generalized "regulations." 3. A failure to provide any general rule for the pub-

[19] See *supra*, § 19.

[20] Kan., § 5371; Tex., § 4886.

[21] N. Y., § 63. Similarly, Ariz., § 3385 (5); Ohio, § 634–6; Ore., § 6368 (5).

[22] Md. IV, § 184C (agent's or broker's license); Minn. L., 1915, Ch. 195, §§ 5, 6 (same).

[23] Minn. L., 1915, Ch. 84, § 3 (misdemeanor to issue policy in violation of "any order or other prohibition" of the commissioner).

[24] See note in 1 *N. C. Law Rev.*, 50–52 (1922). Such statutes, in other fields of administration than insurance, have been upheld. U. S. *v.* Grimaud (1910), 220 U. S. 506, 31 Sup. Ct. 480, 55 L. ed. 563; State *v.* Dudley (1921), 182 N. C. 822, 109 S.E. 63; Payne & Butler *v.* Providence Gas Co. (1910), 31 R. I. 295, 77 Atl. 145; People *v.* Moynihan (1923), 121 Misc. Rep. 34, 200 N. Y. Supp. 434, 438.

licity, promulgation or publication of either "rulings" or "regulations." [25] In a criminal prosecution for violation of a "regulation" of an administrative official, the burden of proof is on the state to show due promulgation and publication of the regulation,[26] and it would seem that the same requirement might well be made in civil litigation, such as a proceeding to review a revocation of license on the ground of violation of a regulation of the commissioner.[27]

§ 30. *Administrative enforcement.* The methods of enforcing the decisions, rulings, and orders of the commissioner may be divided into: 1. Enforcement by administrative action. 2. Enforcement through judicial action. Inasmuch as the administrative methods of enforcement have already been dealt with in the discussion of the commissioner's functions and procedure,[1] the present discussion will be chiefly a recapitulation and analysis.

Before taking up the powers of enforcement vested in the insurance commissioner, the meaning of "enforcement" and of the distinction between judicial and administrative enforcement should be more clearly defined. John Austin is frequently regarded as the chief protagonist of the imperative or analytical theory of law — the doctrine that law rests in the last analysis upon force. Yet in defining his conception of "sovereignty" he was careful to make "habit of obedience" of the subjects, rather than the exercise of force by the sovereign, the criterion of sovereign power.[2] Hence, it must not be too hastily assumed that the exercise of, or even the omnipresent threat to exercise, physical force, is the only, or even the chief, support of the efficacy of the commands of an official invested with sovereign power. "Habit of obedience" will do more work than all the king's horses and all the king's men. In this sense, every official command is self-enforcing; it needs no enforcement. In the field of insurance administration, in particu-

[25] See *supra*, § 27, p. 418.

[26] State *v.* Hall (1923), 96 Vt. 379, 119 Atl. 884: Prosecution for boating and fishing in violation of regulation of state board of health; conviction reversed because court failed to charge jury that publication of the regulation was to be proved by the state.

[27] See Winslow *v.* Fleischner (1924), 110 Ore. 554, 223 Pac. 922, 926, in which the absence of any publication in permanent form of the regulations of the state game commission was given as a reason for declaring the regulation invalid, and enjoining its enforcement.

[1] *Supra*, §§ 11–25.

[2] Austin, *Jurisprudence* (4th ed., 1873) I, 226.

lar, most of the orders of the commissioner are obeyed because the persons to whom they are addressed are not psychopathic and have formed correct habits of obedience.

The significance of physical force as a method of enforcing law arises chiefly in those marginal cases where the habit of obedience breaks down. The importance of these marginal cases is magnified by the element of insecurity which they inject into the future of human transactions and human relations. Thus, the chief difference between an occidental society, such as that of England or the United States, and an Oriental society, such as those described by Maine,[3] is in the greater certainty which the former offers that the commands of its sovereign will be carried out with unfailing vigor through the medium of physical coercion in those cases where the habit of obedience is insufficient. It is this greater certainty which lends importance to the enforcement powers of the insurance commission.

If "enforcement" is used as synonymous with "sanction," it cannot be said that enforcement is limited to physical force. Thus, Austin, who rigorously analyzes "sanction," includes under it "the smallest chance of incurring the smallest evil." [4] In this sense, sanction would include not only physical coercion but also the loss of good will incident to the publication of the revocation of the license of an insurance company.[5] The term "enforcement" is not here used in any such broad sense. Such disadvantageous consequences of revocation of license are treated as "extra-legal" consequences. To so call them is not to minimize their importance, but merely to analyze their significance. It seems better to restrict the meaning of "enforcement" to sanctions which rest, mediately or immediately, upon the application, or refusal to apply, physical coercion.

Even so, a further discrimination must be made as to the mediateness or immediateness of the physical coercion. "In the last result, every obligation is sanctioned by suffering; that is to say, by some pain which may be inflicted upon the wrong-doer whether he consent or not . . . every obligation is ultimately sanctioned by suffering, although (in innumerable cases to which I shall advert

[3] *Early History of Institutions*, Ch. XIII.

[4] *Op. cit.*, I, p. 93.

[5] See *ibid.*, I, p. 472, where he refers to "infamy" as a sanction. Of course, *infamia* in Roman law involved something more than public disgrace; it involved definite curtailment of legal status.

hereafter) the immediate sanction is another obligation." [6] "Obligation" was used by Austin somewhat loosely, and it will clarify the discussion to substitute the more precise terms "duty" and "privilege," "power" and "liability" used by Dean Pound and the Hohfeldian school of jural logicians.[7] Thus, the revocation of the license of a foreign insurance company destroys its privilege of doing business in the state; it is thus under a duty not to do business in the state thereafter, and if it does, a fine or penalty may be imposed upon it by judicial sentence. Failure to pay this fine will be followed by physical seizure of the company's property by the sheriff or other court officials; and not only will such seizure be privileged, but the official will have a power to transfer to a purchaser at judicial sale such legally protected interest as the company had in the property seized. Here, since a judicial trial and judgment must precede the seizure and sale of the property, physical coercion is only a mediate or indirect method of enforcing the commissioner's order of revocation. Yet because the revocation would not be open to collateral attack in the judicial proceeding, it cannot be said that the method of enforcement is solely or exclusively judicial, as it would be if the commissioner were obliged to institute a criminal prosecution in court for the violation of the statute instead of revoking the license on such grounds. Such a method of enforcement may, therefore, be called *indirect administrative* enforcement.

The orders of the commissioner may be enforced in other ways. Thus, revocation of license may preclude the company from suing in the state upon any contracts made with it,[8] or upon contracts made by it after the revocation took effect.[9] The sanction of nullity is a recognized form of coercion.[10] Here the legal effect of the official act is to deprive the unlicensed company or agent, not necessarily of its "right" against the other party to the contract (for it

[6] Austin, *op. cit.*, I, p. 471.

[7] Pound, *Legal Rights* (1915), 26 *Intern. Jour. of Ethics* 92; Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913), 29 *Yale L. J.* 16; Corbin, *Legal Analysis and Terminology* (1919), 26 *ibid.* 163.

[8] *Supra*, § 11.

[9] *Ibid.*

[10] Austin, *op. cit.*, I, p. 522. It is interesting to note that Austin (p. 524) derives the word "sanction" etymologically from the Roman word meaning "taboo," thus anticipating the modern theory that law is an extension of the "taboo" practices of primitive peoples. See Frank, *An Institutional Analysis of the Law* (1924), 24 *Columbia Law Rev.* 480.

may be enforceable in another state) but of its "power" to enforce such a "right" in the particular state in which its license was revoked, or, perhaps more accurately, of its "right" so far as the law of that state is concerned. At all events, the company is denied the enforcement of its claim by the physical coercion of that state. Such a sanction is negative. It is *indirect*, since only a court can pronounce the contract unenforceable, and it is a *passive* method of enforcement, since it calls for no affirmative action on the part of the commissioner after the revocation is made. The defendant who invokes the nullity as a defense to an action on the contract attends to the enforcement. This is perhaps the chief reason why such a mode of enforcement is popular with officials.

A still different type of enforcement is involved when the commissioner is given the power and (or) the privilege of ordering the seizure of person or property without the intervention of a judicial trial. Here the enforcement is by a *direct* administrative method. A summary of these direct methods will be followed by a brief survey of the indirect methods.

1. (*a*) *Direct methods of enforcement. Seizure of property.* In practically all the states the statute as to visitation and examination by the commissioner provides that he (and in many cases, the deputy or examiner appointed by him) "shall have free access" to the books, records, papers, and so forth, of the company, and of its agents.[11] Coupled with these provisions one frequently finds clauses which make it the "duty" of the company and its officers to submit, to produce, or to furnish the commissioner the necessary data for his examination.[12] In some instances a breach of this duty is made a misdemeanor.[13] The legal effect of these two sets of pro-

[11] See full list of citations, *supra*, § 22, p. 359.

[12] Ala., § 4558 (misdemeanor to obstruct commissioner or deputy); Conn., § 4116 ("shall exhibit"; penalty not specified); Fla. L., 1919, Ch. 7871, § 1 ("shall"; penalty not specified); Idaho, §§ 4976 (policyholder "shall produce" policy), 4978 (officers of company "shall produce" books); Ill., § 45 (refusal a "violation of the statute"), § 70 ("duty" of officers to submit books to examination); Ia., § 5469 ("shall produce"); Kan., § 5166 ("duty" to submit books); Mich. I, 2, § 6 ("shall produce"); Mont. G. C., § 4065 ("must"); N. J., p. 2861, § 73 ("duty" to exhibit books); N. Y., p. 1313, § 39 ("shall produce"); Ohio, § 627 (misdemeanor to refuse); S. D., § 9187 (deemed guilty of violation); Tex., § 4885 (misdemeanor to obstruct); Utah, § 1133 (misdemeanor to disobey summons); Va., § 4224 (deemed guilty of violation); Wis., § 1919 (a) (failure to open books is *prima facie* evidence of violation of statute).

[13] See the statutes of Ala., Ohio, Tex., and Utah, cited in last note.

visions taken together is, it is believed,[14] to confer upon the commissioner the *privilege* of taking possession of the books, records, papers, and so forth, for the purpose of examination. Since this privilege is similar to the sheriff's privilege of seizing property under a writ of *fieri facias* (though the commissioner, of course, has no power of disposal) this is obviously a direct method of enforcement. How much force the commissioner may use in exercising this privilege is not clear. Probably, in view of the conservative attitude of the courts toward the use of force, he would not be privileged to break down doors,[15] or to commit a breach of the peace. Apparently the commissioners rarely encounter resistance to their visitations, and even on such rare occasions they would resort to other means than a forcible entry and seizure. Thus, in the only two decisions in which seizure by the commissioner was resisted or refused, he resorted to indirect methods — in the one case to a suit in equity, seeking a mandatory injunction,[16] in the other to revocation of the company's license, which was enjoined.[17]

Aside from the seizure of documentary data necessary for an examination, the commissioner is rarely given a power or a privilege to seize the property of an insurance company or private individual in the enforcement of his orders. In two states he is expressly authorized to distrain for taxes due from insurers.[18] These provisions empower him to seize and sell property by administrative execution without resort to a judicial proceeding, and their constitutionality seems no longer debatable.[19] However, since they relate to the tax-collecting function of the commissioner, they throw little light upon his powers and privileges in the discharge of his regulatory functions.

A somewhat more radical step is taken by the Georgia statute which authorizes the commissioner, at the close of an investigation of charges of "pooling" (combining to fix rates), to assess the costs

[14] No judicial decisions on the point have been found.

[15] See Stehli Silks Corporation *v.* Diamond (1924), 122 Misc. Rep. 666, 204 N. Y. Supp. 542 — court cannot authorize sheriff to break into safe deposit box under writ of attachment.

[16] Bell *v.* Louisville Board of Fire Underwriters (1912), 146 Ky. 841, 143 S. W. 388.

[17] Metropolitan Life Ins. Co. *v.* Clay (1914), 158 Ky. 192, 164 S. W. 968. For discussion of these cases, see *supra*, § 22, notes 120 and 121, pp. 353–354.

[18] Ariz., § 3404 (corporation commission); Idaho, § 4999.

[19] Den. *ex. dem.* Murray *v.* Hoboken Land & Improvement Co. (1855), 59 U. S. 272, 15 L. ed. 372.

of the proceeding against the parties thereto and to issue execution therefor, to be levied as executions from courts.[20] This provision authorizes seizure by a sheriff under an execution issued by the commissioner, and thus provides a direct method of administrative enforcement.

In a few instances, the commissioner is authorized to impose a fine or penalty upon an insurer or its agents. In only one case is seizure of property by the commissioner or under his direction contemplated as the method of collecting the fine, and even that case is not clear.[21] Virginia has a general provision that the corporation commission may "enforce penalties by its own process." [22] It is submitted that the exercise of direct administrative execution to enforce substantially large fines or penalties imposed by the commissioner is a denial of "due process," since no question of abatement of a nuisance is involved [23] and no emergency exists which requires summary action by the commissioner. The collection of the fine or penalty can be accomplished quite as effectively through a revocation of the company's license, which is the method of enforcement authorized by several statutes.[24] In several states the commissioner is empowered to impose fines or penalties but no method of collecting them is specified.[25] Revocation of license or judicial proceeding would seem to be the method contemplated in such cases.

While the imposition of a money penalty is authorized by statutes conferring contempt powers upon the commissioner,[26] there is

[20] Ga. § 2469.

[21] Miss., § 5153, authorizes the commissioner to impose a fine of $100 to $500 or 30 days' imprisonment for the selling of stock without a license, and declares that the commissioner "shall have the powers of a trial justice."

[22] Va., § 4234.

[23] Lawton *v.* Steele (1894), 152 U. S. 133, 14 Sup. Ct. 499, 38 L. ed. 385 (destruction of fish nets); North American Cold Storage Co. *v.* City of Chicago (1908), 211 U. S. 306, 29 Sup. Ct. 101, 53 L. ed. 195 (destruction of unwholesome food). See also U. S. *v.* One Cadillac Touring Car (1921), 274 Fed. 470 (destruction of bootlegger's automobile).

[24] Mich. I, 4, § 13 (fine of $200), II, 3, § 11 (fine of $25); Minn. L., 1915, Ch. 195, § 16 (refusal to testify, etc.); Minn., § 3264; Tenn., § 3281 (forfeiture of license). See also *supra*, § 13, p. 150, revocation of license for non-payment of penalties *judicially* imposed.

[25] Miss., § 5058 ($10 fine for failure of company to report fire or for paying policy claim in less than one week thereafter); N. C. R. B., § 4822 (same); S. D., § 9187; Vt., § 5577.

[26] See *infra*, notes 27 and 31.

no indication that seizure of property under administrative execution is a recognized method of collecting such penalties.

(*b*) *Seizure of person.* As in the case of seizure of property, seizure of the person under an administrative execution issued by the commissioner is authorized chiefly (indeed, it seems wholly) in connection with the inquisitorial powers of the commissioner. In a considerable number of states provisions are found which purport to authorize the commissioner to punish as for contempt the officers or agents of an insurance company (and in some instances, any person) for refusal to appear in obedience to a summons, or for refusal to testify, or for refusal to produce documentary evidence. In some statutes the commissioner is expressly authorized to punish for contempt.[27] Probably these provisions will be declared unconstitutional if they are ever called in question, for the courts have frequently declared that the power to punish summarily for contempt is an attribute solely of courts and legislative bodies.[28]

In view of this judicial attitude, it is not surprising to find that in the only case in which the commissioner's power to commit for contempt was called in question, the court adopted a narrow interpretation of the statute. A Connecticut statute declared that the commissioner "shall have the same power to summon and compel the attendance of witnesses, and to require and compel the production of records . . . as is now possessed by the Superior

[27] Cal. P. C. (1915) § 599; Minn. L., 1915, Ch. 195, § 16 (commissioner or deputy may punish "as for contempt" by fine not over $100, any person who refuses to testify, etc.); Mo., § 6095 ("shall have the right to punish for contempt by fine or imprisonment or both" any person refusing to obey summons to testify or to produce books, etc.); Mont. S., § 4065 (may compel production of books, etc., "by attachment if necessary"); N. M., § 2808 ("shall have the right to punish for contempt by a fine or imprisonment or both any person failing or refusing to obey such summons or order"); Ohio, § 623 (same power as a justice of peace to compel attendance of witnesses and punish for contempt for failure to testify); S. D., § 9124 (fine not exceeding $100 or commitment to jail; relates to commissioner's investigation of fires).

[28] Langenberg *v.* Decker (1892), 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108 (state board of tax commissioners; unconstitutional); *In re* Sims (1894), 54 Kan. 1, 37 Pac. 135, 25 L. R. A. 110 (county attorney; unconstitutional); State *ex rel.* Haughey *v.* Ryan (1904), 182 Mo. 349, 81 S. W. 433 (State Board of Mediation and Arbitration (labor disputes); unconstitutional); People *ex rel.* MacDonald *v.* Leubischer (1898), 34 App. Div. 577, 54 N. Y. Supp. 869 (commissioner to take depositions in suit pending in another state). Cf. Decamp *v.* Archibald (1893), 50 Oh. St. 618, 35 N. E. 1056 (notary public).

Court." [29] Acting under this statute, the commissioner issued a warrant to the sheriff, commanding him to attach the petitioner, Noyes, for failure to obey a subpoena to testify before the commissioner, and the sheriff thereupon attached Noyes and brought him before the commissioner. Noyes still refusing to answer proper questions, he was by order of the commissioner committed by the sheriff to the common jail of New Haven. In a *habeas corpus* proceeding brought by Noyes, he was discharged on the ground that the statute did not explicitly confer on the commissioner the power to commit for contempt in refusing to testify.[30] The court said that the commissioner's power was equal to that of the superior court only in respect to compelling the *attendance* of witnesses and the production of records, and so forth; but that this power became exhausted when Noyes appeared in due time before him. While the court did not declare that a statute conferring this further power on the commissioner would be unconstitutional, it emphasized the failure to use the word "contempt" as indicative of a legislative intention not to confer contempt powers on the commissioner.

Similar statutes, declaring that the commissioner shall have power to subpoena or summon witnesses with like effect as if issued by a judicial officer, are found in a few states,[31] and would probably receive a like construction by the courts. Some of these provisions may mean that while the commissioner issues and serves the subpoena to appear at the investigation, the penalty is to be inflicted by a court — which is the method of enforcement clearly contemplated by several statutes.[32] The constitutionality of such a method of enforcement has been upheld.[33] Statutes which merely prescribe a penalty for refusal to appear or to testify [34] are to be enforced by a criminal prosecution rather than by summary con-

[29] Conn. L., 1877, Ch. 140, § 1.

[30] Noyes *v.* Byxbee (1877), 45 Conn. 382.

[31] Cal. P. C. (1915) § 599 (see note 27); Ga., § 2468 ("under the same rules as now provided by law for civil actions in the superior courts"); Minn. L., 1915, Ch. 195, § 14 ("shall . . . have the same effect as subpoenas from district courts"); Ore. § 6335 ("with like effect as if examined and sworn by a clerk of the circuit court"); S. C., § 2734 (has power of a magistrate in investigations as fire marshal); Va., § 4189 (similar); Wis., § 1946 (k) (similar).

[32] Ariz., § 3378; Wash., § 7038. In the following provisions, the agency of enforcement is doubtful: Colo. L., 1913, Ch. 99, § 12; Ga., § 2468.

[33] Interstate Commerce Commission *v.* Brimson (1894), 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047. Matter of Hirschfield *v.* Hanley (1920) 228 N. Y. 346.

[34] Mass., § 4; and see note 13, *supra*.

tempt proceedings in court. The latter method is much more effective than the former; yet it is not adequately safeguarded.

In view of the conservative attitude of courts in interpreting statutes, it seems clear that statutes which merely authorize the commissioner to "compel" or to "summon and compel" the attendance of witnesses or the production of records [35] do not confer on him the power to attach or to commit summarily for contempt, such method of enforcement not being specified in the statute. The same is obviously true of statutes which merely authorize the commissioner to "summon" or "subpoena" witnesses.[36] Revocation of license is a sufficiently effective method of enforcing the commissioner's inquisitorial and visitorial powers, and the drastic method of summary commitment has, it is believed, proved unnecessary.

2. *Indirect administrative enforcement.* A summary of the indirect administrative methods of enforcement would involve considerable repetition of matters already discussed. By definition, an indirect method of enforcement involves the intervention of a judicial proceeding at some stage between the administrative order and the application of, or refusal to apply, physical coercion. The significance, from the standpoint of administrative privileges and powers and individual rights and duties, of any indirect method of enforcement depends upon the extent to which the court will review the propriety, on its merits, of the administrative order sought to be enforced.

(*a*) *Power to examine under oath.* In most jurisdictions the commissioner is authorized to administer the oath to the officers and agents of an insurance company,[37] and in some jurisdictions to other persons as well.[38] The statutes as to perjury or false swearing are usually broad enough to cover the giving of false testimony by a witness under these circumstances.[39] Thus, the commissioner (and usually, his deputy) [40] has power to impose upon persons who

[35] Ind., § 4706d ("summon and enforce"); Neb., §§ 3144, 3284 (board "shall have power by appropriate process to compel the attendance of witnesses"); N. D., § 4891 (on consolidation hearing); Ohio, § 9354 (same); Pa., § 25; S. D., § 9167 (same as N. D.); Tex., § 4882 (fire marshal investigation).

[36] Ark., §§ 4979, 4984; Md. III, § 244g; Okla., § 6676; Pa., § 28; S. C., § 2699; Utah, § 1133; Vt., § 5577 ("send for").

[37] *Supra*, § 22, n. 150, for full list of citations.

[38] *Ibid.*, notes 151 to 157.

[39] 30 Cyc. 1401, n. 7, 1402, and 1406.

[40] See *supra*, § 22, p. 343; and generally, 30 Cyc. 1416.

appear before him as witnesses a legal duty, sanctioned by judicial penalties, not to testify falsely, with criminal intent. This is an important adjunct to the commissioner's inquisitorial powers, though it is not commonly exercised.[41]

(*b*) *Revocation of license.* Revocation of license, whether it be a company license, an agent's license or a broker's license, has legal consequences in both civil and criminal proceedings. If the licensee continues to engage in business after the revocation takes effect, he is liable to fine or imprisonment in a criminal prosecution. In civil proceedings, the licensee is not only barred from recovery on contracts made after the revocation, and in some instances barred from suing in the state at all, but also, in the case of an agent or broker, he may be personally liable on contracts made in violation of the licensing statute.[42] Revocation of license is thus, aside from its effect on the licensee's good will and reputation, an effective means of enforcement.

(*c*) *Approval and disapproval powers.* Approval and disapproval powers are not usually as clearly sanctioned by definite legal consequences in judicial proceedings as are the license powers. Disapproval of policy forms frequently subjects the company to a criminal prosecution if it thereafter uses the forbidden form,[43] but it is not clear that the commissioner's decision of disapproval would not be subject to attack on the merits in such a criminal proceeding. The narrow scope of the grounds of disapproval in most states makes such a result likely. Moreover, disapproval of a form will in some jurisdictions render of no effect in an action on the policy the language which is inconsistent with the approved form.[44]

What has been said of disapproval applies to refusal to approve, in cases where the approval is a condition precedent. The effect of the exercise of approval and disapproval powers in reference to rates is doubtful. Probably in a civil action the insurer would be denied recovery of the excess premium over and above the amount fixed by the commissioner; but that would depend upon whether or not the commissioner's power was compulsory or only advisory.[45] Perhaps the only case in which the civil consequences of failure to approve was involved is *Iowa Life Insurance Company* v. *Eastern*

[41] See *supra*, § 25, pp. 394, 396, 403, 404, 406.
[42] *Ibid.*, § 11.
[43] *Ibid.*, § 18, p. 266.
[44] *Ibid.*, § 18, p. 267.
[45] *Ibid.*, § 19, especially notes 15, 16, 17.

Mutual Life Insurance Company,[46] in which the court held that failure to obtain the approval of the commissioner was a defense to an action to enforce a reinsurance contract. The statute in this case, however, was clearer than most in attaching civil consequences to the failure to obtain approval.[47]

The sanction of nullity is altogether too much of a blunderbuss to commend itself as a scientific penological device. It shoots in the dark, and may have harmful consequences out of all proportion to the offense. It is a survival of a system of criminal prosecutions in which the state played but little part as prosecutor. If not wholly abolished, it should be narrowly and precisely defined in the statute.

§ 31. *Judicial enforcement.* It is not easy to draw the line between indirect administrative enforcement and what is here designated as "judicial" enforcement. Each is "judicial" in the sense that a judicial proceeding must precede the final infliction of the disadvantageous consequences. However, in judicial enforcement, as here used, the commissioner's decisions have no legal effect; he must prove his case as any other litigant. Thus judicial enforcement preserves greater protection of the individual against arbitrary administrative action.

The types of judicial enforcement are criminal and civil. It is not always easy to draw the line between criminal prosecutions for fines and civil actions, analogous to the action of debt to recover statutory penalties. As only four states [1] expressly provide that the action shall be a civil proceeding, proceedings to collect penalties will be treated as criminal.

The statutes which authorize the commissioner to start criminal proceedings are not numerous. In a few instances he is authorized or directed to sue for a penalty for refusal to give evidence [2] or for a penalty imposed on other grounds.[3] In some instances he may direct the local prosecuting attorney to sue for penalties.[4] In others the prosecuting attorney is directed by statute to sue for penal-

[46] (1900), 64 N. J. L., 340, 45 Atl. 762.

[47] See quotation *supra*, § 16, p. 214.

[1] Kan., § 5178; N. J. L. 1913, Ch. 85, § 2; N. D., § 4964; W. Va., § 10.

[2] Ariz., § 3378; Minn. L., 1915, Ch. 195, § 17; Neb., § 3144; Wash., § 7038; Wis., § 1968.

[3] Ariz., § 3404; N. J. L., 1913, Ch. 85, § 2; N. Y. L., 1917, Ch. 513, § 1.

[4] Me., Ch. 53, § 93; Nev., § 1295.

ties.[5] Only one statute, that of New Jersey, authorizes suit for penalties by any person other than an official.[6] In general, in the absence of express provision, it would seem that the prosecuting attorney or the attorney-general would be the proper official to commence a criminal prosecution for violation of the insurance laws. On the other hand, the commissioner exercises a large measure of practical control over such prosecutions.[7]

With respect to civil proceedings, this is not so clear. The statutes of a number of states authorize the commissioner to institute a civil proceeding to enjoin the further doing of business, to obtain the appointment of a receiver, and to procure the ultimate dissolution, of an insurance company which is financially unsound, or has otherwise failed to comply with the statutory requirements; the grounds of such proceeding correspond closely to the grounds of revocation of license, and this method of enforcement is usually applicable only to domestic corporations or associations.[8] In many statutes it is provided that the attorney-general shall participate in such proceedings. Where the statute merely declares that the attorney-general shall represent the insurance commissioner in such a proceeding, as in New York,[9] it seems that the attorney-

[5] Ala., § 8378, (¼ of penalty goes to prosecuting attorney); Mich., II, 4, § 17 (prosecuting attorney or attorney-general to sue for penalties).

[6] N. J. L., 1913, Ch. 85, § 2.

[7] For example, in 1921, the Iowa department practically tolerated the writing of insurance against riot and civil commotion, and against aeroplane accidents, though it was thought there was no statutory authority therefor.

[8] Ala. § 8344 ("through the attorney-general"); Ariz., § 3385; Ark., § 4984; Cal. P. C., § 601; Colo. L., 1913, Ch. 99, §§ 63, 64; Conn., § 4066,§ 4086, 4130, 4297; Del., § 3891; Fla. L., 1915, Ch. 6843, § 1; Idaho, § 5079; Ill., §§ 11, 70; Ind., §§ 4691, 4726; Ia., §§ 5485, 5486, 5568, 5646; Kan., §§ 5169, 5413, 5227; Ky., § 753; La., § 3580; Me., Ch. 53, § 86, § 114; Md. III, § 178 (7); Mass., § 6; Mich. I, 3, §§ 2, 3, 4; Minn., § 3260; Miss., § 5032; Mo., §§ 6349, 6350 (suit in name of commissioner as plaintiff); Mont. C., § 4153; Neb., §§ 3147, 3310; Nev., §§ 1283, 1301; N. H. Ch., 168, § 15; N. J., p. 2854, § 56, p. 2882, § 137; N. Y., § 63; N. C., § 4702; N. D., §§ 4925, 4975; Ohio, § 634, 9486; Okla., §§ 6677, 6790; Ore., § 6368; Pa., § 54; W. Va., § 4. For a discussion of the extent to which such provisions exclude suits by individual claimants, see *infra*, § 33, p. 451.

[9] N. Y., § 63. Similar provisions are: Ala., § 8344; Cal. P. C., § 604; Conn., § 4297; Del., § 573; Fla. L., 1915, Ch. 6847, § 5; Ia., §§ 5471, 5486; La., §§ 3681, 3682, 3686; Me., Ch. 53, § 155; Md. I, § 204; Mich., § 21; Miss., § 5026; Mont. C., §§ 4065, 4153; Neb., § 3310; Nev., § 1320; N. D., §§ 4925, 4975; Ore. §§ 6368 (1), 6417; Pa., § 50 ("under the direction of the commissioner"); Wash, § 7042.

general is not authorized to exercise any discretion as to the propriety of instituting the proceeding. Where, however, the statute expressly declares that the attorney-general's approval is necessary, as is provided by the National Fraternal Insurance Bill ("Mobile Bill"),[10] that official is given a sort of veto power over the commissioner. No good reason for this provision is apparent. The insurance commissioner is a better judge than the attorney-general of the advisability of winding up an insolvent fraternal society, and the provision in question must have been inserted, because the attorney-general is more amenable to political influence.

Statutes which provide that the commissioner shall "notify" or "report to" the attorney-general the facts upon which an injunction or receivership proceeding may be predicated, or otherwise provide for participation by the latter official [11] leave one in doubt as to the division of function between the two officials. Of course, the commissioner will, apart from any provision, usually call upon the attorney-general to institute any legal proceedings which the commissioner may desire to undertake; but it is important to know whether the attorney-general is acting as an attorney who obeys the wishes of his client (the state, speaking through the commissioner) or whether he will pass upon the policy of instituting the particular proceeding.

The standard omnibus proceeding for the judicial enforcement of the insurance laws partakes chiefly of the nature of a creditor's bill in equity; but in so far as it results in the forfeiture of the charter of a domestic company, followed by an order of dissolution and distribution of remaining assets, it partakes more of the character of a *quo warranto* proceeding. In some instances the statute uses the term *quo warranto*.[12] In cases of doubt, if it becomes necessary to decide in which category this proceeding falls, it would be better to regard it as a suit in equity. The ancient writ of *quo warranto* has been dead so long that its musty learning is unknown to most

[10] See *infra*, § 33, n. 29. See also N. H. L., 1891, Ch. 56, § 2. New York did not adopt this provision of the Mobile Bill, and a number of states have followed its example.

[11] Ark., § 4984; Colo. L., 1913, Ch. 99, § 80; Del., §§ 573, 575; Ill., § 25; Ind., §§ 4691, 4736 (*quo warranto*); Ia., § 5471; Kan., § 5169; Mont. C., §§ 4065, 4157, 4164; Neb., § 3147; Nev., § 1320; N. C., § 4752; Ohio, §§ 653, 9592; Okla., § 6677; Pa., § 51 (hearing before the attorney-general before suing domestic company); S. D., §§ 9181, 9319; Tenn., § 3285; Tex., § 4907a; Wyo., § 5272.

[12] Ariz., § 3495 (fraternal); Idaho, § 4992; Ind., §§ 4635, 4736; Minn., § 3560.

lawyers and judges; and the modern information in the nature of *quo warranto* is more hampered with technical restrictions than is the injunction proceeding.

In a few instances, the commissioner is authorized to institute civil proceedings for particular purposes other than the one just mentioned.[13] Only three states have a general provision authorizing the commissioner to bring a judicial proceeding to enforce any order made by him.[14]

The extent to which the court accepts in fact, or is bound to accept in law, the decision of the commissioner on questions which arise in the course of an application for the appointment of a receiver for an insurance company and an injunction against doing business, is important in determining the degree of judicial protection against arbitrary or erroneous administrative action. In some instances the statute declares that the report of the examiner shall be "presumptive evidence" of the facts therein stated, or shall have a greater or less degree of probative force in a judicial proceeding.[15] In other instances, it is stated that the court shall examine the facts *de novo* and form its own conclusions.[16]

Apart from these formal provisions, does the court really scrutinize the commissioner's array of facts and figures before pronouncing the sentence (injunction and receivership) which virtually means death to the insurance company? There is reason to believe that it does not, and that the judicial "hearing" in such cases is largely perfunctory. An extract from the report of the New York superintendent throws light on this question. Under the head of "Liquidation," in 1922, he said:

> The speedy and elastic procedure provided by the liquidation law by which the superintendent may, summarily and upon short notice,[17] take possession and control of a delinquent insurer, for the protection of the

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[13] Ala., § 8383 (to recover expenses of examination); Idaho, § 4999 (taxes); Mo., § 6098 (to recover fees); N. J., p. 2867, § 89 (action of debt for penalty), Ohio, § 641 (proceeding to sell deposit of securities); Va., § 4195 (to collect expenses of examination). See also *supra*, § 30, n. 32, for statutes authorizing contempt proceedings in court.

[14] Colo. L., 1913, Ch. 99, § 80; Ore., § 6455 (any order as to inter-insurance exchange); W. Va., § 4.

[15] See *infra*, Judicial Control, § 37, p. 486. [16] *Ibid.*

[17] § 63 of the New York Insurance Law authorizes the court, upon application by the superintendent (without a hearing), setting forth certain grounds, to enjoin transaction of business by the company, and on the return of the order to show cause, "and after a full hearing," the court shall either deny the

public, policyholders, creditors, and stockholders, was effectually employed twice at the beginning of the year, when two large marine insurance companies failed.[18]

After describing the cause which led to the insolvency of these two companies, the report continues:

The superintendent made two applications to the supreme court, New York County, at nine o'clock in the morning, for orders to show cause, which were granted returnable at one o'clock in the afternoon. On the return of the orders to show cause, and after full hearings before the court, orders were made which directed the superintendent of insurance forthwith to take possession of the property and liquidate the affairs of the companies pursuant to Section 63 of the Insurance Law. Within five hours after the orders to show cause were granted, all court proceedings required in the statute had been completed and the superintendent of insurance was in possession of the business of the delinquent insurers and was sending to the policyholders, agents of the companies, brokers and the public, notice that the policies of the companies no longer gave full protection; that no further policies would be written; that all policyholders should replace their impaired policies with policies of solvent companies; and that all policies would cease when replaced, or in any event at the expiration of five days. By this quick, practical and business-like procedure, made possible by the statute, policyholders, creditors, and the public were protected.[19]

Apparently the "full hearing" lasted one hour. How could a court in one hour actually determine for itself the solvency of "two large marine insurance companies?" It seems tolerably clear that the court used a rubber stamp in approving the superintendent's findings. While it cannot be said that any substantial injustice was done in these two cases, it must be borne in mind that the New York statute authorizes this same proceeding on seven other grounds in addition to insolvency, including refusal to submit to examination, wilful violation of "any law of this state," and being found, upon examination, to be "in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public." In another case the judicial abdication may be more serious. However, if it is merely a case of the non-expert (judge) deferring to the judgment of the expert on expert matters, the possibilities of harm will be minimized. At all events, the court has a useful function to fulfil in passing upon the individual claims of policyholders and other creditors.

application of the superintendent, or direct the superintendent, forthwith to take possession of the property and conduct the business of such corporation.

[18] Report N. Y. Supt. of Ins., March, 1922 (preliminary text), p. 25.

[19] *Ibid.*, p. 26.

CHAPTER VI

CONTROL OF ADMINISTRATIVE ACTION

A. Non-Judicial Control

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§ 37. Scope of judicial review, 485.

§ 32. *Relations with the public.* That residuum of persons who comprise the "public" have an undefinable measure of control over the insurance commissioner, and at the same time he has an undefinable measure of control over their actions. It seems impossible to separate the one from the other, and therefore the two will be discussed together.

In those states in which the commissioner is elected by direct popular vote, the public control *can* be exercised through the ballot-box. Yet because the policies of the insurance department seldom attract much attention in the hubbub of a general election, it seems likely that the popularly elected commissioners are, on the whole, no more inclined to appeal to the populace than are the officially appointed ones. The commissioner who can make his personality felt outside the ranks of the company officials, the agents, and the brokers, must be a striking and aggressive figure. It is just as well that this should be so, for insurance is too much a matter of technical science to evoke the emotional response which is the psychological stock-in-trade of politics, and the commissioner who does arouse the *vox populi* is as apt as not to be a short-sighted demagogue.

Media of public communication. What are the media through which the commissioner communicates the work of his office to the public? First, there are the records in his office, which, as has been pointed out, are in some instances open to public inspection, in other instances may be withheld from public inspection in the dis-

cretion of the commissioner.[1] Especially are the reports of examinations of interest; and these, as has been seen, may or must in some states be withheld from public inspection for a certain length of time.[2] Second are the provisions for publication of notice of the revocation or suspension of the license of an insurance company,[3] or an agent,[4] or broker.[5] Third are provisions which authorize or require the commissioner to publish in a newspaper the results of examinations of companies.[6]

Three other types of provisions are of interest in this connection. The first are registration provisions, which require the filing in the office of the commissioner, or of some local official, of certain information with reference to the insurers or their agents.[7] The provisions for local publicity through filing or recording in the office of some local official are survivals of pioneer methods of insurance regulation. In urban communities they probably are not worth the trouble that it takes to carry them out, for people do not frequent the offices of these local dignitaries any more than they have to.

A second type of publicity provision is the one which requires the publication of a synopsis of the company's annual financial statement, either by the company directly [8] or by, or under the

[1] *Supra*, § 27.
[2] *Ibid.*, § 22, n. 192.
[3] *Ibid.*, § 12, notes 36, 40.
[4] *Ibid.*, § 14.
[5] *Ibid.*, § 15.
[6] *Ibid.*, § 22, n. 196, p. 368.

[7] Ala., § 8479 (fraternal society shall file copies of changes in by-laws, which are usually made a part of the policy by reference); Idaho, § 4920 (commissioner certifies lists of authorized insurers to clerks of district courts, who shall post them in their offices); Ind., § 4790 (agent shall file in office of circuit clerk, for public inspection, copy of statement on which his license is based); N. Y., § 31 (agent must file in office of county clerk copy of company's certificate of authority); N. C. R. B., § 4700 (commissioner shall certify to clerk of superior court of each county a copy of all reports received by him); Ohio, § 647 (copy of certificate filed with each county recorder), § 9567 (copy of agent's authority filed with county recorder where agency located); Wash., § 7048 (shall furnish each county clerk quarterly a certified list of agents to be posted for public inspection); Wyo., § 5249 (certificates of companies to be recorded with recorder of deeds).

[8] Ga., § 2418 (semi-annually); Idaho, § 5035 (life co.); La., §§ 3620, 3621; Me., Ch. 53, § 117; Minn., § 3294 (or commissioner); Miss., § 5084 (publication by commissioner but company's agent designates newspaper); Mo., § 6461 (county mutual); Mont. C., § 407C (certificate of authority only); Nev., § 1293 (domestic mutual fire company); N. C., § 4699 (commissioner shall publish in newspaper selected by general agent of company); Ore., § 6326 (4); R. I., Ch. 220, § 1; Tex., § 4943 (certificate of authority only).

direction of, the commissioner.[9] Practically the only difference between these two types of provisions is in the discretionary power of the commissioner to designate the newspaper in which the statement shall be published. Through the exercise of this power he can distribute political patronage among his allies.[10] South Dakota endeavors to guard against this by depriving the commissioner of all discretion as to the designation of newspapers; the newspapers are selected in rotation in each judicial district.[11]

The third type of publicity provision is that the annual report of the commissioner shall be printed for distribution.[12] In some

[9] Colo. L., 1913, Ch. 99, § 24; Del., § 573 (merely names of companies licensed); Fla. L., 1915, Ch. 6847, § 5½; Ill., § 74, §200 (shall "cause" annual statement to be published in a Chicago newspaper and a Springfield newspaper); Ind., § 4644; Ia., § 5652 (other than life); Me., Ch. 53, § 92; Md. III, § 206; Minn., § 3294, §3295 (by company or commissioner); Mont. C., § 4025 (newspapers "approved" by commissioner), C., § 4122 (same); N. D., § 4915 (commissioner selects three newspapers, from which company chooses one); Ohio, § 648 (commissioner must certify newspaper to be one of general circulation); Utah, § 1143; Wyo., § 5264.

[10] In two striking decisions the courts have emphasized the latitude of discretion which the commissioner may exercise in designating the newspapers. In Holliday *v.* Henderson (1879), 67 Ind. 103, under a statute requiring publication in "the two leading newspapers of the state having the largest general circulation therein," the court refused, on *mandamus* by the newspaper having the largest circulation, to set aside or review the act of the commissioner in designating two smaller newspapers, though it was conceded that the commissioner was heavily interested financially in one of them, and that he gave as one of his reasons that he intended to designate an organ of one of the two political parties. In State *ex rel.* Cowles *v.* Schively (1911), 63 Wash. 103, 114 Pac. 901, the statute required the companies to publish their statements in "two daily newspapers of the largest general circulation, to be designated by the insurance commissioner, one in Western Washington and one in Eastern Washington. . . ." (Rem. & Ball Code, § 6119). The owner of the Spokane Spokesman Review, which had the largest circulation in Western Washington, sought by *mandamus* to attack the act of the commissioner in designating a newspaper having only one fifth as large a circulation. The court denied relief, holding no abuse of discretion was shown. Three judges dissented.

[11] S. D., § 9172.

[12] Ariz., § 3390; Del., § 573; Ga. L., 1912, p. 119, § 1; Idaho, § 4919; Ill., § 9; Kan., § 10785; Ky., § 757; Me., Ch. 3, § 31; Mass., § 17 (printing is not expressly authorized but is implied from the language "other information . . . relative to insurance and the public interest therein"; at all events, the report is always printed); Miss., §§ 5087, 5100; Mo., § 6093; N. J., p. 2862, § 75; N. Y., § 46 (with minor amendments); N. D., § 4917; Ohio, § 671; Okla., § 6673; Ore., § 6326 (8); R. I., Ch. 220, § 16; Tenn., § 3350a (8); Utah, § 1130; Vt., § 5513; Wis., § 1971.

instances the statute directs that certain things shall be contained in this report.[13] The text of the insurance laws must in some jurisdictions either be inserted in the report [14] or published separately for distribution.[15] The object of these publications is not always clear — whether they are designed for the information of those engaged in the insurance business, or of the legislature and other state officials, or of the public generally. The limits set upon the number of copies to be printed indicate that the latter (distribution to the public) is not the chief object.[16] In the larger states, such as New York and Massachusetts, the commissioner's annual report is a formidable document of two or more volumes. Aside from a summary of the activities of the department during the year, it consists chiefly of page upon page of figures showing the financial condition of every company doing business in the state. Probably

[13] Ala., § 8361; Mass., § 17 ("his official transactions"; receiverships of insolvent companies; "an exhibit of the financial condition and business transactions of the several companies as disclosed by official examinations of the same or by their annual statements, abstracts of which statements, with his valuation of life policies, shall appear therein"; separate reports for fire and marine companies, and for life and miscellaneous companies); Mich. I, 2, § 9 (summary of companies' annual statements); Miss., §§ 5087, 5100 (abstracts of companies' statements); N. Y., § 46 (prescribed in considerable detail; including summary of annual statements, as "audited and corrected by him," names, etc., of companies licensed, companies withdrawn, recommended legislation, and names and compensation of "clerks" employed by him); § 87 (reason for allowing life co. to have excess statutory reserve); N. D., § 4917 (summary of annual statement); Okla., § 6777 (substance of annual statements of fraternals); Tenn., § 3350a (8) (abstract of annual statements of assessment companies); Wis., § 1971 (annual statements).

[14] Mass., § 17.

[15] Ore., § 6326 (7); Utah, § 1130 (to be "furnished" to companies); Wash., § 7048.

[16] Ariz., § 3390 (enough copies for corporation commission and legislature); Idaho, § 4919 (only enough copies for use of insurance department and legislature); Ill., § 9 (1,000 copies); Kan., § 5172 (1,000 copies); Ky., § 757 (1,000 copies); Me., Ch. 3, § 31 (fixed by governor and council, not to exceed 2,500 copies); Mich. I, 2, § 3 (for public information and use in such number as commissioner may deem advisable, not to exceed 1,500 copies); Mo., § 6093 (not more than 2,000 copies); N. Y. L., 1912, Ch. 89 (2,000 copies); N. D., § 4917 (for distribution to companies and legislature), § 172 (7) (500 copies); Okla., § 6673 (not exceeding 3,000 copies); Ore., § 6326 (8) ("for general distribution if he deems it advisable for the public good"); Vt., § 5513 (one to each company; to others in discretion of commissioner); Wash., § 7048 (250 copies for legislature and necessary number for use of insurance department); Wis., § 1972b (2,000 copies).

most prospective policyholders would prefer to consult the commissioner directly by correspondence rather than to attempt to gain light from a perusal of this tedious report. It is significant that in 1912 New York reduced the number of copies of the annual report from 4,000 to 2,000.[17]

Informal relations with the public. The relation of the commissioner to the public is not confined to these formal methods of publicity. Every insurance department is called upon to give information and advice to present or prospective policyholders. Perhaps the public is more inclined to call upon the commissioner for help after the trouble has arisen than before the policy has been taken out. At all events, thirty-four commissioners stated, in many instances emphatically, that they were frequently called upon to advise private individuals as to their claims against insurance companies or agents or brokers.[18] In reply to the question: "Is it your policy to give such advice, or to have the members of your staff give it, gratuitously?" the same commissioners likewise answered in the affirmative.[19] The extent to which the commissioners attempt to compel payment of claims of policyholders has been discussed in a separate section.[20] Here is a phase of the commissioner's activities which was not, apparently, foreseen when the office was first created, and which even to-day is carried on without express statutory requirement. The commissioner becomes the free legal aid bureau and the policyholder's tribune. There is nothing shocking in this. If the giving of legal advice is a public service (as every bar association proclaims it to be), no good reason is perceived why the government should not furnish this service to citizens whenever the government is especially equipped to do so. Whether the personnel of existing departments is adequate to the demands for advice made upon it is another question.

§ 33. *Executive control.* In no state is there a complete system of administrative appeals from the decisions of the insurance commissioner to some higher administrative board or official. In Arizona, Virginia, and Oklahoma a state insurance board exercises

[17] N. Y. L., 1912, Ch. 89.

[18] Ariz., Ark., Colo., Conn., Del., D. C., Fla., Idaho, Ill., Ia., Kan., Me., Md., Mass., Mich., Minn., Mont., Neb., Nev., N. H., N. M., N. Y., N. C., N. D., Ohio, Okla., Ore., Pa., S. D., Utah, Vt., Va., Wash., W. Va., Wis., Wyo.

[19] Question 20 (b).

[20] See *supra*, § 20.

varying degrees of control over the acts of the insurance commissioner.[1] In Illinois, Idaho, and Nebraska the commissioner is a bureau head under the general control of the head of a grand division or department of the state government.[2] In the other states, the executive control over the commissioner is occasional and limited. The governor, through his power of appointment in many states[3] and his less frequent power of removal without cause,[4] exercises a general control over the conduct of the insurance department but not a control over specific official acts of the commissioner.

Aside from these provisions, the governor has some control as to specific details of the conduct of the department in a number of states. Rarely does he have any power to interfere in the regulatory functions of the department. In several states he is a member of the commission to pass upon the application of two companies for permission to consolidate into a single company, or for permission to reinsure one in the other.[5] In Colorado the approval of the governor must be obtained to a suit to enjoin a proposed reinsurance by a mutual company.[6] In Maine the governor and executive council are required to approve the substitution of new securities in place of those deposited by the company with the state treasurer.[7] In Minnesota the commissioner is required to notify the governor of certain violations of the insurance laws, and the governor causes the proper proceedings to be taken;[8] he is also required to notify the governor when sued by a foreign company to recover its deposit.[9] A more common requirement, though confined to a minority of states, is that the commissioner obtain the approval of the governor before making an examination of an insurance company's financial condition.[10] The governor is commonly given the ornamental function of approving the official seal of the insurance department.[11]

[1] See *supra*, § 4.

[2] *Ibid.*, § 5.

[3] *Ibid.*, § 5.

[4] *Ibid.*, § 5.

[5] *Ibid.*, § 16 (6). Among such provisions are: Ia., § 5728; Minn., § 3519; S. D., § 9167.

[6] Colo. L., 1913, Ch. 99, §64.

[7] Me., Ch. 53, § 76.

[8] Minn., § 3263.

[9] Minn., § 3274.

[10] Colo. L., 1913, Ch. 99, § 12 (all examinations); N. M., § 2808; Ohio, § 9556 (8); R. I., Ch. 219, § 2 ("when requested" by governor). See also *supra*, § 22, p. 341.

[11] E.g., Ky., § 749; Mich. I,1, § 3; N. J., p. 161, § 6; N. C., § 4682. Other citations on this point were not collated; such provisions are almost universal.

Incident to his power over the appointment of the commissioner, the governor is usually required to approve the official bond of the commissioner.[12] The annual report of the commissioner is in many states formally addressed to the governor.[13] The remaining powers of the governor relate to the appointment of subordinates by the commissioner, and to the expenses of his office. In some states the commissioner must obtain the governor's approval of the appointment of subordinates,[14] or of the salaries to be paid such subordinates.[15] Aside from the provisions requiring the governor's approval of examinations, which is a check upon the expenditures of the commissioner, the governor is given various other approval powers over the expenses of the insurance department.[16] Taken as a whole, the provisions for gubernatorial control over the insurance department give a picture of disintegrated administrative organization.[17]

The attorney-general exercises a more direct and continuous influence over the acts of the insurance commissioner than any other official. As has been pointed out, the commissioner is rarely a

[12] E.g., Ind., § 9217; Miss., § 5015; N. H., Ch. 67, § 4; N. J., p. 160, § 2; N. M., § 2804; Ohio, § 616; Ore., § 6324; Wis., § 1967.

[13] Ala., § 8361; Cal. P. C., § 595; Conn., §§ 4071, 4301; Idaho, § 4919 (report of department of commerce and industry); Ill., § 9; Ia., § 5465; Kan., § 5172; Me., Ch. 53, § 92; Md. IV, § 178 (10); Mich. I, 2, § 3; Minn., § 3273; Miss., § 5022; Mo., § 6093 (if legislature is not in session); Neb., § 3154 (biennial report); Nev., § 1329; N. J., p. 162, § 9; N. M., § 2807; N. C., §§ 4687, 4688; N. D., § 172 (7); Okla., § 6673; Ore., § 6324; S. D., § 9116; Tenn., § 3300; Utah, § 1130; Vt., § 5513; W. Va., §§ 2, 6; Wis., § 1972b.

[14] Miss., § 5016; N. J., p. 161, § 4; Pa., § 16; S. D. Pol. Code, 1913, p. 41a, § 5; Vt., § 5508.

[15] Colo. L., 1913, Ch. 96, § 3 (additional help); N. J., p. 161, § 3; Ohio, § 622; Vt., § 5508 (salaries fixed by board of control).

[16] Ala., § 8370 (governor approves all vouchers); Colo. L., 1913, Ch. 96, § 3 (additional help; also all vouchers of expenditures); Ky., § 762 (allows compensation of attorneys for enforcing insurance laws); Me., Ch. 53, § 83 (accounts to governor and council quarterly); Minn., § 3267 (governor approves expenses of examination of company or valuation of policies by one not a salaried employee of the insurance department); Miss., § 5115 (approves expenditure by commissioner of not over $500 in detecting violations of insurance laws); Mo., § 6089 (approves employment of other counsel to aid in enforcing insurance laws); N. C., § 4686 (same as Miss.); Ohio, § 9556 (8) (governor fixes compensation of examiners); R. I., Ch. 220, § 26 (governor approves all vouchers for expenses); Vt., § 5508 (shall employ such assistance as the governor deems necessary).

[17] See Holcombe, *State Government in the United States* (1916), p. 318.

lawyer,[18] and only in a few instances does the commissioner have a regularly employed counsel in his office. Yet the work of insurance supervision constantly calls for the interpretation and application of complex, confusing, and minutely worded statutes. Under such circumstances it is not surprising that the commissioner leans heavily on the attorney-general for advice and guidance. The extent to which this is true varies, of course, with the personality of the commissioner and the personnel of his department. That it is quite commonly true is evidenced by the fact that a considerable proportion of the insurance department "rulings," which are put forth as decisions or regulations of the insurance departments, are opinions of the attorney-general and his subordinates, and there is no way of telling how many of those which are put forth over the signature of the commissioner are based upon consultation with the attorney-general's office. Even in New York, where the insurance department is well organized and has a number of lawyers on its staff, fully one fourth of the published rulings on the life insurance statutes are extracts from opinions of the attorney-general's office.[19] The general nature of the attorney-general's duties might well be said to impose upon him the duty of giving legal counsel to the commissioner, apart from any statutory provisions. In some states the statutes expressly impose such a duty upon the attorney-general, and, in some instances, the additional one of representing the commissioner in litigation.[20] Through these "interpretations" and advice, the attorney-general exercises a very considerable degree of control over the insurance department.

Aside from these general powers of control, the attorney-general is by statutory provision in a number of instances given an express power of approval or disapproval over the official acts of the commissioner. These provisions are usually of two types: those which require the approval of the attorney-general before certain administrative acts of the commissioner are done, and those which require the attorney-general's approval of the institution of judicial proceedings.

[18] *Supra*, § 6.

[19] See 1916 edition, "Rulings of the Superintendent of Insurance and Extracts from Opinions of Attorney-General relating to Life Insurance Laws (1906) as Amended."

[20] Idaho, § 4967 ("legal counsel and assistance in enforcing insurance laws"); Ill., Ch. 73, § 5 (same); Kan., § 5163 (same); Mo., § 6089; N. M., § 2806 (same as Idaho); Ohio, § 634 (5); Okla., § 6671; S. D., § 9115 (legal assistance).

It is frequently provided that, before issuing a charter or certificate of authority to a domestic company, the commissioner shall submit the documents in the case to the attorney-general, and his "approval" of them, as conforming with the laws of the state, is required before the charter or certificate may be granted.[21] While the language usually indicates that the attorney-general is merely to ascertain whether or not the documents submitted comply with the requirements of the insurance laws, yet that is, in theory, all that the commissioner does, and it is difficult to draw the line between the discretion of the attorney-general and that of the commissioner. However, it is clear that the attorney-general is (except, perhaps, under a statute as broad as that of California, quoted in the last footnote) confined to passing upon the documents before him, and it is for the commissioner alone to determine whether or not the facts represented in the documents actually exist — for example, by examining into the proposed company's financial assets. It is notable that in Massachusetts the commissioner alone passes upon the legal sufficiency of the documents submitted by the proposed incorporators.[22] On the whole, the provisions requiring the attorney-general's approval seem preferable, since his specialized knowledge and experience are a valuable adjunct to that of the commissioner and his subordinates.

Scattering instances of other approval powers over administrative acts are found. In several states the attorney-general is a member of the commission to approve the consolidation of insurance companies.[23] In New York the "assent" of the attorney-general must be obtained before the commissioner may revoke the license of a foreign fire company on the ground of violation of its agreement not to do any kind of business which similar domestic

[21] Cal. P. C. (Kerr's Supp., 1906–13), § 596a ("such certificate or opinion of the attorney-general shall govern and control the insurance commissioner, subject only to review by a court"); Colo. L., 1915, p. 269; Ga. Code, §§ 2388–2394; Idaho, §§ 4937, 4942; Ill., § 178; Ind., § 4680; Ia., §§ 5477, 5509, 5599; Kan., § 5240; Ky., § 661; Md. I, § 180; Mich. II, 1, § 4; Mo., §§ 6106, 6110, 6214; Mont. C., § 4042; Nev., §§ 1290, 1298; N. J., p. 2840, § 4, p. 2842, § 13; N. M., § 2847; N. Y., § 10 (shall not "grant such certificate of authority until such declaration and charter shall have been examined by the attorney-general and certified by him to the superintendent to be in accordance with the requirements of law"), § 52; N. D., § 4839; Ohio, § 9349; Tex., § 4726; Wis., § 1896.

[22] See Mass., § 49, and Ch. 156, § 11.

[23] *Supra*, § 16, notes 92 and 93; see Ia., §§ 5728, 5729; Minn., § 3519; N. D., § 4891; Ohio, § 9355; S. D., § 9167; Wis., § 1955 (21) (26).

companies are not authorized to do;[24] the receiver of a domestic company must obtain his approval, before reinsuring the risks of the company.[25] In Texas the commissioner must obtain the "consent and approval" of the attorney-general before revoking a license on the ground of rebating.[26]

The chief powers of the attorney-general are in reference to litigation. It has already been pointed out that, in reference to the *omnibus* civil proceeding to enjoin the further doing of business and to obtain the appointment of a receiver, it is sometimes stated that he is to "represent" the commissioner or that he "shall" institute such a proceeding,[27] thus indicating that he has no discretion as to whether or not the litigation shall be commenced, but merely, at most, as to the method of conducting it. In other instances the commissioner is to "notify" or "report to" the attorney-general.[28] On the other hand, in numerous instances the latter is given explicitly a discretionary power of approval as to whether or not the litigation shall be undertaken. Conspicuous among these are the provisions of the fraternal insurance bill ("Mobile Bill") that the attorney-general "shall, if he deems the circumstances warrant it," commence proceedings to wind up a domestic fraternal society.[29] Similar provisions are found applicable to other (non-fraternal) assessment life companies,[30] and occasionally to other types of proceedings.[31]

From the standpoint of judicial control, it is immaterial whether the statute makes it the "duty" of the attorney-general to institute proceedings when requested by the commissioner, or gives the attorney-general a discretionary power to decide upon the propriety of instituting such proceedings. No court would attempt to compel

[24] N. Y., § 56, as amended by L., 1923, Ch. 42.

[25] N. Y., § 23.

[26] Tex., § 4899.

[27] *Supra*, § 31, n. 8.

[28] *Ibid.*, § 31, n. 9.

[29] Ala., § 8496; Ariz., § 3495; Idaho, § 4992; Ky., § 681c (24); Md. III, § 244g; Minn., § 3560; Miss., § 5198; Mo., § 6424; N. D., § 5083; Ohio, § 9499; Ore., § 6490; Pa., § 33; Tex., § 4851; Utah, § 3296; Va., § 4297; Wash., § 7283; W. Va., Ch. 55a, § 25; Wyo., § 5349. Notably New York did not adopt this provision, but made the same rules applicable to fraternals which are applicable to other domestic insurers. N. Y., § 248 (L., 1911, Ch. 198).

[30] Ill., § 247 (assessment life); N. Y., § 207 (assessment life); Tenn., § 3350a (11).

[31] Ind., § 4694 (suit to dissolve any domestic life company); Ky., § 754; N. H., Ch. 167, § 9 (prosecute violations of insurance laws "if he thinks there are sufficient grounds and occasion therefor"); Pa., § 51 (hearing before attorney-general before he sues any domestic company).

the attorney-general, by *mandamus* or a mandatory injunction, to enforce the law.[32]

However, judicial control does not tell the whole story. There can be little doubt that the fraternal provisions were inserted for the purpose of giving the attorney-general a veto power over the decisions of the commissioner to wind up a fraternal society. While it is true that, since the more commonly accepted actuarial standards are not applicable to fraternals, the question of the financial soundness of a fraternal society is frequently a matter of guesswork, no reason is perceived why the attorney-general's guess is any better than the commissioner's. Commissioners have been striving for years to get the fraternal societies to maintain more nearly adequate reserves, and the uniform fraternal bill contained compromise provisions by which this result would be attained in a few years by gradually raising the premium rates. The veto power of the attorney-general is a serious limitation of the commissioner's power to make these actuarial standards effective. The fraternal societies evidently knew their own interests in preserving for themselves this final appeal to an official who is more amenable to political pressure than the commissioner. A fraternal society can muster votes when occasion requires.

In many instances the statute explicitly declares that only the attorney-general may institute proceedings to enjoin, or wind up, an insurer. Such provisions are commonly applicable to fraternal insurers;[33] however, they are sometimes applicable to other types of insurers.[34]

The interpretation of provisions of this type has given rise to considerable difficulty. The history of the former New York statute illustrates this. In *Uhlman* v. *New York Life Insurance Company*,[35] Peckham, J., in denying the right of a policyholder to sue the company for an accounting of the distribution of the sur-

[32] See People *ex rel.* Bartlett *v.* Dunne (1906), 219 Ill. 346, 76 N. E. 570; People *ex rel.* Bartlett *v.* Busse (1909), 238 Ill. 593, 87 N. E. 840; State *ex rel.* Wear *v.* Francis (1888), 95 Mo. 44, 57, 8 S. W. 1; State *ex rel.* Hawes *v.* Brewer (1905), 39 Wash. 65, 80 Pac. 1001. All of these cases involved enforcement of the liquor laws; but the same principle would be applicable to attempts to compel enforcement of the insurance laws.

[33] Ariz., § 3496; Conn., § 4222; Idaho, § 4992; Ky., § 681c (24); Minn., § 3560; Miss., § 5199; Okla., § 6790; Tenn., § 3369a (130).

[34] Ill., § 248 (assessment life); Ind., § 4694; Ia., § 5471 (five days' notice, to commissioner and attorney-general required); N. D., § 4975.

[35] (1888), 109 N. Y. 421, at p. 435, 17 N. E. 363.

plus (which, under the terms of the policy, was to be paid to policyholders as "dividends," to an extent to be determined by the directors), pointed out the dangers of allowing every policyholder to harass the company in this way. In 1890 the legislature, to prevent "such an intolerable nuisance," [36] passed a statute [37] which, as amended in 1892, read as follows:

> No order, judgment or decree, providing for an accounting, or enjoining, restraining or interfering with the prosecution of the business of any domestic insurance corporation, or appointing a temporary or permanent receiver thereof, shall be made or granted otherwise than upon the application of the attorney-general, on his own motion, or after his approval of a request therefor of the superintendent of insurance, except in an action by a judgment creditor, or in proceedings supplementary to execution.[38]

Thereafter a policyholder having a somewhat more definite promise of dividends sued the company to compel it to perform its promise. In the appellate division, it was held that the suit was barred by the statute, since plaintiff in effect charged misconduct of the directors and was thus suing for an "accounting" within the meaning of the statute.[39] To the objection that the statute impaired the obligation of plaintiff's contract with the company by depriving him of the right to sue to enforce it, the majority of the court said that the statute merely provided an exclusive remedy (suit by the attorney-general, or with his approval and that of the superintendent) to enforce the obligation. Two justices, however, dissented on the ground that, as so construed, the statute impaired the obligation of plaintiff's contract, and that the statute was never intended to apply to an "accounting" such as this one, since it was not "interfering with the prosecution of the business" of an insurance company to compel it to perform its contracts.[40] Despite the able argument of the dissenting opinion, the New York Court of Appeals affirmed the decision.[41] Two judges dissented. Gray, J., speaking for the majority, answered the argument that the statute impaired the obligation of contract as follows:

[36] Gray, J., in Swan *v.* Mutual Reserve Fund Life Assn. (1898), 155 N. Y. 9, at p. 20, 49 N. E. 258.

[37] N. Y. L., 1890, Ch. 400.

[38] N. Y. L., 1892, Ch. 690, § 56.

[39] Swan *v.* Mutual Reserve Fund Life Assn. (1897), 20 App. Div. 255, 46 N. Y. Supp. 841.

[40] Follett, J., 20 App. Div. 255, 262, 263; Ward, J., concurred with him.

[41] S. c. (1898), 155 N. Y. 9, 49 N. E. 258.

Touching, as it does, the affairs of insurance corporations, which the state has peculiarly taken within its care and supervision, its enactment was quite within the sound discretion of the legislature, in the emergency which confronted it of the possibility of suits, interfering with the management of the corporate affairs and which might produce hopeless confusion and might impair the efficiency of the company, if not wreck it. The effect of the legislation was not to cut off the rights of a party, but, merely, to prescribe the form of the remedy which he must avail himself of, in the pursuit of his object to compel the corporation to perform acts, or to account as to matters in respect of which it may be alleged to have been neglectful, or wasteful, or mistaken. The plaintiff is not maintaining a purely and essentially private action, with the results of which only himself and the corporation defendant are concerned; but he is maintaining one which concerns a large body of the public and the continued management of the affairs of a peculiar class of corporations which have been the special objects of the care and watchfulness of the state. It is no hardship to him; and it impairs none of the force of the obligations of the company to him, that he should be compelled to follow the particular procedure declared by the statute.[42]

That the suit was, so far as the particular plaintiff was concerned, "private," and that the effectiveness of his remedy was substantially impaired, seems unquestionable. The doctrinaire obscurantism of the opinion unsuccessfully conceals the nice balancing of interests involved in applying the statute. It is the interest of the individual policyholder in the undistributed surplus, as opposed to the interests of other policyholders in the unimpaired good name and good will of the company. The decision that the legislature did not exceed its powers in adjusting these conflicting interests in the manner laid down in the statute seems clearly correct, whatever may be said of the wisdom, from a legislative point of view, of this particular mode of adjustment. This decision was adhered to in later cases.[43] However, it was subsequently held that this statute (§ 56) did not bar a suit by a stockholder to enjoin voting trustees from voting his stock, since that was not a suit against the company or its officers.[44] The court stretched a point in holding that the statute did not preclude one who was both a stockholder and a policyholder of the Equitable Life Assurance Society, suing for herself and others similarly interested, from suing Mr.

[42] 155 N. Y. at p. 22.

[43] Greeff *v.* Equitable Life Assurance Soc. (1899), 160 N. Y. 19, 30, 54 N. E. 712; Perry *v.* Mutual Reserve Fund Life Assn. (1899), 41 App. Div. 626, 58 N. Y. Supp. 844 (Woodward, J., filed a vigorous dissenting opinion).

[44] Knickerbocker Investment Co. *v.* Voorhees (1905), 100 App. Div. 414, 91 N. Y. Supp. 816.

James H. Hyde and other directors of the society to compel the restoration of moneys lost through the negligence or mismanagement of the directors.[45] The court distinguished this proceeding from the ones involved in the earlier cases on the ground that its object was to benefit the corporation, not to injure it, and that the statute was not intended to be a shield to faithless directors. Only the most hidebound adherents of the "corporate entity" theory can distinguish between a suit charging mismanagement by the directors and one charging mismanagement by the corporation. The disastrous consequences of such charges upon the good will of the corporation, as pictured in the excerpt quoted above, is substantially the same in the two cases. The statute was repealed the same year in which this decision was rendered.[46]

The administrative problem raised by statutes giving the attorney-general the exclusive power to commence, or to approve the institution of, particular types of suits against insurance companies, is a real one. On the one hand, the reputation of an insurance company is unusually sensitive to attacks, however groundless, and the civil liability for malicious prosecution affords an inadequate safeguard. In most jurisdictions, there is no liability in tort for groundlessly instituting a civil proceeding unless accompanied by a seizure of property or a preliminary injunction. The interests of stockholders and policyholders may be seriously prejudiced by charges, however unfounded, of incompetency or mismanagement. On the other hand, every action on an insurance policy impairs to some extent the good will of the company in that community — a fact which most companies recognize in settling claims. To draw the line between types of proceedings which may, and those which may not, be started by a private individual is, as shown by the cases above discussed, well-nigh impossible. Moreover, there is something to be said for supplementing official supervision by private initiative in doubtful cases. On the whole, it seems that New York acted wisely in repealing its statute.[47]

[45] Young *v.* Equitable Life Assurance Soc. (1906), 112 App. Div. 760, 98 N. Y. Supp. 1052.

[46] N. Y. L., 1906, Ch. 326, § 15.

[47] In Dresser *v.* Hartford Life Ins. Co. (1908), 80 Conn. 681, 711, 70 Atl. 39, the court said that only the insurance commissioner could sue for the appointment of a receiver on the grounds set forth in the statute authorizing such a suit, but that this did not preclude a private individual from suing for an accounting and for the appointment of a receiver as an incident thereto. See also Huntington County Loan and Savings Assn. *v.* Fulk (1902), 158 Ind. 113,

The control exercised by other executive officials is of relatively small importance. It has already been pointed out that in some jurisdictions the secretary of state issues the charters of newly formed domestic insurance companies.[48] This, however, is perfunctory and constitutes no serious limitation upon the commissioner's discretionary powers. The state treasurer or similar fiscal officer, as we have seen,[49] is frequently made the custodian of deposits, and exercises control over the withdrawal of securities. The expenses of examinations must in seven states be approved by the state auditor, controller, or similar fiscal officer.[50] This constitutes a useful check upon any tendency the commissioner might have to impose exorbitant expenses on the companies examined. It is difficult to understand why it is found in so few states.

From this résumé it will be seen that the insurance commissioner is to a large extent free from legal control by other executive officials. The more or less indefinite influence of the attorney-general over his acts tends to keep him in the straight and narrow path of legalism, but hardly amounts to a direct legal control in most instances. The absence of executive control throws into high relief the scope of judicial control.[51]

§ 34. *Legislative control.* The state legislatures exercise control over the insurance departments of their respective states in four different ways: 1. Through their control over appointments. 2. Through their control over appropriations. 3. Through their control over legislation as to the powers of the commissioner and the administrative norms which are to guide his decisions. 4. Impeachment.

1. *Appointments.* In twenty-one states the insurance commissioner is nominated by the governor and confirmed by the state

63 N. E. 123, and Ulmer *v.* Falmouth Loan and Building Assn. (1899), 93 Me. 302, 45 Atl. 32, in which it was held that statutes authorizing the state official (auditor and bank examiner, respectively) to sue for the appointment of a receiver for a building and loan association, impliedly barred a suit by a shareholder of the association for the same relief. Obviously, a different problem is presented where the commissioner has already obtained the appointment of a receiver for a company; in such a case a subsequent suit by an individual creditor for the appointment of a receiver for the company is barred. *In re* Knickerbocker Life Ins. Co. (1922), 199 App. Div. 503, 191 N. Y. Supp. 780.

[48] *Supra*, § 10.

[49] *Ibid.*, § 17, p. 222.

[50] *Ibid.*, § 22, n. 176.

[51] See *infra*, Scope of judicial review, § 37.

senate.[1] In three states only is the commissioner elected directly by the legislature.[2] In the former group the state senators exercise a degree of control over the selection of the incumbent, which varies with the strength of the governor and their own strength or weakness as party leaders. That the commissioner must run the gauntlet of senatorial scrutiny is not so much a guaranty of his technical qualifications as it is of his personal qualifications and his party regularity.

2. *Appropriations.* The state legislature nearly always fixes the compensation of the commissioner, on an annual salary basis.[3] That the salary is quite generally insufficient to attract a high order of talent is doubtless due in large measure to this circumstance. Legislators are especially jealous of their prerogatives as treasury watchdogs, and are not easy to convince of the wisdom of paying high official salaries. If the legislative control ended with this, the problem would not be as serious as it is. However, the legislative appropriation bills in most states minutely itemize the salaries which are to be paid to the subordinates in the insurance department.[4] It has already been pointed out how this hampers the commissioner in his difficult task of obtaining competent and reliable assistance. On the other hand, the legislatures do not set any limit upon the expenses which the commissioner may incur in employing persons, not members of his staff, to make examinations of insurance companies, because such expenses are paid by the companies and not out of the state treasury. The result is a regrettable tendency to employ unofficial examiners to make examinations. In many instances the commissioner is not to be blamed for this, since the unofficial examiners are often more technically competent than the salaried employees whom he is able to employ with the appropriations given him. The dangers of abuse arising from investing these unofficial examiners with official powers has already been adverted to.[5]

In some states the legislature declares that all of the expenses of the insurance department must be paid out of the fees (not including taxes) collected by the department.[6] Fortunately this hand-to-mouth policy survives in only a minority of the states.

[1] *Supra*, § 5, n. 1.
[2] *Ibid.*, § 5, n. 7.
[3] *Ibid.*, § 8.
[4] *Ibid.*, § 9.
[5] *Ibid.*, § 22, pp. 342–346.
[6] Ala., § 8370; Kan., § 5163; Ky., § 748; Md. III, §§ 175, 176b; Mo., § 6090; N. J., p. 161, § 3.

By contrast, Massachusetts allows the commissioner a free hand in fixing the salaries of subordinates.[7]

3. *Legislation.* In theory and to a considerable extent in practice the legislature is the source of all of the commissioner's powers and duties. In theory, the commissioner must be able to point to a definite statutory authorization of his every official act. In theory, this is the most important phase of control over the commissioner's official acts. That it is not so in practice is due partly to the characteristics of American insurance legislation,[8] partly to what has been called "the American doctrine of judicial supremacy." Insurance legislation exhibits a meticulous insistence upon inconsequential details, coupled with a frequent vagueness on many questions of policy and the important details for carrying into execution known policies. The use of indefinite terms in statutes prescribing administrative norms has frequently been referred to throughout this volume.[9] Many of these indefinite norms are due to the newness of the business standards which are sought to be crystallized into legal norms — notably "rebating," "twisting," and so forth. Others are due to the inability of the legislature to formulate a definite policy on the subject-matter in question, or to an attempt to compromise between two conflicting policies — as in the case of fraternal legislation. Still others are doubtless inserted at the suggestion of the commissioner himself, who drafts the statute himself and naturally wants to keep as free a hand as possible.

For in the case of legislation, it is difficult to determine whether the dog wags the tail or the tail wags the dog. The influence of the commissioner over insurance legislation is augmented by the technical nature of the subject-matter and legislative indifference to questions which are not involved in politics. In many jurisdictions the commissioner is expressly directed to include suggestions or recommendations for legislation in his annual report.[10] Such an invitation would seem to be implied in those jurisdictions wherein

[7] Mass., Ch. 26, § 7.

[8] *Infra*, Appendix B, p. 543.

[9] See especially §§ 12, 13, 14, 15.

[10] Ala., § 8361 (annual report to governor to include such "other information and comments in relation to insurance and the public interest therein as he deems fit to communicate"); Conn., § 4063; Ga. L., 1912, p. 119, § 1; Idaho, § 4919; Ill., § 9; Kan., § 5172; Me., Ch. 53, § 92; Miss., § 5022; Mo., § 6093; Neb., § 3154; Nev., § 1329; N. H., Ch. 167, § 18; N. M., § 2807; N. Y., § 46 (3) ("any amendments to this chapter which in his judgment may be desirable"); N. C., § 4688; S. C., § 2697; Va., § 4199; Wash., § 7048.

the commissioner's annual report is formally addressed to the legislature.[11] That the commissioners almost universally are active in promoting or opposing proposed insurance legislation is not to be doubted. The advantage of requiring that they shall print their proposed bills in their annual reports is that thereby a greater degree of publicity and a greater opportunity for discussion will be given. While no state has yet taken the radical step of allowing the commissioner to introduce bills into the legislature, apparently this constitutes no serious obstacle, since an obliging member of each house may usually be found, who will formally introduce the bill. Nor does the absence of any provision for hearing the commissioner cause difficulty, since most of the work is done in committees, where he will be freely heard.

In an effort to gain some idea of the extent to which the commissioners actually influence legislation, the following question was asked in the uniform questionnaire: "29 (*a*) Can you refer me to any important changes in the insurance statutes of your state which were made wholly or partly as a result of your efforts in your official capacity?" Of the twenty-nine commissioners who answered, twenty-one had fathered one or more changes in the insurance statutes in recent years,[12] while only eight answered "none." [13] Bearing in mind that a considerable number of these commissioners had but recently taken office, one can see that the influence of the commissioner upon legislation is considerable.

Of the twenty-one, several reported that all the insurance statutes enacted at the last session were made wholly or partly as the result of the efforts of the insurance department.[14] The Florida commissioner answered "all changes since 1913." The New Mexico and Oregon commissioners referred to the new codes of those states, which were prepared with the assistance of the insurance departments; and the Ohio official had been given authority to codify the insurance laws of that state — a reform badly needed, as anyone who has attempted to use Ohio's Brobdingnagian legislation will know. The other answers referred to several enact-

[11] Ariz., § 3390; Ark., § 4984; Del., § 573; Fla. L., 1915, Ch. 6847, § 5½; Mass., § 17 ("such other information and comments relative to insurance and the public interest therein as he thinks proper"); N. J., p. 164, § 14, p. 2862 75; R. I., Ch. 219, § 24.

[12] Ark., Colo., Conn., Fla., Idaho, Ia., Mass., Minn., Mont., Neb., N. H., N. M., N. C., N. D., Ohio, Ore., Pa., Vt., Va., Wash., W. Va.

[13] Ariz., Del., D. C., Mich., Nev., Okla., Utah, Wis.

[14] Colo., Idaho, Ia., Mass., Vt., Va. (nearly all).

ments. For instance, in Connecticut, the department sponsored, and secured the passage of, a new fraternal insurance bill, uniform provisions in accident and health policies, and an act requiring periodical examinations of all domestic companies. The New York superintendent of insurance, who is particularly active in legislative work, mentions in his annual report for 1922 fourteen amendments to the insurance laws which he recommends.

To what extent is the commissioner successful in blocking proposed legislation which he deems undesirable? It is hard to tell. Probably he is usually successful where no popular demand or political issue is involved in the legislation. But where he opposes an articulate popular demand with arguments of principle, however technically sound, he is apt to be defeated. A case in point is the legislation growing out of the so-called Lockwood investigation of 1922 in New York. As a result of the terrific increases in rentals of houses and apartments in New York City in 1920 and 1921, a committee was appointed to investigate the means whereby the acute shortage might be relieved and rental charges reduced. Among other palliatives the committee recommended a bill which permitted (but did not require) both foreign and domestic life insurance companies to invest their funds, not to exceed ten per cent of their total assets, in land to be used in the erection thereon by the insurance company of apartments, tenements, or dwelling houses to rent for not more than nine dollars per month per room. The privilege was to expire March 1, 1924, unless extended by a subsequent enactment (as it was). The object of the enactment was to make available further funds for the erection of dwellings. The superintendent vigorously opposed the adoption of this bill. In his annual report he pointed out that the Armstrong investigation of 1905 had uncovered serious abuses in the exercise of the privilege accorded to life insurance companies, of investing in real estate; that life insurance corporations are not permitted to invest the savings of their policyholders in any kind of corporation stocks, not even the preferred stocks of well-established companies; that some of the smaller companies had been earning practically nothing for their policyholders because of their real estate holdings; and that if the field of investment for rentable houses was not sufficiently attractive to interest private capital, there was certainly no reason why the savings of policyholders should be turned into such speculative channels.[15] He concluded:

[15] Sixty-third Annual Report (1922). (Preliminary Text), pp. 7, 8.

The bill seems to be drawn wholly with the idea of protecting interests of the tenants and not the funds of the policyholders.[16]

Despite this protest, the bill was enacted without the changes which he suggested,[17] and in 1924 was extended for an additional two years.[18] Whether or not the legislation had any serious consequences upon the safety of life insurance companies, it is clear that the interests of tenants had a greater political drive at the time than the interests of policyholders, and that the superintendent was unable to check the insistent demand for relief.

However, such incidents as this do not alter the conclusion that the commissioner has substantially more influence over insurance legislation than has the legislature.

4. *Impeachment and removal.* In only two states (Missouri and New York) does the legislature participate in the exercise of the executive power of removal of the commissioner; in those states, the state senate must concur with the governor in the removal.[19]

The power of impeachment applies to the insurance commissioner upon the same terms that it applies to other state executive officials. Impeachment is at best a last resort; and no case of the impeachment by the legislature of an insurance commissioner has come to the writer's attention.

§ 35. *Professional control.* The development of governmental agencies designed to regulate technical business activities leads to the growth of a class of professional administrators who tend to form a group by themselves and to build up a professional *esprit de corps*. Decentralization by profession is one of the outstanding characteristics of the growth of governmental services.[1] Hence a review of the agencies of control which influence the actions of the insurance commissioner would not be complete without a reference to the professional influences which affect the conduct of the commissioner. While these influences do not exercise a legal control, since they seldom have legal power over the commissioner's acts, yet actually they control his conduct more than any other agency, unless it be the courts.

First, we may note the statutory provisions which embody professional standards as administrative norms. Chief among these

[16] Report (1922), p. 8. [17] N. Y. L., 1922, Ch. 658.

[18] N. Y. L., 1924, Ch. 284, § 1 (Insurance Law, § 20a). [19] *Supra*, § 5.

[1] See Duguit, *Traité de Droit Constitutionnel* (2d ed., 1923), iii, § 60, for a discussion of some of the implications of this development.

are the rules laid down for calculating the amount of the reserve fund which must be maintained by life insurance companies; the statutory formula, naming as it does merely the mortality table and the rate of interest, is merely a shorthand description of technical actuarial processes, largely unintelligible to, and wholly unworkable by, one not versed in actuarial science.[2] The calculation of the reserve of a fire company is more simple, if more arbitrary. The empirical formulae for calculating workmen's compensation reserve funds call for considerable knowledge of statistical methods.[3]

Another indication of professional control is the presence of provisions authorizing the commissioner to employ experts in the performance of technical tasks.[4] Two types of experts or professional men are recognized: the insurance actuary and the accountant.

A second type of provision recognizes as a standard the work of certain professional or semi-professional associations. Thus, the National Board of Fire Underwriters is occasionally mentioned.[5] The uniform fraternal bill adopts the mortality table of the National Fraternal Congress, an organization of fraternal societies, rather than the one used by the "old-line" or level premium companies.[6] The form of blanks for annual reports of insurance companies to the commissioner, as adopted by the National Convention of Insurance Commissioners, is prescribed or permitted by statute in many instances.[7] Whether a provision which authorizes

[2] See *supra*, § 16, p. 194.

[3] *Ibid.*, p. 199.

[4] Ala., § 8336 ("qualified actuary"); Ariz., § 3493 ("competent accountant or actuary"); Del., § 573 ("expert assistants"); Ia., § 5470 ("expert examiner having special training and knowledge not possessed by the regular examiners of the department"); La., § 3616 (actuaries and certified public accountants); Md. III, § 178 (6) ("special examiner"); Mich. I, 1, § 5 (second deputy commissioner must be a qualified actuary), I, 3, § 3 (expert in fire insurance rating); Minn. L., 1915, Ch. 208, § 4 ("experienced and competent professional insurance actuary"); Mont. S., § 178b (actuary experienced and skilled in insurance matters), C, § 4117 ("competent actuary"); Okla., § 6671 (actuary), § 6674 (disinterested accountant); Ore., § 6324 (1) (actuary), § 6488 (competent accountant or actuary); S. C., § 2698 (actuary); Tex., § 4850 (competent accountant or actuary); Utah, § 1124 (actuary); Wash., § 7037 (actuary), § 7038 ("disinterested expert accountant"); W. Va., § 1 (actuary).

[5] Colo L., 1919, Ch. 138, § 12.

[6] See, for example: Ala., § 8482; Idaho, § 5171; Ia., § 5581; Ky., § 861c (a); Mich. III, 4, §§ 9, 23; Ore., § 6488; Tex., § 4839; Va., § 3294; Wash., § 7281; Wyo., § 5346.

[7] Ala., § 8348; Ariz., § 3435; Colo. L., 1913, Ch. 99, § 15; Fla. L., 1919, Ch. 7867, § 2, Ch. 7869, § 1; Idaho, § 5001; Ia., § 5556; Neb., § 3181; Ore., § 6326 (3); Wash., § 7071.

the adoption of the form prescribed "from year to year" by the convention [8] is an unwarranted delegation of legislative power to future conventions of insurance commissioners, is of little importance in view of the broad discretion exercised by the commissioner in prescribing and altering the form of the annual statement.[9] In a few instances the legislature has recognized the work of the convention by allowing the commissioner to incur expenses in attending its sessions.[10] In other jurisdictions the commissioner is usually allowed a sufficient appropriation under the head of "incidental expenses" to cover this item.

The significance of the National Convention of Insurance Commissioners is not to be measured by the statutory provisions in which it is given recognition. It is a school of instruction in which a new and inexperienced commissioner may pick up many useful hints for the discharge of his duties. It develops professional *esprit de corps* among the commissioners through the personal contacts of the meetings and engenders mutual respect.

Despite the time given over to sight-seeing and other festivities,[11] the convention has done much valuable constructive work. While most of the work is done in committee, the debate on the floor of the convention is by no means perfunctory. Frequently sharp differences of opinion are developed. Only a few examples of the work of the convention can be given.

The preparation of a standard fire policy is one example. The New York Standard Fire Insurance Policy, drafted by the New York Board of Fire Underwriters, was adopted by statute in 1886. To 1913 it had been adopted, with minor modifications, in some thirty states. However, certain objections were made to it. With a view to securing uniformity in all the states, the New York insurance department in 1913 obtained the passage by the legislature of a resolution requesting the National Convention of Insurance Commissioners to appoint a committee to investigate and recommend changes in the New York form. Accordingly a committee, consisting of the commissioners of New York, North Carolina, Pennsylvania, Connecticut, and Wisconsin, was appointed. Hearings were held in New York City in March, 1913, at which two

[8] As in Colo., Fla., Idaho, Neb., and Wash., see last note.

[9] *Supra*, § 22, p. 336.

[10] Colo. L., 1913, Ch. 99, § 17; Ia., § 5462; R. I., Ch. 220, § 26; Vt., § 5509.

[11] E.g., in 1919, the delegates were entertained at a dinner by the Metropolitan Life Insurance Company. *Proc. N. C. I. C.* (1919), p. 6.

members of the Law Committee of the National Board of Fire Underwriters were present. An amended form, shorter by 395 words than the original, was adopted by the committee, and 1,500 copies were distributed among commissioners and insurers by the New York department. A copy of the re-drafted form was attached to the committee's report and embodied in the report of the proceedings. The committee's report was, without discussion, unanimously adopted.[12] Many suggestions for further changes were received, and the committee, in March, 1914, held a meeting in New York City, at which certain amendments were agreed upon. The committee disapproved a clause authorizing the insertion of "such endorsements and descriptive matter as may be approved by the Superintendent of Insurance," on the ground that it would permit "the unwise discretion of supervising officials." [13] In December, 1915, the committee was authorized to make further amendments and, upon the secretary receiving the approval of the amended form from the majority of the members of the convention, the form was to be deemed adopted by the convention.[14] However, again the committee requested time to consider further suggested changes [15] and it was not until December, 1916, that the final draft was approved by the convention.[16] The reports of the committee show a degree of care and caution which might well be emulated by many legislative committees. Despite this and despite the fact that the New York legislature promptly adopted, by reference, the convention form of fire policy,[17] the movement for uniformity has been unsuccessful thus far, for we find a committee in 1923 declaring that "wide variations in content and intent exist at present in respect of the standard fire insurance policies of the several states." [18]

A piece of legislation which was fostered by the convention with greater success was the Uniform Fraternal Insurance bill. This "model" law for the regulation of fraternal societies was drafted by a committee of the convention after more than a year of effort, and after consultation with representatives of the two national organizations of fraternal societies. A vigorous debate took place on

[12] *Proc. N. C. I. C.* (1913), pp. 44–52.
[13] *Ibid.* (1914), p. 96.
[14] *Ibid.* (1916), p. 16.
[15] *Ibid.* (1916), p. 153 (September, 1916).
[16] *Ibid.* (1917), pp. 13–19. The full text of the form is again printed in the *Proceedings*.
[17] N. Y. L., 1917, Ch. 440, § 3.
[18] *Proc. N. C. I. C.* (1923), p. 162.

the floor of the convention and the committee's recommendation that the bill be adopted uniformly was carried by a vote of nineteen states to seven.[19] The bill was speedily endorsed by the two national fraternal organizations [20]— a circumstance which no doubt partly accounted for the fact that it had been adopted, with some important amendments, in twenty-eight states as early as 1915.[21] In 1921 the convention approved a uniform provision requiring minimum rates of premium for fraternal insurance.[22] It is not known to the present writer how many commissioners have had the courage to enforce the provisions requiring more nearly adequate reserve funds of fraternal societies. The numerous discussions of the commissioners suggest that most of them fear to incur the displeasure of those well-knit organizations.[23]

A piece of work which was even more praiseworthy than this attempt to rescue fraternal insurance was the elaborate investigation and report of a committee of the convention, appointed in 1911,[24] into the methods of settling claims on industrial life, health, and accident policies. The report of this committee, occupying 549 printed pages,[25] disclosed shocking and habitual deception, chicanery and oppression in the settlement of policy claims. The claim adjusters of many companies took advantage of the ignorance and helplessness of beneficiaries and the smallness of the sums involved (usually under $1,000) to force compromises for as low as one fifth of the amount to which the beneficiary was clearly entitled under the terms of the policy. One recommendation which grew out of this report was that industrial health and accident companies should not employ claim adjusters on a profit-sharing basis;[26] another was a proposed bill for standard provisions in health and accident policies, designed to guard against deceptive wording and convenient ambiguities.[27]

The National Convention of Insurance Commissioners was organized in 1870. It operates under a written constitution adopted in 1894. Membership is limited to the heads of insurance depart-

[19] *Proc. N. C. I. C.* (1910), pp. 129–167. The report was adopted at the meeting at Mobile, Alabama, hence the bill is commonly referred to as the "Mobile Bill."

[20] *Ibid.* (1911), pp. 137, 138. [21] *Ibid.* (1915), p. 77. [22] *Ibid.* (1921), p. 124.

[23] The "model" statute contains conflicting provisions which have been held in one case practically to nullify the commissioner's powers of enforcement: Neighbors of Woodcraft *v.* Fishback (1924), 130 Wash. 682, 228 Pac. 703.

[24] *Proc. N. C. I. C.* (1911), p. 167. [25] *Ibid.*, Vol. ii.

[26] *Ibid.* (1912), p. 115. [27] *Ibid.*, p. 118.

ments and regular employees designated by the head. No person having any connection with an insurance company, other than as policyholder, may be a member. The constitution provides for only one annual meeting, but since 1913, the convention has held, in addition to the regular annual meeting in September, an "adjourned meeting" in New York City in December, and sometimes a third meeting elsewhere. The proceedings are fully reported but poorly indexed, and contain material of very uneven value. During the last five years (to 1923, inclusive) the average number of departments represented at the regular meetings has been about thirty-five; at the adjourned meeting in New York, less than thirty.[28]

§ 36. *Methods of judicial review.* Control by judicial action is by far the most direct and effective means of preventing the insurance commissioner from exceeding his lawful authority. The extent to which the court will control administrative errors or abuses varies with the type of proceeding in which the question of error or abuse is raised. Since this is the most important problem in judicial control, the types of judicial proceedings have been classified on this principle. The scope of judicial review, that is, the extent to which the courts will review errors of the commissioner, will be discussed in the following section.[1]

It seems useful to distinguish four types of proceedings in which the official acts, rulings, or decisions of the commissioner may be attacked:

1. *Collateral proceedings.* In an action between two private persons, to which neither the commissioner nor the state is a party, the legal consequences of some official act of the commissioner may be decisive of the litigation. Thus, in an action by an insurance agent or a broker for commissions earned in procuring applicants for insurance, recovery will be denied if the plaintiff, in procuring such applicants, was engaging in the insurance business without having the required license.[2] So an action for premiums by an un-

[28] The data for this last paragraph were taken from the published proceedings of the National Convention of Insurance Commissioners, especially those published since 1910.

[1] *Infra*, § 37.

[2] Goldsmith and Dell *v.* Manufacturer's Liability Insurance Co. (1918), 132 Md. 283, 103 Atl. 627; Black *v.* Security Mutual Life Assn. (1901), 95 Me. 35, 49 Atl. 51; Pratt *v.* Burdon (1897), 168 Mass. 596, 47 N. E. 419; Stern *v.* Metropolitan Life Insurance Co. (1915), 90 Misc. 129, 154 N. Y. Supp. 283; Wyatt

licensed insurer is barred,[3] and the broker or agent issuing the policy for the unlicensed insurer is personally liable upon the policy so issued.[4] While there is a weak *dictum* that the commissioner's issuance of a license is only *prima facie* evidence of compliance with the law by the licensee,[5] no case has been found in which the action of the commissioner in refusing to license or in revoking a license has been attacked in such a collateral proceeding. It is believed that, as pointed out above,[6] the action of the commissioner would not be open to attack, but on the contrary would be conclusive, in such a proceeding — at least in so far as the grounds of attack related merely to error or abuse of discretion. If the grounds of attack were jurisdictional, as that the commissioner had no power to revoke a particular license on any ground whatever, or that the purported revocation was void because no notice or hearing was given or because other procedural requirements of due process of law were not observed, it is believed that such a collateral attack would be successful.

Aside from the cases in which the licensing power is involved, there are numerous instances in which the commissioner's action in refusing to approve, or in disapproving, some particular conduct of the insurer may be involved in private litigation. For example, the juridical effect of his refusal to approve a reinsurance contract might become involved in an action upon the contract by the parties thereto;[7] and his refusal to approve a particular form of insurance policy might be involved in a suit on the policy by the

v. McNamee (1906), 52 Misc. 127, 101 N. Y. Supp. 790. In each of these cases, the license was a "regulatory" license. (*Supra*, § 11.)

[3] Roche *v.* Ladd (1861), 83 Mass. 436; Haverhill Ins. Co. *v.* Prescott (1861), 42 N. H., 547.

[4] See *supra*, § 11, notes 55 to 63. For example, Burges *v.* Jackson (1897), 18 App. Div. 296, 46 N. Y. Supp. 326, aff'd. (1900), 162 N. Y. 632, 57 N. E. 1105; Cordy *v.* Hale Co. (1922), 177 Wis. 68, 187 N. W. 663. See also Karamanou *v.* H. V. Greene Co., Inc. (1922), 80 N. H. 420, 124 Atl. 373, a holding that one who purchased stock from an unlicensed seller of securities may rescind the transaction and recover the price paid without proving fraud or damage. In this case the seller's license had been revoked by the commissioner before the sale, but the revocation was not attacked in this suit.

[5] Langworthy *v.* Washburn Flouring Mills Co. (1899), 77 Minn. 256, 259, 79 N. W. 974.

[6] *Supra*, § 11, p. 74.

[7] See Iowa Life Ins. Co. *v.* Eastern Mutual Life Ins. Co. (1900), 64 N. J. L. 340, 45 Atl. 762, in which, however, apparently no effort has been made to obtain the commissioner's approval.

insured against the insurer.[8] However, no case has been found in which such collateral attack upon the commissioner's action has been attempted, and it is believed that such an attempt would be successful only if based upon the grounds just mentioned in connection with the licensing power.

Likewise, the commissioner's action in disapproving, altering, or fixing fire insurance rates might become involved in private litigation between the insured and insurer. No case of such collateral attack has been found and the effect in judicial proceedings of the commissioner's rulings on such points has not been clearly defined. The nearest approach to a decision on this point is *Olson* v. *Western Automobile Insurance Company*.[9] In this case certain policyholders of a mutual company brought an action of *mandamus* against the company to obtain an inspection of its books and records. The defense was that the superintendent of insurance of Kansas had, prior to the commencement of the action, ordered the cancellation of the policies of all the plaintiffs on the ground that they had been issued at rates which were discriminatory. The court denied the relief prayed for, saying that the defendant was compelled by the superintendent of insurance to cancel these policies under threat of revocation of its license. However, the question of the validity of the superintendent's order was apparently not raised by the counsel.

Similarly the validity of the acts or decisions of the commissioner may be involved in a suit by the receiver of an insolvent company to foreclose mortgage notes deposited with the commissioner by the company.[10] Here again no case of collateral attack has been found.

Thus, collateral attack upon the actions of the commissioner in private litigation does not offer any substantial judicial control over such acts. The extent to which such a collateral attack would be successful, if at all, remains undecided.

2. *Enforcement proceedings.* The commissioner may be authorized to invoke either criminal or civil proceedings for the enforcement of the insurance statutes.[11] In criminal proceedings, a distinction must be made as to the nature of the charge preferred. Thus, if the commissioner prosecutes a licensed insurer, agent, or

[8] See Schilbrick *v.* Inter-Ocean Casualty Co. (1923), 180 Wis. 120, 192 N. W. 456.

[9] (1924), 115 Kan. 227, 222 Pac. 104.

[10] Falkenbach *v.* Patterson (1885), 43 Oh. St. 359, 370, 1 N. E. 757.

[11] *Supra*, § 31.

broker for conduct in violation of the insurance statutes, — for example, if he prosecutes an agent for transferring a premium note in violation of statute,[12] or if he prosecutes an insurer for discrimination in rates,[13] — the commissioner, like any other prosecutor or prosecuting witness, must prove his case, and his decision that the accused has violated the statute will be of no legal effect in such a criminal proceeding. On the other hand, if the prosecution is for engaging in the insurance business without a license, it seems clear that the act of the commissioner in refusing or revoking the license could not be attacked, except, perhaps, on jurisdictional grounds. In the only case in which such an attack was attempted, it was unsuccessful.[14] In the other reported cases of prosecutions for engaging in the insurance business without a license, the question involved has been either whether the business transactions of the accused were "insurance" transactions within the meaning of the statute [15] or whether the conduct of the accused amounted to a "doing of business" within the meaning of the statute,[16] or whether the statute requiring a license of a foreign insurance company is constitutional.[17] Obviously, the decision of the commissioner upon such points as these is not conclusive in such a proceeding.

It would seem that the issuance of a license by the commissioner to the defendant prior to the doing of the acts charged would be a conclusive defense in a prosecution for doing business without a license. An early Kansas case [18] which held the contrary must be regarded as either incorrect or as limited to the particular facts. The commissioner had issued a license before he had obtained payment of the required fees. The court held that this was a jurisdictional defect which rendered the certificate of the commissioner void, but declined to decide whether non-compliance with other requirements could be thus collaterally attacked. So far as the payment of fees is concerned, the license may perhaps be regarded as merely a receipt and thus only *prima facie* evidence of such payment. On

[12] State *v.* Cannon (1923), 125 Wash. 515, 217 Pac. 18.

[13] People *v.* Hartford Life Ins. Co. (1911), 252 Ill. 398, 402, 96 N. E. 1049.

[14] *Supra*, § 11, n. 83. Even there the license was not an insurance license.

[15] State *v.* Towle (1888), 80 Me. 287, 14 Atl. 195; State *v.* Beardsley (1902), 88 Minn. 20, 92 N. W. 472.

[16] State *v.* Johnson (1890), 43 Minn. 350, 45 N. W. 711; Commonwealth *v.* Gaither (1900), 107 Ky. 572, 54 S.W. 956. See also State *v.* Hosmer (1889), 81 Me. 506, 17 Atl. 578.

[17] Paul *v.* Virginia (1868), 75 U. S. 168.

[18] Hartford Fire Ins. Co. *v.* State (1872), 9 Kan. 210.

this theory the decision may be supported. However, it would seem that the issuance of a license by the commissioner should not be open to collateral attack on the ground that the licensee has not complied with requirements, the object of which is not revenue but regulation of the insurance business. The whole question of the legal consequences of the issuance of a license remains undecided.[19]

If the commissioner brings a suit in equity to enjoin insurers from engaging in the insurance business without complying with certain regulatory requirements, his decision that the defendants have not complied will be of no legal consequence; he must prove his case by evidence just as any other plaintiff must.[20] So, in a suit by the commissioner to compel a fire-rating association to submit its books and records to inspection, the court determined *de novo* whether or not the commissioner was entitled to the relief prayed for.[21] Again in a suit by the commissioner to enjoin defendant from engaging in a particular business which is alleged to be an insurance business, it was held to be no defense that a previous commissioner had advised the defendant that such business was not an insurance business within the meaning of the statute and that it would not be required to obtain a license.[22] This decision seems correct, since the commissioner is clearly not empowered to confer upon one who is judicially found to be an insurer the privilege of doing business without a license. A doubtful case is that of *State* ex rel. *Clapp* v. *Fidelity & Casualty Insurance Company*[23] in which the court said that the issuance of a license to a foreign company by the commissioner was no defense to *quo warranto* proceedings brought by the attorney-general to oust the company from doing business in the state on the ground that it had not complied with the retaliatory statute of Minnesota. The *dictum* may perhaps be supported on the narrow ground that *quo warranto* is a high prerogative writ which may be used by the attorney-general to obtain a review of the action of administrative officials.

It will thus be seen that with some exceptions, judicial control

[19] See *supra*, § 11, p. 74.

[20] See North American Ins. Co. *v.* Yates (1905), 214 Ill. 272, 73 N. E. 423; Aetna Ins. Co. *v.* Robertson (1922), 131 Miss. 343, 95 So. 137.

[21] Bell *v.* Louisville Board of Fire Underwriters (1912), 146 Ky. 841, 143 S. W. 388; the case turned upon the interpretation of a statute and a judgment for defendants was reversed.

[22] State *ex rel.* Fishback *v.* Globe Casket, etc., Co. (1914), 82 Wash. 124, 143 Pac. 878.

[23] (1888), 39 Minn. 538, 41 N. W. 108.

over the decisions of the commissioner may be exercised in connection with enforcement proceedings. The extent to which such control may be exercised in connection with the most common type of enforcement proceeding, namely, the suit for an injunction and receivership against the insurer, will be discussed in the following section.[24]

3. *Action against the commissioner to recover money or chattels.* The commissioner is usually required to give bond in a substantial sum for the faithful discharge of the duties of his office.[25] A special bond is sometimes required of the commissioner where he takes possession of the assets of a company pursuant to the order of a court.[26] It is occasionally provided that the commissioner shall be personally liable for the official acts done by his subordinates.[27] The extent to which these requirements afford a means of judicial control over the actions of the commissioner depends upon the scope of his liability. Several states provide that he shall be liable for wilfully abstracting or disposing of deposited securities;[28] and, in the absence of such a provision, it seems he would be liable under such circumstances on common law principles. A more difficult problem is raised where the action against the commissioner is based upon charges of error, negligence, or abuse in the discharge of his duties. This problem can be more conveniently treated in the following section.[29]

The remaining types of suits against the commissioner are two: suits by receivers of insurance companies or by creditors or by the company itself, to gain possession of securities deposited with the commissioner, in which the decision turned upon the interpretation of the statutes pursuant to which the deposit was made;[30] and

[24] *Infra*, § 37, p. 485. See also *supra*, § 31.

[25] See *supra*, § 17, p. 244.

[26] Conn., § 4140.

[27] Kan., §§ 10, 788; Mo., § 6085. See Md. III, § 175, which requires the deputy commissioner to give a bond to the commissioner, thus apparently imposing personal liability upon the commissioner for the acts of a deputy.

[28] Del., § 598; Idaho, § 4970; Ky., § 648 (state treasurer); Mo., § 6341.

[29] *Infra*, § 37, p. 502.

[30] Cooke *v.* Warner (1888), 56 Conn. 234, 14 Atl. 798; Piedmont & Arlington Life Ins. Co. *v.* Wallin (1880), 58 Miss. 1; People *v.* American Steam Boiler Ins. Co. (1895), 147 N. Y. 25, 41 N. E. 423; Ruggles *v.* Chapman (1874), 59 N. Y. 163; *In re* Bean (1923), 207 App. Div. 276, 201 N. Y. Supp. 827; Providence and Stonington Steamship Co. *v.* Va. Fire & Marine Ins. Co. (1882), 11 Fed. 284; Blake *v.* Old Colony Life Ins. Co. (1913), 209 Fed. 309; Universal Life Ins. Co. *v.* Cogbill (1878), 30 Gratt. (Va.) 72.

actions to recover taxes or license fees paid under protest, in which, likewise, the decision turned upon the interpretation of the statute.[31] In none of these cases was the decision or ruling of the insurance commissioner recognized as having any legal consequences.

4. *Actions for specific relief against the commissioner's official acts.* By far the most common type of proceedings in which judicial control over the commissioner's actions is exercised is that in which the object is to obtain specific relief (such as the issuance of a license or the annulment of an order of revocation) from the official act of the commissioner. Proceedings of this type, therefore, require a somewhat detailed analysis.

(a) *Type of remedy used; kinds of administrative determinations which are reviewable.* Five distinct types of judicial review have been invoked in the reported decisions of courts of last resort, namely, *mandamus*, injunction, *certiorari*, prohibition, and statutory appeal or review. Of these, the first two have been by far the most popular. *Mandamus* was the remedy invoked in some fifty of the cases cited in this volume; injunction in twenty cases; *certiorari* was used in three New York cases and in one Wisconsin case; prohibition was successfully used in two cases, and statutory review was used in three cases.

Mandamus is the standard remedy in American administrative law for relief against abuse of discretionary power or against a clear breach of official duty where no such power exists. Because of the intangible nature of the interests affected by such official delinquencies, the ordinary remedies are usually inadequate and the propriety of invoking *mandamus* against the insurance commissioner has seldom been questioned. No case has been found in which *mandamus* against the commissioner has been denied by a court on the ground that other remedies were adequate. This ancient high prerogative writ had certain procedural disadvantages as a method of judicial review. Chief among these was the common law rule that the "return," or answer of the official to the alternative writ, was conclusive on the facts and could only be questioned in a separate action for damages against the official. The result was that the court, in a *mandamus* proceeding, could not try the facts but only the legal questions involved on the face of the record, which included the application made by the relator and the official return. In most of the reported cases of *mandamus* against the

[31] Union Central Life Ins. Co. *v.* Durfee (1896), 164 Ill. 186, 45 N. E. 441; Phoenix Ins. Co. *v.* Welsh (1883), 29 Kan. 672.

commissioner the question which the court was called upon to decide has been raised by a demurrer or motion attacking the legal sufficiency of either the application or the return. This partly serves to explain why the commissioner's findings of fact have been so seldom reviewed.

While the statute of Anne,[32] which allowed the relator to controvert and try the truth of any material facts contained in the return, has been recognized either by legislative enactment or judicial interpretation in practically all the states,[33] no case has been found in which the relator, in a *mandamus* proceeding against the commissioner, has controverted the facts alleged in that official's return. The codes have assimilated the *mandamus* proceeding into the general scheme of civil actions to such an extent that many of its procedural disadvantages have disappeared.

The relief sought in *mandamus* proceedings has most commonly been the issuance of a license to an insurance company [34] or to an agent for such a company [35] or to a broker.[36] However, it has been invoked to compel the commissioner to revoke the license of an insurance company,[37] to compel the commissioner to vacate an order revoking a license; [38] to compel the commissioner to file a company's annual statement; [39] to compel the commissioner to change his valuations of the reserve on plaintiff's life policies; [40] to compel the commissioner to amend the report of an examiner so as to allow certain credits as assets; [41] to compel the commissioner

[32] (1710), 9 Anne, Chap. 20.

[33] Roberts, *Cases on Extraordinary Legal Remedies* (1905), p. 226.

[34] Such was the relief sought in 26 of the 50 cases above mentioned.

[35] This relief was sought in six cases.

[36] In two cases.

[37] State *ex rel.* Sims *v.* McMaster (1913), 95 S. C. 476, 79 S. E. 405; Cole *v.* State *ex rel.* Harris (1907), 91 Miss. 628, 45 So. 11; State *ex rel.* Drake *v.* Doyle (1876), 40 Wis. 175. In the first two cases the relief was denied, in the last case, granted.

[38] Hartford Fire Ins. Co. *v.* Raymond, Commissioner (1888), 70 Mich. 485, 38 N. W. 474; State *ex rel.* Coddington *v.* Loucks (1924), 30 Wyo. 485, 222 Pac. 37.

[39] People *ex rel.* Hartford Life & Annuity Ins. Co. *v.* Fairman (1883), 12 Abb. N. C. (N. Y.), 252, aff'd (1883), 91 N. Y. 385; s. c. *In re* Hartford Life & Annuity Ins. Co. (1882), 63 How. Pr. (N. Y.) 54.

[40] Provident Savings Life Assurance Society *v.* Cutting (1902), 181 Mass. 261, 63 N. E. 433.

[41] People *ex rel.* Long Island Mutual Fire Ins. Corp. *v.* Payn (1898), 26 App. Div. 584, 50 N. Y. Supp. 334.

to grant permission to circulate a certain advertising pamphlet;[42] to compel the commissioner to permit the withdrawal of deposited securities;[43] to compel the commissioner to approve a proposed increase in fire insurance rates;[44] and to compel the commissioner to designate a particular newspaper for the publication of the annual statements of insurance companies.[45] It will thus be seen that the writ of *mandamus* may be used to control a wide variety of official determinations of the insurance commissioner, many of which do not have the definite legal consequences of a revocation of license.

Despite the frequency with which the writ of *mandamus* is actually used as a means of reviewing the commissioner's orders, only one of the many statutes which provide for judicial review expressly mentions *mandamus;*[46] in several other instances the proceeding described in the statute is apparently *mandamus*, although not so named.[47]

Injunction is a newer method of judicial control over administrative action. It has been developed in the United States because the courts of equity here have not been as narrowly circumscribed in their sphere of political action as was the English Court of Chancery after the time of James I, and because the Anglo-American theory of official liability, which treats an official who exceeds or abuses his powers, as merely a private citizen who is committing a private wrong, has made it possible to treat a suit to enjoin the official as a suit between private litigants. While the use of injunction to control some types of administrative action has been barred by the theory that the suit is substantially one against the state and therefore not maintainable without the consent of the state,[48] no case has been found in which a suit to enjoin the insurance commissioner has been barred on such a ground. Injunction resembles *mandamus* in that the relief will be denied if the court finds that

[42] State *ex rel.* Mutual Benefit Life Ins. Co. *v.* McMaster (1912), 92 S. C. 324, 75 S. E. 547.

[43] Alliance Mutual Life Assurance Soc. *v.* Welch (1881), 26 Kan. 632.

[44] State *ex rel.* Waterworth *v.* Harty (1919), 278 Mo. 685, 213 S. W. 443.

[45] State *ex rel.* Cowles *v.* Schively (1911), 63 Wash. 103, 114 Pac. 901; Holliday *v.* Henderson (1879), 67 Ind. 103.

[46] Md. IV, § 184B.

[47] Pa., § 336 (petition for rule to show cause); Tex., § 4785 (by suit to vacate commissioner's order).

[48] State of Louisiana *v.* McAdoo (1914), 234 U. S. 627, 34 Sup. Ct. 938, 58 L. ed. 1506.

there is an adequate remedy by ordinary legal procedure. However, the magnitude of the interests involved or the indefiniteness of the measure of damages caused by a wrongful act of the commissioner, make it easy for the plaintiff to establish the inadequacy of the legal remedy; and no case has been found in which relief was denied on this ground.

Injunction differs from *mandamus* in that the plaintiff in the former proceeding must prove some threatened irreparable injury to his private property or a similar interest of substance, in order to maintain the suit; while the relator in *mandamus* is not required to prove that he has an interest of substance in the consequences of the official act, which he is seeking to attack. This point will be fully discussed farther on.[49] In the original English system of procedure, the method of proof in injunction suits was much broader in its scope than in *mandamus*, since the court of chancery took evidence by depositions and heard all the evidence on both sides. However, in modern practice the two do not differ very substantially in this respect.

Another difference between injunction and *mandamus* was that the latter was used to command affirmative action, while the former was commonly used to prohibit affirmative action. This distinction is perhaps more formal than substantial, since there is but little difference, in substance, between a *mandamus* proceeding to compel the commissioner to vacate or annul an order revoking a license,[50] and a suit to enjoin the commissioner from revoking a license.[51] Of course, if the injunction were issued before the revocation order took effect, the doing of business by the company, pending the litigation, would not be illegal and would not subject the company or its agents to the criminal and civil penalties above discussed,[52] whereas *mandamus* could not be used to prohibit threat-

[49] *Infra*, this section, p. 481.

[50] See *supra*, this section, n. 38.

[51] As in Liverpool, etc., Ins. Co. *v.* Clunie (1898), 88 Fed. 160; Kansas Home Ins. Co. *v.* Wilder (1890), 43 Kan. 731, 23 Pac. 1061; Travellers' Ins. Co. *v.* Kelsey (1909), 134 App. Div. 89, 118 N. Y. Supp. 873; Metropolitan Life Ins. Co. *v.* Clay (1914), 158 Ky. 192, 164 S. W. 968; Clay *v.* Employers' Indemnity Co. (1914), 157 Ky. 232, 162 S. W. 1122; Mutual Life Ins. Co. *v.* Prewitt (1907), 127 Ky. 399, 105 S. W. 463; American Life Ins. Co. *v.* Ferguson (1913), 66 Ore. 417, 134 Pac. 1029; Calvin Phillips & Co. *v.* Fishback (1915), 84 Wash. 124, 146 Pac. 181; American Surety Co. *v.* Fishback (1917), 95 Wash. 124, 163 Pac. 488; Northwestern Title Ins. Co. *v.* Fishback (1920), 110 Wash. 350, 188 Pac. 469; Equitable Life Assurance Society *v.* Host (1905), 124 Wis. 657, 102 N. W. 579.

[52] See *supra*, § 11, p. 84, § 14, p. 164.

ened official action nor to preserve the *status quo*. It is surprising that, in view of this advantage, injunction has not been used as frequently as *mandamus* to contest the validity of a license revocation.

Aside from the suits to enjoin cancellation of a license, injunction proceedings have been used for other purposes: to enjoin a threatened investigation of the books and records of an insurance company; [53] to enjoin the enforcement by the commissioner of an order that plaintiff discontinue the use of certain forms of accident insurance policies; [54] to enjoin the enforcement of an order that fire insurance rates be reduced; [55] and to enjoin the collection of a tax from the plaintiff.[56] In addition, suits have been brought to enjoin the commissioner from enforcing statutes conferring power to fix or alter insurance rates where the sole question involved was not the validity of a particular administrative order but the constitutionality of the statute.[57] In order to maintain an injunction proceeding, the plaintiff must be able to show that the commissioner is threatening to take some definite and final official action which will cause the plaintiff irreparable injury.

Certiorari was originally a common law writ, used for the purpose of reviewing the action of inferior judicial or quasi-judicial tribunals which were not courts of record and did not proceed according to the principles of the common law. In the United States the writ has been confined, in most jurisdictions, to the review of jurisdictional defects; that is, unless the excess of power or abuse of discretion by the inferior tribunal is so gross as to amount to a lack of jurisdiction over the subject-matter or the person, it is not open to attack by a writ of *certiorari*. While it has been frequently said that the insurance commissioner exercises quasi-judicial powers, and, therefore, his actions could be reviewed by *certiorari*, the scope of the review would be, in most states, so limited as to exclude the

[53] Metropolitan Life Ins. Co. *v.* Clay, *supra*, n. 51.

[54] Commercial Accident Ins. Co. *v.* Wells (1923), 156 Minn. 116, 194 N. W. 22.

[55] Aetna Ins. Co. *v.* Lewis (1914), 92 Kan. 1012, 142 Pac. 954.

[56] Clay *v.* Dixie Fire Ins. Co. (1916), 168 Ky. 315, 181 S. W. 1123; Manchester Fire Ins. Co. *v.* Herriott (1899), 91 Fed. 711.

[57] German Alliance Ins. Co. *v.* Lewis (1914), 233 U. S. 389, 34 Sup. Ct. 612; German Alliance Ins. Co. *v.* Barnes (1911), 189 Fed. 769; American Surety Co. *v.* Shallenberger (1910), 183 Fed. 636; Insurance Co. of North America *v.* Welch (1916), 48 Okla. 620, 154 Pac. 48; Henderson *v.* McMaster (1916), 104 S. C. 268, 88 S. E. 645.

correction of the types of error and abuse of discretion which have been the most common subjects of litigation. In New York, however, the original function of the writ, as a method of reviewing error or abuse of discretion, has been preserved, and the only two reported cases in which *certiorari* has been invoked to control the action of the insurance commissioner are found in that jurisdiction.[58] Aside from the New York statutes, which expressly authorize the use of *certiorari*,[59] Vermont is the only other state which expressly authorizes its use.[60]

Prohibition was a writ issued by the common law courts, pursuant to an early statute,[61] directed to an inferior court or tribunal, commanding the latter to refrain from usurping or exercising a jurisdiction with which it was not legally vested.[62] In theory it was more strictly confined than either of the remedies above discussed to restraining the exercise of judicial functions. A Missouri case in which prohibition was used to restrain the insurance superintendent from proceeding to hear and determine a private contract claim against a surety company and from revoking the company's license on the ground of non-payment of such claim,[63] seems in harmony with this theory. However, an Arizona case in which the corporation commission was restrained from holding a re-hearing of charges brought before it to obtain the revocation of an insurance agent's license (at a former hearing before the commission, the charges were not sustained)[64] seems a departure from the common law theory. These are the only two cases in which this remedy has been successfully invoked against the insurance commissioner.[65]

[58] People *ex rel.* Metropolitan Life Ins. Co. *v.* Hotchkiss (1909), 136 App. Div. 150, 120 N. Y. Supp. 649; People *ex rel.* N. Y. Fire Ins. Exchange *v.* Phillips (1922), 203 App. Div. 13, 196 N. Y. Supp. 202; s. c. (1923), 237 N. Y. 167, 142 N. E. 574. Perhaps one should add State *ex rel.* United States Ins. Co. *v.* Smith (1924), 184 Wis. 309, 199 N. W. 954.

[59] New York, §§ 32, 143 (as amended by laws of 1915, Ch. 56, § 1), L., 1914, Ch. 13, § 1.

[60] Vt., § 5624.

[61] 4 Henry IV.

[62] Roberts, *Cases on Extraordinary Legal Remedies* (1905), p. 451.

[63] State *ex rel.* U. S. Fidelity and Guaranty Co. *v.* Harty (1919), 276 Mo. 583, 208 S. W. 835.

[64] Johnson *v.* Betts (1920), 21 Ariz. 365, 188 Pac. 271.

[65] See People *ex rel.* Burr *v.* Kelsey (1908), 129 App. Div. 399, 113 N. Y. Supp. 836, where the court refused to grant a writ of prohibition to restrain a *threatened* revocation of an agent's license, saying only a consummated revocation could be thus attacked.

Statutory methods of review or appeal have been invoked, as such, in only three reported decisions. Two of these, in Massachusetts, were cases in which an insurance company sought to review the rulings of the commissioner as to the forms of life insurance policies.[66] In a recent Utah case a proceeding labeled by the applicant "*certiorari*," but called by the court a petition for statutory review, was used to review the commissioner's action in issuing a license to a foreign insurer.[67]

When one considers that there are numerous statutes which provide for a statutory appeal or review of the orders of the insurance commissioner, it seems puzzling at first glance that the statutory method has been invoked so infrequently, as compared with the common law methods of review above discussed. However, a closer inspection of the statutory provisions leads one to believe that the failure of litigants to invoke them has been due to the anomalous and amorphous character of the statutes and the absence of detailed provisions as to the procedure to be used. It is frequently difficult to determine whether the statute is intended to provide an "appeal" to the court or merely to authorize the use of some of the recognized common law methods of review. In some statutes the language, such as "appeal" or similar wording, indicates clearly that the object is to create a distinct type of judicial review.[68] The Massachusetts provision, which is the most ambiguous of the ones just cited, reads as follows:

> The supreme judicial court, upon petition of said company brought within ten days, shall summarily hear and determine the question whether such violation has been committed, or whether it is insolvent or in an unsound condition or has exceeded its powers or has failed to comply with any provision of law or of its charter, or whether its condition is such as to render its further transaction of business hazardous to the public or to its policyholders, and shall make an appropriate order or decree therein.

The scope of judicial review indicated by this provision points to a method of review broader than any of the common law methods above discussed. It more nearly resembles the "appeal" in equity cases.

[66] N. Y. Life Ins. Co. *v.* Hardison (1908), 199 Mass. 190, 85 N. E. 410; Metropolitan Life Ins. Co. *v.* Insurance Commissioner (1914), 220 Mass. 52, 107 N. E. 397.

[67] Utah Assn. of Life Underwriters *v.* Mountain States Life Ins. Co. (1921), 58 Utah 579, 200 Pac. 673.

[68] Cal. P. C., § 631, L., 1919, Ch. 607, § 1, L., 1917, Ch. 614, § 1, L., 1915, Ch. 608, § 69b; Colo. L., 1919, Ch. 138, §§ 11, 12, L., 1913, Ch. 99, §§ 13, 47;

In a number of instances the statute simply provides for a "review" of the commissioner's rulings, without specifying the procedure or scope of the review.[69] These provisions may be designed to create a new type of statutory review procedure or they may mean simply that the commissioner's decisions are not to be final and are to be open to judicial attack by any appropriate proceeding. The latter interpretation seems the most plausible one to be given to those statutes which provide that the commissioner's rulings shall be open to review by "proper proceedings" or "appropriate proceedings." [70] The scarcity of reported cases in which the statutory review or appeal has been avowedly used indicates that the legal profession has given a similar interpretation to all of these statutes.

That some type of review of the commissioner's official acts is necessary seems incontrovertible. It is surprising, however, that the statutory provisions as to review usually relate to a single or a limited number of types of administrative action. In only four states does a single provision cover judicial review of any and every order or ruling of the commissioner.[71] Such provisions as this one make it more than ever important to have a clear conception of what constitutes an official order or ruling of the commissioner.[72] The Wisconsin provision endeavors to meet this problem by using the phrase "final order."

In the other jurisdictions, review is provided only for particular

Conn., § 4234; Idaho, § 5017; Ind., §§ 4706d, 4706e, 4714e; Ia., § 5671; La., § 3617; Me., Ch. 53, § 116; Mass., § 5 (somewhat doubtful); Mich. II, 4, § 8; Minn., § 3260 (like Mass.), § 3554 ("appeal"), L., 1915, Ch. 195, § 13, Ch. 101, § 6; Mo., § 6284; Mont. S., § 4065a; Neb., §§ 3149, 3288; N. M., § 2808; N. C. R. B., § 4812a; Ore., §§ 6335, 6359, 6389; Pa., §§ 62, 68, 80, 156; S. D., §§ 9179; 9342; Tenn., § 3348a (23); Utah, § 1134; Va., §§ 3734, 4195; Wash., § 7039 (like Mass.).

[69] Fla. L., 1919, Ch. 7868, § 1; Ga., § 2495 (affidavit of illegality); Idaho §§ 5037, 5042, 5161, 5190; Ill., § 208w; Ind., § 4622d; Ky., § 762a (12); Me., Ch. 53, § 11; Md. IV, § 184C; Mass., §§ 108, 132, 134; Mich. I, 3, §§ 3, 13, II, 3, §§ 8, 11, 21, III, 2, §§ 6, 12; Minn., §§ 3480, 3522a; Neb., § 3148; N. H. L., 1913, Ch. 226, § 1; N. M., § 2832; N. Y., § 107; N. D., § 6635f; Ohio, §§ 9423, 9454, 9592 (11); Okla., §§ 6754, 6769; Pa., §§ 205, 217; Tex., § 4760; Utah, § 1158; Wash., § 7233; Wis., §§ 1946 (21), 1970p (3). See also Colo. L., 1913, Ch. 99, § 80 ("injunction, error, appeal, or other process or proceeding").

[70] Ariz., §§ 3486, 3499; Conn., § 4201; Kan., § 5371; Ky., §§ 681c (16), 681c (28), 762a (11); La., § 3628; Mich. III, 4, § 16; Miss., §§ 5188, 5202; N. Y., § 249; Ohio, §§ 9476, 9488, 9490, 9505; Ore., § 6494; Pa., title "Beneficial Societies," § 43; Tenn., § 3369a (103); W. Va., §§ 15d, 15e; Tex., § 4895.

[71] Colo. L., 1913, Ch. 99, § 80; Neb., § 3288; Va., § 3734; Wis., § 1970p (3).

[72] See *supra*, § 31.

types of administrative acts. Leaving out of account the provisions for review of revocation of the license of a foreign fraternal society, as embodied in the uniform fraternal bill, very few states have provisions for review of revocation of an insurance company's license.[73] Revocation of an agent's license, as well as refusal, may be reviewed under the statutes of a number of states.[74] These provisions are usually more elaborate in detail than any of the others, with the exception of the provisions as to review of orders fixing or altering rates.[75] On the other hand the statutes as to review of the commissioner's acts in disapproving, or refusing to approve of, forms of insurance policies are usually confined, as in the Massachusetts and New York provisions, to a meagre statement that "such action of the commissioner shall be subject to review by" the court.[76] The practical importance of such rulings makes it desirable to have a more extensive definition of the scope and procedure of judicial review.

Several states provide for review of, or appeal from, the rulings of the commissioner in respect to a broker's license.[77] The com-

[73] The statutes authorizing review of revocation of an insurer's license, including the fraternal provisions, are as follows: Ariz., §§ 3381, 3486, 3499; Cal. P. C., § 631, L., 1915, Ch. 608, § 59b; Colo. L., 1913, Ch. 99, § 13; Idaho, §§ 5161, 5190; Ind., § 4706e; Ky., §§ 681c (16), 681c (28); Me., Ch. 53, § 116; Mass., § 5; Mich. I, 4, § 13, II, 3, § 11, 4, § 8, III, 4, § 16; Minn., §§ 3260, 3554; Miss., §§ 5188, 5202; Mo., §§ 6313, 6328; Mont. C., § 4165, S., § 4065a; Neb., §§ 3148, 3149; N. M., §§ 2808, 2832; N. Y., §§ 32, 249; Ohio, §§ 9454, 9476, 9488, 9490, 9505; Ore., § 6359; Pa., § 156; S. D., § 9179; Tenn., §§ 3369a (103), 3348a (23); Utah, § 1134; Va., § 4181; Wash., § 7039; W. Va., § 15e.

[74] Cal. L., 1919, Ch. 607, § 1; Fla. L., 1919, Ch. 7868, § 1; Idaho, § 5017; Ind., §§ 4706d, 4714e; Kan., § 5371; Md. IV., §§ 184B, 184C; Mich. II, 3, § 8, II, 4, § 8; Minn. L., 1915, Ch. 195, § 13; N. Y., § 142; N. C. R. B., § 4812a; Ore., § 6335; Pa., § 62; Tenn., § 3348a (23); Wash., § 7090; W. V.., § 15d.

[75] Provisions for review of rate orders are: Colo. L., 1919, Ch. 138, §§ 11, 12; Kan., § 5371; Ky., § 762a (11); Minn. L., 1915, Ch. 101, § 6; Mo., § 6284; Ohio, § 9592 (11); Ore., § 6389; Pa., § 205; Tex., § 4895; W. Va., § 76b; Wis., § 1946 (21). See also Ia., § 5671 (review of an order of the commissioner with respect to combining to fix rates).

[76] Mass., § 108 (by the supreme judicial court), also §§ 132, 134; N. Y., § 107 ("by any court of competent jurisdiction"). Similar statutes are: Ariz., § 3452; Cal. L., 1917, Ch. 614, § 1; Colo. L., 1913, Ch. 99, § 47; Conn., § 4234; Idaho, §§ 5037, 5042; Ill., § 208w; Ind., § 4622d; Me., Ch. 53, § 11; Mich. III, 2, §§ 6, 12; Minn., §§ 3480, 3522; N. H. L., 1913, Ch. 226, § 1; N. M., § 2832; N. D., § 6635f; Ohio, § 9423; Okla., § 6769; Pa., § 217; S. D., § 9342; Tex., § 4760; Utah, § 1158; Vt., § 5624; Wash., § 7233.

[77] Cal. L., 1919, Ch. 547, § 1; Md. IV, § 184C; Pa., §§ 68, 80. See also Mich. II, 3, § 21 (revocation of license of insurance auditor, abstractor, or counselor); N. C. R. B., § 4812a (revocation of adjuster's license).

missioner's determination of the amount of the expenses of an examination, to be paid by the company examined, is subject to judicial review in a few instances.[78]

Of the three reported cases in which statutory review was used, two were cases of attacks upon rulings as to policy forms,[79] while the third was an attack upon the issuance of a license to a foreign company.[80]

(b) *Parties in judicial proceedings to review commissioner's determinations.* Who may demand a review of the commissioner's acts? What classes of persons have a legal power to invoke the remedy of judicial review? The language of the statutes is usually restricted to the person or company immediately and directly interested in the ruling and adversely affected by it, such as the licensee or applicant for a license. The provisions for review of the commissioner's rulings on policy forms [81] do not indicate who may invoke such review; however, since the statute provides only for review of an order disapproving the policy form, it seems clear that only the insurer submitting such form would be entitled to attack the order.

Of the states which provide for judicial review of any order or ruling of the commissioner, Colorado extends the remedy to "any person affected"; Nebraska, to "any person or company," and Wisconsin, to "the company or person affected."[82] The statutes authorizing the commissioner to order a change in insurance rates commonly provide for a judicial review by persons other than the insurer; for example, "any person dissatisfied with the order," [83] any company, person, city, or municipality "interested in" the order,[84] "any party in interest." [85] In Kentucky and Oregon, only the company and rating bureau are mentioned in the statute.[86] Judicial review of rate-fixing orders should be open to the persons who are to pay the rates as well as to those who are to collect them.

[78] Ga., § 2495; La., § 3617; Va., § 4195.

[79] See *supra*, this section, n. 66.

[80] *Ibid.*, n. 67.

[81] *Ibid*, n. 76.

[82] The statutes are cited *supra*, n. 71.

[83] Colo. L., 1919, Ch. 138, §§ 11, 12.

[84] Kan., § 5371; Okla., § 6754. Similarly Tex., § 4895 ("any insurance company or other person or commercial or civic organization, or city, town, or village, which shall be interested in such order or decision").

[85] Mich. I, 4, § 12; Ohio, § 9592 (11).

[86] Ky., § 762a (11); Ore., § 6389.

The New York statute permits the "person aggrieved" by the action of the superintendent in granting or refusing to grant or to renew, or in revoking or in refusing to revoke, an agent's license to obtain a judicial review of such action by a writ of *certiorari*.[87]

In the reported cases, the person seeking judicial relief is usually the licensee or the applicant for a license. In a few instances the insurance company has brought suit to compel the issuance of a license to its agent or agents.[88] In such cases, obviously, the company has a substantial interest in the controversy. So, the proposed incorporators may sue to compel the issuance of a certificate of incorporation [89] and a newspaper may seek to compel the commissioner to designate it as the medium for the publication of the annual statements of insurance companies.[90] A suit by an insurance company to enjoin the enforcement of a statute authorizing the fixing of fire insurance rates, on the ground that the statute is unconstitutional, is designed to prevent an injury to the plaintiff, which is no less direct and substantial because it is common to other insurance companies in the same jurisdiction.[91] A rate-making bureau in New York successfully maintained a *certiorari* proceeding to set aside an order of the superintendent that a discrimination in rates be removed.[92]

A district attorney was permitted, without objection, to bring a *mandamus* proceeding to compel the commissioner to revoke a company's license.[93] Perhaps his official capacity gave him power to bring the proceeding. In only three cases does it appear that review proceedings were brought by persons suing simply as citizens. In *State* ex rel. *Drake* v. *Doyle*,[94] the relator, who had sued

[87] N. Y., § 143. See also Md. IV, § 184B (review of refusal of agent's license); Minn. L., 1915, Ch. 195, § 13 (order as to refusal, revocation or suspension of agent's or broker's license).

[88] Kansas Home Ins. Co. *v.* Wilder (1890), 43 Kan. 731, 23 Pac. 1061; Mutual Life Ins. Co. *v.* Prewitt (1907), 127 Ky. 399, 105 S. W. 463; *In re* Hartford Life & Annuity Co. (1882), 63 How. Pr. N. Y. 54; State *ex rel.* Dakota Hail Assn. *v.* Carey (1891), 2 N. D. 36, 49 N. W. 164; Welch *v.* Maryland Casualty Co. (1915), 47 Okla. 293, 147 Pac. 1046.

[89] People *ex rel.* Gosling *v.* Potts (1914), 264 Ill. 522, 106 N. E. 524.

[90] State *ex rel.* Cowles *v.* Schively (1911), 63 Wash. 103, 114 Pac. 901; Holliday *v.* Henderson (1879), 67 Ind. 103.

[91] German Alliance Ins. Co. *v.* Barnes (1911), 189 Fed. 769.

[92] People *ex rel.* N. Y. Fire Ins. Exchange *v.* Phillips (1923), 237 N. Y. 167, 142 N. E. 574.

[93] Cole *v.* State *ex rel.* Harris (1907), 91 Miss. 628, 45 So. 11.

[94] (1876), 40 Wis. 175, 185.

the insurance company, sought to compel revocation of the company's license because it removed the suit to the federal court. It was objected that the relator had no interest in the proceeding, as the claim had been settled by the company; but the court said that the high prerogative writ of *mandamus* could be invoked by any citizen, or by the court on its own motion, and the relief was granted. On the other hand, in *State* ex rel. *Sims* v. *McMaster*,[95] under almost identical circumstances, the relief was denied upon the ground, among others, that the relator no longer had any interest in the action of the insurance commissioner in refusing to revoke the license. In *Utah Association of Life Underwriters* v. *Mountain States Life Insurance Company*,[96] while the plaintiffs were obviously competitors of the company whose license they sought to have revoked, they sued merely as citizens and taxpayers and as "the party beneficially interested in this proceeding." The court sustained the proceeding on the ground that the provision for review must be applicable to the complainant, as well as to the licensee.[97]

(c) *Limitation of time; exclusiveness of statutory method of review.* A time limit, within which judicial proceedings to review the action of the commissioner must be commenced, is fixed in less than half the statutes which provide a judicial review. The period within which the proceeding must be brought varies from as low as ten days [98] to as high as six months.[99] A limitation of twenty days,[100] or one of thirty days,[101] is more commonly found. The time limit in some instances seems entirely too short to give the person adversely affected an opportunity to decide whether or not to appeal.

These provisions give rise to some interesting problems. Do they purport to fix a period of limitation upon judicial review of the commissioner's orders, not only by the statutory method of review

[95] (1913) 95 S. C. 476, 79 S. E. 405.

[96] (1921), 58 Utah 579, 200 Pac. 673.

[97] 58 Utah 579 at p. 583.

[98] Mass., § 5; Mich. II, 4, § 8; Ore., § 6335; Wash., § 7090; Wis., § 1970p (3).

[99] Va., § 4181, coupled with § 3734.

[100] Ariz., § 3381; Ia., § 5671; Neb., § 3288; Ore., § 6359; Wash., § 7039; W. Va., § 15e. See also Colo. L., 1913, Ch. 99, §§ 13, 47; Mont. S., § 4065a; Utah, § 1134, in each of which the period is 15 days.

[101] Kan., § 5371; Ky., § 762a (11); Mich. L., 1915, Ch. 195, § 13, Ch. 101, § 6; Ohio, § 9592 (11); Okla., §§ 6754, 6769; Ore., § 6389; Pa., §§ 62, 68; S. D., § 9179; W. Va., § 76b. See also Neb., § 3149 (40 days).

but by any other method? Only one case has been found in which the question was raised. In *Aetna Insurance Company* v. *Lewis*,[102] seventy fire insurance companies, doing business in Kansas, brought suit to enjoin the commissioner from enforcing certain reductions in fire insurance rates, which were alleged to be confiscatory. The orders reducing the rates were made in 1909 and in 1910. The companies operated under the reduced rates for four years, during which time, on their showing, they lost $1,500,000. Having failed to obtain a revocation of the orders from the superintendent, they brought this suit. It was urged that the suit was barred by the thirty-day limitation in the statute. However, the court brushed aside this contention, saying that the thirty-day clause is not a statute of limitations. The suit was brought as an ordinary injunction suit and not as a statutory appeal. It would seem, then, that the limitation prescribed in these statutes applies only to a proceeding brought under the statute.

Are these provisions designed to provide the exclusive method of review of the commissioner's acts? In most of them the language is permissive, for example, "may within ten days." In Wisconsin, however, the statute distinctly states that the commissioner's order may be reviewed by a proceeding brought within ten days, "*and not otherwise.*" [103] If this provision or any of the others is designed to exclude judicial review by injunction, *mandamus*, or other non-statutory judicial procedure, is it, or are they, constitutional? This will depend upon the character of the statutory review. If the statute provides an administrative appeal to a court, which shall act as an administrative board of review, then the judicial proceeding for review would be barred until after the final decision of the administrative appeal.[104] However, most states have very strict provisions as to separation of powers, and it would probably take a constitutional amendment, as in the *Prentis* case just cited, to legalize such a form of administrative appeal to a court. It seems clear, then, that the limitations on statutory review are meant to include strictly judicial proceedings. If so, there is high authority for the view that the legislature cannot cut off the ordinary methods of judicial review and provide an

[102] (1914), 92 Kan. 1012, 142 Pac. 954.

[103] Wis., § 1970p (3). (Italics ours.)

[104] Prentis *v.* Atlantic Coast Line (1908), 211 U. S. 210, 29 Sup. Ct. 67. See also Mellon *v.* McCafferty (1915), 239 U. S. 134, 36 Sup. Ct. 94 (taxation).

exclusive statutory method.[105] However, the legislature may regulate the details of review procedure.[106]

(*d*) *Character of hearing in statutory review proceedings.* The character of the hearing and other details of procedure are seldom specified in detail in the statutes. In one type of statute it is stated that the court "shall summarily hear and determine the question whether." [107] Whether this means that the case shall be advanced on the court's docket, or that the hearing shall be brief and perfunctory, is not clear. If the latter, it is difficult to see how the court could pass upon the intricate and voluminous questions involved in determining the solvency or soundness of an insurance company, as in Massachusetts, or upon the reasonableness or adequacy of a rate, as in Pennsylvania, in a summary way, without being wholly superficial.

A second type of statute apparently contemplates that the court shall make a full investigation of the merits of the controversy.[108] That the proceeding is designed to be a review of the commissioner's record and not a trial *de novo* is indicated by provisions that the commissioner shall certify to the court the record of his proceedings; however, in some instances (as in Colorado and Oregon), this is coupled with a provision for a full investigation by the court.[109] In Wisconsin the court hears only the evidence taken before the commissioner.[110] In Colorado a jury trial is provided to review the revocation of a company's license.[111] In South Dakota, the supreme court is authorized to adopt rules regulating the procedure of judicial review.[112] The absence of detailed provisions as

[105] Bacon *v.* Rutland R.R. Co. (1914), 232 U. S. 134, 34 Sup. Ct. 283 (review of public utilities commission order).

[106] Cary *v.* Curtis (1845), 44 U. S. 235.

[107] Ariz., § 3381; Mass., § 5; Minn., § 3260, L., 1915, Ch. 195, § 13; Ore., § 6359; Pa., § 205; Wash., § 7039.

[108] Cal. L., 1919, Ch. 607, § 1, Ch. 547, § 1, P. C., § 631, L., 1915, Ch. 608, § 59b; Colo. L., 1913, Ch. 99, §§ 13, 47; Me., Ch. 53, § 116; Minn. L., 1915, Ch. 101, § 6 (hearing "on the merits"); Mont. S., § 4065a; Neb., § 3288 (hearing without a jury); Ore., § 6335; Va., § 3734 (hearing as on an equity appeal); Wash., § 7090. The constitutionality of such provisions is discussed *infra*, § 37, p. 490.

[109] Colo. L., 1913, Ch. 99, § 13; Ind., § 4714b; Ore., § 6335; Utah, § 1134 — each requires that the commissioner's record be certified to the court.

[110] Wis., § 1970 p (3).

[111] Colo. L., 1913, Ch. 99, § 13. See also Kan., § 5371 (trial as in a civil case).

[112] S. D., § 9179.

to the procedure of statutory review in most jurisdictions explains, as was pointed out above, the fact that common law methods of review have been resorted to in an overwhelming majority of the reported cases.

§ 37. *Scope of judicial review.* The questions involved in determining the scope of judicial review of the acts of the insurance commissioner are extremely difficult. Neither the courts nor the legislatures have had any clear conception of the problems involved. The whole question is still in an amorphous condition.

1. *Collateral proceedings.* The extent to which the courts will review or disregard the orders or rulings of the commissioner in private litigation, in which such orders or rulings are collaterally involved, has already been discussed in the preceding section and need not be repeated here.[1]

2. *Enforcement proceedings.* The commonest type of enforcement proceeding is the suit brought by the commissioner for an injunction against the doing of business and the appointment of a receiver for an insurance company. The statutes authorizing this proceeding universally give the court a free hand in determining whether or not the grounds alleged by the commissioner exist. In some, as in New York, it is simply provided that the court may, "in its discretion," issue or modify the injunction applied for.[2] In others, the court is expressly authorized to determine whether the insolvency or other ground for the proceeding exists.[3] In several instances, the court is authorized to appoint examiners to determine whether or not the grounds for dissolution of the corporation exist.[4] In Illinois, a jury is called to decide whether or not the matured obligations of a domestic assessment life insurance company exceed its assets.[5] That the court is not confined to strictly judicial questions but is authorized to pass upon questions

[1] See *supra*, § 36, p. 465.

[2] Conn., § 4067; Ill., § 70; N. Y., § 63; Ore., § 6368; N. D., § 4925; Pa., § 54. Cf. Ala., § 8344.

[3] Cal. P. C., § 601; Conn., § 4130; Ill., § 70; Ia., § 5646; Kan., § 5169; Mass., § 6; Mich. I, 3, § 3; Minn., § 3260; Miss., § 5032; Mo., § 6350; Neb., § 3147; N. D., §§ 4925, 4975; Ohio, §§ 634, 9486; Okla., § 6790; S. D., § 9181. See also Del., § 3891; Nev., § 1301; N. J., p. 2854, § 56; Okla., § 6677, in which the scope of the court's investigation is somewhat more uncertain.

[4] Ark., § 4984; Ill., § 70; Ind., § 4729; Ia., § 5646; Ky., § 677; Md. III, § 178 (7) (commissioner is one of the examiners); Mont. C., § 4153.

[5] Ill., § 248.

of administrative policy is indicated by statutes which declare that the court shall make such an order or decree "as the interests of the public may require." [6] Thus, in no instance, is any legal consequence or conclusiveness attached to the findings or orders of the commissioner in this enforcement proceeding.

However, there are other provisions which tend to limit somewhat the scope of judicial review in such proceedings. Among these is the statement that the report of the examiner, of his examination of an insurance company, shall be "presumptive evidence of the facts therein stated" in a suit by the state against the company.[7] A somewhat broader provision is that the commissioner's certificate of facts shall be *prima facie* evidence of the facts certified.[8] These provisions attach a more or less definite probative force to the commissioner's findings. On the other hand, the common provision that an instrument authenticated by the commissioner shall be received in evidence [9] merely prescribes a rule of admissibility (but not of probative force) in order to avoid the inconvenience of requiring the commissioner to take up his time in producing the original document.

An exception to the general rule that the commissioner's findings are inconclusive in an enforcement proceeding is found in the statutes which provide that the commissioner's findings as to the value of the company's securities shall be final and conclusive.[10] New Jersey has an interesting provision that the commissioner's determination that the refusal of a license to a New Jersey company by another state was "unreasonable or unfair," shall be final and conclusive in the administration of the retaliatory statute.[11] The question whether or not these provisions violate the doctrine of separation of powers has not been passed upon.

[6] Ill., § 70; Ind., § 4729; Ia., § 5646; Kan., § 5169; Me., Ch. 53, § 86; N. H. L., 1891, Ch. 56, § 2; Ohio, § 634. See also Ind., § 4691 (as shall be for the best interests of policyholders); Ky., § 677 (as shall be for the best interests of the company and the public).

[7] Ariz., § 3378; Conn., § 4065; Idaho, § 4979; La., § 3602; Mo., § 6353; Mont. A., § 178C; N. Y., § 39; Ore., § 6357.

[8] Minn. L., 1915, Ch. 195, § 13 (revocation of agent's license), Ch. 101, § 6 (order as to fire rates); N. Y., § 207 (assessment life companies).

[9] Del. ,§ 579; Mass., § 16; Ohio, §§ 624, 9523; Okla., § 6670; Ore., § 6324 (2); Pa., § 19; S. C., § 2697; Tenn., § 3344; Utah, § 1127; Vt., § 5512; Va., § 4175; Wash., § 7047; W. Va., § 72; Wyo., § 5249.

[10] Cal. C. C., § 422; Me., Ch. 53, § 134; Md. I, § 203 (findings of special appraisers); Mass., § 11; N. H. S., p. 399, § 13; N. Y., § 18.

[11] N. J., p. 2857, § 66.

3. *Actions against the commissioner for damages.* The provisions on the commissioner's liability in damages to one injured by an improper exercise of his official powers are meagre. Only one statute, particularly applicable to the commissioner, has been found; it provides that the commissioner shall not be liable for the exercise of discretion in good faith.[12]

Only two cases have been found in which an action to recover damages was brought against the commissioner. In *State, for use, etc.* v. *Thomas* [13] an action was brought upon the official bond of the insurance commissioner by one who had procured insurance policies in a company licensed by the commissioner, had sustained losses under the policies, and had been unable to collect because the company was insolvent. It was urged that the statute did not authorize the licensing of mutual companies, such as this one. The statute read that the commissioner "shall issue" a license when he "is satisfied that the affairs of such company are in a sound condition." Relying upon this language the court said:

> It follows that his action in issuing the license was discretionary and, therefore, judicial. No liability, consequently, attached unless it was corrupt.[14]

As to the argument that the defendant was bound to know the law, the court made the interesting comment:

> Granting that all this is true, it proves that he may technically and by fiction of law know what he in fact does not know.[15]

With this somewhat metaphysical reasoning, the court fortified its decision sustaining a demurrer to the bill, although the bill alleged that the commissioner acted "knowingly." The court was obviously anxious to classify the commissioner's exercise of the licensing power as a "judicial" function in order to invoke the rule of immunity of judicial officers in the absence of corruption.

In *Minter* v. *McSwain*,[16] the commissioner's action was taken, not in the enforcement of the insurance laws, but in the enforcement of the "Blue Sky" law. However, the principle is much the same. One who purchased stock of a corporation, upon which the commissioner had placed his certificate that the corporation had

[12] Cal. P. C., § 601.

[13] (1890), 88 Tenn. 491, 12 S. W. 1034.

[14] 88 Tenn. 491, at p. 495.

[15] *Ibid.*, at p. 494.

[16] (1923), 126 S. C. 371, 119 S. E. 901. See (1924) 24 *Columbia Law Review* 548.

been given permission to sell stocks in the state (although it was distinctly stated that the commissioner did not recommend the purchase of the stock), sued the commissioner because the stock proved to be worthless and the commissioner had made no investigation before issuing his certificate. The majority of the court denied liability, on the ground that the legislature, by requiring the commissioner to print in his certificate in large type a statement that he did not recommend the purchase of the stock, indicated that the commissioner was not required "to underwrite all the companies to whom he issued a license." One judge dissented, however, on the ground that while the commissioner's license did not amount to a recommendation of the stock, it certainly was an assurance that the commissioner had at least exercised ordinary care in performing the duties imposed upon him by the statute.[17] It is difficult to escape the reasoning of the dissent, and it is submitted that the court erred in sustaining a demurrer to the complaint. These two cases taken together show that the courts are loath to impose personal liability upon the commissioner for injuries caused by an erroneous exercise of his official powers.

4. *Actions for specific relief against the commissioner's decisions.*

a. *Scope of judicial review as indicated in statutory provisions.* The statutory provisions for judicial review usually indicate more or less clearly that the court is authorized to investigate and decide *de novo* the questions passed upon by the commissioner. In some instances it is distinctly stated that the court shall investigate and determine all the facts "*de novo*," [18] or that the court shall determine both the law and the facts.[19] In other instances, the same scope of review is indicated by the statement that the court shall determine whether or not the ground for revocation, or other official action, exists.[20] In a few instances, a limited degree of conclusiveness is given to the commissioner's decision. Thus, in Wis-

[17] Cothran, J., 119 S. E. 901, at p. 902.

[18] Cal. L., 1919, Chap. 607, § 10 ("without regard to the determinations previously made by the insurance commssioner"), L., 1919, Ch. 547, § 1 (same), P. C., § 631 (same), L., 1915, Ch. 608, § 1 (same); Ia., § 5671 (shall be tried *de novo* as equitable issues are tried); Mo., § 6284; N. M., § 2808; Tenn., § 3348a (23).

[19] Colo. L., 1913, Ch. 99, §§ 13, 47; Ind., §§ 4706d, 4706e (tried as an appeal from a justice of the peace); Mich. I, 4, § 12; Mont. S., § 4065a, C., § 4165; Ore., § 6335; Wash., § 7090.

[20] Ariz., § 3381; Mass., § 5; Minn., § 3260; Neb., §§ 3149, 3288; Okla., § 6754; Ore., §§ 6359, 6389; Utah, § 1134; Va., §§ 3734, 4195; Wash., § 7039.

consin, the court is confined to the evidence presented before the commissioner.[21] In Minnesota, his findings in connection with the revocation of a foreign fraternal society's license are *prima facie* evidence of their correctness.[22] Perhaps some limitation upon the scope of review results from directing the court to try the "reasonableness and legality" of his order fixing the expense of examination,[23] or to determine whether an agent's license has been "wrongfully and improperly" refused.[24]

In many instances the legislature provides simply for a "review"[25] or "appeal,"[26] or otherwise leaves the scope of review uncertain.[27] Probably such provisions authorize a full judicial review on the merits.[28]

The statutes which provide for a judicial investigation *de novo* of the law and the fact involved in the commissioner's decision give rise to some interesting questions. In the first place, if the statute is constitutional and is given full effect, the opportunity for a complete judicial hearing will cure the omission of provisions requiring notice and hearing before the commissioner. Many such omissions are found.[29] The United States Supreme Court in construing the "due process" clause has distinctly held that an opportunity for a full judicial hearing is sufficient, even though no administrative hearing is provided for or given.[30] If the court is acting as an administrative appellate tribunal, the United States courts may not

[21] Wis., § 1970p (3).

[22] Minn., § 3554.

[23] La., § 3617.

[24] Md. IV, § 184B.

[25] Idaho, §§ 5037, 5042, 5161, 5190; Ill, § 208w; Mich. I, 4, §§ 3, 13, II, 3, §§ 8, 11, 12, II, 4, § 8, III, 1, §§ 6, 12, III, 4, § 16; Minn., §§ 3480, 3522; W. Va., §§ 15d, 15e.

[26] Idaho, § 5017.

[27] For instance, the Kansas provision for review of an order fixing fire rates (§ 5371) is that the court may set aside all or any part of the commissioner's orders found to be unreasonable, injurious, or excessive, or inadequate to compensate the company. Does this mean that the court is merely to determine whether or not the rates fixed are confiscatory, or is the court itself to fix a reasonable rate? See also Ky., § 762a (11); W. Va., § 76b.

[28] Rutledge *v.* State Medical Board (1922), 106 Oh. St. 544, 140 N. E. 132, ("appeal" from action of physician's licensing board).

[29] See *supra*, § 24, p. 380, § 25, p. 397.

[30] Rail & River Coal Co. *v.* Ohio Industrial Comm. (1915), 236 U. S. 338, 35 Sup. Ct. 359 (public utilities commission); Security Trust Co. *v.* Lexington (1906), 203 U. S. 323, 27 Sup. Ct. 87 (tax assessment).

be resorted to for the purpose of attacking the commissioner's decision until the statutory remedy has been exhausted.[31]

On the other hand, it is probable that, under the strict separation of powers prescribed by the constitutions of most of the states, these statutes are unconstitutional if construed to require the court to act in an administrative capacity in reviewing the commissioner's decisions. The case of *State* ex rel. *Waterworth* v. *Harty* [32] so held. The Missouri statute provided that the court should determine *de novo* the reasonableness of fire insurance rates, upon an appeal from the decision of the commissioner refusing to approve an increase in rates. The court, in refusing to review the commissioner's action, declared:

> It is clear from the principles announced . . . that the courts of this state, under our constitution, are prohibited from participating in the process of establishing a system of rates for application to future charges in a business subject to such regulation.[33]

The court relied upon the statement of Mr. Justice Holmes in *Prentis* v. *Atlantic Coast Line*,[34] that the fixing of rates to operate prospectively is a legislative and not a judicial function.[35] While the reasoning of the case is not necessarily applicable to a provision for statutory review of the commissioner's refusal or revocation of a license, it is believed that the same conclusion would be reached, in view of the decided tendency of the courts to treat provisions for court review of administrative action as strictly judicial, rather than administrative, proceedings.[36] However, it should be noted that in the three cases in which the statutory method of review was used,[37] the constitutionality of the statute was not attacked

[31] Prentis *v.* Atlantic Coast Line (1908), 211 U. S. 210, 29 Sup. Ct. 67. See People *ex rel.* Broadway, etc., Realty Co. *v.* Walsh (1922) 203 App. Div. 468, 196 N. Y. Supp. 672 (court refused to order superintendent of buildings to issue building permit on ground relator had not yet resorted to administrative appeal).

[32] (1919), 278 Mo. 685, 213 S. W. 443.

[33] 278 Mo. 685, at p. 694.

[34] *Supra*, n. 31.

[35] See also Keller *v.* Potomac Electric Power Co. (1923), 261 U. S. 428, 43 Sup. Ct. 445, to the same effect.

[36] U. S. *v.* Ritchie (1854), 58 U. S. 525, 531, 534 (board to settle private land claims in California); Fuller *v.* County of Colfax (1882), 14 Fed. 177 (location of public road). But see Commissioner of Road Improvement District *v.* St. Louis S. W. Ry. Co. (1922), 257 U. S. 547, 42 Sup. Ct. 250, 66 L. ed.

[37] See *supra*, § 36, notes 66, 67.

on this ground, and the Massachusetts court distinctly upheld the statute as against attack on the ground that it was an unwarranted delegation of legislative power to the commissioner, by saying that the court would review the merits of the commissioner's rulings as to the forms of policies.[38]

On the other hand, if the legislature, to avoid the Scylla of imposing non-judicial duties on courts, should declare the decisions of the insurance commissioner conclusive as to all findings of fact, it is not unlikely that, in many jurisdictions at least, it would run into Charybdis in the form of a judicial pronouncement that to deny an individual full judicial redress on all questions involved in the determination of his right to pursue a lawful calling is a denial of "due process." Such a clause in a real estate broker's licensing law (that is, declaring the licensing board's findings of fact "conclusive") was declared unconstitutional in a recent Kentucky case.[39] Such courts seem only dimly aware of the unfortunate dilemma to which their jealousy of their "separate" powers leads, and of the inconsistencies of their dog-in-the-manger attitude. They will neither allow the legislature to cast the burden of full administrative review upon them, nor permit it to be denied to them. The decisions in which judicial attack has been invoked display a similar inconsistency.

b. *Scope of judicial control as shown by decisions on direct attack.* The judicial decisions as to the effect given to the commissioner's findings on direct attack are difficult to analyze because the courts themselves have no adequate analysis of the type of problem involved, and do not themselves adhere strictly to the scope of review which they frequently announce. The classical analysis of administrative problems into "questions of law" and "questions of fact" is too uncertain and confusing to be of much value. It is based upon the syllogistic reasoning of medieval logic,[40] which is

[38] N. Y. Life Ins. Co. *v.* Hardison (1908), 199 Mass. 190, 85 N. E. 410.

[39] Hoblitzel *v.* Jenkins (1924), 204 Ky. 122, 263 S. W. 764, 767. To the same effect, see Commerce Commission *ex rel.* City of Bloomington *v.* Cleveland, etc,. Ry. Co. (1923), 309 Ill. 165, 140 N. E. 868 (*semble*, legislature cannot prescribe weight to be attached, on judicial appeal, to decision of public utilities board); Town of Hoxie *v.* Gibson (1922), 155 Ark. 338, 245 S. W. 332 (board of appraisers in condemnation proceedings). But see *contra:* Matter of Barresi *v.* Biggs (1922), 203 App. Div. 2, 196 N. Y. Supp. 376 (health commissioner licensing midwife); Martin *v.* Bennett (1923), 291 Fed. 626 (state superintendent of banks). See also (1924) 24 *Columbia Law Rev.* 916.

[40] See Isaacs, *The Law and the Facts* (1922), 22 *Columbia Law Rev.* 1.

giving way to newer forms of experimental or pragmatic logic.[41] A more illuminating analysis of the questions involved in law administration is found in Dean Pound's division of the process into three parts: 1. Finding the law. 2. Interpreting the law. 3. Applying the law.[42] To these there may be added a fourth, namely, the ascertainment of the data upon which the decision is to be made. This last involves "questions of fact" in the narrowest sense; for example, whether or not a certain person conducted himself in a certain way at a certain time and place. Questions of this last type may be dismissed from consideration here, because no case has been found in which the commissioner's ascertainment of the data of his decision has been disputed in a proceeding for judicial review. The cases are usually decided upon a demurrer to the pleadings, and the allegations of fact are thus conceded by both sides. It will, therefore, be necessary to analyze the cases only with reference to the first three types of problems.

The distinction between these three types is difficult to draw and even more difficult to define. It may be urged that different judges will analyze the same case differently, one calling it a problem in finding the law, another finding it a problem in applying the law. This, however, is no objection to the classification, since the object of the classification is to predict the future uncertain reactions of the judges to certain stimuli, and, if the reactions differ, naturally the judges' explanations of their reactions will differ. The greatest difficulty, however, is in determining what type of problem the judge thought he was dealing with. Here, no doubt, the writer's own predilections will guide him, whether he wishes them to or not. At all events, it is hoped that the attempt to analyze the cases in this way will prove an interesting experiment.

1. *Finding the law.* One of the obvious problems in finding the law is exemplified in cases where the commissioner is called upon to reconcile conflicting statutes and derive the rule of law applicable from a consideration of all of their provisions. This problem was the decisive one in a number of cases of judicial attack upon the commissioner's decisions.[43] A similar problem is involved in recon-

[41] See Cardozo, *The Nature of the Judicial Process* (1921); John Dewey, *Essays in Experimental Logic* (1916), Ch. VI.

[42] Pound, *Outlines of Lectures on Jurisprudence* (3d edition; Cambridge, 1920), p. 106; Pound, *The Theory of Judicial Decisions*, III (1923), 36 *Harvard Law Rev.* 940, at pp. 945 *et seq.*

[43] In this and subsequent notes in this section, the symbol (o) will be used to indicate that the commissioner's decision was overturned, and the symbol (s)

ciling a constitutional provision laying down a general principle with a statute prescribing a conflicting rule,[44] or in reconciling a provision of the company's charter with a conflicting statute subsequently adopted.[45]

In a few cases the court has avowedly allowed the commissioner to add to the explicit requirements of the statute. Thus, a Nebraska case upheld a decision of the insurance board which was based upon no other statutory provision than one giving the board power to make regulations "for the purpose of carrying out the true spirit and meaning of this chapter." [46] In the same class, perhaps, is an earlier Nebraska case, which, in effect, held that the word "satisfied" in the statute gave the commissioner power to add to the requirements of the statute, though the court found that the particular requirement upon which the commissioner had based his refusal of a license was not prescribed by the statutes.[47] The negative side of law finding is exemplified in several cases in which the court overturned the commissioner's decision because it found no such ground in the statute as the one which he relied upon, and denied his power to add to the requirements of the statute.[48] No

will be used to indicate that the commissioner's decision was sustained. People *ex rel.* Gosling *v.* Potts (1914), 264 Ill. 522, 106 N. E. 524 (o); Lyman *v.* Ramey (1922), 195 Ky. 223, 242 S. W. 21 (s); State *ex rel.* Leach *v.* Fishback (1914), 79 Wash. 290, 140 Pac. 387 (s); Clay *v.* Employer's Indemnity Co. (1914), 157 Ky. 232, 162 S. W. 1122 (o); American Surety Co. *v.* Fishback (1917), 95 Wash. 124, 163 Pac. 488 (o).

[44] National Benefit Assn. *v.* Clay (1915), 162 Ky. 409, 172 S. W. 922 (o). The state constitution provided that foreign corporations should not be admitted to do business in the state on more favorable terms than domestic ones. The commissioner refused to license a foreign insurer because it did not elect its directors by a method which conformed to the statute applicable to domestic corporations of a similar character, though the statute as to licensing such foreign insurers did not name any such requirement. The court held that the statutory requirements fixed the scope of the commissioner's power.

[45] State *ex rel.* North Coast Fire Ins. Co. *v.* Schively (1912), 68 Wash. 148, 122 Pac. 1020. The court found that a provision of the company's charter authorizing it to engage in certain lines of business with the capital which it then had was superseded by a subsequent statute requiring a larger capital of companies so engaged.

[46] Western Life and Accident Co. *v.* State Insurance Board (1917), 101 Neb. 152, 162 N. W. 530 (s).

[47] State *ex rel.* Foreign Insurance Companies *v.* Benton (1889), 25 Neb. 834, 41 N. W. 793 (s).

[48] Mutual Life Ins. Co. *v.* Prewitt (1907), 127 Ky. 399, 105 S. W. 463; Bankers Deposit Guaranty & Surety Co. *v.* Barnes (1909), 81 Kan. 422, 105 Pac. 697; Wallace & Co. *v.* Ferguson (1914), 70 Ore. 306, 140 Pac. 742; Metro-

doubt some, if not all, of these cases might be analyzed as examples of abuse of discretion in applying the law, but the courts, it is believed, treated them as problems in finding the law. The decision of a controversy will often turn upon the choice between these competing methods of analysis.

To these examples may be added cases in which the court found,[49] or refused to find,[50] an implicit requirement from the language of the statute — in each of these cases, a requirement that a domestic company should not engage in business outside the state. Obviously this type of problem borders very closely on the interpreting of law.

2. *Interpreting the law.* An example of interpretation closely related to finding the law is found in a case in which the court declared that the commissioner was empowered to interpret "equitably" a mandatory requirement that he revoke the license of a company for removing a suit to a Federal court, and to refuse revocation where the removal was due to a mistake.[51] If the court had analyzed this case as one of law finding, it could hardly have sustained the commissioner's decision.

Most of the problems of interpretation, which have arisen in the reported decisions, fall into two groups, of which the first relates to the meaning of technical language of the insurance business.[52] It

politan Life Ins. Co. *v.* McNall (1897), 81 Fed. 888; Liverpool, etc., Insurance Co. *v.* Clunie (1898), 88 Fed. 160; State *ex rel.* U. S. Fidelity & Guaranty Co. *v.* Harty (1919), 276 Mo. 583, 208 S. W. 835.

[49] Kansas Home Ins. Co. *v.* Wilder (1890), 43 Kan. 731, 23 Pac. 1061 (s).

[50] Northwestern Title Ins. Co. *v.* Fishback (1920), 110 Wash. 350, 188 Pac. 469 (o).

[51] State *ex rel.* Sims *v.* McMaster (1913), 95 S. C. 476, 79 S. E. 405 (s).

[52] Provident Savings Life Assurance Society *v.* Cutting (1902), 181 Mass. 261, 63 N. E. 433 (s) (interpretation of statutory rule as to valuations of policies); State *ex rel.* European Accident Ins. Co. *v.* Tomlinson (1920), 101 Oh. St. 459, 129 N. E. 684 (s) (whether "insurance" in statute included "re-insurance"); State *ex rel.* Banker's Union *v.* Searle (1905), 74 Neb. 486, 105 N. W. 284 (s) (statute requiring that mortuary fund be kept separate); American Casualty Co. *v.* Fyler (1891), 60 Conn. 448, 22 Atl. 494 (s) (commissioner's decision final as to meaning of technical qualifications of foreign insurers); Union Pacific Life Ins. Co. *v.* Ferguson (1913), 64 Ore. 395, 129 Pac. 529 (s) (whether statute requiring $100,000 paid-up capital meant par value of stock sold or cash proceeds of sale); Metropolitan Casualty Ins. Co. *v.* Basford (1913), 31 S. D. 149, 139 N. W. 795 (s) (technical classification of types of insurance business); Travelers Ins. Co. *v.* Kelsey (1909), 134 App. Div. 89, 118 N. Y. Supp. 873 (o) (superintendent interpreted statute as to method of computing reserve on life policies so as to carry out its purpose, though contrary to its letter).

will be observed that in all but one of these cases the commissioner's interpretation of the technical language was sustained by the court.

The second group of problems in interpretation involves questions as to the meaning of legal concepts and similar questions which are primarily for a lawyer, rather than for an insurance expert. Thus, whether or not a statute authorizing revocation of a company's license likewise authorized revocation of the agent's license,[53] or whether a corporation was eligible for a broker's license,[54] or whether a statute designed to prevent the formation of companies having similar names was applicable to the admission of a foreign company having a name similar to a domestic one,[55] are questions of the kind which lawyers are accustomed to deal with. So is the question, whether a particular statutory requirement is mandatory or merely directory.[56] The question whether or not a statute authorizing revocation of an agent's license without prescribing the grounds therefor, empowered the commissioner to revoke arbitrarily, was determined by the constitutional problem involved.[57] The commissioner's interpretation has been more frequently overturned in this class of cases than in the ones involving technical insurance questions.[58]

3. *Applying the law.* The problem of applying the law to the data of the particular legal controversy is closely akin to that of interpreting the law. Some cases could be placed in one category about as well as in the other. Thus, the leading case of *Provident Savings Life Assurance Society* v. *Cutting*[59] might be treated as the application of the statutory rule for calculating the reserve on life insurance policies, to new forms of policies issued on a preliminary term basis. The court did indeed say:

[53] Maxwell *v.* Church (1901), 62 Kan. 487, 63 Pac. 738 (o).

[54] Shehan *v.* Tanenbaum Son & Co. (1913), 121 Md. 283, 88 Atl. 146 (s).

[55] People *ex rel.* Traders' Fire Ins. Co. *v.* Van Cleave (1899), 183 Ill. 330, 55 N. E. 698 (o). See also State *ex rel.* National Life Assn. *v.* Matthews (1898), 58 Oh. St. 1, 49 N. E. 1034 (o) (taxation statute not applicable to an "assessment" company).

[56] State *ex rel.* Lumberman's Accident Co. *v.* Michel (1909), 124 La. 558, 50 So. 543 (s); Equitable Life Assurance Society *v.* Host (1905), 124 Wis. 657, 102 N. W. 579 (o).

[57] State *ex rel.* Coddington *v.* Loucks (1924), 30 Wyo. 485, 222 Pac. 37 (o).

[58] See North British, etc., Ins. Co. *v.* Craig (1910), 106 Tenn. 621, 641, 62 S. W. 155, where the court said the commissioner had discretion in interpreting a statute of this type, but later took back what it said (p. 643).

[59] (1902), 181 Mass. 261, 63 N. E. 433.

The valuation of policies for the purpose of determining the reserve liability is only one of the processes necessary to determine the company's financial condition. It involves an *application* of the statutory rule to each policy, in connection with the methods and practices in the transaction of the business that exist either as a part of the science of life insurance or otherwise outside of the stipulations of the policy. New forms of policies may be adopted which were not known when the statutory rule was established, and new questions may arise depending in part upon the principles of life insurance as a science and in part upon the practices of the company, as well as upon rules of law, in determining how the statutory rule shall apply to these policies. (Italics ours.)

But the use of the term "application" is not decisive, for the court went on to say:

In the present case, even if the contracts referred to are to be considered technically as the petitioner contends, the statute is silent as to whether the value of the option to continue the insurance at the end of the year without an examination, and at the premium fixed for an age a year younger than the assured would then have attained, is not to be considered in determining the reserve liability of the company under the contract * * * * we are of opinion that, at least so long as he acts in good faith, intending to obey the law, we cannot, by a writ of *mandamus*, compel him to change his conclusions, either of law or fact, in the valuation of the policies or assets of a life insurance company.

Thus, the court treats the problem as one of interpretation, of filling in a gap in the statute, to cover a type of policy which had come into general use since the adoption of the statutory rule for the calculation of the reserve liability.

The chief examples of application of the law are cases in which the commissioner was called upon to apply an administrative standard to a particular transaction or to particular conduct. These cases may be further sub-divided into: 1. Cases involving the application of a technical insurance standard. 2. Cases involving the application of a non-technical standard.

In a number of cases the court viewed the commissioner's problem as the application of actuarial standards, of "solvency" or "soundness" to the financial data of the particular company.[60]

[60] *In re* Hartford Life & Annuity Co. (1882), 63 How. Pr. (N. Y.) 54 (s); People *ex rel.* Long Island Mutual Fire Ins. Co. *v.* Payn (1898), 26 App. Div. 584, 50 N. Y. Supp. 334 (s); People *ex rel.* Hartford Life & Annuity Ins. Co. *v.* Fairman (1883), 12 Abb. N. C. (N. Y.) 252, aff'd (1883) 91 N. Y. 385 (s); Dwelling House Ins. Co. *v.* Wilder (1889), 40 Kan. 561, 20 Pac. 265 (s); State *ex rel.* Insurance Co. *v.* Moore (1884), 42 Oh. St. 103 (s); State *ex rel.* Dakota Hail Assn. *v.* Carey (1891), 2 N. D. 36, 49 N. W. 164 (s).

In the two Vermont cases in which the controversy turned on the method of valuation of policies similar to those involved in *Provident Savings Life Assurance Society* v. *Cutting*,[61] the court held that the commissioner's refusal to apply the company's method of valuation was an abuse of his discretion in applying the statutory standard, "safe and entitled to public confidence." [62] A similar problem of financial safety was involved in the commissioner's decision to require a particular company to deposit securities, rather than a bond, a decision which was upheld by the supreme court of South Carolina,[63] and by the United States Supreme Court.[64]

The fixing of "reasonable" fire insurance rates involves the application of a very vague standard to a large mass of data; if the rates fixed by the commissioner are confiscatory, he has abused his discretion in applying this standard.[65] To determine whether or not certain clauses in an accident policy reduced the indemnity below that stated in the main body of the policy involved a somewhat technical problem in the construction of the policy.[66] Other examples of application of technical standards are given in the note.[67] It is interesting that in two-thirds of these cases involving the application of technical standards the commissioner's decision was sustained by the court.

[61] *Supra*, this section, n. 59.

[62] Bankers' Life Ins. Co. *v.* Howland (1901), 73 Vt. 1, 48 Atl. 435 (o); Bankers' Life Ins. Co. *v.* Ins. Commissioners (1904), 76 Vt. 297, 57 Atl. 239 (o).

[63] State *ex rel.* Phoenix Mutual Life Ins. Co. *v.* McMaster (1913), 94 S. C. 379, 77 S. E. 401.

[64] State *ex rel.* Phoenix Mutual Life Ins. Co. *v.* McMaster (1915), 237 U. S. 63, 35 Sup. Ct. 504.

[65] Aetna Ins. Co. *v.* Lewis (1914), 92 Kan. 1012, 142 Pac. 954 (o); State *ex rel.* Waterworth *v.* Harty (1919), 278 Mo. 685, 213 S. W. 443 (s).

[66] Commercial Accident Ins. Co. *v.* Wells (1923), 156 Minn. 116, 194 N. W. 22 (s).

[67] People *ex rel.* Metropolitan Life Ins. Co. *v.* Hotchkiss (1909), 136 App. Div. 150, 120 N. Y. Supp. 649 (o) (whether tuberculosis hospital for employees of the company was "requisite for its convenient accommodation in the transaction of its business"); People *ex rel.* N. Y. Fire Ins. Exchange *v.* Phillips (1923), 237 N. Y. 167, 142 N. E. 574 (o) (whether rating bureau had discriminated in fixing fire rates); Metropolitan Life Ins. Co. *v.* Insurance Commissioner (1914), 220 Mass. 52, 107 N. E. 397 (o) (computing reserve fund for "extra hazards"); N. Y. Life Ins. Co. *v.* Hardison (1908), 199 Mass. 190, 85 N. E. 410 (approval of policy forms) (s); State *ex rel.* Swearingen *v.* Bond (1924), 96 W. Va. 193, 122 S. E. 539 (s) (whether applicant for agent's license was "trustworthy and competent").

Discrimination and rebating in life insurance involve problems which, though partly technical, are chiefly non-technical in the sense that any lawyer would be competent to form an intelligent judgment.[68] Whether corporation stock was sold "as an inducement to insurance or in connection therewith," [69] whether an assessment policy was deceptively printed to resemble a fixed premium policy,[70] and whether a particular advertising circular is so deceptively worded as to amount to a misrepresentation [71] are similar questions. To determine which newspaper has the "largest general circulation" is more than a mere arithmetical problem because of the qualifying adjective "general." [72] In a few cases the court analyzed the commissioner's decision as the application of a clear and unmistakable rule to undisputed facts which clearly fell within the meaning of the statute.[73] In several of these cases the chief controversy was as to the constitutionality of the statute.

Decisions of the commissioner pursuant to statutes conferring unregulated discretionary power have been attacked in several instances; for example, his power to examine a company "whenever he deems it prudent for the protection of policyholders," [74] or the power to refuse an agent's license "for good cause shown." [75]

[68] The application of this non-technical standard was involved in: Citizens' Life Ins. Co. *v.* Commissioner of Insurance (1901), 128 Mich. 85, 87 N. W. 126 (s); Calvin Phillips & Co. *v.* Fishback (1915), 84 Wash. 124, 146 Pac. 181 (o) (rebating in fire insurance); Cole *v.* State *ex rel.* Harris (1907), 91 Miss. 628, 45 So. 11 (s); Vorys *v.* State *ex rel.* Connell (1902), 67 Oh. St. 15, 65 N. E. 150 (s); Lyman *v.* Ramey (1922), 195 Ky. 223, 242 S. W. 21 (s).

[69] Utah Assn. of Life Underwriters *v.* Mountain States Life Ins. Co. (1921), 58 Utah 579, 200 Pac. 673 (o).

[70] State *ex rel.* Merchants Reserve Life Ins. Co. *v.* Revelle (1914), 260 Mo 112, 168 S. W. 697 (s).

[71] State *ex rel.* Mutual Benefit Life Ins. Co. *v.* McMaster (1912), 92 S. C. 324, 75 S. E. 547 (s).

[72] Holliday *v.* Henderson (1879), 67 Ind. 103 (s); State *ex rel.* Cowles *v.* Schively (1911), 63 Wash. 103, 114 Pac. 901 (s).

[73] State *ex rel.* Equitable Life Assurance Society *v.* Vandiver (1909), 222 Mo. 206, 121 S. W. 45 (s) (statute forbade licensing company which paid larger salary than $50,000); State *ex rel.* People's Fire Ins. Co. *v.* Michel (1910), 125 La. 55, 51 So. 66 (s) (capital not paid up as required by statute); Manchester Fire Ins. Co. *v.* Herriott (1899), 91 Fed. 711 (s) (statute requiring payment of gross premium tax); State *ex rel.* Drake *v.* Doyle (1876), 40 Wis. 175 (o) (statute made it "imperative" duty to revoke license for removal of suit to federal court).

[74] Metropolitan Life Ins. Co. *v.* Clay (1914), 158 Ky. 192, 164 S. W. 968 (o). (See *supra*, § 22, note 119.)

[75] Noble *v.* English (1918), 183 Ia. 393, 167 N. W. 629 (s).

Only one case has been found in which the decision turned upon the interpretation of the facts. In *American Life Insurance Company* v. *Ferguson*,[76] the commissioner decided that certain legal transactions were strings upon the company's assets so that its capital was only simulated. In *Hartford Fire Insurance Company* v. *Raymond*,[77] the commissioner decided that a certain contract made by an insurer with a rating bureau was a combination to fix fire insurance rates; the report leaves one in doubt as to the type of problem involved.

Where the problem has been regarded as one of finding the law, the commissioner's decision has been more frequently overturned than sustained (11–6); where application of the law was involved he has been more frequently sustained than overruled (24–10). The cases above treated as involving interpretation of the law are almost equally divided (5–6). If these statistics are of any value, they indicate which analysis of the controversy is most apt to lead the court to sustain, or to overrule, the commissioner's decision.

Another angle from which to approach the decisions on judicial control of the commissioner's acts is to see whether or not the court regarded itself as limited in its review by the discretionary power conferred upon the commissioner, and likewise to see in how many instances the court found abuse of discretion. The cases may be grouped under three heads: 1. Cases in which the commissioner's discretion was not recognized in the particular case. 2. Cases in which the court recognized that the commissioner had a discretionary power within limits, but also recognized that abuse of discretion amounted to his exceeding his powers. 3. A limited group of cases in which the court treated the commissioner's decision as final unless made from corrupt motives.

1. *Where the commissioner's discretionary power is not recognized.* The cases in which the court failed to recognize the discretionary power of the commissioner are chiefly those in which the problem involved was one of finding the law or interpreting the law.[78] In

[76] (1913), 66 Ore. 417, 134 Pac. 1029 (s).

[77] (1888), 70 Mich. 485, 38 N. W. 474 (s).

[78] State *ex rel.* European Accident Ins. Co. *v.* Tomlinson (1920), 101 Oh. St. 459, 129 N. E. 684 (s); Maxwell *v.* Church (1901), 62 Kan. 487, 63 Pac. 738 (o); Shehan *v.* Tanenbaum Son & Co. (1913), 121 Md. 283, 88 Atl. 146 (s); National Benefit Assn. *v.* Clay (1915), 162 Ky. 409, 172 S. W. 922 (o); Union Pac. Life Ins. Co. *v.* Ferguson (1913), 64 Ore. 395, 129 Pac. 529 (s); Metropolitan Casualty Co. *v.* Basford (1913), 31 S. D. 149, 139 N. W. 795 (s); Bankers' Deposit Guaranty & Surety Co. *v.* Barnes (1909), 81 Kan. 422, 105 Pac. 697 (o);

many of these cases, the court felt so clearly that the problem was a judicial one, that the possibility of treating the commissioner's decision as final without inquiring into the merits, was not mentioned.[79] In other cases, the court distinctly rejected the suggestion that the commissioner had discretionary power to decide the particular question involved.[80] An extreme statement of this position is found in *Guy L. Wallace & Company* v. *Ferguson*,[81] where the commissioner attempted to add to the statute requirements which he deemed beneficial. The court said:

> The commissioner, being a creature of the statute and not a common law officer, must find his authority in the statute establishing his office and prescribing his duties. It is the law of his official being and the boundary of his official activities. . . . Legislation in this state has gone far along the path of paternalism in relation to insurance . . . but the sanction for such action [the commissioner's] rests alone with the legislative power, and cannot be assumed by a mere administrative officer.[82]

In a number of cases, however, the court ignored the discretionary power which should have been conceded to the commissioner in applying an administrative standard, and proceeded to decide

Wallace & Co. *v.* Ferguson (1914), 70 Ore. 306, 140 Pac. 742 (o); People *ex rel.* Traders' Ins. Co. *v.* Van Cleave (1899), 183 Ill. 330, 55 N. E. 698 (o); State *ex rel.* North Coast Fire Ins. Co. *v.* Schively (1912), 68 Wash. 148, 122 Pac. 1020 (s); State *ex rel.* Leach *v.* Fishback (1914), 79 Wash. 290, 140 Pac. 387 (s); Metropolitan Life Ins. Co. *v.* McNall (1897), 81 Fed. 888 (o); Clay *v.* Employers' Indemnity Co. (1914), 157 Ky. 232, 162 S. W. 1122 (o); Northwestern Title Ins. Co. *v.* Fishback (1920), 110 Wash. 350, 188 Pac. 469 (o); Equitable Life Assurance Society *v.* Host (1905), 124 Wis. 657, 102 N. W. 579 (o); State *ex rel.* U. S. Fidelity & Guaranty Co. *v.* Harty (1919), 276 Mo. 583, 208 S. W. Kansas Home Ins. Co. *v.* Wilder (1890), 43 Kan. 731, 23 Pac. 1061 (s); Liverpool, etc., Ins. Co. *v.* Clunie (1898), 88 Fed. 160 (o); Travelers' Ins. Co. *v.* Kelsey (1909), 134 App. Div. 89, 118 N. Y. Supp. 873 (o).

[79] This occurred in State *ex rel.* European Accident Ins. Co. *v.* Tomlinson; Maxwell *v.* Church; Shehan *v.* I. Tanenbaum Son & Co.; Nat'l Benefit Assn. *v.* Clay; Union Pac. L. I. Co. *v.* Ferguson; Metropolitan Casualty Co. *v.* Basford; Bankers' Deposit Guaranty & Surety Co. *v.* Barnes; State *ex rel.* North Coast Fire Ins. Co. *v.* Schively; Metropolitan L. I. Co. *v.* McNall; Clay *v.* Employers' Indemnity Co.; Northwestern Title Ins. Co. *v.* Fishback; Equitable Life Assurance Society *v.* Host; State *ex rel.* U. S. Fidelity & Guaranty Co. *v.* Harty, all *supra*, last note.

[80] Wallace & Co. *v.* Ferguson; People *ex rel.* Traders' Fire Ins. Co. *v.* Van Cleave; People *ex rel.* Gosling *v.* Potts; Kansas Home Ins. Co. *v.* Wilder; Bankers' Deposit Guaranty & Surety Co. *v.* Barnes; Liverpool, etc. Ins. Co. *v.* Clunie; Travelers' Ins. Co. *v.* Kelsey, *supra*, n. 78.

[81] *Supra*, n. 78.

[82] 70 Ore. 306, at pp. 310, 311.

the controversy on its merits.[83] Conspicuous among these was the Vermont case,[84] in which the court proceeded to hear expert testimony and determine for itself the safety of the proposed method of calculating the reserve liability. In other cases where the application of an explicit statutory rule was involved, the problem was so simple that there was no occasion to concede discretionary power to the commissioner.[85]

A narrow and strict view of the doctrine of separation of powers and of the principle that legislative power cannot be delegated has been responsible for some of these holdings that the commissioner acts "ministerially."[86] The Massachusetts case just cited, in which the court, to avoid the objection that legislative power had been delegated, held that the commissioner acted merely ministerially in disapproving forms of policies, is in striking contrast with the views of the same court in *Provident Savings Life Assurance Society* v. *Cutting*,[87] where apparently the issue of constitutionality was not considered. Of the cases above cited, in which the court failed or refused to attach any consequence to, or to recognize, the discretionary power of the commissioner in respect to the particular controversy, twenty are judicial decisions overturning the administrative decision, while thirteen sustain it. A cynical realist might conclude that the judges first make up their minds to agree or disagree with the commissioner, and, if the latter, they ignore his discretionary power. However, in most of these cases the judges could have saved themselves a good deal of work by conceding

[83] State *ex rel.* Mutual Benefit Life Ins. Co. *v.* McMaster (1912), 92 S. C. 324, 75 S. E. 547 (s); Hartford Fire Ins. Co. *v.* Raymond (1888), 70 Mich. 485, 38 N. W. 474 (s); Bankers' Life Ins. Co. *v.* Howland (1901), 73 Vt. 1, 48 Atl. 435 (o); Bankers' Life Ins. Co. *v.* Ins. Commissioners (1904), 76 Vt. 297, 57 Atl. 239 (o); Calvin Phillips & Co. *v.* Fishback (1915), 84 Wash. 124, 146 Pac. 181 (o); Commercial Accident Ins. Co. *v.* Wells (1923), 156 Minn. 116, 194 N. W. 22 (s); New York Life Ins. Co. *v.* Hardison (1908), 199 Mass. 190, 85 N. E. 410 (o); Lyman *v.* Ramey (1922), 195 Ky. 223, 242 S. W. 21 (s); State *ex rel.* Merchants Reserve Life Ins. Co. *v.* Revelle (1914), 260 Mo. 112, 168 S. W. 697 (s); Metropolitan Life Ins. Co. *v.* Insurance Commissioner (1914), 220 Mass. 52, 107 N. E. 397.

[84] Bankers' Life Insurance Co. *v.* Ins. Commissioners, last note.

[85] State *ex rel.* Drake *v.* Doyle (1876), 40 Wis. 175 (o); State *ex rel.* Equitable Life Assurance Society *v.* Vandiver (1909), 222 Mo. 206, 121 S. W. 45 (s); State *ex rel.* People's Fire Ins. Co. *v.* Michel (1910), 125 La. 55, 51 So. 66 (s).

[86] Hartford Fire Ins. Co. *v.* Raymond (1888), 70 Mich. 485, 38 N. W. 774; New York Life Ins. Co. *v.* Hardison (1908), 199 Mass. 190, 85 N. E. 410.

[87] *Supra*, n. 59, and excerpts quoted, *supra*, p. 496.

some measure of conclusiveness to the administrative decision. The present writer's conclusion is that a litigant stands a far better chance of upsetting the commissioner's decision if he can persuade the court to analyze it as one in which the exercise of discretionary power was not involved.

2. *Where the court recognizes a discretionary power which protects against errors but not abuses.* The reported cases in which the court recognized that the commissioner exercised or possessed a discretionary power in deciding the particular question in controversy, are slightly fewer in number than those in which such power was not recognized. This is not to be taken as indicating that by the weight of authority the courts concede to the commissioner no discretionary power. On the contrary, the decided weight of authority is that the commissioner does have a discretionary power in performing certain functions, in deciding certain types of problems arising under certain types of statutes. The preponderance of reported cases in which no such power was recognized is explained when one considers that in most of these cases the problem was one of finding or interpreting the law, or of applying a clear statutory rule. Naturally persons adversely affected by the commissioner's decisions have more frequently attacked them where the chances of overturning them were greatest.

In some of the cases in which the court declared that the commissioner had properly exercised his discretionary power, the court investigated the merits of the controversy no further than to satisfy itself that there was no abuse of discretion in the particular case, and declined to pass upon the merits of the controversy — that is, declined to review mere administrative errors. These cases, it is submitted, represent the most desirable scope of judicial review of the commissioner's decisions. In most of these cases the problem involved was the application of a statutory standard.[88] In one case the problem was closely akin to this,[89] while in another the problem was the validity of a regulation made pursuant to a very broad

[88] Holliday *v.* Henderson (1879), 67 Ind. 103; State *ex rel.* Cowles *v.* Schively (1911), 63 Wash. 103, 114 Pac. 901; State *ex rel.* Waterworth *v.* Harty (1919), 278 Mo. 685, 213 S. W. 443; *In re* Hartford Life & Annuity Ins. Co. (1882), 63 How. Pr. (N. Y.) 54; State *ex rel.* Swearingen *v.* Bond (1924) 96 W. Va. 193, 122 S. E. 539, 543; State *ex rel.* Phoenix Mutual Life Ins. Co. *v.* McMaster (1915), 237 U. S. 63, 35 Sup. Ct. 504; State *ex rel.* Sims *v.* McMaster (1913), 95 S. C. 476, 79 S. E. 405.

[89] Provident Savings Life Assur. Soc. *v.* Cutting (1902), 181 Mass. 261, 63 N. E. 433.

statutory power.[90] These cases bear out the contention that the indefiniteness of the statutory language is a criterion of discretionary administrative power.[91] Even stronger are the cases in which the court upheld the commissioner's decision on the ground that he had stayed within the limits of his discretionary power, though the court intimated that it disagreed with his conclusions on the merits.[92] These cases represent judicial abdication at its best.

A few quotations from the opinions in these cases will serve. The excerpt quoted from *Provident Savings Life Assurance Society* v. *Cutting*,[93] is one illustration of an extreme judicial attitude. A more moderate statement is:

> It appears by the affidavits presented by the superintendent that he has examined the statement which the relator desires to have him file, and that he considers it unsatisfactory under the statute. . . . The affidavits (filed in this proceeding) do not merely state this conclusion, but they give in detail, the facts on which the conclusion is based. . . . It need hardly be said that this court cannot review by *mandamus* a matter put in the quasi-judicial discretion of the superintendent. . . . The superintendent is not a mere ministerial officer. . . . It is unnecessary to discuss the merits of the (relator's) safety fund scheme, for that is a matter, if this be treated as a new application, solely within the discretion of the superintendent.[94]

Here the administrative official presented all the data of his decision to the court and the court examined no further than to ascertain if he had abused his discretion. In *State* ex rel. *Cole* v. *Harris*,[95] the court said:

> The commissioner acted judicially in granting the license originally. . . . He was . . . deciding upon the law applicable to these features, and determining, as a judge would determine, whether they violated any of the provisions of our insurance statute.

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[90] Western Life and Accident Co. *v.* State Insurance Board (1917), 101 Neb. 152, 162 N. W. 530.

[91] See *supra*, §§ 12, 13. The particular language in each case may be learned by consulting references to the case in other parts of the book, as shown by the table of cases.

[92] Cole *v.* State *ex rel.* Harris (1907), 91 Miss. 628, 45 So. 11; People *ex rel.* Long Island Mutual Fire Ins. Corp. *v.* Payn (1898), 26 App. Div. 584, 50 N. Y. Supp. 334.

[93] *Supra*, this section, n. 59 and p. 496.

[94] *In re* Hartford Life & Annuity Ins. Co. (1882), 63 How. Pr. (N. Y.), 54, at pp. 56, 61.

[95] Cole *v.* State *ex rel.* Harris, *supra*, n. 92, at p. 649.

In an Oregon case, the language sounds strangely different from that which was quoted above from another [96] Oregon opinion:

> The insurance commissioner is given a wide discretion in safeguarding the interests of the present and prospective stockholders and policyholders of the company. Common observations of a few cases occurring in Oregon as to the possibilities of such transactions evidence the wisdom of this provision. . . . [97]

The cases are distinguishable, on the ground that no discretion was recognized in adding to the statutory requirements, while discretion was recognized in applying them. However, there is no telling to what extent the decisions were affected by the emotional judgments of the two different judges who wrote the opinions, in the same court and in the same year, toward the policy of "paternalism" expressed in the insurance legislation.

An extreme example of the interpretation of the scope of the commissioner's discretionary power is found in an Iowa case [98] involving the validity of a refusal to license a non-resident insurance agent, the statutory ground being "for good cause shown." The court said:

> If this condition [residence of the agent within the state] were a lawful condition, and one which the state might have imposed, it follows that it is a good condition and one which the legislature has authorized the commissioner to impose.[99]

In all of the cases just cited,[100] the court sustained the commissioner's decision, and in all of them the reported case discloses, so far as one can tell from reading it, a sufficient summary of the data ("facts") to enable the court to pass an intelligent judgment upon the question of "abuse of discretion."

In another group of cases in which the court expressly recognized that the commissioner had a discretionary power in deciding the issue in controversy, the court reviewed the issue fully and agreed with the commissioner on the merits.[101] In these examples the deference paid to the commissioner's decision is, or may be, mere lip service; the court has no clear notion, even in theory, of the distinction between "error" and "abuse of discretion."

[96] See *supra*, n. 82, and p. 500.

[97] American Life Ins. Co. *v.* Ferguson (1913), 66 Ore. 417, 425, 134 Pac. 1029.

[98] Noble *v.* English (1918), 183 Ia. 893, 167 N. W. 629.

[99] 183 Ia. 893, at p. 899.

[100] *Supra*, this section, notes 88–99.

[101] State *ex rel.* Bankers' Union *v.* Searle (1905), 74 Neb. 486, 105 N. W. 284; Vorys *v.* State *ex rel.* Connell (1902), 67 Oh. St. 15, 65 N. E. 150.

It is difficult, of course, to draw the line between reviewing the facts for administrative error and reviewing it for abuse of discretion. In *People* ex rel. *Hartford Life and Annuity Company* v. *Fairman*,[102] the court declined to go into the merits of the commissioner's decision on one branch of the controversy, but reviewed very fully the facts as to the soundness of the company's investments, came to the conclusion that some of them were unsafe, and sustained the superintendent's action on this ground. What scope of judicial review does such a case represent? Again, in *Vorys* v. *State* ex rel. *Connell*, [103] the court states very clearly the doctrine that the superintendent, in refusing an agent's license, exercised a discretionary power and that his decision could not be attacked save for corruption or "abuse of discretion." Yet the court discusses the facts, finds the applicant had violated the insurance statutes in two particulars, and concludes:

> His [the superintendent's] refusal being in accordance with the manifest spirit of the statute, and in furtherance of its obvious purpose, was within his discretion, if not within his imperative duty.[104]

Cases in which the court found "abuse of discretion" are difficult to distinguish from cases in which the court failed to recognize that the commissioner had any discretionary power. Thus, in *Liverpool, etc. Insurance Company* v. *Clunie*,[105] the court conceded that under some circumstances the commissioner had discretion in revoking licenses, but held that he exceeded his power in revoking on the ground that the companies had combined to fix fire rates. In a small group of cases it seems safe to say that the court placed a decision overturning the commissioner's action on the ground that he had abused his discretion.[106] One of the clearest formulations of this view is found in *Utah Association of Life Underwriters* v. *Mountain States Life Insurance Company*, wherein the court said:

[102] (1883), 12 Abb. N. C. (N. Y.) 252; s. c. *supra*, n. 94.

[103] *Supra*, n. 101.

[104] 67 Oh. St. 15, at pp. 20, 21.

[105] *Supra*, n. 78.

[106] Mutual Life Ins. Co. *v.* Prewitt (1907), 127 Ky. 399, 105 S. W. 463; Metropolitan Life Ins. Co. *v.* Clay (1914), 158 Ky. 192, 164 S. W. 968; American Surety Co. *v.* Fishback (1917), 95 Wash. 124, 163 Pac. 488; Aetna Ins. Co. *v.* Lewis (1914), 92 Kan. 1012, 142 Pac. 954; People *ex rel.* Metropolitan Life Ins. Co. *v.* Hotchkiss (1909), 136 App. Div. 150, 120 N. Y. Supp. 649; People *ex rel.* N. Y. Fire Ins. Exchange *v.* Phillips (1923), 237 N. Y. 167, 142 N. E. 574; Utah Assn. of Life Underwriters *v.* Mountain States Life Ins. Co. (1921), 58 Utah 579, 200 Pac. 673.

While it is true that in proceedings of this character, although the power be conferred under a special statute, yet this court will not review the evidence, nor mere errors of judgment of the commissioner, where, however, as here, it is contended that the commissioner has exceeded his authority in granting or renewing a license to carry on the business of life insurance in this state by refusing to follow the provisions of our statute, we are required to examine into the acts of the commissioner to the extent at least of determining whether his acts in granting the license are supported by the provisions of the statute or are contrary thereto. If he has granted a license contrary to the provisions of the statute under which he is empowered to act and must act, then he has exceeded the power or jurisdiction with which he is clothed by statute, and the license should be revoked. That is the precise question that is involved here.[107]

The phrase "exceeded his authority" clearly refers to "abuse of discretion"; the latter phrase is preferable as less likely to cause confusion in a case where the administrative decision, while vulnerable on direct attack, would probably be conclusive on collateral attack — for example, in an action by the licensee to recover premiums.

In two of these cases the commissioner erroneously decided that he had no discretion; the court found in substance, that this was an abuse of discretion and overturned his decision.[108] In a recent Wyoming case, the petitioner alleged that the ground of revocation alleged by the commissioner (that petitioner had sold corporation stock with insurance) did not exist.[109] The commissioner was so ill advised as to demur to this allegation. The court sustained the demurrer, since the allegation that the ground of revocation did not exist was deemed to be admitted in passing on the demurrer, and the commissioner, as the court well said, had no power to revoke an agent's license arbitrarily or capriciously.

3. *Where the commissioner's decision is conclusive except for corruption or "bad faith."* Finally, we find a group of cases, happily not large, in which the court, in sustaining the commissioner's decision, lays down the rule that the decision is final, in the absence of "corruption," "bad faith," or "wilful disregard of duty," [110] or

[107] 58 Utah 579, at p. 583.

[108] American Surety Co. *v.* Fishback, *supra*, n. 106; People *ex rel.* Metropolitan Life Ins. Co. *v.* Hotchkiss, *supra*, n. 106.

[109] State *ex rel.* Coddington *v.* Loucks (1924), 30 Wyo. 485, 222 Pac. 37.

[110] State *ex rel.* Dakota Hail Assn. *v.* Cary (1891), 2 N. D. 36, 49 N. W. 164; Dwelling House Ins. Co. *v.* Wilder (1889), 40 Kan. 561, 20 Pac. 265; American Casualty Co. *v.* Fyler (1891), 60 Conn. 448, 22 Atl. 494; State *ex rel.* Foreign Ins. Cos. *v.* Benton (1889), 25 Neb. 834, 41 N. W. 793; State, for use, etc. *v.* Thomas (1890), 88 Tenn. 491, 125 S. W. 1034.

concedes to him an arbitrary discretion and refuses to go into the grounds of his decision [111] or, while investigating the grounds of his decision and finding them amply sufficient, declares that the decision is conclusive "in the absence of fraud, bad faith or gross abuse of discretion." [112] In none of these cases except the last does the ground of the commissioner's decision clearly appear.

The difference in attitude between cases of this type and those in which the court inquires into the merits of the controversy sufficiently to ascertain that there was no abuse of discretion, is illustrated by the case of *State* ex rel. *Phoenix Insurance Company* v. *McMaster*. The statute authorized the commissioner to require a foreign company to deposit "an approved bond or approved securities, in the discretion of the commissioner." [113] The commissioner refused to license relator unless it deposited securities, on the ground that it did not have one fourth of its legal reserve on South Carolina policies invested in securities named in the statute. Another company, which had one fourth invested in real estate loans in South Carolina, was licensed on giving a bond. The supreme court of South Carolina contented itself with saying:

> It will thus be seen that the statute contemplates that the insurance commissioner must be satisfied by proper evidence, *in each and every case*, that the applicant possesses the necessary qualifications for doing business in this state, and that in each case he must determine whether the public interests would be best subserved by requiring the particular applicant to deposit an approved bond or approved securities. By this construction alone can the discretionary powers conferred upon the commissioner be exercised and made effective. Therefore, the requirement that one applicant should deposit an approved bond and another applicant approved securities is not a denial of the equal protection of the law.[114]

No attempt was made to explain this apparent discrimination against the relator. When the case reached the United States Supreme Court, however, that court was more inquisitive. It found that the commissioner had explained the apparent discrimination by saying, on the witness stand, that a company which had considerable investments in South Carolina realty loans would be more easily amenable to judicial execution of a judgment against it, and manifested an intention to remain in the state permanently.

[111] State *ex rel.* Phoenix Mutual Life Ins. Co. *v.* McMaster (1913), 94 S. C. 379, 77 S. E. 401 (but see same case 237 U. S. 63, 35 Sup. Ct. 504).

[112] State *ex rel.* Ins. Co. *v.* Moore (1884), 42 Oh. St. 103.

[113] S. C. L., 1910, p. 772.

[114] *Supra*, n. 111. The excerpt quoted is found in 94 S. C. 379, at p. 381.

An extreme statement of the conclusiveness of the commissioner's decision is found in *State* ex rel. *Dakota Hail Association* v. *Carey*.[115] After reciting the statutes conferring the usual powers to license "if satisfied," and so forth, the court says:

> From these provisions of the statute it conclusively appears that the state, through its legislature, has seen fit to invest the commissioner of insurance with an absolute power and discretion with respect to granting insurance companies permits to do business within the state, and also with respect to revoking such permit after it has been once granted.[116]

How badly the court was misled by the statutory words denoting mental operation is shown by the following excerpt:

> With respect to granting the permit to do business, it does not suffice that a company is in fact solvent and has strictly complied with all legal prerequisites to the transaction of business. It can secure the permit only when the commissioner "is satisfied with the capital securities and investments," etc. Section 25, *Id.* Again, where a company has made the prescribed annual statement of its affairs and resources in good faith, and with entire truthfulness in fact, the commissioner may revoke any certificate of authority to do business given to such company if, after an examination conducted as he sees fit, or without such examination, the commissioner "has reason to believe that such annual statement . . . is false." Section 28, *Id.* The same absolute right to revoke a certificate of authority is given the commissioner when the examination has been made by a representative of the commissioner, if from the report made it shall appear to the commissioner that the affairs of any company not incorporated by the laws of this territory are in an unsound condition. Section 33, *Id.* Whether such unrestricted power and discretion . . . is or is not wisely vested in the insurance commissioner, are questions which address themselves to the legislature.[117]

Fortunately, these decisions do not represent the present-day law. They were all, save one, decided prior to 1892, and represent a period in American juristic thought when it was conceived that the foreign corporation was subject to arbitrary and capricious restrictions by the state legislature. This view no longer prevails as it once did. Moreover, these minority decisions are but weak authorities in their own states. Thus, in the Tennessee case,[118] the court was obviously anxious to find that the commissioner's action was "judicial" and vulnerable only in case of corruption, in order to bring him within the rule as to non-liability of judicial officials in actions for damages by one injured by the decision. The Kansas

[115] See *supra*, n. 110.
[116] 2 N. D. 36, at p. 44.
[117] 2 N. D. 36, at pp. 44, 45.
[118] State, for use, etc. *v.* Thomas, *supra*, n. 110.

case [119] was promptly abrogated by an amendment to the statute.[120] The Nebraska case has in effect been repudiated by later Nebraska decisions.[121] The South Carolina doctrine of judicial review is likewise more moderate.[122] Thus, only North Dakota and Connecticut, at most, are still to be ranged in this minority group.

In appraising these decisions on judicial review, it should be constantly borne in mind that the statutes frequently do not throw any procedural safeguards about the commissioner's official acts,[123] and that his decisions are often reached informally. Until these defects, if such they are, are remedied, it would be better for the court to err on the side of thoroughness rather than superficiality in reviewing the commissioner's decisions on direct attack.

The answers to the questionnaire show that very few judicial proceedings are brought to attack the commissioner's decisions, and that the commissioners do not regard judicial control as an embarrassing restriction upon their powers. Thus, they were asked:

> In how many instances, if at all, during the past year, have your rulings or decisions been overturned by a court? . . . Sustained?

Of the twenty-nine answers obtained, none indicated a decision overturning the departmental ruling, while six reported one decision (in each state) sustaining the administrative action.[124] The remaining twenty-three answered "none" to both parts of the question.[125]

The following question was designed to elicit the administrative attitude toward judicial control:

> Do you think that the power of control exercised by the courts of your state over your official acts interferes with the efficient performance of your duties or exercise of your powers?

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[119] Dwelling House Ins. Co. *v.* Wilder, *supra*, n. 110.

[120] See Kansas Home Ins. Co. *v.* Wilder (1890), 43 Kan. 731, 23 Pac. 1061. The court was quite willing to interpret the new statute as altering the doctrine of its former decision.

[121] See Western Life & Accident Co. *v.* State Insurance Board, *supra*, n. 90, and State *ex rel.* Bankers' Union *v.* Searle, *supra*, n. 101.

[122] See State *ex rel.* Sims *v.* McMaster, *supra*, n. 88; State *ex rel.* Mutual Benefit Life Ins. Co. *v.* McMaster, *supra*, n. 83.

[123] See *supra*, § 25, Hearing.

[124] Ariz., Ark., Mont., Neb., Ohio, Okla.

[125] Colo., Conn., D. C., Fla., Idaho, Ia., Kan., Md., Mass., Mich., Minn., Nev., N. H., N. C., N. D., Ore., Pa., S. D., Utah, Va., Wash., W. Va., Wis.

Twenty-eight departments answered "no." [126] The commissioner of Oregon, where the decisions have not settled the scope of the commissioner's powers,[127] replied "very little." The Pennsylvania commissioner, Mr. Donaldson, probably voiced the sentiments of many others when he answered:

> I think a court the most irrelevant place in the world for an insurance issue to be heard. And, more than one judge has agreed with me. We go to extremes to avoid litigation, and we always will avoid it if we can.

Probably by "insurance issue" he meant those technical questions concerning which, as shown above, the courts have been willing to concede the commissioner a very considerable latitude of discretionary power.

[126] Ariz., Ark., Colo., D. C., Fla., Idaho, Ia., Kan., Me., Mass., Mich., Minn., Mont., Neb., Nev., N. H., N. M., N. C., N. D., Ohio, Okla., S. D., Utah, Vt., Va., Wash., W. Va., Wis.

[127] *Supra*, this section, pp. 500, 504.

APPENDICES

APPENDIX A

HISTORY OF ADMINISTRATIVE CONTROL OF THE INSURANCE BUSINESS

§ 38. Regulation of the insurance business in medieval Europe, 513.

§ 39. Insurance regulation in England, 515.

§ 40. Beginnings of insurance regulation in the United States: Special incorporation statutes, 519.

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§ 42. In the United States (continued): Development of independent administrative agencies, 529.

§38. *Regulation of the insurance business in medieval Europe.* A full account of the history of insurance regulation in Continental Europe would be beyond the scope of the present volume. The following brief sketch is based upon secondary authorities. Nevertheless, it may serve to dispel the myth that the present system of strict regulation represents a decadence from some golden age in which all insurers were honest, wise and free.

Almost from the beginning of insurance the insurer has been a marked man. It is true that among ancient societies we find organizations and arrangements which were designed to fulfill the same function which modern insurance does. Yet the growth of insurance as an economic device built on scientific principles was retarded by social limitations which did not readily yield to scientific theories. One was the absence of a system of exchange or currency — for insurance can flourish only where the amount of a loss can readily be translated into a common standard of value. Another was the circumstance that the need for some device for spreading the losses due to fortuitous events existed long before the possibility of such a device was perceived.[1] Again, the religious beliefs of earlier times made any attempt to alleviate the hardship of providential misfortunes seem a presumptuous interference with the inscrutable plans of the Deity.[2] Finally, the Church made war on usury, and insurance, because it involved the payment of a larger sum in return for a much smaller one, was undiscriminatingly classed as usurious. A papal decree of

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[1] Alfred Manes, *Versicherungswesen* (Leipzig; 3te aufl.; 1922), I, 21.

[2] *Ibid.*, 22. Apparently William Penn (1705), had religious scruples against insuring ships. See *A History of the Insurance Company of North America* (Philadelphia; 1885), p. 14.

1227 is said to have prohibited bottomry loans,[3] the form which early insurance transactions assumed,[4] and it was doubtless to evade the usury ban that insurance transactions were made to assume the form of a fictitious sale "by regarding the insured property as sold to the insurer, subject to a resolutive condition in the event of its safe arrival." [5] On the other hand, the use of insurance became more widespread with the disappearance of these limitations and the progress in ship-building, fireproof construction and personal hygiene and sanitation, which tended to reduce the risks in marine, fire and life insurance, respectively, to a point where they could be economically spread.[6]

Insurance in the modern sense may be said to date from the rise of a class of professional entrepreneurs whose rôle it was to intermediate between the risk-takers and risk-bearers through the medium of individual contracts. It is generally conceded that, in this sense, insurance had its rise in the cities of northern Italy about 1300.[7] The earliest extant policy of insurance comes from the archives of Genoa and is assigned the date 1347.[8] The form which the brokers of Genoa, Florence and Pisa evolved in the fourteenth century has in substance shaped the policies of our modern law.[9]

The earliest legislation on the subject of insurance which has been found is Genoese, and dates from the last quarter of the fourteenth century.[10] It was designed to prevent the making of insurance on foreign ships,[11] which was frequently used as a gambling device. Apparently the earliest statute for the taxation of insurance was adopted in Genoa in

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[3] Hoffman, *Insurance Science and Economics* (1911; The Spectator Co., New York), p. 143, where it is said that this decree is "the first authentic instance of government interference and regulation of insurance contracts." This work, by a former president of the American Statistical Association and a Fellow of the Royal Statistical Society, is not carefully documented and gives but slight evidence of critical scrutiny of historical materials.

[4] Holdsworth, *The Early History of the Contract of Insurance* (1917), 17 *Columbia Law Rev.* 85, 89.

[5] *Ibid.*

[6] Manes, *op. cit.*, I, 21.

[7] Bensa, *Histoire du Contrat d'Assurance au Moyen Age* (translated from the Italian by Jules Valery, 1897; Ancienne Libraire Thorin et Fils; Paris) 18–24; Holdsworth, *op. cit.*, p. 85; Vance, *The Early History of Insurance Law* (1908), 8 *Columbia Law Rev.* 1, 6. In Richards, *Insurance* (3rd ed., 1914), p. 12, n. 2, and Hoffman, *op. cit.*, p. 145, it is stated, without citation of authority, that a Chamber of Insurances was established at Bruges as early as 1310; but this, as Professor Vance says, can hardly be correct. (8 *Columbia Law Rev.* 6, n. 21.) Manes refers to the traditional account of the Bruges experiment, without comment, *op. cit.*, I, 25.

[8] Manes, *op. cit.*, I, 28; Holdsworth, *op. cit.*, 88; Bensa, *op. cit.*, 20; Vance, *op. cit.*, 7, where it is set out in full. It is in the form of a fictitious loan.

[9] Bensa, *op. cit.*, 33; Holdsworth, *op. cit.*, 91.

[10] Bensa, *op. cit.*, 52; Holdsworth, *op. cit.*, 93. An ordinance of insurance is said to have been decreed by King Ferdinand of Portugal in 1367 (Hoffman, *op. cit.*, 145), but it is not accepted by the other writers.

[11] Holdsworth, *op. cit.*, 93.

1401.[12] Other enactments prescribed the conditions and form of the contract.[13]

The early Italian legislation was fragmentary. The first comprehensive code of insurance law was the Barcelona ordinance of 1435, which attained great fame and influence through its being circulated with the famous Consolato del Mare.[14] It contained, among others, severe restrictions upon insurance brokers. Every broker who participated in the making of a contract of insurance in violation of the statute was subjected to a fine. The law fixed the brokerage fee at two sous per 100 livres; a penalty was prescribed for charging a higher fee.[15]

Probably the earliest instance of the creation of a special administrative agency for the regulation of the insurance business is to be found in the Florentine statute of 1523. Commissioners appointed by the city magistrates were invested with extensive powers over insurance transactions. Thus, clauses which were not in the standard form of policy — "the general and universal policy at present in use" — could be inserted in policies only with the consent of five of these insurance commissioners. The commissioners were authorized to appoint a broker to write out all marine policies, and it was made unlawful to enter into insurance contracts unless they were so written.[16] This provision is reminiscent of the Candler monopoly in England. In addition, the commissioners were empowered even to fix the rates of premium, "provided they conform themselves to equitable regulations in the matter." [17] Modern rate-fixing statutes have added but little to this formula in the way of exactness.

Thus the regulation of even the details of the insurance business is no innovation of the nineteenth century. One noticeable omission in the early legislation is the absence of any provisions requiring the insurers to maintain reserve funds to meet policy claims as they fall due. Perhaps the scarcity of safe investments yielding a conservative rate of return made any such regulations impracticable. And probably the use of insurance (chiefly marine) was confined to shrewd merchants who were able to judge for themselves as to the financial responsibility of insurers.

§ 39. *Insurance regulation in England.* In England, too, attempts at administrative regulation came within the same century which saw the introduction of the business of insurance into England. That occurred in the early sixteenth century.[1] The Privy Council exercised an amorphous

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[12] Bensa, *op. cit.*, 53; Holdsworth, *op. cit.*, 94.

[13] Holdsworth, *op. cit.*, 93, 94.

[14] Holdsworth, *op. cit.*, 94.

[15] Bensa, *op. cit.*, 62.

[16] Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (1876; London; Macmillan & Co.), 27.

[17] Martin, *op. cit.*, p. 28.

[1] Vance, *The Early History of Insurance Law* (1908), 8 *Columbia Law Rev.* 1, 11; Holdsworth, *The Early History of the Contract of Insurance* (1917), 17 *Columbia Law Rev.* 96. While it is sometimes said that insurance was introduced into England in the fourteenth century, the evidence to support this conclusion is very unsatisfactory, as Vance points out.

and spasmodic control over the insurance business in the last quarter of the same century. About 1574 one Richard Candler was given by royal grant the exclusive privilege of making and registering insurance policies, and the establishment of an "Office of Assurances" followed.[2] Thus the favorite tax-gathering device of the period, the monopoly, was pressed into service to do the business of regulation. The brokers and notaries protested against this monopoly.[3] To meet these objections the Privy Council in 1574 directed:

> . . . that the Lord Mayor by conference with suche as be moste skilfull in those cases, shold certifie my Lordes what lawes, orders and customes are used in those matters of assurance, to thend they may be put in ure [use?[accordinglie.[4]

The Lord Mayor was slow to act, for we find the council in the following year writing him to certify what had been done, and further:

> . . . to rate the prices for making and registringe of pollicies of assurances, wherein he shold do well to enquire and followe the prices accustomablie paid in other count[r]ies adjoyninge.[5]

Later in the same year the Lord Mayor received another gentle reminder from the council,[6] and in July, 1576, the council commanded him to report his progress, and to send in without delay "the perfect note of the rates that hath been set down for the registringe of assurances. . . ."[7] A few days later the council directed his Lordship to publish his schedule of rates at some exchange time, when the merchants should be most gathered together.[8]

But apparently the Lord Mayor never published or even prepared a schedule of insurance rates, and the Privy Council abandoned the attempt to fix rates. Its project for an insurance code to settle insurance disputes was likewise abandoned. For a while the council entertained petitions for the settlement of insurance claims and referred them to mixed commissions, consisting of the Master of the Rolls, a justice of the Common Pleas, Doctors of the Civil Law, and foreign merchants,[9] or to four Doctors of the Civil Law.[10] The petitions were chiefly from foreigners [11] and in 1593 the council, on complaint of the foreign merchants that the Mayor and aldermen had appointed six or seven persons as arbitrators in insurance cases, without choosing any foreigners among the number — "whereas by

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[2] Holdsworth, *op. cit.*, 99, 100.

[3] *Ibid.*, 99.

[4] Dasent, John Roche, *Acts of the Privy Council of England*, New Series (1892; London), viii, 321. This is the first reference to insurance in this series of reports.

[5] *Ibid.*, viii, 397.

[6] *Ibid.*, ix, 43.

[7] *Ibid.*, ix, 163.

[8] *Ibid.*, ix, 177 (July 30, 1576).

[9] *Ibid.*, 168 (July 19, 1576); see also ix, 230.

[10] *Ibid.*, xiv, 214.

[11] *Ibid.*, x, 232 and xi, 360; petition of Ipolito Bujamonte or Hippolito Beamonti; xiv, 214, controversy between Henry Jollyffe and Lucas Baudett.

the course of justice some strangers are ever permitted to the decision and triall of all other their [the merchants'] controversies" — ordered the Mayor and aldermen to add as arbitrators "three strangers of foreign nations," "marchants known to be of worthe, judgment and integritie." [12] The incident is reminiscent of the efforts of American insurance companies to have their cases tried in the Federal courts.

However, the council's attempts to regulate the settlement of insurance controversies were unsuccessful because the litigants refused to obey the orders of the arbitrators, and in 1601 the council petitioned the Chief Justice of the Queen's Bench to devise some way of settling insurance controversies without a law suit.[13] The common law judges were equally incompetent to settle insurance controversies, with or without a law suit, until the time of Lord Mansfield,[14] and the special commission for the trial and adjustment of insurance disputes which was created by the Act of Parliament of 1601,[15] though strengthened some sixty years later,[16] proved ineffectual because the common law courts interpreted strictly the scope of the commission's jurisdiction and refused to treat a judgment of the commissioners as a bar to a subsequent action at law.[17]

Whether because the regulation of insurance had become associated with the odious royal prerogative of the Tudor period, or because the association known as Lloyd's exercised a professional extra-legal control over the insurance business which made legal control unnecessary, attempts at administrative regulation of the insurance business practically ceased after the abortive efforts of the Privy Council in Queen Elizabeth's time. Down to 1870 England had no restrictions upon the way in which an insurer should conduct his business, apart from the statutes against wagering and similar statutes governing judicial controversies.[18] In 1870

[12] Dasent, John Roche, *op. cit.*, xxiv, 313 (June 17, 1593).

[13] *Ibid.*, xxxi, 252 (March 29, 1601).

[14] Vance, *op. cit.*, 16; Holdsworth, *op. cit.*, 104, 108.

[15] 42 Eliz., Ch. 12; Vance, *op. cit.*, 14; Holdsworth, *op. cit.*, 102.

[16] 13, 14 Charles II, Ch. 23.

[17] Holdsworth, *op. cit.*, p. 104.

[18] The Joint Stock Companies Act, of 1844 (7 & 8 Vict., Ch. 110), it is true, was expressly made applicable to insurance companies (§ 2), but it contained no provisions peculiarly applicable to them, and the administrative powers conferred on the Registrar were chiefly clerical. Hence, while it may have been designed to correct the evils of unsound enterprises (Pannier, *De l'Organization et de la Surveillance des Sociétés d'Assurance sur la Vie*, p. 76), it contains no regulatory provisions comparable, even in respect to publicity of financial condition, with the American legislation of the same period. Hence, no reference was made to it in the text. The statement of Pannier (*op. cit.*, p. 73) that England was the first nation to regulate the business of life insurance, is highly erroneous and misleading. He not only overestimates the regulatory effect of the English Joint Stock Companies Act of 1844, but also ignores the earlier American legislation (*op. cit.*, pp. 88 *et seq.*) which is summarized *infra*, "Appendix A, § 41." For instance, the Massachusetts statute of 1807 (Mass., Resolves of the General Court, January Session, Ch. 56, p. 39), which was in terms applicable to *all* domestic insurance companies, was a more effective regulation of the business of life insurance than the English Joint Stock Companies Act of 1844.

an act was passed subjecting life insurance companies to a certain measure of supervision. The act required each new company to deposit £20,000 with the Accountant General of the Court of Chancery, to be invested in securities, and to be returned to the company as soon as its reserve fund equalled £40,000.[19] Each company was required to file with the Board of Trade annually a sworn financial statement, and to present a full actuarial report of its financial condition at longer intervals.[20] Amalgamation or reinsurance between two companies required court approval after full publicity.[21] Aside from the elaborate regulation of Friendly Societies (including "fraternal" insurance associations) under the act of 1896,[22] the next important regulation of the insurance business was the extension to employers' liability insurance companies of the provisions of the act of 1870.[23]

The first comprehensive regulation of insurance companies in England, on a scale comparable to that which is to be found in New York as early as 1849,[24] is the Assurance Companies Act of 1909.[25] Whether this statute was passed because of existing evils among British insurance companies, or whether to avert the evils which were revealed in the American insurance business by the Armstrong investigation of 1905 in New York,[26] it brought within the scope of regulation two types of insurers who had not been theretofore subject to any form of regulation, namely, fire insurers, and health and accident insurers.[27] Moreover, its scope was not limited to corporations but included individuals and unincorporated associations as well,[28] though members of Lloyd's or any other association of underwriters approved by the Board of Trade were required only to deposit £2,000 and were exempted from the other requirements.[29] The provisions as to deposits, annual reports, and so forth, applicable to corporations, were very similar to those of the act of 1870.[30] The art of legislative draftsmanship displayed in this bill might well serve as a model for American legislators seeking to revise their prolix and confused insurance laws. Two features of note are: first, the requirements common to all types of insurers are included in general provisions, followed by brief sections setting forth the requirements peculiar to life insurers, fire insurers, and so forth,thus avoiding needless repetition of provisions common to all; second, the details of annual reports and other minor matters are not included in the body of the act but are placed at the end, in nine "schedules" which occupy nearly twice as many pages as the body of the act. Thus the general tenor of the act is not obscured by cumbrous detail.

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[19] 33 & 34 Vict., Ch. 61, § 3 (1870).
[20] *Ibid.*, §§ 5–10.
[21] *Ibid.*, §§ 14, 15.
[22] 59 & 60 Vict., Ch. 25 (1896).
[23] 7 Edw. VII, Ch. 46 (1907).
[24] N. Y. L., 1849, Ch. 308.
[25] 9 Edw. VII, Ch. 49 (1909).
[26] Hoffman, *Insurance Science and Economics*, 326, asserts that the English law was due to this cause.
[27] 9 Edw. VII, Ch. 49, § 1.
[28] *Ibid.*
[29] *Ibid.*, § 28, and Eighth Schedule.
[30] *Supra*, n. 19.

However, on the actuarial side, the American statutes are usually better than the English one, and in substance their requirements are more strict and thorough. For instance, the English law does not indicate any method of calculating the reserve fund, nor does it require the maintenance of any reserve fund apart from the deposit of an arbitrary sum of £20,000 by each company, regardless of the amount of its outstanding liabilities; nor is any limitation placed upon the company's investments. No provision is made for periodical examination by official examiners of the books, affairs and condition of the company.

The "Insurance Commissioners" in England today are not a group of officials who supervise the regulation of privately conducted insurance enterprises. They are the officials who administer, or supervise the work of local "committees" in administering, the elaborate provisions of the National Insurance Act,[31] which establishes a scheme of "social" insurance, that is, of universal compulsory sickness insurance payable out of contributions from the insured, the employers, and the public treasury. By later enactments many of the administrative powers incidental to this act have been conferred upon the Minister of Health [32] who administers the Unemployment Insurance Act of 1920.[33]

The most rigorous supervision of private insurance enterprises yet adopted in England is established by the Industrial Assurance Act of 1923,[34] which gives to the Industrial Insurance Commissioner power to "award that a society be dissolved and its affairs wound up" if he "is satisfied" that it has defaulted in respect to the required deposit of £20,000,[35] and to order an inspection of the affairs of any society or company if "in the opinion of the Commissioner there is reasonable cause to believe" that an offense against the insurance laws "has been or is likely to be committed," and he may charge the expense of such an inspection to the company or society inspected.[36]

This enactment, like the social insurance laws above referred to, is designed to protect the proletariat rather than the bourgeoisie.[37] England is likely to be for some time to come too deeply engrossed in her stupendous tasks of proletarian betterment to devote any further attention to the conduct of the private insurance enterprises of the well-to-do, which have probably on the whole been soundly managed. With true political thrift the British will not use law where other means of social control are effective.

§ 40. *Beginnings of insurance regulation in the United States: Special incorporation statutes.* A complete history of the development of insur-

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[31] 1 & 2 Geo. V, Ch. 55, Sec. 57 (1911).

[32] 10 & 11 Geo. V, Ch. 10, § 20 (1920).

[33] 10 & 11 Geo. V, Ch. 30 (1920).

[34] 13 & 14 Geo. V, Ch. 8 (1923).

[35] 13 & 14 Geo. V, Ch. 8, § 7 (3).

[36] *Ibid.*, § 17.

[37] The act defines "industrial insurance" to mean life insurance, the premiums of which are received by means of collectors, but excluding cases where the premiums are payable at intervals of two months *or more*, or where the amount of insurance is £25 or more and the premiums are payable at intervals of one month or more. (§ 1).

ance regulation in the United States would be beyond the scope of the present volume. For a complete history would take account, not only of the statutes, but also of the growth and spread of the insurance business and the changes in administrative practices. Only an exhaustive survey of the data on these last two points would afford a basis for reliable conclusions as to the correlations between the business of insurance and the law and administrative practice of insurance regulation. It is extremely doubtful, indeed, if data sufficient for any such generalizations could be found. The present survey, necessarily narrowed in its scope, will be confined chiefly to a summary of the history of insurance legislation, especially of administrative regulation, based upon an exhaustive study of the legislative enactments of all the states, extending as far back as 1692 and coming down to about 1890, when the period of legislation of the existing types begins.[1]

Nevertheless, unless and until such a complete study is made, some general observations as to the conditioning factors of the development of insurance legislation will not be out of place. Chief among these factors was the growth of the corporation as a form of business organization. The corporate form was particularly well adapted to the insurance business — no less so than to the banking business. In an economic society where there were few large fortunes of liquid capital, the corporate organization was a useful device for the pooling of the funds of a number of small investors, no one of whom would have been financially able to assume alone the risks of the insurance business.[2] The limitation of liability encouraged the investment of capital in insurance enterprises. Again, the corporate form assured continuity of management, especially desirable in making contracts, such as life insurance, calling for performance over a long period of time, and equally desirable for the building up of a large agency force capable of spreading the company's business over a wide area. Thus the corporation was an important factor in *developing the insurance business* in the United States.

The use of the corporate organization rendered less effective, as a means of protection against dishonesty or stupidity, the insured's power of choosing his insurer, for many a knave and many a fool may hide behind a high-sounding corporate name. Moreover, the use of the corporate form restricted the number of insurers from among whom the insured could choose, and diminished his bargaining power. Thus the corporation was an important factor in *creating the demand for governmental regulation* of the insurance business.

The corporate units of business enterprise can be more easily and effec-

[1] The survey is based upon the collection of American statute law in the Harvard Law Library. A careful search of the index of each volume, under every conceivable heading, was made. This work occupied all of the writer's time during a period of about six weeks. Nevertheless, the early laws are so poorly indexed and so confusingly arranged that it is hardly conceivable that there are no errors and omissions.

[2] The greater safety of, and public confidence in, corporate insurers is given in the preamble as one of the reasons for the incorporation of two insurance companies by Act of Parliament in 1719. 6 Geo. I. Ch. 18.

tively regulated and continuously supervised by governmental officials than can the individual units. The permanency, cohesiveness and centralization of activities in the corporate form all contribute to this result. An insurance corporation does the business which would otherwise be done by a number of individual insurers; there is one set of records to be examined, instead of many. Moreover, the capricious power of the state legislatures to grant or refuse the privilege of incorporation on such terms as they chose, and their almost equally capricious power to admit or exclude foreign corporations, paved the way for strict regulation of corporate enterprises at a time when the prevailing political philosophy and constitutional theory was opposed to "paternalistic restrictions" on private business. Thus the corporate form *made insurance regulation practicable.*[3]

Another factor was the popularization of insurance. As long as the taking out of insurance was confined to shipowners and merchants of considerable means and experience, it might well be thought that insured and insurer were on an equal footing and that no special governmental action was necessary to require the continuous solvency and prudent management of the insurer. As soon as insurance became a popular economic device, the small policyholders were at a disadvantage, for they had neither the time nor the means to safeguard their interests. The spread of insurance among the classes of moderate means since the Civil War (especially of life insurance) accounts in part for the flood of insurance legislation during that period.

The colonial history of insurance regulation in America is a blank page. The trading and producing activities of the New England colonists were such as to create a demand for insurance on property. As early as the middle of the seventeenth century, Massachusetts had developed extensive fishing and ship-building industries and her carrying trade with the West Indies became considerable in the latter half of this century. In the agrarian colonies of the south, the need for marine insurance was less keenly felt, as most of the goods imported and exported were carried in English or foreign ships. Nevertheless, even in the northern colonies, the development of insurance was long postponed after the need for it was felt. It is said that the first advertisement of the opening of an insurance office in America appeared in the "American Weekly Mercury" of Philadelphia in 1721,[4] and the establishment of an insurance office was announced in Massachusetts as early as 1728.[5] The earliest fire insurance office, it seems, was established in South Carolina in 1735, but its career was ended by a

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[3] Hoffman, *Insurance Science and Economics* (1911), 150; Freund, *Standards of American Legislation* (1917), 39.

[4] Hoffman, *op. cit.*, 104; *History of the Insurance Company of North America* (Philadelphia, 1885), 15. The advertisement recites that merchants of Philadelphia have been obliged to send to London for marine insurance, which has been troublesome and precarious. The enterprise failed.

[5] Hardy, *Account of the Early Insurance Offices in Massachusetts from 1728 to 1801* (Boston, 1901), 27; Hoffman, *op. cit.*, 169. The enterprise was unsuccessful and it was two generations later that the first successful fire insurance office was established in Massachusetts. Hardy, *op. cit.*, 28.

disastrous fire five years later.[6] The first successful fire insurance association is said to have been established in Philadelphia in 1752.[7] By 1770, it seems there were three insurance institutions doing business in Philadelphia,[8] which are said to have done a very considerable business.[9] The earliest reference to insurance litigation which the present writer has found is a resolution of the colonial legislature of Massachusetts of June 3, 1767.[10]

Prior to the American Revolution it seems safe to say that marine insurance was conducted solely by individual underwriters, and the same is true of other forms of insurance with the exception presently to be noted. Indeed, any attempt to form a stock insurance corporation in the colonies would have been illegal. The Act of Parliament of 1719 which authorized the granting of charters of incorporation to two English insurance companies (under which the Royal Exchange and the London Assurance companies were formed) expressly forbade, under penalties, the organization of any other stock insurance companies in His Majesty's dominions, though insurance by individuals was not prohibited.[11] To settle any doubts that may have arisen, the prohibition was explicitly extended to the American colonies in 1741.[12] These enactments may well have hampered the growth of insurance enterprises in America, for the colonists were unable to compete with Lloyd's in individual underwriting on a large scale.

The earliest American insurance corporation of which the writer has been able to find any record is the Philadelphia Contributionship, which was incorporated by act of the colonial legislature of Pennsylvania in 1768.[13] It was a mutual company (that is, the directors were elected, it seems by the policyholders)[14] and hence apparently did not fall within the prohibition of the English statutes. No provisions for safeguarding the financial solvency of the company were contained in the act, except that the treasurer was required to give bond. No other incorporations of insurance enterprises prior to the Revolution have been found.

Apparently one other insurance company was organized prior to the adoption of the Constitution of the United States. A petition for the incorporation of such a company is said to have been rejected in Massachu-

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[6] *South Carolina Historical and Genealogical Magazine* (January, 1907), viii, 46–53; Hoffman, *op. cit.*, 169, 170. The enterprise took the form of a friendly society, or mutual unincorporated association.

[7] Hoffman, *op. cit.*, 170. The association was called "The Philadelphia Contributionship," an unincorporated association. *History of the Insurance Company of North America*, 17, 18.

[8] Hoffman, *op. cit.*, 170.

[9] *Ibid.*, 125.

[10] *Acts and Resolves of the Province of Massachusetts Bay* (Boston, 1912), xviii, 230 — a petition of Fortescue Vernon to be relieved of a default judgment obtained against him by one Joshua Coffin in an action for £100 on a policy of marine insurance.

[11] 6 Geo. I, Ch. 18, §§ 18–21.

[12] 14 Geo. II, Ch. 37, § 1.

[13] Laws of Pennsylvania, 1700–1810 (Philadelphia, 1810), I, 279, Ch. 576.

[14] Called the "contributors." *Ibid.*, § 4.

setts in 1785.[15] However, in 1786, the legislature of Pennsylvania adopted "An Act for incorporating the Society, known by the name and style of the Mutual Assurance Company, for insuring houses from loss by fire." [16] It is therefore erroneous to say that no insurance "companies" existed in America prior to the adoption of the Constitution,[17] though it seems clear that no *stock* companies were formed prior to that time.

The earliest record of the incorporation of an insurance company having capital stock is likewise to be found in Pennsylvania. By a statute passed April 14, 1794, the Insurance Company of North America, still a thriving institution, was incorporated with a capital stock of $600,000. The statute (of which only a résumé has been published) [18] required that the funds be invested from time to time in certain stock, that all deposits of money be made in the Bank of Pennsylvania, that the company should not hold real estate of a yearly value exceeding $10,000, and that ready money should be "reserved" to pay losses. Similar restrictions were imposed in the act, passed four days later, incorporating the Insurance Company of Pennsylvania.[19] In the following year Massachusetts granted incorporation to the Massachusetts Fire Insurance Company, with a capital stock of $300,000.[20] The capital was to be invested in the funded debt of the United States or of Masachusetts, or in stock of the Bank of the United States or of any incorporated Massachusetts bank; and provision was made for an assessment of ten dollars per share on the stockholders if the losses exceeded the capital. Thus, the principle of requiring conservative investments and of safeguarding the solvency of the company against exceptional losses was established in the earliest insurance legislation.

The incorporation of insurance companies by special enactment became fairly common in the nineteenth century. In 1802–03, no less than sixteen insurance companies were incorporated in Massachusetts.[21] A Louisiana statute of 1816 [22] required that the capital be "secured" by bank stock or mortgages. Two Michigan statutes of 1834 contained practically no restrictions.[23] The practice of incorporating insurance companies by spe-

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[15] Hoffman, *op. cit.*, 175.

[16] Laws of Pennsylvania, 1700–1810 (Philadelphia, 1810), II, 370, Ch. 1190 (Feb. 27, 1786). The details of the act are not given in the published text. Apparently it was a mutual company similar to the Philadelphia Contributionship.

[17] See Hoffman, *op. cit.*, 125, where the author says that the Judiciary Committee of the House of Representatives (session not given) erred in stating that insurance "companies" were in active operation long before the adoption of the Constitution. The author of this book was strongly motivated by a desire to prove by historical arguments that a Federal regulation of the insurance business would be constitutional.

[18] Laws of Pennsylvania, 1700–1810 (Philadelphia, 1810), Ch. 15229 (III, 129).

[19] *Ibid.*, Ch. 15236 (III, 140).

[20] Mass. L., 1795, Ch. 22.

[21] See Index to Mass. L., 1802–1803, 1047.

[22] Lislet's Digest of Acts of La., 1804–1827, 586.

[23] Mich. Territorial Laws (published 1874), III, 1277, 1308.

cial statute persisted in Florida as late as 1870 [24] and in Maryland as late as 1872; but in most of the states the practice of granting special charters had long before been discontinued. The restrictions in corporation charters were but a beginning, and insurance regulation soon passed into the phase of general laws.

Aside from the purpose of protecting policyholders, two other objects contributed to the development of insurance regulation. One was the hostility toward British insurers which manifested itself before, during, and even after, the War of 1812, and which found expression in a statute of Pennsylvania of 1810, prescribing a penalty of $5,000 for any person who should make insurance on behalf of a corporation of a foreign country,[25] and in a South Carolina statute passed a few months earlier [26] of similar import. The enactment of a similar statute in New York in 1807 was prevented, it is said, only by the efforts of Chancellor Kent.[27] The South Carolina law was repealed in 1810.[28] The way in which such unqualified prohibitions were twisted into qualified prohibitions or regulations is illustrated by the next insurance legislation of Pennsylvania after the one just cited. It provides a penalty of $500 for the making of a contract of insurance by any person as agent of a corporation *not incorporated in Pennsylvania, before* such person has filed a copy of the company's charter, and further requires the filing and publication of certain financial statements.[29]

The second object which led to the regulation of insurance companies was revenue. In many jurisdictions the earliest insurance legislation is found in taxing statutes. No doubt the administrative features of many of these furnished the analogies upon which the administrative devices for regulating the conduct of the business were patterned. Thus, the tax on the stock of insurance companies in Connecticut necessitated a full report from the companies as to their stockholders [30] and the tax on premiums collected in the state required a similar report as to premiums.[31] The

[24] Fla. L., 1870, Ch. 1771 — act incorporating the "Santa Rosa Railroad, Banking and Insurance Company" (!).

[25] Pa. L., 1809–1810, Ch. 59, p. 81 (approved March 10, 1810).

[26] S. C. Stat. L. (ed. Thos. Cooper, 1839), V, 612.

[27] Hoffman, *op. cit.*, 192, citing N. Y. Messages of the Governors (Albany, 1909), II, 613. (The reference cited merely shows that such a bill was rejected in 1807 by the Council of Revision.) However, such a statute was adopted in New York in 1814. N.Y. L., 1814, Ch. 99 (March 18, 1814). The penalty was $1,000.

[28] S. C. Stat L., V, 633.

[29] Pa. L., 1826–1827, p. 239 (April 13, 1827). See also the next insurance legislation in S. C. after the law of 1809 was repealed, which is S. C. Stat. L., 1856, p. 563.

[30] Conn. L., 1830, Ch. 28, § 1; L., 1833, Ch. 45, § 1.

[31] New York was the first state to adopt a tax on premiums. N. Y. L., 1824, Ch. 277, p. 340 (Nov. 19, 1824) imposed a tax of 10 % on premiums collected in the state. It is the irony of fate that the state in which most of the large insurance companies are incorporated should have been the first to adopt this tax against which the insurers strongly protest when they are obliged to pay it in other states. New Jersey adopted a premium tax of 5 % in 1826. N. J. L., 1826, p. 67. See also Ky. L., 1851, Ch. 14, §§ 4, 5. See also W. Va. L., 1864, Ch. 33, for other early examples of the relation between revenue and reports.

"license tax" imposed upon insurance agents, for example, by early Illinois and Maryland statutes,[32] is easily metamorphosed into a regulatory license, to obtain which the agent must not only pay a fee but must also submit evidence of his company's financial condition.[33] In other states, of course, revenue and regulation came in together.[34] After all, it has never been very far from the King's purse to the King's peace.

§ 41. *In the United States (continued): The stage of publicity and periodical reports.* Continuous official control of the activities of insurers is the latest phase in the development of the administrative regulation of insurance. Prior in time to this phase there came, in most jurisdictions (especially in the older states) a period during which the sole regulatory devices, after the company was once put in operation, were periodical reports and publicity as to the financial condition of the company. These requirements were evidently designed to accomplish two objects. First, they were aimed to provide data for legislative action and for judicial enforcement through the ordinary proceedings, whether by prosecuting officials or by private citizens. Second, they were expected to call the attention of the insuring public to the financial conditions of the various companies and thus enable each individual to determine for himself the safety of the enterprise in which he chose to take out insurance. That neither of these theories was sufficient in practice to attain the chief end of insurance regulation is evidenced by the fact that in every jurisdiction in which they were tried they have been superseded, or at least supplemented, by administrative devices, such as licensing, inquisitorial and disapproval powers, which give continuous and effective official control.

The earliest provision of this type is to be found in the Massachusetts statute of 1799 reincorporating the Massachusetts Fire and Marine Insurance Company.[1] The company was required to publish annually in two Boston newspapers the amount of its actual funds, the periods when the remainder (of its capital) was to be paid, the greatest amount to be insured on any one vessel or house, and the risks to be insured against; and it was further declared that the president and directors should, when and as often as required by the legislature, lay before that body such a statement of the company's "affairs," as the legislature might "deem it expedient to require," and submit to an examination thereon under oath. While these requirements were limited to a single company, one can see in them several of the favored phrases which have come down to us in the statutes which now define the inquisitorial powers of the commissioner.[2]

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[32] Ill. L., 1841, p. 180, § 1 (requiring the agent to pay $200 annually for a "license"); Md. L., 1845, Ch. 167, § 2 (requiring agents to pay clerk $100 annually for a "license."); Mo. L., 1837, p. 69; Va. L., 1845–1846, p. 6, § 3.

[33] Ill. L., 1855, p. 46; Md. L., 1868, Ch. 243. The latter statute particularly well illustrates the transition from revenue to regulation.

[34] E.g., Ala. L., 1859, No. 136.

[1] Mass. L., 1798–1799, Ch. 46, especially §§ 5, 8.

[2] See *supra*, § 21; e.g., "affairs," "deem it expedient," and "submit to an examination under oath."

The earliest provision of this type applicable to insurance companies generally is a Massachusetts statute of 1807, which requires the president and directors of each domestic insurance company to present to the next legislature a statement under oath of the "affairs" of the company, including the amount of capital stock paid in, in what "funds" (securities) the "stock" was invested and the amount of outstanding policies.[3] No record is found of any legislative action being taken as a result of the information so obtained. The earliest general requirement of publication is found in a Massachusetts law of 1818, which, besides repeating substantially the act of 1807, directed the domestic companies to publish annually in a newspaper the amount of stock, risks insured against, and the largest sum insured on any one risk.[4] A statute practically identical in wording was adopted in Maine in 1821.[5]

That the purpose of these requirements was chiefly to give publicity to the financial reports of domestic companies is evidenced by the circumstance that the law as to domestic companies remained unaltered in Massachusetts until 1837[6] and in Maine until 1856.[7] Meanwhile, the publicity requirements were extended to foreign insurance companies, with this difference: The domestic companies were required to file their reports with the legislature (in Massachusetts and Maine), whereas the agents of foreign (non-domestic) insurers were required to make their reports to an administrative official. By the Massachusetts legislation of 1827, the agent was required, under penalty of $500, to leave with the treasurer of the state a copy of the charter of his company and of his letter of authorization to represent the company; to deposit annually with the same official a statement, sworn to by a majority of the directors, of the amount of "capital" and how invested; and to publish this statement in a newspaper published in the county in which his agency was located.[8] In the same year Pennsylvania adopted the same provisions as to foreign companies [9] with the addition of a requirement, that the company have $200,000 capital fully paid.

The first insurance legislation of New York, aside from the revenue and exclusion statutes above referred to,[10] was the act of 1827–28, which was in terms applicable only to domestic companies thereafter created. It extended to all "monied corporations," which would include banks as well as insurance companies. They were required to file annually with the comptroller of the state a sworn statement, the prescribed form of which was the same for all corporations; seven items were specified in the statute: 1, amount of "stock" paid in or invested; 2, value of realty; 3, "stock" held by the company; 4, debts owed to the company; 5, debts owed by the company; 6, claims against the company not acknowledged as debts; 7, the amount for which the company is bound as surety, or for which it

[3] Mass. L., 1807, Ch. 56, p. 39. [4] Mass. L., 1818, Ch. 120, §§ 5, 6.
[5] Me. Rev. L., 1821, Ch. 139, §§ 5, 6.
[6] Mass. L., 1837, Ch. 192 (April 18, 1837).
[7] Me. L., 1856, Ch. 270 (April 9, 1856).
[8] Mass. L., 1827 (January session), Ch. 141 (March 10, 1827).
[9] Pa. L., 1826–1827, p. 239 (April 13, 1827).
[10] *Supra*, § 40, notes 27, 31.

may become liable on the happening of contingent events, "whether upon policies of insurance or otherwise." [11] From the standpoint of accountancy, this form of statement is crude, as compared with the elaborate and detailed statements now required of insurance companies; [12] yet at that time it was the most detailed form of report required of insurers. The comptroller was required to enter these statements in a book "open to public inspection"; [13] the only further use of the statements was in the provision that

> If it shall appear to the comptroller from any statements received by him that there is reason to apprehend that any corporation is, or will become, insolvent, it shall be his duty to report the facts, together with his opinion, without delay, to the *legislature*.[14]

The comptroller was merely a detective for the legislature.

The Maine statute of 1838 introduced a feature which had considerable popularity in nineteenth-century insurance legislation, though now it is virtually obsolete, namely, the filing of the financial statement and other documents in some *local* public office. By this Maine enactment, the agent of a non-domestic insurance company was required to file, in addition to his company's charter and his own power of attorney, a sworn financial statement, in the office of the register of deeds of the county in which he did business, and also to publish the statement in a local newspaper.[15] Similar statutes designed to secure local publicity are found among the earliest insurance legislation of a number of states.[16]

Statutes designed simply to secure publicity of the financial conditions of insurance enterprises were found in the earliest insurance legislation of a considerable number of states. It is a remarkable fact that in many states such statutes were modelled upon the legislation of other states long after they had been superseded by more effective methods of regulation in the states in which they originated. In most of the older states, and in

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[11] N. Y. L., 1827–1828, Pt. I, Ch. 18, Title II, §§ 19, 20, 51 (vol. I, p. 593).

[12] See, for example, § 103 of the present New York insurance law; and see *supra*, § 22, p. 336.

[13] N. Y. L., 1827–1828, Pt I, Ch. 18, Title II, § 23.

[14] *Ibid.*, § 24. (Italics ours.)

[15] Me. L. (1831), III, Ch. 402 (approved Feb. 23, 1828).

[16] Those which required newspaper publication and filing in a local office: Cal. L., 1850, Ch. 128, § 44; Dakota Terr. L., 1867–1868, Ch. 15, § 14; Pa. L., 1850 (Appendix), p. 923, §§ 5–11 (Jan. 24, 1849). Those which required filing in a local office of a copy of the financial statement filed with the comptroller or other state official: Ala. L., 1859, No. 136, § 3; Ill. L., 1855, p. 46, § 3; Ia. L., 1856, Ch. 149, § 7; Kan. L., 1863, Ch. 32, § 3; Ky. L., 1856, Ch. 302, § 5; Minn. L., 1860, Ch. 6, § 3; Neb. L., 1864, p. 145, §§ 1, 15; Ohio L., 1856, p. 75; Tenn. L., 1855–1856 (first session), Ch. 102. Requiring merely local filing of company's financial statement: Mo. L., 1843, p. 7. Those which required the agent simply to file in a local office evidence of his agency: Colo. L., 1861, p. 71, § 16; Ill. L., 1843, p. 165; Ind. Rev. Stats. (1852), I, Ch. 54, § 56 (approved June 17, 1852); Mich. L., 1855, No. 107, p. 241. The oldest insurance legislation in Ohio is a statute giving the court of common pleas power to appoint examiners to inquire into the financial condition of a mutual company: Ohio L., 1841, p. 35.

some of the newer ones as well, the first regulations (aside from revenue provisions) were of this type;[17] in others the earliest regulations combined with these publicity requirements a more or less perfunctory "certificate of authority."[18]

It is not remarkable, of course, that some states should have been more backward than others in adopting legislation designed to protect the insuring public, for different economic and social conditions would readily account for that. That they should have borrowed the older rather than the current legislation is not so easy to explain. An older school of anthropologists might explain it by a unilinear theory of social evolution: Each community was obliged to go through the same stages of development; not a single step could be omitted.[19] However, enough states are absent from the above lists to refute any theory of universality. A more likely explanation is that the pioneer lawyers who settled in each of the states above cited brought with them copies of legislation in force when they emigrated, which had become obsolete by the time they became lawmakers. Or perhaps the lawmakers realized that they did not have the

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[17] Cal. L., 1850, Ch. 128, § 44; Colo. L., 1861, p. 71, § 16 (see last note); Conn. L., 1853, Ch. 27, § 1 (also, evidence that company has required capital), see also Conn. L., 1857, Ch. 20, §1 (fire companies); Dakota Terr. L., 1867–1868, Ch. 15, §§ 1, 2 (domestic companies); Del. L., 1875, Ch. 118, § 1 (a remarkable instance of retarded imitation); La. L., 1855, p. 486, § 4 (merely publication of financial statement, no filing required); Mich. L., 1855, No. 107, p. 241 (merely charter and power of attorney); Miss. Rev. Stats., 1836, p. 357 (modeled on the New York law of 1828; see *supra*, n. 11); Mo. L., 1843, p. 7; Neb. L., 1846, p. 145, §§ 1, 2 (domestic companies); N. H. L., 1849, Ch. 851; N. J. L., 1852, Ch. 79 (domestic companies); N. C. L., 1871-1872, Ch. 199, §§ 42, 43; R. I. L., 1854 (October session), p. 13; Vt. L., 1852, No. 46, p. 47, §§ 6, 16.

[18] In the following states, the earliest regulatory legislation contains publicity requirements, though licensing provisions of a more or less perfunctory nature were added: Ala. L., 1859, No. 136 (Feb. 24, 1860); Dakota Terr. L., 1867–1868, Ch. 15, §§ 5, 6, 7 (non-domestic companies); Fla. L., 1850, Ch. 313, § 13; Ga. L., 1859, Title XII, § 8; also Ga. L., 1869, Title X, p. 127 (the act of 1859 was repealed before it took effect); Idaho Terr. L., 1887, § 2753; Ill. L., 1855, p. 46; Kan. L., 1863, Ch. 32, §§ 1–3; Ky. L., 1856, Ch. 302; Md. L., 1868, Ch. 243; Mich. L., 1859, p. 1049 (sworn financial statement); Minn. L., 1860, Ch. 6; Miss. Rev. Code, 1857, Ch. 35, § 11, Art. 57 (apparently enacted in 1857; relates to non-domestic companies); Mont. General Terr. L., 1879, p. 54, §§ 1–5; Neb. L., 1864, p. 145, §§ 5, 6, 15 (non-domestic companies); N. J. L., 1852, Ch. 79 (foreign companies); N. M. Terr. L., 1882, Ch. 46, §§ 20, 24; Ohio L., 1856, p. 75 (the earliest Ohio insurance statute, except one relating to mutual (local) fire companies; see *supra*, n. 16); Okla. Statutes of 1890, Art. 11, §§ 16, 17; S. C. Stat. L., 1856, p. 563; Tenn. L., 1855, 1856 (first session), Ch. 102; Tex. L., 1874, Ch. 145; Utah L., 1884, Ch. 46; W. Va. Code, 1868, Ch. 34, § 2 (foreign companies); Wyo. L., 1877, p. 55, §§ 20, 23, 24. Many of these statutes appear to have been modelled on the New York law of 1849: N. Y. L., 1849, Ch. 308. Other examples of early publicity requirements are: Conn. L., 1853, Ch. 27, § 1; Ore. Deady's Gen. L., 1845–1864, Ch. 20, § 5 (Jan. 20, 1864) (publication in newspaper of notice of withdrawal from state); Wis. L., 1850, Ch. 232, §§ 7, 13.

[19] For a discussion and a criticism of this theory, see Robert H. Lowrie, *Primitive Society* (New York, 1920), 301, 336, 430.

administrative personnel for an effective control over the insurance business. Whatever one's guess may be, the facts are interesting.

The system of regulation through publicity and periodical reports was never a very effective method of protecting the insuring public against unsound enterprises. It rested upon the assumption that those who were unscrupulous or foolish enough to conduct an unsound insurance enterprise would be sufficiently ingenuous and intelligent to make public a clear statement of their own folly or rascality. Another postulate of the system was the belief that each individual could judge for himself, if given the "facts," the safety of an insurance company. The latter assumption became (if it was not always) unsound as soon as insurance became a popular economic device; for the man in the street cannot draw intelligent conclusions from even a clear and truthful financial statement. For these reasons the system was supplanted or supplemented by effective legal control through independent administrative agencies equipped with legally effective administrative devices for continuous supervision and control. These features will be discussed in the next section.

§ 42. *In the United States (continued): Development of independent administrative agencies.* The transfer of the depositary of insurance companies' reports from the legislative to the executive department of the state government [1] was a significant step toward an effective legal control of the business. Even more significant, in many ways, was the establishment of independent administrative agencies whose sole function was the supervision of insurance. So long as the comptroller or auditor or treasurer or some other fiscal officer was charged with this task, it was to be expected that it would be performed in a desultory and perfunctory way. There is reason to believe that such was the fact in most instances. Indeed, many of the earliest statutes clearly called for no more than a perusal of the company's financial statement. Insurance supervision is a technical service, distinct from the task of collecting, and supervising the expenditure of, the state's revenue. Only when the legislators perceived this distinction and established a separate organ of enforcement could thorough-going control be attained.

Leaving out of account the purely revenue statutes [2] and the provisions for filing documents in the office of some local dignitary who was not intended to exercise any administrative supervision,[3] the earliest statutes manifest considerable diversity as to the choice of the official invested with such powers of supervision as were granted. Usually, however, a state fiscal officer was named. Thus the earliest statutes in Massachusetts [4] and Pennsylvania [5] named the state treasurer as the depositary of official reports. The first New York statute chose the state comptroller.[6] These

[1] *Supra*, § 41, p. 526.

[2] *Supra*, § 40, notes 31, 32.

[3] *Supra*, § 41, notes 15, 16. The Ohio law (L., 1841, p. 35), however, gave the court of common pleas full inquisitorial powers over mutual companies.

[4] Mass. L., 1827 (Jan. session), Ch. 141 (March 10, 1827).

[5] Pa. L., 1826–1827, p. 239 (April 13, 1827).

[6] N. Y. L., 1827–1828, Pt. I, Ch. 18, Title II, §§ 19, 20, 51.

models were copied in the earliest regulatory legislation of a number of states.[7] In many of the southern and western states the official corresponding to the comptroller was called the "auditor," and this official was designated in a number of the earliest statutes.[8] The reasons for the choice of fiscal officials are not far to seek. They were supposed to be more expert in financial matters than the other state officials. In those jurisdictions where the regulatory license developed from the revenue license, this was obviously an additional reason for the choice. In most of the states which have not yet established independent insurance departments, the state auditor is *ex officio* head of the insurance department.[9]

The secretary of state has sometimes been named as the administrative agency. In Louisiana the earliest legislation devolved insurance regulation upon the secretary of state,[10] and this is still the case,[11] though at one time

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[7] States in which the earliest regulatory legislation named the state treasurer as the administrative agency: Alaska Terr. L., 1919, Ch. 46, § 17; Ariz. Rev. Stats., 1887, § 257 (March 8, 1887); Conn. L., 1853, Ch. 27, § 2 (shared with comptroller); Idaho Rev. Stats., 1887, § 2753 (Jan. 3, 1887); Mass. L., 1827 (Jan. session), Ch. 141; Me. L., 1843, Ch. 21, §§ 1, 2; Minn. L., 1860, Ch. 6; Ore. Gen. L., 1874, Ch. 24, § 1 (took effect Jan. 24, 1871); Pa. L., 1826–1827, p. 239 (April 13, 1827); R. I. L., 1854 (Oct. session), p. 13 (partial; also a board); Vt. L., 1852, p. 42, § 15 (with secretary of state); Va. L., 1865–1866, Ch. 96. Fla. in 1872 devolved most of the powers upon the treasurer (Fla. L., 1872, Ch. 1863). In Tenn. the state treasurer is still insurance commissioner. (Tenn. L., 1873, Ch. 58, § 3.)

States in which the earliest regulatory legislation named the state comptroller as the administrative agency: Ala. L., 1859, No. 136, § 1; Cal. L., 1862, Ch. 227, § 1; Conn. L., 1853, Ch. 27, § 1; Fla. L., 1850, Ch. 313, § 11; Ga. L., 1869, Title X, p. 127; Md. L., 1868, Ch. 243; Nev. L., 1864, Ch. 17, § 7; N. Y. Rev. Stats., 1827–1828, Pt. I, Ch. 18, § 19; S. C. Stat. L., 1856, No. 4305, §§ 1–4; Tenn. L., 1855–1856 (1st session), Ch. 102, § 1; Tex. L., 1874, Ch. 145.

[8] States in which the earliest regulatory legislation named the state auditor as the administrative agency: Colo. L., 1883, p. 212 (auditor "*ex officio*" superintendent of insurance); Dakota Terr. L., 1867–1868, Ch. 15, § 1; Ill. L., 1855, p. 46, § 1; Ind. Rev. Stats., 1852, I, Ch. 54, § 13 (Jan. 17, 1852); Ia. L., 1856, Ch. 149, §§ 1, 5; Kan. L., 1863, Ch. 32, § 1; Ky. L., 1856, Ch. 302, § 1; Miss. Rev. Stats., 1836, p. 357, § 11; Mont. Terr. L., 1879, p. 54, §§ 1, 3; Neb. L., 1864, p. 145, §§ 1, 5; Ohio L., 1856, p. 75 (but see *supra*, § 41, n. 16); Okla. Terr. L., 1890, Art. 11, § 16; S. D. L., 1890, Ch. 51, §§ 7, 30, 44; Utah L., 1884, Ch. 46, § 8 (partial); W. Va. Code, 1868, Ch. 34, § 2 (enacted 1868); Wyo. Terr. L., 1877, p. 55, § 24.

In Ark. the insurance commissioner was at first a subordinate in the office of, and appointed by, the auditor (Ark L., 1873, No. 106, p. 248). In Ky. this is still the case (Ky. L., 1870, Ch. 538, §§ 1, 2). In Rhode Island the auditor is still officially designated as insurance commissioner (R. I. L., 1862 (May session), Ch. 414), but a clerk in his office is referred to as insurance commissioner in a recent act appropriating his salary (R. I. L., 1918 (Jan. session), Ch. 1645). In Va. the auditor had virtually all the regulatory powers, except those relating to deposits of securities, from 1873 (L., 1872–1873, Ch. 220) down to 1906. In West Virginia the auditor is still insurance commissioner *ex officio* (W. Va. L., 1907, Ch. 77, § 1).

[9] See *supra*, § 6, p. 43.

[10] La. L., 1877, p. 24, § 2.

[11] Wolff's La. Statutes (1920), pp. 927–1009.

the auditor was given a share of the work.[12] In Michigan the secretary of state administered the insurance laws from the earliest time[13] down to 1917.[14] New Hampshire more quickly abandoned the secretary of state.[15] New Jersey entrusted insurance supervision to the secretary of state for nearly forty years;[16] North Carolina likewise employed the secretary of state as the administrative official for many years;[17] and Oregon, after requiring deposits of securities with the state treasurer in 1871,[18] made the secretary of state *ex officio* insurance commissioner in 1887.[19] Utah divided insurance supervision between the secretary of state and the auditor.[20] The secretary of state was made *ex officio* insurance commissioner in the earliest legislation of Washington.[21] In Wisconsin the earliest legislation designated the secretary of state as the licensing official,[22] and in 1870 he was formally designated "insurance commissioner."[23] These statutes, or some of them at least, are probably patterned after the Massachusetts law of 1837,[24] which is the earliest designation of the secretary of state. It contained merely the typical requirements for periodical reports and publicity, and was not repealed until 1852.[25]

To recount all the detailed changes in the assignment or apportionment of supervisory powers after the *earliest* statutes just cited would serve no useful purpose. A summary of some of the typical vagaries, illustrating how in many instances the legislature played battledore and shuttlecock with the task of enforcing insurance legislation, is given in the footnote.[26]

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[12] La. L., 1877 (extra session), No. 39, p. 64, §§ 1, 2 (registration of policies and deposit of bonds).

[13] Mich. L., 1859, p. 1049; see also Mich. L., 1871, p. 172 (insurance commissioner head of bureau in department of state).

[14] Mich. L., 1917, No. 256.

[15] N. H. L., 1849, Ch. 851, repealed by L., 1851, Ch. 1111.

[16] N. J. L., 1852, Ch. 79, repealed by L., 1891, Ch. 6.

[17] N. C. L., 1871–72, Ch. 199, §§ 42, 43, which was changed in 1899 when a separate department was created.

[18] *Supra*, n. 7.

[19] Ore. Hill's Anno. L. (1887), § 3563 (approved Feb. 24, 1887).

[20] Utah L., 1884, Ch. 46; continued in Comp. L., 1888, §§ 2465, 2466.

[21] Wash. L., 1889–1890, p. 508, § 1 (March 27, 1890).

[22] Wis. L., 1850, Ch. 232, § 7. [23] Wis. L., 1870, Ch. 56, § 32.

[24] Mass. L., 1837, Ch. 192, § 1.

[25] Mass. L., 1852, Ch. 231, which made the treasurer the depository of the annual reports of insurance companies, and created a board of insurance commissioners.

[26] Summary of important changes in administrative officials:

Alabama. after designating the comptroller in 1859 (*supra*, n. 7), in 1897 made the secretary of state *ex officio* commissioner (L., 1896–97, No. 614). In *Alaska*, one provision of the Civil Code requires filing with the secretary of the district by foreign insurers of a certificate of authority from another insurance official (L., 1919, Ch. 46. § 1), but requires that a license be obtained from the territorial treasurer (*ibid.*, § 17). *Arkansas* in 1873 established an insurance bureau in the office of the auditor (*supra*, n. 8); this was abolished in 1875 (L., 1875, p. 190) and in 1911 the auditor was named as *ex officio* commissioner (L., 1911, No. 164, § 1). *Connecticut* in 1853 conferred the power to visit and examine insurance companies upon the bank commissioners (L., 1853, Ch. 31).

One important phase of this period of experimentation was the creation of boards of insurance commissioners. Excluding from consideration as relatively unimportant the statutes authorizing the appointment of tem-

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Florida, after giving the power to approve the financial qualifications of newly formed domestic companies to the comptroller (*supra*, n. 7), in 1872 required all companies to obtain a certificate from the state treasurer, who, however, shared this power in some indefinite degree with a board of insurance commissioners consisting of the treasurer, comptroller and attorney-general (L., 1872, Ch. 1863). The treasurer was formally designated insurance commissioner in 1915 (L., 1915, Ch. 6847, § 1). In *Georgia*, an independent insurance commissioner was provided for by a law of 1859 (Ga. L., 1859, Title XII, § 8); but the taking effect of this law was twice postponed (*ibid.*, Title XXIV, p. 71; and L., 1860, p. 37), and it was soon repealed (L., 1861, p. 51). After the Civil War the comptroller was given licensing powers (*supra*, n. 7), and in 1887 was designated as "insurance commissioner" (L., 1887, p. 113, § 1); in 1912, an "insurance department" was established in his office (L., 1912, p. 119, § 1). *Idaho*, after its original designation of the treasurer in 1887 (*supra*, n. 7), in 1889 gave the comptroller the power to license certain types of assessment companies (L., 1889, p. 11, § 2), and in 1901 created an independent insurance commissioner (L., 1901, p. 165, § 1) who was, in the administrative reorganization of 1919, absorbed into the department of commerce and industry (L., 1919, Ch. 8). *Indiana* has stuck by the auditor down to the present time (L., 1919, Ch. 103, § 3). *Kentucky* in 1912, established a state insurance board, composed of the auditor (*ex officio* insurance commissioner) and two other citizens, with power to change fire insurance rates (L., 1912, Ch. 5, p. 28); in 1918 the board was abolished and its powers transferred to a newly created superintendent of fire insurance rates to be appointed by the auditor (L., 1918, Ch. 38, § 1); two years later this office was abolished and the powers of the superintendent were vested in the auditor (L., 1920, Ch. 16), who is still insurance commissioner. *Louisiana* while usually designating the secretary of state, in 1877 turned over the enforcement of the registered policy law to the auditor (L., 1877 (extra session), p. 64). *Maine*, in 1844, repealed the act of 1843 requiring agents of foreign companies to make reports to the treasurer (L., 1844, Ch. 82); in 1849, the bank commissioners were required to examine certain types of companies annually (L., 1849, Ch. 151, § 1), though the annual reports of foreign companies were made to the secretary of state (*ibid.*, § 2); this provision was repealed in 1850 (L., 1850, Ch. 178). In 1856, all insurance companies were required to report annually to the secretary of state (L., 1856, Ch. 270). Twelve years later the powers of insurance commissioner were vested in the commissioner of insurance and banking (L., 1868, Ch. 220); the independent office of insurance commissioner was created two years later (*infra*, n. 62). *Maryland*, following its original designation of the comptroller (*supra*, n. 7), in 1870 established a "distinct bureau" of insurance in the comptroller's office (L., 1870, Ch. 388). *Massachusetts* employed successively the treasurer (*supra*, n. 7), the secretary (*supra*, n. 24, n. 25) and, after experimenting with various types of boards (*infra*, this section), established an independent office in 1866 (*infra*, n. 62). *Michigan* made a few changes (*supra*, n. 13, n. 14). *Mississippi*, though adhering to the original plan of vesting most of the supervisory powers in the auditor from 1836 to 1902, in 1837 gave the bank commissioners power to examine such "monied corporations" as insurance companies (Gen. Stats., 1840; Act of May 12, 1837). *Nebraska* in 1899 adopted a statute creating a bureau of insurance and making the governor insurance commissioner, with all the powers formerly possessed by the auditor

porary examiners *ad hoc*[27] and the occasional grant of inquisitorial powers to bank commissioners,[28] the insurance boards may be classified in two

(L., 1899, Ch. 47, §§ 1, 2, 8); yet for some mysterious reason, though this law was never repealed, so far as one can find, the auditor was in 1903 designated as the licensing and supervising official (L., 1903, Ch. 27, Ch. 47 and Ch. 103), and continued to be insurance commissioner until the state insurance board, consisting of the governor, auditor and attorney-general, was established (L., 1913, Ch. 154, Art. II, § 3). The bureau of insurance has been in the department of trade and commerce since 1919 (Neb. L., 1919, Ch. 190). *New York*, in its comprehensive statute of 1849 (L., 1849, Ch. 308), adhered to the plan of having the comptroller administer the insurance laws. *Oklahoma* in 1893 abandoned its original designation of the auditor and made the secretary of the territory *ex officio* superintendent of insurance (Comp. Stats. (1893), § 5949). The first constitution of the state created a separate department of insurance (Const., 1907, Art. VI, § 22), but this did not prevent experiments with insurance boards (see *infra*, this section, n. 51, n. 53). *Oregon's* experiments are indicated above (*supra*, n. 18, n. 19). *Pennsylvania*, which started out in 1827 with the treasurer as its insurance official (*supra*, n. 5), in 1856 transferred the supervision of foreign companies to the auditor (L., 1856, p. 284, § 1). *Rhode Island* has divided the work among the secretary of state, treasurer, and lieutenant-governor (L., 1854 (Oct. session), p. 13), and later transferred it all to the auditor (*supra*, n. 8). *Tennessee*, having in 1856 conferred licensing powers on the comptroller (*supra*, n. 7), in 1870 transferred these powers, and granted others, to a board (L., 1869–1870, Ch. 102) and later established its present "Bureau of Insurance" in the office of the treasurer, who was named "Commissioner of the Insurance Department" (L., 1873, Ch. 58, §§ 1, 3, 14). *Texas'* changes are elsewhere indicated (*supra*, n. 7 and *infra*, this section, notes 50, 61). *Utah* divided the duties of insurance regulation between the secretary of state and the auditor (L., 1884, Ch. 46; Comp. L., 1888, §§ 2465, 2466) until a separate department was created in 1909 (*infra*, n. 62). *Virginia*, while it required life insurance companies to appoint resident agents for service of process and to report premiums for taxation purposes to the auditor (L., 1855–1856, Ch. 18, p. 26), and required deposits of securities with the treasurer (L., 1865–1866, Ch. 96, p. 206), gave the first regulatory powers of any consequence to the auditor in 1873 (L., 1872–1873, Ch. 220, p. 197). *West Virginia* in 1868 adopted a statute very similar to the New York law of 1849, conferring upon the auditor all the powers and duties of an insurance commissioner except that each company was required for some reason to deposit $25,000 in cash or securities with the governor (Code, 1868, Ch. 34, § 2). *Wisconsin*, while conferring on the secretary of state most of the powers, required the governor's approval of the charter of a domestic company (L., 1850, Ch. 232, § 11) and in 1858 added to this by giving the governor inquisitorial and licensing powers over all insurance companies (L., 1858, Ch. 103, §§ 1–5). This act, though not formally repealed until 1870 (L., 1870, Ch. 56, § 38), seems to have been coolly ignored in the enactment of two statutes of 1867 which gave the secretary of state once more administrative powers over both domestic and foreign insurers (L., 1867, Ch. 158, § 1 and Ch. 179, §§ 1–9). *Wyoming* see-sawed between the auditor and an independent commissioner (*supra*, n. 8 and *infra*, n. 62). The date of the establishment of a separate and independent department of insurance in each state where that has taken place is given *infra*, this section, n. 62.

[27] E.g., Ohio L., 1841, p. 35, § 2, authorizing the courts of common pleas to appoint examiners of mutual fire companies.

[28] See the statutes of Conn., Me., Miss., cited in n. 26, *supra*.

ways: First, it must be noted whether the board was an *ex officio* board or a "full-time" board; that is, whether the members were other state officials designated *ex officio* for this work, or were citizens devoting their full time to it. Second, it must be noted whether the board was "general" or "special" in its powers, that is, whether it exercised general administrative powers over insurance companies, or was merely created for some special function.

The first board of insurance commissioners was established in New Hampshire in 1851.[29] It was a "general" "full-time" board. The governor, with the advice of the council, was authorized to appoint three "suitable" persons, residents of the state, for a term of one year whose duty it was to examine personally each year the affairs of all insurance companies, and report to the legislature.[30] They were empowered to sue for an injunction against an insolvent company.[31] Their fees were to be paid by the companies examined. This board continued to discharge its functions until 1869, when a single commissioner was provided for.[32]

Massachusetts in 1852 created an *ex officio* board of insurance commissioners whose duties were "general" with respect to foreign companies.[33] The board consisted of the secretary, treasurer and auditor of the commonwealth, whose duty it was to examine the annual reports of the companies and require sworn answers if any return was "obscure, defective or in any respect unsatisfactory;" [34] and they were charged with the enforcement of the insurance laws.[35] In the same year Vermont created two *ex officio* boards: one, consisting of the secretary, treasurer and auditor to examine the sworn annual statements of life companies,[36] and the other to examine those of health insurance companies, composed of the secretary and treasurer of the state.[37] These boards were chiefly inquisitorial. The Vermont board was continued down to 1917, when a single full-time commissioner was provided for.[38]

Massachusetts, however, conducted further experiments with its board. In 1854 its powers were strengthened.[39] In 1855 the board was changed from an *ex officio* board to one of three members appointed by the governor for a term of three years, though the fact that the compensation was fixed at five dollars per day for every day's attendance on the duties of the office, renders it uncertain whether or not it was a "full-time" board.[40] The act somewhat increased the board's powers. Whether these *per diem* commissioners were satisfactory is uncertain. At all events, three years later the number of commissioners was reduced to two, they were given

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[29] N. H. L., 1851, Ch. 1111.
[30] *Ibid.*, §§ 1, 3.
[31] *Ibid.*, § 6.
[32] N. H. L., 1869, Ch. 12, § 1.
[33] Mass. L., 1852. Ch. 231 (approved May 18, 1852).
[34] *Ibid.*, § 5.
[35] *Ibid.*, § 9; the attorney-general and district attorneys were likewise so charged.
[36] Vt. L., 1852, No. 46, p. 47 (approved Nov. 23, 1852).
[37] *Ibid.*, p. 42, § 15 (approved Nov. 23, 1852).
[38] Vt. L., 1917, p. 171.
[39] Mass. L., 1854, Ch. 453, § 42 (approved April 29, 1854).
[40] Mass. L., 1855, Ch. 124.

an annual salary of $1500, and in addition to inquisitorial powers were authorized to perform the then novel task of calculating the reserve on life insurance policies.[41] Eight years later a single commissioner was given the powers of the board.[42] The Massachusetts experiment is instructive as to the most desirable type of organization of an administrative agency for insurance regulation; for during this period Massachusetts was assuming a leading position in actuarial science.

Following the lead of Massachusetts, Rhode Island in 1855 created an *ex officio* board, consisting of the lieutenant-governor, secretary of state and general treasurer with powers almost identical with those granted by the Massachusetts Act of 1852.[43] Similar *ex officio* boards having "general" powers were subsequently created in three other states, and likewise abolished. The Tennessee board of 1870, consisting of the secretary of state, comptroller, and treasurer, had extensive inquisitorial and licensing powers over life insurance companies.[44] The Florida board of 1872 consisted of the treasurer, comptroller, and attorney-general; it divided the administrative powers with the treasurer.[45] The Nebraska board of 1913, consisting of the governor, auditor and attorney-general, was given general powers over all companies; [46] however, the secretary of the board, elected by it, was given a salary and the title of "insurance commissioner." [47] In this respect the Nebraska arrangement resembled that of Virginia and Arizona, where the corporation commission supervises the work of the commissioner.[48]

In three other states boards have been created for the "special" function of reviewing and fixing fire insurance rates. These boards were all established in the period 1910–15, when the demand for regulation of public utilities rates had reached its highest intensity. In each instance the board was partly *ex officio* and partly full-time. In Kentucky [49] and in Texas [50] the board consisted of the insurance commissioner and two others; in Oklahoma the state fire marshal, as well as the insurance commissioner, was made *ex officio* a member, and a third member was provided for.[51] The Kentucky board was abolished in 1918; [52] the other two are extant. In addition to these "special" boards, Oklahoma adopted in 1919 a statute

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[41] Mass. L., 1858, Ch. 177, §§ 1, 2. [42] Mass. L., 1866, Ch. 255.

[43] R. I. L., 1854 (Oct. session), § 17 (took effect Jan., 1855). The board was abolished by L., 1862 (May session), Ch. 414.

[44] Tenn. L., 1869–1870 (2d session), Ch. 102, §§ 1, 2, 3, 5, 10 (approved July 11, 1870). Abolished by Tenn. L., 1873, Ch. 58, § 1.

[45] Fla. L., 1872, Ch. 1863. The Florida board continued to function, it seems, down to 1915 (see Fla. Comp. L., 1914, §§ 2757, 2758, etc.), when the treasurer was made insurance commissioner (Fla. L., 1915, Ch. 6847, § 1).

[46] Neb. L., 1913, Ch. 154, Art. II, § 3.

[47] *Ibid.*, §§ 5, 6. The board was abolished in the administrative reorganization of 1919 (Neb. L., 1919, Ch. 190).

[48] *Supra*, § 4.

[49] Ky. L., 1912, Ch. 5.

[50] Tex. L., 1910, Ch. 8.

[51] Okla. L., 1915, Ch. 174.

[52] Ky. L., 1918, Ch. 38, § 2.

creating a fraternal insurance board composed of the insurance commissioner and four members appointed by the governor and senate from different fraternal societies, with power to license and control fraternal insurance societies.[53]

The final phase in the development of administrative agencies for insurance supervision and control was the creation of a separate office, independent of any office or department already existing, the sole function of which was the enforcement of the insurance legislation. This step signified a recognition of two things: that the regulation of the insurance business was of sufficient magnitude and importance to absorb the full time of one man and usually of an entire corps of assistants as well; and that the regulation of insurance was a distinct, specialized and highly technical function which could not be economically amalgamated with other state services. To which state should be given the credit for first taking this important step? The choice lies between New York and Massachusetts. New York, it seems, has the better claim. While Massachusetts in 1855 [54] established a board of insurance commissioners on a *per diem* compensation, and in 1858 [55] reduced the board to two commissioners on a salary basis, neither of these Massachusetts boards possessed any very considerable administrative powers. Their work was chiefly inquisitorial and advisory, and it was not until 1866 that a single commissioner was given these powers.[56] On the other hand, New York in 1859 conferred upon the single superintendent of insurance the fairly extensive licensing and inquisitorial powers granted to the comptroller by the act of 1849.[57] Thus New York was the first state to make its administrative control thorough and effective. Even to-day, Massachusetts relies more upon judicial enforcement than does New York.

The only other state which adopted similar legislation at so early a date was Georgia. Since the Georgia act of 1859 creating a separate insurance department was repealed before it took effect [58] and Georgia has not subsequently enacted similar legislation (the comptroller still being insurance commissioner), it may fairly be excluded from the list of pioneers.

Connecticut established a single independent commissioner the year before Massachusetts did.[59] California created a single independent office and endowed it with broad powers of legal control in 1868.[60] In 1869, Missouri and New Hampshire took the final step.[61] By 1919 thirty-six states had adopted this type of administrative agency.[62] Of these states, only one (Georgia) has gone back permanently to the *ex officio* type of

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[53] Okla. L., 1919, Ch. 67. [54] *Supra*, n. 40. [55] *Supra*, n. 41.

[56] Mass. L., 1866, Ch. 255. However, it was as a member of these Massachusetts boards that Elizur Wright did his revolutionary work as to reserve-fund requirements.

[57] N. Y. L., 1859, Ch. 366, L., 1849, Ch. 308, §§ 7, 11, 13.

[58] *Supra*, n. 26.

[59] Conn. L., 1865, Ch. 91, § 1.

[60] Cal. L., 1867–1868, Ch. 300, § 1.

[61] Mo. L., 1869, p. 23; N. H. L., 1869, Ch. 12, § 1.

[62] *Establishment of an independent department of insurance:* Ala. L., 1915, p. 834, §§ 1, 2; Ark. L., 1917, No. 190, p. 1038, § 1 (also state fire marshal);

commissioner. Thirteen states have created separate departments of insurance since 1900. Excluding Georgia, in only two states, Delaware and Missouri, was the creation of an independent office not preceded by statutes conferring administrative powers upon some existing state official in addition to his other duties.[63] The circumstance that in the administrative consolidations inaugurated by Idaho, Illinois and Nebraska [64] the insurance bureau has been grouped with other bureaus under a departmental head who has other duties to perform, does not affect the significance of the establishment of an independent insurance department; for there is no reason to believe that a re-integration of state administration will impair the technical effectiveness of insurance regulation.

The reader who has had the patience to thread the mazes of this somewhat detailed account of the history of the office of insurance commissioner will have seen in it a significant picture of the process of trial and error, of progress and retrogression, of imitation and invention, which marks the pathway of social development.

Cal. L., 1867–1868, Ch. 300, § 1; Colo. L., 1907, Ch. 193, § 2; Conn. L., 1865, Ch. 91, § 1; Del. L., 1879, Ch. 22, § 1; Ga. L., 1859, Title XII, p. 38, § 8 (never took effect; repealed by L., 1861, p. 51); Idaho L., 1901, p. 165, § 1; Ill. L., 1893, p. 107, § 1, L., 1917, p. 2, § 5 (superintendent of insurance in department of trade and commerce); Ia. L., 1913, Ch. 146; Kan. L., 1871, Ch. 93, § 1; Me. L., 1870, Ch. 156; Md. L., 1878, Ch. 106; Mass. L., 1866, Ch. 255 (single commissioner); Mich. L., 1917, No. 256, I, 1, § 1; Minn. L., 1872, p. 22, § 1; Miss. L., 1902, Ch. 59; Mo. L., 1869, p. 23; Neb. L., 1913, Ch. 154, Art. II, § 5 (secretary of insurance board); N. H. L., 1869, Ch. 12, § 1; N. J. L., 1891, Ch. 6 (commissioner of insurance and banking); N. M. L., 1905, Ch. 5; N. Y. L., 1859, Ch. 366; N. C. L., 1899, Ch. 54, § 3; N. D. Const., 1889, Art. III, § 82, L., 1889–1890, Ch. 73; Ohio L., 1872, p. 32; Okla. Const., 1907, Art. VI, § 22; Ore. L., 1909, Ch. 230, § 1; Pa. L., 1873, p. 20; Tex. L., 1887, Ch. 105 ("Commissioner of Agriculture, Insurance, Statistics and History"; by Tex. L., 1907, Ch. 59, a separate department of agriculture was created, and the insurance commissioner is now designated as "Commissioner of Insurance, Statistics and History"); Utah L., 1909, Ch. 121; Vt. L., 1917, No. 160, §§ 1, 2; Va. L., 1906, Ch. 112 (under supervision and control of corporation commission); Wash. L., 1907, Ch. 109; Wis. L., 1878, Ch. 214, § 2; Wyo. L., 1884 Ch. 48 (see Rev. Stats., 1887, §§ 1769, 1770). (This act was repealed by Wyo. L., 1888, Ch. 64, and the territorial auditor was made *ex officio* insurance commissioner; by Wyo. L., 1919, Ch. 75, § 1, a separate department of insurance was again provided for).

[63] Del. L., 1879, Ch. 22, § 1 (Del. L., 1875, Ch. 118, merely required companies to publish financial statements, but provided no special administrative machinery); Mo. L., 1869, p. 23. Mo. L., 1837, p. 69, required agents of foreign companies to obtain licenses from the clerk of the county court, on payment of $200; this was obviously a revenue measure. Mo. L., 1843, p. 7, required such agents to file an annual financial report with the clerk of the circuit court, who was given, however, no enforcement powers.

[64] *Supra*, § 6, p. 43.

APPENDIX B

THE SCOPE AND THE DATA OF THE PRESENT STUDY

§ 43. *The scope and the data of the present study.* The scope of the present volume is sufficiently indicated by its sub-title, "A Study in Administrative Law and Practice." To the reader who would know what the writer means by "administrative law," the foregoing chapters will furnish the answer better than would any formal definition. However, since the present volume contains some material which is not strictly "administrative law," it may be worth while to indicate what is beyond its scope. In the first place, it is not a treatise on the legal relations between insurer and insured as enforced in the ordinary civil action. Insurable interest and warranties, waiver and estoppel, form another story. And if it is not a treatise on "Insurance Law," in the traditional sense, no more is it a treatise on the business of insurance, or on actuarial science. No doubt to an insurance expert or an actuarial scientist many of the statements in this volume about the more technical phases of the insurance business, particularly those relating to such matters as reserve funds and rates, will seem superficial or inaccurate. Still, if we are ever to effect a *liaison* between the law and related social sciences, a beginning must be made somehow and sometime; and even the feeble bridge of a dilettante may somewhat relieve the law's insularity.

It proved impossible to do more than rattle the dry bones of statutory phraseology and judicial decision without going to the factual basis of the commissioner's exercise of his powers. How, for example, can one illumine his power to revoke insurers' licenses on financial grounds without throwing light upon the financial technique of insurance enterprises? My chief concern has been to depict the *legal* or *governmental* phases of the commissioner's activities; and I have tried to keep the background in proper perspective. If the omissions of detail seem glaring, I would call attention to the length of the book, which has already far exceeded the original plan. If my generalizations seem inaccurate as applied to particular branches of the insurance business, I can only say that it was impossible to treat them all, and that I have confined my attention chiefly to the common types, life, fire and accident.

Again, the present study does not purport to deal with all phases of administrative law. For example, the admissibility of hearsay evidence in official hearings, a subject which has given rise to considerable controversy in the case of Workmen's Compensation Boards, is practically negligible in the case of the insurance commissioner for the simple reason that there are few formal hearings and practically no methods of reviewing his rulings on the admissibility of evidence. Thus the student of the general field of administrative law need not be surprised if some of his favorite problems are ignored. At the same time I have tried to view the insurance commis-

sioner as a part of the administrative system and to point out glaring omissions or departures.

The scanty treatment of judicial enforcement proceedings deserves a word of explanation. The standard receivership proceeding for an insolvent insurance enterprise, for example, would be worthy of a study in itself. However, even where the commissioner is the official receiver, it is a little out of our picture; for once the proceeding gets into a court of law, it ceases to be a distinctly administrative proceeding and falls into the ordinary legal categories. I have here envisaged it only in its initial stages, as a means of enforcement and at the same time a method of control of the commissioner's decisions. On the other hand, I have dealt rather fully with direct judicial attack on the commissioner's decisions, as falling fairly within the field of administrative law.

Likewise, the omission of any detailed treatment of the assessment or collection of the gross premium tax by the commissioner should be noted. Not only did this topic fall logically without the field of administrative regulation of the insurance business, but also a collection of statutory and judicial data on the topic indicated that, however interesting it might be for the student of taxation, it involved no interesting problems in the field of administrative law and practice.

Has one not often wished in reading a law book, that one might know how the writer went about making it? Such information would throw more light on the dependability of the book than would any ordinary testing of its statements and citations. We lawyers are too prone to regard a legal treatise as the inscrutable contrivance of an "Unknowable Somewhat," as Maitland might say. As this particular study is the first of a projected series and is the result of an attempt to devise methods of research in a somewhat novel field of law, there are peculiar reasons why an explanation of methods seems desirable. Hence, at the risk of seeming tediously personal, I shall sketch the way in which I worked.

The data on which the present study is based are of three kinds: 1. Judicial decisions. 2. Statutes and constitutions. 3. Miscellaneous evidences of administrative practices.

1. *Judicial decisions.* The reported judicial decisions were gathered by a thorough combing of the "Century Digest" and its supplements, of the index to the "Insurance Law Journal" from its beginning down to 1919, inclusive, and of the annotations of the compiled statutes of a number of states. Incidentally, textbooks and encyclopedias were consulted. Since none of these compilers had in mind all of the problems which I have chosen to discuss, I shall not be surprised if a few pertinent decisions have escaped me, though I shall be surprised if they prove to be numerous. The unreported judicial decisions — of courts of first instance — I have made no attempt to gather.

Either the judicial opinions are misleading or many of these reported cases were not well tried and thoroughly briefed. Too often the commissioner has adopted a legalistic defense to an attack upon his decisions by demurring to a complaint or putting in an answer which sounded arbitrary. Too often the insurer or other person aggrieved has sought to attack the

commissioner's decision on the merits. The judicial report not infrequently leaves one in doubt as to what the controversy was really about and only rarely discloses the administrative procedure of the official action. I cannot but believe that many of these judicial attacks were friendly controversies framed up for the purpose of getting a judicial construction of a particular statute. For all of these reasons I am convinced that a study of the insurance commissioner's legal position, let alone his practices, based solely upon reported judicial decisions, would be inaccurate and misleading.

2. *Statutes and constitutions.* In fact, I began the present study by collecting cases, and trying to glean from the reports the other data which I needed — statutes and administrative practices. About half of a preliminary draft was written before this plan was abandoned. For the judges frequently disdain to cite, much less to quote, the statutes of their own states, and without them a mere outsider cannot tell what the trouble was about. Even less do the judges pay attention to administrative practices. Moreover, even on the points which they clarify, the judicial decisions are not sufficiently numerous to afford a basis for generalization. So, I was reluctantly obliged to seek elsewhere.

Reluctantly, because I was not wholly deceived as to the work which a thorough analysis of the statutes would entail. Now that it is done, even though I am a protagonist of legislation as a means of social change, I can be charitable toward those old-fashioned lawyers who disdain to regard statutes as law. They have their excuses in the shortness of life and in the ease with which language can be made to conceal the absence of thought.

Would it be enough merely to analyze the current legislation? No, I thought, because the insurance department is an institution, and institutions do not come into being at one legislative session. Thus, I began by making an historical study of the insurance statutes. Six weeks were devoted to a study of all the insurance legislation of each state from its earliest statutes down to about 1890, when the institution may fairly be said to have reached its majority. Pretty full notes were made of the changes that took place in each state. Yet I did not write them up into a history of the administrative regulation of insurance, until long afterwards. It is one thing to ignore history; it is quite another to be a slave to it. I did not want my approach to the problems of my subject to be dominated by their history. Accordingly I postponed the writing of the history until the last. This explains why it is placed in an appendix.

Granted that I was to proceed next upon the basis of an analysis of existing legislation, how far was I to go? The idea of confining my statutory studies to one or two representative states from each section was appealing, and I am not sure that if I had adopted it I should not have given an equally representative general picture of the field. Yet it had all the disadvantages of the "sampling method" as a means of testing a large volume of material which one could not be sure was homogeneous. One of the objects of the statutory study was to discover to what extent such a homogeneity existed; and it is believed that there is no short cut to the answer. Moreover, by a study of typical jurisdictions, I should have missed many of those startling "sports" of legislation which are sometimes specimens of its amusing vagaries and sometimes are the ancestors of new

species. So, a study of all the current legislation, from Alabama to Wyoming, seemed requisite.

Where was one to begin? A preliminary survey of the insurance legislation of New York and Massachusetts led me to believe that these two jurisdictions typified the diversities, and that the others might be cited as simply examples of one or the other type. In certain portions of the book this method of treatment and citation has been used. Still, the legislation of other states was no slavish imitation of these two types. Connecticut, for example, has maintained its independence, and Colorado and Michigan, with elaborate insurance codes, have been original, in language, if not, indeed, in thought. Words are the protoplasm of a statutory study, hence, the determination to begin with Alabama and go down the list of states alphabetically.

What books should one use? Should one rely upon the official or unofficial compilations of statutes, or should one go to the original session laws and trace the changes through successive sessions? No doubt the latter method would have produced a more accurate statement of the law of a particular jurisdiction as it actually is. Yet it would have been more confusing and prolix. To determine whether the thirty-third legislature, in passing a certain law relating primarily to accident insurance, impliedly meant to repeal or supersede an enactment of the thirty-first legislature relating to life and accident insurance, would have required extended and difficult discussion of details having only a slight general interest. Furthermore, it is not the purpose of this book to present a substitute for the official statute books. As such, it would soon be out of date. What was sought was an analysis of the legislation existing during a particular decade. For these reasons (not to mention economy of time and labor) the decision was reached to base the study upon the latest statutory compilation available at the time.

The study of statutory materials was made chiefly in the summer of 1921. Some of the compilations which are dated in that year, or even in 1920, were not available at that time. Wherever possible the later session laws were scanned for important changes or additions. Thus, the excellent Colorado and Michigan "codes" of insurance legislation were used instead of the earlier statutory compilations of those states. However, in the main the task of correlating the successive legislation (in effect, making up an insurance "code" for each state) was too great to be attempted. Hence the study in most instances stops with the (then) latest compiled statutes of the states. Appendix C gives the date at which the study was stopped in each state.

Still further selection and elimination were necessitated by the multiplication of provisions applicable to particular types of companies. Illinois and Ohio are (or were) the worst offenders in this respect. In addition to the usual subdivisions of the insurance field (life, fire, accident, and health, "casualty," liability, surety, and so forth), each represented by distinct provisions, there were further subdivisions based on the type of organization ("stock," "legal reserve," fraternal, "assessment," county mutual, township mutual, inter-indemnity exchanges, and so forth), besides the universal distinctions between domestic and foreign corporations.

Provisions which seemed atypical and relatively unimportant — for instance, those relating to county and township mutuals — were almost completely ignored. Assessment companies generally have received scant attention, except as they are affected by the uniform bill for the regulation of fraternal insurance societies approved by the National Convention of Insurance Commissioners in 1910. The statutes applicable to "old line" or reserve fund companies engaged in life, fire, or health and accident insurance, have been the chief sources drawn from. A not very systematic attempt has been made to indicate, where it seemed important, the limited scope of application of a statute by stating in a parenthesis following the citation, the kind of company: "(domestic)," "(life)," to which it applies. I have as a rule refrained from citing more than three statutes from a single state on a single point.

How to get at the statutory material in any systematic way and see it as a whole without getting lost among the trees, was another problem. I found that, in the main, the relevant statutes were all brought together (in the compilation) in one, or at most, two chapters or other subdivisions. I ran over the index for strays. However, I found the indices quite unreliable as a means of locating particular desired provisions. The statutory indices are commonly of the feeblest of man's intellectual works; and even an intelligent index-maker would not have in mind my categories. So, there was nothing to do but to construct an index of my own. I accordingly divided the subject into grand divisions and subdivisions, and marked them off vertically on large sheets of paper, the horizontal columns representing the states. It happened there were ninety-nine such subdivisions (exclusive of the statutes on "Organization and Personnel"), so that when I had done my summer's work, I had atomized and anatomized the statutes of thirty-one states into 3,069 compartments. Of course, some of the compartments were empty, because the particular state had no provision on that point; but other compartments had a dozen or twenty excerpts or summaries, with the accompanying citations. Thus the material was put into fairly manageable form before the task of writing was begun. In all, nearly seven thousand sections of statute law were read, though many of them were not grist for my mill. I cannot hope to have escaped error in this elaborate mechanical process.

From the statutes of thirty-one states I drew the material from which the bulk of the book was written. For the chapter on Organization and Personnel, and for the History, I covered every state. After the other sections of the book were written, I turned them over to Mr. John H. Johnson, a graduate, and now a Lecturer in Law, of the Columbia Law School, who devoted some seven weeks to completing the citations for the remaining seventeen states. I have no doubt that his work was careful and accurate. I have had frequent occasion to check it and have found it correct. Mr. Johnson's work was done in 1923, hence in a few instances he drew from a later compilation than the one available in 1921.

The form of the statutory citations is the result of a compromise. Presumably, most of those who may consult the book will be interested only in knowing in what states a particular type of provision was found. For this purpose the mere naming of the states in the footnotes would suffice.

This method I adopted for Chapter II, since there were often multiple provisions or cross-references dealing with the topics of that chapter. However, in the other chapters the multiplicity of provisions on a particular topic — due in most instances to enactment of different statutes for different types of companies and for different branches of the business — made such a method of citation impractical. Moreover, the painstaking reader should be given the opportunity to check the soundness of my conclusions by specific statutory citations. Yet it would inordinately extend the notes if the full title of every statutory compilation were inserted in each footnote reference. Hence the form of citation adopted. The list of statutory compilations in Appendix C furnishes a key to the books consulted on each state; and references to this book are made simply by giving the (abbreviated) name of the state and the section number. Session laws, by whatever name called, are cited by the name of the state, the letter "L," the date of the session, and the chapter, or page, and section.

I have already referred to some of the characteristics of American insurance legislation, in this Appendix as well as in the preceding chapters. At this point it seems worth while to comment upon some of the more general characteristics of this body of statute law.

Characteristics of American insurance legislation. One such characteristic is the lack of a sense of proportion and emphasis. One finds a meticulous insistence upon unimportant detail in some sections, and a convenient vagueness on important questions of policy in others. For example, in prescribing the mode of organizing new companies, the minutest details as to the meeting and organization of the stockholders are often set down; the documents which foreign companies must submit to the commissioner before being licensed are carefully described; and the contents of the company's annual report to the commissioner are, in many states, embodied in the statute. On the other hand, the grounds of revocation of licenses are frequently described in such vague terms as "good faith," "unfair discrimination," "condition hazardous to the public or to its policyholders," or "will best promote the interests of the people of this state." There is reason to believe that the detailed provision represents the older type of statute, while the vague provision represents the newer one. Even where the statute contains considerable detail, it may leave crucial questions of policy unanswered, as is shown by the varying opinions as to the validity of the "preliminary term" methods of valuing life insurance policies under the apparently complete statutes prescribing the actuarial basis of reserve computations.

In general, insurance legislation tends to be standard-creating rather than abuse-correcting. It is designed to compel insurers to conform to standards which are somewhat above the minimum of normal safety. This is true of the amount of reserve fund required (especially of life insurance companies) and of the types of investments permitted. The insurers frequently complain that the legislation has been unduly restrictive. Wisely or unwisely, the insurance statutes have, in some instances at least, created new business standards. A striking example of this is the method of computing the reserve funds of life insurers. When Elizur Wright, the Massachusetts commissioner, appeared before a legislative committee in

1859, the English or "gross" method of computing the reserve to be maintained was in common use; and it was through his untiring efforts that the legislature was induced to adopt, despite opposition from the insurers, the stricter and safer "net" method of valuation.[1] The "net" method speedily won the day. Again, the provisions as to advertisements of insurers frequently provide not merely that the company shall not make any false statement of its financial condition,[2] but also that all statements as to financial condition shall conform to the company's last annual report.[3]

In substance, and as far as they go, the insurance statutes do, it is believed, conform to accepted actuarial standards. No existing legislation is as naïve as the early Missouri statute,[4] which required a foreign company to cease writing business as soon as the amount of insurance in force exceeded five times the amount of its *capital*. The assessment and fraternal legislation is a conspicuous exception. The standards of solvency exacted of the "old line," "fixed premium" companies are not applied to fraternal or assessment societies. Even the Uniform Fraternal ("Mobile") Bill drafted in 1910 by the National Convention of Insurance Commissioners in collaboration with the fraternal orders, contains inconsistent provisions and does not set up as high a standard.[5] The result is an attempted compromise between "cheap insurance" and "safe insurance." Another such an attempt at compromise is found in the statutes relating to rate-fixing combinations. Here one finds that legislatures have frequently vacillated between the policy of coerced competition and the policy of supervised combination, as a means of obtaining fair and reasonable rates.

Hostility toward foreign corporations is another marked characteristic of the insurance legislation. It is manifested not only in the stricter requirements and broader grounds of revocation applicable to foreign insurers, but also in the retaliatory statutes which, under the benevolent-sounding name of "reciprocal provisions," exact of foreign insurance companies the same requirements imposed on *its* foreign insurers by the state or foreign country in which the foreign insurer is incorporated. That these statutes were inspired chiefly by the desire to protect domestic enterprises from unpleasant competition can scarcely be doubted.[6]

Many of the insurance enactments display a profound ignorance that there is any such thing as administrative law. Fundamentally this is due to a defect in logical theory. It is assumed that the application or administration of law is merely a task of applying the major premise of the statute to the minor premise of particular facts and deducing therefrom

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[1] Frank H. Hardison, in Dunham, *The Business of Insurance*, iii, 21.

[2] E. g., Idaho § 5020; Ill., § 21; Ia., §.5499; La., § 3598; Miss., § 5036; Neb., § 3190; N. J. L., 1912, Ch. 303, § 1; N. Y., § 47.

[3] E. g., Idaho, § 5021; Ill., § 22; La., § 3599; Minn., § 3290; Miss., § 5035; Mont. C., § 4064; Neb., § 3191; N. Y. L., 1913, Ch. 205.

[4] Mo. L., 1843, p. 7.

[5] Neighbors of Woodcraft *v.* Fishback (1924), 130 Wash. 682, 228 Pac. 703, especially the dissenting opinion of Fullerton, J., at p. 699; N. Y. Insurance Report (1925), Part I, pp. 9, 10.

[6] See the remarks of Commissioner Hartigan of Minn., in *Proc. N. C. I. C.* (1910), p. 24.

a mathematically inevitable conclusion. Hence the failure to recognize the existence of "administrative discretion"; as in the Illinois statute which declares it shall be the "imperative duty" of the commissioner to revoke the license of any company which has failed to comply with any of the numerous insurance laws of that state.[7] Hence, too, the even more common failure to provide for administrative procedure.

Artistic draftsmanship is a rarity in American insurance legislation. The wearisome tautology of the penal provisions is partly forced upon the legislatures by the "strict interpretation" tradition of the courts, partly by the newness of the standards of conduct which the statutes are intended to set up. Another kind of repetition is found in multiple provisions laying down the same requirements for different types of companies. Still further repetition arises from sheer carelessness, as in the extreme example of the three separate Montana provisions requiring that licensed insurance agents shall be residents of the state.[8]

Minute subdivision of the types of companies is an occasion of prolixity and confusion. While there are in most states "general provisions" applicable to all types, these commonly go no further than the appointment, removal and organization of the insurance commissioner. New York, Massachusetts, Michigan and Colorado have done most to simplify their laws in this respect. Missouri and Illinois appear to have the most confused statutes. Moreover, great dissimilarity exists in the classification and nomenclature of the types of insurance business in the different states. Yet in substance and effect we find little variation or originality in the insurance statutes of one state as compared with those of other states. We have all the disadvantages of imitation without the advantages of uniformity in wording.

No state purports to separate analytically the provisions to be enforced by the commissioner from those to be enforced by the courts. All are jumbled together under the head of "Insurance," and it is frequently impossible to tell what requirements the commissioner is empowered to enforce. This I have discussed at length elsewhere.[9] No state has a "code" of administrative procedure applicable to the various types of administrative powers. The procedural provisions are usually repeated (if they are mentioned at all) in connection with each specific requirement. Again, old statutes are continued in force long after their prescriptions have become practically obsolete. An example is the Illinois provision, enacted originally in 1879, requiring the commissioner to give notice of the revocation of an insurance company's license by publication in a *weekly* newspaper in Springfield.[10]

All of these characteristics enhanced the difficulty of analyzing the statutory provisions relating to the insurance commissioner, and determined to some extent the form in which the present study is presented. For example, the licensing powers, which involve many types of conduct, had to be discussed before it was possible to take up a functional analysis

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[7] Ill., § 31.

[8] Mont. Code (official compilation, 1907), §§ 4023, 4035, 4041.

[9] *Supra*, § 13, p. 135.

[10] Ill., § 33.

of the commissioner's powers. I hope that the numerous cross-references and some of the repetitions of the book may be excused by the absence of analysis in the statutes themselves.

3. *Administrative practices.* A motion picture of a machine will usually tell us more about it than a still-life study. Similarly, a study of statutes and judicial decisions alone gives us only an incomplete view of the insurance commissioner. Only the commissioner's practices will tell us about the "law in action" as distinguished from the "law in books." I wish that my study were less a still life than it is. We have no cinematograph for administrative practices, and I was able to devote but little time to working "on location."

I am consoled by the reflection that even a fairly thorough observation, covering a period of, say, a month, of every insurance department, would have failed to bring the commissioner's practices into sharp focus. For in the first place, he does not have them sharply focused himself. Thus, the New York department rarely "refuses" a license to an insurance company; it merely indicates, by correspondence, its dissatisfaction with the company's showing, and the company either remedies the defects or drops the correspondence. Again, the answers to the questionnaire indicate that the commissioners have no settled notions, or very few, as to their administrative practices, as distinguished from the substantive requirements which they are authorized to impose. They think chiefly in terms of the net results to be obtained by the exercise of their powers, rather than the methods by which those powers are to be exercised. A careful perusal of the reported proceedings of their national convention for the past fifteen years confirms this impression. The most one can get on their administrative practices is their attitude toward such problems; for the problems themselves are infrequently, if at all, presented. The Texas commissioner who wrote me that he enforced the "laws" of his state, and that I could find out his administrative practices by reading the Texas statutes, displayed a typical attitude. I am inclined to think that such personal reactions tell more than would volumes of descriptive detail. Of the office routine, of the books and desks and inkpots, I would have learned more; but out of the welter of detail no clear picture would arise save by a somewhat arbitrary process of selection.

Finally, the harmful consequences of the existing administrative practices could be ascertained only by interviewing the private individuals affected thereby as well as the commissioners, and appraising their conflicting views. This would have taken even more time, not to mention the reluctance of the insurance company officers to talk freely about their specific grievances against a particular commissioner. And after all was said and done, the evil or wisdom of a particular administrative practice would involve an appraisal of the results actually produced by it, and that would lead to taking sides on many debatable questions of the insurance business. About all that one can show, unless one is armed with the subpoenas of a legislative investigating committee, is that undesirable consequences *might* result from a particular administrative practice.

Visits to the offices of four insurance departments helped me to arrive at the foregoing conclusions. Many of the questions which I asked the

officials about administrative procedure evoked surprise, even a politely concealed impatience. I was accustomed to look for sharp lines of demarcation, and for the most part there were none. Even the (then) Massachusetts commissioner, who was a lawyer, and understood my questions, regarded many of them as academic. The Illinois superintendent seemed unable to understand what I was driving at. Yet the officials whom I interviewed had an air of confidence that they were doing a job worth while and doing it as well as could be expected. They had no apologies for their administrative technique, and no plans for its improvement. The deputies, in particular, impressed one as satisfied bureaucrats.

Singularly enough, I succeeded in interviewing only two of the commissioners. The Massachusetts commissioner was courteous and intelligent. On the other hand, the Illinois superintendent, explaining that the impending city election in Chicago (1922) made it necessary to curtail appointments, grudgingly conceded me only twenty minutes. I found him, not in the offices of the Chicago branch of the Illinois insurance department, but in the offices of the private firm of insurance adjusters of which he was (or had been) a member. After twenty minutes of questioning, I was convinced that he had but little information of use to me.

The Iowa commissioner and the New York superintendent wrote, in response to my requests for interviews, that they would be unavoidably absent on the dates mentioned but both suggested that I interview their subordinates, which I accordingly did with satisfactory results. In all four instances I got most of my information from talking with deputies, chief examiners, policy examiners, and so forth. Except for a certain concreteness of detail, I felt that I got from all of these interviews no better information than I obtained from the answers to the questionnaire.

The questionnaire was made up after the study of statutes and decisions had progressed far enough to enable me to understand most of the problems which I was interested in. The questions were of several kinds. Some were designed to elicit information in statistical form; for example, the number of revocations of company licenses during the past year. Others were framed to call for a "yes" or "no" answer; for example, "Do you *invariably* give a company notice and hearing before refusing or revoking its authority to do business in the state?" A third type of inquiry was aimed to elicit a brief description of a particular administrative practice; for example, "What sort of an investigation do you make before refusing an application for an agent's license, or before revoking same?" Both of these two last-named types of questions actually evoked, I suspect, in many instances simply the official's *attitude* toward the problem. A fourth type of question was frankly designed to elicit such a statement of the official's attitude; for example, "Do you think that the power of control exercised by the courts of your state over your official acts interferes with the efficient performance of your duties or exercise of your powers?"

I realized from the first that I should be lucky if I got even such an expression of official attitude from all the commissioners. For, despite careful revision and pruning, the questionnaire contained ninety-nine questions. In all, I obtained answers from thirty-five states and the District of Columbia, though some departments did not answer all of the

questions. The answers gave evidence, for the most part, of courteous and thoughtful attention. The smaller departments were the quickest to respond. On the other hand, the Illinois, New York and Missouri departments refused to answer, and the answers for the two former were obtained by visiting those departments. The states from which no answers were obtained were: Alabama, California, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, New Jersey, Rhode Island, South Carolina, Tennessee, Texas. The states from which results were obtained were sufficiently diversified in geography and population to lead me to believe that my incomplete data were typical. I have inserted these data in their appropriate places in the text. In order to present the answers in summary form, I was frequently obliged to place my own interpretation on them and if I have erred in doing so I make due apology.

Aside from the visits and the questionnaire, information about administrative practices was obtained from several other sources. I perused carefully the published reports of the proceedings of the National Convention of Insurance Commissioners from 1910 to 1923, inclusive. While these volumes contain chiefly discussions of policy or actuarial detail, I gained from them many useful hints as to administrative practices. About the same may be said for the published rulings of the various insurance departments, known as the Weekly Underwriter Rulings. I studied carefully all the published rulings for 1923, and selected samples from earlier years back to and including 1920. The annual reports of the insurance departments proved far less helpful than their bulk had led me to hope. They are taken up chiefly with financial summaries of the insurance companies, though occasionally I have gleaned something from them. My two interviews with officers of insurance companies convinced me that, even with an appropriate introduction, I could gain from such sources but little useful information which I could honorably publish.

Many of us are now going through a period of disillusionment. It is not merely that we have lost the illusion that our legal institutions have an inherent validity, an inscrutable cosmic fitness for all times. One may still cherish the belief that one can get the "facts"; that one can marshal them statistically, test them economically and interpret them sociologically, and then remould our institutions nearer to the heart's desire. The more serious disillusionment comes when one realizes the hopelessness of ever getting at the "facts." I mean the "facts" as they are and are to be. By the time one has gathered one's data and interpreted it, the world has moved on to new experiences. One can not be sure that the 1921 answers to the questionnaire would be repeated in 1925, for instance. One can stay the eternal flux only by a politic fiction, a hopeful generalization. Yet even this disillusionment need not destroy one's faith in the efficacy of effort. One must get the "facts" as far as one can. One must give not an armchair guess, but an informed guess. That is the most that I can claim for this study of the administrative practices of the insurance commissioner.

APPENDIX C

KEY TO STATUTORY CITATIONS AND OTHER ABBREVIATIONS

Key to Statutory Citations. Where simply the name of the state and a section number (§) are given in the notes or text, the reference is to the statutory compilation listed below. Thus, "Ia., § 5499" means "Iowa Compiled Code of 1919, Section 5499." Where the sections in the compilation are not numbered consecutively, reference is made to the chapter or page, as indicated below. All session laws, by whatever name called (e.g., "Public Laws," "Acts and Resolves," "Statutes," etc.), are designated by the generic term "Laws," abbreviated to "L," followed by the year in which they were passed, and the chapter, number or page, as the case may be, and the section. The figure in parenthesis immediately after the name of the state, below, shows the date of the most recent statutory material used.

Alabama (1923).....Code, 1923 (official; adopted August 17, 1923).

Arizona (1913).....Civil Code, 1913 (official).

Arkansas (1915).....Kirby & Castle's Digest, 1915.

California (1919).....Civil Code (cited "C. C."), Political Code (cited "P. C."). ("C. S." indicates the Cumulative Supplement, 1906–13, of Kerr's Cyclopedic Codes. "(1915)" indicates the 1915 Biennial Supplement to same.) Also, Statutes of 1917 and of 1919.

Colorado (1919).....Mills' Annotated Statutes, 1912, and Session Laws through 1919. Most of the references are to the comprehensive insurance act of 1913.

Connecticut (1918).....General Statutes, 1918 (official).

Delaware (1915).....Revised Statutes, 1915 (official).

Florida (1919).....Compiled Laws, 1914 (unofficial; West Publishing Company; through 1913). Also, session laws through 1919.

Georgia (1912).....Code, 1910 (cited "Ga.") and Penal Code, 1910 (cited "Ga. Code, 10th Div."). Also, session laws of 1912.

Idaho (1919).....Compiled Statutes, 1919 (official).

Illinois (1917).....Hurd's Revised Statutes, 1917 (unofficial), Chapter 73 (cited "Ill."). Also, Laws, 1917, p. 2.

Indiana (1914).....Burns' Annotated Indiana Statutes, 1914.

Iowa (1919).....Compiled Code, 1919.

Kansas (1915) ..... General Statutes, 1915.

Kentucky (1918) ..... Carroll's Kentucky Statutes, 1915, and 1918 Supplement. The references to the Supplement of 1918 are indicated by small letters following the section number, e.g., "743s–3."

Louisiana (1915) ..... Marr's Annotated Revised Statutes, 1915.

Maine (1916) ..... Revised Statutes, 1916 (official). (Cited "Me." with chapter and section.)

Maryland (1918) ..... Bagby's Annotated Code, vols. I and II, through 1910, vol. III, through 1914 (supplement), and vol. IV, through 1918 (supplement). The references in each case are to Article 23, the volume (e.g., "I") and section being given.

Massachusetts (1921) ... General Laws, 1921, ch. 175 (official). Occasional references to other chapters are indicated by the chapter number.

Michigan (1917) ..... Public Acts of 1917, No. 256 (a complete insurance "code," repealing prior legislation). Cited "Mich.," with the "Part" in Roman numerals (e.g., "I," "II," "III"), the chapter in Arabic numerals, and the section indicated by the section mark (§). Thus, "I, 4, § 9" refers to Section 9 of Chapter 4 of Part I of the Act.

Minnesota (1917) ..... General Statutes, 1913 (official). Also, session laws of 1915 and of 1917.

Mississippi (1917) ..... Hemingway's Annotated Code, 1917.

Missouri (1919) ..... Revised Statutes, 1919 (official).

Montana (1915) ..... Revised Codes, 1907 (cited "Mont. C."), and 1915 Supplement (cited "Mont. S.").

Nebraska (1913) ..... Revised Statutes, 1913 (official).

Nevada (1912) ..... Revised Laws, 1912 (official).

New Hampshire (1913) .. Chase's Public Statutes, 1901 (cited "N. H." with reference to chapter and section), and Supplement, 1901–13 (cited "N. H. S.").

New Jersey (1910) ..... Compiled Statutes, 1910 (cited "N. J." with reference to page and section).

New Mexico (1915) ..... Statutes Annotated, 1915.

New York (1923) ..... Consolidated Laws, 1909, Ch. 28 (Laws, 1909, ch. 33), being the "Insurance Law." (Cited "N. Y.," with section number.) The text used was McKinney's Consolidated Laws of New York, annotated with supplements to the close of 1923. Where reference is made to session laws after 1909, the section of the Insurance Law, as given in the McKinney edition, is inserted in parentheses following the citation.

North Carolina (1917)...Pell's Revisal of 1908 (cited "N. C."), Gregory's Supplement of 1913 (cited "N. C. S."), Gregory's Revisal Biennial (through 1917) (cited "N. C. R. B.").

North Dakota (1913)....Compiled Laws (Annotated), 1913.

Ohio (1920).....The General Code. (Revised edition, Page, 1920.)

Oklahoma (1921).....Compiled Oklahoma Statutes (Annotated, 1921, Bunn).

Oregon (1920).....Laws, 1920 (Olson).

Pennsylvania (1923)....Supplement to Purdon's Digest, 1923, vol. 8. (Cited "Pa." with reference to section under title "Insurance," pages 8504 and following, unless other title specified.)

Rhode Island (1909)....General Laws, 1909. (Cited "R. I." with reference to Chapter and Section.)

South Carolina (1912)...Civil Code (1912). Also Acts, 1917.

South Dakota (1919) ...Revised Code, 1919.

Tennessee (1917).....Annotated Code, 1917 (Shannon).

Texas (1914).....Civil Statutes (Vernon Sayle's, 1914). References are to Articles.

Utah (1917).....Compiled Laws, 1917.

Vermont (1919).....General Laws, 1917, and Acts of 1919.

Virginia (1919).....Code, 1919.

Washington (1922).....Compiled Statutes (Remington, 1922).

West Virginia (1923)....Code Annotated (1923, Barnes). (Cited "W.Va.," with references to sections of Chapter 34 unless otherwise stated.)

Wisconsin (1921).....Statutes (1921).

Wyoming (1920).....Compiled Statutes (1920).

In Chapter II, specific citations are commonly omitted. A list of the citations will be found at the end of that chapter.

Other Abbreviations:

N. Y. Rulings (1916)....Rulings of the Superintendent of Insurance and Extracts from Opinions of the Attorney-General relating to Life Insurance Laws (1906) as amended; Supplement to Part V of Insurance Department Report for 1916. Also separately printed in pamphlet form by the New York Insurance Department. The references in the text are to this pamphlet edition.

Proc. N. C. I. C.....Proceedings of the National Convention of Insurance Commissioners, issued annually by the secretary of the convention. The number in parenthesis indicates the year date.

W. U. R.....Weekly Underwriter Rulings, selected official rulings of the insurance departments, and of the attorney-general on insurance questions, published weekly, for subscribers, by the Weekly Underwriter Company, 80 Maiden Lane, New York, N. Y. The pages of the annual volumes of these rulings are not consecutively numbered, and the references in this text give the state, the number of the ruling, and the year in which issued. Thus, "W. U. R., Ala. 1 (1923)," indicates the first published ruling of Alabama in the year 1923.

APPENDIX D

TABLE OF CASES

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