The Jurisdiction of Courts (Part 3)

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JURISDICTION OF COURTS

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(Continued from June Journal)

VI.

One of the corollaries of the doctrine of the separation of powers is the proposition that the legislature may not deprive the courts of judicial jurisdiction. The legislative action here in general takes two forms. The first deals directly or indirectly with judicial jurisdiction as such. The second directly or indirectly seeks to delegate to or impose upon a non-judicial person or tribunal judicial power.

In the first instance the situation is complicated by the fact that constitutions commonly provide for the establishment of designated courts but often add that they are constituted “with such jurisdiction as the legislature may prescribe.” Constitutions also frequently expressly grant to the legislature power to establish additional courts. Other constitutions leave the establishment of courts to the legislature in rather broad terms.

If a constitution expressly or by fair implication limits the jurisdiction of a designated court or if it grants it exclusive jurisdiction over a given subject-matter the legislature obviously cannot enlarge or limit the jurisdiction of such a court nor delegate that jurisdiction to another court. It is fre-

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189 The federal Constitution (Art. III) is a fair sample.
quently held that the creation by the constitution of a court with a specific grant of power to it is by fair implication a constitutional grant of exclusive or limited power in that field. This has been held to be true even although the constitution also provides that the legislature may “regulate and restrict” the court’s jurisdiction thus granted. Probably it is a fair interpretation of that or a similar phrase that it gives no authority to delegate jurisdiction to another court; delegation is not regulation. But in general it is a fair interpretation of most constitutional provisions on the subject of courts (apart from specific courts of final review) that the

626, 98 So. 820 (1924); Boswell v. Roberts, 157 Ga. 585, 122 S. E. 216, 651 (1924); Ex parte France, 176 Ind. 72, 95 N. E. 515 (1911); State v. Wilson, 30 Kan. 661, 2 P. 828 (1883); Reiser v. Ward, 193 Ky. 368, 236 S. W. 255 (1922); Perez v. Cognевич, 156 La. 331, 100 So. 444 (1924); City of New Orleans v. Rüsse, 164 La. 369, 113 So. 879 (1927); Mailman v. Record F. & M. Co., 118 Me. 172, 106 A. 606 (1919); Attorney General v. Lacy, 180 Mich. 329, 146 S. W. 871 (1911); Lading v. City of Duluth, 153 Minn. 464, 190 N. W. 981 (1922); Robertson v. So. Bitulithic Co., 129 Miss. 453, 92 So. 580 (1922); In re Letcher, 269 Mo. 140, 190 S. W. 19 (1916); State ex rel. Barrett, Atty. Gen. v. May, 290 Mo. 302, 235 S. W. 124 (1921); State ex rel. v. Locker, 266 Mo. 384, 181 S. W. 1001 (1915); Redmond v. Quincy, O. & K. C. R., 225 Mo. 721, 126 S. W. 159 (1910); Burnham v. Bennison, 121 Nebr. 291, 256 N. W. 745 (1931); Ex parte Thompson, 85 N. J. Eq. 221, 96 A. 102 (1915); In re Walker’s Est., 95 N. J. Eq. 619, 123 A. 423 (1924); Chas. W. Sommer & Bro. v. Albert Lorsch & Co., 254 N. Y. 16, 172 N. E. 271 (1930); Cincinnati Polyclinic v. Balch, 92 Oh. St. 415, 111 N. E. 159 (1915); Wagner v. Armstrong, 93 Oh. St. 443, 113 N. E. 397 (1916); In re Hawke, 107 Oh. St. 341, 140 N. E. 583 (1923); Commonwealth Oil Co. v. Turk, 118 Oh. St. 273, 160 N. E. 856 (1928); Strickland v. Seaboard A. L. Ry., 112 S. C. 67, 98 S. E. 853 (1919); Winner Mill Co. v. Chicago & N. W. Ry., 43 S. D. 574, 181 N. W. 195 (1921); Clements v. Roberts, 144 Tenn. 152, 231 S. W. 902 (1921); Panama R. v. Johnson, 264 U. S. 375 (1924); Cf: State v. Aiello et al., 317 Ill. 159, 147 N. E. 916 (1925); City of Detroit v. Dingeman, 233 Mich. 356, 206 N. W. 582 (1926); People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A. L. R. 152 (1921); State ex rel. Gallagher v. District Court, 36 Utah 68, 104 P. 750 (1909).

191 Most of the cases cited supra n. 190 fall in this category. They involve usually courts of review.

constitution is providing for a court system, and therefore a constitutional mention of "circuit" or "district" courts is not an exclusive grant of all trial jurisdiction to such courts.193

But assuming a grant of exclusive jurisdiction it would seem to make no difference whether or not the legislative attack on such exclusively granted constitutional jurisdiction was direct or indirect. Thus there is authority for the proposition that the legislature cannot without limit change equity law into common law, and thereby deprive equity courts of their jurisdiction,194 nor can Congress change Admiralty law into common law and deprive the Admiralty courts of their jurisdiction.195 The doctrine is not without its jester, for common law courts and the legislature have frequently created substantive common law rights similar to recognized equitable rights and thus assumed or created a "concurrent jurisdiction,"

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which is necessarily a denial of an exclusive jurisdiction. It was held in *Panama Railroad Co. v. Johnson*\(^1\) that Congress might create a "concurrent jurisdiction" in the common law courts as to subject-matter which had previously been exclusively within Admiralty jurisdiction. The court denied that this invaded the Admiralty jurisdiction created by the Constitution, saying that it did not deprive courts of jurisdiction, it simply gave an alternative "permissive" remedy. The substance of the result of course is that the Admiralty jurisdiction of the Federal courts has been construed not to be exclusive.

The fact that a constitution gives the legislature power to create additional courts, or specific power to "regulate and restrict" the jurisdiction of constitutional courts in final analysis adds little if anything to the legislature's power in this connection.

Provisions of that character must be (and in fact have been) read in the light of the express or implied doctrine of the separation of powers, and also of the doctrine of the supremacy of the courts. It is an essential corollary of those doctrines that the courts be entirely free from any legislative restriction which directly or indirectly hampers a complete and independent judicial system. The only reasonable interpretation of a constitutional grant to the legislature of power over judicial jurisdiction in the light of those two doctrines is that the legislature may, as between courts (where there is no exclusive constitutional grant to a designated court involved) divide judicial jurisdiction in a reasonable manner. It may also regulate and restrict the exercise of judicial jurisdiction within reason. Ultimately, however, there must be a complete system of courts, free to exercise all judicial power, without unreasonable regulation or restriction. Nothing less than the latter satisfies the paramount doctrine of judicial supremacy. Until that latter doctrine is repudiated or modified the cases cited above\(^1\) rest on an accepted basis, even

\(^1\) *Supra*, N. 195.

\(^1\) *Supra*, N. 190-192.
although in a given case it may be possible to quarrel successfully with the application of the doctrine.

Regulations or restrictions which are not unreasonable and which do not invade the field of judicial jurisdiction as such but which deal with its exercise are thus properly sustained.\textsuperscript{198} In this connection, however, the courts themselves have inclined to error. They have failed to distinguish between the concept of judicial jurisdiction as such, and the concept of the regulation of its exercise. If we accept the doctrines described immediately above it is obvious that the usual trial court has all of the judicial jurisdiction possible as a matter of constitutional law. At least jurisdiction of the subject-matter in any event, even although it be in the first instance from a legislative act, is simply an allocation of jurisdiction. The latter necessarily rests on the Constitution, it is not created by the legislature. The latter can create no judicial jurisdiction. The doctrines of the separation of powers and the supremacy of the courts constitute a constitutional creation of all the judicial jurisdiction there can be. Thus legislation in this field apart from that dealing directly with the allocation of jurisdiction as such, and the dividing line between courts, is legislation regulating the exercise of judicial jurisdiction.\textsuperscript{199} If accepted in that light such legislation could always be construed to be directory and not mandatory. A violation of such legislative rules could well be said not to destroy jurisdiction. If a court, acting judicially, having jurisdiction of the subject-

\textsuperscript{198} See, \textit{e. g.}, \textit{Ex parte} McC Cardle, 74 U. S. 506 (1868); \textit{Ex parte} Harker, 49 Cal. 465 (1875); Sacramento & S. J. Drain. Dist. v. Superior Court, 196 Cal. 414, 238 P. 687 (1925); McGinnis v. McGinnis, 289 Ill. 608, 124 N. E. 562 (1919); Lake Erie & W. Ry. v. Watkins, 157 Ind. 600, 62 N. E. 443 (1902); \textit{In re} Petitions To Transfer, 202 Ind. 365, 174 N. E. 812 (1931); Thompson v. Redington, 92 Oh. St. 101, 110 N. E. 652 (1915); Dempsey v. Reisler, 173 Wis. 296, 181 N. W. 218 (1921). Many additional cases expressly or by implication sustain this proposition. \textit{Cf.:} Wine v. Jones, 183 Ia. 1166, 162 N. W. 196, 168 N. W. 318 (1918).

\textsuperscript{199} The Declaratory Judgment Acts, for example, may be sustained not as a grant of judicial jurisdiction but as a legislative regulation on the exercise of jurisdiction. The author has enlarged upon the point in a previous article. See, \textit{Procedure Under The Uniform Declaratory Judgment Act}, 8 Ind. L. J. 409 (1933).
matter, actually exercises judicial jurisdiction the fact that there was some infraction of legislative rules on the subject of its exercise of jurisdiction could be said to be erroneous but not jurisdictional.

But courts have been fond of describing such legislative requirements as conditions precedent to jurisdiction of the subject-matter. Thus they have held that the issuance of process is a condition precedent to jurisdiction of the subject-matter. Statutory requirements as to the allegations in a complaint and other procedural requirements have met the same fate. This has been particularly true in the field of appellate practice. Procedural defects thus assume jurisdictional proportions. Two principal reasons are suggested by way of explanation. Courts have been misled by the common law analogies which are now wholly inapplicable. Courts, and particularly appellate courts, have reduced the burden of their labors by this indirection.

The implications of the underlying theory have have far-reaching consequences in what we call the law of judgments and they are discussed later. It can fairly be said, however, that a re-examination and thorough analysis of this field will result in some saner results, particularly in the law of collateral attack and foreign judgments. It is indeed a rather unusual situation where it can be said properly that a judgment was rendered without jurisdiction. The court may have violated some rule as to the exercise of its jurisdiction, but that is erroneous and not jurisdictional.

The question of the delegation of judicial power to a tribunal other than a court or judge is raised in a number of situations. The solution of the problem must start with the

200 See, e.g., Friebe v. Elder 181 Ind. 597, 105 N. E. 151 (1914); Ramsdell v. Duxberry, 14 S. D. 222, 85 N. W. 221 (1901).

201 See, e.g., Holton v. Holton, 64 Ore. 290, 129 P. 532 (1913) and note 48 L. R. A. (N. S.) 779.

202 Nothing is worse settled than the proposition that practically every step in appellate procedure is jurisdictional. An appellate court may occasionally break down and hold that a procedural defect is immaterial but such decisions are very rare.

203 See supra, pp. —.
concept of judicial organization. If the tribunal or officer in a given case is a court or a judge then the problem presented is not one of delegation but is one of the allocation of judicial power. But in order to avoid the implications of both propositions the courts have not hesitated to describe the tribunal in question as "administrative" or "quasi-judicial" and therefore not "judicial." The tribunal and its personnel therefore fall within the executive or legislative department, and the final problem is whether or not judicial power has been delegated to it.

The cases are somewhat indefinite as to what the concept of a "court" is. It is of course clear that when constitutions, legislation and judicial decision talk about a "judge" and a "court" they are talking in terms of legal concepts and not the physical background. A person is a "judge" simply because he has been elected or appointed to that office. He acts judicially when he attempts to perform the duties of the office. A "court" likewise is a "court" because by constitutional and legislative authority it has been so incorporated. It is a legal entity quite apart from its physical paraphernalia and its personnel. The "judge" is but an element. Usually judicial action is action by the "court", although of course the judge, the clerk and other officers direct its action.204

It does seem clear that we conceive of judicial power being exercised by a legal entity called a "court". Due to the law of terms of courts and vacation it is necessary sometimes to ascribe judicial action to the judge rather than the court because during vacation there is no "court".205 Whenever we repudiate the idea of terms and vacations206 there will be no necessity for that distinction and all judicial action will be performed by the "court".

The dividing line between a "court" and a tribunal or officer in the executive department starts necessarily with constitu-

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204 See, e.g., Thompson v. Dillingham, 183 N. C. 566, 112 S. E. 321 (1922).
See also the cases cited in 33 C. J., p. 960, n. 80-85.

205 Statutes frequently provide that the "judge" may grant injunctions, appoint receivers and take care of other emergency matters during vacation. They preserve, in form, the idea that during vacation there is no "court."
tional provisions on the subject. In so far as they are exclusive courts and judges thereby provided for are beyond legislative control. Certainly if a constitution, for example, provides that the judges of the supreme court shall be elected legislation providing for their appointment would be invalid. Legislation could not properly provide for the exercise of any of the judicial powers of a trial judge, whose office is provided for in a constitution, by one not selected as provided by the constitution.207

The jury, of course, in certain types of cases is a part of the "court". It acts judicially. But there is authority for the proposition that even so legislation may not delegate to the jury the decision of questions of fact in an equity case where the verdict is anything more than advisory.208

But in the absence of express constitutional prohibition courts and judges may be established and selected according to legislative standards, if there is no invasion of an exclusive constitutional jurisdiction in an existing court.209

Additional legislative courts as a matter of fact are frequently established where jurisdiction is concurrent with or supplementary to that of existing judicial tribunals.210 This

206 The idea is, of course, copied from the English system which was motivated by religious reasons. Courts adjourned for the religious feasts. There is no present validity to those results. The only practical result is that a judgment becomes "final" on the termination of the term. When terms are abolished provision will have to be made to take care of that situation.

207 See, e. g., Shoultz v. McPheeters, 79 Ind. 373 (1881); Van Slyke v. Farmers' Mut. Fire Ins. Co., 39 Wis. 390, 20 Am. Rep. 50 (1876); and note 25 Am. Rep. 540. Thus in the absence of constitutional authority special judges must be chosen from those already regularly constituted as judicial officers. The Indiana case cited above is subject to the criticism that the Indiana Constitution (Art. VII, Sec. 10) expressly gives the legislature power to provide for special judges, and the act in question might well have been sustained on that theory.


209 See supra, n. 193. A great many cases sustain this proposition. In most instances the result is obvious.

210 For a thorough treatment of the situation in the Federal system see, Katz, Federal Legislative Courts, 43 Harv. L. Rev. 394 (1930). The Federal situation is not essentially different from the normal state situation.
is particularly true if legislation makes notable changes in the substantive law upon a given subject and a tribunal is created to deal with the new law thus established.

It is more or less obvious that in almost any instance the legislature could create a court rather than an administrative tribunal to deal with some of the problems so often delegated to the latter.

It is not the purpose here to attempt a complete statement on the subject of administrative law. Only in so far as it presents a problem in the field of the jurisdiction of courts it is a pertinent inquiry at this point. However it may be worth while to point out that there has been some unnecessary emphasis on the subject. It develops that those who discovered "Administrative Law" and who would exploit it are simply dealing with some old law under a new name. We have always had a law of "Public Officers." "Administrative Law" is composed of three major divisions. The first is one of statutory interpretation. The problem there is, what authority has a statute given an officer? The technic seems to be no different from that in any other field. The second is the one of the tort (legal or equitable) liability of the public officer who exceeds his authority thus granted. The third is the one of the constitutional validity of the statute giving administrative authority. To the casual observer there has been little significant development here during the past two decades. It is true that the volume has increased. But the volume of all law in action and law in litigation has increased. But certainly; there has been no change in the constitutional law on the subject. The change in tort liability has been imperceptible; the administrative officer who exceeds his authority is liable even although he acted in good faith; he has none or little of the immunity of judicial officers. The change in statutory interpretation is slight. Apparently courts have been a little more liberal in construing legislation in this field in favor of the officer; he has more "discretion", that is a wider grant of power than he had under earlier decisions. But the problem is still one of a fair statutory interpretation. The
rules seem no different than in the balance of the field of statutory interpretation.

The essential problem is the one of legislative policy at the beginning: ought administrative responsibility to be placed primarily on the executive or the courts? It can be demonstrated that the legislature, as a matter of constitutional law, has the power to put it in either field. The decision should be on the merits, and probably in most instances has been on the merits. Thus lawyers who lament the practical invasion of the judicial field by administrative tribunals would do well to abandon the repeated and unsuccessful attacks on constitutional grounds and accept the proposition that a disinterested tribunal (the legislature) has determined in almost every instance possible that administrative tribunals are preferable to courts. Until the latter are modernized and lawyers meet the problem squarely the decision will continue to be against them.

The problem of the limits of the law of self-help is ever with us. It lies within the field of legislative power because it is expressed in terms of substantive rights. What are the conditions precedent to the ultimate enforcement of legal interests? To what extent are one's personal and property interests protected against the private enforcement of the rights of others? Some of the law of self-help is still with us. One is privileged under some circumstances to re-capture his goods, and to protect his person and property without seeking first a recognition of his legal interests from an executive or judicial tribunal. It is a curious fact that to some extent at least the law gives the individual the privilege of making an honest and reasonable mistake in invading the rights of others in this connection, whereas the law still is that an administrative officer who makes an honest and reasonable mistake usually is liable for invasion of the rights of others. The law still deals with unnecessary harshness with the mistakes of administrative officers. The contrast with the complete immunity afforded judicial officers is too extreme, although it gives point to the fact that the law here is judge made. The judges have abso-
lute faith in their own integrity but little or none in that of others.

In most instances, however, there is a rather complete abolition of the law of self-help. One's rights against another can only finally be enforced after a judicial or administrative recognition of them. The requirements have varied. In some states, for example, a mortgage may only be foreclosed through the means of a judicial proceeding and sale. In some states the foreclosure and sale are through an administrative officer. In others a sale by the mortgagee himself is a proper procedure. Workmen's compensation law, too, for example, has been variously administered.

While many attacks have been made upon those, and similar situations, it must be taken as settled that (apart from the added implication of the constitutional privilege as to a jury trial211) the doctrine of the separation of powers does not prohibit legislation prescribing an administrative rather than a judicial recognition of legal interests as a condition precedent to their ultimate enforcement by the executive. That result after all seems obvious. The recognition of rights as a step in their enforcement, whether disputed or not, has never been exclusively a judicial function.

Indeed as has been pointed out above212 the executive inevitably decides controversies, and determines facts and legal interests whenever he acts in the discharge of his duties. Whether he, or other persons, should be compelled to consult a judicial tribunal before actual enforcement is available is a matter of policy upon which the legislature has been accorded almost unlimited power.

But the constitutional doctrine here which gives the executive and the legislature pause is the doctrine of the supremacy of the courts. The executive or administrative officer must decide correctly; he has no power to make a mistake. Whether

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211 There is of course some authority for the proposition that this right may not be impaired by the indirection of creating statutory rights and new remedies and tribunals. See, e.g., United States v. Cunningham, 37 F. (2d) 349 (D. C. Nebr., 1929).

212 Supra, pp. —.
he has or has not made a mistake is exclusively within the judicial function. The executive may not assume that function, nor may the legislature give it to him.

It is inadvisable to attempt a review of all of the authority upon this proposition. The cases of course are not without confusion. But it is submitted that the controlling authority is clear and decisive on the point. The land marks among the cases are the *Ben Avon Borough* case and the case of *Crowell v. Benson*. The first case decided that due process of law required that the courts of a state be given power to review the decision of an administrative tribunal on the merits, both fact and law. Probably the results of that case are questionable, for it has since been held that the absence of an express provision for such a review is immaterial because under the doctrine of the supremacy of the courts the courts have the power of independent review in any appropriate action. Innumerable cases exist where the courts have insisted upon such a review.

213 After all this doctrine of the supremacy of the courts is judicial doctrine. It really rests on the lawyers' and judges' belief in their own superiority. In any system of government one finds someone with final power. In some countries it is the executive, in others it is the legislative and only in the United States, or countries which have copied our system, it is the judiciary. The courts have seized the power on the theory that if anyone is to be given final power it should be the courts. See, Potter, Judicial Power in The United States, 27 Mich. L. Rev. 1, 167, 285 (1928); Willis, The Doctrine of The Supremacy of The Supreme Court, 6 Ind. L. J. 224 (1931).

214 Including in this word administrative officers.

215 Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920). See also note 34 Col. L. Rev. 332 (1934) and authorities there cited.

216 285 U. S. 22 (1932). See also, Brown, Administrative Commissions and The Judicial Power, 19 Minn. L. Rev. 261 (1935) and articles and authorities there cited.


218 The situation after all is no different from any other case where the contention is that the legislature or the executive has exceeded its constitutional authority. When such a case is properly presented to the courts the doctrine of the supremacy of the courts requires a review on the merits. Otherwise by a simple misstatement of the facts the court review would become meaningless. One of the most effective illustrations is that where the United States Supreme Court reviews a state court decision under the Federal Employers Liability
The case of *Crowell v. Benson* is but a reiteration of established doctrine. In it the emphasis was laid upon the doctrine of the supremacy of the courts and not upon the due process clause. It recognizes again the proposition that to give an administrative tribunal power to decide fact or law erroneously would invade the judicial function. Despite the dissenting opinion in this case it is submitted that that result is accepted doctrine and that an opposite decision would be a repudiation of the doctrine of the supremacy of the courts. The argument in the minority opinion is quite inconclusive. It rests substantially on the proposition that courts had accepted administrative decisions as at least *prima facie* correct. But courts have always, through a jury, a master, or a referee, delegated, especially in technical cases, the preliminary survey of the facts and accepted the decision as *prima facie* correct. No reason exists why the rule should not be extended. That is not at variance with the major proposition which precludes the legislative or executive branch of the government from finally deciding legal interests in controverted cases, or of creating a jurisdiction which does not exist by the simple expedient of mis-stating the facts.

Other procedural problems here are beside the principal point. On the whole, however, it seems properly within the province of the legislature to prescribe the procedure for the judicial review, provided it is adequate.

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219 *Per* Brandeis, J., concurred in by Stone and Roberts, JJ.

220 The author is not defending the doctrine of the Supremacy of the Courts. Its validity is a debatable question, for its acceptance is in one sense undemocratic. So long, however, as it is accepted doctrine the logical result must be that the courts shall retain the power to review legislative and executive decisions as on a trial *de novo*, subject of course to any presumptions the courts wish to employ.

221 Thus the legislature may reasonably prescribe conditions precedent to a...
It is, of course, true that as between executive departments the legislature may make administrative decisions *res judicata* and that to the extent they are correct, or at least to the extent that a person cannot prove that they are incorrect, private individuals cannot properly refuse to obey them.

It is a fair choice in any case whether the legislature will select the administrative, the judicial tribunal, or neither in dealing with the desirability of an official or non-official recognition of rights prior to their enforcement. If the administrative is chosen some time may be gained in the usual case because ordinarily administrative proceedings are more expeditious than judicial.

On the other hand in some, if not a good many cases, the administrative set-up slows up enforcement processes, for in case of real controversy there must be two trials rather than one. Suppose, for example, that rate-making for public utilities, which finally involves the problem of what is a fair rate, were from the start under the supervision of a judicial tribunal, would not much time be saved in that field in a great many instances? A survey of that situation might demonstrate that the policy of originating those proceedings before an administrative tribunal is a mistake.

It is believed that nothing stands in the way of creating a judicial review, or the courts themselves may adopt rules on the subject and, for example, refuse review until legislative provisions have been exhausted. They may require the administrative record to be perfect. See, *e. g.*, United States v. Chicago, M., St. P. & P. R. Co., — U. S. —, 55 S. Ct. 462 (1935). For a thorough discussion of the cases on the first problem see, note, Administrative Action As A Pre-Requisite of Judicial Relief, 35 Col. L. Rev. 230 (1935).

See, *e. g.*, Silva v. Tillinghast, 36 F. (2d) 801 (D. C. Mass. 1929); United States v. Great Northern R., 287 U. S. 144 (1932). A failure to pursue the proper and a timely remedy for judicial correction of the administrative decision may, of course, make it *res judicata* as against the parties. See, *e. g.*, State Corporation Comm. of Kan. v. Wichita Gas Co., 290 U. S. 561 (1934). It is only *res judicata* as to matters expressly litigated. See, note, 48 Harv. L. Rev. 689 (1935).

See, *e. g.*, Corn Exchange Bank v. Coler, 230 U. S. 218 (1910). There was some additional court action here, which, however, was ineffective as such because of the absence of a necessary party (i. e., the court conceded that the latter was not bound). The principal proposition seems obvious, and the case cited holds that there is in it no denial of due process of law.
special court in place of a good many administrative tribunals. Congress, for example, has created many legislative courts.\footnote{See supra, n. 210.} The only possible objection would be that the legislative court trespasses upon the exclusive jurisdiction granted another court by the constitution, and that would be but infrequently a valid objection. As to trial rather than appellate courts the objection cannot well be sustained, for the jurisdiction of such special courts is outside the accepted jurisdiction usually conferred on trial courts by constitutional mandate, and as a matter of fact business demands have been held to permit the creation of additional courts.\footnote{See supra, n. 193.} If they had to be called by a constitutional name nothing is lost.\footnote{Usually there is nothing which stands in the way of additional “circuit” or “district” courts under the normal constitutional provision on the subject. \footnote{See, Marine Transit Corp. v. Dreyfus, 284 U. S. 263 (1932); Berkovitz v. Arbib, 230 N. Y. 261, 130 N. E. 288 (1921); note, 48 Harv. L. Rev. 121 (1934); Phillips, A Lawyer’s Approach to Commercial Arbitration, 44 Yale L. J. 31 (1934) and articles and cases there cited.} \footnote{See supra, n. 216.}

The most effective illustration of this technic is Compulsory Arbitration. So far statutes on the subject have been uniformly upheld.\footnote{The subject of special judges and courts, as has been shown above, is largely within the power of the legislature. The case of Vitaphone Corp. v. Electrical Research Products, Inc., 19 Del. Ch. 247, 166 A. 255 (1933) holding that as a matter of conflict of laws a foreign arbitration statute was “remedy” not “substance” supports this theory.} The decision of the arbiters is given the element of finality by statute. If the arbiters act other than judicially the statute is at variance with Crowell v. Benson\footnote{Supra, n. 216.} and it invades the doctrine of the supremacy of the courts. But the fair purport of Compulsory Arbitration statutes is that the parties select for the occasion a special judge whose decision is \textit{res judicata} because it is a judgment and not an administrative order. There is no constitutional reason why such special courts, created in part by the parties, cannot be provided for in this field by the legislature. They have concurrent jurisdiction with the existing trial courts but that of itself is not a conclusive objection. Until the existing trial
courts have nothing to do it cannot be seriously contended that the creation of additional courts invades their jurisdiction.

VII

Another corollary of the principal proposition is that the legislature may not impose upon the courts a non-judicial function. Thus in the absence of an express constitutional provision courts cannot be compelled to give advisory opinions on supposititious cases. An opinion on a certified question is really in lieu of an appeal; it deals with the decision of an actual case, and is therefore a valid procedure.

Statutes have frequently imposed upon judges the duty of making appointments to offices other than judicial. They have been more or less uniformly upheld, although certainly in substance and policy there is little to sustain them. Courts have facetiously evaded the difficulty by asserting that the duty was imposed upon the judge not as judge but upon the person who happened to be judge at the time. If the appointee is to perform other than judicial duties as a matter of good government he ought to be appointed by the executive. Indeed as between the executive and legislative there is controlling authority for the proposition that the power of appointment, in the absence of specific constitutional provision otherwise, is exclusively an executive function. Logically the same result should follow in the principal situation. The earlier cases here were decided prior to the final acceptance of the doctrine of the separation of powers and its full purport

230 See 1 C. J. 973, 4. The distinctions between a "moot" case and a proceeding proper under The Declaratory Judgments Act are pointed out by Professor Borchard, Declaratory Judgments (1934), 1-61.

231 See 3 C. J. 989-1003.

232 See, 15 R. C. L. 523, 4. By tradition a good many non-judicial acts are imposed on local courts. See, Nutting, Non-Judicial Functions of the District Courts in Iowa, 19 Iowa L. Rev. 385 (1934).

233 As indicated by the text cited immediately above there is some very respectable authority denying the power.

was established and their present significance may well be questioned.

VIII

Apart from the field of "administrative" law, where both the legislature and the executive are involved, there are few clashes between the judiciary and the executive. The essential problem again is as to whether or not the doctrine of the supremacy of the courts applies as against the executive. Earlier cases, accepting the false analogy of the English system, where the courts were agencies of the sovereign and not a separate and integral part of government, were inclined to deny jurisdiction in the courts to deal directly against the executive. Recent decisions have repudiated that position and it seems now established that the executive is in no more favorable a position than the legislature. He must decide correctly, and there is a judicial review of his action on the merits.

Closely akin to that situation is the one involving so-called "political questions." It has been said that the courts may not decide them. The cases it is here asserted are inconclusive on the point, and if taken at their face value they constitute one of the few remaining repudiations of the doctrine of the supremacy of the courts. It is of course true as illustrated by those cases that the legislative and the executive departments in dealing with officers of another or their own government decide ipso facto whether or not those with whom they deal are proper officers. It does not follow from that, however, that the decision is correct. It does seem, however, that in each of the situations so far presented in the cases that the decision was correct. If and when a case is presented

236 See, Sterling v. Constantin, 287 U. S. 378 (1932) and cases there cited.
237 See, e. g., Pacific States Tel. & Tel. Co. v. State of Oregon, 223 U. S. 118 (1912) and cases there cited.
238 There was little merit in any of the contentions that the states involved did not "enjoy" a republican form of government.
in which the decision by the legislature or executive is obviously incorrect it remains to be seen whether or not the courts will evade the question. Logically if they stick to the doctrine of the supremacy of the courts they cannot evade it. That is, assuming for example that Congress and the executive have the power to decide whether in a given case a state enjoys a republican form of government (and obviously in the routine course of events they must decide it) they must still decide that question correctly. If they decide incorrectly some judicial remedy logically must be available.

One other notable exception to the general doctrine exists. There is substantial authority for the proposition that the courts will accept as conclusive recitations in legislative journals or certificates of legislative officers to the effect that constitutional requirements as to proper legislative procedure have been followed, and in the absence of an affirmative recitation to the contrary will conclusively presume that the constitution has been followed. In such instances the legislatures and not the courts determine constitutional jurisdiction, and under the guise of a form of words the legislatures are permitted to violate the constitutions. Again a good many of those cases were decided before the doctrine of the supremacy of the courts reached its full strength and their present acceptability is doubtful.

IX

As was pointed out at the beginning of this article the specifically applied law of jurisdiction is found in the law of direct and collateral attack, in the law of res judicata and the law of domestic and foreign judgments generally. This is due to

239 Part of the basis of those earlier decisions has been repudiated. They rested in part on the untenable proposition that a judgment which a court could not enforce could not be rendered. But it has been demonstrated successfully that enforcibility of judgments is no pre-requisite of judicial jurisdiction, although it may be a pertinent inquiry as to the propriety of its exercise. See, Borchard, Declaratory Judgments (1934) 9-12.

240 See note 40 L. R. A. (N. S.) 1. The opposite proposition has been held, however.
the underlying assumption that a judgment to be a valid judgment is the utterance of a court having jurisdiction.

It has also been pointed out above that something is to be gained by dealing with the concept of "existing" jurisdiction as one problem, and by dealing with the limitations upon its proper exercise as a distinct problem.

"Existing" judicial jurisdiction may vary according to three possible standards: 1. Local Law; 2. Constitutional Law; and 3. Conflict of Laws. The exercise of jurisdiction may be likewise limited and classified.

The first problem (and the answer in the usual case is obvious) is this: (a) under the constitution and the statutes of the state what jurisdiction, so far as this court or this court system is concerned, has been granted? (b) what limitations from those sources have been placed upon the exercise of that jurisdiction? From a purely local point of view a state may grant or limit judicial jurisdiction and its exercise in any manner and to any extent it wishes. It is well to emphasize again that the common law technic here is inapplicable, the problem is exclusively one of constitutional and statutory interpretation. Thus the common law analogies may well be false, for the English system of courts rests on an essentially different theory.

The second problem is this: (a) what are the permissible limits of jurisdiction or its exercise under accepted doctrines of conflict of laws (that is, to what extent will a judgment be recognized elsewhere, and to what extent will this state recognize a judgment rendered elsewhere)? (b) what are the permissible limits on jurisdiction or its exercise under the Federal and local constitutions? (On the latter score a state constitution for example may contain a due process and equality clause, constituting therefore a general limitation on the exercise of judicial, legislative or executive jurisdiction.) If a local situation is involved (a) cannot successfully be raised directly. But the Fourteenth Amendment and Full Faith and Credit Clause to all practical purposes have been construed to impose the conflict of laws standards of accepted international
The application of the concept of an accepted judicial jurisdiction to a specific case is the logical problem of fitting the case at hand into or out of the jurisdiction granted to the court in question under those standards. The local limitations or jurisdiction or its exercise increase the hazards. As has been pointed out above unfortunately the courts in a great many instances have regarded legislative limitations and conditions here as conditions precedent to jurisdiction as such, rather than limitations and conditions as to its exercise, holding that there must be literal compliance with the limitations and conditions and that they cannot be waived, nor decided erroneously.

To start with such an attitude is based upon the mistaken notion that there is something peculiarly brittle and theological about jurisdictional concepts. The idea has been that once litigants get outside of the accepted bounds of jurisdiction the results are necessarily absolute zero. It has followed that judicial action beyond the preconceptions of jurisdiction is void with a vengeance. This after all is not peculiar to the law

241 That is, an assertion of judicial jurisdiction beyond the proper limits of jurisdiction is a deprivation of property without due process of law. See supra, n. 21.

242 The question as to whether or not a state must furnish reasonable court jurisdiction is one which remains somewhat open. It is settled that the Full Faith and Credit Clause and the Commerce Clause compel state judicial jurisdiction in those situations. It seems clear that due process compels (in the absence of a reasonable excuse) the same result generally. The author has presented the cases on this point previously. See, The Commerce Clause of The United States Constitution (1932), Sec. 41, 105,
of jurisdiction. When parties get beyond the limits of the law of torts, contracts and property the result is "no liability." But indeed in one sense there are no limits there, for "no legal liability" is as much legal concept and can be as good legal concept as "legal liability" is. However, and in any event, in those fields the law has conceded to the parties considerable power by their conduct to mark the limits to suit the needs of the situation. Prior to the point where estoppel is operative the law of torts and property to a large extent are within the control of the parties. They may contract concerning their interests in those fields, and finally their interests may be determined by their conduct quite apart from their consent and the accepted pre-conceptions on the subject. The point where the desires of the parties and their intentions as evidenced by their conduct becomes inconclusive is the point where it is thought that good policy places a limit for fear that one party has too great an advantage in controlling the conduct of another because of a superior position, or because the results will offend the general common good. In general the parties must get over into the field of "illegality" before their intentions and wishes are inconclusive and the preliminary pre-conceptions on the subject become unbreakable. Indeed it is only as a formal proposition that we separate the law of contracts, quasi-contracts, torts, property, trusts and estoppel. The substantive law in its entirety includes them all. The law of contracts, trusts and estoppel may be a significant factor in any case, and is as much "law" as the "law" it supplements. Starting points are seldom proper ending points in the quest for legal "truth."

And so it is, and ought to be, in the field of jurisdiction. There is an immense amount of authority for the proposition that parties may waive, may contract away and may be estopped to assert constitutional privileges and limitations. It has always been true that the law of estoppel has constituted

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243 The Hohfeldian philosophy places the emphasis on the inevitable relational interests arising out of membership in society. Any picture of legal interests which neglects the human aspect of them is of course necessarily incomplete.
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a part of the law of judicial jurisdiction. Indeed it is fair
to say that on the whole enlightened courts on this score have
dealt with the law of jurisdiction on the same basis as they
have dealt with substantive law. Constitutional and legisla-
tive utterances in the field of judicial jurisdiction have been
accepted in the light of the law of contracts and estoppel, just
as constitutional and legislative utterances in the field of sub-
stantive law have been accepted as against a similar back-
ground.

The full significance of that will be discussed later. At this
point the proposition sought to be established is the rather
obvious one that we cannot concede to jurisdictional concepts
any natural or theological content, and that a supposed trans-
gression in the field of jurisdiction, in the light of additional
concepts on the subject, may become insignificant. Jurisdic-
tional concepts should enjoy no peculiar sanctity.

When it comes to a fair interpretation of statutory limita-
tions on the subject of the exercise of judicial jurisdiction it
will be found that most of them are for the benefit of the
adverse party. There is no apparent policy which insists upon
their observance at all odds. They lie rather obviously within
the field of contract and estoppel, and not in the field of "ille-
gality." If the party for whose benefit they have been enacted
does not insist on them there is no occasion for the public
insisting upon them for him or for it. Accepted in that light
a good many restrictions would become immaterial in any
litigated case, and might be immaterial in a default case.

This has usually been the result when dealing with juris-
diction of the person. The pre-conception was that the courts
had jurisdiction over every person physically within the

244 The common law made the sheriff's return conclusive, and one was not
permitted to question the authority of an attorney who had appeared for him.

245 It is indeed impossible to interpret legislative and constitutional utter-
ances apart from common law background. Few general statements in statutes
and constitutions are literally applied because they carry with them the ac-
cepted common law exceptions on the subject.
state,\textsuperscript{246} and over those domiciled within the state, or citizens of it but residing elsewhere. Thus rules as to service of process and other means of bringing a specific individual before the court in a given case are rules as to the exercise of that jurisdiction. They were for the benefit of the party and could thus be waived. They required in any event a substantial rather than a literal compliance.\textsuperscript{247} Although there was no distinction made where the point in issue was a lack of jurisdiction in the international sense. That too could be waived. The result further was that a violation of the rules on the subject had to be raised by a plea in abatement thus giving the adverse party the earliest opportunity to correct the defect. The presumptions were in favor of a compliance with the rules.

In the field of jurisdiction of the subject-matter the results were in reverse. There were no presumptions in favor of its observance, and the question was not waived by a failure to raise it.\textsuperscript{248}

Just why the common law developed the rule that jurisdiction of the person and venue could be waived, while jurisdiction of the subject-matter could not be waived seems impossible of satisfactory explanation. The most plausible explanation which occurs to the present writer is that jurisdiction was conceived of in rather brittle terms, as were a good many other common law concepts. But due to the doctrine of estoppel of record jurisdiction of the person unless properly attacked was established by the record, whereas a lack of jurisdiction of the subject-matter most often appeared on the face of the record\textsuperscript{249} and thus was \textit{conclusively} established

\textsuperscript{246} "State" is here used as defined in Sec. 2 of the Restatement of Conflict of Laws, American Law Institute (1934).

\textsuperscript{247} The latter is immaterial in any case where there was an appearance. It would only be material in a default case, or in those instances where the question was properly raised and saved by appropriate procedure.\textsuperscript{248}

The cases hold that it may be raised for the first time on appeal.\textsuperscript{249}

That is, if the writ, the pleadings, the verdict and the judgment were not consistent the matter was settled, regardless as to what the evidence might have disclosed or have failed to disclose.
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without the point being expressly raised. Thus really the formalism of the doctrine of estoppel of record and the accident that jurisdiction of the person depended on matter extraneous to the record brought about the distinction.

Estoppel of record is still accepted doctrine in some cases but for the most part as against jurisdictional objections it has been repudiated. As pointed out above we would do well to repudiate it completely.

It is difficult if not impossible to point out any satisfactory basis for the distinction which provides that jurisdiction of the person is waived unless raised by a plea in abatement whereas jurisdiction of the subject-matter is an open question until after final judgment on appeal (if not longer). A decent system of procedure would have the same rule for the latter which it has provided for the former. Every consideration of policy demands the settlement of the question of jurisdiction first, and compels the result that if not raised properly it is waived. Jurisdiction by conduct is as valid a concept as substantive law by conduct. No persuasive policy is observed which makes jurisdiction by conduct "illegal." As pointed out above constitutional and statutory materials on the subject can fairly be said to include that background. The short answer to a contrary assertion is that in truth we have an immense amount of authority for jurisdiction by conduct. The formal difficulties are decreased by construing constitutional and statutory materials on the subject as being limitations on the exercise of jurisdiction and not conditions precedent to its existence.

But in final analysis the difficulties here are surmounted by the doctrine of the separation of powers and the doctrine of the supremacy of the courts. Judicial jurisdiction and the consequence thereof on the legal interests of interested parties is finally a judicial question. It cannot be decided by the legislature or the executive; it must therefore be decided by the

250 2 Black, Judgments (1891), Sec. 901.
courts. There is thus imposed on the courts the super-power of deciding judicial jurisdiction. Thus if the jurisdiction of another court is called in question in a subsequent proceeding involving the affect of the first court’s action on the interests of the parties the second court cannot escape a decision on that question. As it must determine the jurisdiction of the legislature and the executive if properly presented it must determine the jurisdiction of other courts. Judicial jurisdiction is a judicial question; courts have power, or jurisdiction to determine jurisdiction. That is a necessary incident of the doctrine of the separation of powers.

Does the power include the power to determine it as against or in favor of itself? Does it include the power to determine it finally although erroneously? In other words does the doctrine of res judicata apply to jurisdictional matters? Does a fair application of the doctrine of the supremacy of the courts call for an affirmative answer? Under that doctrine the courts have allocated to themselves the exclusive power to make mistakes as to substantive rights, and as to executive and legislative jurisdiction and quite as clearly the doctrine calls for the application of the same principle to judicial jurisdiction. The sole question is whether the power will be allocated to the first, second, third or subsequent court.

It has long been accepted doctrine that if a court's own jurisdiction is properly called in question in the first instance that it has the duty of deciding the question.\(^{251}\) In fact a refusal to decide it is a decision in its favor.\(^{252}\)

Procedurally the question can be raised in a number of ways,\(^{253}\) and it is said that the court itself must raise the ques-

\(^{251}\) The only case with which the author is familiar which denies this is the case of State v. Hall, 142 N. C. 710, 55 S. E. 806, (1906). The case was one where the contention was that there was no court for any purpose. The decision illustrates the logical difficulties of this general situation once we start with the assumption that jurisdiction is jurisdiction.

\(^{252}\) This is illustrated by the case cited immediately above. The “court” tried and sentenced the defendant and therefore held that it was a court.

\(^{253}\) By plea in abatement, demurrer, answer or motion in the trial court. It may be raised also by writ of prohibition, mandamus and habeas corpus and sometimes by injunction. Thus there is presented a procedure for a deter-
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It has been held that the question can be raised for the first time on appeal. Thus the assertion is commonly made that the question of jurisdiction of the subject-matter is always open, and is never waived. As applied to that situation, that is, one involving a so-called direct attack the assertion is correct. Unfortunately it has been extended to include so-called collateral attack, and is the apparent basis for much of the confusion in that field. For it seems well established there that the assertion is incorrect.

There long has been almost unanimous support for the proposition that a question of jurisdiction squarely presented to a court of so-called general jurisdiction for decision is res judicata in a subsequent action. This is true even although jurisdiction in the international sense was involved.

Even although the matter was not expressly raised if the case was litigated on the supposed merits there is now abundant authority for the proposition that the judgment is res judicata as to the jurisdictional questions which might have been presented, even although again they involved jurisdiction in the international sense. This has been variously "ex-

254 See, 15 C. J. 852.
255 Ibid. 849, 50. There certainly is little to sustain this result. Courts have repeatedly held, for example, that constitutional questions not properly presented below will not be considered on appeal.
256 See, e. g., 15 C. J. 850.
257 The cases have not always been clear as to the distinction between a direct and a collateral attack. During the trial, and on appeal, of course, a question raised as to jurisdiction is a direct attack. Prohibition and mandamus, because they take the place of appeal, are direct attacks. Equitable proceedings to vacate or enjoin a default judgment are usually held to be direct attacks. They may be successfully maintained, of course, for other than jurisdictional reasons. Other situations constitute collateral attacks.
258 See, Baldwin v. Iowa State Traveling Men's Assoc., 283 U. S. 522 (1931) and cases there cited.
259 This was true in the case cited immediately above.
plained.” It has been said that the first court is “conclusively presumed” to have decided the jurisdictional question in its own favor, or that the parties have “waived” the question, or that they are “estopped” to raise the question.261

It is still true, apparently, that a default judgment does not decide jurisdictional questions.262 Although even there there is authority for the proposition that jurisdictional questions may be foreclosed under the doctrine of “estoppel of record.”263

Again the analogies of the substantive law feature of the situation sustain the principal result. It has been established for some time that as to substantive rights the law of res judicata foreclosed not only a subsequent inquiry into the interest which was specifically involved and passed upon but other legal interests which “might have been” presented under accepted procedure.264 The basis of the doctrine of res judicata is one of repose. It rests on the policy against relitigation of the same matters and there is good sense in requiring parties to present all matters as expeditiously as modern procedure will permit or be foreclosed from a subsequent and separate litigation of it. On the point of policy involved there seems to be little controversy.265

the most part involve jurisdiction of marital status in the international sense. See also, Sec. 450, 451, Restatement Conflict of Laws, American Law Institute (1934).

261 In those cases where the facts sustain an actual estoppel there is no reason why the doctrine should not operate. “Waiver” and “estoppel” here have been used to explain cases, however, where there was a simple failure to raise the question.

262 See, e. g., Atchison, T. & S. F. Ry. v. Wells, 265 U. S. 101 (1924). There is no indication in any of the recent cases of a departure from this result. Thus a defendant may default, even although having actual notice of the proceedings and raise a jurisdictional question in later proceedings. Unless there is a lack of jurisdiction in the constitutional or international sense this result is questionable.

263 See, e. g., Miedreich v. Lauenstein, 232 U. S. 236 (1914). In this case it was held that it was due process of law to enforce a default judgment against a defendant where the sheriff had made a false return, and therefore where the defendant had no notice other than by estoppel.

264 The point has been developed in previous articles cited supra, n. 6.

265 The point in issue has been as to how best to “explain” the results.
The same reasons after all compel the application of the same policy and rule to the litigation of jurisdictional matters.\textsuperscript{266} If they "might have been" litigated their subsequent litigation is foreclosed. Once we repudiate the theological notion that "jurisdiction is jurisdiction" (which in fact was never true, and which the cases very effectively, if not consistently, repudiate) there are of course no formal or logical difficulties in the way of the complete acceptance of that result.

The ultimate point is that any acceptance or definition of jurisdiction which overlooks the jurisdiction to determine jurisdiction is inaccurate and incomplete. Under the doctrine of the supremacy of the courts there is by hypothesis included the power to finally decide it, and thus to decide it erroneously. There is likewise included the power to impose on the parties the burden of properly raising the question at the earliest possible time, or at least prior to judgment, and of imposing as a penalty for the violation of that rule a foreclosure of the possibility of presenting it in a collateral proceeding.

One can explain the results here in terms of waiver or estoppel or in terms of any other analogous situation.\textsuperscript{267} The present author's objection to those explanations is that they assume a narrow view of judicial jurisdiction which in final analysis is at variance with the underlying and accepted concepts on the subject. It is believed that we shall arrive at a decent result here more quickly by avoiding the confusion which necessarily arises out of explaining the law of jurisdiction in terms of substantive results.

The problem of specifically applying jurisdiction is one in

\textsuperscript{266} It is to be noted that the Restatement of Conflict of Laws, Sec. 451, leaves open the question as to whether or not jurisdiction of the subject matter in the international sense can be "waived." Certainly there is authority to sustain that result if jurisdiction of the person is concerned, and by analogy, and due to the fact that many of the cases sustaining jurisdiction in a litigated case by a conclusive presumption in its favor make no mention of such a distinction, there is every reason to suppose that a good court will take that position.

\textsuperscript{267} The explanation is of course a matter of form; it is the result which counts.
which theoretically there is little if any common law leeway. A given court has been established by a constitution or statute and its powers are there set out, including the powers incident to the doctrines of the separation of powers and the supremacy of the courts. A fair interpretation of the constitution and the pertinent statutes marks the limits of its powers both as to persons and subject-matter. As has been suggested above we would do well to construe most statutory limitations here to be limitations as to the manner of the exercise of judicial power rather than conditions precedent to its existence, to adopt a standard of substantial performance in any event, to repudiate the present judicial doctrine which distinguishes between courts of general and courts of special jurisdiction, and to revise our procedural rules and require all jurisdictional questions to be raised at the earliest possible moment. A sane approach to the problem of jurisdictional questions will certainly minimize the present dangers in that field.

As in the subdivision of jurisdiction of the person local standards in the subdivision of jurisdiction of the subject-matter may be inconclusive in the light of constitutional and conflict of laws requirements. Fitting a specific case into the jurisdiction of the court in question in the usual case is a simple matter and the result is obvious. Conceding that the jurisdiction is a permissible or enforced one under constitutional limitations the problem turns on a fair interpretation of statutory materials on the subject.

X

The author set out to prove nothing. Whether or not he has succeeded is debatable. It is hoped that an examination of the authorities in this field and a re-examination of the commonly accepted ideas on the subject will result in some good. It does seem obvious that a general definition of judicial power which is accurate will be so general as to be meaningless. As against individuals the power is complicated by the combination of the common law and civil law technics. The
courts, the legislature and the executive perform similar functions in a great many instances. But finally the most significant feature of judicial power, as against individuals and as against the other departments of government is that arising out of the doctrine of the supremacy of the courts. The only really distinctive feature of judicial power is its power to determine legal interests (including jurisdictional background) in final form. Without being facetious one can, if he must attempt a general definition which is significant, define the judicial power to be the power to make a mistake.
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Left to right: Charles F. Remy, Indianapolis; Theodore J. Louden, Bloomington; Franklin McCray, Indianapolis; and T. B. Cunningham, Kentland.

Of the seventeen survivors of the original one hundred and ten charter members of the Indiana State Bar Association five attended the 40th annual meeting at Lake Wawasee on July 10th and 11th. In addition to the four pictured above South Bend was present.

The seventeen survivors, in addition to Mr. Parker and the men pictured above, are: Ed. K. Adams, Shelbyville; Samuel Ashby, Indianapolis; George W. Brill, Danville; Frank E. Gavin, Indianapolis; Leonard J. Haackney, Winter Park, Florida; William A. Hough, Greenfield; David A. Myers, Indianapolis; Samuel O. Pickens, Indianapolis; William A. Pickens, Indianapolis; John W. Spencer, Evansville; William L. Taylor, Indianapolis; and William C. Smith, Delphi.