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CORNELL STUDIES

IN

HISTORY AND POLITICAL SCIENCE

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THE PRESIDENT WHITE SCHOOL

CORNELL UNIVERSITY

VOLUME III

THE JUDICIAL WORK

OF THE

COMPTROLLER OF THE TREASURY

AS COMPARED WITH SIMILAR FUNCTIONS
IN THE GOVERNMENTS OF
FRANCE AND GERMANY

A STUDY IN ADMINISTRATIVE LAW

THESIS

Presented to the faculty of the Graduate School of Cornell University in part fulfillment of the requirements for the degree of Doctor of Philosophy

BY

WILLARD EUGENE HOTCHKISS

CORNELL UNIVERSITY
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VITA.

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PREFACE

With all the tendencies of our social and institutional development emphasizing the need of efficient and orderly administration, administrative law seems destined to demand constantly increasing attention from students of American institutions. Until we have demonstrated the possibility of combining democratic government with efficient administration, municipal, state and federal, the forces which regulate the course of administrative activity may well occupy a place of paramount importance in the attention alike of students and administrators. It is in the hope of contributing something toward a better understanding of these forces that this study is undertaken.

The author is deeply indebted to all those, both in this country and in Europe, who have rendered him such courteous assistance in the preparation of this work. Special acknowledgment should be made to Comptroller Tracewell for his helpful criticisms and suggestions. Through the courtesy of M. Bénac, Director of the general movement of funds (*directeur du movement général des fonds*) in Paris it has been possible to observe at close range the treasury operations of France and to utilize freely the wealth of material available in the French Ministry of Finance. M. Victor Marcé, *Conseillier référendaire* of the French Court of Accounts, and Dr. Hugo Preuss of the University of Berlin have kindly read and given able criticism of the portions of the work descriptive, respectively, of French and German institutions. M. Marcé most generously made available material contained in his unpub-

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THE JUDICIAL WORK OF THE COMPTROLLER OF THE TREASURY

AS COMPARED WITH SIMILAR FUNCTIONS IN THE GOVERNMENTS OF FRANCE AND GERMANY

INTRODUCTION

Political science in the United States during the nineteenth century has been concerned almost exclusively with the constitutional side of public law.[1] The name administrative law has been associated in our minds with institutions peculiar to Continental states. Anglo Saxon concepts of justice which demand that government prerogatives and the affairs of individuals be regulated by the same law and the same courts, have been thought to preclude the development of administrative law in English speaking countries.[2]

[1] Only within comparatively recent years has the term administrative law found a place in our political science vocabulary. Dr. Ernst Freund, writing in the *Political Science Quarterly* as late as 1894 (IX. p. 404), called particular attention to the "new term" used by Goodnow in his *"Comparative Administrative Law,"* and expressed the hope that it might become familiar to the public and the legal profession, and that the subject itself might become a recognized branch of our public law.

[2] The neglect of this subject has not been confined to American students. In England it has been customary to assume that administrative law is unknown in those countries whose institutions are based on the English common law. Mr. Dicey in the sixth edition of his lectures on *"The Law of the Constitution,"* has explained that what in England is sometimes called administrative law, is nothing more than "official law" or "governmental law" (London and New York, 1902,

Acceptance of this term to designate collectively the body of rules and institutions under which the public services are organized and administered, does not imply that the principles of administrative law are the same in Anglo Saxon as in Continental states. Separate administrative courts in France find their historical explanation in Montesquieu's doctrine of the separation of the powers. This doctrine received in France a practical interpretation diametrically opposite from that given to it in America. Here the essential part of the doctrine was contained in the idea that the judiciary should be removed from the influence of the other powers, that it might be left free and untrammeled to apply one law to the relations of all citizens, whatever their personal or official status. According to the French interpretation, it was the executive power

appendix, pp. 486–487). The former, being the law of the civil service, is composed of the rules which determine the position of the servants of the state; the latter has arisen in connection with factory acts and other social legislation under which various boards have been organized to exercise regulative functions.

"The term *droit administratif*," says Dicey, "is one of which English legal phraseology supplies no proper equivalent. The words 'administrative law,' which are its most natural rendering are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation. This absence from our language of any satisfactory equivalent for the expression *droit administratif* is significant; the want of a name arises at bottom from our non-recognition of the thing itself" (p. 323).

The difficulty of rendering comes chiefly from regarding the French term from an exclusively legal standpoint as involving the idea of an administrative jurisdiction in the peculiar French or Continental sense. This purely legal view reveals only a part of the idea contained in the phrase *droit administratif*. Administrative law may be regarded not only from the standpoint of law, but from that of political science, and in this light includes the ensemble of rules and principles governing the organization and operation of the public service. (For a further expression of the same idea cf. Hauriou, Maurice, "*Précis de droit administratif*," 3e éd., 1897, p. 235, also 5e éd., 1903, pp. 190, ff.)

which was to be placed in the foreground and made free from any interference from the judiciary in carrying out its policies.

The historical reason for these different interpretations is sufficiently obvious. The American view is in harmony with the whole development of English legal notions. In France where different ideas had prevailed, experience prior to the development of separate administrative tribunals had shown, that when the judiciary possessed power to pass upon matters of administration, either the executive was unduly hampered in its policy by an unsympathetic interpretation of the law, or else it dominated the judiciary in such a way as to destroy its character as an organ of justice. The withdrawal from the courts of all cases involving questions of prerogative was a natural development under the old régime and with these cases already controlled by the administration, the subsequent creation of special courts for their trial was, in form, at least, a movement toward judicially regulated administration.[8] The

[8] This change, which was effected in 1806 by the reconstitution of the Council of State and its endowment with judicial functions, was at first a change of form rather than of substance. In harmony with the French interpretation of Montesquieu's theory, the new jurisdiction belonged exclusively to the executive branch of the government and was constituted to take a broad view of questions of government policy. The fact that the primary functions of the Council of State were those of an advisory board, and that appointment and tenure were at the pleasure of the Emperor, naturally subjected its judicial work to imperial dictation. The court was therefore practically the administration, specially organized for the purpose of judicially passing upon its own acts and of giving to arbitrary power a disguise of legal form. During the progress of the century the advisory functions of the Council have tended to become relatively to its judicial work, less important. Although the independence of the court has fluctuated under the several régimes, it has been establishing a body of legal precedents which are developing into an orderly system of jurisprudence.

raison d'être of Continental administrative jurisdiction is the need of an efficient but orderly executive.[4]

Absence of administrative tribunals in English speaking countries does not imply absence of administrative prerogative. Although a government with monarchical traditions and a bureaucratic administration possesses a personality to which prerogatives more readily attach, there is in every state, whatever its history and constitutional form, a body of privileges without which administration could scarcely proceed. Moreover in all states it rests, largely with the administration, not only to exercise such privileges but to determine in the first instance their limits. The executive whether acting by his own authority, in the absence of special law, or proceeding under the direction of the legislature, is subject to judicial process only when his authority is called in question.

When a private individual on the Continent considers his rights infringed by an act of administration, his remedy is regularly an appeal to the appropriate administrative court.

[4] In Germany where the doctrine of the separation of the powers has not been incorporated in public law, administrative jurisdictions, organized more or less according to the French model, are justified on the ground that conflicts of public and private interests cannot be settled according to the principles of abstract justice as applied between man and man; therefore ordinary courts accustomed to purely judicial reasoning are not qualified to deal with questions in which the broader interests of the state are involved. While the Germans have not seen the need of withdrawing from the ordinary civil jurisdiction the great mass of cases in which the state, in some of its various relations, is a party, or of making the higher administrative tribunals dependent on the executive, the existence of separate courts, made up in part of persons trained for administrative duties, is a recognition of the fact that private right must give way before the broader considerations of public interest. The functions of German administrative courts no less than of French, is to exercise justice without curtailing essential prerogatives of the government.

In England and America, analogous redress is granted by the ordinary judiciary, in form of such writs as *quo warranto, mandamus,* and *habeas corpus* issued more or less arbitrarily. Whether the court tends to favor private claims, or upholds official prerogative, the purpose of a jurisdiction which carries authority to address these several writs to public officers, is to harmonize private right with public interest, and the jurisdiction is within the realm of administrative law.

In America, expense and extreme technicality often make an application of the judicial remedy for grievances against the administration impracticable. Wherever the administration is hierarchically organized, an intermediate remedy is found in the appellate jurisdiction exercised by higher administrative officers. When no appeal is possible within the administration, the suitor may demand a reconsideration of his case, but he usually accepts the final decision of the officer or public body involved. The jurisdiction, original or appellate, lodged in the active administration, is regularly recognized as an instrument of redress for private grievances.

In American state governments the development of administrative jurisprudence was formerly precluded in large measure by the disconnected character of state administration. In recent years the increased number of appointive officers and the creation of new departments has in many states been bringing a larger measure of executive power into the hands of the Governor. The wide powers given to boards created to exercise the regulative functions of the state has moreover greatly increased the relative importance of the executive branch of the government.[5]

[5] The absolute futility of entrusting such functions as the care of the public health, the supervision of charities, the inspection of factories,

These changes together with the gradual substitution of a professional for a political civil service, are furnishing conditions which in the future are likely to be increasingly favorable to the development of commonwealth administrative law.

The administrative side of government has been developing with particular rapidity in the local divisions of the commonwealth. Many of the boards which are exercising the regulative power of the state, have in the city administration counterparts which operate with but slight supervision from the central authority. The problems of urban life moreover give rise to entirely distinct and separate activities which are only found in the municipal administration. Under the influence of expanding municipal functions, the executive branch of city government has everywhere increased in relative importance and in many cities has developed into a strongly centralized power.[6] The

the regulation of banking, of insurance, of railways, and even the oversight of public works, to officers or boards with narrowly restricted powers, is slowly influencing our legislatures to endow the organs of social regulation with large jurisdiction over private activities. The courts have usually upheld such jurisdictions as legitimate instruments for exercising the police power. The powers recently granted to the New York Public Service Commissions and the Wisconsin Railway Commission are late illustrations of the tendency to emphasize the administrative side of state governments.

[6] With absolute power to appoint the heads of all city departments except the department of finance, with a veto power which can be overruled only by a two thirds vote for ordinary ordinances, and by a three fourths vote when the expenditure of money is involved, and which is final in the case of a franchise, the mayor of New York City exercises under the present charter a power over the institutions and the people under his jurisdiction, which is not approached by that of any commonwealth executive nor exceeded by the power of any local officer in the constitutional states of Europe. The French Prefect with his vast power occupies a place in the official hierarchy subordinate to the ministry, while the mayor is the chief of a separate hierarchy with an

tendency to replace the term "city government" with the expression "municipal administration" is indicative of the change. New organs under control of the city administration, with their wide range of jurisdiction are shifting the burden of city government from the municipal legislature to the executive.[7]

Organic conditions favorable to the development of a consistent body of administrative law, have been present to a large extent from the start in the federal government. Except for a short period, the President has always had the legal power effectively to control the federal administration. Though legislative regulation of detail reaches a minuteness unknown to European governments, the growing volume of administrative affairs has compelled Congress to leave more and more the internal affairs of departments to executive regulation. Every extension of government activity

authority of his own which can be modified or abridged only by legislative amendment of the city charter.

[7] At the time this goes to press (January, 1910), a mayor is assuming office under political auspices different from those surrounding a majority of the administrative officers who collectively control the budget; the question is raised whether in case of conflict, the mayor will be able to exercise substantial independent power. As concerns administration proper the question may be answered by recalling the measure of the mayor's power of appointment and removal. The New York situation does however raise the question how far it is profitable in municipal affairs to consider the executive and the legislative as something distinct and separate. The same question is raised with greater emphasis by the introduction of the commission form of government in several cities. While these occurrences make the New York example less typical perhaps than it appeared when the preceding note was written they indicate no tendency to diminish the emphasis on administration in city affairs. Both the commission form of government and the large power of the mayor and other administrative officers in cities like New York magnify the executive by placing a large part of the legislative power in a body which is merely the administration organized in collegiate form.

has augmented this tendency and increased the relative importance of the executive.[8]

With the extension of federal activity a broad administrative jurisdiction is coming to be regarded as both inevitable and desirable. The nice balance between executive, legislature and judiciary, which has nominally characterized the home government can scarcely apply in the same spirit

[8] In connection with the administrative changes in city, state and nation it should be noted that the sum total of administrative development is a net loss for the state compared with the city and the federal government. While municipal and federal functions have multiplied, the volume of affairs under the direct administration of the commonwealth has remained relatively stationary. With every new concession to the demand for municipal home rule, functions formerly performed by the central administration for the commonwealth at large, are delegated as far as the urban areas are concerned, to the several municipal governments. In the acquisition of new functions moreover, the commonwealth has by no means kept pace with the cities. The need of social and industrial regulation arises in many cases out of the conditions of urban life and is a direct result of the growing importance of cities. In spite of the minute detail with which legislatures regulate the exercise of local functions, the city possesses a social identity which the legislature in general respects. Notwithstanding legislative interference so much deplored, the city charter is regarded in the light of a constitutional statute possessing a certain degree of permanence. The representation of the city as a whole in the person of the mayor removes in a large measure the occasion for minute and repeated direction which the legislature exercises over the disconnected branches of the commonwealth administration.

At the other end of the scale, federal functions are tending on the whole to increase at the expense of the commonwealth. In the larger affairs of our modern industrial and social life state boundaries are without significance. Commonwealth regulation of problems national in scope has proven hopelessly inadequate; and the federal government, under a liberal interpretation of its granted powers, is meeting the situation by a constant extension of its own jurisdiction. Under these circumstances the exigency of a thoroughly efficient administration, and consequently of a centralization of power, has not been felt with the same keenness in the commonwealth as in the federal and municipal governments.

to the government of the Philippines. The Philippine Commission as combined legislature and executive, has had to exercise extensive judicial functions and through its paramount influence and power of appointment has inevitably influenced to a certain extent the judiciary proper. Similar conditions obtain in other possessions,[9] while in the home government the exigencies of social and commercial regulation have endowed administrative boards with far-reaching judicial powers.

In connection with more recently developed activities, whether in insular government or industrial regulation it has come to be recognized that effective administration inevitably involves a large measure of judicial activity.[10]

[9] Although the growth of executive power has doubtless been enhanced by the administration of recently acquired territory, it cannot be assumed that confusion of administrative and judicial work is confined to the insular possessions. The administration of the Continental territories has always called for the executive exercise of a wide range of judicial power; indeed the whole system of territorial courts has been in a measure a part of the administration, since the judges, contrary to the constitutional principles which control the federal judiciary, are appointed, not for life but for a term of years and are thus dependent upon the federal executive. The system of Congressional courts has been held by the Supreme Court not to violate the Constitutional provision that all federal judges shall hold office during good behavior. (American Insurance Co. *v.* Canter, 1 Peters 511.)

[10] It is worthy of note that although under the old law the Interstate Commerce Commission was one of our most important administrative jurisdictions, it was frequently assumed in the discussions on the rate law of 1906 that the endowment of a branch of the administration with extensive judicial powers was a radical departure from established practice. The most frequently reiterated arguments in the debates upon the rate making power, especially upon the subsidiary question of a court review, concerned the constitutionality of an attempt to confer judicial functions upon an administrative body. The same discussion arose in connection with federal meat inspection and has all tended to emphasize the impossibility of entirely separating administrative and judicial functions.

It is not so generally recognized that in the older and more fundamental branches of government activity, judicial powers of similar extent are not wanting. Such services as the pension bureau, the consular service, the customs and internal revenue service, the patent office, the currency, and many other services call for the exercise of a jurisdiction intimately connected with the private rights and interests of every citizen with whom they come in contact.

Among the judicial activities which characterize in varying degree divers branches of the federal administration, there are none more far-reaching in their effect upon the relation of private citizens to the state, than those performed in the administration of the treasury. While other organs hear and decide questions arising within their own peculiar spheres, the treasury administration, wherever fiscal operations are involved, holds jurisdiction over all departments of the government. The organs of treasury regulation are at the same time organs for weighing and determining the legality of claims against the state, and as such, although their decisions may be reviewed by the courts, exercise a most important judicial function.

This function is centralized in the Comptroller of the Treasury who, as director of the machinery of treasury regulation, superintends all disbursements of public funds. The official subordination of the Comptroller to the Secretary of the Treasury in whose department his activities center, has always been to a large extent nominal. The Comptroller receives his appointment direct from the President and is regarded throughout the administration as final judge in matters of accounts. This position has been confirmed by legislation enacted in 1894, which specifically endows the Comptroller, within his sphere, with the attributes of a Court of Appeal for the whole administration.

Under this legislation the Comptroller undoubtedly exercises the most important judicial functions of any single officer in the administration. The Attorney General advises and directs legal process; the Comptroller is clothed with power to decide, and every organ of the administration is bound by his decisions.

From the point of view of the individual citizen the Comptroller's judicial powers are of the utmost importance as bearing upon the rights of persons who stand in the position of creditors of the state. Though the government by establishing the Court of Claims, and subsequently by extending a practically concurrent jurisdiction to circuit and district courts, has furnished all claimants a legal remedy outside the administration, the practical remedy frequently lies in an appeal from the particular branch of the administration, through the subordinate treasury officers to the Comptroller.

Probably in no branch of our government's activity have the delays and the expense of judicial proceedings encouraged the growth of administrative jurisdiction to a greater extent than in the office of the Comptroller. In France, where administrative courts possess a final appellate jurisdiction over claims, comparatively simple and inexpensive process has made the ultimate legal remedy at the same time a practical remedy. Under our system with its complete provision for appeal to the courts, the absolutely informal and unrecognized jurisdiction of a political officer, has developed a practical significance out of all proportion to the constitutional position which it occupies among our organs of government.

Administrative activity, following the constant growth of government functions, has in recent years undergone remarkable development. The centralized power of the fed-

eral executive has always been essentially favorable to the growth of an orderly system of administrative law, and municipal governments with their rapidly increasing activities are in many cases beginning to exceed the federal administration in centralization. Even in the commonwealths where the assumption of new functions has been more or less neutralized by the encroachment of both municipal and federal activity, executive power has been considerably increased by specific acquisitions, and the decentralization which characterizes commonwealth administration is becoming in many cases less absolute.

Many of the forces which tend to enhance the relative importance of the administrative side of government in America are found, not in the letter of constitutional or legal provisions, but only in the actual working of government machinery. Adequate understanding of institutions of government requires a knowledge of the functions which they perform. The following chapters therefore will aim, not only to show the historical development and present legal status of the Comptroller's jurisdiction, but will be primarily concerned with setting forth the actual judicial work which the comptroller performs. A comparison of that work with the methods of accomplishing similar ends in Continental states may be expected to throw some light upon an important branch of American administrative law.

PART I

THE JUDICIAL WORK OF THE COMPTROLLER

CHAPTER I

ORIGIN AND HISTORY OF THE COMPTROLLER'S OFFICE

The office of Comptroller was first created by a resolution of the Continental Congress passed in 1778.[1] The judicial side of his work dates from 1781[2] when in addition to the supervisory executive duties previously performed he was vested with appellate jurisdicition over accounts. The act of 1781 provided that any person with a grievance might appeal from the Auditor's judgment to the Comptroller who was directed to give public hearing and render final

[1] J. C. Sept. 26, 1778, v. 3, p. 70. The resolution provided also for an Auditor, a Treasurer and two Chambers of Accounts. Prior thereto the duties of these officers had devolved partly on an Auditor General and a Treasury office of Accounts (Res. Ap. 1, 1776, J. C. v. 1, p. 302), partly on the treasurers (sometimes one and sometimes two) and partly on a standing committee for supervising the treasury (Res. Feb. 17, 1776, J. C. v. 1, p. 267). After April 1, 1776, the standing committee was known as the Treasury Board. The organization of the Board was modified in 1779 (Res. July 30, J. C. v. 3, p. 330), by a provision that three of its five members should not be delegates to Congress.

[2] The utter confusion of the finances under the various arrangements led in 1781 to the total reorganization of the Treasury under the Superintendent of Finance (Res. Feb. 7, and Sept. 11, 1781, J. C. v. 3, pp. 574 and 666). These acts placed the Comptroller at the head of the whole accounting service and next in rank to the Superintendent. Under the Comptroller were a Register and a Treasurer, with the respective duties of bookkeeper and custodian, and Auditors who were to pass upon accounts prior to their transmission to the Comptroller.

decision. Satisfactory reports concerning the practical operation of the law are lacking. The chaotic state of finance administration during the six and one half years it was in force[3] was not favorable to the establishment of a definite jurisdiction; nevertheless, judging from the congressional debates in 1789, the judicial aspect of the Comptroller's work seems to have become familiar.

In discussing the bill for organizing the Treasury under the constitution,[4] the judicial nature of his duties was made the basis for suggesting a definitely stipulated right of appeal from the Comptroller's decisions to the Supreme Court. On the same basis a strong plea was made for limiting executive control of his tenure. James Madison referred to the Comptroller's duties in this language:

> We shall easily discover they are not purely of an executive nature. . . . The principal duty seems to be deciding on the lawfulness and justice of claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the Government.[5]

Madison's views were not reflected in the law as passed.[6] No mention was made of the Comptroller's tenure and his position in the department was similar to that contemplated in the law of 1781. The essential difference in the opera-

[3] In this connection the brief improvement under Superintendent Morris should be noted. The officers of Comptroller and Auditor were abolished on September 21, 1787 (J. C. v. 4, p. 773), and their duties transferred to the Board of Treasury, re-created in 1784 and first reorganized in 1787.

[4] This bill which became law on September 2, 1789, followed in the main the lines laid down in the law of 1781.

[5] An. of Con., 1 Cong. v. 1, p. 635.

[6] Law of Sept. 2, 1789, 1 U. S. St., 65.

tion of the two laws arose from the nature of the governments behind them. Assignment of duties in both made the Comptroller and the Auditors the only adjudicators of accounts. The Secretary of the Treasury was directed to sign warrants to be countersigned by the Comptroller, but he had no authority to decide upon accounts. With powers similar to those outlined in 1781, the existence of a strong executive and the centralization of accounting in the Department of Treasury gave opportunity which had been lacking under the earlier law for the systematic exercise of the Comptroller's judicial powers.

Since 1789 the chief obstacle in the way of developing the judicial side of the Comptroller's work has been the failure of administrative reform to keep pace with the growth and congestion of public business. Until a central audit of accounts was in some measure harmonized with decentralization of details in the several departments by the act of 1894, the Comptrollers were constantly charged with a mass of routine which tended seriously to impair the judicial quality of their final audit.

During the first three years of the government, the Treasury not only regulated all disbursements, but also superintended the purchase of supplies in other departments. The cumbersomeness of the arrangement led in 1792[7] to the creation of an accountant in the War Department who was authorized to settle all departmental accounts submitting them quarterly to the Treasury for revision. Following the creation of the Navy Department in 1798,[8] a similar procedure was established there, and in addition the Secretaries of War and Navy were authorized to make purchases for their respective departments.[9] The practice

[7] 1 U. S. St., 280.

[8] 1 U. S. St., 553.

[9] 1 U. S. St., 610.

of the department under such acts as these[10] rendered the Treasury revision of accounts practically nugatory. Accounting officers still continued to pass upon accounts as before, but whereas those of the Treasury Department were paid only upon report of the auditor confirmed by the Comptroller, payment in other departments preceded such revision. The subsequent Treasury revision tended to be in large measure perfunctory and gave the whole arrangement the effect of independent departmental regulation.

The laxity of this system became apparent in the early years of the century but it was not until the finance administration practically collapsed under strain of the war of 1812 that reforms could be carried through. On April 20, 1816,[11] a senate resolution directed the heads of executive departments to report jointly a plan for more effective accounting. On the basis of this report submitted in December, 1816,[12] an act was passed aiming to leave the departments a degree of independence essential to the proper conduct of public business, and at the same time to furnish machinery by which the provisions for a central audit could be enforced.[13] The act provided for an additional Comptroller and four additional Auditors.[14] The Auditors be-

[10] In the law establishing the land office in the Treasury Department in 1812 (2 U. S. St., 716), provision was made for the settlement of accounts in the Commissioners's office, to be transmitted directly to the Comptroller. The same provision was maintained when the office was transferred to the Interior Department in 1849 (9 U. S. St., 395).

[11] An. of Con., v. 29, p. 331.

[12] An. of Con., v. 30, p. 23. Report signed by James Monroe, William H. Crawford, George Graham, and B. W. Crowninshield.

[13] An. of Con., v. 30, pp. 48 and 1038.

[14] 3 U. S. St., 366. Another provision of the law of 1817 gave the heads of the several departments power to sign warrants provided they were registered by the appropriate Auditor and countersigned by the

came, and still remain officers of the Department of Treasury.[15]

While the law of 1817 established the fundamental relation of the Treasury to departmental accounts it did not provide a permanently efficient system of audit. When the great mass of payments came to be made by disbursing officers under bond, accounts instead of undergoing two revisions were subjected to three or four. The real work was performed by the disbursing officers and in the bureaus of the executive departments, while the final responsibility was with the officers of the Treasury. As the volume of business increased, the necessity of revising all accounts burdened the Comptroller with a mass of mechanical work which restricted him to a mere perfunctory examination.

In 1842 after flagrant defalcations had been unearthed,[16] a select committee on retrenchment, recognizing the incorrectness of multiple responsibility, recommended that the

Comptroller. In 1822 this arrangement was modified by a provision that all warrants should be drawn by the Secretary of the Treasury upon requisition of the head of the department concerned (3 U. S. St., 689).

A recommendation of the report, that a solicitor be appointed to relieve the Comptroller from the duty of recovering debts, was not acted upon in 1817. The office of Solicitor was subsequently created in 1830 (4 U. S. St., 414), and transfered to the Department of Justice in 1870 (16 U. S. St., 162).

[15] The bill for reorganizing the Post Office Department in 1836, as originally drawn, provided that the sixth auditor should be under the direction of the Postmaster General, the object being to keep the post office funds and accounts distinct from the general funds of the country. After considerable debate, a motion to place the Auditor under the direction of the Secretary of the Treasury prevailed (Con. Debates, v. 12, pt. 3, p. 3779; 5 U. S. St., 81).

[16] For the relation of Treasury officers to fiscal irregularities, cf. discussion of Swartwout defalcation,—von Holst, "*Const. Hist. of U. S.*," II. 1823–1846, pp. 349 ff.; cf. Colton, "*Life and Times of Henry Clay*," II. pp. 396 ff.

first Comptroller be relieved of all administrative duties and devote himself exclusively to the duties of final judge.[17] No action of this nature was taken but in 1849 provision was made for a Commissioner of Customs who was virtually a third Comptroller.[18] Aside from provisions from time to time for more stringent accounting by disbursing officers[19] no important administrative reforms were accomplished until 1894. Meanwhile the enormous increase of business had so delayed final settlements that advances to disbursing officers were frequently many times the amount of their bonds. The only effective audit under these conditions was conducted in the bureaus of the executive departments. The Comptrollers, overburdened with the duty of going through a mass of accounts, frequently years after the disbursements had been made, were in no position to furnish a valuable check upon expenditures.

In his last annual message in 1892, Secretary Foster urged the need of thoroughgoing reform.[20] Upon his recommendation a committee was appointed to investigate and report to the next session of Congress.[21] On the basis of information obtained from a census of all the executive departments, the Commission's experts recommended a complete reorganization of accounting and auditing.[22] Its plan was embodied in a bill and with but slight changes

[17] Doc. 27. Con. 2. Sess. H. R. 4, Rep. 741, p. 13.

[18] 9 U. S. St., 395.

[19] 12 U. S. St., 593; 14 U. S. St., 571.

[20] Doc. 52. Con. 2. Sess. H. E. 23, p. lxxviii.

[21] This Commission, known from its chairman as the "Dockery Commission" was made up of Senators Cockrell, Jones and Cullom appointed by the President of the Senate and Representatives Dockery, Richardson and Dingley appointed by the Speaker.

[22] The work was in immediate charge of Mr. J. W. Reinhart, Vice-President of the Atchison, Topeka and Santa Fe Railroad.

became law on July 31, 1894. By this act known as the "Dockery Law"[23] the executive duties of the Comptrollers were for the most part devolved on other officers; their judicial functions were given specific legislative sanction and united in a single office.[24]

The law of 1894 abolished the offices of first and second Comptroller, deputy first and second Comptroller and Commissioner of Customs and provided for a Comptroller and an assistant Comptroller, the latter with power to countersign warrants, but only under the Comptroller's authority and direction. The purely administrative duties of the offices abolished were transferred to the respective Auditors whose titles were changed to indicate the work actually performed.[25] The findings of the Auditors under this law are final unless appeal is taken to the Comptroller.[26]

[23] The original bill introduced in the House was never acted on by the senate; its essential provisions were attached as a rider to the legislative, executive and judicial appropriation bill and in that form received the approval of President Cleveland (28 U. S. St., 205–211, ch. 174, sects. 3–24).

[24] Such sanction had in a measure been given in 1868 by a law which specified explicitly that balances stated by an Auditor and properly certified by a Comptroller should be final and conclusive upon the heads of departments (15 U. S. St., 54). The purpose of this law was to relieve an uncertainty arising out of a decision of the Supreme Court in U. S. *v.* Jones (18 Howard 92), to the effect that accounting officers could not question decisions reached by heads of executive departments. This principle was never fully accepted by the officers of the Treasury. In 1856 Secretary Guthrie had instructed the fourth Auditor that it should be held to apply only to the particular case and not considered as changing the law. (Cf. Renick, E. I., in *Pol. Sci. Quart.*, VI. p. 277.) The law of 1868 was a statutory confirmation of a principle already established in actual practice.

[25] From first, second, third, fourth, fifth and sixth, to Auditor for the Treasury, for the War, for the Interior, for the Navy, for the State and other Departments, and for the Post Office Department.

[26] Several important changes in administrative procedure were instituted. The Division of Bookkeeping and Warrants, enlarged from the

Provisions for appeal permit any person whose account has been settled by an Auditor, the head of an executive department or of any board, commission or other establishment not subject to an executive department, to appeal to the Comptroller within one year from date of settlement. Within the same time the Comptroller may of his own motion revise any account. After the Comptroller's decision is rendered, the Secretary of the Treasury may suspend payment if in his judgment the government interests so require, and demand a reëxamination. The Secretary acquires by such action no jurisdiction over the case, the second examination like the first being wholly the work of

old Division of Warrants, Estimates and Appropriations, and kept in the office of the Secretary, became the official record bureau. The duties of the register were left to be prescribed by the Secretary. For advancing money, requisition made on the treasury is sent to the Division of Bookkeeping and Warrants to ascertain the condition of the account. Thence it goes to the appropriate Auditor who acts according to facts submitted. If approved the requisition is returned to the division of bookkeeping and warrants, where warrant is issued and sent with the requisition to the Secretary and the Comptroller for signature, thence to the Treasurer who issues draft and returns the requisition to the Auditor for filing. The statute directs Auditors to disapprove requisitions of officers delinquent in their accounts, his decision being subject to reversal by the Secretary, whose duty it is to prescribe rules for insuring prompt settlement and to report annually to Congress all officers who have been delinquent during the preceding year.

Accounts for postal revenues, like all others, are received by the proper auditor but balances from postal revenues are certified not to the division of bookkeeping and warrants, but to the Postmaster General. The policy of regarding the Post Office Department as distinct from other activities of the Government has been steadily followed. The only connection between the Treasury and the Post Office Departments arises from the common relation to the Comptroller and from his jurisdiction on appeal. (Cf. note 15.)

Returns relative to the public lands are still made to the Commissioner of the General Land Office. Accounts of this office which were formerly sent from the Commissioner direct to the first Comptroller are now audited by the Auditor for the Interior Department. (Cf. note 10.)

the Comptroller. The final decision of the Comptroller is conclusive upon the executive branch of the government.

The Comptroller exercises not only an appellate but also an authoritative advisory jurisdiction. Disbursing officers, heads of executive departments or of boards, commissions or establishments not subject to an executive department, may apply to the Comptroller for a decision upon any question involving a prospective payment and the decision rendered binds not only the Auditor but the Comptroller himself should the case come to him on appeal. Auditors moreover, when making an original construction of statutes or modifying an existing construction, must forthwith report to the Comptroller and suspend payment of any items affected, until the Comptroller has signified his approval, disapproval or modification of the construction adopted.

Without establishing any new principles of law, the act of 1894 has given the Comptroller's jurisdiction a twofold recognition. Judicial functions exercised to a greater or less extent since the foundation of the government, have now received specific and comprehensive definition, and of even more importance, by removing the burden of executive routine, and confining the Comptroller's work to cases which demand legal construction, the law for the first time recognized the Comptroller's judicial work as the primary and well nigh exclusive function of his office.

CHAPTER II

THE COMPTROLLER'S JURISDICTION

Within his legal sphere the Comptroller renders decisions which are final and conclusive upon the executive branch of the government. Coördinately he is an executive officer of the Treasury Department and as such is nominally subordinate to the Secretary of the Treasury. Although in his judicial capacity he is legally independent of the Secretary, the relation between the two officers is important in determining the actual degree of independence with which the Comptroller operates.

Long before the more active administrative duties of the Comptroller were transferred to other officers, it had been recognized that subordination in these matters might tend to make the Comptroller less independent in the exercise of his judicial functions.[1] The danger of such an influence

[1] 27th Con., 2. sess., H. R. v. 4, Rep. 741, p. 11.

"The union of administrative and accounting duties in the hands of the First Comptroller, the committee regard as peculiarly objectionable. As the final judge in matters of accounts, he was designed to be independent of the Secretary; but, in superintending the customs, he appears to be entirely subject to his control. The tendency of this submission in one part of his duties is but too well calculated to impair his independence in the other; and it is probable that, in the practical operations of his office, the distinction between his two classes of duties is apt to be overlooked. The general tendency of the system has doubtless been to give a prevailing influence, touching even upon accounts, to the administrative branches of the Department over the accounting. The higher salary of the Secretary, his political position and connexions, and his access to the President, contribute to this influence, and doubtless to disincline the accounting officers to resist his authority, whenever he is inclined to assume the responsibility of de-

is in large measure obviated by the essential difference in the nature of the two officers' executive functions. This difference was recognized in France at one time by provision both for a Ministry of Finance and a Ministry of Treasury, and at present in all important European countries the two sorts of duties, though performed in the same ministry are kept administratively distinct. In our own government the Secretary's duties as Finance Minister, in spite of the large part played by the Ways and Means Committee of Congress in providing revenue, have so increased with the growth of departmental business as completely to overshadow his relation to the disbursing machinery of the government. Although by virtue of his position in the administrative hierarchy the Secretary still nominally superintends the machinery of disbursements, his actual directive activities in that branch of the department's work are of little importance. The actual duties of a Minister of the Treasury are performed by the Comptroller who holds his position not by the appointment of the Secretary but direct from the President. While the President would doubtless

cision. This office should be restored to what it was, or was intended to be—the final umpire in matters of accounts—and should be freed from the administrative duties in connexion with the customs."

A similar danger was referred to by Senator Jefferson Davis in the debate over the creation of the Interior Department in 1849.

"No feature," said Senator Davis, "is more common to our form of Government that its checks and balances—one department checking and guarding the other. . . . It was a departure from that great principle to put in the same hands in the organization of our Government the collection and disbursement of the revenue. The one should check the other. The officer who is charged with finding the ways and means to carry on the Government properly, never should have been charged with the disbursement of those means. And this division of the Treasury Department, I consider essential to rigid economy and just accountability which belongs to our Government." (Congressional Globe, 30th Con., 2 sess., p. 670.)

avoid the appointment of a person whose relations with the Secretary were seriously inharmonious, there is nothing to show that in recent years the Comptrollers have been in any sense overawed by the Secretary's superior position.

The Comptroller's independence and the esteem in which the office is held were doubtless somewhat enhanced by the publication of the first Comptroller's reports which began in 1880.[2] When, in 1894, the Dockery Act replaced the several Comptrollers[3] by a single one, emphasis was given to the independent position of the Comptroller simply as an executive officer, and his definite recognition as final judge in matters of public disbursement gave his office a judicial dignity which the Secretary of the Treasury as well as other officers of the executive departments is likely to respect. This circumstance may be fairly expected to prevent permanently any influence, to which the Comptroller's position as an administrative officer might seem to subject him, from seriously impairing the stipulated finality of his decisions upon officers of the executive departments.

In defining the Comptroller's jurisdiction his relation to the Attorney General should receive special attention. Before 1894 it was the Comptroller's sole function to act and decide while the Attorney General alone was the legal advisor of the government. Although by following the apparent intent of the law in confining advice to the heads of executive departments[4] the Attorney General even before

[2] After the appearance of six volumes, 1880 to 1885 inclusive, with the exception of a small volume, 1893 to September 1894, publication ceased until the inauguration of the new organization in October, 1894. Since then there have been no interruptions.

[3] The Commissioner of Customs performed essentially the duties of a Comptroller.

[4] Rev. St., sec. 356.

the law of 1894 would have been excluded from that field which the Comptrollers occupied independently of the Secretary, it was generally regarded as within the Attorney General's province to give opinions upon matters to be passed upon by the accounting officers of the Treasury.[5] At the same time the practice grew of seeking in advance advice from the Comptrollers upon matters which were likely to come before them for decision. These two functions which prior to 1894 were legally distinct and committed to different hands became in practice to a large extent confused.

Such a situation was well calculated to give occasion for conflicts of jurisdiction. The Comptrollers' decisions were conclusive upon the executive branch of the government and there seems to be strong ground for regarding the advice of the Attorney General as having the force of law until overruled by the courts. This view comes out clearly

[5] For a different practice note the following opinion of Atty. Gen. Bates in 1863, replying to a request for aid in making a decision: "By long and unbroken construction and practice, it has been settled that the Attorney General acts. . . . simply as the law adviser of the President and Heads of Departments. . . . He is not the official legal adviser of any subordinate officer of any department, except the Solicitor of the Treasury. It is true that he often gives to Heads of Departments advice and opinions upon questions arising in the bureaux of their respective departments, but such advice and opinions are intended to aid only the judgment of the Secretary himself in deciding such questions. To enlarge the rule beyond this extent would not only be unwarranted by law, but would convert the Attorney General's office into a sort of general appellate court, where dissatisfied claimants might seek relief from adverse decisions, and subordinate executive officers find a way of escape from official labor and responsibility. . . . [It] would be clearly wrong to give an opinion in a case which not only is not before the Secretary of the Treasury, but which evidently cannot reach him. My opinion would simply be advice to the Auditor and not to the Secretary, and this I have no power by law to give" (11 Op. A. G., 5).

in an opinion given by Attorney General Olney about a year before the law of 1894 went into operation.

I do not think, said the Attorney General, that the First or Second Comptroller or the Commissioner of Customs has any legal status as an advisor upon legal questions. These gentlemen are accounting officers holding great power, but their function is to take action, not to advise others how to act. Each is the trial judge within his own sphere. . . . The act of 1870 . . . provided that written opinions prepared by a subordinate in the Department may be approved by the Attorney General, and that "such approval so endorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney General." This provision is embraced in substantially the same language in section 3581 of the revised statutes. Evidently, therefore, Congress contemplates that the official opinions signed or endorsed in writing by the Attorney General shall have some actual and practical force. Congress's intention cannot be doubted that administrative officers should regard them as law until withdrawn by the Attorney General or overruled by the courts, thus confirming the view which generally prevailed, though sometimes hesitatingly expressed, previous to the establishment of the Department of Justice.[6]

However such a force given to the Attorney General's opinions may have affected the prerogative of the Comptroller prior to the law of July 1894, the situation was essentially different as soon as that statute was in force. The Comptroller was by that act not only confirmed in his position of judge but was also given the legal status of advisor to the heads of executive departments and other establishments and to disbursing and accounting officers upon questions of law concerning prospective disbursements. This status moreover has been definitely recog-

[6] 20 Op. A. G., 655.

nized in an abundance of cases by all of the successive Attorneys General since the law was enacted.[7]

The fact that cases of this sort continued to be referred to the Attorney General, is to be attributed largely to the effect of long continued practice. Many of the requests emanating from the Secretary of the Treasury are joined in by the Comptroller himself and indicate merely a natural respect for the high legal authority of the Attorney General and a desire to benefit by it in reaching a difficult decision. The independent position which the Comptroller holds, the fact that his subordination to the Secretary is

[7] The first reported opinion of this sort was given by Attorney General Olney on May 22, 1895. It is interesting to note that in pointing out the change of advisory jurisdiction made by the law of July 1894, Attorney General Olney contemplated retention of jurisdiction by the Attorney General in matters of great importance. To a request from the Secretary of the Treasury he replied in part: "By the act of July 31, 1894, . . . the questions which you now ask me could have been asked of the Comptroller of the Treasury. . . . I think that they belong to a class of questions which, now that an opinion of the Comptroller forms a complete protection, should no longer be asked of the Attorney General, at least except in matters of great importance. They are questions which the Comptroller, by his greater experience, is better qualified to pass upon, and it is desirable to avoid any possible conflict of precedents" (21 Op. A. G., 178). On the day following the delivery of this opinion, in consideration of the fact that the Comptroller joined the Secretary in asking his advice, Attorney General Olney consented to give an opinion upon an interpretation made by the Comptroller, as coming under the reservation he had made the previous day for cases of great importance. In this case, however, he concurred entirely in the conclusions reached by the Comptroller (*ibid.*, 182). About two weeks later, in replying to a request from the Secretary of the Treasury regarding the right to refund certain duties collected by mistake, the stand taken in the first case was reiterated and an opinion accordingly denied (*ibid.*, 188). The fact that later opinions of Attorneys General make no exception of cases of great importance seems sufficient ground for concluding that the reservation is no longer upheld (22 Op. A. G., 581; 23 Op. A. G., 468 and 586).

merely nominal, the consciousness which he undoubtedly possesses of the judicial character of his office, makes it seem extremely improbable that his action in such cases is the result of secretarial influence. The sounder conclusion is that a joint request of the two officers represents a genuine coöperation to insure a correct decision. The decision when rendered is that of the Comptroller alone.

While the opinions of the Attorney General concerning matters of expenditure are largely gratuitous, cases arise in which, while passing upon other points of law the Attorney General expresses, by implication at least, opinions upon matters properly within the province of the Comptroller. A typical case arose under the law making provision for the twelfth census.[8] The act so enlarged the powers of the Director of the Census as compared with those exercised by the Superintendent of the Eleventh Census that question arose whether the Secretary's approval should be necessary for appointments and for the execution of plans formulated by the Director. This question the Attorney General answered squarely in the negative but his opinion would have been largely nugatory had the Secretary under the law giving him power to sign requisitions[9] been able effectively to control the expenditure of census money. The Attorney General therefore accompanied his refusal to accept jurisdiction over the question of disbursements, by an opinion that any duties devolved upon the Secretary in that connection was of a purely ministerial nature not involving power to pass upon the wisdom of the expenditure.[10] The opinion was so expressed as to leave it entirely with the Comptroller to decide whether or

[8] 30 U. S. St., 1014, ch. 419.

[9] Rev. St., sec. 444.

[10] 22 Op. A. G., 413–421.

not the Secretary's signature should be required. It is obvious that an opinion so rendered, whatever its legal status, could scarcely fail to be of material assistance to the Comptroller and would naturally be received with peculiar deference. Attorneys General on the other hand have shown themselves scrupulously careful not to transgress the advisory jurisdiction allotted to the Comptroller by the act of 1894.

The extent of the advisory power which the Comptroller may exercise, and the circumstances under which he may legally assume jurisdiction in a case, have been determined in a large measure by his own decisions. Interpreting liberally the provision for advance decisions, executive officers have sometimes requested such decision when no payment was under contemplation. In all such cases the Comptroller has held that he possessed no jurisdiction to render decisions except such as affected proposed payments actually under consideration.[11] Moreover the Comptroller does not hold himself authorized to render a decision at the request of an executive officer when the appropriation concerned is under the control of some other officer.[12] Nor does the provision authorizing the head of an executive or independent department to apply for the revision of an account settled by an Auditor, authorize the head of a bureau in a department to apply for such revision.[13]

So with reference to the jurisdiction of Auditors the provisions of law have been strictly carried out. The Auditor is not permitted within one year to review an account he

[11] In Re Seamen of SS. Paris. I Comp. Dec., 411. In Re Com. of Indian Affairs' bond, II Comp. Dec., 58. In Re Marine Corps enlistment, I Comp. Dec., 139.

[12] I Comp. Dec., 317.

[13] I Comp. Dec., 199.

has passed upon,[14] nor will the Comptroller entertain a claim not previously passed upon by an Auditor.[15] After a year from the date of settlement has expired the Auditor has exclusive right to reopen a case settled by himself or his predecessors,[16] but in strict accord with the existing constructions as established by the Comptroller. In all these cases the Comptroller has held his jurisdiction to be strictly limited by specific provisions of law and has applied consistently the well established principle of Anglo Saxon jurisprudence that the law is developed not by a declaration of general principles but by decision of specific cases.

In practical operation the law of 1894 has fully established the independent character of the Comptroller's advisory jurisdiction. The provision moreover which makes his decisions binding upon all executive officers has been shown to possess an actual as well as a legal validity. This provision does not of course bar any individual claimant from bringing his case in the courts although the right of suing the government is of comparatively recent statutory enactment.[17]

Until the Court of Claims was established in 1855,[18] the only means of pursuing a claim denied by the Treasury was through petition to Congress. The Court of Claims was at first hardly more than a bureau for investigating claims; its findings, drawn up in form of a bill, had no

[14] I Comp. Dec., 27.

[15] III Comp. Dec., 337.

[16] VIII Comp. Dec., 95, and IV Comp. Dec., 303.

[17] When in 1789 James Madison proposed a specific right of appeal from the Comptroller's decisions to the Supreme Court it was contended in the debate that the individual already possessed this right on the principles of common law. It is not to be supposed, however, that this opinion was widespread among lawyers at that time.

[18] 10 U. S. St., 612.

legal validity until approved by Congress.[19] In 1863, however, when the court was given authority to render judgments against the government and provision was made by which either party could carry cases to the United States Supreme Court,[20] the forum of appeal from executive decision passed from the legislative to the judicial branch of the government. There can be no doubt that at present the Comptroller is bound by authoritative judicial decision and his decisions may be reversed by courts of competent jurisdiction.

The status of the Comptroller as an adjudicator of individual claims is for the most part determined by the statutory provisions under which claims may be pursued in the courts. The original intention of the law of 1855 seems not to have been to establish any new rights but to facilitate procedure under the right of petition which had always existed.

The law of 1863 by which the decrees of the Court of Claims were made executory in its own name was in the interest of uniformity and was warmly approved by the officers of the Treasury. Especially was this true after the law of June 25, 1868, permitted heads of departments to throw the original responsibility for adjudicating controverted questions of law, directly upon the Court of Claims.[21] When, however, the acts of March 3, 1887, gave concurrent jurisdiction with the Court of Claims to Circuit and District Courts,[22] the interests of uniformity subserved by the earlier acts were in large measure defeated. For several

[19] For a discussion of the right of an individual to sue the Government see Goodnow, "*Comparative Administrative Law,*" New York and London, 1893, II. pp. 154 ff.

[20] 12 U. S. St., 765.

[21] 15 U. S. St., 76. Rev. St., sec. 1063.

[22] 24 U. S. St., 505, ch. 359, sec. 2.

succeding years the law of 1887 encountered emphatic protest in annual reports of the Comptroller.[23]

Complaint was likewise made that the lack of uniformity was greatly increased by the act of March 3, 1891, which created the Circuit Court of Appeals, and made it in its several branches, a tribunal of last resort for all cases not exceeding one thousand dollars.[24]

The grievance of the Treasury Department, especially under the law of 1887, was not a restriction of its own jurisdiction but rather the unwelcome necessity of ignoring supposedly authoritative judicial precedent. The power to sue in Circuit and District Courts produced oftentimes a great variety of interpretations of the same law, some of which the Comptroller found it impossible to follow.[25] It is obvious that Comptrollers have considered themselves in general bound by court decisions.[26] The jurisdiction of the courts, however, is not so much appellate as it is parallel and independent; cases decided by the Comptroller are not heard upon regular appeal proceedings, nor are they reviewable by writ of error or other judicial process. In the words of First Comptroller Lawrence:[27]

The general rule is that the courts cannot in any respect

[23] Cf. reports of First Comptroller contained in Reps. of Secty. of Treas., 51. Cong., 1 sess., H. E. Doc. 19; 2 sess., H. E. Doc. 19; 52. Cong., 1 sess., H. E. Doc. 23; 2 sess., H. E. Doc. 23, and particularly report for 1891–'92 in 53. Con., 2 sess., H. E. Doc., 22.

[24] 26 U. S. St., 826, ch. 517.

[25] Cf. report of First Comptroller Bowler for 1891–'92, 53. Cong., 2 sess., H. E. Doc. 22.

[26] Complaint concerning the law of 1891 would seem to have been less well founded. The provisions under which the Supreme Court may instruct the Circuit Court of Appeals or even take over its cases largely forestall the conflict of precedent otherwise likely to result from nine tribunals of last resort (26 U. S. St., ch. 517, sec. 7).

[27] First Comptroller Decisions, III. Introduction, p. xxxix.

control, interrupt, or interfere with accounting, or other executive, officers in the exercise of the jurisdiction conferred upon them by law. . . . When there are rival claimants demanding payment of the same claim, and the executive officers make payment to the wrong claimant, a court having jurisdiction of the parties and subject-matter may, after such payment, as between the parties or others charged with notice, give relief to the rightful claimant.

There will not in this case, however, be any recourse to the executive officer, and even if a suit is pending to decide the validity of the claims, the executive officer need not await its decision before making payment.

As a matter of actual practice, however, the decisions of the Comptroller with certain exceptions[28] are subject to judicial review. The decisions of the Supreme Court, and to a less extent those of the Court of Claims furnish precedents which it is incumbent upon the Comptroller to follow. The influence of the Circuit, District and state courts is less authoritative; their judgments are entitled to the highest consideration and though not always controlling, possess a most potent persuasive force. Principles laid down by the Comptroller, before review in one of these courts, occupy a position dependent entirely upon their merits; temporarily they are binding; ultimately they may or may not be found correct.[29]

[28] Cases decided in favor of claimants; cases which decide that an act does not make an appropriation to carry out a given object; cases barred by six years limitation; various minor cases.

[29] There are some conditions under which failure of the courts to sustain the action of the Comptroller cannot fairly be considered a reversal of his decision. Such a condition would arise when a specific provision of the law forces the Comptroller to reject a claim on technical grounds which is afterwards sustained on its merits. Again, some cases are denied by the Comptroller because of a question re-

Probably the widest assumption of jurisdiction ever made by a Comptroller was that of Comptroller Bowler in the Sugar Bounty Case.[30] Although the case was referred to the Court of Claims before the Comptroller had attempted to exercise the authority claimed, his action constituted virtually an assumption of right to pass upon the constitutionality of an act of Congress. The case brings in review nearly all the important judicial decisions bearing on the Comptroller's jurisdiction. For this reason as well as for the important legal principle involved it is of peculiar interest.

The McKinley Tariff Act of 1890[31] made provision for a bounty to producers of sugar who should fulfil certain conditions. The Wilson Act of 1894[32] repealed the provision. Claim was set up before the Court of Appeals of the District of Columbia,[33] that the Wilson Act was not effective to cut off the rights of persons who, prior to its passage, had procured licenses for the current fiscal year and expended money thereunder. This position was resisted by the government on several grounds, among others, that the legislation of 1890 was unconstitutional. All the contentions of the government were supported by the court in-

garding some essential facts; additional evidence presented to the court with reference to such a claim may lead to its allowance. It may also happen that the Comptroller rejects a claim for the specific purpose of allowing it to take its course in the courts, because, on account of suspicion of fraud, or for other reason, it appears that the ends of justice will in that way be better subserved.

[30] II Comp. Dec., 98.

[31] 26 U. S. St., 584.

[32] 28 U. S. St., 521.

[33] 23 Wash. Law Rep., 33; 5 D. C. App., 138. U. S. ex rel. Miles Planting and Manufacturing Company *v.* John G. Carlisle and Joseph S. Miller.

cluding that of unconstitutionality.[34] In the civil appropriation act of March 2, 1895, Congress enacted that all those producers of sugar who, previous to the repeal of the bounty clause, had complied with the provisions of the law of 1890 should receive the amount due at the date of the repeal, and a specific appropriation was made for payment.[35] Under this appropriation the claim of the Oxnard Beet Sugar Company of Grand Island, Nebraska, having been allowed by the Commissioner of Internal Revenue and the Auditor of the Treasury Department, came before the Comptroller for final decision.

The Comptroller called upon the Oxnard Company to show why he should not follow the decision of the court above referred to and refuse payment of bounties on the ground of unconstitutionality of the appropriation.

In their reply, after attacking the Comptroller's power on minor grounds,[36] the company contended that his power to construe statutes did not vest in him jurisdiction to declare a law a nullity, and that to assume such a right would be a dangerous usurpation of power. The Comptroller's reply rested on the well-known principle that an unconstitutional

[34] Mr. Chief Justice Avery expressed no opinion upon the question of constitutionality, since the conclusion that Congress had power to repeal the bounty provision rendered it unnecessary to pass upon the constitutionality of the original bounty clause.

[35] 28 U. S. St., 933. Provision was made also that those who had complied with the bounty provision by securing licenses prior to July 1, 1894, should be paid the bounty for sugar produced during the year ending June 30, 1895, and an appropriation was made to cover such payments.

[36] These related chiefly to the power of the Comptroller under the statute to reverse decisions of the Commissioner of Internal Revenue. It was contended that if he possessed any power it was of a purely perfunctory nature. The Comptroller asserted his power to review for lack of jurisdiction supporting his argument largely on the decision in Bank of Greencastle *v.* U. S. in 15 Ct. Cls. Rep., 225.

act is not law and cannot bind an executive officer. His contention was supported by Chief Justice Marshall's opinion in the case of Marbury *v.* Madison and by a long line of succeeding cases.[37] Arguments were based wholly upon his position as an executive officer and not on any peculiar status arising out of his judicial function.

Considering the Oxnard case on its merits, he concluded that an appropriation for the payment of a bounty which had accrued under an unconstitutional act was not an appropriation of money for a public purpose within the powers granted to Congress in the constitution. Instead of denying the claim, it was referred to the Court of Claims, but before it was reached on the calendar of that court the Supreme Court in the parallel case of Realty Company *v.* United States had decided that regardless of the constitutionality of the bounty act of 1890 the appropriation act of 1895 was entirely within the power of Congress.[38] The general principle was laid down that when Congress makes an appropriation founded on purely moral and honorary obligations and upon principles of right and justice, its action can rarely if ever be subject to review by the judicial branch of the government.

[37] This point was argued in great detail. The chief cases upon which the Comptroller supported his conclusion were Marbury *v.* Madison, 1 Cranch 180; Norton *v.* Shelby County, 118 U. S. 442; Huntington *v.* Worthen, 120 U. S. 101; The People ex rel *v.* Salomon, 54 Ill. 46; Smyth et al. etc. *v.* Titcomb, 31 Me. 272; Sessums *v.* Botts, 34 Tex. 335.

[38] The reasoning of the opinion was as follows: Although it is true in general that in the purely legal sense an unconstitutional act of Congress is the same as if there were no act, yet by reason of occurrences which took place before the appropriton was made, among which was the passage of the act of 1890, parties situated like the defendant in error, acquired claims upon the Government of an equitable, moral or honorary nature which Congress could legally recognize and pay, although the act of Congress which resulted in such a situation might have been unconstitutional.

This reasoning, of course, applies *a fortiori* to the executive branch of the government. While it is conceivable that such a peculiar and unusual combination of circumstances might arise as to lead the Comptroller to go behind the intention of Congress regarding a matter, the constitutionality of which had not been decided by the courts, still, in the absence of authoritative judicial decision to the contrary, laws will be interpreted as nearly as possible in accordance with the intention of Congress. The action of Comptroller Bowler in this case is likely to be regarded as an assumption of jurisdiction which Congress never intended the Comptroller to possess; it is hardly likely to be repeated by future Comptrollers.

The judicial powers which Congress has conferred on the Comptroller make him practically independent of other executive officers. Like other officers of the government he is bound to respect the decisions of the Supreme Court and is presumed, except in cases of conflict, to follow the precedents of other courts. Within his sphere he exercises a jurisdiction of far-reaching legal as well as practical importance. Probably in no branch of the government is there a more constant exercise of judicial powers than in the cases which come before the Comptroller for adjudication. From a consideration of these powers it is obvious that there is being administered and progressively developed in his office a large and important body of administrative law.

CHAPTER III

THE COMPTROLLER AS INTERPRETER OF APPROPRIATION ACTS

By virtue of his position at the head of the disbursing machinery of the government, it becomes one of the Comptroller's chief duties to construe appropriation acts. The need for administrative adjudication in this field is greatly enhanced by the lack of a budgetary system. Appropriations in this country form no part of a centralized fiscal plan, neither is there unity in the appropriation measures themselves nor a definitely calculated balance between revenue and expenditure. There is no one committee in either house of Congress to which are referred all measures for the disbursement of the public revenues. The Appropriations Committee of the House deals merely with those appropriation measures which do not come within the jurisdiction of some other committees.[1] Appropriations may also be made by specific acts as well as by regular appropriation bills and such measures may be introduced by any member of Congress. Finally House bills are freely amended in the Senate. In spite of the intention of Congress to make specific and minute provisions for all expenditures, unsystematic procedure results in ambiguity and conflict, and leaves a large field for interpretation.

[1] Appropriations for "Rivers and Harbors," "Foreign Affairs," "Military Affairs," "Naval Affairs," "Indian Affairs," "Post Offices and Post Roads," are in charge of the respective committees upon these subjects. The Appropriations Committee is left with only the executive, administrative judicial, District of Columbia, pension, deficiency and permanent appropriation bills.

It is the Comptroller's duty to determine to what extent an act authorizes the payment of money. In practice no act is regarded as an appropriation unless the intention of Congress is manifest, but any language which clearly directs payment by an executive officer is recognized as making a valid appropriation.[2] It is a recognized principle of construction in the Comptroller's office as well as in the courts[3] that wherever possible, acts will be so interpreted as to give effect to the object designed by the Legislature. Some of the cases however seem to indicate that specific language may be required before the doctrine will be enforced. A case in point arose under a joint resolution of March 3, 1897,[4] providing for the preparation of an index to government publications with the following provision for compensation:

And the compiler shall be entitled to receive as compensation for his work, at the rate of one thousand dollars per Congress to be paid by the Secretary of the Treasury as follows: Five hundred dollars whenever he shall certify to said officer that the index to the documents of any entire Congress is completed, and the balance when the copy for the entire work is ready for delivery to the Public Printer.

The question whether this resolution made an appropriation for the compiler's pay was submitted to Comptroller Bowler for his opinion. No payment being contemplated, as the money had not yet been earned, the Comptroller was unable to make an authoritative decision, but referring to the constitutional prohibition of payment of money from the Treasury except upon appropriations made

[2] VI Comp. Dec., 514; VIII Comp. Dec., 818.

[3] In Re Ross, 140 U. S. 475.

[4] 29 U. S. St., 704.

by law,[5] he expressed grave doubts whether payment was authorized by the language quoted and suggested that Congress be asked to make a definite appropriation. When later the question came before Comptroller Tracewell for decision, Congress having failed to make the appropriation more definite, Comptroller Bowler's opinion was confirmed and payment denied. The language was held merely to designate a method of payment; thus the whole object of the law was nullified.[6]

The question has sometimes arisen whether the necessity for an expenditure authorizes the use of an appropriation for an object for which it would not otherwise be available. By an act of March 3, 1901,[7] Congress provided for an addition to the custom house and post-office building in the city of Newark, New Jersey. The necessity of removing a church building which had been purchased by the government for temporarily quartering employees and for storage, entailed additional expenditures, and the question arose whether by making the appropriation for the addition to the custom house and post-office, Congress had already by implication made appropriation for these other purposes. The Comptroller held[8] that the removal of the church building was a necessary incident to carrying out the purpose of the appropriation, and was provided for in the appropriation, as would have been the removal of a tree or boulder. The furnishing of temporary quarters on the other hand, while made necessary by this removal, was held not essential to the execution of the original act.

Other cases illustrate the difficulty of applying the neces-

[5] Art. I, sec. 9, clause 7.

[6] IV Comp. Dec., 325.

[7] 31 U. S. St., 1135.

[8] VIII Comp. Dec., 1.

sary incident principle to a particular set of facts. The Commissioners of the District of Columbia, in carrying out an appropriation for permanent highways, had occasion to use certain enlarged prints of topographical maps which although originally prepared by the coast and geodetic survey, had been paid for by the District of Columbia. The expense incurred by the survey in making the enlarged prints was held to be a proper charge against the appropriation for highways.[9] Again it was held that the appropriation for the maintenance of the Washington aqueduct was applicable to constructing a sidewalk in front of the aqueduct office.[10] Further, the appropriation for ocean and lake surveys is applicable to the purchase of instruments required for use in one of the vessels of the survey, even though some of the instruments would form a part of the regular equipment of the vessel when not engaged in the surveys.[11] Per contra it was decided by Comptroller Bowler that an appropriation for the construction of an addition to the United States court house and post-office in Little Rock, Arkansas, was not applicable to the work of cleaning, redressing and pointing up the walls, or painting the wood work of the original structure, in order to make it harmonize with the new materials of the addition, such work not being a necessary incident to the construction of the addition.[12]

A further important question for construction is presented by the uncertain distinctions between different kinds of appropriations. The recognized classes are "annual," "permanent annual," and "permanent specific." The gen-

[9] I Comp. Dec., 503.
[10] VI Comp. Dec., 443.
[11] IV Comp. Dec., 221.
[12] IV Comp. Dec., 192.

eral policy of the Treasury has been to regard all appropriations as annual unless a contrary intention is expressed in the act, or the object for which appropriation is made clearly indicates a purpose to make the appropriation available until the object is accomplished.

Whatever the principle of classification adopted, the line separating the different kinds of appropriations is not sufficiently definite to forestall a continual recurrence of doubtful cases. Roughly stated the practice has been to include in the class of "permanent annual appropriations" the salaries of judges, expenses of collecting customs, support of the Smithsonian Institution, repayment of taxes or other dues collected by error, and such permanent claims as interest on the public debt and the amount due the sinking fund. Appropriations for those public works and services for which it is impracticable to fix a definite time limit, are classed as "permanent specific," and all other appropriations are regarded as "annual."

The chief difficulty for the accounting officers is in deciding what appropriations should be classed as "permanent specific." Departmental construction upon the subject has been neither uniform nor consistent. The nearest approach to an exact discrimination is a decision by Comptroller Bowler that cases not falling within the category of "permanent specific" appropriations by definite provision of law are not to be so classed.[13]

The case which called forth this construction arose in connection with an appropriation of twenty thousand dollars for an agricultural experiment station. The act was a part of the regular annual appropriation for the Department of Agriculture for the year 1891,[14] and after remain-

[13] III Comp. Dec., 623 and 629.

[14] 26 U. S. St., 282 and 288.

ing on the books for two years without being used had been covered into the treasury. The law of June 20, 1874,[15] under which this disposition was made, exempted among other things, from the provision for covering balances of two years standing with the treasury, all permanent specific appropriations. In supporting the action of the officer of the treasury, the Comptroller held that the appropriation for an experiment station did not come within the terms of the exemption. This decision of Comptroller Bowler, based upon a strict construction of the statute may properly be regarded as establishing a policy which had been for some time developing in the Comptroller's office.

[15] 18 U. S. St., 110. The law of June 20, 1874, was amendatory of earlier legislation the defects of which had proved a source of inconvenience to the accounting officers and had furnished a loophole for improper disbursements of Government revenues. The original act on the subject was passed on March 3, 1795 (1 U. S. St., 433–437), and was amended in 1820 (3 U. S. St., 568) and again in 1852 (10 U. S. St., 76 and 99). To check the practice of liberal interpretation by which annual appropriations were held available after the years for which they were made (Letter of John Sherman, Sec. of Treas. to Sam. J. Randall, Speaker, Dec. 14, 1877; found in 1 Lawrence Comp. Dec., 580, Appendix; also 14 Opin. A. G., 109), a new law enacted July 12, 1870 (16 U. S. St., 230; secs. 5 and 6; Rev. Stat., 3690 and 3691), made provision that all balances of appropriations contained in annual appropriation bills and made specifically for the service of any fiscal year should only be applied to the payment of expenses properly incurred during that year, and balances not needed for such purposes should be carried to the surplus fund. This regulation was not to apply to appropriations known as "permanent or indefinite appropriations," the term "permanent specific" being not yet introduced. Supplementing these sections was a provision that no one department of the Government should expend in any fiscal year a sum in excess of the appropriations made for that year, or involve the Government in any contract for the future payment of money in excess of appropriations previously provided for (16 U. S. St., 251, sec. 7; Rev. St., 3679). Even this act did not accomplish the purpose intended and the act of 1874 was intended to give Congress a still more rigid control of the disposition of the public funds.

The tenor of all the legislation touching the subject of appropriations and their availability is directly opposed to liberal construction. Congress has always guarded with the greatest jealousy its constitutional privilege of making appropriations. It is not improbable, however, that in the case just considered the Comptroller went even beyond the will of Congress in the line of strict construction.

The effect of appropriations for incidental, contingent or miscellaneous purposes, and the distinction between cumulative and exclusive appropriations for the same object are two matters which have been most prolific of serious questions of construction. The use of a contingent fund appropriated to any department bureau or office, is admittedly within the discretion of the head of the department and may be disbursed upon his order;[16] but contingent or miscellaneous appropriations embodied in bills for specific objects are interpreted to mean such unforeseen incidental expenses as are necessary, usual and appropriate to the object for which the appropriation is made, and there is no discretion conferred upon the heads of departments to use such appropriations for other purposes.[17] While this rule is universal it is obvious that wide difference of opinion may arise as to what is necessary, usual and appropriate in individual cases.

Regarding appropriations for the same object found in more than one act of Congress, under a general rule which covers a large number of such cases, the existence of specific appropriations excludes the use for the same purpose of a general appropriation, although but for the specific appro-

[16] However, the provision of 3683 Rev. St., requiring the signature of the head of the department for such disbursement is strictly construed, and his subsequent approval of disbursements is not deemed sufficient. II Comp. Dec., 1.

[17] IV Comp. Dec., 287. V Comp. Dec., 151. VI Comp. Dec., 617.

priation the general one would be available for that object.[18] When two appropriations both specific in their nature apply to the same object, it has been held that they are to be treated as cumulative and either or both may be used in the discretion of the head of the department concerned.[19]

In other cases it is held that one appropriation may be used when another is exhausted. Such a case arose in connection with a law of March 1, 1895, increasing the salary of the judge of the United States Court in Indian Territory from $3,500 to $5,000.[20] On the day following the enactment of this law (March 2, 1895) two measures were passed, one making the regular appropriation of $3,500 for the judge's salary,[21] the other being an appropriation of $50,000 for salaries of judges, and other officers in Indian Territory.[22] It was held that when the first appropriation was exhausted the second could be drawn upon to make up the deficiency.[23]

Again it was held that where a general appropriation for the ordinary expenses of quarantine stations had been construed as applicable to the maintenance of vessels, a subsequent appropriation of a specific sum for the repair of vessels in the service, passed to make up a deficiency[24]

[18] I Comp. Dec., 57, 126, 236, 417, 492, 563. III Comp. Dec. 70.

[19] IV Comp. Dec., 121.

[20] 28 U. S. St., 693, ch. 145.

[21] 28 U. S. St., 806, ch. 177.

[22] 28 U. S. St., 966, ch. 195.

[23] I Comp. Dec., 357.

[24] This was somewhat of a variation of the ordinary "Deficiency Bill" since it was not coextensive with the original bill, but provided only for a special object covered by the original bill.

In the contemplation of the Comptroller's office a "Deficiency Appropriation" proper is one made to pay a liability legally created, for the payment of which an appropriation previously made is insufficient; it supplements the original appropriation, partakes of its nature, and is subject to the same limitations which attached by law to the use of the original appropriation. IV Comp. Dec., 61.

in the general measure, would not be construed to exclude the use of the general appropriation for that purpose; the two would in that regard be considered as cumulative.[25]

Another decision has held that specific provisions of appropriation acts which in their general extent are for different objects, may be cumulative in so far as these provisions are applicable to a common object; each appropriation in that case would be available for certain objects not provided for in the other.[26]

All these cases in the nature of exceptions to a general rigid rule of construction, in no sense minimize but rather emphasize the strictness of the general principle. A certain deviation from hard and fast rules is indispensable to bring even a minimum of elasticity into a rigid system. The end in view is always to make effective the control exercised by Congress over the expenditure of public revenues. The most liberal construction adopted will be in general one consistent with this end.

Aside from contingency funds in the departments and emergency appropriations expended at the President's discretion, there is, in case of appropriations for particular objects, a large amount of discretion exercised by executive officers and upheld by the Comptroller. Such a discretion is in the very nature of a superior executive office and scarcely any appropriation could be expended without its exercise. The practice is to allow such discretion the very widest range consistent with objects for which the appropriation is made. For example, it was held that an appropriation for the expenses of the Bureau of Animal Industry was available for the purchase, exportation and sale in foreign countries of American butter, if the Secretary of

[25] VIII Comp. Dec., 142.

[26] II Comp. Dec., 59.

Agriculture deemed such a course expedient in carrying on the work of the bureau.[27] Discretion cannot be exercised, however, to the extent of using an appropriation for objects essentially different from those for which it was made. To illustrate, the Comptroller on one occasion declined to authorize the Secretary of the Treasury to use an appropriation for the care of immigrants, to pay for printing, music, decorations and refreshments in connection with the opening of a building at the Ellis Island immigrant station.[28] In general, discretionary appropriations, although exempt from some of the restrictions by which other appropriations are limited, are nevertheless equally subject to the broad principle which distinguishes our system from those in which the details of appropriation measures are less minute.

Decisions of the Comptroller are sometimes overruled by the courts as was done in the Sugar Bounty case,[29] but in a large proportion of the cases which have come before the Comptroller, his decisions have stood. On some occasions the Comptroller's decisions have been necessary for the amplification of court decisions upon the same or kindred subjects. In illustration may be cited one of the cases which arose over duties on goods imported from Porto Rico. On March 24, 1900,[30] Congress enacted that revenues colleced upon imports from Porto Rico after the evacuation of Spain should be appropriated for education, relief and other public works in the island. On May 27, 1901, the Supreme Court, in DeLima *v.* Bidwell[31] held that

[27] III Comp. Dec., 445.

[28] VII Comp. Dec., 31.

[29] Cf. supra, pp. 34 ff.

[30] 31 U. S. St., 51.

[31] De Lima *v.* Bidwell, 182 U. S., 1.

goods coming from Porto Rico were not under the then existing tariff laws subject to duty. This placed the government under the obligation of returning the duties illegally collected and the question arose whether the appropriation so far as unexpended was nullified by the decision of the court. The Comptroller decided that the appropriation was made without condition and would therefore continue available notwithtanding the fact that the government must refund to importers the whole of the duties collected and would therefore, contrary to the intention of Congress, be in no way reimbursed for the expenditures.[32]

Practically every undertaking which requires an appropriation for its execution is in some form or other passed upon by the Comptroller. At the beginning of the Spanish war when an expedition was sent to Cuba, question arose whether the appropriation would be available for operations in Porto Rico; the Comptroller decided that the exigencies of the situation demanded a liberal interpretation and the appropriation was therefore made generally available for the West Indian campaign.[33] The French spoliation claims,[34] the Chinese exclusion act,[35] the Columbian exposition,[36] and other measures of large political significance have demanded the exercise of the Comptroller's judicial functions. Some of these cases have involved merely the execution of minor details while in others the disposal of large sums of money and the fate of the measure depending upon such expenditure has been determined by the Comptroller's decision.

[32] VIII Comp. Dec., 408.

[33] V Comp. Dec., 383.

[34] VII Comp. Dec., 422. VIII Comp. Dec., 626.

[35] I Comp. Dec., 202. V Comp. Dec., 47, 382. VII Comp. Dec., 372, 437, 712.

[36] I Comp. Dec., 7.

CHAPTER IV

DECISIONS OF THE COMPTROLLER CONCERNING THE PUBLIC REVENUES

The field of executive jurisdiction on questions of taxation is narrowly limited to the application of general principles laid down by the courts. This limitation arises naturally from the practice of bringing to court all more important questions, carrying them usually to the court of last resort. While the broad principles in accordance with which the Comptroller is compelled to act are thus authoritatively outlined for him, there remain a great variety of questions involving extensive interests to which these principles must be applied.

Revenue cases are usually numerous, both in the courts and in the office of the Comptroller, whenever new forms of taxation are adopted, especially when extensive changes occur in the machinery of collection. When a form of taxation has been for a long time a part of the revenue system, its application becomes by judicial interpretation, and by long usage, so well understood that even radical changes in the policy back of the system give rise to few new cases, so long as the administrative machinery remains essentially unchanged. For example none of the tariff revisions of recent years have to any large extent resulted in the presentation of new and important questions to the Comptroller's office for adjudication.[1]

[1] The Sugar Bounty case although resulting from legislation enacted in connection with tariff revision measures, cannot itself be considered as coming under tariff legislation.

The Comptroller is called upon to take cognizance of public revenue questions principally in the form of claims for refunding taxes alleged to have been illegally collected. Many cases of this nature arose out of the political changes resulting from the Spanish American War. Before the establishment of civil government in Porto Rico, the President, by an order of January 20, 1899, promulgated a schedule of customs duties which were collected by the military authorities of the island. In Dooley *v.* United States, the third of the suits commonly designated the "Insular" Cases,[2] the Supreme Court held that such collections were illegal. The question was thereupon brought before the Treasury Department whether similar claims would be refunded without suit.[3] The Comptroller held that authority to refund was only given by specific provision of statute; since the statutes in force only provided for refunding duties wrongly paid to a "collector of customs," and the military authorities of Porto Rico were not, properly speaking, collectors of customs, the collector had no power to refund.[4]

[2] Dooley *v.* U. S., 183 U. S., 151.

[3] VII Comp. Dec., 848.

[4] Commenting upon the language of Justice Brown who, in DeLima *v.* Bidwell, said, "a collector though appointed by a military commander, may be presumed to have the ordinary power of a collector," the Comptroller observed, "I do not take it that the court intended by such language to hold that an army officer appointed by the military power of the Government to operate in a certain territory—such was the officer who collected the duties in question, stationed at San Juan, Porto Rico, not a port of entry of the United States, who did not account to the United States for the duties collected, who made no report to the Secretary of the Treasury thereof, which duties were not collected under any law of Congress, but under a military order having no relation whatever to our tariff system,—was any such collector as was in the contemplation of Congress when it made provisions for the refund of duties collected and liquidated by the collectors of customs

This ruling forced individuals making claims under the decision of the Supreme Court each to bring suit for the amount illegally collected. The process of collection, was, however, somewhat simplified by the act of April 29, 1902, authorizing the Secretary of the Treasury to repay duties collected by the military authorities of Porto Rico upon the certificate of judgment by the Court of Claims.[5]

In DeLima *v.* Bidwell,[6] the first of the Insular Cases, the Supreme Court decided that duties levied on articles brought from Porto Rico to the United States between the ratifying of the Treaty of Paris[7] (April 11, 1899) and the date upon which the Foraker act[8] went into effect (May 1, 1900), were illegally collected. Again the Comptroller was called upon to rule upon the question of making refunds. A. S. Lascelles & Co., who paid duties under protest, the circumstances being identical with those in the DeLima case, presented claim against the treasury for the amount collected.[9]

The power to refund moneys illegally collected is found in the act of March 3, 1875,[10] and in the customs adminis-

therein mentioned. It certainly was not in the mind of Congress . . . to extend the provisions of said act (act of June 10, 1890) to duties collected by the military arms of the Government. . . . I do not believe that the act can be so extended; hence I am of the opinion that you [referring to the Secretary of the Treasury] are not authorized to use the appropriation made in said section 24 to make the refundments mentioned in your reference."

[5] 32 U. S. St., 176.

[6] DeLima *v.* Bidwell, 182 U. S. 1.

[7] 30 U. S. St., 1754.

[8] 31 U. S. St., 86, ch. 191. Act regulating the commercial relations between the United States and Porto Rico after cession by the Treaty of Paris.

[9] VIII Comp. Dec., 12.

[10] 18 U. S. St., 469.

trative act of June 10, 1890,[11] which latter act contains a provision for appeal from the Board of General Appraisers,[12] and for the refund of excessive payments and of monies deposited on appeal.[13] In an earlier case the Supreme Court had held that in reviewing the work of the Board of General Appraisers, as provided in the act of 1890, the court was limited to questions of legal construction, classification and the rate of duty, which the board had original authority to determine, but it could not go beyond the board's functions to pass on the question whether or not an article was imported merchandise.[14]

The Comptroller held that this decision did not pass upon the quesion of refund but simply laid down that a person of whom a duty is exacted as an import duty, when in fact the goods are not imported or importable, cannot put this question before the courts for review by any proceedings under the customs administrative act of 1890.[15] This rested the authority to refund upon the act of March 3,

[11] 26 U. S. St., 140, ch. 407, sec. 24.

[12] Ib., sec. 15.

[13] Ib., sec. 24. The following is the language employed: "Whenever it shall be shown to the satisfaction of the Secretary of the Treasury that, in any case of unascertained or estimated duties, or payments made upon appeal, more money has been paid to or deposited with a collector of customs than, as has been ascertained by final liquidation thereof, the law required to be paid or deposited, the Secretary of the Treasury shall direct the Treasurer to refund or pay the same out of any money in the Treasury not otherwise appropriated. The necessary moneys therefor are hereby appropriated, and this appropriation shall be deemed a permanent indefinite appropriation; and the Secretary of the Treasury is hereby authorized to correct manifest clerical errors in any entry or liquidation, for or against the United States, at any time within one year of the date of such entry, but not afterwards."

[14] In Re Fassett, 142 U. S., 479.

[15] VIII Comp. Dec., 16.

1875,[16] the language of which is somewhat broader than that employed in the act of 1890. It provides negatively that no moneys collected as duties on imports in accordance with any decision of the Secretary of the Treasury shall be refunded except under judgment of a Circuit or District court, under a special appropriation, or where collected under an erroneous view of facts. Upon this act the Comptroller ruled that the collection of money as duty on imports, whether or not the articles were in fact imported goods, was sufficient to comply with the letter of the law, and that under such a state of facts the government, having first impressed upon the articles the character of imported goods for its own profit should be estopped from contending the contrary.

The conclusion that the law of 1875 gave power to refund under such circumstances as existed in the Lascelles case, made the decision hinge merely on the status of that law. In deciding the case concerning duties collected by the military authorities in Porto Rico,[17] the Comptroller had already expressed the opinion that the law of 1890 was intended as a complete substitute for all prior legislation on the subject, and hence by implication, repealed all such prior laws. His opinion in the earlier case, however, was not fundamental to the decision, and this made it possible while adhering to the decision to reconsider his opinion.[18] Accordingly he held in contradiction to his opinion

[16] 18 U. S. St., 469.

[17] VII Comp. Dec., 848.

[18] The language with which the first decision is concluded seems to indicate that at the time it was made the Comptroller had in mind no other provisions than those of the law of 1890 to enable him to refund duties under circumstances such as existed in the Lascelles case. "I express no opinion," he said, "as to whether section 24 of the act of June, 1890, with its cognate sections 14 and 15, are broad enough to

expressed two weeks earlier, that the law of March 3, 1875, had not been repealed by the act of June 10, 1890, and that therefore duties collected under the circumstances described could legally be refunded by the Secretary of the Treasury.[19]

The fourth and last of the Insular Cases commonly known as the "Fourteen Diamond Rings Case,"[20] came before the Comptroller on a claim for drawback[21] upon

justify a refundment as to such merchandise when such duties are collected by a United States Collector under protest, and go into the Treasury of the United States and are properly liquidated as provided in said section" (VII Comp. Dec., 852). In the Comptroller's earlier decision where the opinion had been expressed that the law of 1875 was repealed by the act of 1890, the denial of a power to refund was based largely on the technical definition of the phrase, "collector of customs." The desirability from an administrative viewpoint of providing an economical and just system of making refunds in a large class of cases might well have led to a reconsideration of an opinion, even though it had been vital to the case in which it appeared. The two cases are indicative of the difficulties which legal technicalities often place in the way of necessary administrative ends.

[19] VIII Comp. Dec., 20. The line of argument by which the later opinion was supported well illustrates the characteristic legal considerations which the Comptroller has occasion to employ. It includes the following points:

1. The act of 1890 in specific terms repealed certain other sections of tariff laws but omitted to repeal the act of 1875; this act therefore must be repealed if at all, by the general clause repealing all acts inconsistent with the act of 1890.

2. The act of 1875 related to a class of refunds not embraced in the law of 1890 and was therefore not inconsistent with it.

3. The act of 1890 required a statement to be made to Congress of all moneys refunded under that or any other act; if the law of 1875 were not in force there would be no other act under which money could be refunded and the language would have no meaning.

4. The usage of the Treasury Department after the passage of the law of 1890 had assumed that the law of 1875 was in force, and refunds had continuously been made under it.

[20] Fourteen Diamond Rings, Emil J. Pepke *v.* U. S., 183 U. S., 176.

[21] VIII Comp. Dec., 427.

goods, which having paid the internal revenue tax as provided by the act of June 13, 1898,[22] had been subsequently shipped to the Philippines. The law provided for drawback on such goods when shipped to a foreign country, but although the Fourteen Diamond Rings case had applied the doctrine of DeLima *v.* Bidwell to the Philippines, it was contended that nevertheless these islands were included in the term "foreign countries" as contemplated by Congress in the war revenue measure of June, 1898.[23] The Comptroller held, however, that the decision of the Supreme Court had thrown the Philippines outside of the drawback provisions of the law of 1898 and the claim was not allowed.

Questions regarding drawbacks have frequently been before the Comptroller's office ever since the passage of the internal revenue act of 1864.[24] The principle by which they are decided is summed up in a case adjudicated by First Comptroller Lawrence in 1884, and known as the "Exporter" case.[25] The essence of this decision was that a drawback is not a gratuity but arises as a right under a statute, and that it is sufficient to establish a claim if a claimant furnishes legal proof that he has manufactured the goods, paid the internal revenue tax and has exported them.

The war revenue measure of June 13, 1898,[26] introducing as it did new forms of taxation, gave rise to several cases to which considerable legal and fiscal significance attached. It included among other things provision for a tax on

[22] 30 U. S. St., 448, sec. 26.

[23] The second Insular case, Downes *v.* Bidwell (182 U. S., 244), had decided that the Foraker act, levying a duty on articles passing between Porto Rico and the United States, was constitutional notwithstanding the decision in DeLima *v.* Bidwell, 182 U. S.).

[24] 13 U. S. St., 302.

[25] V Lawrence Comp. Dec., 13.

[26] 30 U. S. St., 448.

brokers at once presenting the question by what circumstances a broker is constituted. In one case[27] the evidence indicated that a firm had from time to time invested its funds in securities such as school orders, county warrants, etc., whereupon the Collector of Internal Revenue required the firm to buy a fifty dollar tax stamp for which claim for redemption was made and allowed by the Commissioner of Internal Revenue. The Auditor for the Treasury Department reversed the Commissioner's ruling and referred the case to Comptroller Tracewell who upheld the Commissioner deciding that a person who buys securities for investment is not a person whose business it is to negotiate purchases of such securities, and is, therefore, not a broker according to the meaning of that term in the act. Further definition of the term "commercial broker" was made by a later case in which it was held that the term included only such persons as negogiated the purchase and sale of goods without having the custody of them.[28] If that condition is fulfilled, however, negotiation carried on with a single firm,[29] or the negotiation of a single transaction[30] constitutes a person a broker and makes him subject to the tax.

The tax on mortgages has likewise occasionally had to be construed by the Comptroller. He has held that a mortgage given to secure the payment of bonds to a specified amount is taxable according to the sum for which upon its face it purports to be given as security, notwithstanding the fact that bonds to a much smaller amount have been issued.[31] Other cases have involved construction of the statutes, providing for the disclosure of liability to taxa-

[27] VI Comp. Dec., 216.
[28] VI Comp. Dec., 545.
[29] VII Comp. Dec., 337.
[30] VII Comp. Dec., 495.
[31] VII Comp. Dec., 46.

tion, and penalty for the failure to make such disclosure;[32] likewise the conditions for making refunds, and the provisions for the redemption of documentary stamps are subjects which the Comptroller has been called upon to consider.[33]

Of somewhat greater legal interest are cases which define the relation of the Comptroller to the Commissioner of Internal Revenue.[34] The principle followed is that the findings of the Commissioner are conclusive upon the Comptroller as to the fact upon which an allowance is made, but not as to the questions of law arising therein. The principle differs but little from that governing the relations of the Comptroller to other executive officers.

A question of some fiscal significance and one which, had it been decided otherwise might have led to litigation, arose in connection with an increase in the tax on fermented liquors, provided for by the act of June 13, 1898.[35] The tax was raised from one dollar to two dollars per barrel and made to apply to all liquors brewed, or manufactured and sold, or stored in warehouse, or removed for consumption or sale, within the United States. The language of the act differed from that of its predecessors by the phrase, "or stored in warehouse" and the question arose whether liquor in the possession of a wholesale dealer at the time the law became operative would be charged the additional tax. The Comptroller decided that the phrase referred to storing in warehouse by the person liable for the tax, namely the brewer, and that the tax was not intended to apply to dealers other than brewers.[36]

[32] VI Comp. Dec., 686 and 760; VIII, 663 and 697; Rev. St., sec. 3173.

[33] VI Comp. Dec., 434 and 558; VII, 158; VIII, 280 and 363.

[34] VI Comp. Dec., 259.

[35] 30 U. S. St., 448.

[36] VI Comp. Dec., 196.

Revenue cases do not constitute one of the most important branches of the Comptroller's activities. One effect of relieving him of administrative duties in 1894 was to take matters concerning the collection of revenue largely out of his hands. It is only when an alleged illegal collection brings a revenue law before him for judicial construction that his functions in this field become important, and even then his work is usually preceded by authoritative decisions of the courts. This circumstance has tended to reduce the sphere of the Comptroller's jurisdiction to a minimum, and to rest the significance of his work in this field not so much upon the importance of legal principles developed as upon the material interests involved in controversy.

CHAPTER V

THE COMPTROLLER'S JURISDICTION OVER DISBURSEMENTS FOR SERVICES TO THE GOVERNMENT

Few of the disbursements in this field are directly regulated by decisions of the courts. The sums involved, although large in the aggregate, are individually far too small to warrant the expense of a suit at law. It results that the work coming within this category, both as regards the number of questions decided and the aggregate amount involved, is greater than in any other line of cases, and for the great majority of these cases the Comptroller is final judge.

The classification of cases into civil and military indicates the most obvious line of division. Military cases have to do either with the regular pay of members of the army or navy or with allowances such as mileage and travel expense, commutation of rations and quarters, medical attendance, burial expenses, bounties and pensions. The considerations which determine the amount and conditions of payment for these purposes are primarily, terms of enlistment or appointment, nature and duration of service, promotion and advancements, desertion, leaves of absence, discharge or retirement, and finally statutory provisions. Civil cases involve the distinction between officers and employees, the rights of employees resting upon the contract of employment,[1] while the rights and obligations of officers depend upon interpretation of the law under sanction of

[1] IV Comp. Dec., 696.

which the office exists. Much depends also, as will appear, upon the nature of the office and the method of compensation.

Of the large number of cases arising in the army and navy, the majority are decided by the rigid application of specific and detailed statutory provisions. This is well illustrated in a case which came under the statutes providing for extra pay for service in the Spanish American war. An act passed January 12, 1899,[2] provided that all persons who had served in the army outside of the United States, should upon being mustered out receive two months extra pay and that those who had served within the United States should receive extra pay for one month. On March 3, 1899,[3] this act was amended to provide for the payment of extra pay to the legal heirs and representatives of those who died in the service. On the same day (March 3, 1899),[4] Congress extended the provisions of the act of January 12, 1899, to members of the navy without, however, especially providing for payment to legal heirs or representatives. The Court of Claims in Semple *v.* United States[5] held, on July 28, 1899, that grants of extra pay are mere gratuities, and create only an inchoate right which, if not reduced to possession by the beneficiary, dies with him and does not descend and become a part of his estate. Applying this decision, Assistant Comptroller Mitchell held that the right to extra pay of an heir or representative of a person who had died in the army service rested merely upon the specific provision of the act of March 3, 1899, and that therefore a father is not entitled under the act applying

[2] 30 U. S., 784.

[3] 30 U. S. St., 1074.

[4] 30 U. S. St., 1228.

[5] Semple *v.* U. S., 24 Ct. Cls., 422.

to members of the navy, to extra pay which would have accrued upon discharge to his deceased son.[6]

The facts in this case are not without legal interest. A father entered claim for extra pay as the legal heir of his son, who he claimed had died in the service. On the date on which his company was mustered out, the son had been reported as "absent, sick in hospital." The resident surgeon of the hospital where the son had later died, reported that the son's condition was such that he was unable to receive notice of the mustering out. Upon this state of fact the Assistant Comptroller held that the government was excused from giving him such notice, and that he was to be regarded as having been discharged with the muster out of the company. As he was therefore not in the service at the date of his death his heirs would not be entitled under the statute to the extra pay to which he had an inchoate right during his life time.[7]

Upon grounds of equity it would seem that the illness of the soldier which excused the government from notifying him of his discharge, might likewise have operated to perpetuate the inchoate right and pass it on to the heirs. The same condition that prevented the government from serving notice of discharge likewise prevented the soldier, through no fault of his own, from reducing this inchoate right to possession as it may be supposed he had the legal right to do between the date of the muster out of the company and his death. Whether the courts would look for a more equitable interpretation of the law and the facts is not to be ascertained. The case is a striking example of construction in strict accordance with express statutory provisions.

[6] VI Comp. Dec., 86.

[7] VII Comp. Dec., 453.

The same principle applies in general to decisions upon the questions of mileage, but there have been some rather notable exceptions. Like the regulations regarding pay, this subject is covered by most detailed statutory provisions. Mileage is regarded under the law as an allowance in lieu of traveling expenses actually incurred, and in spite of minute regulations, it is not always clear whether mileage or the actual expenses are to be allowed. The question has arisen when officers of the army and navy have been detailed for duty with the civil branch of the government. The settled policy is that they are entitled to the same allowance when so engaged as they would receive when performing their duties in the military service whether such allowance amount to more or less than their actual expenses.[8]

In general, for mileage to be allowed all the specific conditions of the statutes must be complied with. The travel must be performed under orders,[9] issued, except in cases of emergency, before the travel is performed.[10] It is allowed in general over the shortest usually traveled route,[11] but if it can be shown that the exigencies of the service required a longer route, or if orders specified such a route, mileage will be computed accordingly.[12] Unless, however, this can be shown it will be computed by the shortest route regardless of the number of miles actually traveled.[13]

In addition to those requirements there are minute pro-

[8] III Comp. Dec., 703. In a case decided June 30, 1899, Acting Comptroller Mitchell held in spite of this principle that an officer of the Army detailed to witness the issue of annuity goods to the Indians is entitled to actual traveling expenses but not to mileage. V Comp. Dec., 982.

[9] I Comp. Dec., 381.

[10] IV Comp. Dec., 175.

[11] I Comp. Dec., 115.

[12] I Comp. Dec., 118.

[13] II Comp. Dec.,544; IV, 74.

visions for deductions to be made from total mileage for travel by Government conveyance, the deductions being adjusted according to the provisions for subsistence. Arrangements are likewise made for deductions in case of travel over subsidized railroads and those roads with which the government has special agreements.[14]

In general, a rigid regulation strictly interpreted will tend to foster the interest of the government. A technical interpretation, however, has sometimes resulted in a more liberal allowance than the general spirit of the statute would have seemed to direct. This is illustrated by a case which arose with reference to mileage for travel to and from the insular possessions. The army appropriations act for the year 1901–1902 provided for seven cents mileage for officers and contract surgeons[15] but limited payment for sea travel to, from or between our island possessions to actual expenses.

While this law was in force Surgeon General George M. Sternberg traveled to and from the Philippine Islands and Japan in execution of the following order:

The Secretary of War directs as necessary for the public service that you proceed via Chicago, Ill., Kansas City, Mo., and Los Angeles to San Francisco, Cal., on official business pertaining to the inspection of the medical supply depot in the latter city and the United States General Hospital at the Presidio of San Francisco; that upon the completion of this duty you proceed to Manila, P. I., for the purpose of inspecting the supply depots and general and post hospitals in Manila and such other places in the Philippine Islands as you may deem it necessary to visit; that upon the completion of this inspection you proceed to Nagasaki, Japan, and inspect the military hospital at that place; thence to Yokohama, Japan, for the pur-

[14] I Comp. Dec., 122; III, 210; V, 70; VI, 622.

[15] 31 U. S. St., 901.

pose of visiting the naval hospital recently established there; and that, upon the completion of the duty herein ordered, you return via San Francisco, Cal., to your proper station in this city.[16]

General Sternberg's claim for mileage was denied by the Auditor for the War Department on the ground that performance of temporary duty in Nagasaki and Yokohama did not make the journey any less travel to and from the Philippines. Assistant Comptroller Mitchell reversed this decision and supported his position by the following line of argument: The effect of the order issued to Brigadier General Sternberg was the same as if separate and distinct orders had been given for each portion of the journey.[17] In obeying the orders to proceed from Manila to Nagasaki he was not traveling from our island possessions to the United States; neither was he in going from Yokohama to San Francisco and therefore the whole journey from Manila to Nagasaki, from Nagasaki to Yokohama, and from Yokohama to San Francisco carried with it mileage at seven cents per mile.

A whole line of decisions concerning sea travel of officers to and from our island possessions under provisos limiting payments on account of such travel to actual expenses, has shown a tendency to interpret the proviso in favor of the officer even when a construction no more liberal than is ordinarily followed would have operated to the advantage of the government. Considering the fact that mileage is technically regarded as an allowance for expenses actually incurred and not in any sense as compensation, the reasons for observing a construction favorable to the government with reference to provisions for extra pay, would seem to

[16] VIII Comp. Dec., 577.

[17] He cited the precedent established in I Comp. Dec., 29, where it was laid down that an order to travel to a designated point, perform certain duty, and return is in effect two distinct orders.

apply with equal force here. Upon that basis the position of the Auditor who pointed out that on principles of justice reimbursement was fully made when actual expenses were repaid, would appear fully as tenable as that adopted by the Assistant Comptroller.

Closely connected with the questions concerning pay and allowances are those relating to bounties and pensions. Bounty is technically considered as an allowance, and a soldier's right to it, except as otherwise specifically provided in the bounty laws, depends upon the same conditions regarding service and forfeitures as other allowances.[18] The question, however, has been the subject of much legislation and executive construction. A large number of the decisions have had the effect of forestalling claims obviously in the nature of "grabs" under liberal bounty provisions. This fact is particularly patent in connection with the effect of Congressional removal of charges of desertion.

The earliest case decided by the department, as at present organized, was the claim of a private, who enlisted in 1861 for three years. A year later he deserted and after being absent as a deserter for two months, was again mustered into service for three years as a sergeant in another regiment. He was discharged as a corporal with his company at the close of the war. By the operation of an act of May 17, 1886,[19] supplemented by the act of March 2, 1889,[20] the charge of desertion was removed and the soldier furnished with a discharge from the day of his desertion. On the strength of this discharge he made claim not only for pay and allowances, including one hundred dollars bounty, under the act of April 2, 1872,[21] which granted

[18] III Comp. Dec., 684.

[19] 24 U. S. St., 51.

[20] 25 U. S. St., 869, sec. 3.

[21] 17 U. S. St., 55.

bounty to those who had enlisted prior to July 22, 1861, but likewise for veteran bounty, his status as veteran having arisen as he claimed, from his service under the first enlistment. As the bounty provisions required nine months service[22] and an honorable discharge or a minimum of two years service, the claim was clearly unfounded and was accordingly disallowed.[23]

More difficult cases arise when disabilities are removed by private legislation. A typical case decided in 1896,[24] had to do with a soldier enlisted for three years in 1861 as a private. In 1864, he reënlisted as a veteran, deserted after six months, was arrested two weeks later, and again deserted at the expiration of another month. In 1880, the charge of desertion was removed by a private act,[25] and an honorable discharge ordered. Claim for pay and bounty was disallowed under this act by the Second Comptroller on the ground that the soldier was indebted to the United States in an amount exceeding all credits.[26]

In 1896, Congress by another private act directed the accounting officers to liquidate and settle the soldier's claim and appropriated three hundred dollars to cover whatever amount might be awarded.[27] After reëxamining the account in compliance with the specific direction of Congress, the Auditor placed the soldier on the footing of a veteran discharged for close of the war and granted an allowance for veteran bounty and travel. This finding was reversed

[22] General orders nos. 191 and 216, Adjutant General's Office, series of 1863, as quoted in I Comp. Dec., 562.

[23] I Comp. Dec., 561.

[24] III Comp. Dec., 109.

[25] 21 U. S. St., 546.

[26] Digest Second Comp. Dec., Vol. I, secs. 296, 297, 298 as referred to in III Comp. Dec., 111.

[27] 29 U. S. St., 723.

by the acting Comptroller who treated the discharge upon removal of a charge of desertion, as tantamount to a discharge for the soldier's convenience, since to consider him discharged for close of the war would put a deserter on a better footing than a soldier discharged at the same time at his own request or on account of sickness, which he held could not have been the intention of Congress. The effect given to the act of 1896, was simply to authorize and require the accounting officers to reëxamine the claim and to allow any balance they might find due. Otherwise it did not change the soldier's status nor confer on him any right he did not possess under the earlier statute.[28]

Questions connected with the civil service, concern almost exclusively the claims of officers.[29] One of the most inter-

[28] In both the above cases the construction adopted was calculated to carry out the terms of the statutes in such a way as to minimize injustice to soldiers against whom no charge of desertion had been entered.

In some cases rigid adherence to the terms of such statutes operates in favor of the claimant. Thus it was held under an act for the relief of a volunteer soldier making no provision for his discharge, but directing the removal of the charge of desertion and the substitution of, "absented himself without leave . . . reënlisted . . . and was honorably mustered out," that since the relief act created a right which did not before exist, the statute of limitations did not apply. III Comp. Dec., 541.

On the subject of pensions, questions which have come before the Comptroller's office have concerned for the most part minor matters of procedure. This subject has evidently been so thoroughly covered by specific legislation as to leave little room for executive construction. There have been a few rulings upon the provisions for reimbursement to cover the expenses of the last illness of pensioners (I Comp. Dec., 207; II, 149; VII, 208, 613, 841, 822; VIII, 534), and for other payments to survivors (II Comp. Dec., 381; III, 502; VIII, 428), but the jurisdiction exercised by the Comptroller in this field presents no principles sufficiently new to demand particular attention.

[29] Questions concerning employees are settled, as are all questions of government contract, by an application of the general principles of contract law.

esting line of cases has arisen in connection with recess appointments. The revised statutes, section 1761, provide that in case of appointments requiring the confirmation of the Senate no salary shall be paid to any person appointed during recess to fill a vacancy which existed while the Senate was in session. When an office is created by an appropriation or other act which goes into effect at a date subsequent to its passage it devolves on the Comptroller to determine when the vacancy occurred. It has been held that in such cases there is no vacancy until the date on which the appropriation became available and that theretofore, if the Senate adjourns before that date, an appointee named after adjournment is not precluded from receiving compensation prior to his confirmation.[80]

A somewhat different situation arises when the Senate fails to confirm an appointment made by the President, as appears in the following case.[81] On April 12, 1894, the President sent to the Senate the nomination of one Marbury for United States Attorney for Maryland, to succeed an incumbent whose term of office was to expire during the following month. At the expiration of the term, the nomination of Marbury had not been confirmed and the Circuit Justice of Maryland appointed the late incumbent to act until the person appointed by the President should qualify.[82] As the Senate adjourned on August 28, 1894, without having acted on Mr. Marbury's nomination, the President again named his unconfirmed appointee to fill the office until the end of the next session of the Senate.[83] Having again sent the nomination to the Senate on Decem-

[80] III Comp. Dec., 82.

[81] III Comp. Dec., 89.

[82] Under power granted in sec. 793, rev. st.

[83] Constitution, Art. II, sec. 2.

ber fifth without its being acted upon when that body adjourned March 4, 1895, the President on that same day again appointed Mr. Marbury to hold office until the end of the next session of the Senate. The same nomination was once more sent the Senate on December 4, 1895, without having been acted upon when that body adjourned on June 11, 1896, and the day following Mr. Marbury was again appointed by the President to hold office until the next session of the Senate.

When Mr. Marbury's claim for salary came before Comptroller Bowler, he decided that the statutory power of the Circuit justice was an emergency measure, which did not contemplate the filling of a vacancy in any constitutional sense. The vacancy therefore existed during the session of the Senate, and Mr. Marbury was therefore precluded under section 176 revised statutes, from receiving salary for the time covered by his first appointment. The vacancy however which ensued at the expiration of this time was interpreted as occurring during a recess of the Senate, and salary was allowed for the full time served under the appointment of March 4, 1895, likewise under the appointment of June 12, 1896.

The considerations upon which this decision was based appear more fully in a case concerning the appointment of a district judge of North Carolina, decided by Comptroller Tracewell on May 9, 1899.[84] On January 12, 1898, Judge Dick of the western district of North Carolina tendered his resignation to take effect upon the appointment and qualification of his successor. The following day the President sent the name of Hamilton G. Ewart to the Senate which failed to act upon the nomination before adjournment on

[84] V Comp. Dec., 785.

July 12, 1898. Thereupon the President conferred upon Judge Ewart a recess appointment which commissioned him to serve until the end of the next session of Congress. He was again nominated for the position December 13, 1898, but Congress adjourned March 4, 1899, the Senate having taken no action, and he received a second recess appointment under which he duly qualified. In addition to the considerations involved in the previous case, the question was raised, whether under the Constitutional requirement that judges hold office during good behavior, the President is authorized to fill a judicial office by temporary appointment.[35] Following the practice of a century, the Comptroller held that the constitutional provision for tenure during good behavior was to be interpreted in connection with the power to make recess appointments and that the judge was entitled to salary under the first appointment. The second appointment raised again the question of vacancy and after bringing in review the foregoing decision of Comptroller Bowler[36] as well as repeated opinions of Attorneys General,[37] the payment of salary was allowed.

A most important line of Comptroller's cases relates to the subject of fees. Though sometimes loosely used to

[35] In the case of ex parte Henry Ward, 173 U. S. 452 it was contended that no such appointment could be legally made. The court did not express an opinion on the contention but attention was called in the report to the provision for recess appointments above referred to.

The Ewart case reverted to the somewhat hair-splitting question whether a recess appointment fills the office or merely the existing vacancy. The whole question was important in this case only as it concerned the salary provision of section 1751 Revised Statutes since it had been held by great weight of authority, that for the legality of an appointment it is immaterial whether a vacancy first occurs or merely continues during recess.

[36] III Comp. Dec., 89.

[37] 2 Op. A. G., 336, 525; 3 *ib.*, 673; 4 *ib.*, 523; 10 *ib.*, 356.

include payments for mileage and expenses, the term fee in its proper sense means compensation for a service. There is a strong tendency at present to abandon this form of compensation; wherever it has been preserved, recent legislation has sought to simplify the subject and bring it within definite and specific provisions of law.[38] Fees are now confined for the most part to court officers such as marshals, district attorneys and clerks of court, and to some extent, the members of the consular service. In some cases the whole fee is retained as compensation by the officer who imposes it, in others it is accounted for and retained only in part, while in still others the whole amount collected is turned into the treasury, the officer receiving a direct salary compensation from the government.

Accounting officers experience considerable difficulty in securing a proper accounting of fees collected by the officers of the courts. Under the present law[39] every clerk of a United States District or Circuit court must report to the Attorney General every six months, all the fees and emoluments of his office of every description and it is especially provided that the report shall include naturalization fees and fees collected from attorneys admitted to the bar.

Some clerks of court were reluctant to accept the stringent provisions of the present law. Under earlier legislation although the Supreme Court had declared the practice illegal,[40] clerks had not been inclined to report naturaliza-

[38] Cf. especially in this connection act of May 28, 1896. 29 U. S. St., ch. 252, secs. 6–24.

[39] Act of June 28, 1902. 32 U. S. St., 475.

[40] Bean *v.* Patterson, 110 U. S., 401. The court seems to have later made an exception of naturalization fees, holding that they were not official emoluments which had to be accounted for (U. S. *v.* Hill, 120 U. S., 169). Congress evidently intended to have them included and when a law of March 15, 1898 (30 U. S. St., 317) did not satisfactorily accomplish that result, the law of 1902 above referred to was enacted.

tion and admission fees but to regard them as personal gain over and above the maximum legal salary. In the face of the obvious intent of the law the clerk of a United States District court filed a protest against being compelled to account for fees of this sort, his contention being that while the law required such fees to be reported it did not compel an accounting. The Comptroller, however, held otherwise, in harmony with the evident intention of the law.[41]

The general principle followed in fee cases is that no fee will be allowed unless the specific provisions of law have been fulfilled. This principle was well illustrated by a case decided by Comptroller Tracewell in 1903. The case concerned a fee claimed by a United States commissioner in Alabama for hearing a Chinese exclusion case. Two Chinese charged with being unlawfully in the United States, were released on bail and failed to appear for trial. The commissioner claimed that although there had been no trial there had been such a final determination of the case as entitled him to his fee. His claim was disallowed, the Comptroller holding that while it was well founded in equity, there had been no "final determination" of the case such as under the law would justify the allowance of the claim.[42]

When a *bona fide* complete service is performed such as the law contemplated, the allowance will not generally be defeated by a mere technicality. The consular regulations contain very strict provisions prohibiting consular officers from receiving profit on account of money, supplies or other relief furnished to seamen.[43] A tariff of consular fees au-

[41] IX Comp. Dec., 688.

[42] IX Comp. Dec., 649.

[43] Rev. St., sec. 1719, Consular Regulation of 1856.

thorized by the President on October 1, 1897, contained the item, "services to vessels." Under this tariff there was presented to the Treasury Department a claim for thirty-six dollars by the consul at Yarmouth, Nova Scotia, for eighteen orders sending seamen to hospital. The seamen being disabled were discharged at the same time the orders were issued and the question was raised whether by the discharge they did not become distressed seamen in a way to bring the orders under the prohibition of section 1719 revised statutes. Comptroller Tracewell held that the fees were provided for in the schedule of tariffs of October 1, 1897, and that the consul was entitled to them regardless of whether an order was issued before or after the seamen were discharged.[44]

The accounting officers are frequently called upon to review claims for fees when no bona fide service has been performed. In other cases a single service will be divided into several parts in order to make it appear that several distinct services have been performed when in reality the whole ought actually to be included in a single operation. The difficulties presented by such cases are well brought out in a claim for fees entered by the clerk of a district court in North Carolina.[45] The fees were claimed for "entering requisitions and orders for record books, copies of same and entering openings and adjournments of court for the purpose of making said entries, and the clerk's per diem fee for one day upon which such an entry was made." There were also various minute entries scattered through the account.[46]

[44] X Comp. Dec., 709.

[45] X Comp. Dec., 712.

[46] The law of 1902 (supra, p. 71) did not abolish the fee system but provided that all fees over and above a fixed maximum salary should be turned into the treasury.

It appeared that the record books mentioned in the account were purchased by order of the court, and although the Attorney General had made simple and adequate provision for the procurement of all necessary record books, it is a general principle of law that when the court makes an order the clerk is entitled to his fee for entering and also to per diem fees for all services rendered under the order,[47] yet where the only function of an order seems to be to increase the fees of the clerk, there is some authority for disallowing any claims arising under it.[48] This exception to the general rule that a clerk is entitled to a fee for services performed by the order of the court is essentially the same as that laid down by the Court of Claims in Martin *v.* United States.[49] In this case the court said:

> Where the only question is whether the service was rendered, or whether it was necessary, or whether it was required by the court, the approval of the account [by the court] makes it evidence *prima facie.* Conversely, where the question is one of law, where the controversy is whether a statute authorized the service, whether one provision of the fee bill or another should regulate the compensation, the approval of the account raises no presumption and is wholly inoperative in an action on the account.

Upon the basis of those cases the Comptroller ruled that so much of the claim for fees as was covered by the order of the court for the purchase of record books should be allowed without questioning the necessity of the order. It did not appear, however, that the judge had ordered the opening and closing of court for the entry of the orders for

[47] U. S. *v.* Payne, 147 U. S., 687. U. S. *v.* Van Duzee, 140 U. S., 169. U. S. *v.* Finnell, 185 U. S., 236.

[48] U. S. *v.* King, 147 U. S., 676.

[49] Martin *v.* U. S., 26 Ct. Cls., 160.

books and as such formality was obviously uncalled for, since the orders were in the nature of vacation orders which did not require the court to be opened for their entry, all per diem and other fees connected with such opening and closing of court were rejected.

The second part of the claim had to do with minute entries scattered through the account. This claim was likewise for a service ordered by the court and one which the court had approved. It was obvious, however, that the record had been split up into a great many separate parts, captions of the case being repeated in each separate entry in a way to greatly increase the amount of fees. The following is the Comptroller's observation upon them:

The only comment I desire to make relative to these entries, their numbers, and their manner of making is that the judge who permitted and adopted them must assume all responsibility therefor.

If these entries had been made on the motion of the clerk and not under an order of the court, I should not hesitate to hold that as a whole they were unconscionable, vexatious, and evidently made with the sole view of multiplying fees, and not the result of the orderly dispatch of business. The record of the proceedings of a court, at least when collaterally attacked, import absolute verity, and when the record discloses the fact that a certain motion was made, or other proceedings in a case had, however fantastic and improbable such record may appear, one must shut his eyes, stifle his sense of the improbable, and assume the record speaks the truth. . . . This account, no doubt was presented to the court and approved. This presentation and approval by the court is *prima facie* evidence of every question of fact. . . . If, however, the facts are before the accounting officers, and they show that the court was mistaken as to any of these facts, it is our duty and province, notwithstanding disapproval of the court, to allow or disallow the charges in accordance with the true state of the facts.

Upon questions of law arising in these accounts, such *prima facie* effect is not necessarily given to the act of approval by the court. . . . The circuit court of appeals in United States *v.* Marsh (106 Fed. Rep., 477), . . . says: No rule of court, which separated a single order or proceeding into separate parts, would justify the clerk in doubling the charge.

In accordance with this decision and with his own decision in an earlier case,[50] the Comptroller held that the claim for so many of the entries as constituted palpable separation into parts of the same service must be disallowed. The extreme difficulty of applying the law in a way to defeat even obviously improper claims, which is so well illustrated in this case, will doubtless lead in time to the abandonment of the whole system of compensation by fees.

The subject of mileage as it concerns civil officers presents essentially similar questions to those already considered with reference to officers of the army and navy.[51] The question has sometimes arisen whether members of legislative bodies whose seats have been successfully contested by opposing candidates are entitled to mileage in returning to their homes. Such cases have usually concerned members of territorial legislatures, and it would seem from an order to territorial secretaries issued by the First Comptroller during the eighties, that it was formerly the practice to allow both parties full mileage both ways provided the contestant were successful.[52] This practice has now been reversed so far as it applies to the return mileage of an ejected member, on the ground that from the minute the contest is decided against him he is no longer a member.

[50] V Comp. Dec., 120.

[51] Cf. supra, pp. 62–65 for further discussion on mileage.

[52] Circular of instruction cited by Secretary of New Mexico Territory in justificaton of a similar allowance in 1903. X Comp. Dec., 428.

A certificate of election would constitute *prima facie* evidence of membership and justify allowance of mileage in going to the place of assembly regardless of the contest. In case a contestant succeeds in unseating a member, he would be regarded as the rightful member from the start and entitled to mileage both ways; should he fail he would of course receive no mileage at all.[53]

The problems which are presented to the accounting officers in connection with specific mileage allowance or definite per diem allowance for expenses, are of comparatively simply solution. When, however, actual expenses are reimbursed, or when a reimbursement of traveling expenses is combined with a per diem subsistence allowance, puzzling questions frequently arise. It is the practice of the department even at the risk of injustice to individuals, to settle all such cases as nearly as possible in accordance with the strict letter of law although at times, in the interest of the treasury, the intent of Congress will be considered. A case in point concerned the case of a policeman of the District of Columbia under a provision for expenses "during disability encountered in the discharge of duty." The Comptroller held that expenses during disability from a stroke of paralysis could not be reimbursed since the law seemed to contemplate disability from bodily injury.[54]

Two cases under the act for the Louisiana Purchase Exposition illustrate how the same rule may appear extreme in some cases while in other it is clearly necessary to forestall obviously improper payments. One of the Commissioners of the exposition under an appropriation of five thousand dollars for "salary and expenses" presented a claim for hotel expenses in addition to salary. The lan-

[53] I Comp. Dec., 245; X, 425.

[54] X Comp., Dec., 789.

guage of the law was clear and the claim was disallowed.[55] In the second case a disbursing clerk of the government board demanded reimbursement for calling cards and expenses for telegraphing. In supporting the first item he claimed that cards bearing his name and title were necessary for purposes of introduction at various places of business. The Comptroller held that evidence of the clerk's position was furnished by his commission and that if for his own convenience he chose to employ calling cards instead, he should personally bear the expense.[56]

The claim for expense for telegraphing which the clerk presented at the same time involved the question, what is to be included in subsistence under a per diem allowance, and what expenses are properly chargeable to transportation. The telegrams in question had to do with reserving rooms in St. Louis for the use of the board, and it was held that under an allowance of eight dollars per diem in lieu of subsistence the cost of rooms and all expense incident to obtaining them was a private matter of the members of the board in which the government had no interest and that the claim could not be included in transportation expenses to be borne by the government.[57]

A recent decision concerning the pay and expenses of special agents employed in the Bureau of Corporations attempts to draw the line between traveling expenses and subsistence. The appropriation under consideration employed the following language:[58]

For compensation, to be fixed by the Secretary of Commerce and Labor, of such special agents in the Bureau of Corpora-

[55] X Comp. Dec., 66.

[56] X Comp. Dec., 506.

[57] X Comp. Dec., 508.

[58] 32 U. S., 1081. Similar language is used in the appropriation of March 18, 1904, for the year 1904–1905.

tions, and for per diem, subject to such rules and regulations as the Secretary of Commerce and Labor may prescribe, in lieu of subsistence at a rate not exceeding four dollars per day to each of said special agents, while absent from their homes on duty, and for actual necessary traveling expenses for said special agents including necessary sleeping car fares, sixty thousand dollars.

The Secretary requested a ruling of the Comptroller whether under this appropriation he was authorized to promulgate a regulation stipulating, that in addition to per diem allowance in lieu of subsistence, expenses would be confined to actual and necessary traveling expenses usual and essential to the comfort of travelers and to embrace among other things, reasonable charge for laundry work and baths when travel continues for a week or more, the charge for baths not to exceed fifty cents each.

A similar question had been presented earlier, when it was held that an officer receiving per diem in lieu of subsistence was not entitled to reimbursement for expenditures for subsistence as a part of traveling expenses.[59] It was further held that nothing could be included as a part of traveling expense which could properly be regarded as subsistence.[60] In a later case ordinary traveling expenses have been definitely differentiated into two classes consisting first of expenses for transportation and those incident thereto, and secondly expenses for subsistence and those incident thereto. The expense of laundry was in that case held to belong in the second category.[61]

In addition to reiterating the decision in these cases the Comptroller pointed out that Congress by the words "including necessary sleeping care fares" used in the appropriation act in question, had recognized a doubt which had

[59] X Comp. Dec., 508.

[60] IV Comp. Dec., 424.

[61] VI Comp. Dec., 45.

formerly existed as to whether those expenses were to be classed as transportation or as subsistence. Although sleeping car expenses had already been held to be more in the nature of transportation than of subsistence,[62] Congress by specially stipulating that they were to be classed among traveling expenses, subject to reimbursement, had evidently intended that all other expenses aside from transportation were to be regarded as subsistence to be covered by the agent himself from his per diem allowance.

The Seceratry was accordingly advised that the regulation proposed by which laundry and baths were to be included in necessary traveling expenses, would not be permissible. This holding would not of course affect a case in which the law made no provision for per diem in lieu of subsistence. If the head of the department were authorized as is sometimes done to provide as a part of the compensation of an office, a per diem allowance, no compensation having been fixed by law, he would then have power to stipulate that such allowance, although in terms, in lieu of subsistence, should not include laundry, baths or other items which he chose to exclude.[63]

While there are obvious general principles applying to the pecuniary relations between the government and its servants, the Comptroller's chief task is to ascertain the meaning of specific provisions of statutes. The great importance of his jurisdiction rests upon the magnitude of the aggregate interests involved. From the great number of cases and their individually small amounts it is obvious that but few of them can ever reach the courts. The decisions of the Comptroller determine the pecuniary situation of every officer and employee of the government, and to all intents and purposes his decisions in this field are final.

[62] V Comp. Dec., 508.

[63] IV Comp. Dec., 424.

CHAPTER VI

INTERPRETATION OF CONTRACTS

When the United States enters into contract relations with its citizens, it subjects itself to the same rules of right and justice which govern dealings between individuals,[1] and contracts of this kind are interpreted in the main according to the principles of municipal contract law. The initial interpretation of contracts rests ordinarily to a large extent with one of the parties, and only in case there is disagreement or dissent, is recourse taken to the courts. The same recourse to the courts obtains for contracts with the government, and while it would probably not be denied that a contract with the government is regarded in a somewhat different light from an ordinary contract between individuals, nevertheless the fact that the judicial branch of the government may and does come in to adjust disagreements, necessitates an adherence on the part of the Comptroller to recognized principles of legal construction.[2]

[1] Mann *v.* U. S., 3 Ct. Cls., 411; II Comp. Dec., 407.

[2] It has not been thought necessary to discuss in detail the more general questions which come before the Comptroller for decision, such question as the nature of the contract relation, by what constituted, the capacity of the parties, the legality of the object, form, and other questions which come up in entering into a contract; or questions which have to do with the construction, execution and discharge, together with the distinction between express and implied contracts; the effect of certain irregularities such as mistake, misrepresentation, fraud, duress and undue influence; the effect of waiver, rescission, and subsequent agreement; the remedies legal and equitable for failure to perform a contract; all these matters involve principles of law which now obtain in the courts and which the Comptroller feels himself bound to

Contracts ordinarily come before the Comptroller because of some alleged failure to carry out their expressed or implied terms. To forestall the necessity of reference to a third party, many contracts provide in advance for a stipulated amount of damage to be paid to the aggrieved party in case of failure to comply with any of the terms. These agreements themselves often become the subject of disagreement and call for judicial consideration. When that occurs the reasonableness of the agreement will usually be called in question. A typical case of this kind decided by Comptroller Tracewell in 1901[3] involved a stipulation in a contract for flat-boats, for damages to the amount of one dollar per day for delay in completing the order. In addition, in case of extension of time, cost of inspection was to be deducted from the agreed price. The time of delivery was twice extended for three months, each time without remission of costs. When the contract finally expired by time limitation only a small portion of the boats had been completed. Subsequently the remaining boats were completed and accepted subject to the conditions of the contract. Had the stipulated damages been rigidly enforced, the contractor would have received about sixteen dollars for each boat instead of three hundred nineteen dollars as agreed. Instead of following those courts which enforce rigidly the intention of the parties, the Comptroller chose rather to consider the matter on equitable grounds, and finding that no actual damage had been suffered, directed that no reduction be made.[4]

follow. The absence of detailed discussion in no sense indicates a failure to recognize the importance of the Comptroller's judicial work in this field.

[3] VIII Comp. Dec., 133.

[4] Those courts which incline to the equitable interpretation followed by the Comptroller have tried to reconcile it with the intention of the

Two months after this decision had been rendered, another case arose on a contract providing for liquidated damages of one hundred dollars per day for delay in completing a steel frame for a government printing office building.[5] The contract provided specifically that time should be an essential feature and that the sum stipulated represented the damages which the United States would suffer, and not a penalty. There was a delay of 194 days and the Comptroller held that the damages stipulated were not unreasonable. Since the subject seemed to have been carefully considered by the parties, and the language was so explicit as to leave no room for misunderstandings, he decided that the agreement should be enforced.[6]

parties. The rule adopted is that where the parties undertake to measure damages which are difficult of ascertainment they are acting strictly within their rights and it is the duty of the courts to enforce their agreement (Nielson *v.* Read, 12 Fed. Rep., 441); but where the amount of damages is easily ascertainable, and especally where the amount stated is exorbitant or unreasonable the provision has been construed as a penalty (Davis et al. *v.* U. S., 17 Ct. Cls., 215). Such action is sometimes upheld on legal grounds by the fiction that the parties have not understood the force of the words they were using, or that they have used the wrong word, since they cannot make that liquidated damages which is in its very nature a penalty. On this point it was the opinion of the Comptroller that the prevailing tendency was toward an equitable construction. In reaching this conclusion he emphasized the familiar principle that the words of an agreement are taken most strongly against the person who prepared it as compared with the person who merely signs it (Davis et al. *v.* U. S., 17 Ct. Cls., 215).

[5] VIII Comp. Doc., 238.

[6] Two other lines of contracts upon which the Comptroller has occasion to pass are those for transportation and for fiscal services in connection with government disbursements. Agreements with transportation companies though large in volume, are principally of legal importance when they concern the relation of the Government with land grant or bond aided railroads. Such contracts usually rest on an act of Congress and differ from other contracts in raising all the general question of legislative interpretation. Fiscal arrangements sometimes

In addition to contracts to which the government is directly a party, the Comptroller exercises jurisdiction over certain of those entered into with Indians. Contracts with Indians not citizens of the United States are subject to specific statutory limitations among which are, that they must be executed before a court of record and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs whenever they are made for certain enumerated purposes.[7] The object of these provisions is obviously to protect the Indians from exploitation. As illustrative of the legal problems involved in an effort to realize this object may be cited a case which came before the Comptroller in 1900.[8]

The six nations of New York entered into a contract with attorneys by which the latter undertook to prosecute against the United States certain treaty claims shared by these Indians with other tribes of New York and Wisconsin. The contract was duly approved, judgment secured and appropriation made to cover the amount. Taken by itself the contract entitled the attorneys to the stipulated fee of ten per cent. In connection with the claim were presented other agreements which called for twelve and one half per cent. on the total amount of the judgment. These included contracts not only with the six nations, but with the Oneidas and Stockbridges to which latter two, the approval of the Secretary and Commissioner, having been given after expiration, appeared to be non-operative. On the other hand, it was shown that the Oneidas and a portion at least of the Stockbridges, were citizens of the

require interpretation to determine under what circumstances claims for exchange are allowable (VI Comp. Dec., 431, 638).

[7] Rev. St., sec. 2103.

[8] VI Comp. Dec., 849.

United States at the time the agreements were made; as had already been held, the provision for approval applied only to Indians not citizens.[9]

While the agreements with the Oneidas and Stockbridges provided for an attorney's fee of fifteen per cent., there were accompanying all the contracts two assignments, the latter of which, bearing date February 16, 1900, provided for a distribution of fees upon a uniform basis of twelve and one half per cent. of the judgment plus interest.

The Auditor had decided that certification by the Secretary and Commissioner precluded further examination of the case; the Comptroller, however, went behind this certification and considered the various contracts on their merits. He held first, that agreements in order to justify certification, must have been in strict accordance with the provisions of statute, and that the equity of the claim, or the length, or value of the service as measured by results, could not be considered.[10] Furthermore all the agreements except the one with the New York Indians, he held were about matters provided for by statute. To the question whether or not the Oneidas and Stockbridges were citizens of the United States, no allusion was made; but it was held that, in the first place, the contracts with them had no legal existence at the time they were approved by the Secretary and the Commissioner, and that, in the second place, even if they had, they could not bind the judgment creditors of the New York Indians, but would justify only the distribution of twelve and one half per cent. of such parts of the judgment as might finally be allotted to the two tribes concerned.

A contract of April 13, 1895, with the New York Indians

[9] I Comp. Dec., 176.

[10] 18 Op. A. G., 497.

provided for the assignment of twelve and one half per cent. of any judgment which might be rendered in favor of the Indians, the same to serve as reimbursement to the assignees, for moneys paid by them to other persons claiming formerly to have been attorneys to the Indians. These earlier claims had already been rejected, so that the contract of April 13, 1895, besides being found not to conform to the provisions of law,[11] was held to be based not only on a past, but on an illegal consideration. It was an attempt by indirection, to cause a government officer to pay fees on contracts which Congress had declared were to be held void and which prohibited any officer of the government from paying them in whole or in part.[12]

Upon the implication of the Auditor that the action of the Secretary of the Interior and the Commissioner of Indian Affairs should be considered final upon the accounting officers, the Comptroller observed that the action of the Interior Department relative to Indian contracts was to be considered final only in matters submitted by law to its discretion.

The Secretary of the Interior, he continued, is not authorized to waive any of the statutory requisites relative to these contracts. He cannot say that a contract concerning matters not embraced in section 2103 are matters therein embraced. He cannot make legal by his approval a thing declared by Congress to be illegal.

The approval of the Interior Department indorsed upon these contracts for attorney's fees made under section 2103, Revised Statutes does not cure the omission therefrom of any of

[11] Rev. St., 3477, provides that all assignments unless made in the presence of two witnesses after issue of warrant for payment, and sworn to before a notary, shall be null and void.

[12] 18 U. S. St., 35.

the statutory prerequisites upon which their validity depends. Such approvals are conclusive and binding only as to the truth of the affirmative facts therein recited. Fraud in the procurement of such contracts and patent mistakes of fact recited therein, however, are subject to review.

Upon the basis of these facts and the accompanying line of argument, all the contracts except the first one with the New York Indians were held to be inoperative. Upon this one, the Auditor was authorized to certify for payment, the ten per cent. fee as stipulated.

From the foregoing cases it appears obvious that in the interpretation both of contracts to which the government is a party and of those over which it has acquired a statutory jurisdiction the Comptroller's duties call into play judicial activity of a high order. Here even to a greater extent than elsewhere he is met with a body of more or less conflicting opinions, state and federal. In harmonizing decisions and formulating them into rules, which, until reversed by the courts, become binding precedents, the Comptroller may be considered to make law as truly as it is made by any except the highest courts.

PART II

COMPARISON OF THE COMPTROLLER'S WORK WITH SIMILAR FUNCTIONS IN FRANCE AND GERMANY

INTRODUCTION

Since the several divisions of the Comptroller's activity find collectively no close analogy on the Continent, a comparison of his work with similar functions in France and Germany involves a study of the institutions by which in part parallel activities are performed. These institutions include in the first place the accounting services of the active administrations, together with the final auditing bodies known as courts or chambers of accounts, and secondly the courts with which jurisdiction over claims against the state is lodged. Many special services absolutely indispensable to the proper functioning of the machinery of one country are entirely absent in another. In the following chapters therefore, the various organs of the institutions described will be considered rather in their relation to each other as constituting a complete whole than in their relation individually to any specific activity of the Comptroller.

According to American notions it is when viewed from the standpoint of the individual, as determining the rights of private claimants against the government, that the work of the Comptroller assumes a distinctively judicial character. From this point of view such a jurisdiction as he exercises is practically unknown in the active administra-

tions of Continental states. When the head of any branch of the administrative service, or in some cases even a subordinate officer, settles a claim, appeal lies only to the court charged with hearing such claims. The essential difference between such suits and controversies between individuals is recognized if at all by lodging jurisdiction over them, not with the civil tribunals but with the administrative courts.

Aside, however, from these functions which the Anglo Saxon readily recognizes as judicial, that branch of the Comptroller's work which is here regarded as purely administrative, involves activities which to the Continental mind are essentially judicial. It is the Comptroller's duty to direct the auditing machinery of the government and to exercise a final check upon treasury operations. From this point of view he performs the function known in France as the control of the execution of the budget (*contrôle de l'exécution du budget*).[1] Budgetary control culminates in nearly every country on the Continent in a formal and systematic auditing by a body variously organized from country to country, but everywhere recognized as one of the judicial organs of the administration. The members of this body, whether it be known as a Court of Accounts as in France or as a Chamber of Accounts as in Prussia, usually stand on a level officially with the higher judicial officers.

Comparison for France and Germany with that part of the Comptroller's work which has to do with treasury regulation, or budgetary control, involves a study of the

[1] The French word "*contrôle*" as used in this phrase has a significance in addition to that of the word "control" somewhat the same as that of our word "check." For the sake of definite reference the word control will usually be employed, but it should be borne in mind that control in this sense can be exercised subsequently as well as previously to the operation controlled, in which case it signifies a check upon operations already completed.

relation existing between the active budgetary administration and special tribunals of accounts. From the other or more distinctively judicial side, comparison will have to do in the first place with the relation of the whole finance administration to the courts, whether administrative or civil. Finally, concerning the disposition of claims appealed from decisions of administrative officers, a comparative study will raise the whole question of jurisdiction between the administrative tribunals and the civil courts.

Merely to mention these questions covering nearly the whole field of jurisprudence and finance administration, shows the difficulty of close comparison. An exhaustive discussion of the questions raised is obviously beyond the scope of this study. It would not, however, be warranted in studying comparatively any single branch of government functions, to seek in technical organization alone, an explanation of differences in practical operation. Temperament of peoples, contrasts in systems of law and government, the way in which legislators and the people whom they represent are in the habit of regarding executive officers, history and traditions of institutions, all the conditions in short, which make one state different from another, come in to influence the working of every part of governmental machinery.

While it is not necessary to dwell at length upon such general differences, mere reference to them makes clear that a study of this kind cannot seek exact parallels. Every part of the regulative machinery possesses its significance, not so much in comparison with other machinery, as from its place in the complete system. The object here sought will be to ascertain by what methods and in how far, similar ends are attained under completely different systems of law.

CHAPTER VII

THE REGULATION OF TREASURY OPERATIONS IN FRANCE AND GERMANY

As chief of the disbursing system, the Comptoller exercises in our government the function known on the Continent as budgetary control. The Continental control systems are all modelled in large measure after the system of France where there is no single office in which the Comptroller's functions are effectively centralized. The whole control system comprises what is known as administrative control, that exercised in the various ministries, including the Ministry of Finance, judicial control, exercised by the Court of Accounts (*cour des comptes*) and the legislative control of the Chambers.

By legislative control is not meant the control over the finances which the Chambers exercise in voting the budget law, but rather a control or check exercised after the operations of the budget year have been completed, and which consists in approving these operations, practically in the form of a bill of indemnity to the ministers (*loi de règlement du budget*). This bill cannot be taken up immediately at the close of the year, as under the French system the operations of the budget year are not completed until some time after the year is ended;[1] in theory, how-

[1] Under this system of taking account of the actual operations of the Treasury during the year, there is credited to the year all the income arising from laws in force during the year, and charged to it all expenditures made on account of appropriations for the year, whether or not the money comes into the treasury, or the accounts are settled

ever, it should be introduced at the beginning of the session next succeeding the close of the budget period (*exercice*), before the introduction of the budget law for the next year.[2] As a matter of fact the indemnity laws are passed years after the operations under the budget have been completed, with the result that the action becomes largely perfunctory.[3]

and paid. This is known as the "*exercice financier*" as compared with the English system of recording actual receipts and expenditures which in French finance is called "*gestion annuelle.*"

[2] Law of May 15, 1818, article 102.

[3] It is not improbable that the framers of that section of our constitution which provides that regular statement and account of the receipts of all public moneys and expenditures shall be published from time to time (Art. I, sec. 9, cl. 7), contemplated some formal auditing of accounts by Congress. The reports of the Secretary of the Treasury which were deemed to fulfill the requirements of this section, so far as it plays a part in budgetary legislation, is the basis of future estimates and not the subject of a Congressional audit.

With our lack of budgetary unity anything parallel to the French "*loi de règlement*" would be impossible. This does not mean that the accounts are never subjected to Congressional scrutiny. There have been committees on public expenditure since 1814. In that year the House provided for a standing committee on public expenditure whose functions were specifically outlined (House Jour., v. 9, pp. 311, 314. Quoted in Adams, E. D., *Control of the Purse in the United States Government,* p. 218). The duties of this committee were later divided among several committees and at present there are standing committees on the expendture of each of the several departments and on expenditures on public buildings. The duties of these committees as outlined in the rules of the house are, "the examination of the accounts and expenditures of the several Departments of the Government and the manner of keeping the same; the economy, justness, and correctness of such expenditures; their conformity with appropriation laws; the proper application of public moneys; the security of the Government against unjust and extravagant demands; retrenchment; the enforcement of the payment of moneys due to the United States; the economy and accountability of public officers; the abolishment of useless offices; the reduction or increase of the pay of officers." (See McConachie, L. G., *Congressional Committees,* New York and Boston, 1898, Appendix VI,

Although the classification of the organs of control into administrative, judicial and legislative is perhaps the most obvious, and the most convenient for purposes of study, a more significant division would come from differentiating the control exercised upon the officers who authorize expenditures (*contrôle des ordonnateurs*) from that exercised over accounting officers (*contrôle des comptables*). As will be apparent both in studying the administrative regulations and the work of the Court of Accounts, the real character of the French system is determined by considering it from these two points of view.[4]

The lack of effective centralized regulation of public expenditures in France applies not so much to the actual disbursement of moneys as to the contracting of expenditures. The actual accounting is sufficiently well centralized

p. 398.) Work similar to that alloted to these several committees is assigned in the Senate to the committee on organization, conduct and expenditures of the executive departments.

The work of these several committees has not been to make formal audit of accounts or expenditures under the appropriations of each separate year, but rather to keep a general outlook for irregularities and for tendencies toward unwarranted expenditure. In the regular course of their duties they have not usually been in a high degree efficient in performing this work. Misapplications of funds have usually been revealed through the efforts of the executive departments themselves, or else through special Congressional investigations. (For a discussion of the work of standing committees on expenditures cf. Wilson, Woodrow, *Congressional Government,* Boston, 1885, pp. 175 ff.)

[4] Exposition of the French control system may be found in detail in Besson, *Le Contrôle des Budgets en France et à l'étranger,* and in articles on *"Contrôle"* and *"Cour des Comptes"* in Say's *Dictionnaire des Finances.*

The most exhaustive discussion of this subject is contained in an unpublished monograph entitled *Contrôle de l'exécution des Budgets en France et à l'étranger,* by M. Victor Marcé, *conseiller référendaire à la cour des comptes.* This work was awarded the grand prize by the Academy of Moral and Political Science, Paris, 1900.

in the division of public accounts in the Ministry of Finance (*direction générale de la comptabilité publique*) and payment cannot be made upon any warrant without the countersignature of the Director of the general movement of funds (*directeur du movement général des fonds*), who ascertains whether the proposed expenditure is provided for in the budget or by additional credits, and whether funds are still available to meet it. Accounts are also carefully revised by the Court of Accounts, accountants being held pecuniarily liable for any discrepancies. None of these precautions, however, prevent the ministers or their delegates from contracting for expenditure far in excess of the credits voted in the budget. This they often do in the full expectation that the Chambers will vote a supplementary credit to make up the deficiency.

The responsibility for this practice lies largely with the budgetary system in France under which neither the original budget nor the demand for supplementary credits are government measures for which the ministry through the Minister of Finance stands responsible. The Minister of Finance centralizes the demands but he does not control them.[5] Each ministry in preparing its own budget groups its demands and presents, with the original budget, those which have the greatest chance of being granted, knowing full well that the credits will not cover the expenditures contemplated. Demands which would be the most subject to attack, when the Chamber is attempting to preserve a balance between income and expenditure, are held back to be presented when, with a less critical examination, the reasons for the expenditure are not likely to stand in such glaring opposition to arguments for budgetary equilibrium.[6]

[5] Stourm, René, "*Le Budget*," Paris, 1891, 2e éd., p. 62.

[6] *Ib.*, p. 313.

It is perhaps natural that under these circumstances the ministers should not always wait for the credit to be voted before contracting for the expenditure. Oftentimes the fact that an obligation actually has been incurred, furnishes the strongest possible argument for meeting it.[7] Since the refusal of the state to pay the obligation contracted in its name by its authorized agents would amount to repudiation, it is scarcely practicable to hold the ministers pecuniarily responsible.[8] Students of budgetary science have long recognized in this method of making expenditures, a weakness of the French system. In nearly every session, some measure containing remedial provisions is introduced in the Chambers and many such measures have become law. Thus far, however, the practical situation has not been materially changed.

In the formal regulation of disbursements great progress has been made. Prior to the period of the Third Republic regular provision was made for meeting payments in excess

[7] A case in point occurred in the Ministry of Marine in 1886. The minister decided by a simple order that the age for pensioning the civil officers of his department should be lowered three years. This order was censured by the legislature at its next session, but remained in force until the minister retired from office in July, 1887, thus resulting in an overdrawing of credits to the amount of nearly 550,000 francs. A new minister who was entirely without responsibility for the condition his predecessor had brought about, then came into power, and the Chambers were practically left no choice but to vote the amount necessary to make up the deficiency (Stourm, *"Le Budget,"* 2e éd., p. 571).

[8] Under the law of May 15, 1850, this is legally possible. In cases where the surpassing of credits has been most flagrant, proposals have been entertained in the Chamber to put this law into practical operation. This was notably the case in 1887 when, without the excuse of any particular emergency or even necessity, the Minister of Marine exceeded his credits by 8,240,000 francs. A majority, however, was received for the supplementary credit (Session of Nov. 5, 1887, cited by Stourm, 2e éd., p. 477).

of appropriations by transferring to a chapter where there was a deficiency the surplus from chapters where a more liberal allowance had been voted (*virements*). This freedom was natural at a time when the part of the legislature in government was much more restricted than at present, but long after this practice was legally prohibited,[9] payments were frequently made by means of urgency warrants in the total absence of appropriations.

In general, actual payments are now held strictly within the limits of regularly voted credits, but all efforts to hold the contracting of expenditures within the same limits, have run counter to the feeling of independence, which is thoroughly imbedded in each ministry. The Ministry of Interior, which has been the worst offender usually carries with it the Premiership and is able to present strong political reasons for opposing a more complete control. No

[9] Law of Sept. 16, 1871, art. 30. In 1882, upon occasion of an expedition to Tunis, the appropriations in several chapters of the budget were exceeded in this way to the total amount of nearly six million francs. This extraordinary supplementary credit was denied by the Chambers and the affair was never regularized until June 17, 1890, when the law of indemnity (*loi de règlement*) for the budget year (*exercice*) 1882 was passed.

Stourm has called attention to the fact that up to 1891 the financial system in vogue in the colonies was peculiarly favorable to the overrunning of credits. Before the ordinances of delegation arrived, the Governors were in the habit of opening credits of their own accord, to the officers to whom the power of authorizing disbursements was to be delegated (*ordonnateurs secondaires*). Payments were thus made without any knowledge of the amount of available appropriations. The decree of May 16, 1891, which aimed to apply to the colonies the same rules of budgetary practice as were in force in France, still left possible the continuance of the old practice for a time at the end of each budget period and it was not definitely specified what the limits of this time should be (Stourm, 2e éd., p. 477, note 2).

provision involving fiscal subordination to the Minister of Finance is likely to be effectively executed.[10]

While the absence from the French system of an officer like the American Comptroller doubtless impairs somewhat legislative control over the incurring of expenditures, it is from the reverse side that comparison between the two systems is especially significant. The real power for effective regulation which our Comptroller exercises, arises to a very large extent from the thoroughness and minuteness with which Congress makes effective its power to direct public expenditures. This fact universally understood and accepted gives to the officer upon whom is devolved the interpretation and application of the will of Congress, a

[10] Since 1891 (law of Dec. 26, 1890, sec. 59; *Bulletin des lois,* p. 1714) there has been in each of the several ministries, an officer whose nominal duty it is to regulate the incurring of obligations for his ministry (*controlleur des dépenses engagées*). This officer, in theory at least, is supposed to act more or less independently of the head of the department, and the later legislation has aimed to bring him more under the jurisdiction of the Ministry of Finance. As at first enacted the law provided simply for monthly reports regarding obligations undertaken, to the Bureau of Public Accounts (*direction de la comptabilité publique*), but by the latest amendment which makes the concurrence of the Finance Minister necessary for the appointment of the Controller, all his findings (*avis*) have to be made in duplicate and addressed as well to the Finance Minister as to the head of the particular department. Besides, it is provided that prior to every demand for special credits, the statement of balances, after deducting payments to be made from credits granted, must receive the Controller's verification (Budget law of March 31, 1903, sec. 53).

It is to be noted that the power lodged with this officer is practically limited to giving information and establishing the accuracy of statements. He is still a part of the ministry whose accounts come before him, and as such is dependent upon the head of the department. The officers of the Treasury in Paris are not at present especially hopeful that the recent changes will work any considerable reform. (For discussion on this subject cf. Boucard et Jèze, *Éléments de la Science des Finances,* Paris, 1896, pp. 54 ff.)

power which under other circumstances he could hardly be expected to possess.

The basis of the French system of regulating expenditures was established under a government whose executive exercised a large degree of arbitrary power. Many of the organs of the system, and indeed its essential character are the same now as under earlier régimes. The many far-reaching reforms have aimed to improve the operation of the system rather than to change its general characteristics. In view of French administrative history it is not surprising that control over the expenditures of higher executive officers should not be exercised with a minuteness of detail, which Americans regard as necessary for safe-guarding the interests of the treasury.

Those officers who keep the public accounts and are charged with the actual handling of public funds, are surrounded by all the checks which an elaborate system can provide. Accounts for all receipts[11] are centralized in the

[11] The fact that the work of the Treasury in France includes not only operations analogous to those of our Federal Government, but to those of the state governments as well, and regulates, besides expenditures, receipts from a great variety of forms of taxation, serves to give the machinery an appearance of great complexity. The same organs are usually employed for regulating receipts and disbursements, especially in the departments and communes. Receipts from direct taxes are controlled simply by holding the general treasurer and paymaster of each department (*trésorier-payeur général*) responsible for the whole amount assessed to his department. He in turn holds the receivers (*receveurs particuliers*) responsible for the amount due from their *arrondissements* and they likewise the collectors (*percepteurs*). When it is impossible to recover the full amount assessed, the collecting officers obtain indemnity by means of process before the prefectural councils.

The collecting of indirect taxes is controlled by three administrations, that of the indirect taxes proper (*régie des contributions indirectes*), that of customs duties (*régie des douanes*), and that of registry and stamp taxes and receipts from public property (*régie de l'enrégistre-*

books of the treasury at Paris, the actual specie being distributed according to the needs for payment upon order of the Director of the general movement of funds. Payments are actually made from the office of the central paying cashier (*caissier payeur central du Trésor*), by the general treasurers and paymasters (*trésoriers payeurs généraux*) and their subordinates in the departments, and by the receivers (*receveurs particuliers*), and collectors (*precepteurs*). These officers, who are at the same time the collectors of direct taxes, constitute the responsible disbursers of the public funds (*comptables du Trésor*).

As, however, expenditure of revenues is not entirely an affair of the Ministry of Finance, it is not alone the disbursing officers proper who are held responsible for the correctness of their balances. Each of the several ministries in whose interests disbursements are made, have their own regulations for checking and auditing, and although the general bureau of public accounts (*direction générale de la comptabilité publique*) in the Ministry of Finance is charged with the duty of unifying the methods of accounting, there is to be found in the several ministries considerable variety of system.

In all the ministries there is either a single bureau of accounts, whose chief checks and supervises the work of

ment des domaines et du timbre). Each of these administrations is supervised by a Director, who has under him inspectors and sub-inspectors to superintend and check the work of collectors. Besides, there are controllers of receipts either at Paris (*receveurs-controleurs*) or traveling from place to place (*controleurs-receveurs ambulants*), whose special duty it is to be on the lookout for irregularities and frauds. The administration of state manufactures has also its inspectors and inspecting engineers who check, not only the operations in cash, but in materials as well. The accounts of these various services, as also those of the posts and telegraphs, are examined by the General Inspectors of Finance (*inspecteurs générals des finances*).

subordinate accountants or, as for a long time in the Ministry of Public Instruction, the accounts are adjusted in several bureaus corresponding to different divisions of the service. In the Ministry of Foreign Affairs supervision is exercised by the bureau for the direction of funds and of accounts (*direction des fonds et de la comptabilité*). Under the superintendence of the chief of this bureau, a special accounting agent audits the accounts for the diplomatic and consular service and prepares them for submission to the Court of Accounts. In the Ministry of War there is a special control corps resident at Paris, which inspects at irregular intervals accounts of the various services of the department in much the same way apparently that general financial operations are inspected by the general inspectors of finance. In the services of the Ministry of the Interior are centralized the accounts of the departments and communes of all France.

The operations of the different services in so far as they have to do with disbursements, after being checked and audited at the ministry from which they emanate, are subjected to the control of the Finance Ministry. This control is exercised through the agency of three services, called the central control of the public treasury (*contrôle central du trésor public*), the general direction of public accounts (*direction générale de la comptabilité publique*), and the direction of the general movement of funds (*direction du movement général des fonds*). The first of these services has jurisdiction over matters of fact which might affect the validity of accounts,[12] the second regulates matters of

[12] All claims against the public treasury must receive the visé of the controller of the public treasury. He is required through his deputies to watch all balances of the treasury and forestall all fraudulent entries of receipts or disbursements, to supervise the entries regarding the

form,[13] while the third has to do with questions of budgetary regularity.

From a fiscal point of view the third service is by far the most important. The Director of the general movement of funds is charged with holding actual disbursements within the limits of available appropriations. No payment upon any warrant can be made without the director's countersignature. He shares moreover with the Central Control Bureau and the general Director of public accounts supervision over the work of the accounting officers of the Treasury. At the end of each year, he prepares the general account of treasury disbursements which is submitted first to the Commission for verifying ministerial accounts, and later to the Court of Accounts.[14]

funded debt, and in general to vouch for the authenticity of every account as to the essential facts which constitute a claim against the treasury. He has likewise to authenticate the daily résumé which the chiefs of the various services submit to the Bureau of Public Accounts, and to the direction of the general movement of funds; he himself prepares a statement of each day's operations, to be submitted to the minister. The general Director of public accounts, the Director of the general movement of funds and of the funded debt, are required to furnish the controller information regarding any decisions, ordinances or balances which he may require for the proper performance of his duties.

[13] The work of the general direction of public accounts (*direction générale de la comptabilité publique*), has to ascertain if all rules regarding public accounts have been observed, and prescribes the form in which accounts shall be submitted. It receives and registers all the ordinances emitted by the several ministries and all resolutions (*arrêtés*), and decisions applicable to public accounting. It is to a certain extent the record bureau of the department.

[14] Important functions are likewise performed by the Director of the general movement of funds with reference to the public debt and the emission of interest bearing loans. He exercises also a certain surveillance over the coining of money, over the operations of the stock exchange—in France conducted by a syndicate with a governmental monopoly (*agents de change*)—and over the issuing of bonds by

It is of course to be borne in mind in connection with the work of the Director of the general movements of funds, that he acts entirely as the subordinate of the Minister of Finance, and not like the Comptroller of the Treasury in Washington, in an independent capacity. The monthly distribution of funds to the different services of the government, although considered as one of the Director's important control functions, takes place on the basis of information collected in the name of the Minister of Finance, and the distribution itself is made by executive decree.[15] Nevertheless the real work of keeping abreast of operations of the various services, and of imposing an actual check upon their disbursements, whether by holding them within the monthly allotments or within the limits of total appropriations, is performed by an office immediately under the Director's superintendence (*comptabilité des droits constatés*).[16]

The only other preventive check upon treasury operations, is that exercised by the general inspection of finance. This service divides the territory of France into ten districts (*circonscriptions*) each provided with a corps of inspectors under the direction of an Inspector General. Between the first of May and the fifteenth of November, the inspectors traverse each district and subject all accounts of the department and of such of the subordinate services as

subsidized railroads and those, the interest on whose bonds is guaranteed by the state. All these powers make him, next to the minister, by far the most important officer of the ministry of finance.

[15] Art 61, Decree of May 31, 1862.

[16] The examinations to which accounts are subjected in the other bureaus of the Treasury, after receiving the endorsement of the Director of the general movement of funds, have to do with the identity of the parties and matters of technical accuracy involving no important administrative questions.

seems necessary, to examination. In addition, special investigations are undertaken as occasion demands.[17]

After treasury operations have been completed the review of accounts is begun by the Commission for verifying ministerial accounts (*commission pour vérification des comptes des ministres*)[18] which submits an official report

[17] The Inspector-General serves for three years in a single district, and within that time he is supposed to verify and check as far as possible, the work of all the services within his territory. After each investigation, report is made by the inspector upon an authorized form upon which space is reserved for reply by the accountant to any criticism of the Inspector and for remarks by the chief of the service. These various elements of the report are summed up by the Inspector-General in a final column. Finally the reports for each inspection district accompanied by a general report by the Inspector-General, containing a résumé of the principle facts and suggested reforms, are forwarded to the Minister of Finance.

There would seem to be danger that a service of this kind might become in large measure perfunctory. French budgetary authorities, as the following quotation from Stourm indicates, seem to feel the service is peculiarly efficacious:

"L'inspection des finances, par sa position supérieure, son émanation directe du ministre et ses apparitions inopinées, constitue un des contrôles les plus redoutés, et les plus efficaces que nous ayons encore rencontrés. Étrangère aux relations et aux habitudes locales, elle représente l'uniformité de la règle partant du centre pour faire respecter, jusqu' aux extrémités de la France, le texte de la loi, sans ménagements, ni routine, ni défaillance. Elle concourt, en un mot, d'une manière prépondérante, à maintenir dans sa rectitude et sa vitalité notre belle organisation financière" (Stourm, 2e ed., p. 412).

[18] This Commission consists of nine members chosen by the executive from among members of the Senate, of the Chamber of Deputies, the Council of State and the Court of Accounts. The final account of expenditures which each ministry is required to submit at the end of the year (*compte définitif des dépenses*), the final account of receipts (*compte définitif des recettes*), and the general finance account (*compte général des finances*), submitted by the Minister of Finance, are examined and compared with the books of the Bureau of Public Accounts in the Ministry of Finance, and with the records kept in the several ministries. The final accounts and the books are checked not

to the Minister of Finance, the Senate and the Chamber of Deputies. The work of the Commission is in some measure a judicial investigation. The final detailed judicial examination devolves upon the Court of Accounts, a body, characterized not only by its name but by its organization and the ceremony and dignity of its proceedings as a judicial tribunal.

The court was founded by Napoleon I in 1807, partly after the model of the Chambers of Accounts of the old Monarchy.[19] Its jurisdiction extends to the operations of all

only as to their agreement, but as to the intrinsic regularity of all the operations.

[19] The internal organization of the court has undergone only comparatively slight modifications since that time, although the tenure of its members and, as was natural, the relation of the court to the executive has changed somewhat under the different régimes.

For the greater part of its work, the court is divided into three Chambers, each consisting of six members (*conseillers maîtres*), presided over by a President. There is besides a first President who presides at the sessions of the united court, and assigns the members to the three Chambers. The four Presidents, as well as the eighteen judges (*conseillers maîtres*), are appointed by the executive upon the nomination of the Minister of Finance, and hold office during good behavior.

There is connected with the court a body of twenty-six attorneys (*conseillers référendaires*), of the first class, sixty of the second class, and twenty-five auditors, likewise divided into two classes. No one can become an attorney of the first class who has not served two years in the second class, one half of the promotions being made by selection, and one half on the basis of length of service. In the same way one half of the appointments of attorneys of the second class must be made from among the auditors of the first class. The auditors are appointed by competitive examination from among licensees in law (*licencié en droit*). With these qualifications promotions and appointments of the subordinate officers of the court follow the manner of appointment of judges (*conseillers maîtres*). It is the subordinates who perform the actual work of auditing and verifying accounts and of making reports to be acted upon by the judges.

A very important adjunct of the court is an institution styled the

functionaries responsible for the receipt or disbursement of public revenues. The court after passing in review all vouchers[20] and determining their regularity, renders first a provisional judgment, to which the accountant by presenting new documents, may object within three months. At the expiration of that time final judgment is rendered to which again appeal may be made either for revision by the court itself (*pourvoi en révision*) or for cassation by the Council of State (*pourvoi en cassation*). Revision may be demanded by the accountant for any reason whatever, provided the request is supported by documents obtained subsequently to the rendering of judgment. De-

Public Ministry (*ministère public*), which consists of an Attorney General (*procureur général*), with an assistant (*avocat général*), chosen from among the attorneys (*conseillers référendaires*), of the first class.

It is the duty of the Attorney General to conduct the correspondence between the Court of Accounts and the ministries, replying to any requests for information which they may address to him. He gathers likewise from the ministries information needed by the court and has prepared a general statement with regard to all accountants whose accounts should be presented to the court. He also watches over the work of the court, ascertains that the sessions of the Chambers are regularly held, that the other officers promptly perform their duties and that all accounts are presented within the time limits prescribed by law. Any delay or negligence he reports to the first president. He may take part in the examination of any account when he deems such a course necessary, and by notifying the President of a Chamber and having a day fixed for that purpose, he may be heard before the Chamber regarding any matter over which the court has jurisdiction. When the whole court (*chambre du conseil*) is considering matters of jurisdiction or other general questions, or preparing and discussing public reports, the Attorney General takes part in the discussion and has a vote.

[20] In case a disbursing officer has made payment upon the requisition of officers authorized to issue warrants, he is not held responsible, even though the court finds the warrant irregular. The court only points out the irregularity since its jurisdiction does not extend to those who authorize expenditures (*ordonnateurs*).

mand for revision may likewise be made by the Attorney General (*procureur général*), or the court may revise upon its own motion, when in the revision of other accounts errors or omissions have come to light. There is no fixed time within which revision must take place. Appeal in cassation may be based upon errors in law or form, and upon lack of jurisdiction or excess of power. It must be made by the accountant interested or by the head of one of the ministerial departments within the space of three weeks. The power of the Council of State in such cases is limited to sending the account for revision to one of the chambers of the Court of Accounts which has not already passed upon it.

A final decree of the Court of Accounts declares an account balanced, in advance, or in arrears. In the first two cases the accountant is discharged and his bond cancelled; in the third the deficiency has to be paid within a time prescribed by law, at the end of which execution is issued and the bondsmen are held responsible. The court has no jurisdiction over the person of accountants; if any fraud or embezzlement is discovered the Minister of Finance is notified, and it is his duty through the Minister of Justice, to bring the matter before the ordinary civil tribunals.

Whenever operations not contemplated by law are discovered by the Court of Accounts (*comptabilité de fait*), the officers responsible are required to appear before the court and furnish the same vouchers as in the case of regular operations. This, however, applies only to irregularities with the public revenues such as the drawing of funds upon fictitious warrants, or the failure to deposit funds which should have been deposited; the court will not take cognizance of the regularity of the public service by which an expenditure is caused.[21] Within the limits of

[21] Case of Alexander Dubois, cour des comptes, June 25, 1900.

its jurisdiction, the requirements of the court concerning irregular operations are likely to prove severe, since in general, it will not be easy to support irregular transactions by regular vouchers. In this field, moreover, contrary to the general rule,[22] officers who authorize disbursements are amenable to the court's jurisdiction.

Aside from its jurisdiction as a judicial tribunal, the court exerts an influence with regard both to the accounting and the authorization of expenditures, which is perhaps of greater effect than the formal functions just described. After passing upon the annual accounts each year, the court issues two general declarations addressed to the Minister of Finance and communicated to the Senate and the Chamber of Deputies. The first of these has reference to the annual operations, and concerns itself chiefly with matters of form and technical accuracy; the second relates to the budget period which has expired (*situation définitive de l'exercice expiré*), and affects mainly those officers responsible for incurring expenditures. By making public any discrepancies between the figures which they submit and the accounts upon which the court is obliged to pass, it exercises upon these officers a sort of indirect control.

More important still is the annual report to the President which contains a summary of the infractions upon the budget law and suggestions of reform. When this report is in the hands of the executive, the various services concerned are requested to explain the irregularities indicated, and the report together with the response is printed and laid before the two Chambers. Here again through the publicity given this document, the court, without exercising any

[22] Art. 18, law of Sept. 16, 1807, creating the Court of Accounts had provided that in no case should its jurisdiction extend over those who authorize public expenditures (*ordonnateurs*).

jurisdiction whatever, exerts perhaps the most effective control upon the contracting of expenditures which the French budgetary system provides.

After all the accounts of a budget period have been acted upon by the Court of Accounts, formal control is completed by the perfunctory passage of a law of indemnity (*loi de règlement*).[23] The actual legislative power over expenditure is exercised in preparing and enacting the budget; detailed direction over the execution of its grants the French Chamber does not assume.

In Germany administrative decentralization throws the burden of imperial functions largely upon Prussian officers or those of other individual states.[24] It follows that the state control system, that of Prussia being by far the most important, furnish the significant material for comparative study. Prussian treasury regulation involves the checking of actual cash manipulated (*Kassenrevision—Kassenkontrolle*)[25] and the control of all accounting operations irre-

[23] Cf. *supra*, p. 91.

[24] The local operations connected with the collection of duties and other federal taxes, all of which in the United States are performed by organs of the Federal Government, are as a rule accomplished in Germany either by Prussian officers or by officers of the state in which the transaction occurs, and thus fall within the jurisdiction of the state and local organs of control.

[25] In order to check operations in cash, both the central treasury and the treasuries of special services in Berlin, as well as the provincial and local treasuries, are subject to a regular inspection at least every three months, and to further inspection at irregular intervals and without previous warning. It is the duty of the Finance Minister or other minister concerned, and, for the provincial and local treasuries, of the provincial President to see that these inspections are faithfully carried out. All treasuries in the provinces, whether local, special, district or provincial, must be inspected on the same day and at the same hour. Each visitation must be certified by the inspector, and his certificate which either vouches for the regularity of all transactions or cites irregularities discovered, must be countersigned or acknowledged by the

spective of the handling of funds (*Rechnungskontrolle*).[26]

Treasury administration in Prussia centers in the Ministry of Finance. For all cases except those which the minister reserves for personal attention, treasury operations are supervised by the directors of three main divisions into which the treasury is divided. The first of these divisions, directed by an under-secretary, has charge of the general budgetary and treasury machinery (*État- und Kassenwesen*), while the second and third, each under a director, administer respectively the direct and the indirect taxes.[27]

Director of the treasury inspected. The certificate is then sent to the chief of the particular service, the minister or the provincial President as the case may be. In case of shortage resort is had to summary proceedings (*Defektverfahren*), to compel the officer or his bondsman to make good the amount. Such proceeding does not of course bar prosecution in case of criminal malfeasance.

[26] This involves an inquiry not only into the mathematical accuracy of accounts but should insure at the same time, the observance of proper forms, and a correspondence between the operations actually performed and those authorized by the proper superior officers. The actual work of securing these results is performed in part in conjunction with the treasury inspection just described, and devolves usually, so far as local accounts are concerned upon inspectors delegated by the provincial or district Government.

It should be here noted that for the purpose of administration and local government the consecutive divisions of Prussian territory are, province, government district (*Regierungsbezirk*), circle (*Kreis*), and commune (*Gemeinde*), with certain variations such as *Stadtkreis, Landgemeinde,* etc., in case of the last two units. The government district is merely an administrative unit but has no organs of self government. As will be seen, in case there is no branch of the central treasury in the circles, local collectors remit directly to the district treasury (*Bezirkshauptkasse*). Generally, however, the committee of the circle is charged with the auditing of accounts of rural communes (Landgemeindeordnung of July 3, 1891; div. 2, art. 10, sec. 121).

[27] Functions of the Ministry of Finance outside of these three divisions cover such duties as the administration of the public debt. Still other branches of finance administration come under the direction of the

The work of these divisions covers for the most part those operations of the Ministry of Finance which have to do with collecting, disbursing and accounting for, public revenues. Subordinate to these divisions is a whole hierarchy of officials, a part of whom perform their duties at the capital and a part in the provinces.[28]

The organization of provincial and local administration of revenue is somewhat different for the direct and indirect taxes. The latter are administered by the provincial revenue office (*Provinzialsteuerdirektion*), under which are several grades of customs offices administering at the same time, the imperial taxes. Ultimate authority over the personnel of the service rests with the President of the Province (*Oberpräsident*), through whom likewise all communications with the central treasury must be conducted.[29] Direct taxes are administered by a division of

particular ministry with which they are closely related. Thus the administration of forest and state lands, which has a decidedly financial aspect, is controlled by the Ministry of Agriculture, while mines are administered by the Ministry of Trade and Commerce, and railways by the Ministry of Public Works. The Finance Minister exercises by no means absolute power; in addition to the restrictions placed upon him by the constitution and laws, he must be guided by the principle of ministerial solidarity. This makes it necessary for him to work in harmony with the Minister-President, who is usually at the same time Chancellor of the Empire and direct representative of the King and Emperor.

[28] In the first category, are such services as the mint and the general lottery, both under the division of budget and treasury, and the central stamp warehouse in Berlin under the division of indirect taxes. Likewise all Prussian customs officers performing their duties in parts of the empire outside of Prussia, are directly associated with the central division of indirect taxes.

[29] The provincial revenue office of Brandenburg in Berlin, also the city government of Berlin (*Stadtkreis*), and the government of Hohenzollern in Sigmarinen may communicate directly with the treasury division of indirect taxes.

the district government, through which likewise the government acts in the administration of forests and state lands (*Abteilung der Bezirksregierung für die Verwaltung der direkten Steuern und der Domänen und Forsten*). Here again except in Berlin, communication with the central treasury is through the Provincial President.[30] All local and intermediate treasuries act at the same time, as collecting and disbursing organs for their respective branches of government. Through the main division of the central treasury the results of their operations come finally under the jurisdiction of the superior Chamber of Accounts (*Oberrechnungskammer*).[31]

The Prussian Chamber of Accounts is the analog of the Court of Accounts in France. Its members are appointed

[30] In every district there is a central district treasury (*Regierungshauptkasse*), directed by a single treasurer (*Kassenrat*). In some provinces, especially in the newer ones, and in parts of the Rhine province, where the governments of the circles are without treasuries, all the direct taxes are collected by the local collectors in the communes, and whatever is not destined for local purposes is sent directly to the district treasury. Elsewhere local collections are sent first to the treasury of the circle and thence forwarded to the district treasury.

[31] The jurisdiction of the Chamber of Accounts is not confined to services connected with the Ministry of Finance. There are a number of social and industrial institutions of the Government which administer their treasuries independently of the Finance Ministry. Such for instance are the treasuries of the schools and universities, the hospital service, the police service and others. Likewise the state mines and the railways administer separately their finances. In all these cases, however, the principle of subjecting accounts progressively to the control of divisions of the service next in rank above the division by which the account was submitted is uniformly observed. Decisions of the various auditing bodies that involve private rights may be attacked before the ordinary civil courts (Landgemeindeordnung of July 3, 1891, art. 10, sec. 121, Kreisordnung of Dec. 13, 1872, div. 3, art. 3, sec. 128, 128a and 129). For a discussion of the whole auditing system see Heckel, Max von, "*Das Budget*," p. 272 ff.

by the King and occupy the position of judicial officers.[32] The procedure of the chamber is somewhat less formally judicial than is the case with the French court and it centralizes to a greater extent than is true in France the genaral control function. Though freedom is left with the chamber to determine the form which its action shall take, opportunity is made for investigation on the spot where accounting services are performed. In conducting such investigations, both the chamber and the higher administrative officers perform through a corps of inspectors appointed for the purpose, some of the work accomplished in France by the general inspection of finance.[33]

[32] Historically the Prussian Chamber dates from the reign of Frederick William I by whom it was established in 1717 as the General Chamber of Accounts (*Generalrechnungskammer*). In its present form, it rests upon a decree of Dec. 18, 1824, as modified after the formation of the empire by the law of March 27, 1872. Until 1826 the jurisdiction of the Chamber was shared with the Board of General Control (*Behörde für die Generalkontrolle*), which was abolished in that year, leaving the control function exclusively with the *Oberrechnungskammer*. The Chamber consists of a President, two Directors and fourteen Councillors all appointed by the King and directly responsible to him. The President is appointed upon the nomination of the Cabinet, and the Directors and Councillors upon nomination of the President with the approval of the presiding officer of the cabinet. Near relatives by blood or marriage are not permitted to serve in the Chamber at the same time, and the members are not allowed to hold any other remunerative office or to be members of either house of the Prussian Landtag. The President connot vote except in case of tie, but he may for fourteen days suspend a decision of the chamber, at the end of which time the decision suspended must be again considered in collegiate session and finally acted upon. Regulations regarding the routine of business are determined by royal ordinance and must be communicated to the Legislature. Unlike the work of the French Court of Accounts, that of the Prussian Chamber is designated as an administrative rather than as a judicial control (*Verwaltungskontrolle*).

[33] The local functions analogous to those of the General Inspection of Finance devolve largely upon the officers of the district governments

Although the Chamber of Accounts coöperates with the higher and intermediate administrative officers in securing the formal regularity of accounts, its legal relation to the administration in matters of budgetary control is that of a superior tribunal.[34] Besides checking the accuracy and regularity of accounts its activity is directed towards securing the faithful execution of the budget law (*Verwaltungskontrolle*).[35] The chamber must not only assure

(*Bezirksregierung*). Accounts of the rural communes are audited by the committees of the circle (*Kreisausschüsse*).

The formal audits of the Chamber are conducted according to budget years (Oct. 1 to Sept. 30), the accounts of each year being revised during the next succeeding year. For this purpose cognizance is taken only of the actual operations (*gestion—Gebarung*), and not of the results accruing from laws in force during the year (*exercice*). When an audit is completed and report laid before the Chamber, the accounting officers are notified of any irregularities discovered and given opportunity to respond. In case satisfactory explanation is made, or if the accountant recognizes and corrects the irregularity, a quittance without reservation (*ohne Vorbehalt*), is issued. When, however, the irregularity involves a reimbursement, the right to which the accountant refuses to recognize, or if such reimbursement is made under protest, the accounting officer entering claim for return of the amount, report is made with reservation (*mit Vorbehalt*). Such cases may involve a violation of official duty thus subjecting the accountant to punishment at the hands of a superior, in which case, final recourse, if any, would be to the administrative court; they may, however, involve criminal malfeasance and subject the accountant to prosecution.

[34] The Chamber is entirely independent of the several ministerial departments, being subordinated directly to the King. Excepting political funds including those voted to the Minister of Interior for private police purposes, it has jurisdiction over all budgetary operations of the state as to form, technical accuracy and legality. Accounts of minor importance already audited by the proper administrative authorities, may be passed without further examination, but such action is entirely discretionary with the Chamber.

[35] The work of the Chamber, though performed generally after all the operations of the year are completed, is by no means a perfunctory proceeding. Accounting officers realize that any mistakes or irregularities

itself that the revenues have been legally collected and disbursed but it must ascertain whether the most feasible method of carrying out the law has been adopted. At the end of each year the chamber makes formal report to the King citing irregularities discovered and suggesting reforms. There is also prepared annually a general state account (*allgemeine Staatsrechnung*), which is accompanied by observations of the chamber and laid before the legislature.[36]

The reports of the chamber are chiefly valuable on account of the moral influence which they exert. Only in case of the most flagrant over-running of appropriations is there serious discussion.[37] The authority of the chamber over the higher officers who authorize expenditures (*or-*

which may fail of detection in the examination conducted by the administrative officers, are practically sure to be discovered by the investigations of the Chambers of Accounts and that they and their sureties will then be charged with any deficit which may result. The respect for the work of the Chamber which this certainly inspires, gives its investigations the practical effects of a preventive check in the only field in which under German conditions, such a check outside of the administration proper seems to be practicable.

[36] The remarks which accompany the report of the *Oberrechnungskammer* to the Legislature, include a résumé of all the facts brought to light by the investigations of the Chamber with the circumstances attending all overdrawing of credits and other irregularities. The Legislature then receives royal approval of the report submitted by the *Oberrechnungskammer* to the King, and appoints a committee to consider it in detail. Upon the report of this committee a vote of indemnity is granted to the administration (*Entlastung*—or *Absolutorium*). The form which this vote assumes depends in some measure upon the magnitude and importance of the budgetary violation to be legalized.

[37] The Legislature is practically compelled to grant the indemnity, as any other course, besides causing a deadlock in the operations of the state, could not prevent the act already accomplished. Ministers in Germany are not even politically responsible to the representatives of the people, and much less financially. Moreover, appropriations are in general overrun only with the approval of the crown.

donnateurs), rests not on legal sanction, with power of execution as is the case with mere accountants, but rather upon the dignity, the high character, and the judicial standing of the body itself.

Augmented by a number of additional members the Prussian Chamber of Accounts' functions as the Court of Accounts of the German Empire (*Rechnungshof des deutschen Reiches*).[38] The jurisdiction of the imperial court like that of the Prussian chamber extends to all funds, excepting special political funds (*Dispositionsfonds*) of the imperial treasury and of Alsace-Lorraine. A report of its work is submitted each year in the form of a memorial to the Emperor, the Bundesrat and the Reichstag. The Bundesrat and the Reichstag each acts upon the report independently and each passes a separate bill of indemnity.

In most of the smaller German states are found organs of control similar in main outline to those in operation in Prussia, although in many cases the control bodies either form a part of the Ministry of Finance or are subordinated to it. Bavaria with its elaborate machinery consisting of inferior and superior tribunals provides merely for reports to the Minister of Finance, with no connection between the control organs and the legislature.[39] In Württemberg, the

[38] The Imperial Court has no permanent existence but is re-created from year to year by a law which gives over to the Prussian Chamber the imperial control function for the single budget year and provides for the appointment *ad hoc* of such additional members as are deemed necessary.

[39] The first examination is conducted in the circles by special officers of the Chambers of Finance (*Rechnungskommissariate der Kreisregierungsfinanzkammern*). At nearly all the central disbursing offices there are special Chambers of Accounts whose agents conduct examinations individually (*bureaumässig*), making reports for the collegiate action of the Chamber. Over these bodies as a court of last instance, is the Supreme Court of Accounts (*oberster Rechnungshof*). This court is essentially a part of the Ministry of Finance.

Chamber of Accounts is incorporated in the Ministry of Finance, its president being at the same time director of treasury administration.[40] In Saxony, Baden and a number of the other states control systems bear closer resemblance to that of Prussia.[41]

From the point of view of technical accuracy the French and German systems of audit, regarding that of Prussia as typical, arrive at similar results by essentially similar methods. In the more clearly judicial work of preventing unauthorized expenditures, executive unity in German governments tends to encourage administrative control, and to confine budgetary infractions within limits approved by the executive branch of the government as a whole.[42] The great generality of German budgets in some measure removes the temptation to overdraw credits, and with it, the demand for a preventive control apart from the active administration.[43] In pointing out irregularities which have

[40] *Direktor der Staatskassenverwaltung.*

[41] Facts concerning the smaller German states are taken mainly from Heckel, pp. 291 ff.

[42] The center of power in German Government is not in the Legislature but in the administration. The principle of parliamentary responsibility is unknown to the German Government, ministers being responsible only to the King and Emperor.

Although the Legislature by refusing to grant credits, may considerably embarrass the administration which it cannot depose, its power is not such as entirely to paralyze it. The Government always has some sources of revenue not entirely dependent upon the annual grants; indeed it is an open constitutional question whether the executive may not conduct the government quite independently of legislative grants. The most important political laws, such as that fixing the number of troops for the army voted for a period of from five to seven years, are generally held to carry with them the appropriation for their execution. Such a system is not calculated to prevent overdrawing of credits, especially with respect to those services for which the legislature has illiberally reduced the Government's demands.

[43] For a discussion of the relation between the Legislature and administration in budgetary affairs, cf. Laband, Paul, *Staatsrecht des*

occurred, and suggesting remedies the Chamber of Accounts acts rather as an aid to the administration in checking the several branches of its own work, than in opposition to it, by bringing its faults to the attention of the legislature.

Whatever influence in the direction of budgetary regularity the Chamber of Accounts exerts upon the Prussian administration is due in large measure to the executive unity of Prussian government. In France where ministerial independence has retarded the growth of such an influence, students of budgetary affairs have long advocated endowing the Court of Accounts with legal power to approve in advance, or refuse to approve, all proposals which involve a charge upon legislative appropriations.[44] Although both countries are making progress toward greater responsibility for the executive authorization of expenditures, both their systems of control are still characterized by an elaborate and effective organization for checking subordinate functionaries, coupled with a large measure of fiscal independence for higher executive officers.

The authority by which the Comptroller regulates the whole disbursing machinery of our government finds in neither France nor Germany a parallel. His power to control by binding judicial decisions the fiscal operations of cabinet and other higher officers is contrary to the whole spirit of Continental administration. Even the regulation of accounting and disbursing operations requires from the

deutschen Reiches, pp. 210 ff. in Marquardsen, *Handbuch des öffentlichen Rechts.* Per contra cf. Rönne, Dr. Ludwig von, *Das Staatsrecht des deutschen Reichs,"* 2te Aufl., Leipzig, 1877, Bd. 2, Abt. 1, pp. 169 ff. and notes; also *Staatsrecht der preussischen Monarchie,* 3te Afl., Leipzig, 1872, Bd. 1, Abt. 1, pp. 398–417.

[44] For an exhaustive exposition of the control systems of the various European countries cf. Besson, Emmanuel, *Le Contrôle des budgets en France et à l'étranger.*

Continental standpoint a formal body with a formally judicial procedure.[45] To intrust a simple executive officer with the duty of finally judging the regularity of public expenditure seems a conspicuous overlapping of executive and judicial functions. It is paradoxical that while Americans often regard the administrative jurisdictions of the Continent, including the Courts of Accounts, as executive assumptions of judicial powers, their own system for regulating public expenditures should, from the Continental point of view, be subjected to practically the same criticism.

In the government of the United States where all the more conspicuously judicial affairs of treasury administration fall within the jurisdiction of the ordinary courts, formal distinction is not made, between those functions of the administration, which are purely executive and those which partake of a judicial nature. Though nominally an executive officer the Comptroller's judicial powers over treasury administration are far greater than are anywhere possessed by the Continental organs of control.

[45] Note in this connection the reservation with which Stourm compliments the English system of control: "Such a rapidity," says Stourm, "should inspire us with envy. But the régime of administrative control which may be adapted to England on account of the organization of her public powers would not from the same point of view be suitable in France. With us the uncertainties and fluctuations in political conditions will, for a long time to come, make necessary for the judgment of accounts, the institution of a high magistracy absolutely independent of the executive" (Stourm, 2e éd., p. 568).

CHAPTER VIII

AMERICAN COMPARED WITH CONTINENTAL JURISDICTION OVER CLAIMS AGAINST THE STATE

While the machinery of treasury regulation bears marked similarities among the countries of Continental Europe, the relation in which that machinery stands to other organs of government is strikingly different from country to country. These differences concern in large measure the questions of jurisdiction over acts of treasury administration. As constituting part of the administrative machinery of government, treasury organs are not in general subject to outside judicial control. When administrative acts come in conflict with private rights of individuals, the administration, in so far as its acts are judicially reviewable, is amenable, not to the ordinary civil tribunals but to special administrative courts. Only when government prerogatives are not at stake, and the acts to be reviewed are of a private rather than of a public character will jurisdiction be lodged with the civil courts.

In several of the Continental countries of which Prussia is typical, the actual interpretation of these principles tends to favor the civil jurisdiction. In France, on the other hand, and in those countries which follow the model of France, a much broader jurisdiction is given to the administrative courts. Government prerogatives are assumed to be at stake in France in all except a comparatively few of the pecuniary controversies of the administration; in Prussia such controversies are heard for the most part by the civil courts.

Corresponding to the difference in jurisdiction, the dependence of the French administrative courts upon the administration is much closer than in Prussia. Though the lower courts in both countries are organs of active administration, the French tribunals are nominally to a much larger extent than the Prussian, under the immediate control of the executive. Members of prefectural councils in France, which for most purposes are the administrative courts of first instance,[1] are named by the executive and hold office during pleasure. The councils are composed of either three or four members, presided over by the prefect who in case of tie, has a casting vote.[2]

The bodies which fulfill the function of administrative courts of first instance in Prussia, the circle and district committees (*Kreisausschüsse* and *Bezirksausschüsse*), likewise are the executive organs of their respective jurisdictions.[3] They are not, however, subject to arbitrary removal. The circle committee consists of the chief executive (*Landrat*), as chairman, and six other members chosen by the local assembly (*Kreistag* or *Kreisversammlung*).

[1] The municipal council which in some cases is the court of first instance is an elective deliberative body constituting within a limited sphere the legislature of the commune.

[2] As the prefect dictates all the active administration of the department, and is the direct agent of the ministry, his power of presiding over the council when sitting as a court has been much attacked. As a matter of fact the power of presiding is not generally exercised, one of the councillors being selected each year by decree to preside in the prefect's absence.

[3] See reference to local subdivisions of Prussian territory, ch. VII, note 26. For a brief description of the administrative and local government divisions here mentioned and their governing bodies cf. Wilson, Woodrow, *The State,* Boston, 1889, pp. 286–296. For more detailed description of these bodies and their administrative and local government functions, cf. Bornhak, Conrad, *Preussiches Staatsrecht,* Bd. 2, Freiburg in B., 1889–93, pp. 276 ff. and 312 ff.

The *Landrat* is appointed by the King, usually from among the members of the local assembly, for membership in which body no particular legal qualifications are demanded. Members of the committee serve for six years, one third being chosen every two years without restriction as to reëlection.

The district President (*Regierungspräsident*) is ex-officio chairman of the district committee which consists besides of six members, four of whom are chosen by the provincial committee. The more important local executive officers may not be chosen. The remaining two members are appointed by the King for life, with the restriction that one of the appointees must be qualified for a judicial office and the other for one of the higher administrative offices. One of the members appointed by the King is designated at the time of his appointment to preside in the absence of the President. In this capacity the member designated bears the title of administrative court Director (*Verwaltungsgerichtsdirektor*).[4]

The more important differences in organization between

[4] This title seems to have been preserved from the time when the judicial work of the district committee was performed by a district administrative court (*Bezirksverwaltungsgericht*), while the active administration was conducted by a district council (*Bezirksrat*). The court consisted of five members two of whom possessed the same qualifications as the royally appointed members of the present committee, the other three members being residents of the district elected by the provincial committee for three years. The *Bezirksrat* consisted of the district President, of one higher administrative officer of the district, appointed by the Minister of Interior, and of four additional members, resident in the district, and qualified for membership in the provincial legislature. The latter were appointed by the provincial committee. These two separate bodies were in operation from 1875 to 1883, when their functions were turned over to the newly created district committee (Gesetzsammlung, 1875, p. 375; 1880, p. 315; 1883, law of July 30).

French and Prussian administrative justice are found in the courts of last resort. Unlike the prefectural council, the French Council of State is not in its entirety identical with the court made up from among its members.[5] The whole council consists of thirty-two ordinary councillors (*conseillers en service ordinaire*), nineteen ex-officio members (*conseillers en service extraordinaire*), and thirty-one attorneys (*maîtres des requêtes*), forty assistant attorneys (*auditeurs*), and a general secretary. The Council is presided over by the Minister of Justice, and in his absence by the Vice President of the Council. The business of the Council is transacted by sections, four of which, consisting of five members each, divide the advisory administrative and legislative work according to ministries.[6] A fifth section of seven ordinary councillors devotes itself exclusively to judicial affairs (*section du contentieux*).[7]

The vice president and the presidents of sections are appointed by the administration as are the attorneys and ordinary councillors;[8] one half of the latter, however, since April 13, 1900, must be selected from among the attorneys

[5] With certain changes embodying recent modifications this sketch follows the article of Léon Aucoc in Block's "Dictionnaire de l'Administration francaise," 4e éd., Paris, 1898.

[6] The primary function of the Council of State is to render expert advice to the executive and the legislature. These duties have come to be in some measure overshadowed by its work as an administrative court.

[7] The minister may likewise preside over the sections always with voting power; he cannot, however, sit in the section for litigation nor in the council when organized as an administrative court (*délibérant en matière contentieuse*). The other ministers have also a seat in the general assembly of the council, but no minister can vote on matters not concerning his own ministry. They, likewise, may not sit in the section for litigation.

[8] Attorneys and councillors must be respectively twenty-seven and thirty years of age.

and two thirds of these in turn from among the assistant attorneys of the first class. The division of assistant attorneys into classes is on the basis of length of service, the second or lower class being recruited by competitive examination of candidates, who must possess the equivalent of a diploma in law, science or letters. The assignment to sections of ordinary councillors like their appointment is by decree, but official members are distributed according to the needs of the service. Attorneys and assistant attorneys are also changed from section to section as the service may require.

The Council organized as an administrative court (*délibérant en matière contentieuse*) consists of the section for litigation increased by eight ordinary councillors chosen from among the other sections by the Vice President of the Council in conjunction with the presidents of sections and removable by the same authority. The court thus constituted is presided over by the Vice President, and in his absence, by the president of the section for litigation. A large part of the court's work is performed by a body known as the Public Ministry (*ministère public*), which consists of four attorneys of the council (*maîtres des requêtes*), designated by the President of the Republic to act as preliminary judges.[9] As a large proportion of the decisions made by members of this body are confirmed without question, they often constitute to all intents and purposes the real judges.

Procedure before the Council of State depends in part on the nature of the case at bar but in large measure upon the manner of its presentation. Formerly, all cases except those brought by a minister had to be regularly presented

[9] The attorneys so designated are styled individually commissaries of the government (*commissaires du gouvernement*).

by a lawyer of the Council.[10] At present when a case involves small pecuniary interest[11] it is given directly to a Commissary of the Government (member of the Public Ministry) who passes upon it and submits it for final decision to the section for litigation.[12] Only upon request of a Commissary or a councillor are such cases heard by the full court.

Cases duly presented by a lawyer are first taken up by the section for litigation, three councillors constituting a quorum. With the coöperation of the Commissary of the Government, a report is drawn up and distributed in printed form to all interested parties. The case is later taken up in open session of the court and the argument of both parties presented whereupon the Commissary gives a provisional decision. After hearing a number of cases, the Council goes into closed session and renders final decision. Since 1872, decisions of the Council of State organized as an administrative court are executory in the name of the Council itself.[13]

The Prussian administrative court of last resort (*Oberverwaltungsgericht*), unlike the Council of State, is occupied exclusively with the judicial affairs of the administration. One half of its members must be qualified to act as judges, while for the other half, eligibility for appointment to a higher administrative office is required. The

[10] Decree of July 22, 1806.

[11] Many questions concerning direct taxes come in this category; also questions concerning elections to the general councils of the departments, arrondissements, and communes, various police matters, and by decree of July 22, 1889, appeals from the decisions of executive officers. The less formal procedure is calculated to facilitate recourse to the council; it is usually accompanied by a remission of fees.

[12] The section usually acts upon a number of cases at once; its proceedings take place in closed session.

[13] They were formerly drawn up as decrees signed by the executive.

appointment is made for life by the King upon nomination of the Cabinet, and only the sentence of a tribunal of justice can work a removal; all members must be at least thirty years of age. The King likewise appoints a first president and presidents of senate, the senates resembling somewhat the sections of the French council of State. The first president is chairman of the senate to which he belongs, and presides over the sessions of the whole court; the other senates are presided over by their respective presidents.[14] The subdivision into senates is made upon the recommendation of the Cabinet, but members are distributed by a body called the *Präsidium,* which consists of the first president and presidents of senate together with the senior member of the court.[15] The *Präsidium* also distributes the work among the senates.[16]

Complaints before the administrative courts must be made in writing within two weeks from the notice of the act to be attacked. If the defendant can satisfy the court at the start that the charge is without foundation, it will be at once dismissed; otherwise the trial proceeds in regular form, either the facts submitted by the plaintiff or the legal justification for the charge being attacked. Procedure is sometimes oral and sometimes by memorial, but must always be oral if either party so demands. It is likewise public, unless the court, on grounds of public policy or

[14] The division into senates is copied from the organization of the regular civil courts. Indeed in technical organization the Prussian administrative courts differ but little from the civil tribunals (cf. Garner, J. W., *The German Judiciary* in *Pol. Sci. Quart.,* V. 17, pp. 502 ff.).

[15] If different members have served the same length of time the oldest of them acts with the Präsidium.

[16] The constitution of the Prussian administrative court of last resort is found in the law of July 3, 1875, as modified by the supplementary act of Aug. 2, 1880 (Gesetzammlung, 1875, p. 375; 1880, p. 315).

morals decides to make it private. A judicial decision is the only way in which an administrative process according to Prussian law can be determined. Withdrawal of a suit or compromise between the parties outside of court will not be recognized by the court as a reason for not rendering a decision.[17]

The contrasts between French and Prussian administrative justice appear most strikingly in connection with the jurisdiction of their respective courts. In neither country does the jurisdiction of the administrative, over against the civil courts follow strictly the line of official and non-official acts.[18] Questions of competence between the ordinary and administrative courts in France were formerly decided by the Council of State itself, but are now determined by the Court of Conflicts, composed of three members of the Council of State, three members of the Court of Cassation, two other members chosen by the foregoing six, together with the Minister of Justice who presides. The line of jurisdiction is frequently different for cases arising in the

[17] The purpose of this provision is to discourage recourse to the court merely for purposes of extortion.

[18] As an example of lack of uniformity in separating the two jurisdictions in France, Lowell calls attention to the fact that questions relating to indirect taxes and the lesser highways are heard by the ordinary courts while those concerning direct taxes and the greater highways come before the administrative courts (Lowell, A. L., *Governments and Parties in Continental Europe,* I. p. 62). There are obvious practical reasons for the division adopted. Hauriou suggests that cases concerning indirect taxes involve only the application of statutes and not the interpretation of acts of administration (Hauriou Maurice, *Précis de droit administratif et de droit public général,* 5e ed., Paris, 1903, p. 748). It has also been suggested that a political explanation in the case of indirect taxes is to be found in the necessity of reconciling the people to certain unpopular taxes after the revolution. Procedure of the ordinary courts in tax matters is summary, following closely that of the administrative courts.

departmental or communal administrations than for those in which the general government is directly a party. Litigation between the state and its creditors is heard almost without exception by the administrative tribunals when the central government is concerned; when a department or a commune is a party, cases not involving expenditures for public works come before the ordinary courts.[19]

Recourse to administrative courts may be had for excess of power;[20] for interpretation, when the interpretation of an administrative act is necessary for the decision of a case; in certain exceptional cases, for injunctions (*repression*), to prevent the infraction of rights;[21] and finally, in full jurisdiction under which come the great mass of cases in their nature pertaining to the administrative rather than to the ordinary tribunals.[22]

Recourse under the first of these heads is almost excusively to the Council of State. The Council also has primary jurisdiction to interpret executive acts connected with certain police matters and with elections to the general councils of the department.[23] The Council may review on

[19] It should be noted that nearly all important expenditures of the departments and communes come under public work.

[20] In such cases they act simply as Courts of Cassation. Laferrière calls attention to the especial development of this line of litigation since 1872 (*Traité de la juridiction administrative,* II. p. 412. See law of July 17, 1900). By a Court of Cassation is here meant one which merely overthrows a decision without rendering one to take its place. Courts which render decision on appeal are somtimes called to distinguish them, Courts of Revision.

[21] This jurisdiction pertains in first instance principally to the council of the prefecture.

[22] A discussion of the functions of the Council under these several heads may be found in Hauriou, p. 799 (cf. Lebon monograph in Marquardsen's Handbuch, p. 122).

[23] The acts of special commissions and of certain administrative jurisdictions such as the Council of Public Instruction, though sometimes

appeal cases decided by inferior administrative tribunals, such as prefectural councils and administrative courts of the colonies, and the acts of ministers, prefects, and other administrative authorities. Decisions of the Court of Accounts may be appealed for the violation either of form or of law. Jurisdictional disputes between other administrative tribunals are decided by the Council of State.[24]

Financial controversies between the state and its citizens are in general in France within the province of administrative jurisdiction. The great variety of relations out of which such controversies arise may be roughly summarized as questions concerning the assessment and collection of taxes, questions regarding contracts, claims for indemnity on account of injuries, controversies over salaries and pensions of public officers and employees, and finally, claims arising within the administration in connection with the adjustment of accounts. Recourse in the case of direct taxes is in the first instance, to the prefectural council with appeal to the Council of State.[25] Contracts of the general

regarded as special courts of last resort, may be reviewed by the Council. Acts of administrative councils when they possess powers of their own may be reviewed as may those of ordinary executive officers.

[24] There are certain provisions for recalling a decision rendered by the Council. The principal cases are those in which a decision has been rendered by default, cases in which it appears that an innocent third party has been injured by a decision, and in certain other minor cases. Petitions for such a recall must be filed within two months after the decision is rendered.

[25] Recourse to the administrative tribunals was formerly taken directly from the action of local officials, there being no provision for appeal to the superior officers of the administrative hierarchy proper. By the laws of July 21, 1887, and Dec. 7, 1897, art. 2 and 13 respectively, claims for a modification of taxes as assessed may now be made in the office of the mayor, and on appeal, before the departmental director of direct taxes. They cannot be taken before the General Director nor the Minister of Finance. It will be recalled that cases concerning indirect taxes are heard by the ordinary civil courts.

government[26] for the purchase of commodities (*marchés de fourniture*) may be taken to the administrative courts only for a cash indemnity; however palpably the government may have broken its agreement, the courts will not reinstate the contract nor render any decision to nullify the action of the administration.

A striking exception to the rule assigning to the administrative courts all questions in which government prerogatives is concerned, is the provision for taking before the ordinary courts indemnity claims for requisitions made upon individuals or communes, or for the occupation of private property in connection with maneuvers of the army. Such claims are heard in the first instance by a commission appointed by the Minister of War and composed of a majority of civil members. This commission exercises, however, no jurisdiction, but merely makes proposals which claimants may reject and bring suit in the civil courts.

Claims arising out of the prosecution of public works whether for damages to property or injuries to person are decided by the prefectural councils.[27] Cases under public works contracts both in the central and local administrations, are only within the province of the ordinary courts when they relate to the private domain.[28] Contractors may

[26] Contracts of departments and communes come before the civil courts.

[27] The Court of Conflicts reinforced by a law passed on April 9, 1898, has introduced certain restrictions upon this jurisdiction, the most important being, the assignment to the ordinary courts of all demands for indemnity for accidents, made by laborers against a contractor (*entrepreneur*). Prior to the law of 1898 the Council of State had insisted upon unqualified jurisdiction in this field for the administrative courts. Case of Bordelier, Ct. Confl., May 15, 1886; Case of Lefort, C. d'É., Nov. 30, 1877; Case of Cames, June 21, 1895.

[28] The private domain in France includes the national forests, the national coast front, certain fortifications and mines, and according to

not bring their claims before the administrative courts until a definite decision of the active administration has been rendered. Concessions for construction and exploitation of public utilities such as railways, tramways and lighting plants as well as mining and other similar concessions, fall likewise entirely within administrative jurisdiction.[29]

Salary and pension claims for all branches of the French public service pertain exclusively to the administrative jurisdiction. Recourse to administrative courts may always be had whether the claim rests upon incorrect evaluation, unlawful retention as a matter of discipline or otherwise, or upon illegal removal from office. Pension cases likewise upon completion of the prescribed period of faithful service, may be taken to the Council of State if the application for pension is rejected by the minister in whose department the service has been performed.[30] The decree when finally obtained, must be countersigned by both the minister of the department and the Minister of Finance,

some authorities, certain personal property used in connection with the public service as well as incorporeal rights such as those of hunting and fishing.

[29] Contracts of this sort are surrounded by such a mass of conditions in favor of the state as to make the operations under them resemble those undertaken directly by the administration.

[30] The granting of a pension under French law is regarded in no sense as an act of grace. Pensions are regarded as contingent annuities (*rentes viagère*), to which civil and military servants of the state, having fulfilled certain requirements, are entitled. The most important of these requirements is the accomplishment of a specified period of faithful service. When this period is completed, the right of pension is asserted through an application made to the minister of the department in which the person has served. If the right is recognized the minister endorses the application and recommends to the council of state a decree of liquidation. The application may, however, be rejected, in which case the minister's decision may be attacked before the Council.

and the name of the functionary with the amount of the pension be inscribed by the Finance Minister upon the role of pensions (*grand livre*). By setting up irregularity the Minister of Finance may refuse the inscription, in which case recourse must again be had to the Council which can only settle the question of regularity but cannot force the Minister to act.[31]

The difference between French and Prussian practice appears strikingly in the disposition of claims arising out of accounting operations of the state. When an accounting officer in France feels his private rights injured by the act of a superior officer, or any of the organs of control, such redress as he has is secured by process before an administrative court. Over-drafts upon the local tax collectors are indemnified as was seen, upon appeal to the perfectural councils;[32] in like manner, appeals from a decision of the Court of Accounts, whether for revision or cassation, are heard by the Council of State. In contrast to the principles of French law, nearly every provision for the regulation of accounts in Prussia reserves to the accountant the privilege of appeal, for the protection of his private rights, to the ordinary civil courts.[33]

[31] It is a general principle of French administration that whether debts arise out of controversies settled by the courts, or in the regular course of the public service, the operations of liquidation and settlement are left entirely with the active administration. There was moreover formerly no procedure for compelling a minister to take action if he chose to remain silent. By the law of July 17, 1900, failures on the part of the minister to act during four months after demand is made for liquidation, is interpreted as a refusal and recourse may then be had to the Council of State. Against the Government there is of course no means of execution,

[32] Cf. *supra*, ch. VII, note 11.

[33] Landgemeindeordnung of July 3, 1891; div. 2, art. 10, sec. 121, par. 1. Kreisordnung of Dec. 13, 1872; div. 3, art. 3, sec. 128a.

The right to pursue pecuniary claims before the civil courts is a fundamental principle of Prussian law. Whereas in France the great majority of such claims are heard by the lower administrative courts with right of appeal to the Council of State. The only direct line of jurisdiction between the Prussian finance organs and the administrative courts, concerns the administration of direct taxes.[34] Distinction is made between questions involving the legality of the tax and those which have to do with the administration of the finance machinery. The assessment of property or income is a matter of administrative jurisdiction, but when a person claims exemption from a certain tax upon legal grounds, or seeks to reclaim illegally collected taxes, process is before the civil jurisdiction.

Prussian jurisprudence, in addition to extending widely the field of private law, gives to the civil courts a large jurisdiction over matters recognized as falling within the realm of public administrative law. Technically all claims against the state have to do with public law since they rest

[34] When an assessment made by the local assessors (*Veranlagungskommission*) has been revised by the Commission of Appeal (*Berufungskommission*), which is an organ of finance administration, appeal lies to the Superior Administrative Court (*Oberverwaltungsgericht*). Likewise with communal taxes, complaint having to do with the correctness of the assessment, may be appealed from the tax committee (*Steuerdeputation*), to the district committee (*Bezirksausschuss*), which is an administrative court, and finally to the Superior Administrative Court. See law of June 24, 1891, Gesetzsammlung, 1891, p. 353. Taxes are assessed by a committee whose jurisdiction usually comprises a circle. The chairman of the committee (*Landrat* or in some cases *Regierungskommissar*) is the actual assessor. In each government district there is a revisory committee (*Berufungskommission*) whose chairman (*Kommissar*), is appointed by the Minister of Finance. A minority of the committee is likewise chosen by the Finance Minister and the majority by the provincial committee (*Provinzialausschuss*).

upon an entirely different foundation from claims between individuals. The state as sovereign, permits the use of its courts for the pursuit of private claims against itself only by courtesy, and not because the citizen possesses any inherent right to have his claim judicially determined. Not only does Prussia open its civil courts to private claims, but the fact that the claim arises out of an act of sovereignty, does not in general change the jurisdiction. The state as sovereign may annul ancient and established privileges, it may appropriate property under the right of eminent domain[35] or it may, through the exercise of its police power,[36] work injury to private interests; indemnity in all these cases may ultimately be fixed by appeal to the ordinary civil tribunals. Similarly, claims which involve the property rights of officials over against the state, although clearly involving questions of administrative law, are brought before the civil courts.[37]

By far the widest extension of private law over cases in which the state is a party, arises through the operations of the state as owner and manager of private property. In this capacity the state has occasion to buy and sell, and enter into contracts similarly as a private property owner might do, and when so acting, a legal fiction has endowed it, under the name of "*Fiskus*," with the character of a

[35] The jurisdiction of civil courts in case of eminent domain proceedings is restricted to fixing the amount of idemnity on appeal. Zuständigkeitsgesetz of Aug. 1, 1883, § 153; *Gesetzsammlung*, 1883, p. 298.

[36] Police regulations as a whole naturally fall within the realm of administrative jurisdiction; it is only when an established private right is invaded or when a burden is laid upon one individual and suit is brought to have it transferred to another, that civil courts have jurisdiction.

[37] For a discussion of administrative jurisdiction of civil courts, cf. Bornhak, p. 298.

private property owning corporation (*Vermögensrechtliche Persönlichkeit*). While the *Fiskus* is naturally exempt from taxation, and still possesses some other privileges not enjoyed by corporations in general, the tendency has been to subject it entirely to the principles of private law. This tendency has been definitely sanctioned by an imperial law which provides that no case which, from its subject matter or the nature of the complaint, would be heard by the civil courts, may be withdrawn to any other jurisdiction because the *Fiskus* or a commune or any other public corporation is a party.[38]

By this provision, but more particularly by stipulations concerning conflicts between the civil courts and administrative jurisdictions,[39] imperial law has encouraged uniformity of jurisdiction among the several states. The fundamental principles of imperial law give to civil courts the decision of all conflicts, but there are numerous exceptions to this principle.[40] Cases arising in any state may, upon the request, and with the consent of the Bundesrat, be heard by the Imperial Court at Leipzig[41] but this privilege does not preclude any state from establishing a special tribunal of conflicts in conformity with the requirements of imperial law. At least one half the members of such a

[38] Einführungsgestz zur Civilprozessordnung, § 4; *Reichsgesetzblatt,* 1877, p. 244. Imperial jurisprudence regards the administrative courts as possessing only such jurisdiction as is especially assigned to them by law, the civil jurisdiction prevailing in all cases where the law is silent.

[39] Administrative jurisdiction may be in this case either an administrative court or an officer. The imperial law applies alike to those states possessing administrative courts, and those in which they are absent.

[40] Gerichtsverfassungsgesetz, § 17; *Reichsgesetzblatt,* 1877, p. 44.

[41] Einführungsgesetz zum Gerichtsverfassungsgesetz," § 17; *Reichsgesetzblatt,* 1877, p. 79.

court must be judges of either the Imperial Court or the highest state court, tenure in the Court of Conflicts being the same as for the chief office. All other than ex-officio members must be appointed for life. Decisions must be made in public session by not less than five members, and no decision may deny jurisdiction to the civil courts when such jurisdiction rests upon an established court decision which was not drawn in question at the time it was made.

The Prussian Court of Conflicts was reorganized to conform to the above provisions by a decree of August 1, 1879,[42] and is at present composed of eleven members of whom six are judges of the Superior Court at Berlin (*Oberlandesgericht*), the other five being required to possess either the qualifications of judge or of higher administrative officers. Not less than seven members may render a decision.

The effect of imperial law has been most felt in those states in which the separation of the active administration from administrative justice occurred more largely under French influence.[43] States which have established administrative courts since their inauguration in Prussia have

[42] *Gesetzammlung,* 1879, p. 573. For original organization see decree of April 8, 1847, Gesetzsammlung, p. 170. It will be seen that the organization of the Court of Conflicts precedes that of separate administrative courts, the conflicts in question being between the active administration and the courts.

[43] In Hesse the highest administrative court so modeled as to fulfill the requirements of imperial law, acts as a Court of Conflicts. Although the Hessian administrative courts are usually considered to date from the legislation of 1874 and 1875, considerable progress was made toward separating administration from administrative justice in 1832 (cf. in Marquardsen, Gareis, *Staatsrecht des Grossherzogthums Hessen,* pp. 96 and 98). Administrative courts were established in Baden in 1863 thus antedating those of Prussia by twelve years. All the other large states have since taken similar action;—Württemberg, 1876; Bavaria, 1878; Saxony, 1900.

followed for the most part the Prussian model. Beyond the laws already mentioned there has been no attempt to provide for a closely uniform jurisdiction through the empire; except in so far as the Bundesrat as chief administrative council of the empire, acts in a judicial capacity, the empire has no general administrative court.[44]

The contrasting legal principles which determine the boundary between administrative and civil jurisdiction in France and Germany rest for the most part upon historical foundations. The doctrine of the separation of the powers which so largely influenced the reorganization of the French state after the revolution, and which furnishes the theoretical justification of separate administrative jurisdictions, in France, has never been accepted in Germany. Administrative courts in Prussia are in some measure the culmination of general reforms inaugurated early in the nineteenth century by Stein and Hardenberg. The conscious aim in all these reforms has been technical administrative perfection. With this purpose in view the division of jurisdiction between the two sets of courts has been drawn less along logical, than along practical lines. The jurisdiction of administrative courts has been extended only far enough to avoid the danger to executive efficiency, which might arise from the purely judicial temper of ordinary civil courts.

A comparison of the two Continental systems according to the standards of Anglo Saxon jurisprudence can be of little value.[45] Each must be judged, whether historically

[44] For the description of several so-called special Imperial Administrative Courts cf. in Marquardsen, Laband, *Staatsrecht des deutschen Reiches,* p. 61.

[45] The restrictions placed upon Prussian administrative jurisdiction and the judicial character of its organization, brings it superficially much closer than the French system to Anglo Saxon standards. An American writer has suggested that alongside of the ordinary civil law

or with reference to its present organization and efficiency, in connection with the whole framework of the government of which it is a part. From this view point it is worthy of note that Prussian civil courts have shown no tendency toward troublesome interference with executive officers, and their wide jurisdiction does not imply necessarily a corresponding restriction upon the operation of government prerogatives. In all Continental countries

there may grow up in Germany "an equally logical and equally inflexible administrative law, which will control the officials as effectually as the common law does in Anglo Saxon countries." The same writer adds: "It is not improbable also that the inconvenience of two systems of law enforced by separate courts will in time bring about the fusion of the two in the same way that English common law and equity are tending to become fused; and if this happens the government officers will lose their peculiar privileges and become in the end subject to the same tribunals as the rest of the community" (Lowell, I. p. 296).

To what extent a tendency toward the diminution of official prerogative has actually been at work in Germany since the time when the administration became adjusted to the constitutional system, is perhaps an open question; if such a tendency develops in the future, it seems probable that it will occur through the perfection of administrative law rather than through its fusion with civil law. The relation here is essentially different from that existing between the common law and equity. Equity, though it may at times have been the organ of prerogative, reinforces the common law by securing between individuals a more perfect justice than the rigid forms of the common law permit, but justice between individuals, whatever their official standing, is the principle by which both alike are inspired. Administrative law, in the peculiar continental sense rests fundamentally on an essentially different principle. Efficiently administered, its result like that of equity, the common law or the civil law should be to secure essential justice, but a justice nevertheless always in harmony with the supremacy of government prerogatives. At present there seems to be no indication that this fundamental difference will not continue to distinguish the administrative from the ordinary civil law. It may perhaps even be expected as the administrative law becomes more perfectly developed as an organ of justice that the logical principle of the system will appeal with even greater force to the Continental mind.

where administrative tribunals are found, the supremacy of prerogative, or in other words, the unimpeded progress of administration is recognized as a prime desideratum of public law.

In practical application, the principle of executive supremacy has kept French administrative courts in close contact with the government and has imposed strict limitations upon the jurisdiction of civil courts.[46] Contributing to this result, the fear of judicial interference has been reinforced by a characteristic desire to develop administrative jurisprudence into a complete and logical system. French jurists everywhere recognize that the ultimate task of administrative tribunals is to harmonize administration with justice. With the increasing liberality of French institutions, the extended jurisdiction of administrative courts has emphasized the necessity of perfecting them as organs of individual justice. There appears no reason to doubt that in France as much as in Prussia the development of administrative law will continue to emphasize the judicial character of administrative tribunals.

The limitations that are gradually being placed upon the freedom of the executive in making appointments are slowly remedying the most serious weakness of the French system.[47] There exists at present such a strong sentiment opposed to arbitrary removal that the tenure of Councillors is practically secure. Members of the Council, and this

[46] A decree of the national assembly, Sept. 13, 1870, giving the ordinary courts power to review official acts, was interpreted in such a way as to make it practically inoperative.

[47] See law of April 13, 1900. The changes in the letter of the law furnish in themselves but slight guarantee against executive interference. The Governmental interference in the work of the Council has, however, been much less frequent in recent years than under the second Empire and earlier régimes.

applies to Commissaries of the government, are men of distinguished legal training, who command for the court the respect which is fitting a high tribunal of justice.[48]

[48] The reëstablishment of the Court of Conflicts, though its object is to protect the jurisdiction of the administrative rather than of the civil courts, has had a distinctly legalizing influence. The court was first established in 1848, was abandoned in 1852 and again established in 1872. Of the same general effect was the change which gave to the decisions of the Council of State the force of judgments rather than of executive decrees which they had prior to 1872. Since that time, various changes have been introduced both in the organization and in the powers of the court, which, though individually insignificant, show in the aggregate a distinct tendency toward separating the court more and more from the active administration. Cf. "Recueil de lois et règlements concernant le Conseil d'État," Imprimerie nationale, Paris, 1900. Cf. especially laws of July 13, 1879; Oct. 24 and 26, 1888; July 22, 1889; April 13, July 17, and Aug. 7, 1900. For a brief concise discussion of the evolution of the Council of State in its judicial aspect during the nineteenth century, see Dicey, *Law of the Constitution*, 6th ed., pp. 492 ff.

Corresponding to the development in the position of the Council itself, it is interesting to note in the more or less theoretical legal discussions a change of attitude which perhaps leads rather than follows the changes in the Council itself. De Tocqueville regarded the establishment of administrative tribunals as only half a reform since having driven the judiciary from the sphere of administration, it had left the executive free to interfere in the proper affairs of the judiciary (*Ancien Régime et la Revolution*, 7e éd., p. 81, cited by Dicey, p. 491). As it was through these tribunals that the administration operated in judicial matters, this view would seem to imply a practical identity of the executive with the administrative courts. The antagonism of the parlements to the executive and the part they had often played in impeding reforms well accounts for this attitude and suggests moreover the historical explanation of a separate system of administrative jurisdiction (cf. introduction, p. 3).

Later writings make a greater distinction, but nevertheless recognize that in the first instance the minister is judge. M. André Lebon, in a work published in 1886, observes that although the question had been much discussed this view was generally held (Monograph on France in Marquardsen's Handbuch). (Cf. Laferrière, *Cours de droit public et administratif*, 5e éd., 1860, II. p. 519; Ducrocq, *Cours de droit admin-*

In America where government prerogatives have been subordinated to the principle of unity and universality of law, the ultimate legal sanction for acts of administration rests with the judicial branch of the government. Though the necessity of prerogative is recognized, as it must be in all governments, it is the work of the courts to determine according to the constitution and laws, what those prerogatives are. The danger to administrative efficiency through

istratif, 6e éd., 1881, p. 392; Aucoc, *Conférence sur l'administration et le droit administratif*, 5e éd., 1885, I. sec. 332 and 334, pp. 605–619.)

As late as 1893 M. Émile Charrier shares this view but calls attention to the fact that the ministers never have to pass upon a case as judge which they have decided as administrators ("*Théorie générale de la juridiction administrative*," 1893, p. 219).

The latest writers generally go further than this and deny to ministers the character of judges altogether (Hauriou, 5e éd., 1903, p. 812; Appleton, Jean *La séparation de l'administration active et de la juridiction administrative*, 1898, p. 3; Audibert, J., *Le juge ordinaire du contentieux administratif*, 1898, especially p. 24).

The change of opinion is especially noticeable in the two editions of M. E. Laferrière's treatise. In the first, while denying that the minister is the ordinary judge of first instance, he enumerated certain cases in which he acts in that capacity; in the second he denies the minister the function of judge entirely (Laferrière, E., *Traité de la juridiction administrative*, lère ed., 1888, I. p. 414; 2e éd., 1896, I. p. 15). In the second edition he uses the following language: "Nous espérons établir dans la suite de cet ouvrage que cette anomalie n'existe pas dans notre législation que les attributions importantes qui appartienent aux ministres en matière contentieuse ne sont pas des attributions d'ordre juridictionnel et que celles-ci resident tout entières dans les tribunaux administratifs."

A question of this kind may seem, it is true, largely academic since the powers of the ministers at any given time are essentially the same whether regarded as administrative or jurisdictional. A tendency, however, of authoritative legal opinion towards a certain point of view is not without significance since in the long run the evolution of legal notions and the evolution of legal institutions tend to follow a parallel course.

a too narrow restriction of prerogative, is thought to be compensated in our system by a greater protection to individual rights. In practice, the courts on the whole have avoided interference with the necessary functions of the political branches of government.[49] If the courts show a tolerable degree of adaptability to the social and political development of the country, it is probable that the executive branch of our government will continue to be amenable in the last analysis to the law as interpreted by the regular courts.

As already pointed out, absence of administrative courts does not prevent the development of a body of administrative law. Whether so designated or not, administrative law must constitute an essential part of the political institutions of every constitutional state. The absence of special courts may tend to increase rather than to diminish the exercise of judicial functions by officers of the active administration. Under the Anglo Saxon principle of interpretation exclusively through the decision of individual cases, it would be impossible for our courts even with every facility of rapid and inexpensive procedure to interpret every law, or to develop more than the outlines of administrative jurisprudence. Tediousness and expense of judicial process naturally discourage litigation and throw a still greater weight of judicial interpretation upon the officers of the active administration.

Among the many branches of government activity by which the law is being developed and construed, there is nowhere a more intimate connection with the property rights of individuals than in the judicial work of the Comptroller. In addition to a jurisdiction on a par with that

[49] Cf. decision of C. J. Marshall, 1829, Foster, etc., *v.* Neilson, 2 Peters, 253.

of the Continental courts of accounts, which the Comptroller possesses as chief of the accounting department of the government, he exercises in part at least, the jurisdiction over private claims which is lodged in France with the regular administrative courts. Though his decisions are final only when the claimant chooses not to undertake the burden of a suit at law, the power to sue is a right which in the vast majority of cases it is impracticable to exercise. In the actual operation of our system the Comptroller is usually the final judge.

From the administrative viewpoint the Comptroller is the officer to whom Congress looks for a proper and judicious application of its appropriations. Whether this system of executing appropriations results in a larger measure of justice to the individual than the German or the French, it is not here necessary to discuss. It is not improbable that the system of each country is best adapted to the peculiar genius of its institutions. The French system has the advantage of a comparatively rapid and inexpensive process for securing a decision from the highest authority which the Constitution provides. A large element in the success of the German system is universal confidence in the integrity of the active administration. In Germany as here, though practically all claims against the state may be appealed to the civil courts, a vast majority of them are ultimately decided by the higher administrative officers.

The spread of liberal ideas and the growth of democratic institutions in France has tended to regulate, but in no sense to obstruct the development of administrative jurisprudence. On the other hand, the wide and important jurisdiction exercised by such officers as the Comptroller, developing as they do a large body of administrative law, cannot be regarded as marking a tendency toward the establishment in this country of formal administrative tribunals.

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