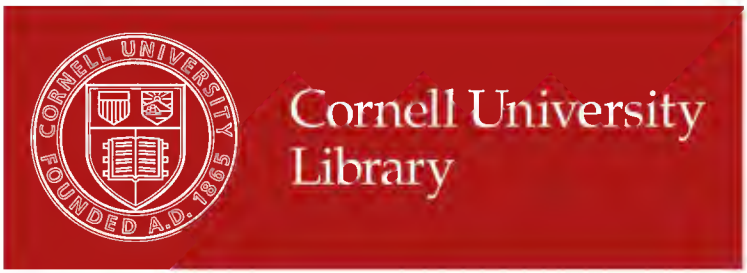

THE GERMAN EMPIRE


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THE GERMAN EMPIRE

BY

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TO THE MEMORY

OF

JONATHAN SAYRE SLAUSON

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THE GERMAN EMPIRE

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CHAPTER I

THE FOUNDING OF THE GERMAN EMPIRE[1]

THE study of the German Empire, from a juristic standpoint, begins with the founding of the North German *Bund*. If, with the formal dissolution of the Holy Roman Empire in 1806, one period of the constitutional history of Germany ended, the disruption of the German Confederation, in 1866, brought another period of that history to a no less definite termination. The break between the North German *Bund*

[1] From a wealth of material the following literature may be cited: Aigidi und Klauhold, *Das Staatsarchiv*, Bd. X. ff.; Glaser, *Archiv der Norddeutschen Bund*, Berlin, 1867; Hahn, *Zwei Jahre preussisch-deutscher Politik, 1866–67*, Berlin, 1868; *ibid. Der Krieg Deutschland gegen Frankreich und die Grundung des deutschen Kaiserreichs. Die Deutsche Politik, 1867–71*, Berlin, 1871; Von Bezold, *Materialen der deutschen Reichsverfassung*, 3 Bde. mit Register, Berlin, no date; Otto Mejer, *Einleitung in das d. Staatsrecht*, 2 Aufl., Freiburg und Tübingen, 1884; Von Sybel, *Die Begründung d. D. Reiches durch Wilhelm I.*, 7 Bde., München und Leipzig, 1889–94; Binding, *Die Grundung d. N. D. Bund*, Leipzig, 1889. *Die Drucksachen des Reichstags des N. D. B.* for 1870 contain very valuable material. Many important discussions are also to be found in the various volumes of Hirth's *Annalen des Deutschen Reichs*. See also the treatises on *D. Staatsrecht* by Laband, Hänel, Meyer, Zorn, Arndt, and the *Commentaries* of Arndt and Seydel. Treitschke, *D. Geschichte*, Bd. I., and *Politik*, Bd. II. Kloeppel, *Dreizig Jahre d. Verfassungs-geschichte*, Leipzig, 1900. Volume I. alone is published. Bismarck's *Gedanken und Erinnerungen*, 2 Bde., Stuttgart, 1898. Two good histories of the period before the founding of the N. D. B. are Kaltenborn, *Geschichte d. deutschen Bundesverhaltnisse und Einheitstrebungen von 1806 bis 1856*, 2 Bde., Berlin, 1857; and Klüpfel, *Geschichte d. D. Einheitsbestrebungen bis zu ihrer Erfüllung; 1848–71*, 2 Bde., Berlin, 1872.

and the German Confederation legally is no less sharp than that between the German Confederation and the old Empire. The legal continuity between the North German *Bund* and the present Empire, however, is complete. The modern German State is not something different juristically from the North German *Bund*. It is rather an expansion of it. The Imperial Constitution is the federal constitution revised.

Long before the tension between Prussia and Austria had been brought to the point of breaking by the deve.opment of the Schleswig-Holstein affair, the constitutional organization of the German State, under the provisions of the *Bundesakt*, had proven hopelessly inadequate. That some form of reorganization was inevitable became patent to every one. What that form should be was not so clear. The unavoidable and irreconcilable rivalry between Prussia and Austria indicated plainly that in the reorganization — whatever form it might take — one of these two great powers must be eliminated. The decision as to which of these two it should be was rendered by history's great court of last resort — War.

On the 11 June, 1866, Austria moved, in the Federal Diet, the mobilization of the federal army against Prussia,[1] on the ground that the Prussian government had resisted the interposition of the Diet in the dispute between Austria and Prussia over Schleswig-Holstein. Prussia had maintained that the Schleswig-Holstein matter lay outside the jurisdiction of the Confederation, and she therefore could not admit the right of the Diet to interfere in an affair which concerned the two great powers alone. No ground existed, under the *Bundesakt*, for the mobilization of the federal troops against Prussia. The Prussian government could look upon the motion of Austria, therefore, as nothing less than a declaration of war, — not only a declaration of war

[1] Motion printed in Hahn, *Zwei Jahre*, etc., p. 118.

on the part of Austria against Prussia, but a declaration of war on the part of the Confederation against a member. This was an act directly violating the organic law on which the Confederation was based. Prussia saw in the motion to mobilize the army a breach of the union which must be met with decisive measures.[1]

On the 14 June, 1866, the Diet assented to the Austrian proposition and ordered the mobilization of the 7th, 8th, 9th, and 10th army corps. Prior to the vote, the Prussian ambassador made the following statement: "The Prussian ambassador must vote against any and every action with respect to the motion of Austria, as contrary to the form and content of the union, and herewith enters an express protest against such action, in the name of his government." [2] The vote stood nine to six in favor of the motion.[3] Thereupon the Prussian ambassador declared that his government must regard the action of the Diet as in open conflict with the Constitution, and as a breach of the federal relation. "In the name and upon the command of his Majesty, the King, the ambassador therefore declares that Prussia looks upon the treaty of union, hitherto existent, as hereby broken, and, on that account, as no longer binding, will consider the same as dissolved and will so act. However, his Majesty,

[1] "Vollends würde die Annahme des österreichischen Antrages nicht blos als ein Akt offener Feindseligkeit gegen Preussen, sondern auch als ein entscheidener Bundesbruch aufzufassen und zu behandeln sein." Bemerkungen der *Provinzial-Correspondenz* von 13 Juni, 1866, cited by Hahn, *op. cit.* p. 121.

[2] *Ibid.* p. 124.

[3] The votes were as follows: Affirmative — Austria, Bavaria, Saxony, Württemberg, Hannover, Hesse, both Grand Duchy and Electorate, Nassau, and the 16th Curia, consisting of Lichtenstein, Reuss, etc. Negative — Saxe-Weimar and the Thüringian Duchies with the exception of Meiningen, Oldenburg, Anhalt-Schwartzburg, Mecklenburg, the Free Cities except Frankfurt, Luxemburg, and Baden. Prussia did not vote, regarding the whole transaction as unconstitutional.

the King, will not regard the national foundation on which the Confederation has been built as destroyed with the dissolution of the union which has existed up to this time."[1] With the question whether the position of Prussia was well taken or not, the present discussion has nothing to do. In the light of subsequent events, such a question can have only a doctrinaire interest. The student of German affairs is confronted by a fact, not by a theory. That fact is the open rupture between Prussia and Austria, into which, as adherents to one or other of the parties, the members of the Confederation were drawn. Whether the Confederation was legally dissolved or not, whether the action of the Diet justified Prussia's contention or not, so far as the actual situation was concerned, the old relation between the German States had gone to pieces.

With the Preliminary Peace of Nicolsburg, 26 July, 1866, following the short but victorious Prussian campaign, the problem of reconstruction forced its way to the front. Perhaps it were more accurate to say that the problem was one of construction, rather than of reconstruction, — to organize out of the dispersed elements of the old Confederation a new political and constitutional structure, which should avoid the weakness of the old loose union and prove itself sufficient for the tasks which must, in the nature of things, be laid upon it.

Two very definite ideas had shaped themselves in the mind of those best fitted to grasp the real state of affairs under the confederation: first, that the organization of the German State on an international basis, carrying with it necessarily the unit rule in the determination of all public questions, must be replaced by a closer federation, invested with larger powers; and, second, that no such union could be consum-

[1] Glaser, *Archiv*, I. p. 27; Hahn, *op. cit.* pp. 124 ff.

mated so long as Prussia and Austria, each, as a world power, unwilling to become subordinate to the other, were members of the federation.

The second of these ideas, the elimination of Austria from the problem of a reorganized Germany, was accomplished by the terms of the Treaty of Prag, 23 August, 1866, in which "his Majesty, the Kaiser of Austria, recognizes the dissolution of the German Confederation and gives his consent to a new formation of Germany, in which the imperial State of Austria shall have no part. Moreover, his Majesty promises to recognize the narrower federal relations which his Majesty, the King of Prussia, shall establish north of the Main, and declares himself also willing to allow the German States south of the Main to join themselves into a union, whose national association with the North German *Bund* shall be reserved for a more detailed agreement between the two parties." To this agreement the remaining opponents of Prussia also subscribed, with the exception of Hannover, Kur-Hesse, Nassau, and Frankfurt, whose independent existence has ceased through conquest and subsequent incorporation in the Prussian State.[1]

The Treaty of Prag cleared the way for a constructive work — for the erection of a new and true State in the room of the old confederacy. In this movement Prussia naturally assumed the lead. As early as June 10, 1866, Bismarck, foreseeing the inevitable, had addressed a circular note to the German governments,[2] in which, after referring to the failure of Prussia, earlier in the year, to put through a motion looking to a reformation of the *Bund*, asks for an immediate answer to the question "whether, should the relations exist-

[1] See Treaty with Baden, Bavaria, Hesse, Reuss ä. L., Saxe-Meiningen, Saxony, August to October, 1866.

[2] See Hahn, *op. cit.* p. 123.

ing between the members of the *Bund* be dissolved by a threatened danger of war, they (the governments) would be inclined to favor a new *Bund*, to be erected on the basis of these modifications of the old treaty of union." "These modifications" referred to a series of changes submitted to the governments, together with the circular despatch, under the titles "Principles for a New Federal Constitution."[1] To such an extent does this document forecast the later constitution of the North German *Bund* that it may be properly styled the "first draft" of that instrument. Four days after the date of this note occurred the dramatic scene on the floor of the *Bundestag*, when the Prussian representative declared the *Bund* no longer existent.

On the 16 June, Prussia addressed an identical note to all the governments of the North German States, with the exception of Hannover, Saxony, Kur-Hesse, Hesse-Darmstadt, and Luxemburg, proposing a union. These governments accepted the proposition, with the exception of Saxe-Meiningen and Reuss ä. L. On 4 August, 1866, Prussia laid before these friendly governments the draft of a treaty of union,[2] which was definitely adopted at Berlin on 18 August.[3] This action was a purely international arrangement between Prussia and the fifteen German States north of the Main, and is known as the "August Treaty." The two Mecklenburgs entered into the relation on 21 August,[4] the grand duchy of Hesse, for that part of its territory north of the Main, through the Treaty of Peace on 3 September;[5] the principality of Reuss ä. L., the duchy of Saxe-Meiningen, and the kingdom of Saxony on the 26 September, 8 October, and 21 October respectively.[6] The number of contracting

[1] The text of these "Grundzüge" is found in Hahn, *op. cit.* pp. 121 ff.
[2] *Ibid.* p. 462. [3] *Ibid.* p. 463. [4] *Ibid.* p. 464.
[5] *Staatsarchiv*, XI. 2375. [6] *Ibid.* 2430, 2432, 2434.

parties to the August Treaty was thus raised to twenty-two.

With the conclusion of the August Treaty, a definite and positive step was taken toward the erection of a German federal State. The terms of the treaty provided for an offensive and defensive alliance between all the signatory powers, with the assignment of the chief command over the military forces of the allies to the king of Prussia. Further, the August Treaty was not to be perpetual, but was to have binding force for a year, at the longest, unless it terminated earlier through the carrying out of its provisions. The main principle of the treaty, in fact its *raison d'être*, was, as the wording of Article 2 explicitly states, to establish finally a federal constitution, on the basis of the Prussian draft of 10 June, 1866, with the coöperation of a general parliament to be summoned for that purpose. That is to say, the August Treaty does not, nor does it intend to, create a new state. It was merely an international agreement between the several governments to meet within a year from date, together with a body chosen by popular representation, and definitely decide upon a federal constitution which should take the place of the offensive and defensive alliance provided for in the treaty. Should such a constitution be not fixed upon within the prescribed time, the treaty terminated. The method by which the constitution was to be drawn up was laid down in Art. 5 of the treaty, which reads: "the allied governments will order, simultaneously with Prussia, the election of delegates to a parliament, in accordance with the provisions of the imperial law of 12 April, 1849, and summon them in common with Prussia. At the same time will they send plenipotentiaries to Berlin, in order to fix upon a draft of a federal constitution, in conformity to the 'Principles' of 10 June, 1866, which draft shall be

laid before the parliament for its consideration and consent."

The treaty of 18 August, 1866, constitutes the international base for the erection of the North German *Bund*. "Aside from the alliance defensive and offensive for the period of one year, the contracting parties pledge themselves to a single transaction, to the performance of one act, which, from its very nature, cannot be repeated, to wit, the production of a federal constitution. They do not establish a constitution, but they pledge themselves to establish one. They do not agree upon a constitution, but they do agree upon a method by which a constitution shall be determined upon."[1] The August Treaty was a contract between the governments taking part in it, creating a temporary offensive and defensive alliance, not longer than a year in duration, and obligating those governments to determine upon a federal constitution, within that period, which should supersede the alliance. It was a purely international contract and, as such, did not, and could not, create a new state. Further, the duration of the alliance terminated with the establishment of the new federal relation in the fulfilment of the contract. In other words, the treaty of 18 August, 1866, ceased to exist upon its fulfilment, and with it ceased the international alliance between the several contracting governments.

Looking closely at the treaty, the contracting parties bind themselves to two subsidiary acts in fulfilment of the main purpose of the agreement: (1) to order an election to a parliament, and (2) to despatch plenipotentiaries to Berlin for the purpose of determining a draft of a constitution. In meeting the first of these two it was necessary to put in force the imperial law of 12 April 1849, in each several State; in other words, to give this law, in such ways as each several

[1] Laband, I. p. 16. Cf. also Hänel, *Studien*, I. p. 69.

State might choose to do so, the force of a State law. In Prussia, even before the signatures were appended to the August Treaty, — that is, on 13 August, 1866, — the government laid before the *Landtag* the "draft of a law touching the election to the *Reichstag* of the North German *Bund*." The purpose of this law was, as the bill declared, "to secure in Prussia a legal foundation for the election to the parliament." In conformity to the stipulations of the proposed August Treaty, this draft was a reproduction of the law of 12 April, 1849. In considering this draft, however, the Prussian House of Delegates modified the measure in such wise that the parliament to be elected was granted power, not to give final form to the Constitution of the North German *Bund*, but to confer or deliberate with respect to such Constitution. The adoption of the new federal Constitution would necessarily involve considerable modification of the several State constitutions. Prussia was unwilling to concede to any general body of men the right to amend her constitution. Further, Prussia did not propose to relinquish her right to a voice in the final shaping of the constitution for the proposed *Bund*, nor did she care to be put in the position of having the federal State erected over her head, with no opportunity for her *Landtag* to express itself definitely in the matter of its organization. This view of Prussia was shared by the other States, with the exception of Brunswick. The original idea of the August Treaty was therefore modified to the extent that the plenipotentiaries of the several States and the parliament were not given power to determine the final form of the constitution, but only to deliberate over it and bring in a draft that should be referred to the legislative bodies of the several States for their final action.

Pursuant to the stipulations of the August Treaty, on invitation of the Prussian government, plenipotentiaries

from the various States met, in a confidential conference, in Berlin, on 15 December, 1866. In the name of Prussia, Bismarck laid before the assembly a draft of a constitution, containing a somewhat more detailed working out of the "Principles" of 10 June, 1866.[1] This is referred to by German writers as the "second draft of the Constitution." The meeting was not an open one, and no record was kept of the debates. On the 7 February, 1867, Prussia having consented to a number of amendments proposed by the other States, the assembly of plenipotentiaries united on the draft of the constitution to be presented to the parliament, not yet assembled.[2]

The general election of members of the parliament took place on the 12 February, 1867, and the delegates met in Berlin on the 24th of that month. The debate over the proposed constitution lasted from 9 March to 16 April. Numerous amendments were proposed by parliament, and the final draft was agreed upon, 16 April, 1867, by a vote of 230–53. On this same date, the assembly of plenipotentiaries met and "resolved to accept the draft of a constitution as it was finally passed upon by the parliament." This action was announced to the parliament by Bismarck on the following day.

Both the assembly of plenipotentiaries and the parliament had now definitely agreed upon the text of the Constitution. Nevertheless, that document had still no binding force. It was only a draft of a proposed constitution. Its content had been determined in accordance with the provisions of the August Treaty, but the Constitution itself had no validity. It did not become operative with the mere agreement of the

[1] For text of this draft, v. Binding, *Staatsgrundgesetze*, Heft I., grössere Ausgabe, pp. 75 ff.; also app. to Kittel, *Die Preuss. Hegemonie*, pp. 40 ff. Cf. also Hänel, *Studien*, I. pp. 273 ff.; also Hahn, *op. cit.* pp. 483–485.

[2] See text in Binding, *op. cit.* p. 75.

deliberative bodies as to the text of it.[1] The parliament was not given power to adopt and give legal effect to a constitution, but only to deliberate over the text of a constitution. The German Constitution does not rest upon an agreement made between the representatives of the several State governments and the members of a general parliament. "The parliament was not one of the 'parties' to the Constitution, but only a means of coming to some sort of an agreement over the Constitution. It had no legal powers, but simply a political duty. It was meant to balance the divergent views and particularistic tendencies of the several governments, and its consent should serve as a guarantee that the Constitution, as agreed upon, should correspond to the political views and desires of the people, to public opinion. The 'agreement' between the governments and the parliament was a harmonizing of views as to what sort of a constitution should be given to the *Bund*, and the result of that 'agreement' was not to impart validity to a constitution, but to produce the draft of a constitution."[2]

In conformity to the requirements of the August Treaty, the draft of the Constitution had now been made. There still remained the fulfilment of the pledge to found a federation. This could not be done without the consent and the concurrent action of the legislative bodies of the several States. This consent was given by all the States belonging to the North German *Bund*, in the form provided by the organic law of the State for constitutional amendments, and the Constitution of the North German *Bund* was published in the Gazette of each individual State, except Brunswick

[1] See discussion of Binding, in his pamphlet, *Die Grundung d. N. D. Bund*, and the refutation of his arguments by Laband, I. pp. 22, 23. Also Hänel, *Staatsr.* I. pp. 19 ff.; Meyer, *Staatsr.* pp. 164, 165.

[2] Laband, I. p. 23.

and Bremen, who had already given their consent previous to the meeting of parliament and the assembly of plenipotentiaries. In each formula of publication it was stated that the new Constitution should go into effect on 1 July, 1867.

It is at this stage of the proceedings that controversies arise as to the juristic significance of this action on the part of the State legislatures. Seydel, the Calhoun of Germany, declared that by the action of the legislatures of the several States, the Constitution of the North German *Bund* became part of the municipal law of each commonwealth; that it was an identical State law, no more, no less, and that the laws published on the basis of this Constitution derived their validity from the constitution of the State. Hänel, on the other hand, shows that the Federal Constitution dealt with matters which it was impossible for the State law to deal with, and that it presupposed a union of States, whose organization it defined. A State law can legally control only such matters as fall within the sphere of the State. It does not extend to such as contemplate or anticipate the existence of several States. "The legal regulation of such a relation of coexistence lies beyond the realm of sovereignty of any single State, and consequently of any State law. The North German *Bund*, therefore, could never acquire an actual and legal existence through the sum of identical and particular laws." Laband declares that the Constitution of the North German *Bund* is not an identical State law, nor did it obtain its sanction from the State power in any particular State. The *decision of the State* to enter the *Bund* defined by the Constitution, however, was affirmed in each State by State law. The Publication Law of June, 1867, did not determine the Constitution, but is a declaration of entrance into the *Bund* which that Constitution outlines. No State had any power to introduce the Constitution by itself as State law, but each

State could declare, in the form of law, that it would take part in the erection of the North German *Bund* on 1 July, 1867. The several articles of the Constitution are not introduced into the territory of each State as State law, but the Publication Patent gives sanction to a single clause, which is everywhere the same and runs: The State *x* belongs from the 1 July, 1867, to the North German *Bund*. The Publication Law is a governmental transaction requisite to the successful carrying out of the terms of the August Treaty. With this founding of the *Bund* the stipulations of the August Treaty were fully met. The Treaty expired through its fulfilment. The international agreement between the States became a constitution. What had been a league became a State. The contract relation between the several States ceased to exist.

The North German *Bund* was erected on 1 July, 1867. "When, on 14 July, 1867, the king of Prussia appointed Graf von Bismarck as chancellor of the *Bund*, and ordered, on the 26 July, the issuance of the Federal Gazette with the publication of the Constitution in the first number thereof, the North German *Bund* was already in existence and the Constitution already in force." King William acted by reason of a power given him by the Constitution. The publication was not an act of legislation. The "Publicandum" of 26 July, 1867, with which the Gazette begins, contains no clause which imparts validity to the Constitution, but the king "gives notice, and, in the name of the North German *Bund*, announces, that the Constitution of the North German *Bund*," — here follows the text — " was promulgated on the 25 June, of the present year, and went into force on the 1 July." So the 1 July, 1867, is the birthday of the North German *Bund*, and the sum total of the legislative acts of the several States, twenty-two in all, was the act which created

it. The "North German *Bund* brought its Constitution with it into the world."

By the Treaty of Prag, the North German *Bund* could not extend itself south of the Main. The German States lying beyond the line of the Main were left free to form a union of their own, whose ultimate relations with the North German *Bund* were to be determined by their own independent action. This union never came into being. In its place arose a relationship based on individual treaties between the several States and the *Bund*, which subsequently led to the formation of the Empire. Upon the conclusion of the treaty of peace, an offensive and defensive alliance had been made between Prussia and the South German States, whereby, in case of war, the troops of all Germany were to be placed under the command of the Prussian king. This was before the erection of the *Bund*. It effected a military unity of the whole of Germany prior to the founding of the federal relation. All the troops were to be fashioned on the Prussian model.

The Customs Union Treaty of 8 July, 1867,[1] was also instrumental in bringing about a closer union of the two sections of country. This Union, established as early as 1833 and destroyed by the war of 1866, had had for decades as its motto the sentence which now is adopted by the Imperial Constitution: "Germany forms one territory in matters of tariff and of trade, surrounded by common boundaries." The Treaty was renewed on 8 July, 1867, to run for twelve years, and by tacit consent, should no notice of termination be given, for another like period. The affairs of the Union were managed by a Tariff-union legislature, composed of a Tariff *Bundesrat* and a Tariff parliament. The Tariff *Bundesrat* was made up of the *Bundesrat* of the North German *Bund*, plus representatives from the South German States, —

[1] *RGBl.* p. 81.

identical with the present *Bundesrat* of the Empire, — while the Tariff parliament was composed of the *Reichstag* of the *Bund* plus eighty-five members elected from the South German States, on the basis of the equal, general, secret suffrage prevailing in the *Bund*. The laws of the Union were to take precedence of federal laws, that is, of the laws of the *Bund*. The Presidency belonged to Prussia and carried an indirect veto, through the Prussian plenipotentiaries, of all laws, administrative arrangements, and provisions. The treaty was accepted by the *Reichstag* of the North German *Bund*, 26 October, 1867. A number of other treaties, concluded before the war, revived, so far as was consistent with the new political form of Germany, and several new treaties guaranteeing legal aid, providing for military freedom of migration, for postal arrangements, etc., were made. Thus, before the advent of the Empire, its approach was already shadowed forth in the relations existing between the *Bund* and the South German States.

The Constitution of the *Bund*, also, looked toward the ultimate union of all Germany in one great political body. Article 79 of that instrument reads: "The entry of the South German States, or any one of them, into the *Bund* shall take place upon the proposal of the *Praesidium* of the *Bund*, in the way of legislation." All provision had been made, in the very beginning, for an extension of the *Bund* to South Germany and for the erection of the Empire. The war of 1870, with France, brought the sense of national unity to fruition. On the declaration of hostilities, the South German States stood fast for a united Fatherland. They fought side by side with the Prussian troops in defence of their common country.

"The initiative came from Bavaria. The government of Bavaria, in the course of September, 1870, gave the *Prae-*

sidium of the *Bund* to understand that the political relations of Germany, as they had been brought about by the warlike events, necessitated, according to its conviction, a departure from the international treaty which had hitherto bound the South German States to the North German *Bund*, and called for a constitutional bond."[1] In other words, the South German States had come to the conclusion that no relation based upon international treaty would longer suffice, but that all the German States should be bound together in one great political organization by a common Constitution.

The movement took legal form by the adoption of several agreements first of all between the North German *Bund* and the several South German States. These were:—

1. An agreement between the North German *Bund*, Baden, and Hesse relative to the founding of a German Union and the adoption of a federal Constitution, drawn up at Versailles in November, 1870.[2]

2. A treaty between the North German *Bund*, Baden, and Hesse, on the one side, and Württemberg, on the other, relative to the acceptance by Württemberg of the Constitution of the German Union, drawn up on the 25 November, 1870, together with the Final Protocol and the Military Convention of the same date.[3]

3. A treaty with Bavaria, relative to the acceptance of the Constitution of the German Union, on the 23 November, 1870, together with the Final Protocol of the same date.[4]

These treaties contain, first of all, a declaration of the entry of the contracting parties into the North German *Bund*. They then set forth, as the condition under which they enter, certain amendments to the federal Constitution, which seemed either necessary or desirable to the South German States.

[1] Delbrück, speech before the *N. D. Reichstag*, 5 December, 1870.
[2] *BGBl.* p. 650. [3] *Ibid.* pp. 654, 657, 658. [4] *Ibid.* 1871, pp. 9, 23.

These amendments were accepted by the *Bund*. Bavaria, in particular, obtained a number of rights, which are known as the Bavarian "*Sonderrechte*."

The November treaties stipulated that the general ratification of their contents should follow the constitutional action of the legislative bodies of the parties, and that they should go into effect on 1 January, 1871. The consent of the *Bundesrat* and *Reichstag* of the North German *Bund* and that of the legislative assemblies of Württemberg, Baden, and Hesse — for that part of its territory lying south of the Main — were given in December, 1870. Bavaria delayed a little, but finally voted its assent on 21 January, 1871. The extended North German *Bund* was to be called the German Empire, and the king of Prussia, in his capacity as bearer of the praesidial power, was styled "the German Emperor."

The German Empire, therefore, came into being on 1 January, 1871, — not as a new constitution, but as an extension of the North German *Bund*. For the situation was not identical with the erection of the *Bund* under the August Treaty. Then certain independent States undertook to form a union. Here, however, the November treaties were formed between the North German *Bund*, as a unit, on the one hand, and the individual South German States on the other. The bond existing between the North German States was neither dissolved nor ended, in order to the formation of the new State. It was extended and somewhat modified. "While no legal continuity exists between the old German Confederation and the North German *Bund*, it is preserved between the *Bund* and the Empire."[1] The found-

[1] *Sten. Ber. II. Ausserord. Sess., 1870*, p. 152; Hänel, *Studien*, I. p. 82; *Staatsrecht*, I. pp. 49 ff.; Meyer, *Erörterungen*, p. 61; *Staatsrecht*, 67, note 6; Schultze, I. p. 172; Mejer, *Einleitung*, pp. 330 ff.; Arndt, p. 55. For contrary opinion, see Seydel, *Comm.* p. 30; and Riedel, *Die Verfassung von 1871*, p. 77.

ing of the Empire was already provided for in the Constitution of the North German *Bund.*

The advent of the South German States into the *Bund,* and the change of the style of the State, rendered a revision of the Constitution an absolute necessity. The documents upon which the State rested were scattered through the old Constitution and through several treaties and conventions between the *Bund* and the individual States. It was necessary that the whole be brought into one complete instrument. A draft of an Imperial Constitution was laid before the Reichstag and accepted by that body on 14 April, 1871. It was published as *an imperial law* on 16 April, 1871. The present Imperial Constitution, therefore, stands on the statute books of Germany as an imperial law. It is not a contract, nor an identical State law, but a law of the Empire. It was published, like any other imperial law, by the same factors and in the same way. "The Imperial Constitution rests upon the will of the Empire and upon it alone."

CHAPTER II

THE EMPIRE AND THE INDIVIDUAL STATES

THE German Empire is composed of twenty-five States, twenty-two of which are monarchical in their organization, while three are republican City-states.[1] Before the erection of the North German *Bund*, these States were sovereign and independent, and bound together by an international agreement into the German Confederation. At the time the North German *Bund* was formed, therefore, the German people were not an unorganized mass politically, but were divided into the peoples of the various States, each of which had its own political personality and its own constitutional organization. This organization was not destroyed by the creation of the federal State, but at the same time it did not remain unaffected by the new structure. "From the standpoint of historical speculation, we may regard the founding of the Empire as an act of the German people, or as an evolution of its political constitution; the treatment of the question from the standpoint of constitutional law must limit itself exclusively to processes which are legally relevant. Viewed from this point, the founding of the North German *Bund*, and of the German Empire, appear not as an act of the German people, but as an act of the German *States* existent in 1867

[1] The States are as follows: Prussia, Bavaria, Saxony, Württemberg, Baden, Hesse, Mecklenburg-Schwerin, Saxe-Weimar, Mecklenburg-Strelitz, Oldenburg, Brunswick, Saxe-Meiningen, Saxe-Coburg-Gotha, Saxe-Altenburg, Anhalt, Schwartzburg-Rudolstadt, Schwartzburg-Sonderhausen, Waldeck, Reuss ältere Linie, Reuss jüngere Linie, Schaumburg-Lippe, Lippe, Lübeck, Bremen, and Hamburg.

and 1870. All the acts leading up to the erection of the federal State were acts of the States as personalities. In entering the *Bund* they gave up their sovereignty, it is true, but not their existence as States. This legal individuality continued and became the foundation of the joint personality of the federal State. The members of the Empire, therefore, are not the individual citizens of the Empire, nor are these citizens the bearers of the imperial power. The members of the Empire are rather the several States. *The German Empire is not a juristic person composed of fifty-six million members, but of twenty-five members.*" [1]

The German Empire is not a league of princes. It is a State constructed out of States. In becoming a member of the *Bund* each several State gave up its sovereignty, receiving therefor, as Bismarck expressed it, a "share in the joint sovereignty of the Empire." Since there can be no limitation of sovereignty and no division of it, these States are not sovereign "in their own sphere." But the individual State takes a part in forming the power that stands over it. The German States are not subjected to the domination of any one of them, nor to any foreign sovereign, but rather to a corporate State builded out of themselves. "The German States are as a totality sovereign." Sovereignty, according to the German jurists, is not an essential element of a State. It may constitute the basis of recognition in international law, but from the standpoint of constitutional law it is an insufficient test of statehood. The true mark of a State consists in its possession of original and underived power. This mark belongs to each of the German States. There is a large field in which the State is left free to govern itself. The powers of the Empire are specifically defined. It may enlarge those powers, but until it does the State enjoys a

[1] Laband, I. p. 91.

free hand. This independence is not granted to it by the Empire. It forms no part of the imperial powers. It is State power, pure and simple. The State wields it as of right and not by concession. It existed before the founding of the Empire. It survives that act. It is that autonomous area of power belonging to the State which has not yet been invaded by the Empire. The sovereign power lies with the Empire and comes to expression, not in the Kaiser, who is in no sense the "monarch" of Germany, but in the "totality of the allied governments" regarded as a single personality, — in other words, in the *Bundesrat*.

By Art. 4 of the Imperial Constitution the Empire is given the power of supervision and legislation with reference to a number of matters which affect more or less the general interests of the country. In all such matters the action of the States is excluded and their power is renounced in favor of the *Bund*. The field covered by imperial legislation and oversight is quite extensive, and includes the following subjects: —

(1) Regulations relating to free migration; matters of domicile and settlement; right of citizenship; matters pertaining to passports and to the surveillance of foreigners; industrial activity, including insurance matters, so far as they are not provided for in Art. 3 of the Constitution; and matters relating to colonization and emigration to foreign lands. In Bavaria, however, matters of domicile and settlement are excluded.

(2) Legislation pertaining to customs duties, commerce, and the taxes to be applied for imperial purposes.

(3) The regulation of the system of weights and measures and of the coinage, in addition to the laying down of principles for the emission of funded and unfunded paper money.

(4) General banking regulations.

(5) Patents and inventions.

(6) The protection of intellectual property.

(7) The organization of a general system of protection for German trade in foreign countries, for German navigation and for the flag on the high seas, together with the arrangement of a system of general consular representation to be maintained by the Empire.

(8) Railway matters — with the reservations as applied to Bavaria in Art. 46 — and the construction of roads and waterways in the interest of public defence and of general intercourse.

(9) Rafting and navigation upon the waterways common to several States, and the condition of such waterways, together with the imposition of river and other water dues, likewise the regulation of signals used in navigation.[1]

(10) Postal and telegraph matters — in Bavaria and Württemberg, however, only in accordance with the provisions of Art. 52.

(11) Regulations pertaining to the mutual execution of judgments in civil matters and the fulfilment of requisitions in general.

(12) The authentication of public documents.

(13) General legislation with reference to the whole domain of civil and criminal law, and of legal procedure.[2]

(14) The military establishment of the Empire and the navy.

(15) The regulation of the medical and veterinary police.

(16) The regulation of the press and the right of association.

All these matters are regulated by imperial legislation, and are accordingly withdrawn from the sphere of State legislative activity.

[1] Amendment added 3 March, 1873. [2] Amendment of 20 December, 1873.

What, then, remains as the exclusive field of State legislation? Every State has the absolute control of its own organization. It determines the laws of succession and settles questions which arise over its internal administration in accordance with its own constitution. It has the right to determine what that constitution shall be, subject only to the condition that there shall be nothing in its organic law that is contrary to the Imperial Constitution. It makes its own budget and its legislative bodies enact laws governing a large part of its internal affairs. Police regulations touching public meetings; fire and building regulations; water rights; road laws, so far as these do not fall within the competence of the Empire; matters of ordinary credit not represented by the banks; the regulation of the domestic agricultural situation; the breeding of cattle; forestry; mines; hunting and fishing; the relation of church and state; the control of public instruction — all these matters fall within the competence of the individual State, and are provided for by State legislation. In general it may be said, that where the Empire has not legislated on any subject, and has not the competence so to legislate, that field is left free to State legislation. Where, however, both State and Empire have legislated upon a matter, the federal law takes the precedence.

Turning to the executive sphere, we find a wholly different principle at work. In the division of competence between the Empire and the several States, a strong unitary tendency is seen. In matters of military control, naval affairs, and of justice, the legislative authority is taken wholly from the States and is vested in the Empire. In finance about two-thirds, and in affairs touching the internal administration of the country about one-half, are removed from State legislation. In the carrying out of the laws, however, the federalistic principle prevails. Aside from the postal and telegraph admin-

istration, which is strictly imperial down to the slightest detail, the Empire depends upon the organs of the States for the execution of its laws. It does not attempt to apply through its own officials the laws it has enacted, but looks to the officials of the individual States for the execution of those laws under imperial supervision. Imperial customs and imperial taxes are not levied by the officials of the Empire, but by State officials. The tariff and tax officials are State authorities. The jurisdiction of the courts is fundamentally State jurisdiction. The judgments are rendered in the name of the State and not in the name of the Empire. The police officials who carry out the laws and regulations governing industry and other imperial ordinances are in the service of the State primarily, and act in the capacity of imperial organs. In short, the State carries on the imperial business according to norms which the Empire has laid down.

In matters pertaining to foreign affairs, however, as well as in regard to the navy and fortifications, the control of the Empire is quite supreme. Here the Empire exercises not alone the legislative authority, but the administrative as well. The ambassadors to foreign lands are imperial officers, while the consuls and officials in the protectorates are imperial appointees. The naval organization and the administration of the imperial fortifications are in the hands of imperial organs. Both the commanding admiral and the Secretary of State for the Navy hold office under the Empire, not under Prussia, and the governors of the naval fortifications and the commandants stand in the service of the Kaiser.

With regard to the army there is a dual arrangement. The authority of the Empire goes farther than the mere right of oversight. It regulates directly all the activity of the officers in command. On the other hand, the subordinate officers are under the control of the several States and the whole system

of military organization, instruction, religious care, and justice is left in their hands. The army inspectors are imperial, the commanding generals and the ministers of war are State officials.

So far as the execution of the laws is concerned, the powers of the individual States exceed that of the Empire, and in the division of competence the federal principle is strongly carried out. The Empire has but a fragment of the general executive powers, save in the matter of foreign affairs. It is practically excluded from the judicial, financial, and internal administration. In the German Empire we have a strongly unitarian power to legislate joined to a strongly federal power to execute.

The Empire is not empowered to exclude any individual State from membership in the *Bund*. It cannot alienate even a portion of it from the imperial domain, convert it into a Territory, unite it with another State, divide it, or change its vote or relative weight in the councils of the Empire. On the other hand, no State has any right, on any ground, to withdraw itself from the union. For every act detrimental to the interests of the State there is always legal recourse. Nor may any State modify or diminish by any legal transaction the organic rights and duties of membership in the *Bund*, or by a unilateral act change the conditions upon which those rights and duties rest. No alliance or agreement may be made with a foreign land, or between the States themselves, which does violence to any Article in the Imperial Constitution or contravenes an imperial law. Where in any State the State constitution, or the House Laws of the reigning family, or treaties made by the State or between families of reigning monarchs, regulated matters coming under the direct supervision of the Empire at the time of the founding of the *Bund*, the stipulations and provisions of the Imperial Constitution hold and exclude the operation of such enactments.

The competence of the Empire has suffered a limitation, however, in certain directions, through the *reserved rights*, or "*Sonderrechte*," which were made the condition on which the South German States entered the Union. Baden reserves the taxation of brandies and beers of domestic origin to the State legislation, while the revenue therefrom flows into the State treasury. The same reservation is made by Württemberg, together with administration of the post and telegraph within her borders. Certain military reservations with reference to Württemberg are considered in their proper place under the military organization of the Empire. In Bavaria certain regulations touching the right of domicile and of settlement are reserved, the regulation of the postal and telegraphic arrangements are identical with those of Württemberg practically, the taxation of domestic brandy and beer is made a matter for State legislation, certain railroad exemptions are granted, certain insurance laws may be passed only with the permission of Bavaria, and an extensive reservation is made with respect to the military arrangements. There are certain reserved rights or special rights which touch the organization of the Empire. Prussia has the right of *praesidium* with all the rights accruing therefrom. Her king is German Kaiser. Bavaria has an advantage by being granted six votes in the *Bundesrat*, instead of four, to which she was entitled in the old German *Bund*. She has a permanent place on the imperial Committee for the Army and Fortifications in the *Bundesrat*, and the chairmanship of the Committee on Foreign Affairs. She has also the right of substitute in the chairmanship of the *Bundesrat*. Should, for any reason, the imperial ambassador be hindered from acting, the Bavarian ambassador may represent him. Moreover, Württemberg and Saxony have each a permanent seat on the Committee on Army and Fortifications and on Foreign Affairs. These

rights may not be taken away from the several States holding them without the consent of the States themselves.

If a State becomes recalcitrant in the exercise of its duties, or refuses to perform its part in the general obligation laid upon every member of the *Bund*, it may be compelled to a performance of its duty by means of what is known as an "execution" — a show of armed force. The federal army may be mobilized, in whole or in part, against the offending State. The decision as to the wisdom or necessity of such a move is determined by the *Bundesrat*. The execution is carried out by the order of the Kaiser.

According to Art. 78 of the Constitution, changes and amendments to the Constitution may be made in the way of ordinary legislation. An increased majority is required for such amendatory legislation in the *Bundesrat*, fourteen negative votes rejecting the measure. It will be seen that the Empire is competent to enlarge its own competence — the *Kompetenz-Kompetenz* of the German jurists — and to widen the sphere of its legislation. By means of ordinary legislation it may extend the limits of its legislative and supervisory activity as set forth in Art. 4 of the Constitution, increase very materially the number of matters now brought within the sphere of imperial affairs, and assume control of what now it touches not at all or only indirectly.

CHAPTER III

THE KAISER[1]

In the organization of the North German *Bund* three factors had to be considered: the allied governments, the German people as a totality, in whose breast the sentiment of nationality had for long been growing, and the Prussian State, which had done the lion's share in making the German nation a concrete fact. In the Constitution of the North German *Bund* each of these factors found its expression and place. The allied governments were given the *Bundesrat*, the German people were given the *Reichstag*, while Prussia received recognition mainly through the powers with which her king was invested. The title "Kaiser" nowhere appears in the Constitution of the North German *Bund*. Nevertheless all the powers which the Kaiser enjoys under the Imperial Constitution were found in the Constitution of the North German *Bund*, though under three different designations. The larger number of these powers were granted to the *Bundespraesidium*, *i.e.* to the king of Prussia as chief magistrate of the nation. In this capacity he summoned, opened, prorogued, and closed the *Bundesrat* and *Reichstag*, engrossed and published the federal laws, appointed and dismissed the chancellor, as well as the

[1] See Held, *Das Kaiserthum als Rechtsbegriff*, 1879; Laband, I. pp. 191 ff.; Meyer, *Staatsr.* p. 127; Hänel, *Studien*, II. pp. 56 ff.; Schulze, *Lehrb. d. d. Staatsr.* II. pp. 36. ff.; Von Rönne, *Staatsr.* I. pp. 5 ff.; Zorn, *Staatsr.* I. p. 7; Bornhak, *Die verfassungsrechtliche Stellung d. D. Kaiserthums*, *Arch. f. d. öff. R.* VIII. pp. 425 ff.; Arndt, *Komm.* pp. 124 ff.; Fischer, *Das Recht d. D. Kaisers*, Berlin, 1895; Laband, *Das D. Kaiserthum*, Strassburg, 1896; Binding, *Die rechtl. Stellung d. Kaisers*, Dresden, 1898; Von Jagemann, *Die d. Reichsverfassung*, pp. 99 ff., Heidelberg, 1904.

federal officials, and supervised all branches of the federal administration. Further, a most complete military authority was granted to the king of Prussia as *Bundesfeldherr*, or commander-in-chief of the federal armed forces: the supreme command of the federal army in war and peace, the supervision of the troops with respect to their equipment and readiness for effective service, the determination of the active strength of the army and the division of it into various military units, the power to erect fortifications within the federal territory and to appoint members of the *Bundesrat* Committee on the Army and Fortifications, and the authority to carry out a federal "execution" as well as to declare any part of the territory in a "state of siege." Finally, the supreme command of the federal navy, together with the regulation of its organization and composition, was granted to the "King of Prussia" by the Constitution of the North German *Bund*.

This triple division, *Bundespraesidium*, *Bundesfeldherr*, and king of Prussia, did not vanish with the conclusion of the treaties with the South German States. While Art. 11, Cl. 1, of the Constitution published 31 December, 1870, recognized the new title, "German Kaiser,"[1] and stipulated that the king of Prussia, as *Praesidium* of the *Bund*, should bear that title henceforth, yet the old expressions indicative of a threefold position of the king of Prussia still remained in the body of the instrument.[2] By the revision of 16 April, 1871, the word "Kaiser" was everywhere made to take the place of old expressions and the triple designation was eliminated.[3]

[1] *Das Praesidium des Bundes steht dem König von Preussen zu, welcher den Namen Deutscher Kaiser führt.* For this draft of the 31 December, 1870, see *BGBl.* 1870, p. 627; also found in Triepel, p. 85.

[2] Compare Arts. 19, 53, 62–68 of the Constitution of 31 December, 1870, with the same Articles of the Constitution of the North German *Bund*.

[3] In the present Constitution, the word "*Praesidium*" is retained in Art. 5,

The substitution of the title "Kaiser" and the revival of the imperial dignity effected no constitutional change whatever in the relation of the king of Prussia to the other States and monarchs of the *Bund*. It invested him with no powers which he did not before possess, save the purely personal right to the specific title and to the imperial arms and standard. The adoption of the title "Kaiser" in the Constitution created no new political institution. "The definition of the *Bundespraesidium* has not been changed by connecting it with the imperial title. From the historical events which led to the restoration of the imperial dignity, from the *Motiven* and explanation which accompanied the draft of the Constitution in its present wording, and especially from Art. 11 of the Constitution itself, one draws the sure conclusion that the Kaisership is fully and completely identical with the *Bundespraesidium* and that, apart from the title and the insignia corresponding to it, it contains no rights other than the *praesidial* rights." [1]

The substitution of the word "Kaiser" for the words "*Bundespraesidium*," "*Bundesfeldherr*", and "King of Prussia," involved no restoration of the ancient imperial institution, no setting up anew of the old *Kaiserwürde*. The legal continuity between the old imperial dignity and the new can no more be maintained than the legal continuity between the old Empire that tumbled into dust in 1806 and the new Empire that arose in 1871. The time between those two dates is no mere interregnum. Yet as Schulze remarks,[2] "the historical connection between both dignities cannot be ignored. Without the great memories which fasten them-

Cl. 2; Art. 7, Cls. 2 and 3; Art. 8, Cl. 2, and Art. 37. Fischer holds that in these articles the expression refers not to the *Bundes-praesidium* but to the *Bundesrats-praesidium*. See *op. cit.* p. 24.

[1] Laband, I. p. 195.

[2] *Lehrbuch*, II. pp. 36, 37.

selves to the imperial history of the Middle Ages, the erection of the German Empire would have been impossible."

The restoration of the Kaiser title was a political stroke of Bismarck's. The purpose lying back of his insistence on the assumption of the imperial dignity by Wilhelm may be gathered from Bismarck's own words: "The assumption of the title 'Kaiser' by the king, on the expansion of the North German Confederation into the Empire, was a political necessity, because, recalling the days when it had a greater significance legally though less importance in actual fact, it became an element making for unity and centralization. And I was convinced that the pressure solidifying our imperial institutions would be more permanent, the more the Prussian wearer of the imperial title should himself avoid that dangerous striving which marked the earlier history of Germany — the striving on the part of our dynasty to flaunt its own preeminence in the face of the other dynasties. King William I. was not free from this inclination, and his resistance to the title was not disconnected from his desire to do just this thing — to call forth a recognition of the superior prestige of Prussia's crown over the Kaiser title." The assumption of the Kaiser title made it impossible henceforth to think of the Empire as nothing but an "expanded Prussia."

In this movement for the restoration of the Kaiser title, there was no slightest notion of elevating the king of Prussia to the position of *monarch* of Germany. Ludwig of Bavaria made this perfectly clear in his letter to Wilhelm suggesting the adoption of the title "German Emperor." "I have proposed to the German princes," he wrote, "to join me in urging your Majesty to assume the title 'German Emperor,' *in connection with the exercise of the praesidial rights of the*

Federation."[1] The new imperial dignity was to be no investiture of the king of Prussia, as such, with authority over the other German princes. It was to be no mere extension of Prussian power. It did not aim to give the Prussian State a hegemonial position in the Empire. In fact, it meant the very reverse, "the giving up of the hegemonial idea, and the union of all the praesidial rights appertaining to the Prussian crown, outside the sphere of the *Bundesrat*, including the power over the army and navy, into a single imperial office, the Kaisership."[2] It may be said that the imperial dignity stands for the *nationalizing* of the praesidial power. The rights which the Kaiser exercises in the matter of government are not in any sense manifestations of the power of the Prussian State. They are, rather, the legal functions of an *imperial organ*, attached, by the organic law of the Empire, to the Prussian crown.

The German Empire is a true State, but it is not a monarchy. Sovereignty does not rest with the Kaiser, but with the totality of the allied governments. This union of the allied governments finds its expression, not in the Kaiser, but in the *Bundesrat*. The *Bundesrat*, therefore, is the supreme organ of the Empire. It must not be concluded that the Kaiser is subordinated to the *Bundesrat*. Whatever powers the Kaiser exercises in the Empire, he exercises in the name of the Empire, not in the name of the *Bundesrat* or of the allied governments.[3] None of the imperial powers is derived from the *Bundesrat*. Certain acts of the Kaiser are limited by the coöperation of the *Bundesrat*, but in no case can the Kaiser be regarded as an organ of that body. As an organ of the Em-

[1] See *Sten. Ber. d. Nordd. Rtags. II. Ausserord. Sess., 1870*, p. 67. Also speech of Delbrück, 8 December, *Sten. Ber. II. Ausserord. Sess., 1870*, p. 167. Cf. Hänel, *Studien*, II. p. 29, note 1.

[2] Anschütz, *Staatsr. in Kohler-Holzendorff*, p. 547.

[3] *RVerf.* Art. 17. Note exceptions mentioned below in the text.

pire, the Kaiser is coördinate with the *Bundesrat*, not subordinate to it.

Nevertheless, the Kaiser is not monarch of the Empire, though he is vested with powers usually found possessed only by monarchical rulers. The Kaiser cannot assume any authority in the Empire as of his own right. Whatever power he possesses as Kaiser, he possesses by virtue of authority granted him by the Constitution or by laws made in pursuance thereof. The State power of the Empire does not centre in him. His powers are all derivative, not original. In case of doubt, the presumption is against him. The reverse is true in a monarchy. On the other hand, the Kaiser is not President of the Empire, in the sense in which the word "President" is understood in the United States and in France. He is neither elected or appointed. He is responsible to no higher authority. He is not the "subject" of any sovereign. He may not be removed by any judicial procedure. He occupies his position by reason of his holding the Prussian crown, since the Constitution has declared that the chief magistracy of the Empire shall belong to the Prussian crown. His occupancy of the imperial position, then, depends upon his right to the crown of Prussia, under the Prussian Constitution. Indirectly, therefore, he may be said to hold the praesidial position in his own right.

It has been stated above that the powers exercised by the Kaiser are exercised in the name of the Empire. There are two exceptions to this principle. Both these exceptions, as Anschütz observes,[1] refer to the relation sustained to the *Reichstag* and indicate that it is not the Kaiser, but the *Bundesrat*, that is to be thought of as possessing the imperial governmental authority over against that body. The first of these exceptions is seen in the opening and closing of the

[1] Anschütz, *op. cit.* p. 548.

Reichstag, sovereign rights which, according to Art. 12 of the Imperial Constitution, are handed over to the Kaiser with no instructions as to the ceremonial connected with the function, but which, according to a fixed practice, are carried out "in the name of the allied governments." The second exception is in the transmission of bills, passed by the *Bundesrat*, to the *Reichstag*. This is done "in the name of the Kaiser." The act, however, is purely ministerial. The Kaiser acts simply as an administrative of the *Bundesrat* in this connection. These two exceptions do not in any way alter the position of the Kaiser as an immediate organ of the Empire. They are simply the exceptions which prove the rule. The principle is well stated by Laband: "When the Kaiser acts for the Empire or when he issues declarations of the will of the Empire, he does not do so in his own name, but in the name of the Empire. When the subject of the imperial power comes into consideration as over against the *Reichstag*, *i.e.* in the constitutional relation of the organs of the Empire to one another, he acts in the name of the allied governments." [1]

It is at once apparent that the Kaiser occupies a unique position in the world of political institutions. No definition which might exhaust the qualities and characteristics of other organs in any other existing government would serve to depict the Kaiser. He refuses to be classified with other rulers of constitutional States. The character of his position is composite rather than simple. He is neither monarch nor president, yet he exhibits elements of both. The Kaisership may, perhaps, be defined in broad terms as an immediate organ of the Empire, an organ of such a sort that it must be set in a class by itself.

Beyond the single statement in Art. 11, to the effect that

[1] Laband, I. p. 196. See also Seydel, *Comm.* p. 126.

the king of Prussia, whoever he may be, is German Emperor, the Imperial Constitution makes no attempt to settle the question of succession to the imperial dignity. The provisions of the Prussian Constitution of 31 January, 1850, with respect to the order of succession to the Prussian throne are therefore decisive of the question of succession to the Kaisership. In other words, there is an indissoluble union between the Prussian crown and the Kaisership. He who is king of Prussia is *ipso facto* German Emperor. Apart from the Prussian crown the imperial dignity does not exist. It cannot be either acquired or laid down, nor can its functions be performed, independently of the Prussian crown. It is, as Laband and Meyer put it, an *accessorium* of the Prussian crown. For this reason the Imperial Constitution lays down no norms for regulating in any wise the matter of succession. To attempt to do so by law would involve an amendment of Art. 11. The imperial dignity follows *ipso jure* the Prussian crown.

The whole question of succession, therefore, is regulated by Arts. 53–58 of the Prussian Constitution. According to the provisions therein made, the crown of Prussia descends by agnatic succession in the Hohenzollern House by primogeniture. The king attains his majority at the age of eighteen. He takes a solemn oath in the presence of both Chambers to maintain inviolate the Constitution of Prussia and to rule in accordance with its provisions and with the laws. The assumption of the title and powers as well as of the rights of the crown does not depend on his taking the oath. While a refusal to take oath would be a serious breach of the Constitution, yet such refusal or an omission to take the oath without urgent grounds would draw after them no legal results. He could not be punished with the loss of his crown, nor could his act be construed as a renunciation of the throne. Just

as little is it to be assumed that the exercise of the right to rule is suspended until the oath is taken. No further oath, swearing obedience to the *Imperial* Constitution, is required. A refusal to take the Prussian oath on succeeding to the Prussian throne would be a matter of Prussia's own internal affairs and would have no legal effect whatever so far as the Empire is concerned.[1]

The determination of the question: Who is German Kaiser? rests absolutely upon the determination of the question: Who is King of Prussia? In the solution of this latter question the Empire has no voice whatever. The Empire, therefore, has no voice in the decision as to who shall be Kaiser. This does not mean that the constitutional law of Prussia extends to the Empire, or that the organs of the Prussian State influence imperial affairs in a legal way. As Laband observes,[2] the provisions of the Prussian Constitution with respect to succession and to the regency apply only to Prussia. The Prussian *Landtag* and the Prussian Ministry act only for Prussia. The erection of a regency in Prussia is exclusively an action of the Prussian State. But the imperial law connects the acquisition of the imperial title with the acquisition of the Prussian crown, by force of an objective legal principle whose operation is wholly withdrawn from the sphere in which the Prussian *Landtag* exercises its will, and at the same time takes place without any act of will on the part of the *Bundesrat* and *Reichstag*. The legal interest of the Empire is limited to a single point: that the same person who exercises the rights of the Prussian crown shall be the person who exercises the rights and authority granted to the *Praesidium*. It does not extend to the laying down of rules according to which the Prussian crown shall be acquired.

[1] See Fischer, *op. cit.* pp. 47, 48.

[2] Laband, I. pp. 200–201.

The rights of the imperial dignity attach to the Prussian crown, not to the person of the ruling monarch. Should occasion for a regency occur in Prussia, the exercise of the imperial powers would pass to that person who, for the time being, exercised the rights of the Prussian crown.[1] The question of a regency in Prussia is provided for in Arts. 56–58 of the Prussian Constitution. If the king is a minor, or is permanently hindered from ruling in person, then that agnate to whom the throne would next descend, if he be of age, assumes the regency. He must at once summon the legislative Chambers, who, in joint session, shall take action upon the question of the necessity for a regency. If there is no agnate of full age available, and no law already on the statute books provides for such an emergency, then the Ministry must summon the Chambers, who, in joint session, shall elect a regent. Until the regent has entered upon his duties, the government is carried on by the Ministry. The regent exercises, in the name of the king, those powers which belong to the crown. He takes an oath, before the united Chambers, that he will maintain the Constitution and rule in conformity with it and with the laws. Until such oath has been taken the Ministry is responsible in every case for all governmental transactions.

The determination of the question of a regency in Prussia also lies wholly outside the sphere of imperial action. It is a matter of Prussian internal affairs, and is therefore settled according to Prussian constitutional law. Nevertheless, he who is regent by reason of Prussian law is also regent of the Empire. Neither the necessity for a regency in the Empire, nor the legal provisions for such cases as the absence of any agnate of proper age, etc., come within the purview of the

[1] See Laband, I. p. 20; Seydel, *Comm.* p. 155; Fischer, *op. cit.* pp. 49, 50; Von Kirchenheim, *Die Regentschaft*, pp. 117–130.

imperial organs. Like the question of succession to the throne, the question of a regency is wholly a Prussian matter. The exercise of the rights and powers of the Kaisership, or of the regency, should such become necessary, attach themselves to a *fact*. Whoever is king of Prussia, or regent of Prussia, is *ipso facto* German Emperor or German regent. Matters of succession and of regency lie wholly outside the sphere of imperial action and are left to the laws governing the Hohenzollern House and to the Prussian Constitution.[1]

The rights of the Kaiser are usually treated by German writers under two heads: *personal* rights and *governmental* rights. First and foremost among the personal rights, or rights to certain honors, is the right to the title "German Emperor." The form of the title was the result of premeditation. It was purposely chosen in preference to the title "Emperor of Germany" and "Emperor of the Germans." Great care was taken not to offend the sensibilities of the other German monarchs by selecting a designation for the *Praesidium* of the *Bund* which would seem to diminish in any way the royal dignity of the other ruling princes or reduce them to even the semblance of subordination to the head of the Empire. The title "German Kaiser" carries with it no idea of territorial domination. The Kaiser is a monarch *in* the Empire, but not *over* the Empire. He is in no sense the *Landesherr* of the Empire. The old feudal conception which reduced the State to a matter of private law, a possession, theoretically at least, of the monarch, finds no footing whatever in the German Empire. The title "German Emperor"

[1] See Schulze, *Pr. Staatsr.* I. pp. 178 ff.; Von Rönne, *Pr. Staatsr.*, Zorn's edition, I. pp. 218 ff. The House Laws have been collected and published with an introduction by Hermann Schulze, *Die Hausgesetze der regierenden deutschen Fürstenhäuser*, 3 Bde., 1885. Consult Bd. III. pp. 535 ff., in connection with Prussian matters discussed in the text.

is an official title, a magisterial title, although the Kaiser cannot strictly be classed among the imperial officials. It is only in matters which are imperial in their nature and relation — not Prussian — that, from a purely legal standpoint, the title can be used.[1]

The bearing of the title "German Kaiser" carries with it the right to the imperial standard and coat of arms.[2] By Proclamation of 18 August, 1871, the Kaiser invested the Prussian Crown Prince with the title: "Crown Prince of the German Empire," with the predicate "Imperial Highness." The title "Crown Prince of the German Empire" was made hereditary. Further, various officials and administrative authorities appointed by the Kaiser are given the predicate "Imperial." This predicate may also be given to private servants of the Kaiser, to officers of the imperial court, and to certain tradesmen, firms, etc., such as the "*Hoflieferanten.*"

The Kaiser also enjoys special protection before the criminal law. He is not responsible in the sense that a court exists before which he may be brought for any act or omission. Moreover, every attempt upon the life of the Kaiser, as well as the murder of the Kaiser, is punishable with death.[3] Acts or words of a scandalous nature directed against the Kaiser are subjected to special penalties.[4]

The Kaiser, as such, receives no income from the Imperial

[1] See extract from letter of Ludwig of Bavaria, already mentioned above in the text, and the Proclamation of Versailles, 18 June, 1871, in which Wilhelm I. announces the assumption of the title for himself and his successors to the Prussian crown "*in allen Unseren Beziehungen und Angelegenheiten des Deutschen Reiches.*" In official documents the title "German Kaiser" is always coupled with the title "King of Prussia." It never appears alone.

[2] See Proclamation of 3 August, 1871 (*RGBl.* p. 318, with correction, p. 458), Nr. 2 and 3. Also Graf Stillfried's work, *Die Attribute des neuen D. Reiches, abgebildet, beschrieben und erläutert*, mit 16 Tafeln, 2 Aufl., Berlin, 1874.

[3] *StGB.* § 80.

[4] *Ibid.* §§ 94, 95.

Treasury. There is no "Civil List." The pecuniary revenues of the Kaiser are bestowed upon him as Prussian king, or come to him from the possessions of the royal house. A fund, however, called the "*Dispositionsfonds*," is placed at his disposal each year as an item of the Budget Law.

The governmental rights and functions of the Kaiser are of a varied nature, falling within the sphere both of legislation and of administration. A detailed account of these rights and functions would necessitate a repetition of much that must appear in the discussion of taxation and customs, military affairs, and other branches of the imperial organization. It is enough here to trace the constitutional rights and functions of the Kaiser as a governmental organ in broad and general outlines.

In the first place, the Kaiser is the sole representative of the Empire so far as other States are concerned. Article 11, Cl. 1, of the Imperial Constitution declares, "The Kaiser shall represent the Empire in international matters and in the name of the Empire shall declare war and make peace, and enter into alliances and treaties with foreign States." In exercising the powers thus laid upon him, the Kaiser is, of course, not left to his own free discretion. The authority vested in him is not an unlimited one. A check upon the exercise of his powers as representative of the Empire is found in the coöperation of the *Bundesrat* and *Reichstag* in certain instances specified in the Constitution. The principal point now brought forward is that the *sole and exclusive* representative of the Empire is the Kaiser. No treaty can be made without him. Neither the *Bundesrat* nor the *Reichstag* nor both together can ignore the Kaiser and enter into contract relations with a foreign State.

In declaring war the Kaiser can act upon his own initiative only in repelling an invasion of German soil. In all other

instances, the consent of the *Bundesrat* is necessary.[1] When a treaty with a foreign State involves matters which, under Art. 4 of the Imperial Constitution, fall within the sphere of imperial legislation, not only is the consent of the *Bundesrat* necessary for their conclusion, but the approval of the *Reichstag* is essential to their validity.[2] The imperial ambassadors, ministers, and accredited representatives of the Empire are appointed by the Kaiser, and the representatives of other States in Berlin are accredited to him. The German consuls abroad are exclusively imperial consuls and are appointed by the Kaiser, after hearing the *Bundesrat's* Committee on Trade and Commerce.[3]

According to Art. 12 of the Imperial Constitution, the Kaiser has the right to convene, open, prorogue, and close the *Bundesrat* and *Reichstag*. So far as the *Bundesrat* is concerned, this right has become practically obsolete, for the reason that that body is now regarded as continuously in session.[4] No annual convening of the *Bundesrat*, as provided for in Art. 13 of the Imperial Constitution, is therefore necessary. The right of the Kaiser to prorogue the *Reichstag* is modified by Art. 26 of the Constitution, which declares that prorogation shall not exceed a period of thirty days without the consent of the *Reichstag* and shall not be repeated during the same session without such consent. While the Kaiser may not dissolve the *Reichstag*, the power to do so being given to the *Bundesrat*, by Art. 24 of the

[1] *RVerf.* Art. 11, Cl. 2. The question whether an attack has been actually made on imperial territory is determined by the Kaiser himself. Were it not so, the right of the Kaiser to assume warlike action in such case becomes absolutely illusory. See Von Jagemann, *op. cit.* p. 106.

[2] *RVerf.* Art. 11, Cl. 3.

[3] *RVerf.* Art. 56.

[4] The same is also true respecting the provisions in Art. 14 as to convening the *Bundesrat* on request of one-third the votes.

Constitution, with the consent of the Kaiser, yet in actual practice the Kaiser does dissolve the *Reichstag* with the consent of the *Bundesrat*. Moreover, the Kaiser may not summon the *Reichstag* unless the *Bundesrat* is also convened.[1] Should the *Reichstag* be dissolved, a new election must be held within thirty days and the new *Reichstag* convened within sixty days of the date of dissolution.[2]

Bills passed by the *Bundesrat* are laid before the *Reichstag* in the name of the Kaiser. Measures which have passed both legislative bodies are engrossed and published by the Kaiser in the name of the Empire. In the matter of engrossing and publishing the laws thus passed by the *Bundesrat* and *Reichstag*, the Kaiser has no discretion. It is generally admitted, however, that in performing the legislative functions assigned to him under the Constitution, the Kaiser has the right to satisfy himself that the *formal* requirements have been met in the passage of the bill, and that he may refuse to publish a law which, in his judgment, is formally defective. He may not refuse on the mere ground that the *content* of the law is repulsive to him, or that it is a piece of bad legislation.

The Kaiser, as such, has no right of initiation in the matter of imperial legislation. This, at least, is the theory. As a fact, however, this rule is constantly violated in practice, and one may speak of a right of initiation on the part of the Kaiser as a "convention" of the Constitution, or, better, as part of the "unwritten Constitution" of the Empire. Constitutionally the Kaiser has no veto. He does possess a practical veto as king of Prussia, controlling the Prussian votes in the *Bundesrat*. That lies wholly outside of his sphere of action as Kaiser.

The Kaiser not only publishes the laws of the Empire, but

[1] *RVerf.* Art. 13. [2] *Ibid.* Art. 25.

also supervises their execution.[1] This supervision is nowhere defined in the Constitution. It does not involve any independent right of issuing ordinances on the part of the Kaiser, whereby he may interfere in the activities of the several States to whom the execution of the imperial laws is intrusted, by the direct issuance of ordinances remedying any defect or neglect on the part of the State officials. The right of the Kaiser to issue ordinances is limited to such ordinance power as may be given him by the Constitution or by specific imperial laws. Many such laws, however, are now on the statute books, granting to him the power to keep a check on or exercise a species of control over those State officials in whose hands the execution of the imperial laws is placed. Nor may the Kaiser *immediately* compel the proper execution of the imperial laws. By means of imperial officials, whose duty it is to inspect the work of the State officials, he obtains reports of the manner in which the imperial laws are carried out by the various States, but he has no disciplinary or police power by means of which he may force the State officials to properly perform their duties to the Empire. Should any State neglect to carry out the imperial laws or prove refractory, the Kaiser may, as a last resort, bring the matter to the attention of the *Bundesrat*, in whose hands is the power to issue an "Execution." Such an "Execution" would be carried out by the Kaiser.[2]

The Kaiser appoints the Imperial Chancellor, the sole responsible Minister of the Empire, and may dismiss him at pleasure.[3] Since the Imperial Chancellor is the vital centre of the imperial administration and is also President of the *Bundesrat*, no small power is thus put into the hands of the

[1] *RVerf.* Art. 17. [2] *Ibid.* Art. 19.

[3] *Ibid.* Art. 15. See also *Reichsbeamtengesetz*, 31 March, 1873 (*RGBl.* p. 61), § 25, — found in Triepel, pp. 124 ff.

Kaiser. He becomes virtually director of the general governmental policy. For though as a matter of fact the Imperial Chancellor conducts the business of the imperial government, yet he is the legal instrument and aid of the Kaiser.[1] The Kaiser also appoints all the imperial officials, and he may also retire them.[2] Such appointment and dismissal requires the countersignature of the Imperial Chancellor. That is to say, the heads of the various State departments and all the minor imperial officials are appointed and removed by the Kaiser. This places the administrative hierarchy, from the Imperial Chancellor down, in the hands of the Kaiser. In making these appointments the coöperation of the *Bundesrat* is not necessary. The Kaiser also appoints on motion of the *Bundesrat* the members of the *Reichsgericht*, or Imperial Court.[3] These judges, once appointed, are not subject to removal by the Kaiser at his discretion or even upon motion of the *Bundesrat*. The appointment of the judges is for life, thus insuring the independence of the courts.

In certain instances the Kaiser has the right of pardon. Such power is not conferred by the Imperial Constitution, but by the Code of Criminal Procedure, Sec. 484, which reads: "In matters in which the *Reichsgericht* has passed judgment as a court of first instance, the Kaiser has the right of pardon."[4] In the application of this law, no distinction is made between cases to which the competence of the *Reichsgericht* extends *per se* and individual cases to which that competence is specially extended. Further, the pardoning power of the Kaiser consists only in the right to remit penalty already

[1] Laband, I. p. 211. [2] *RVerf.* Art. 18. [3] *GVG.* § 127.

[4] The competence of the *Reichsgericht* as a court of first instance extends to the trial of cases of high treason and treason in a State where these crimes are directed against the Kaiser or against the Empire. *Gerichtsverfassungsgesetz*, § 136.

imposed by judicial sentence. It does not involve any "*Abolitionsrecht*" or power to "*nolle prosequi.*"[1] According to the Law regulating Consular Jurisdiction,[2] the Kaiser has the right of pardon in criminal cases where judgment has been passed by the consul, or by the consular court acting as a court of first instance. Moreover, the Kaiser may exert the pardoning power in the disciplinary courts and may also mitigate sentence passed by the disciplinary boards.[3] He may also exercise the pardoning power in the prize courts,[4] and in the courts of the Protectorates.[5]

Extensive powers, powers of a monarchical nature, belong to the Kaiser as commander-in-chief of the armed forces of the Empire. These are explicitly treated in a later chapter of this work. The Kaiser has the supervision of the German army, and may at any time satisfy himself by inspection that the organization, formation, equipment, and command, the training of the men, and the qualifications of the officers are up to standard, and that the condition of the several divisions is such as meets his approval. He may correct any defects found as a result of his inspection. It is within the competence of the Kaiser also to determine the strength, composition, and division of the contingents of the army. With him rests the organization of the *Landwehr*, or National Defence, and he also determines the garrisons within federal territory. He may, should occasion arise, mobilize any portion of the troops.[6]

[1] For brief discussion of the pardoning power and *Abolitionsrecht*, see Löwe, *Kommentar zur Strafprozessordnung*, 1900, pp. 26–28.

[2] Law of 7 April, 1900 (*RGBl.* p. 213), § 72.

[3] *RBeamtenges.* § 118.

[4] Law of 15 February, 1889 (*RGBl.* p. 5), § 27.

[5] Law of 25 July, 1900 (*RGBl.* p. 813), § 3. In matters relating to the customs and taxes, the pardoning power remains in the hands of the rulers of the several States. Cust. Un. Tr. of 8 July, 1867, Art. 18 (*RGBl.* p. 81).

[6] *RVerf.* Art. 63.

All the German troops take an oath of allegiance to the Kaiser personally, and are bound by their military oath to implicitly obey his orders. The appointment of commanders of the contingents, of officers commanding more troops than a contingent, and of officers in charge of fortresses belongs to the Kaiser. The appointment of generals, and of officers performing the duties of generals in a contingent, is in each case subject to the Kaiser's approval.[1] All officers appointed by the Kaiser take the oath of allegiance to him.

The German navy is a united one, under the supreme command of the Kaiser, who, as in the case of the army, has charge of its constitution and organization and the appointment of its officers and officials. Both officers and seamen are sworn in the name of the Kaiser.[2] The Kaiser has also the right to construct fortresses, appropriations for the same having been made according to the constitutional provisions in Art. 12.[3] Should the public safety demand it, in federal territory, the Kaiser may proclaim martial law in any part of the Empire.[4]

It will be readily seen that with the supreme control of military and naval matters in the hands of the Kaiser, with a military system which aims to pass the whole able-bodied male population of the Empire through the army, and with the oath of personal allegiance binding officers and men to the Kaiser, the position of the Kaiser as something more than a mere official head of the Empire is tremendously strengthened, and a monarchical tendency finds a ready instrument fitted to its hand.

In conclusion, the Kaiser exercises a monarchical function

[1] *RVerf.* Art. 64. [2] *Ibid.* Art. 53. [3] *Ibid.* Art. 65.
[4] *Ibid.* Art. 68. Certain exemptions in the case of Bavaria and of Württemberg arising out of the "November Treaties" are noted in the chapter on "The Armed Forces of the Empire."

in relation to Alsace-Lorraine.[1] To him belongs the powers usually accorded to the ruler of a State. Strictly speaking, however, the Kaiser is not the *Landesherr* of Alsace-Lorraine. The relation of the Kaiser to the Imperial Territory is based entirely on law.[2] The power exercised in the German protectorates is exercised in the name of the Kaiser.[3]

[1] See Law of 9 June, 1871 (*RGBl.* p. 212), § 3.

[2] See chapter on the "Relation of Alsace-Lorraine to the Empire."

[3] See Law of 17 April, 1886 (*RGBl.* p. 78), § 1; also amendments of 7 July, 1887 (*RGBl.* p. 307); 15 March, 1888 (*RGBl.* p. 71); 2 July, 1899 (*RGBl.* p. 365); 25 July, 1900 (*RGBl.* p. 809); 10 Sept., 1900 (*RGBl.* p. 813); Ordinance 9 November, 1900 (*RGBl.* p. 1005).

CHAPTER IV

THE BUNDESRAT[1]

THE *Bundesrat*, or Federal Council, is an institution peculiar to the constitutional system of the German Empire. No close analogy to it can be found in any other governmental organization. While in some instances resemblances can be traced between the *Bundesrat* and the Upper House in other constitutional governments, yet the similarities are slight and the divergencies so great that one must needs place the *Bundesrat* in a class by itself. It is not an "Upper House," yet it performs functions which usually fall to such a body. An organ of legislation, it has no power of deliberation, but registers the will of the several governments whom it represents and by whom it is instructed. It may make no law without the assent of the *Reichstag*, yet it possesses a wide power of ordinance. Standing for the federal idea in the Empire, it is the place of all places where the individual States may assert themselves, where the play of State interests is adjusted. In short, the *Bundesrat* is the very core of the Imperial Government. It is the centre around which the whole system revolves. For, as Meyer observes, the *Bundesrat* is not a mere congress of ambassadors, like the old

[1] For literature on the subject of the *Bundesrat*, aside from the treatises of the various writers on the Constitution, such as Laband, Meyer, Schulze, Hänel, Zorn, Arndt, etc., see Seydel, *Der deutsche Bundesrat*, in *Holzendorff-Brentano, Jahrbuch für Gesetzgebung*, etc., neue Folge III., pp. 273 ff.; *Comm.*, pp. 131 ff. *et passim;* Laband, Article, "*Bundesrat*," in *Stengel's Wörterb.* I. pp. 284 ff.; Kliemke, *Die Staatstr. Stellung des Brats;* Herwegen, *RVerf. und Bundesrat*, Köln, 1902 (*Doktordissertation*).

Bundestag. In it sit, on the one hand, the leading statesmen of the several States, on the other hand, experienced officials from the various branches of the administration; and by this means the necessary relations between legislation and administration are established, without which the real effectiveness of both is impossible. The same men who coöperate in the *Bundesrat* in the sanctioning of the laws direct the execution of these laws in the several States. Over all the political assemblies of other States, the *Bundesrat* has this advantage: in it are found only men who are in the very midst of the business with which it is called upon to deal. This observation of Meyer must be accompanied by the suggestion that the composition of the *Bundesrat* in which he sees such advantage is a matter of political expediency and not of law. The rulers of the several States are under no *legal* obligation whatever to choose their ministers or other officials as their representatives in the *Bundesrat*. In fact, the choice of the rulers is quite unrestricted.

The *Bundesrat* is composed of representatives of the members of the *Bund*.[1] The number of delegates which each member of the Empire may appoint is determined by the number of votes which it possesses in the *Bundesrat*. Under the constitution of the North German Confederation each State was entitled to that number of votes in the *Bundesrat* which it had in the *Plenum* of the old Diet of the German

[1] There is a difference between German writers on constitutional law as to the content of the term "member of the *Bund*." Meyer, *Staatsr*. p. 388, claims that the members of the Empire are the monarchs of the States and the senates of the three free cities. He cites, in support of his view, Thudichum, *Jahrb. d. D. Reiches*, I. p. 21, note 3; Von Mohl, *Staatsr*. p. 233; Seydel, *op. cit.* pp. 273 ff. See, on the other hand, Laband, I. p. 91; Jellinek, *System*, etc., p. 287, note 1; Anschütz, *Staatsr. in Holz.-Kohler*, II. p. 540, who claim that the members of the Empire are the several States. This is the better view.

Bund.[1] Prussia, originally possessing four votes, received in addition the thirteen votes belonging to Hannover, Kur-Hesse, Holstein, Nassau, and Frankfurt, on the incorporation of those States into its territory, making the present vote of Prussia in the *Bundesrat* seventeen.[2] By the terms of the Customs Union Treaty of 8 July, 1867, Bavaria, originally possessing four votes in the old *Plenum*, received two extra votes in the *Bundesrat* of the *Zollverein*.[3] These votes were retained on the entrance of Bavaria into the Empire. The distribution of votes in the *Bundesrat* to-day is identical with that in the *Bundesrat* of the *Zollverein*, and is as follows: Prussia, seventeen; Bavaria, six; Saxony and Württemberg, each four; Baden and Hesse, each three; Mecklenburg-Schwerin and Brunswick, each two; and the rest of the States, including the three Hanse Cities, each one, making a total of fifty-eight votes.[4]

The members of the *Bundesrat* do not vote as individuals, exercising their own discretion in the determination of matters brought before them. The *Bundesrat* is not, therefore, primarily a deliberative body. The delegates are *instructed*. This instruction is given by the government of the State to which they belong, in the manner provided by the laws of that State.[5] The vote is the vote of the State. Hence

[1] These votes were as follows: Austria, 4; Prussia, 4; Saxony, 4; Bavaria, 4; Hannover, 4; Württemberg, 4; Baden, 3; Kur-Hesse, 3; Hesse-Darmstadt, 3; Holstein, 3; Luxemburg, 3; Brunswick, 2; Mecklenburg-Schwerin, 2; Nassau, 2; Saxe-Weimar, 1; the other 23 states 1 each, making 69 votes in all.

[2] *Verf. d. NGB.* Art. 6.

[3] Cust. Un. Tr. Art. 8, § 1.

[4] *RVerf.* Art. 6.

[5] Meyer, *Staatsr.* p. 389; Laband, I. pp. 223 ff., 93 ff. As to whether the instructions can be made contingent upon the assent of the *Landtag*, there is a considerable dispute. In the affirmative may be cited Laband, *Staatsr.* I. pp. 223 ff. Compare also Zorn, *Staatsr.* I. pp. 132, 168 ff.; Von Kirchenheim, *Lehrb. d. D. Staatsr.*, p. 299. In the negative, Meyer, *op. cit.* pp. 389, 390;

the unit rule prevails, each delegation voting a solid vote. The States are not under compulsion to exercise their right to vote in the *Bundesrat*.[1]

The *Bundesrat* has the right to examine and pass upon the credentials of its members. It has no right, however, to verify the instructions.[2] It is not for the *Bundesrat* to determine whether the vote of a member tallies with the instructions of his government. The *Bundesrat* cannot "go behind the vote." Each member is responsible to his own government alone for the way in which he casts his ballot. When that vote is once cast, the government to which the delegation belongs is unconditionally bound thereby.[3]

Alsace-Lorraine, not being a State, is for that reason not a "member" of the *Bund*. It is Imperial Territory — *Reichsland*. Alsace-Lorraine, therefore, has no claim to a representation in the *Bundesrat*. The *Statthalter* has been given the right, by law, to appoint Commissioners to the *Bundesrat*, who, while they have no authority to vote, are yet entitled to take part in the discussion of matters which affect the interests of Alsace-Lorraine.[4]

Seydel, *op. cit.* p. 277, *Comm.* p. 132; Hänel, *Staatsr.* I. p. 785; *Studien*, I. p. 219; Von Rönne, *Pr. Staatsr.* II. p. 360; Von Sarwey, *Württ. Staatsr.* II. pp. 78 ff.; Schulze, *Staatsr.* II. 52.

[1] Meyer, *Staatsr.* p. 389; see also Laband, I. pp. 219 ff; Seydel, *op. cit.* p. 280. Zorn, *Staatsr.* I. p. 157, seems to hold that in case of refusal to vote an "execution" is justified.

[2] Meyer, *Staatsr.* p. 399; Laband, I. p. 227; Von Rönne, *Staatsr.* I. p. 204; Zorn, *Staatsr.* I. p. 158; Seydel, *Jahrb.* p. 276.

[3] Laband, I. p. 227.

[4] Law of 4 July, 1879 (*RGBl.* p. 165), § 7. The Revised Standing Orders for the *Bundesrat* of 26 April, 1880, § 5, read: "Die durch den Statthalter für Elsass-Lothringen in den Bundesrat abgeordneten Kommissare können an den Berathungen des Bundesrats und seiner Ausschüsse theilnehmen. Sie können im Verlaufe der Diskussion eines auf die Tagesordnung gesetzten Gegenstandes Anträge stellen, auch mit Referaten beauftragt werden." See reprint in Triepel, p. 227.

The opening, proroguing, and closing of the *Bundesrat* is the right of the Emperor alone.[1] While the Emperor *may* summon the *Bundesrat* when he will, yet under three conditions he *must* summon it: at least once a year; when it is requested by at least one-third of the whole number of votes in the *Bundesrat;*[2] and, finally, whenever the *Reichstag* is summoned. The *Bundesrat* may, however, be summoned without the *Reichstag* being called together at the same time.[3]

The *Bundesrat* transacts its business in conformity to its "Standing Orders," adopted 27 February, 1871, revised 26 April, 1880, and further amended 31 January, 1895.[4] The Imperial Chancellor, who is appointed by the Emperor, presides over the *Bundesrat* and conducts its affairs.[5] For this reason the Imperial Chancellor must always be a Prussian delegate. On the one hand, the presidency of the *Bundesrat* corresponds to the praesidial position of Prussia in the *Bund.* On the other hand, the presiding officer of the *Bundesrat*

[1] *RVerf.* Art. 12. In actual practice the summoning of the *Bundesrat* has fallen into disuse, for the reason that the *Bundesrat* is no longer formally closed by the Emperor. Arndt, *Komm.* p. 138, note 2, to Art. 12 of the *RVerf.*

[2] *RVerf.* Arts. 13, 14. That is, it needs 20 votes at least to make a request for a meeting of the *Bundesrat* binding on the Emperor. Should the Emperor fail to fulfil his obligation, the *Bundesrat* has no right to assemble on its own initiative.

[3] *Ibid.* Art. 13. This article states that the *Bundesrat* may be thus summoned for the "preparation of the work." No doubt has been cast, in practice, on the right to summon the *Bundesrat* for the undertaking of such work as might be carried on without the aid of the *Reichstag*, *e.g.* the issuance of ordinances, etc., under Art. 7, Cls. 1, 2. The *Bundesrat* may also remain in session after the closing of the *Reichstag.* Meyer, *Staatsr.* p. 391, note 4; Arndt, *Komm.* p. 139.

[4] These Standing Orders may be found in *Protokolle des Bundesrats*, 1880, Anlage zu § 323; also in Triepel, pp. 227 ff. Triepel calls attention to two reprints which are inaccurate: *Allgemeine Zeitung*, 1880, No. 142, p. 2048, and Von Poschinger's *Fürst Bismarck und der Bundesrat*, IV. p. 205.

[5] *RVerf.* Art. 15.

must be a member of that body. The Imperial Constitution designates the Chancellor as the presiding officer, hence the Chancellor must be a member of the *Bundesrat*. But the Constitution also states that the Chancellor is appointed by the Emperor. The Emperor, however, *as Emperor*, has no right to appoint a delegate to the *Bundesrat*. He may do this only in his capacity as king of Prussia. Hence it follows that the Imperial Chancellor must always be a Prussian delegate to the *Bundesrat*. This is made clearer still by Figure IX of the Bavarian *Schlussprotokoll*, to which reference is made below.[1]

The Imperial Chancellor may appoint, in writing, any other member of the *Bundesrat* as his substitute,[2] in presiding over and conducting the business of the *Bundesrat*. Such an appointment needs no special assent on the part of the Emperor. Should no *Prussian* delegate be available, the right to serve as such substitute falls to Bavaria, according to the *Schlussprotokoll* of the November Treaty with that State.[3] It must not be inferred, however, that Bavaria possesses in any sense the *Vicepraesidium* of the *Bundesrat*. If a Bavarian delegate should be chosen as substitute for the Chancellor and should temporarily act as the presiding officer of the *Bundesrat*, the praesidial rights of Prussia would be in no wise affected thereby. For these rights belong to *Prussia*. They do not attach to the chairmanship of the *Bundesrat*. The momentary substitution of a Bavarian

[1] See, in this connection, Laband, I. p. 255; Meyer, *Staatsr.* p. 391, notes 6 and 7; Hänel, *Studien*, I. pp. 26 ff.; Zorn, *Staatsr.* I. pp. 160 ff.; Von Rönne, *Pr. Staatsr.* I. p. 125. For different views, see Hensel, in Hirth's *Annalen*, 1882, pp. 23 ff.; Bismarck, speech in *Reichstag*, 13 March, 1877 (*Sten. Ber.* p. 127), and speech of 24 January, 1883 (*Sten. Ber.* p. 183) also *Gedanken und Erinnerungen*, II. pp. 397 ff.

[2] *RVerf.* Art. 15, Cl. 2.

[3] *Schlussprotokoll*, Treaty of 23 November, 1870 (*RGBl.* 1871, 23), IX.

delegate for the Prussian leader of the *Bundesrat* would, therefore, transfer no praesidial right whatever, ascribed, by the Constitution, to Prussia.

Every member of the *Bundesrat* has the right to present measures to that body, and the *Praesidium* is bound to submit such measures to discussion.[1] A strict application of this principle would bar the Emperor, as Emperor, from introducing bills into the *Bundesrat.* As king of Prussia, however, he may initiate legislation through the Prussian members. In actual practice, an imperial initiative has developed, measures being introduced in the *Bundesrat* directly by the imperial government.[2] In the various sessions of the *Bundesrat* the principle of continuity obtains. Business unfinished at the end of one session is resumed at that point where it was left when the session terminated.[3] The Constitution fixes no set number as requisite for a quorum. Any least number of members is competent to transact business.[4] In taking a vote, the simple majority decides as a general rule. To this rule, however, two exceptions must be noted: amendments to the Constitution are to be considered lost when fourteen votes in the *Bundesrat* are cast in the negative;[5] and, secondly, where there is a division of opinion with respect to proposed legislation touching military affairs, the navy, the tariff and the consumption taxes on salt, tobacco, brandy, beer, sugar, and syrup, as well as touching the provisions and arrangements proposed for carrying out the tariff and tax laws, the vote of Prussia is decisive if it is cast in favor of

[1] *RVerf.* Art. 7, Cl. 2.

[2] Laband, I. p. 217; Hänel, *Studien*, I. p. 42; Meyer, *Staatsr.* p. 393. Compare Seydel, *Comm.* p. 145;. and Fischer, *Das Recht d. D. Kaisers*, Berlin, 1895, pp. 148 ff. Such measures are treated as Prussian.

[3] Meyer, *Staatsr.* p. 393.

[4] *Ibid.* p. 393; Laband, I. p. 221; Seydel, *Comm.* p. 135.

[5] *RVerf.* Art. 78.

maintaining the *status quo*.[1] Votes not actually present, or represented by proxy, and votes not instructed, are not counted.[2] In case of a tie the praesidial vote, *i.e.* Prussia, decides.[3] Any delegate may appoint a delegate from any other State as his proxy in voting.[4] Where legislative action is taken upon a subject which, according to the provisions of the Constitution, does not concern the whole Empire, the votes of those States alone are to be counted whose interests are affected by the matter in question.[5]

Out of its midst the *Bundesrat* chooses certain Committees, some of them being provided for by the Constitution,[6] others by the Standing Orders.[7] These Committees, which are permanent in character, are twelve in number and are styled as follows: 1. Army and Fortifications; 2. Naval Affairs; 3. Tariff and Taxation; 4. Trade and Commerce; 5. Railroads, Post, and Telegraph; 6. Judicial Affairs; 7. Accounts; 8. Foreign Affairs; 9. Alsace-Lorraine; 10. Constitution; 11. Standing Orders; 12. Railroad Freight Rates. In each of these Committees, at least four States, besides Prussia, must be represented. No State may have more than one vote in any Committee.[8]

In the Committee on the Army and Fortifications, Bavaria, under the Constitution, and Württemberg and Saxony, under

[1] *RVerf.* Arts. 5 and 37.

[2] *Ibid.* Art. 7, Cl. 3.

[3] *Ibid.* Art. 7, Cl. 3. This right to decide in case of a tie is a special privilege of Prussia, and does not pass to the temporary presiding officer, *e.g.* the Bavarian substitute for the Chancellor.

[4] *Geschäftsord.* § 2, Cl. 2, reads: "Jeder stimmführende Bevollmächtigte kann in Verhinderungsfällen den Bevollmächtigten eines anderen Bundesstaats substituiren, die Substitution gilt jedoch nie länger als für eine Sitzung."

[5] *RVerf.* Art. 7, Cl. 4. See, in this connection, Laband, I. pp. 228–229; Meyer, *Staatsr.* p. 394; Zorn, *Staatsr.* I. p. 151; Seydel, *Jahrb.* p. 283, *Comm.* pp. 147 ff.

[6] *RVerf.* Art. 8. [7] *Geschäftsord.* § 17. [8] *RVerf.* Art. 8, Cl. 2.

the Military Conventions, have each a permanent seat.[1] The remaining members of the Committee, and the members of the Committee on Naval Affairs, are appointed by the Emperor. With the exception of the Committee on Naval Affairs, and the Committee on Foreign Affairs, each Committee consists of seven members. The two Committees mentioned as exceptions have five members each. With the exception of these same two Committees, the members of the several Committees are elected by secret ballot.[2] In selecting members of these Committees, it is not the rule to name the individual who is to sit upon the Committee, but to designate the State that shall be represented. In all the Committees, save that on Foreign Affairs, Prussia is not only to be represented, but is to have the chairmanship. Members of the Committees are selected at each session of the *Bundesrat*, or every year at any rate, and the former members are eligible to reëlection.[3] The business of the Committees consists mainly in preparing reports for the *Bundesrat*, and they have the right to call upon such officials as may be necessary to assist them.[4] The Committee on Foreign Affairs occupies a somewhat unique position. Its main function is to furnish the Chancellor information with reference to matters of foreign policy, in other words, to furnish the Chancellor with information which he already possesses. Prussia, since the Chancellor is a Prussian Minister, needs no representation upon the Committee on Foreign Affairs, and is not represented upon it. The Committee consists of delegates from Bavaria, Saxony, and Württemberg, with two additional members, the empty honor of chairmanship falling to Bavaria.[5]

[1] *RVerf.* Art. 8, Cl. 2; Military Conv. with Württ., 21–25 November, 1870, Art. 15; and with Saxony, 7 February, 1867, § 2.
[2] *Geschäftsord.* § 18. [3] *RVerf.* Art. 8, Cl. 2. [4] *Ibid.* Art. 8, Cl. 4.
[5] *Ibid.* Art. 8, Cl. 3. Compare Laband, I. pp. 268, 230 ff.

The member of the *Bundesrat* is not an *imperial official.* He is rather the *Chargé d'affaires* of the State, which he represents with full power. This fact receives a recognition in the Constitution. Article 10 reads: "The Emperor is bound to guarantee the customary diplomatic protection to the members of the *Bundesrat.*" The members of the *Bundesrat,* together with such members of their household as are not Prussian, enjoy the privilege of exterritoriality. They are therefore exempted from Prussian taxation and from Prussian jurisdiction.[1] Moreover, they may not be summoned as witnesses or as experts, during their residence at the place where the *Bundesrat* meets, and brought to another place, without the consent of the ruler of their State.[2] Their general status before the courts is determined by § 15 of the Code of Civil Procedure and § 11 of the Code of Criminal Procedure.

No one can be at the same time a member of the *Bundesrat* and a member of the *Reichstag.*[3] This does not mean that a member of the *Bundesrat* may not be elected to the *Reichstag.* The election of a member of the *Bundesrat* to the *Reichstag* would not be invalid *per se.* But a member of the *Bundesrat* can *accept* a seat in the *Reichstag* only by giving up his seat in the *Bundesrat.* In other words, the Constitution does not deny the eligibility of the member of the *Bundesrat,* but asserts the incompatibility of membership in the *Bundesrat and Reichstag.*[4]

It has already been shown that the German Empire, though made up for the most part out of monarchies, is not itself a monarchy. It is true that the Emperor performs certain

[1] *GVG.* §§ 18–20; Seydel, *Jahrb.* p. 280; Laband, III. p. 369.

[2] *Civilprozessordnung,* §§ 382, Cl. 2, 402; *Strafprozessordnung,* § 49, Cl. 2, 72.

[3] *RVerf.* Art. 9.

[4] Laband, I. p. 291.

functions and exercises certain authorities, which, in a monarchical State, usually fall to the monarch. But, as a matter of fact, all authority exercised by the Emperor is delegated authority. In case of doubt as to where the seat of power lies in any given case, the presumption is always against the Emperor, not in his favor. He is not the "*Träger der Staatsgewalt.*" In other words, sovereignty does not lodge with him. The "bearer of the power of the State" is the *Bundesrat.* Sovereignty lies in the "totality of the allied governments." [1]

In the general organization of the German government, the *Bundesrat* plays a triple part. First and foremost, of course, it is an organ of legislation. But its activity is not exhausted by this function. It is an administrative organ and a judicial organ as well. The main work of the *Bundesrat,* under the Constitution, is legislative. Primarily, therefore, it is an organ for making laws. Its coöperation in matters that properly belong to the government, *i.e.* matters which deal with the administration and application of the law rather than the making of it, is the exception rather than the rule, and extends only so far as is laid down by law.[2] Each of these three functions must be briefly treated in turn.

I. *The legislative function of the Bundesrat.* In Art. 5 of the Imperial Constitution it is expressly declared that "the legislative power of the Empire shall be exercised by the *Bundesrat* and *Reichstag.*" This is further supplemented by Art. 7, Cl. 1, 1), which reads, "The *Bundesrat* shall take action upon the measures to be proposed to the *Reichstag,* and upon

[1] Bismarck, in a speech before the *Reichstag,* 19 April, 1871, said: "Die Souveränetät ruht nicht beim Kaiser; sie ruht bei der Gesamtheit der verbündeten Regierungen." See Kohl, *Polit. Reden des Fürsten Bismarcks,* V. pp. 39 ff.

[2] Laband, I. p. 232. Compare Seydel, *Jahrb.* p. 284.

the resolutions passed by that body." Further, all laws must be engrossed and published by the Emperor. The *Bundesrat*, therefore, is not the sole organ of legislation. No law can be promulgated without the consent of the *Reichstag*. This consent, however, does not in any sense partake of the nature of a *sanction*. It is rather a necessary condition preliminary to the imparting of the sanction. The sanction itself is an act of the *Bundesrat*.

While the right of initiation belongs to the *Reichstag* as well as to the *Bundesrat*, measures, as a general rule, are introduced in the latter body. A bill which has passed the *Bundesrat* is transmitted to the *Reichstag* for its action, and is then returned to the *Bundesrat* for final determination. In other words, the bill does not pass from the *Reichstag* to the Emperor for his signature. It goes back to the *Bundesrat* for a second action. In this second action the measure receives the *sanction*, without which it is no law. The sanction, therefore, is not imparted by the Emperor, but by the *Bundesrat*. "As in an individual State the monarch is the bearer of the power of the State, so in the Empire the totality of the allied governments appears as the bearer of the power of the Empire. It is to be regarded as the holder of the legislative authority. Its sanction imparts to a measure the character of law. This totality of the allied governments is represented, however, by the *Bundesrat*. The sanction, therefore, takes place through a resolution of the *Bundesrat*. The consent of the *Reichstag* is simply a prerequisite to the imparting of the sanction. Even a bill which has been sent by the *Bundesrat* to the *Reichstag* and accepted by that body, without amendment, needs, in order to become law, the further acceptance of the *Bundesrat*." [1] In its determination

[1] Meyer, *Staatsr.* pp. 523–526. For an extensive literature upon the subject, see Meyer's note 4. Compare Laband, II. p. 31.

with reference to measures to be laid before the *Reichstag*, and with reference to bills passed by that body, the *Bundesrat* is free so far as any legal restrictions are concerned. It may accept or reject as it sees fit. So far as legislation is concerned, then, the function of the *Bundesrat* is a double one: it takes part in determining the *content* of the law, and it imparts the *sanction* to the law.

II. *The administrative function of the Bundesrat.* The *Bundesrat* is not an administrative authority — "*Administrative Behörde*" — in the strict sense of the term.[1] It shares in the administration, however, by means of certain ordinances which it is empowered to issue, under certain conditions.

In the first place, the Imperial Constitution grants to the *Bundesrat* the power, and lays it under obligation as well, to "take action upon the general administrative provisions and arrangements necessary to the execution of the imperial laws, so far as no other provision has been made by law."[2] That is to say, where a law does not, in the text of it, make the provisions necessary to its execution, and does not delegate the power to make such general administrative arrangements to some other organ, the determination of such general administrative provisions falls to the *Bundesrat.*

In the second place, the Constitution further provides that the *Bundesrat* shall take action with respect to the "remedying of defects which may be disclosed in the execution of the imperial laws or of the aforesaid provisions and arrangements." The idea seems to be this: the *Bundesrat* has a

[1] Laband, I. p. 234, note 1, cites *Reichsgericht* (*Entsch. in Strafsachen*, Bd. VII. p. 382) in which the court holds that the *Bundesrat* is not a *Reichsbehörde* in the sense in which that term is used in *StGB.* §§ 196, 197, but a *politische Körperschaft.*

[2] *RVerf.* Art. 7, Cl. 1, 2).

power of curative action with respect to certain formal defects in the imperial laws. No authority is given to the *Bundesrat* to remedy "bad legislation." The remedy in such cases is a new law secured by the ordinary method of legislation. The *Bundesrat* has no power to revise and reconstruct the content of a law. In other words, the *Bundesrat* cannot remedy unwise or vicious legislation by the mere exercise of its ordinance power under the Constitution. Defects in the laws, however, arising from the lack of adequate provision for the execution of the law, or from the obscurity of such provision as may have been made, may be cured by the *Bundesrat* by the issuance of ordinances which either supply the administrative provisions lacking or amend and alter those provisions which exist. Such power on the part of the *Bundesrat* is implied in Art. 7, Cl. 1, 2), discussed in the preceding paragraph. Wherein, then, does the authority granted the *Bundesrat* by Art. 7, Cl. 1, 3), differ from that granted by Cl. 1, 2)? What are the "defects" to be remedied by the *Bundesrat*, which are not covered by the power to issue "general administrative ordinances"? In a word, the difference would appear to lie here: Clause 1, 2), provides for the remedying of defects in the *form* of the laws. By this clause the formal administrative defects of the law are to be cured. Clause 1, 3), goes to the cure of defects which are discovered in the *actual execution* of the law. The *Bundesrat*, that is, may not only supply by ordinance certain administrative regulations which may be wanting in the law, and better such regulations as may be defective or obscure, but may also exercise a sort of *supervision over the execution of the law*. The meaning of Cl. 1, 3), can scarcely be understood apart from a knowledge of its historical development. This historical development is briefly traced by Laband, I. pp. 286 ff., whose line

of argument is closely followed in the succeeding paragraphs.

In the old *Zollverein* all the States composing the Union were sovereign and independent. Each State levied and administered its own customs and revenues. It was to the interest of each State that these matters should be administered in conformity to the provisions of the Customs Union Treaty. To this end an arrangement was developed by which the tariff and revenue authorities of the several States came under the control of certain plenipotentiaries, appointed by the States. When these plenipotentiaries discovered a misapplication of the provisions of the treaty or a defect in the execution of its stipulations, due notice was given, and in case the matter was not remedied by the proper authorities of the State involved, it was brought to the attention of the Conference of the Customs Union for its discussion and final adjustment. Since, from the international character of the *Zollverein*, unanimous consent was requisite to the validity of any action taken by the Conference, there was no necessity for a careful definition of its competence. It seemed sufficient to assign to this Conference of delegates, "the negotiations with respect to all complaints and defects which were noticed in relation to the execution of the fundamental agreement."[1]

On the founding of the North German Confederation, the administrative organization which had thus arisen in the *Zollverein* remained essentially unchanged, except that the delegates to whom were assigned the control or inspection of the customs and revenue matters in the several States were now appointed by the *Praesidium*. In Art. 37 of the Constitution of the North German Confederation, the *Bundesrat* was given, in Cl. 1, 1), a coöperation in the issuing of

[1] Customs Union Treaty of 16 May, 1865, Art. 34 *a*.

tariff and tax laws and in the conclusion of treaties affecting commerce; in Cl. 1, 2), it was empowered to issue administrative ordinances, and in Cl. 1, 3), it was granted the power to take action "with respect to defects which might appear in the execution of the common legislation (Art. 35)." Article 35 refers wholly to the power of the *Bund* to legislate in customs matters and in matters relating to taxation. The power of the *Bundesrat*, therefore, to cure "defects" would seem to be limited to those defects which developed in the execution of the tariff and tax laws falling within the competence of the Confederation. Article 8, § 12, of the Customs Union Treaty of 8 July, 1867, repeats the same declarations, and they are taken up into the Imperial Constitution with such changes only as were necessary in the revision of it. The *Bundesrat* of the *Zollverein* was at the same time the direct heir of the Conference, only freed from the necessity for unanimous consent in order to conclude business.

In Art. 36, Cl. 2, the Imperial Constitution grants to the Emperor the right to supervise the carrying out of the proper legal provisions touching matters of tariff and taxation, by the State authorities. This supervision is exercised through officials appointed by the Emperor after coming to an understanding with the committee of the *Bundesrat* on customs and revenues. These officials are coördinated with the customs and tax officials and with the Directive Boards of the State. Clause 3 of Art. 36 of the Imperial Constitution says, "Reports made by these officials with respect to defects in the execution of the common (*gemeinschaftliche*) laws (Art. 35) shall be laid before the *Bundesrat* for action."

There is no question here as to the relation between the Emperor and the *Bundesrat*. So far as the supervision of the individual States is concerned, the Emperor has the right to appoint the imperial customs inspectors and deputies, and

to place them side by side with the officials of the State. The material decision, however, over the reports which these officials make, and the securing of a fair and equitable administration and interpretation of the customs and revenue laws, is handed over to the *Bundesrat.* In this respect the *Bundesrat* has taken the place of the old Customs Conference, save that its decisions no longer have the character of international treaties, but rather that of the findings of a supreme authority. In customs and revenue matters, the *Bundesrat* is a central administrative board of the Empire, a board of supervision standing over the administrative authorities of the several States, and which, like the supreme administrative court, sees to it that the self-administration left to the individual States shall not, in matters of customs and revenue, lead to an unfair administration or interpretation of the imperial laws.

In the revision of the Imperial Constitution which was agreed upon at Versailles during the transactions with the South German States, in the addition to the declaration contained in the Customs Union Treaty, Art. 7 of the Constitution was determined upon, fixing the matters to be subjected to the action of the *Bundesrat,* and is incorporated in the present wording of that instrument. Even before the conclusion of the treaty with the South German States, the practice had arisen in the North German Confederation of laying before the *Bundesrat* cases in which there was a question respecting the administration of the imperial laws or doubts as to the application of them.

It will be seen, therefore, that the powers of the *Bundesrat* have not been essentially extended by Cl. 1, 3), of Art. 7 of the Imperial Constitution. They have, however, acquired a constitutional basis which, under the Constitution of the North German Confederation, they possessed only with

reference to customs and revenue matters. The matter may be summed up in a word defining the relation of the Emperor to the *Bundesrat* with respect to supervision of the execution of the laws. The Emperor appoints the officials necessary for supervising the acts of the several States in carrying out the imperial laws; while the *Bundesrat* renders the material decision with respect to the interpretation or application of the imperial laws, or with respect to some general provision for curing defects which may emerge in the execution of imperial legislation. This remedy is applied, of course, through the Imperial Chancery.

It need scarcely be added that the power of the *Bundesrat* does not extend so far as to supersede or supplant the functions and authority of other imperial organs, especially of those imperial boards whose competence extends to the rendering of judicial decisions in administrative matters and in suits at law. The competence of the *Bundesrat* finds a limit in the right of self-administration of the individual State. The *Bundesrat* does not constitute a superior instance above the central authorities of the States, before which may be drawn individual cases for definite determination. The *Bundesrat* cannot set aside a judgment of the State, nor can it either convict or acquit. It has no power to instruct the authorities of the individual State. It can only make claim of the right to decide how far the general duty of every State to observe the imperial laws bears upon the special point laid before it.[1]

Further, the *Bundesrat* performs a part in the appointment of certain imperial officials. In no case does the *Bundesrat* appoint. That is the prerogative of the Emperor. But in certain classes of officials the *Bundesrat* directly chooses the

[1] See further, with respect to the ordinance power of the *Bundesrat*, Meyer, *Staatsr.* pp. 540 ff.; Hänel, *Staatsr.* I. pp. 289 ff.

persons to occupy the position, while the Emperor goes through the merely formal ceremony of appointing the individuals thus selected. In other cases, the Emperor appoints by and with the consent of the *Bundesrat* or one of its committees.[1]

In certain governmental acts of the Emperor, the *Bundesrat* has also a power of limitation. The consent of the *Bundesrat* is necessary in declaring war unless an attack has been made upon the territory or coast of the Empire;[2] and in concluding treaties with foreign States, so far as they relate to matters which, under Art. 4 of the Imperial Constitution, fall within the competence of imperial legislation.[3] The consent of the *Bundesrat* is also required in carrying out an "execution" against one of the States of the Empire,[4] and in dissolving the *Reichstag*.[5]

The *Bundesrat* also occupies a peculiar position with respect to the financial affairs of the Empire.[6] The fixing of the imperial budget in the form in which it is to be laid before the *Reichstag*, as well as the decision with respect to amendments proposed by that body, the granting of a loan as well as the assumption of obligations which shall burden the Empire, fall within the scope of the activity of the *Bundesrat*, inasmuch as matters of this sort are determined by way of legislation. Moreover, the *Bundesrat* has to audit the accounts which the several States carry with the Empire in matters of customs and revenue, and to fix the amount which

[1] See *RVerf.* Art. 36 and Art. 56. Also Law of 4 July, 1688 (*BGBl.* p. 433), § 2; *GVG.* § 127 and § 150; Law of 6 June, 1870 (*BGBl.* p. 368), § 42; 31 March, 1873 (*RGBl.* p. 68), § 39; 23 May, 1873 (*RGBl.* p. 120), § 11; Bank Law of 14 March, 1875 (*RGBl.* p. 184), § 27, Cl. 3; Law of 6 July, 1884 (*RGBl.* p. 102), § 87; Stock Exchange Law of 22 June, 1896 (*RGBl.* p. 157), § 3 and § 17, Cl. 2.

[2] *RVerf.* Art. 11, Cl. 1.

[3] *Ibid.* Art. 11, Cl. 2.

[4] *Ibid.* Art. 19.

[5] *Ibid.* Art. 24.

[6] See Laband, I. p. 241.

is due to the Imperial Treasury from the treasury of each State.[1] The Imperial Chancellor is bound to lay before the *Bundesrat*, for its discharge, an annual statement of the expenditure of all the imperial income.[2] It is further provided by law that three members of the *Bundesrat* shall belong to the Imperial Debt Commission[3] and that the *Bundesrat* shall appoint three members of the Board of Governors of the Imperial Bank, as well as nominate its president and the members of its directorate. The *Bundesrat* may designate certain of the larger cities in which a branch of the Imperial Bank may be located. The by-laws of the Bank require the consent of the *Bundesrat* before they are promulgated by the Emperor.[4] The disposition of the funds of the War Treasure is made contingent upon the consent of the *Bundesrat*, and the Imperial Debt Commission has to make a yearly report to that body as to the condition of the funds in the War Treasure.[5] The *Bundesrat* determines the manner in which gold shall be coined,[6] and has extensive powers in adjusting claims for compensation arising from military requisitions in time of war.[7] Moneys received from the sale of fortifications no longer used, or from the sale of real estate in possession of the imperial administration, can be spent only with the consent of the *Bundesrat*.[8]

In numerous other matters the imperial laws invest the *Bundesrat* with various powers in the determination of special

[1] *RVerf.* Art. 39.

[2] *Ibid.* Art. 72.

[3] Law of 19 June, 1868 (*BGBl.* p. 339), § 4.

[4] Law of 14 March, 1875 (*RGBl.* p. 184), §§ 25, 36, 40.

[5] Law of 11 November, 1871 (*RGBl.* p. 403), §§ 1, 3.

[6] Law of 4 December, 1871 (*RGBl.* p. 405), §§ 6, 7.

[7] Law of 13 June, 1873 (*RGBl.* p. 129), §§ 16, 20, 23. Compare Ordinance of 1 April, 1876 (*RGBl.* p. 137).

[8] Law of 8 July, 1872 (*RGBl.* p. 290), Art. 4, and Law of 25 May, 1873 (*RGBl.* 115), § 11.

questions. Nor is it strange that the body which stands at the very centre of the imperial system, the body which represents preëminently the federal idea, should play a large rôle in the settlement of all affairs which touch the States, as such, and the nation as a whole.

III. *The judicial function of the Bundesrat.* The authority granted to the *Bundesrat* by the Constitution, with respect to curing defects which may develop in the execution of the laws, includes to a certain extent the exercise of an administrative jurisdiction, since such action may involve a judgment on the question as to whether a provision of an imperial law has been properly interpreted or applied.[1] As a general rule, however, such an action on the part of the *Bundesrat* does not have the force of a judicial decision. The matter is finally settled usually by the competent State or imperial administrative board.

In some instances, however, the *Bundesrat* possesses the power to issue decisions which amount practically to formal decisions of an administrative court. For example, the Law of 30 May, 1873,[2] touching the widening of the gates of fortified towns and the approaches leading to them, declares that "the decision as to whether, and as to what widenings are necessary in the interests of traffic and permissible from a military standpoint, shall be rendered, in last instance, by the combined Committees of the *Bundesrat* for Trade and Commerce and for the Army and Fortifications."

Moreover, the *Bundesrat* has the final decision on appeal made from a refusal to grant permission for buildings and construction in the naval ports of the Empire, and the settlement of controversies between the Naval Office and the government of Oldenburg with respect to the erection of

[1] See Laband, I. p. 244.

[2] *RGBl.* p. 124.

works in the Oldenburg territory of Jade harbor.[1] It also decides certain matters concerning the Imperial Insurance Office,[2] and certain matters touching the retirement and pensioning of imperial officials.[3] In administrative controversies within the jurisdiction of the Consular Courts, the decision in first and last instance is to issue from the *Bundesrat*.[4]

Article 19 of the Constitution provides that where a State refuses to fulfil its constitutional obligations toward the Empire, it may be compelled to perform its duties by means of an "execution." The decision as to whether such an "execution" is to be carried out and how it shall be done belongs to the *Bundesrat*. The execution is actually carried out by the Emperor. The "execution" is, in fact, an act of administrative justice. It involves a judicial decision on the part of the *Bundesrat* as to whether the State has fulfilled its obligations as a member of the Empire. An affirmative decision partakes of the nature of a *judicial sentence*.[5] In fact, as Hänel observes, there is a double decision; the judgment which legally determines the constitutional duty of the State in the matter under consideration, and the executory judgment, in case it is found justifiable, which in this particular instance presumes that the State has not satisfied fully the prior decision as to its constitutional duty in the premises.[6]

Again, the *Bundesrat* is the highest appellate instance in case a State refuses or denies justice.[7] Article 77 of the Con-

[1] Law of 19 June, 1883 (*RGBl.* p. 105), §§ 3, 5.

[2] Law of 30 June, 1900 (*RGBl.* p. 335), §§ 39, 50, also 28.

[3] Law of 31 March, 1873 (*RGBl.* p. 61), §§ 39, 51, 52, 66, 68.

[4] Law concerning Consular Jurisdiction, 7 April, 1900 (*RGBl.* p. 213), § 23, Cl. 2.

[5] Laband, I. p. 245, and in Hirth's *Annalen*, 1873, pp. 485–486; Arndt, *Komm.* p. 150; compare also Seydel, *Jahrb.* pp. 287 ff., and *Comm.* p. 189. In answer to Seydel, see Meyer, *Staatsr.* Sec. 212, note 14.

[6] Hänel, *Staatsr.* I. p. 448.

[7] See Laband, I. p. 245, note 4; Hänel, *Staatsr.* I. pp. 736 ff.

stitution reads, "If, in one of the States of the Union, justice shall be denied, and no adequate relief can be secured by legal measures, it shall be the duty of the *Bundesrat* to receive substantiated complaints concerning the denial or obstruction of justice, which are to be tested by the constitution and the existing laws of the respective States of the Union, and thereupon to secure judicial remedy at the hands of the State government which has given occasion for the complaint." In making its decision in such a case, the *Bundesrat* has simply to follow the principles of law, and is bound by the terms of Art. 77 to decide such complaints in accordance with "the constitution and laws of the States concerned." The *Bundesrat* has a right to secure the opinion of a court or of other professional experts in the matter.[1] The determination of the question as to whether the state of facts set forth in the complaint is proven, is a judicial decision.

According to the provisions of Art. 76, Cl. 1, of the Constitution, the *Bundesrat* may determine controversies between the several States, in so far as these disputes do not fall within the sphere of private law, and hence within the jurisdiction of the competent courts. In taking cognizance of such controversies, the *Bundesrat* does not act on its own initiative. It acts only on the appeal of one of the parties.[2] "Article 76 does not propose to clothe the *Bundesrat* with exclusive jurisdiction over controversies between the German States. It would simply insure a means by which peace may

[1] Laband, I. p. 245, note 5. On account of the regulation of the judicial organization and procedure by imperial law, Art. 77 has lost its practical significance so far as the ordinary controversial jurisdiction is concerned. See further Hänel, I. pp. 736 ff.

[2] *RVerf.* Art. 76, Cl. 1. The *Bundesrat* has taken the place of the old *Austrägalinstanz*, under the former *Bund*. Article 76, Cl. 1, is based on Art. 11, Cl. 4, of the *Bundesakt* of 8 June, 1815. Von Meyer, *Corp. Jur. Confoed.* II. p. 5; also Binding, *Staatsgrundgesetze*, Heft 3, p. 28.

be preserved among the States in all cases. And, since war between the States of the Empire is absolutely barred, there must be an instance with power to settle differences when all other permissible means of peaceful solution have been exhausted. Hence the jurisdiction of the *Bundesrat* is not set up if neither of the contesting States requests its interference." [1]

The controversies which may thus come before the *Bundesrat* for settlement, under the Constitution, are contests between *States* as such. Disputes over internal constitutional questions and controversies over the private rights of princes would not ordinarily fall within the terms of Art. 76, Cl. 1, though circumstances may be easily conceived in which they would properly come before the *Bundesrat* for decision.[2]

"In disputes relating to constitutional matters, in those States of the Union whose constitution does not designate an authority for the settlement of such controversies, the *Bundesrat* shall, at the request of one of the parties, endeavor to effect an amicable settlement, or, if this is unsuccessful, to settle the matter by imperial legislation." [3] The interference of the *Bundesrat* is made contingent here upon the appeal of one of the parties to the controversy. If, however, the dispute should be of such a nature that the State was prevented from fulfilling its proper duties under the Constitution, the *Bundesrat* might unquestionably interfere on its own initiative, — not under Art. 76, Cl. 2, but under Art. 19 of the Constitution.[4] By "disputes relating to con-

[1] Laband, I. p. 247.

[2] If, for instance, they involved the fulfilment of treaties between the States, or if claims were made by one State to part of the territory or domain of another State. See Hänel, *Staatsr.* I. p. 573.

[3] *RVerf.* Art. 76, Cl. 2.

[4] Laband, I. p. 248.

stitutional matters" are meant controversies arising between the government and the "Estates" (*Stände*).[1]

It may be laid down as the principle controlling the action of the *Bundesrat* that in all cases where the dispute affects merely the internal affairs of the individual State, and does not affect the relation of the State to the Empire, the *Bundesrat* may not interfere, unless requested to do so by one of the parties concerned. Nor may the *Bundesrat* intervene so long as there remains an authority, under the constitution of the State, or under a State law, vested with the competence to settle controversies of that nature. The *Bundesrat* may be appealed to by one of the parties provided no such competent authority exists, but it is not the sole arbitrator in the settlement of controversies over the internal affairs of the State. The parties may attempt to reach a settlement through an arbitrator agreed upon between them. In such case the *Bundesrat* has no right to interfere on its own initiative. The right of the *Bundesrat* to assume jurisdiction is merely a contingent right, and becomes operative only through the appeal of one of the parties.

If the *Bundesrat* is not able to arrange an amicable settlement of the matter under dispute, a final determination may be had by means of imperial law. In such an event, the *Reichstag* shares in the final adjudication. Such a law is virtually a judicial decision, and in enacting it the legislative bodies perform a judicial function. It may well be remarked such an arrangement is scarcely designed to secure a purely judicial decision. The determination of questions of rights through legislation opens the door to considerations far

[1] Laband, I. p. 248. Article 76, Cl. 2, is based on Art. 1 of the *Bundesbeschluss* of 30 October, 1854, providing for a Court of Arbitration for the settlement of controversies between the governments and the Estates. See text in Von Meyer, *Corp. Jur. Confoed.* II. p. 316.

from judicial and to motives which are much more political than juristic. Laband calls attention to this fact. "*Bundesrat* and *Reichstag*," he says, "have other tasks to perform than the rendering of judgments, and for this reason are organized in a manner least calculated to serve the requirements of the administration of justice. The members of the *Bundesrat* vote according to instructions, and the members of the *Reichstag* vote under the influence of political views and tendencies. When two such bodies, none of whose general aptitudes is suited to play the rôle of a judicial tribunal, must agree unanimously in order to decide a legal controversy, the probability is not very great that the decision will be based simply on legal grounds."

This power to adjust differences, to determine controversies, by means of imperial legislation, in view of the fact that imperial law takes precedence of State law, gives a wide opportunity for the imperial power to meddle deeply in the sphere of State power.[1] For, in the settlement of controversies by means of imperial legislation, an imperial law may not only set aside or amend a constitutional law of the State, but it may amend and even partially annul the constitution of the State. In this respect, Laband calls attention to two inferences worthy of note: first, that the individual State is not sovereign even in that sphere which has been left to its own autonomy, but is actually subordinate here to the power of the Empire; and secondly, that in the activity of the *Bundesrat*, not alone in this particular instance, but as a whole, the legislative, administrative, and judicial spheres are not sharply distinguished from one another, but are merely forms in which the one indivisible power of the State, corresponding to the indivisible personality of the State, comes to expression and is made effective.[2]

[1] See, in this connection, Seydel, *Comm.* p. 407. [2] Laband, I. p. 250.

We come now to a question of considerable importance, viz. the question whether the *Bundesrat* is competent to decide contests over succession to the throne and over a regency, and if so, under what conditions. Over this question a prolific literature has arisen, and it is still a "*Streitfrage*" among German jurists.[1] The recent discussion with respect to the succession in Lippe, has given the controversy an added interest and importance. The writer of the present volume will content himself with reproducing the argument of Laband on the subject, as embodying, on the whole, the most consistent view.[2] The *notes* of Laband are also for the most part subjoined.

No such competence of the *Bundesrat* can be derived from Art. 76, Cl. 2, of the Constitution, for the reason that a contest

[1] In addition to the discussions in the various works on *Staatsrecht*, the following may be cited: Francke, "*Die Nachfolge in Braunschweig als Frage des Rechts*," 1884, in *Deutsche Zeit- und Streitfragen*, 13 Jahrg.; Bornhak, *Die Thronfolge im Fürstentum Lippe*, 1895; Seydel, "*Der Streit um die Thronfolge in Lippe*," 1898, *Deutsche Juristenzeitung*, 3 Jahrg., No. 24; Arndt, "*Die richtliche Stellung des Bundesrats in Verfassungsstreitigkeiten der Bundesstaaten*," *Deutsche Juristenz.*, 3 Jahrg., No. 25, 1898; Kekule von Stradonitz, "*Erörterungen über den gegenwärtigen Stand der Lipp. Thronfolgefrage*," *Arch. f. öff. R.*, Bd. 14, 1899; Binding, "*Bundesrat und Staatsgerichtshof*," *Juristenz.*, 4 Jahrg., No. 4, 1899; Laband, "*Der gegenw. Stand der Lipp. Thronfolgefrage*," *Juristenz.*, 4 Jahrg., No. 18, 1899; Perels, *Streitigkeiten deutscher Bundesstaaten auf Grund des Artikel 76 der RVerf.*, 1900; Seydel, *Artikel 76 der RVerf. und der Lipp. Thronfolgestreit*, an expert opinion furnished to the government of Lippe, found in *Staatsrechtliche und politische Abhandlungen von Max von Seydel*, Neue Folge, 1902; Stoerk, *Die agnatische Thronfolge im Fürstentum Lippe*, 1903; Triepel, *Der Streit um die Thronfolge im Fürstentum Lippe*, 1903; Krick, *Der Bundesrat als Schiedsrichter zwischen deutschen Bundesstaaten*, 1903; Fleischer, *Die Zuständigkeit des Bundesrats für Erledigung von öffentlich-rechtlichen Streitigkeiten*, 1904; Bornhak, "*Zur lipp. Thronfolgefrage*," *Annalen des deutschen Reiches*, 1904, No. 1; Sklarek, *Der Lipp. Erbfolgestreit nach seinem heutigen Stande*, 1904; Anschütz, *Der Fall Friesenhausen*, 1904; Luther, *Thronstreitigkeiten und Bundesrat*, 1904.

[2] Laband, I. pp. 250. ff.

over the succession to the throne is not a "dispute over constitutional matters" in the meaning of this provision, — it is not a controversy between government and Estates, but between several pretenders. That Art. 76, Cl. 2, does not extend to controversies over succession to the throne follows from the wording of the clause, "in those States in whose constitution no authority is designated for the settlement of *such* disputes." Article 76, Cl. 2, therefore, relates only to "such" controversies as *can* be handed over to an authority for settlement. Disputes over the succession to the throne are not of this sort. For, in a monarchical State, every authority derives its competence from the monarch and renders its judgment in his name. The monarch, on the contrary, does not derive his position as supreme head of the State from any judgment or award. There are no authorities in the German States competent to decide questions of succession.

Still more doubtful may be the application of Art. 76, Cl. 1, to the matter of disputes over succession to the throne. This clause presupposes "controversies between different States of the Union." It is therefore not applicable at all, where the contest is between members of the ruling house, no one of which is at the time ruler of another State of the Union, for the dispute is not between "different States." The same is true even when the ruler in one of the German States lays claim to succession to the throne of another German State. The "State" can have no right of succession. That belongs to the prince, and further, only in his capacity as prince; not as the representative of his State, but only by reason of his descent, or by reason of some other legal title founded on his person.[1] If it is assumed, however, that the terms "State of the Union" (*Bundesstaat*) and "member of the Union"

[1] As Binding puts it, the State is not the *subject*, but the throne is the *object*, of the dispute.

(*Bundesglieder*) are identical in the Constitution, and that by "members of the Union" one is to understand the princes in the Union, then one must certainly come to the conclusion that Art. 76, Cl. 1, applies to all the controversies between these princes, which do not partake of the nature of controversies at private law.[1] Taking this interpretation of the clause, the *Bundesrat* declared its competence in the matter of the succession in Brunswick, in 1885, and in that of Lippe, in 1898.[2]

Further, it is beyond question that the *Bundesrat* has the right to pass upon the credentials of its own members. This proof of credentials *can* go so far as to determine whether they have issued from the authority empowered to issue them, and hence may involve a decision as to the right of succession.[3] This decision, however, affects only a single right belonging to the power of the State, — the right to vote in the *Bundesrat.* The pretender rejected by the *Bundesrat* may still maintain possession of the throne, and in case none of the other pretenders should also send plenipotentiaries to the *Bundesrat,* that body would not be in a position to decide the controversy over the succession to the throne in the form of a proving of the credentials of its members.[4]

[1] See the illogical position of Seydel, in *Comm.* p. 132, and in the *Deutschen Juristenzeitung,* III. p. 483.

[2] It may be adduced in favor of this view that Art. 76. Cl. 1, of the *RVerf.* is to be traced back to Art. 11, Cl. 4, of the *Bundesakt* of 1815. The meaning of this is fixed, however, by the *Bundesbeschluss* of 16 June, 1817, to be that the *Bundesversammlung* is the authority before which each and every controversy of the members of the *Bund* one with another is to be brought. See Von Meyer, *Corp. Jur. Confoed.* II. p. 64.

[3] See Kekule von Stradonitz, in *Archiv f. d. off. Recht,* XIV. pp. 9 ff., in answer to objections raised by Seydel, *Comm.* p. 409.

[4] In a way similar to that in which the *Bundesrat* decides upon the admissibility of an accredited plenipotentiary, the Emperor may also prove and decide as to which of several pretenders the rights attaching to the

But apart from the applicability or inapplicability of Art. 76 of the Imperial Constitution, the competence of the *Bundesrat* to decide controversies over succession to the throne follows from the federal relation itself. Every State belonging to the Union must have a head, who fulfils the obligations growing out of membership in the Empire and exercises the corresponding rights. The Empire is not an unconcerned spectator in a controversy over succession, but is immediately and directly interested. No one can be ruler in a German State who is not recognized as a member of the *Bund*. This recognition can be given or refused only by the totality of the States, since it can be given only as a unit. It is impossible that there should be one legitimate ruler for one group of States and another legitimate ruler for another group of States. There must be one ruler who shall be regarded as legitimate by all the States. The organ through which the totality of the German States can make a united and self-binding decision is the *Bundesrat*. The competence of the Empire follows, further, from the fact that every form of physical self-help, especially war, is excluded so far as the relations between the States are concerned, and that the *Bund* was erected for the very purpose of "protecting the federal territory and the rights in force within it." Pretenders to a throne, therefore, can find this protection and the realization of their rights only at the hands of the Empire, and this predicates the proof and determination as to which one of the pretenders is entitled to the throne in case of a contest. But all functions of the Empire for which the Constitution

headship of a contingent and the military honors under the Constitution and the Conventions are due and are to be given by the commanders of the troops. The practical significance of such a decision of the Emperor is not to be overlooked, but it concerns only a part of the rights involved in the position of ruler.

has declared no other organ of the Empire competent, or for which the imperial law has provided no competent organ, are to be performed by the *Bundesrat.*

Since this competence of the *Bundesrat* is not based upon Art. 76 of the Imperial Constitution, but is independent of the provisions of the Constitution, it is also not affected by the hypotheses laid down in that article. It cannot therefore be taken away from the *Bundesrat* by a State law, which refers the dispute to an authority, the Imperial Supreme Court, for example, for decision, for State law cannot arbitrarily diminish or change the rights of the Empire. Nor is the competence of the *Bundesrat* made contingent upon the appeal of one of the parties. The *Bundesrat* may take the initiative, since not only the interests of the pretender but the interests of the Empire itself are concerned.[1]

[1] See the references in Laband, I. p. 253, note 1.

CHAPTER V

THE REICHSTAG

In every constitutional State, a body representative of the people of that State finds a place among the governmental organs. In this respect the German Empire is no exception to the general rule. This popular representative body is known in Germany as the *Reichstag*, or Imperial Diet. It occupies a position in the Empire similar to that occupied by the *Landtag*, or representative body, in the individual State. It is a necessary organ in imperial legislation. Every imperial law requires for its validity the consent of the *Reichstag*, and to it also falls the discharge of the annual accounts.

The principle underlying the constitution and organization of the *Reichstag* is radically different from that upon which the *Bundesrat* is constituted and organized. While in the *Bundesrat* State lines are sharply drawn and the federal element dominates, in the *Reichstag*, except in the mere matter of administrative technique with regard to the election of its members, State lines are ignored and the unitary element is emphasized.[2] For, in the *Reichstag*, it is not the people of

[1] See the study by Seydel, in Hirth's *Annalen*, 1880, pp. 352 ff; Laband, I. pp. 269 ff.; Seydel, *Comm.* pp. 190 ff.; Meyer, *Staatsr.* pp. 399 ff.; Zorn, *Staatsr.* I. pp. 213 ff., and in *Holz. Rechtslex.* III. pp. 409 ff.; Anschütz, in *Holz.-Kohler Encyclop.* II. pp. 550 ff.

[2] The fact that the election districts are constructed with direct reference to the boundaries of the States would seem to conflict with the unitary idea. But this arrangement is based on a principle of administrative convenience rather than on a principle of a political nature. The fact that suffrage does not follow State citizenship, but that any citizen of the Empire may vote in whatever place he may reside, shows that the mere administrative technique does not invalidate the unitary character of the *Reichstag*. See Anschütz, *op. cit.* p. 552.

the individual State who are represented, even by the members elected within the territory of that State and from the midst of its population. Each delegate represents the whole people of the Empire. It was the avowed purpose, in giving this unitary character to the popular representative body, to avoid all possibility of having the larger interests of the nation sacrificed to the interests of the individual State, or made a mere incident or accident in the conflict of dynastic and particularistic politics.[1] This is the end sought in Art. 29 of the Imperial Constitution, which says, "The members of the *Reichstag* are representatives of the whole people and are not bound by orders or instructions." In other words, the members of the *Reichstag* have no local constituency to whom they are in any wise responsible. The *Reichstag* is not an organ of the States. It is an organ of the Empire as such.[2] It is because the *Reichstag* does represent the people as a whole, and not a fraction thereof, that the principle obtains that every German who possesses citizenship in the Empire is entitled, other things being equal, to vote for members of the *Reichstag* in whatever State he may have his residence at the time the election is held, irrespective of whether he is a citizen of that State or not.

While, in the Imperial Constitution, the *Reichstag* is styled the "representative" of the people, yet it does not represent the people as a corporate body. The people do not constitute a juristic person. They cannot as a juristic person impose a command or issue an instruction. The imperative mandate finds no place in the German Constitution. As

[1] See Hahn, *Zwei Jahre*, etc., p. 60.

[2] It will be readily seen why Alsace-Lorraine *cannot* be represented in the *Bundesrat*, and why it must be entitled to elect members to the *Reichstag*. For, while Alsace-Lorraine is not a "member" of the Empire, is not a State at all, and for that reason could not be represented in the *Bundesrat*, yet its population is part of the German people.

Laband observes, "The *Reichstag* is a representative of the people, not with respect to its rights and duties, but only with respect to its construction and composition." It is a representative of the people in the sense that every individual citizen of the Empire who enjoys the right of suffrage may take part in the constitution of this organ of the Empire.

The *Reichstag* consists of a single chamber. Under the provisions of Art. 20 of the Imperial Constitution, the members of the *Reichstag* are chosen by direct and secret ballot, at a general election. The details of such elections are regulated by the Election Law of 31 May, 1869.[1] Every citizen of the Empire, of male sex, who has completed his twenty-fifth year, is entitled to vote for members of the *Reichstag* in that State in which he has his domicile and in that precinct of the Commune in which his domicile is located. He may vote only in one precinct.[2] Certain persons are excluded from voting, though possessing the general qualifications above mentioned. The law designates four classes which are thus cut off from the exercise of the franchise:[3] (1) Persons who are under guardianship or for whom a trustee has been appointed; (2) persons against whose property proceedings in bankruptcy or insolvency have been commenced in the courts, during the continuance of such proceedings; (3) persons who are receiving support

[1] *RGBl.* p. 145 This law went into force in Baden, South Hesse, Württemberg, and Bavaria through the "November Treaties" at the same time with the going into effect of the Imperial Constitution. See the *Bundesverfassung*, Art. 80, I. p. 13; Treaty with Württemberg, Arts. 1 and 2; Treaty with Bavaria, III. § 8. The law went into effect in Alsace-Lorraine on 1 January, 1874, — through law of 25 June, 1873, § 6 (*RGBl.* p. 161, *GBl. f. El.-Loth.*, p. 131), and in Heligoland, on 1 April, 1891, through law of 15 December, 1890, § 4, together with § 2 (*RGBl.* p. 207).

[2] Election Law, § 1 and § 7. If he has several domiciles, he must choose one and vote there only. Seydel, *op. cit.* p. 363.

[3] Election Law, § 3.

from public charities, or who have received such support during the year immediately preceding the election; (4) persons from whom the full enjoyment of their rights as citizens has been withdrawn, as the result of a judicial decision, during the period of such withdrawal, in so far as they have not been restored to the exercise of these rights.[1] If the withdrawal of the full enjoyment of the rights of citizenship is due to political misdemeanor or crime, the right to vote revives as soon as the penalty, imposed in addition to the loss of civic honors, has been paid, or remitted through pardon. Military persons, whether in the army or in the navy, may not vote so long as they are in active service (*bei der Fahne*).[2] This provision covers officers, army surgeons, and the men, but does not apply to the military officials and civil officials of the military administration. The decisive fact is the condition of active service. A furlough or leave of absence enjoyed at the time when the election is held does not release the person on leave or furlough from the operation of this prohibitory provision of the law, since such furlough or leave in no wise terminates the relation of the individual to the active service of the army or navy.[3] In the case of military persons in active service, the right to vote is not looked upon as lost, but the exercise of it is suspended during the period. As the German phrase goes, it "rests." In like manner the exercise of the right of suffrage is denied to persons who, while citizens of the Empire, have no domicile in the territory of the Empire, and to persons who, though entitled otherwise to vote, are not registered in the list of

[1] See *Strafgesetzbuch*, §§ 32–37, also § 45.

[2] Election Law, § 2. The Military Law of 2 May, 1874 (*RGBl.* p. 45), § 49, Cl. 1, denies the right also to vote for State representatives, *i.e.* for members of the *Landtag*.

[3] Seydel, in Hirth's *Annalen*, 1880, p. 360.

qualified voters. That the omission of the name is due to an error makes no difference.[1] The list of voters in every precinct is carefully made up, and is exposed for a sufficient length of time to public inspection to enable every person who is interested to see that his name is included. Should the voter fail to scrutinize the list and should his name be erroneously omitted, he must suffer the consequences of his own neglect by being barred from the exercise of the franchise for that election. The right is not lost, it "rests."

Every German, of male sex, in the whole territory of the Empire, who has completed the twenty-fifth year of his life and who has been a member of a State of the Empire for at least a year, is eligible to membership in the *Reichstag*, provided he is not excluded from the right to vote by § 3 of the Election Law.[2] In order to eligibility, it is not necessary that the person be a citizen of the same State for a year, nor is it required that he be a citizen of the State from which he is elected. He must have been a citizen of the *Empire* for at least a year, and must be a *resident* of the State from which he is elected. The main requirements for eligibility, therefore, are citizenship for a year in the Empire and the possession of the qualifications of a voter under the Election Law. Eligibility, then, is not denied to those persons who, by reason of belonging to the active army or navy, or because of the omission of their names from the list of qualified voters, are temporarily suspended from the exercise of the right of suffrage.[3] Article 9 of the Imperial Constitution closes with the declaration that "no one can be a member of the *Bundesrat* and of the *Reichstag* at the same time." This position is fully justified by the fact that the member of the *Bundesrat* does not vote according to his convictions, but according to

[1] Election Law, § 8, Cl. 2.

[2] *Ibid.* § 4.

[3] Meyer, *Staatsr.* p. 401; Laband, I. p. 291; Seydel, *op. cit.* p. 366, note 3.

his instructions, while the member of the *Reichstag* is free; and, further, the member of the *Bundesrat* acts entirely in the capacity of a deputy or proxy. This declaration of Art. 9 does not, however, render the members of the *Bundesrat* ineligible. The German writers on constitutional law generally agree that ballots cast for a member of the *Bundesrat*, or even for the Imperial Chancellor, are not to be rejected as invalid, nor is the election of a member of the *Bundesrat* void. A member of the *Bundesrat* cannot *serve* as a member of the *Reichstag*. In the event of his election he must choose whether he will resign as member of the *Bundesrat* and accept the election, or whether he will refuse the election and retain membership in the *Bundesrat*.[1]

Officials require no special leave in order to enter the *Reichstag*.[2] There has been some controversy among the writers on German constitutional law as to the meaning of the word "official" in this clause.[3] The question is as to whether it should be made to include persons in the service of the Commune and of the church, persons occupying a notarial position, and all "persons invested with a public office," or whether it should cover only those who are in the service of the Empire or of a State. The point is still a mooted one. Whatever may be ultimately decided with reference to it, all are agreed, at any rate, that all officials of the Empire and of the States are included. The gist of the article is this: When a man has been chosen by the vote of his fellow-citizens to membership in the *Reichstag*, he may not be hindered, in the exercise of the functions thus assigned him, by any supe-

[1] Laband, I. p. 291; Meyer, *op. cit.* p. 402; Seydel, *op. cit.* p. 366, note 4; Zorn, *Staatsr.* I. p. 220; Arndt, *Staatsr.* p. 120, *Komm.* pp. 129, 154, note 4.

[2] *RVerf.* Art. 21.

[3] See Laband, I. p. 312, note 1; Meyer, p. 204; Zorn, I. p. 232; Arndt, *Staatsr.* p. 138, *Komm.* p. 159; Seydel, *op. cit.* p. 404, also *Comm.* pp. 196, 197.

rior to whom he may be subordinated in his capacity as a public servant. "The declaration contains no other doctrine than this, that the official who leaves the service in order to fulfil the choice which has fallen upon him, commits no unauthorized or blameworthy breach of duty as a public servant, and requires no permit from a superior authority as the condition of his entry into the *Reichstag*." [1]

In determining the number of members in the *Reichstag*, the principle obtains that each State shall elect as many representatives as it contains multiples of 100,000 in its population. Should the population of a State fall below this 100,000, the State may elect one member notwithstanding. Further, should the surplus in any State, after dividing its population by 100,000, exceed 50,000, that State may elect an additional member.[2]

By the Election Law of 31 May, 1869, § 5, Cl. 2, the number of delegates to be elected by each State belonging to the former North German Confederation was definitely fixed until such time as it might be changed by subsequent legislation. That is, since the number is fixed and incorporated in the law itself, the apportionment of members does not change automatically, but only through specific legislation. The total number fixed by the Law of 1869 for the States of the North German Confederation was 297, of which Prussia, including the solitary vote of Lauenburg, had 236.[3] Article 20, Cl. 2, of the Imperial Constitution fixed the num-

[1] Laband, I. p. 311.

[2] Election Law, § 5, Cl. 1.

[3] The apportionment was as follows: Prussia, 236; Saxony, 23; Hesse, 3; Mecklenburg-Schwerin, 6; Saxe-Weimar, 3; Meckenburg-Strelitz, 1; Oldenburg, 3; Braunschweig, 3; Saxe-Meiningen, 2; Saxe-Altenburg, 1; Saxe-Coburg-Gotha, 2; Anhalt, 2; Schwarzburg-Rudolstadt, 1; Schwarzburg-Sondershausen, 1; Waldeck, 1; Reuss ä. L., 1; Reüss j. L., 1; Schaumburg-Lippe, 1; Lippe, 1; Lübeck, 1; Bremen, 1; Hamburg, 3.

ber of delegates to be elected by the South German States on their entry into the Empire.[1] To this number fifteen delegates from Alsace-Lorraine were added by the Law of 25 June, 1873, § 3.[2] The whole number, as now fixed by law, is 397. For certain political reasons, the German government has not seen fit to pass a new law, readjusting the representation according to the changes in population which have taken place since the Law of 31 May, 1869. Berlin, with a population of over 2,000,000, still sends a half-dozen delegates to the *Reichstag*.[3] For the purposes of election each State is divided into what are known as Election Circles (*Wahlkreise*), each delegate being elected in a special Circle.[4] A majority of the votes cast is required for an election. Should no candidate receive an absolute majority, a new election is held, in which the choice is confined to one of the two candidates receiving the highest number of votes at the regular election. In case of a tie, the lot decides.[5] All the elections for members of the *Reichstag* are held on one and the same day throughout the Empire. This day is fixed by the Emperor.[6] Upon receiving notification of his election,

[1] The apportionment in the South German States was as follows: Bavaria, 48; Württemberg, 17; Baden, 14; Hesse, south of the Main, 6.

[2] Law on the Introduction of the Imperial Constitution into Alsace-Lorraine (*RGBl.* p. 161, *GBl. für El.-Loth.*, p. 131).

[3] A new apportionment would increase the representation from the large cities, where social democracy is most numerously in evidence.

[4] Election Law, § 6, Cl. 1. That is, the voters of each Circle vote for a single candidate, not for a list of candidates. Each ballot contains but one name, — the *uninominal system*. The boundaries of the election Circles are fixed by imperial law. A list of the Circles, made up in conformity to the Election Law, § 6, may be found in App. C to the *Wahlreglement* of 28 May, 1870 (*BGBl.* p. 289). See also supplementary list for South German States in *RGBl.* 1871, p. 35.

[5] Election Law, § 12. This second election is called a "*Stichwahl.*" For general procedure of election, see Laband, I. pp. 296 ff.

[6] Election Law, § 14.

the successful candidate must signify his acceptance or refusal of the office, and must furnish proof, if he accepts, that he is eligible under the law.[1] A declaration of acceptance must be filed within eight days after the notification. A failure to accept within that time, or an acceptance under protest or with a reservation, is to be held as a refusal, and a new election is to be ordered.[2]

Members of the *Reichstag* are elected for a period of five years, dating from the day of the general election.[3] Membership in the *Reichstag* is terminated, aside, of course, from the death of the member, in four ways: (1) by the expiration of the term, (2) by the dissolution of the *Reichstag* during the term, (3) by voluntary resignation, and (4) by accepting a *salaried* office in the service of the Empire or of one of the States, or by assuming an imperial or State office with which a higher rank or larger salary is connected.[4] In the latter case, however, he may regain his seat through a new election.[5]

"The Imperial Constitution knows no case where a member of the *Reichstag* can be deprived of his seat and vote as a

[1] *Wahlreglement* of 28 May, 1870, § 33.

[2] *Wahlreglement*, §§ 33, 34.

[3] *RVerf.* Art. 24. Originally 3 years, but extended by law of 19 March, 1888 (*RGBl.* p. 10). German jurists are not a unit as to when the term of a member of the *Reichstag* begins. The prevailing view is that given in the text. Meyer, p. 404; Laband I. p. 315, note 1; Seydel, *Comm.* p. 204. Arndt, however, inclines to the view that the term begins with the day on which the *Reichstag* first assembles. *Komm.* p. 163, *Staatsr.* p. 133; Herrfürth, in *Deutschen Juristenzeitung*, III. (1898) p. 2.

[4] *RVerf.* Art. 21, Cl. 2. The seat in the *Reichstag* is not lost, however, by accepting an *unsalaried* imperial or State office, nor is it forfeited by being invested with a higher rank and title *in the same office*. Meyer, *Staatsr.* p. 405. Compare *RVerf.* Art. 21. The decision of the question whether in a given case the conditions which would deprive a man of his seat actually exist, is in the hands of the *Reichstag* alone. Laband, I. p. 315; Seydel, *Annalen*, p. 398.

[5] *RVerf.* Art. 21, Cl. 2.

penalty (*Strafe*). The loss of membership cannot be inflicted through criminal judgment, nor is the *Reichstag* given power to exclude a member because of continued neglect of his duties or because of dishonorable conduct.[1] It is a fair question, however, whether a member who has lost one or more of those qualifications essential to *eligibility*, does not thereby, *ipso facto*, lose his seat and voice in the *Reichstag*. The answer to this question may be in doubt for the reason that the conditions requisite for *becoming* a member of the *Reichstag* need not of necessity be the same as the conditions requisite for *remaining* a member.

"But an affirmative reply to the question may undoubtedly be derived from the very nature of the case, for instance, where a member leaves the country and ceases to be a citizen of the Empire. He who no longer belongs to the German 'people' can certainly not be their representative. If one admits as a fact that the loss of one prerequisite to eligibility draws after it the loss of membership in the *Reichstag*, — *e.g.* the loss of citizenship in the Empire, — logically one must also assume that the same result ensues if any one of the four requisites to the right of suffrage and of eligibility, laid down in § 4 of the Election Law, fails. This is expressly determined by law in the case of a member who has been deprived of his civil rights (*bürgerliche Ehrenrechte*). According to § 33 of the Criminal Code of the Empire, the loss of civil rights involves the loss of those rights derived from public election. So must it also be assumed that a man loses his seat and vote in the *Reichstag*, when proceedings in bankruptcy are commenced against his property or when he

[1] This, of course, does not touch the right of the President of the *Reichstag* to maintain order and to exclude a member from the sitting for gross breach of good order. See *Geschäftsordnung* of the *Reichstag* of 16 February, 1895, § 60 (*Sten. Ber.* 1894–95, p. 946).

draws support as a pauper out of the common or public funds."[1]

Any such case would be decided by the *Reichstag* itself, since it involves the fundamental right to determine its own membership, a right which lies within the competence of the *Reichstag* alone.

The *Reichstag* cannot assemble on its own initiative nor can it take up its work on its own motion. The *Reichstag* is summoned by the Emperor in the name of the allied governments. It is also opened by the Emperor, either in person or by proxy.[2] The summoning of the *Reichstag* takes place by means of an imperial ordinance, with the counter-signature of the Imperial Chancellor. In this matter of summoning the *Reichstag* the Emperor is not left wholly to his own discretion. He must call that body together at least once in every calendar year.[3] He may summon it oftener.[4] The Emperor cannot call the *Reichstag* together without summoning the *Bundesrat*.[5] Since the *Reichstag* cannot meet without the call of the Emperor, any assembling of that body in the absence of such a call would be illegal and its acts void. So far as its competence is concerned, such an assembly would have no more power than any other assembly of citizens.

Further, the Emperor possesses the right to prorogue and to close the *Reichstag*. No such right is inherent in the *Reichstag* itself. It may not, therefore, continue its session after prorogation by the Emperor, and any business transacted by it in such circumstances would be void. Here, too, the Emperor is not left entirely to his own free will. The period

[1] Laband, I. p. 316. Compare also Meyer, *Staatsr.* p. 405; Von Rönne, *Staatsr.* II. p. 250; Seydel, *Annalen*, p. 397.

[2] *RVerf.* Art. 12.

[3] *Ibid.* Art. 13.

[4] Laband, I. p. 317, note 1; Seydel, *Annalen*, p. 406.

[5] *RVerf.* Art. 13.

for which the *Reichstag* is prorogued cannot exceed thirty days, without the permission of the *Reichstag* itself, and prorogation cannot be repeated in the same session.[1] An indefinite prorogation, therefore, is not permissible. The effect of prorogation upon the business of the *Reichstag* is that of a temporary suspension, not that of a complete break. In other words, the prorogation does not set the principle of "discontinuity" in operation. Business left unfinished on the day of prorogation is taken up at the point where it was left, on the resumption of the sittings. With the closing of the session, however, all business not finished on that date fails, and must be introduced *de novo* if it is to be acted upon at all.[2]

The *Reichstag* may be dissolved. It cannot, however, separate on its own motion. This dissolution of the *Reichstag* requires, according to Art. 24 of the Imperial Constitution, a resolution of the *Bundesrat* with the consent of the Emperor.[3] In actual practice, however, dissolution takes place through ordinance of the Emperor with the consent of the *Bundesrat*. With its dissolution, the *Reichstag* ceases to exist and its members revert to private life. A dissolved *Reichstag*, therefore, cannot be again summoned.[4] In case of a dissolution, a new election must be fixed by the Emperor within sixty days from the date of dissolution, and the newly elected *Reichstag* must be summoned to meet within ninety

[1] *RVerf.* Art. 26.

[2] *Geschäftsord. d. Rtags.* § 70. Compare Law of 23 December, 1874, 1 February, 1876, and 20 February, 1876, continuing the Commission on the Code of Criminal Procedure, etc., between the sessions of the *Reichstag*, by special legislation. It is a matter of dispute whether committees may sit during the period of prorogation. For two different views, see Laband, I. p. 318; and Meyer, *Staatsr.* p. 406, note 6.

[3] *RVerf.* Art. 24.

[4] See Laband, I. p. 319; Meyer, p. 405; Seydel, *Comm.* p. 205.

days from the date of dissolution.[1] In other words, when a *Reichstag* is dissolved, a newly elected *Reichstag* must be *assembled* within ninety days. This new *Reichstag* is not elected to fill an unexpired term, but for the full period of five years from the date of the new election. The members of the old *Reichstag* are, of course, eligible to reëlection. The *Reichstag* may be dissolved not only during its sessions, in which case the dissolution carries with it the closing of the legislative period, but also between its sessions. A newly elected *Reichstag* cannot be dissolved, however, before it has assembled for the first time.[2]

Article 27 of the Imperial Constitution provides that the *Reichstag* shall prove the credentials of its members and decide upon the same. It shall regulate the conduct of its own business and its discipline by means of Standing Orders, and shall elect its own President, Vice-President, and Secretary. In the conduct of its affairs, therefore, the *Reichstag* is not subject to the dictation or domination of any other organ of the government. In conformity to the provisions of Art. 27 the *Reichstag* has adopted a *Geschäftsordnung*, or system of Standing Orders.[3] The presiding officer of the *Reichstag* is the President, who is elected at the opening session of the

[1] *RVerf.* Art. 25.

[2] Seydel, *Comm.* p. 206.

[3] *Geschäftsordnung für den Reichstag*, 10 February, 1876. The *Reichstag* of the North German Confederation, which at first used the Standing Orders of the Prussian *Abgeordnetenhaus*, adopted Standing Orders of its own, 12 June, 1868. (See *Sten. Ber.* p. 369.) The first *Reichstag* of the Empire declared, 21 March, 1871, that these Standing Orders were still in force, and they have been tacitly regarded as binding by every successive *Reichstag*. Several new paragraphs which had been inserted occasioned a revision of the Standing Orders in 1876, the date given above. In fact this revision consisted practically of a renumbering of the paragraphs and was a piece of private work tacitly accepted by the *Reichstag*. There has been no formal recognition of it in the proceedings of the *Reichstag*. It has been used in the revised form since 10 February, 1876.

legislative period for a temporary term of four weeks, at the end of which time the election for the remainder of the session takes place. In all the subsequent sessions the election for the term of the entire session takes place at once.[1] The same is true of the Vice-President. The secretary is elected at the beginning of the session for the entire session. An appeal from the decision of the President may be taken only so far as the Standing Orders permit it. The President is also the representative of the *Reichstag* in all official intercourse outside the body.

The *Reichstag* is divided into seven divisions, each having the same number of members so far as an equal division is possible. Every member of the *Reichstag* must belong to one of these seven divisions. These divisions are constituted by lot, immediately upon the assembly of the *Reichstag*,[2] and stand until the *Reichstag*, upon a motion supported by thirty members, resolves to proceed to a new partition.[3] The function of the divisions is to pass upon the credentials of members of the *Reichstag* and to elect members of the several committees.[4] With the exception of the Committee of Elections, the Standing Orders do not provide for any special standing committees, leaving the selection of them as occasion and the business of the *Reichstag* may demand. The Committee on Elections is constituted in each session of the *Reichstag* for the entire session. Theoretically, the committees are made up by the several divisions, each division choosing by ballot an equal number of members for each committee, the majority rule obtaining. As a matter of fact, however, these committees are made up by an understanding between the leaders of the various factions in the *Reichstag*. The function of the committees is the prepara-

[1] *Geschäftsord.* § 11, Cl. 1.
[2] *Ibid.* § 2, Cl. 1.
[3] *Ibid.* § 2, Cl. 3.
[4] *Ibid.* § 26, Cl. 3.

tion of various matters referred to them and the bringing of these matters before the *Reichstag*. The sittings of the committees are not open to the public, but any member of the *Reichstag* may be present, unless the *Reichstag*, by special resolution, excludes its own members.[1]

The first clause of Art. 22 of the Imperial Constitution reads, "The proceedings of the *Reichstag* shall be public." This provision of the Constitution does not, of course, give to any particular individual, or to all individuals, a right of access to the meetings of the *Reichstag*, nor the right to retain a seat once secured, should the President command removal in the interests of order. The conditions of the Constitution are met if some of the public are admitted.[2] Section 36 of the Standing Orders is in direct opposition to Art. 22 of the Constitution. It reads: "The sittings of the *Reichstag* are open. On motion of its President, or of ten members, the *Reichstag* shall go into secret session, in which the first business to be decided is the question of excluding the public." This section is taken bodily from Art. 79 of the Prussian Constitution. Over the question as to whether § 36 of the Standing Orders is not legally without force, German jurists disagree. The prevailing opinion, however, seems rightly to be that § 36 and Art. 22 flatly contradict each other and that § 36 is invalid.[3]

The real publicity is not found, however, in the admission

[1] *Geschäftsord.* § 27, Cl. 5.

[2] As a matter of fact, the number of persons from the general public admitted to the meetings of the *Reichstag* is limited to forty. Each individual seeking admission must apply to the proper official, giving name, occupation, and address. Cards of admission are then issued for the sitting of the following day.

[3] See, however, the report of the sitting of 17 March, 1900, when, during the discussion of the "Heinze Law," proposing certain changes in the criminal code as to matters which it was deemed wiser not to discuss in public, the public was excluded from the sitting. To exclude the public from

of the people to the meetings of the *Reichstag*, but in the publication of true reports of the transactions, as provided for in Art. 22, Cl. 2, of the Imperial Constitution. Such true reports are privileged, whether made orally in public assemblies or circulated in the public press. "True reports of the transactions in the public sittings of the *Reichstag* shall be free from all responsibility."[1]

"The *Reichstag* shall take action by absolute majority. To render such action valid the presence of a majority of the statutory number of members is necessary."[2] In other words, 199 members must be present in order to constitute a quorum. Unless the question is raised, a quorum is always assumed to be present. The presence of a quorum is required only for the passing of acts, *i.e.* for the conclusion of business, not for the mere discussion of it. The question of the presence of a quorum can be raised by any member prior to the vote. It cannot be raised after a vote has been had.[3] The President has no deciding voice. In case of a tie the motion is lost.

In order that the members of the *Reichstag* may be free and independent in the exercise of their functions, certain important provisions are laid down for their protection, in the

the discussion is not the same, however, as to exclude them from the vote. For a brief discussion of the question, see Seydel, *Annalen*, pp. 416–418; Laband, I. pp. 321, 322.

[1] *RVerf.* Art. 22, Cl. 2; *RStGB.* § 12. In a complaint or in judicial proceedings against a person, based on reports of the transactions of the *Reichstag*, the case turns on the question whether the reports are *wahrheitsgetreu*. For discussion of the question of "privilege" with respect to such reports, see Seydel, *Comm.* pp. 199 ff.; Laband, I. pp. 320, 321.

[2] *RVerf.* Art. 28.

[3] Seydel, *Comm.* p. 210; Laband, I. p. 323, note 2. Article 28 formerly contained a Cl. 2, which provided that in matters which touched certain of the States only, and not the whole Empire in common, the vote of the members from those States only should be taken whose interests were affected. This clause was repealed by the Law of February, 1873 (*RGBl.* p. 45).

Constitution and in the laws. These provisions must not be regarded as creating or recognizing *personal rights* of the members of the *Reichstag*, though that view is held by a considerable number of German writers on constitutional law.[1] The aim of legislation of this sort is not to secure legal or other benefits to the individual members of the *Reichstag* personally, but to guarantee to the State the free and untrammelled action of one of its most essential organs. To this end certain impediments are placed in the way of the operation of the criminal law and of the law of criminal procedure. These impediments do not annul or neutralize the laws in these particular instances, but merely delay their operation until such time as they may act with least inconvenience to the State. That is to say, the State places a temporary restraint upon the activity of one organ — the judicial organ — in order to secure the undisturbed activity of another organ — the legislative. To that end it is provided (1) that "no member of the *Reichstag* shall at any time be subjected to judicial or disciplinary prosecution on account of his vote or because of any utterance in the exercise of his functions, or otherwise held responsible outside the assembly."[2] However great may be his political responsi-

[1] See Von Pözl, *Das Bayrische Verfassungsrecht*, etc., p. 129; Von Rönnel, *Staatsr.* I. p. 270; Meyer, *Staatsr.* p. 299; Sontag, *Der besondere Schutz der Mitglieder des deutschen Reichstags*, pp. 20 ff. On the other hand, see Laband, I. p. 329; Seydel, *Annalen*, p. 352, *Comm.* p. 213. Cf. Jellinek, *System des subj. öffentl. Rechtes*, pp. 161 ff.

[2] *RVerf.* Art. 30. This of course does not exempt the member from proper discipline *within* the assembly itself. See § 46 and § 60 of the Standing Orders. For literature on the subject of the immunity of members of the *Reichstag* from criminal prosecution, see Von Rönne-Zorn, *Pr. Staatsr.* 5 Aufl., 1899, I. p. 369, note 7, p. 370, note 1. Also Laband, I. p. 330, note 3. For debate on a bill proposing to give the *Reichstag* power to impose certain penalties upon its members, see *Sten. Ber.* for 1879, pp. 247 ff. This bill passed the *Bundesrat*, but was killed in the *Reichstag*, 7 March, 1879.

bility to his constituents, the member of the *Reichstag* may not be magisterially pursued for anything said or done in that body, in the performance of his duties.[1] (2) "Without the consent of the *Reichstag*, no member of it shall be tried or arrested during the session for any penal offence, unless arrested in the commission of the act or in the course of the following day."

Here also, the case is not dismissed, but trial is postponed in the interests of the State rather than of the individual. This immunity covers the "session" — *Sitzungsperiode* — of the *Reichstag*. That is, it includes not only the "sitting" of that body, but extends from the opening of the *Reichstag* through any and all recesses to the moment when the *Reichstag* is formally closed.[2] The consent of the *Reichstag* is also required for the arrest of one of its members for debt.[3]

"At the request of the *Reichstag* all criminal proceedings instituted against one of its members, as well as every detention on remand and arrest in civil matter, shall be suspended during the session."[4] Further protection is secured to members of the *Reichstag* by Art. 74 of the Imperial Constitution, which provides for the punishment of slander. This article is supplemented by § 106 of the Criminal Code, which imposes a penalty for hindering a member in the dis-

[1] See also *StGB.* § 11, and the *Komm.* of Olshausen on it.

[2] This is the generally accepted view of the German constitutional lawyers. A divergent opinion is held by some of the specialists in criminal law. See Laband, I. p. 332, note 1.

[3] *RVerf.* Art. 31, Cl. 2.

[4] *Ibid.* Art. 31, Cl. 3. Article 31 does not exempt a member from an arrest made in the *execution* of a sentence already imposed, in due process of law. It deals with the primary arrest and preliminary trial incident upon an offence committed, rather than with the aftermath of a trial already judicially had and terminated. Moreover, proceedings are interrupted only *on request of the Reichstag*, and unless such request be made the law takes its regular course.

charge of his duties, by abduction or by threats of bodily or other violence.

Members of the *Reichstag* may refuse jury service and service as *Schöffen*.[1] Members of the *Reichstag* cannot, without the consent of the *Reichstag*, be summoned as experts or as witnesses, during the session, and brought to a place other than that in which the sittings of the *Reichstag* are held.[2]

"The members of the *Reichstag*, as such, may not draw any salary or compensation."[3] Inasmuch as no legal penalty is provided for the infraction of this prohibition, it must be regarded as a *lex imperfecta*. Considerable discussion has arisen among the constitutional lawyers of Germany as to the exact scope of this prohibition; as to whether it is directed only to preventing the payment of *public* moneys to members of the *Reichstag* in the form of salary or compensation, or whether it covers also cases of private provision. The prevailing view is that it prohibits the payment of salaries and compensation both out of public and private funds.[4] Nevertheless, the custom has arisen of granting free transportation over State and private railroads to members of the *Reichstag*, during the sitting, as well as eight days before its opening and eight days after its close. A lump sum is appropriated out of the imperial funds for transportation over private railroads.[5]

[1] *GVG.* § 35, Cl. 1; § 85, Cl. 2.

[2] *StPO.* §§ 49, 72; *CPO.* §§ 382, 402.

[3] *RVerf.* Art. 32. But see Law of 23 December, 1874 (*RGBl.* p. 194), as well as Law of 1 February, 1876 (*RGBl.* p. 15), and Law of 20 February, 1876 (*RGBl.* p. 23), where provision was made for the recompense of members of certain commissions.

[4] See Laband, I. p. 336; Seydel, *Comm.* p. 216. Repeated effort has been made by the *Reichstag* to amend Art. 32, but it has been steadily opposed by the *Bundesrat*.

[5] Free transportation is at present limited to the journey between the residence of the member and the place of meeting.

The motive underlying Art. 32 of the Constitution is thus stated by Laband: "The prohibition in Art. 32 has been set up, as comes out with indisputable certainty in the debate in the *Reichstag* over the Constitution, as a political corrective to universal and direct suffrage, and was advanced by the government as a condition to its acceptance of the draft of the Constitution which the *Reichstag* has passed. The prohibition of salaries, therefore, rests upon public interests and is an imperative principle of law which cannot be violated or circumvented by transactions under private law." [1] Nevertheless this prohibition operates immediately only with respect to the payment of salaries and compensation out of imperial or State moneys. Private contracts and testamentary bequests and foundations having as an object the payment of a salary or the remuneration of services as a member of the *Reichstag* are void. No penalty attaches to a violation of the prohibition. The member who may receive a remuneration contrary to the provisions of Art. 32 does not thereby forfeit his seat, nor does an assurance of remuneration made prior to election render the election void.[2] In the matter of receiving gifts, the members of the *Reichstag*, not being officials, do not stand upon the same footing with judges and other officials. The prohibition of Art. 32 is confined to the receipt of salary or compensation *as a member of the Reichstag*. The mere fact of being a member of the *Reichstag* does not justify a prohibition of gifts. At any rate it is a known fact that a number of the members of the *Reichstag* are "supported."

The chief function of the *Reichstag* is indicated in Art. 5 of the Imperial Constitution: "The legislative power of the Empire shall be exercised by the *Bundesrat* and *Reichstag*. The consent of a majority of both bodies shall be necessary

[1] Laband, I. p. 335. [2] Seydel, *Comm.* p. 217.

and sufficient for the passage of an imperial law." The *Reichstag* is an essential factor in imperial legislation. No bill becomes a law without its consent. The will of the Empire comes to expression in the form of legislation only through its coöperation. Existing laws cannot be changed, new laws cannot be enacted, the Constitution cannot be amended, against the will of the body which represents the German people. While, as a matter of fact, most bills arise in the *Bundesrat*, yet the Constitution guarantees to the *Reichstag* as well the right of initiative.[1] Under the German system it is not necessary that "money bills" originate in the *Reichstag*. These bills cannot become law, however, without its consent. Further, in so far as treaties with foreign powers affect matters which, according to Art. 4 of the Constitution, fall within the competence of imperial legislation, the ratification of the *Reichstag* is necessary for their validity.[2] A yearly report of the expenditures of the Empire is to be laid before the *Reichstag* for its discharge.[3] A species of control over imperial administration is secured to the *Reichstag* through the right guaranteed it by Art. 23 of the Constitution to refer petitions addressed to it to the *Bundesrat* or to the Imperial Chancellor.[4] The Constitution does not give to the *Reichstag* or to its members a *right* of interpellation. The government is under no obligation, other than such as might arise on political grounds, to answer questions put to it by the *Reichstag* or by any member thereof. The mere fact that the matter of interpellations is regulated in the Standing Orders[5] does not elevate the interpellation to a "juristically fixed institute of public law."[6]

[1] *RVerf.* Art. 23.
[2] *Ibid.* Art. 11, Cl. 3.
[3] *Ibid.* Art. 72.
[4] See Laband, I. pp. 282, 283.
[5] *Geschäftsord.* §§ 32, 33.
[6] Laband, I. p. 284. See also Seydel, *Annalen*, p. 430, *Comm.* p. 203.

CHAPTER VI

IMPERIAL LEGISLATION[1]

I. Four stages may be distinguished in the process whereby a law comes to perfection under the German Constitution: (1) the determination of the content of a law; (2) the sanction; (3) the engrossment, and (4) the publication. To become effectually operative a law requires the coöperation of four agencies or organs,—the *Bundesrat*, the *Reichstag*, the *Kaiser*, and the *Imperial Chancellor*. The functions and relative importance of these organs in imperial legislation will appear in the following discussion.

(1) *The Determination of the Content of a Law.*—In framing a bill, or determining the content of a law, the Imperial Constitution makes no distinction between the powers of the *Bundesrat* and those of the *Reichstag*. Article 5, Cl. 1, of the Constitution reads: "The legislative power of the Empire is exercised by the *Bundesrat* and *Reichstag*. The consent of a majority of both bodies is necessary and sufficient for an imperial law."[2] While, on the one hand, the notion that the relation between the *Bundesrat* and *Reichstag* is that between

[1] In discussing the subject of imperial legislation, no time shall be devoted to the dispute over the distinction between "*Gesetze im formellen Sinne*" and "*Gesetze im materiellen Sinne*," between "*Rechtsverordnungen*" and "*Verwaltungsverordnungen*," — a dispute which, however interesting it may be to a German jurist, seems to an American or English jurist very useless and very juiceless.

[2] It is not necessary at this point to discuss the meaning of the word "sufficient" (*ausreichend*). If, however, as Laband maintains, — and very properly, — that a distinction must be made between the *content* of the law and the *sanction* of the law, his point that the Constitution, in using the word "sufficient" in this clause, refers only to the content of the law is well taken. As elsewhere observed, the clause was introduced in order to avoid the

an upper and lower House must be constantly guarded against, on the other hand, the view must be as carefully repelled that, in determining the content of the law, the activity of the *Reichstag* goes no farther than the exercise of a veto right upon the proposals of the *Bundesrat*.[1] Both bodies possess the right of initiative. In *Bundesrat* and *Reichstag* bills may be introduced on the motion of a member. "Every member of the *Bund* is empowered to propose bills and to speak to them, and the *Praesidium* is bound to bring them to discussion." In these words, Art. 7, Cl. 2, of the Constitution guarantees the right of initiative to each State in the Union, through its accredited representative in the *Bundesrat*. All measures proposed by the Reichstag must be signed by at least fifteen members, and must open with the words, "*Der Reichstag wölle beschliessen.*"[2]

inconvenience arising under the old system requiring unanimous consent to a bill in order to raise it to a law. But in making his distinction between the content of the law and the sanction of the law, and in taking the position — which is the only tenable one — that it is the *sanction*, and not the mere determination of the content of a bill, which makes a measure *law*, Laband must logically give away the contention over law in a formal sense and law in a material sense, and admit that it is the *form* and not the *content* which determines whether a proposition is or is not *law*. Any bill, coming before the legislative bodies in due form and not transcending the competence of those bodies to legislate, is law, if passed by the requisite majority and sanctioned by the power authorized to impart the sanction. It makes no difference whether the content of the measure carries with it a "*Rechtsatz*" or not, whether it involves a principle affecting private or public rights, or whether it concerns mere administrative matters; it is a law, if passed in the form of law and duly sanctioned. The content enters into the question merely in determining the previous question of competence.

[1] Fricker, in his little monograph, *Die Verpflichtung des Kaisers zur Verkündigung der Reichsgesetze*, p. 31, holds the view that it is the *Bundesrat* alone which determines the positive content of a law, while the *Reichstag* merely exercises the veto right. It is difficult to understand how Fricker can maintain his thesis in view of the right of the *Reichstag* to initiate and amend.

[2] *Geschäftsord. d. Rtags*, Art. 22, Cl. 1.

While no restriction is laid by the Imperial Constitution upon the *Bundesrat's* right of initiative, Art. 23 contains a modifying clause which seems to limit the exercise of that right by the *Reichstag*. This article reads: "The *Reichstag* has the right to propose laws *within the competence of the Empire.*" This clause, "within the competence of the Empire," has occasioned considerable discussion among the writers on German constitutional law. If it is conceded that the right of the *Reichstag* to originate legislation is full and complete, then this clause is absolutely meaningless. According to Art. 78 of the Constitution, the Constitution may be amended by ordinary legislation. In other words, the competence of the Empire itself can be widened by the same process by which any other law comes into being, that is, by imperial legislation. The Empire is competent to *extend its own competence by law.* Since, therefore, such an extension lies "within the competence of the Empire," the *Reichstag* is empowered, even under Art. 23 of the Constitution, to originate a bill having such an end in view. In order to avoid the interpretation of the clause under discussion in such wise as to make it devoid of meaning, it is suggested that while Art. 78 establishes the competence of the Empire to amend the Constitution in the form of imperial legislation, yet the question as to the right of initiative on the part of the individual legislative factors must be answered by declaring the right an unlimited one so far as the *Bundesrat* is concerned, but, so far as the *Reichstag* is concerned, limited by Art. 23 to *those matters falling within the competence of the Empire at the time.*[1] Such an interpretation, if strictly adhered to, would necessitate a double process, should the *Reichstag* desire to propose a law touching matters outside the present competence of the Empire: (*a*) the proposal of a bill to extend the legislative

[1] See Hänel, *Studien*, I. p. 256, note 7.

competence of the Empire; and, after this became law, (*b*) the proposal of a bill on the desired subject.[1] Laband says in this connection that it is difficult to see why the *Reichstag* should not join its original bill with the bill to extend the competence of the Empire, making the former contingent on the latter, or why it should not propose an extension of the competence of the Empire *by means of* the sanctioning of the proposed law.[2] However, the matter which the constitutional lawyers have much debated has been settled in a very decisive manner by the actual practice of the legislative bodies. Further, the *Bundesrat* has the power always to check legislation proposed by the *Reichstag*, whether such measures concern matters lying within the legislative competence of the Empire or without it, and should a bill proposed by the *Reichstag*, touching matters without the competence of the Empire, receive the assent of the *Bundesrat* in due constitutional form, as well as the sanction of the *Bundesrat*, the validity of such a law could not be impeached, since, under the Constitution, the consent of a majority of the *Bundesrat* and *Reichstag* — an increased majority in the *Bundesrat* where a law involving the amendment of the Constitution is concerned — is sufficient to warrant its sanction and hence its force as law. In other words, the law could not be attacked, in such circumstances, on the ground that it originated in the *Reichstag*.[3]

The Constitution does not recognize the right of the Emperor, as such, to initiate bills or to present drafts of laws in his own name. Government measures are, of course, best

[1] This is the view held by Seydel, in the first edition of his *Commentar*, but subsequently abandoned. See *Comm.* 1st edition (1873), p. 151; 2d edition (1897), p. 202; Von Rönne, *Staatsr.* I. pp. 266–267.

[2] Laband, II. p. 23.

[3] See Meyer, *Staatsr.* p. 507, note 11.

prepared by that department whose interest in the proposed legislation and whose knowledge of the requirements are greatest.[1] In practice, such bills are actually introduced in the name of the Emperor, but they are treated in the *Bundesrat* as *praesidial*, or Prussian, measures.[2]

Article 16 of the Constitution provides that bills which have passed the *Bundesrat* are to be laid before the *Reichstag* in the name of the Emperor, in the form in which these measures have been adopted by the *Bundesrat*, and that these bills shall be represented on the floor of the *Reichstag* by members of the *Bundesrat*, or by commissioners especially appointed by that body. Bills thus passed by the *Bundesrat* are transmitted to the *Reichstag* by the Imperial Chancellor, as the sole imperial Minister, who acts as an official of the Emperor, and not as the presiding officer in the *Bundesrat*. The introduction into the *Reichstag* of bills passed by the *Bundesrat* is an independent right of the Emperor. In transmitting such bills, therefore, the Imperial Chancellor is not acting under authority conferred upon him by the *Bundesrat*, but under authority, special or general, granted him by the Emperor. "It is the Emperor and not the *Bundesrat* to whom the formal right of initiative with respect to the *Reichstag* belongs, though this right is certainly restricted under the Constitution to such an extent that he may lay before the *Reichstag* only such measures as are passed by the *Bundesrat*." [3]

[1] So far as constitutional law is concerned it is, of course, a matter of no moment by whom bills are *prepared*, but by whom *introduced*.

[2] See Laband, II. p. 22, note 2, also I. pp. 217, 352, note 1; Hänel, *Studien*, II. p. 42; Meyer, p. 507.

[3] Hänel, *Studien*, II. p. 45; Laband, II. p. 24; Meyer, *Staatsr.* p. 395; Meyer, "*Antheil der Reichsorgane*," etc. in *Festgabe für Rudolf von Gneist*, 1889, p. 72; Von Rönne, *Staatsr.* II. p. 14; Zorn, *Staatsr.* I. p. 110; Seydel, *Comm.* p. 176; Hensel, in Hirth's *Annalen*, 1882, p. 14; Report of Sitting of *Reichstag*, 24 February, 1881, in *Sten. Ber.* I. pp. 30 ff.

Two interesting questions arise at this point: (*a*) May the Emperor examine a bill passed by the *Bundesrat* to determine whether it has been adopted according to the provisions of the Constitution? In other words, may the Emperor, in transmitting a bill from the *Bundesrat* to the *Reichstag*, pass upon the *formal* constitutionality of the measure, and, in case the bill does not, to his mind, respond to the tests of constitutionality, may he refuse to lay it before the *Reichstag?* (*b*) May the Emperor, on other grounds, on grounds of expediency or of public policy, or for any other similar reason based on the content of the measure, refuse to transmit it to the *Reichstag?*

It is generally admitted by German jurists that the first question is to be answered in the affirmative, and for the following reason: the wording of Art. 16 of the Imperial Constitution undoubtedly gives to the Emperor the right to transmit bills to the *Reichstag* from the *Bundesrat*, as his own peculiar prerogative. In the exercise of this right, the Emperor does not act as an organ of the *Bundesrat.* Bills are not transmitted in the name of that body, nor has it any responsibility in the matter. On the contrary, bills are transmitted in the name of the Emperor, by virtue of his imperial office, and the responsibility attaches to him — so far as one may speak of responsibility attaching to the Emperor at all. In order to set in motion the exercise of this right on the part of the Emperor, it is not enough that the measure shall have passed the *Bundesrat;* it must have passed the *Bundesrat* in the manner provided for by the Constitution. Only such bills as fulfil the constitutional conditions requisite to their validity fall within the competence of the Emperor to transmit measures to the *Reichstag.* The Emperor, therefore, has both an independent right and an independent duty to test such measures in order to determine whether they are,

in each given case constitutionally within the competence ascribed to him.[1] It is conceivable that a decided difference of opinion might arise between the Emperor and the *Bundesrat* as to whether a bill passed by the latter body fulfilled the constitutional requirements. In such case, there is no higher instance to which the *Bundesrat* can appeal, nor is the *Bundesrat* itself, in such a case, a higher instance to whose decision the Emperor must submit as final.

The second question must be answered in the negative. The Emperor may not, on grounds of policy or expediency, or because he does not approve of the content of the bill, refuse to transmit it to the *Reichstag*. This negative answer must be given for two reasons: In the first place, an affirmative answer would do violence to a canon of interpretation. Every law is fairly assumed to be consistent with itself in all its parts. Where two interpretations are possible, one involving an inconsistency and the other not, the interpretation which preserves the consistency of the law is to be preferred to that which destroys it. Article 16 of the Imperial Constitution consists of two parts. The first part provides for the transmission of bills passed by the *Bundesrat* to the *Reichstag* in the name of the Emperor. The second part provides that such bills are to be represented on the floor of the *Reichstag* by members of the *Bundesrat* or by commissioners appointed by it.[2] It is the evident intent and purpose of this second part to exclude any and all representation of the Emperor through his officials on the floor of the *Reichstag*. The members of the *Bundesrat* and commissioners named by it alone — not the Imperial Chancellor or his deputies or any

[1] Hänel, *Studien*, II. p. 46; Laband, II. p. 25, note 1.

[2] See also *RVerf.* Art. 9; *Geschäftsord. d. Rtags.* of 10 February, 1876, §§ 43, 48, also 29, found in Triepel, pp. 188 ff.

other imperial officials — are to follow the measure to the floor of the popular representative body. The plain inference to be drawn is this: that while the Emperor is given the right to transmit and with it the right to test a bill sent to him by the *Bundesrat* as to the constitutionality of its *form*, yet the Constitution would remove the decision as to the material content of the measure entirely from the competence of the Emperor, and leave it wholly in the hands of the *Bundesrat*. The members of the *Bundesrat*, therefore, or their commissioners, are to support the measure before the *Reichstag*. The determination of the content of the bill should lie outside of the function of the Emperor and of the imperial officials. To give to the Emperor, then, the right to refuse to transmit a bill to the *Reichstag*, on the ground that he disapproved of its content, from reasons of policy, expediency, or for any similar reason, would conflict with the plain intent of the article, and would make the second part of the article irrelevant and inconsistent.

In the second place, to answer the question in the affirmative would do violence to the spirit of the Constitution. No material distinction is made by the Constitution between the right of initiative of the *Bundesrat* and that of the *Reichstag*. To permit the Emperor to refuse to transmit to the *Reichstag* bills passed by the *Bundesrat*, clearly within its competence and according to constitutional form, on the ground that the content of the bill was not pleasing to the Emperor, would at once create a distinction between the position of the *Bundesrat* and that of the *Reichstag* with respect to the initiation of legislation, since no such barrier as this imperial right stands in the way of bills initiated by the *Reichstag*. Measures arising in that body and passed by it are transmitted by the President of the *Reichstag* to the *Bundesrat* through the Imperial Chancellor — not, however, as Chancellor, but as

President of the *Bundesrat*.[1] No opportunity is afforded for the intervention of the Emperor. No chance is offered for the exercise of an imperial veto. If the right of the Emperor to interfere in the transmission of a bill arising in the *Bundesrat* be conceded, the initiative of the *Bundesrat* is virtually destroyed, and measures arising in that body stand on a different and less favorable footing than those originating in the *Reichstag*. While the *Reichstag* may bring bills before the *Bundesrat* on its own motion and at its own discretion, measures originating in the *Bundesrat* — and most bills originate there — can reach the *Reichstag* only when it seems good in the eyes of the Emperor to permit it. Such an interpretation is wholly foreign to the spirit and intent of the Constitution and invests the Emperor with a power and function in the legislation of the Empire which is contrary to the plain purpose of the Constitution and to the clear declaration of Art. 5, which says that the legislative power of the Empire shall be exercised by the *Bundesrat* and *Reichstag*, whose consent, by a majority vote in each body, is necessary and *sufficient* in determining the content of the law.

In transmitting a bill from the *Bundesrat* to the *Reichstag*, the responsibility of the Imperial Chancellor goes only to the constitutionality of the proceedings by which the measure has passed the *Bundesrat*, in other words, to the *formal* constitutionality of the bill. It does not reach the question whether the bill, as passed, conforms to a proposition made by the Emperor. The countersignature of the Chancellor enables the Emperor to fulfil a duty laid upon him by the Constitution, and for this only is the Chancellor responsible. That responsibility does not go to the content of the bill. The Chancellor may not, therefore, pleading his responsibility in extenuation of his act, refuse to transmit a bill passed in

[1] See *Rev. Geschäftsord. d. Rtags.* § 69, 8.

due form to the *Reichstag*. Should a measure reach him for transmission whose content was regarded by him as impolitic, or unsound, or even antagonistic to the interests of the country, this fact would not justify him in declining to transmit it, though it might serve as a sufficient reason, perhaps, for his resignation, should he choose to tender it.[1]

[1] Hänel, *Studien*, II. p. 48, says, "Undoubtedly he may request his dismissal on the ground that his duty to transmit conflicts with his political conceptions, just as on any other ground, but he cannot make the withholding of a measure from the *Reichstag* a condition of his retaining his office." In this connection Hänel cites an interesting case. On 3 April, 1880, the *Bundesrat* decided to amend the draft of a law proposed by the Emperor, in such a way that the receipts from money orders and postal advances should be exempt from taxation. Thereupon the Imperial Chancellor, Bismarck, requested his release from office, assigning as his motive that "he could not stand for a bill passed by a majority against the vote of Prussia, Bavaria, and Saxony, nor was he able, in his capacity as Chancellor, to make use of the privilege granted to the minority by Art. 9 of Constitution." This article gives to every member of the *Bundesrat* the right to appear and be heard on the floor of the *Reichstag*, even when he is a member of the minority in the *Bundesrat* and speaks against the measure as passed. The Chancellor, as such, is not a member of the minority or majority. As Chancellor he cannot appear on the floor of the *Reichstag* to represent the views of any State government, which Art. 9 of the Constitution has especially in mind. On the 8 April, the Emperor replied to the resignation of the Chancellor by issuing the following Cabinet Order: —

"In reply to your request of the 6th inst. I would say that I am aware of the difficulties into which you may be brought by a conflict between the duties imposed upon you by the Constitution and your responsibility, but I cannot bring myself to release you from your office on the ground that you do not believe yourself able to respond, in a given case, to the tasks laid upon you by Arts. 16 and 17 of the Constitution. Rather do I leave it in your hands to lay before me, and then before the *Bundesrat*, such proposals as may be adapted to bringing about a constitutional solution of such a conflict of duties." In the sitting of 12 April, the *Bundesrat* withdrew its earlier act, and the affair was accordingly settled.

Another case arose out of the action of the *Bundesrat* of 26 February, 1880, with reference to a bill proposed by Prussia and passed by the *Bundesrat*. Because of certain doubts on the part of the Chancellor, he did not transmit the bill to the *Reichstag*. No accurate information is available as to whether

In both *Bundesrat* and *Reichstag* the majority principle prevails. So far as the *Reichstag* is concerned this principle operates absolutely. In the *Bundesrat* it suffers certain modifications: —

(1) Amendments to the Constitution are lost when fourteen votes in the *Bundesrat* are cast in the negative.[1]

(2) In legislation with respect to military and naval matters, as well as with respect to matters touching the customs and the consumption taxes, should a difference of opinion arise in the *Bundesrat*, the vote of Prussia — as *Praesidium* — is decisive, if cast in favor of maintaining the existing order.[2]

(3) In dealing with a matter which, according to the provisions of the Constitution, does not concern the whole Empire, the vote of those States alone is counted which are interested in the matter.[3]

(4) Certain provisions of the law regulating the tax on brandy can be amended, after the law has gone into effect in the States comprising what is known as the "brandy-tax group," only with the consent of those States.[4]

The question whether one of the four cases given above actually exists is to be decided by the *Bundesrat* by a simple majority.[5]

the *Bundesrat* finally withdrew this bill or whether the matter simply rested in the pocket of the Chancellor. At any rate the measure was not transmitted to the *Reichstag*. These cases were thoroughly discussed in the sitting of the *Reichstag* of 24 February, 1881. See *Sten. Ber.* Bd. I., especially speech of Bismarck, pp. 30 ff. See also discussion by Hänel, *Studien*, II. pp. 49 ff.; Meyer, *Staatsr.* p. 395, *Antheil*, etc., pp. 72 ff.; Laband, II. p. 24, note 2; Hensel, *Annalen*, 1882, pp. 14 ff.; Seydel, *Comm.* p. 176.

[1] *RVerf.* Art. 78. [2] *Ibid.* Art. 5, Cl. 2. [3] *Ibid.* Art. 7, Cl. 4.

[4] Law of 24 June, 1887 (*RGBl.* p. 253), §§ 39, 47. These sections have not been amended by the new revision of 16 June, 1895 (*RGBl.* p. 265). See Proclamation of 17 June, 1895 (*RGBl.* p. 276).

[5] See Hänel, *Studien*, I. p. 258; Meyer, *Staatsr.* p. 506, note 10 and citation there given; Laband, II. p. 33, note 3.

When a bill passed by the *Bundesrat* is transmitted to the *Reichstag* for its action, the scope of such action is not confined to a mere acceptance or rejection of the bill *en bloc*. In other words, the function of the *Reichstag* in imperial legislation is not exhausted by the exercise of its right of assent or veto. All bills submitted to the *Reichstag* may be amended, as well as accepted or rejected.[1]

(2) *The Sanction of a Law.*—Laband calls attention to the distinction which is to be drawn between the content of a measure and that which gives to the measure the character and force of law. The content is fixed by the *Bundesrat* and *Reichstag*. But when the content of a bill has been determined by these two bodies, the bill does not become vested, *ipso facto*, with the force of law. The element of *command* must be imparted. The draft agreed upon by the two legislative bodies is raised to a law by commanding, or ordering, obedience to its provisions. Such a command, it need scarcely be said, can be valid only when it issues from the competent authority.

"Every law," says Laband, "consists of two parts, wholly distinct from each other, the one containing the rules themselves, and the other containing the legal command, the order that these rules be obeyed."[2] While a distinction may be

[1] Bills arising in the *Reichstag* may also be amended by the *Bundesrat*. Bills amended by either body must be again submitted to the other for its action. This action may again take the form of further amendment, thus setting in motion an endless chain of amendment and counter-amendment, until an agreement is reached between the two. No provision is made in the Constitution, or in the Standing Orders, for terminating such a game of legislative battledore and shuttlecock. In practice it is customary, however, in important measures originating in the *Bundesrat*, for that body to indicate to the *Reichstag*, at a certain stage in the proceedings, what amendments it will agree to and what changes it will reject. By such an expedient legislative business is expedited.

[2] Laband, II. p. 26.

fairly drawn and sharply drawn between the content of the law and the command of the law, such a distinction is very apt to blur the significance of the act of determining the content and to isolate it unwarrantably. Laband's analysis clearly distinguishes a mere formulation or coördination of legal propositions, which anybody is at liberty to make, and which is devoid of all binding force, from that formulation of legal propositions which is possessed of the authority to compel obedience. This analysis lays its finger on the very characteristic which differentiates such legal formulas from laws, viz. the possession of binding force. Moreover, it follows from this distinction that to impart the element of command to a legal rule, or series of rules, is equivalent to issuing a law. But when Laband speaks of a distinction between the content of a law and the command of a law, which separates the one wholly from the other, he is in danger of creating a false impression. For, as Meyer well insists,[1] the matter must not be so conceived that the element of command shall be regarded as something externally added to the formulated proposition or rules. On the contrary, these legal propositions constitute the *subject-matter of the command*. Through the command, the content of the bill becomes law.[2] But the passing of a bill by the *Bundesrat* and *Reichstag* means more than a mere favoring of its content. It is an expression of will, an agreement that a draft containing these definite and enumerated propositions, — no more, no less, — shall be given the force of law, shall be made binding, shall be invested with the command which compels obedience. These legislative bodies, therefore, do not

[1] Meyer, *Antheil*, etc., p. 28.

[2] Laband also recognizes this patent fact: "Selbstverständlich ergreift der Befehl '*ita jus esto*' auch den Inhalt." II. p. 5, note 1. See also Jellinek, *Gesetz und Verordnung*, p. 318.

exhaust their legislative functions in the mere determination of the content of a measure, but they share also in the communication of the element of command to the projected bill. It may be freely conceded that the command does not issue from the deliberative bodies, as such, but their consent is a necessary condition to its issuance.[1]

The determination of the content of a bill and the imparting of the element of command, while sharply distinguishable in thought, are not wholly separate from each other, as Laband declares, but in reality are inseparably bound together. The fixing of the content of a law has a vital and indissoluble relation to the sanction of it.

In attempting to locate the organ by which the sanction is imparted, a difficulty is encountered in the very nature of the Empire. It is a principle of constitutional law in all the German monarchies that the power of the State — *Staatsgewalt* — centres in the ruler. He is, therefore, the lawgiver. He it is who imparts the element of command to the draft of a law. The sanction is his by virtue of his own right. No doubt can arise in one of these monarchies as to the organ by which the sanction is given. Not so in the Empire. The Constitution does not mention the word "sanction." Whatever is drawn from that document, therefore, respecting the sanction of the laws must be drawn from it by implication. On the other hand, the usual preamble or formula by which a law is published would seem to indicate that the Emperor is clearly the organ by which the sanction is given.[2] Such an assumption is untenable for several reasons. The Emperor is not monarch in the Empire, as the King of Prussia, for

[1] Meyer, *Antheil*, etc., p. 33.

[2] The formula reads, "We . . . by the grace of God German Emperor and King of Prussia, etc., do order in the name of the Empire, the consent of the *Bundesrat* and *Reichstag* having been obtained, what follows:"

instance, is monarch in Prussia. In case of doubt respecting his powers, the presumption is not in favor of the Emperor, as is always the case in a monarchy. The Emperor does not rule in his own right, but by virtue of the Constitution, with such powers only as are explicitly delegated to him. The right of sanction is not among them.

It is true that under the Constitution the publication of a law is laid upon the Emperor. It is given him as a delegated right. It is not a monarchical prerogative. Moreover, the publication of the law is not only the right of the Emperor, it is his duty, a duty which he may not avoid. He must publish every law which has passed the *Bundesrat* and *Reichstag* in due form, without regard to his own personal attitude toward its content. It may be a law contrary to the will of the Emperor. It may be a law originating with the Emperor and subsequently amended to such an extent as to render it wholly repugnant to him. It may be a law passed against the vote of Prussia. In any case, if passed in due form, the Emperor must publish it. It cannot be maintained, therefore, that the publication of the law by the Emperor carries with it the sanction of the law, *uno actu*. The publication of an imperial law follows the sanction logically and chronologically. It follows as a mechanical result. The Emperor has no will in the matter, if the law is passed in proper form. This fact alone indicates that the publication does not include the sanction. It presupposes the sanction. The sanction is not a prescribed act. It is an act of free will. It is an act which decides whether a certain bill shall become law. He who possesses the right to sanction, possesses also the right of absolute veto. The Emperor has no such power under the Constitution. On the contrary, there is an evident intention on the part of the Imperial Constitution to exclude the Emperor as an inde-

pendent factor in imperial legislation. Clause 1 of Art. 5 reads, "The legislative power shall be exercised by the *Bundesrat* and *Reichstag*." Here no mention is made of the Emperor. "Were it intended," says Laband,[1] "that the Emperor should be granted the power to give or withhold the sanction to an imperial law; were his assent, therefore, essential to the bringing of a law into being, he could not have been passed by in the enumeration of those organs by which the legislative power is exercised." The declaration of the first part of Art. 5, Cl. 1, together with the statement in the second part of the clause, that the majority vote of both legislative bodies shall be necessary and *sufficient*, would seem to indicate very clearly that the Constitution aimed at the exclusion of the Emperor as an independent factor in the legislation of the Empire.[2]

Whatever view may be held as to the general proposition that the sanction to a law must be imparted by that organ which is the bearer of the sovereign power, certain it is that such a principle characterizes German constitutional law. The sanction of a law is imparted by the monarch in his capacity as bearer of the sovereign power of the State. Moreover, it is an essential characteristic of the sanction that it is always

[1] Laband, II. p. 27.

[2] It may well be urged that the word "sufficient" is intended merely to defeat the principle of required unanimity in the vote of *Bundesrat* and *Reichstag*, which would embarrass legislation; that the word is taken from the "Prussian Outline of 10 June, 1866," and in view of the historical motive must not be given a too sharp juristic interpretation. It may be also urged that Cl. 1 does not fully exhaust the process of legislation and something more must be added in order to a full regulation of it. But, as Laband observes, any addition that contradicts the wording of the clause is by that very fact to be rejected. Moreover, "a comparison of Art. 5, Cl. 1, with the prototype, Art. 62 of the *Pr. Verf*, shows beyond doubt that the omission of the Emperor's assent in the making of a law indicated that his assent should not be required in the issuance of a law." Laband, II. p. 28.

ascribed to those organs in a State which have a material right of assent to the laws.[1] The Emperor, however, is not bearer of sovereignty in the Empire, nor has he a material right of assent to the laws. It is true that the Emperor, in conformity to Art. 17 of the Constitution, is intrusted with the engrossment and publication of the imperial laws and the supervision of their execution. But these functions do not constitute the sanction. They presuppose it as already a *fait accompli*.[2]

Through what organ of the Empire, then, is the sanction imparted to a bill? In accordance with the general principle of German constitutional law, through that organ which represents the bearer of the sovereign power in the Empire, — through the *Bundesrat*.[3] Whether one holds, with Meyer and others, that the sovereign power of the Empire lies in the totality of the German *governments*, or, with Laband, that it lies in the totality of the German *States*, there is no disagreement over the proposition that the organ through which the members of the Union exercise their share in the power of the Empire is the *Bundesrat*, not the Emperor. It is through the *Bundesrat* that the sovereign will of the Empire is uttered in the making of laws.

Article 7, Cl. 1, of the Imperial Constitution provides that the *Bundesrat* shall take action with respect to measures to be laid before the *Reichstag* and with respect to resolutions

[1] Meyer, *Antheil*, etc., p. 36.

[2] Laband, II. p. 28, calls attention to Cl. 2 of Art. 5, which provides that bills touching military and naval matters and certain customs and tax matters referred to in Art. 35 shall be considered lost if the vote of the *Praesidium* is cast against them. "The granting of such a right would be wholly devoid of meaning if the *Praesidum* had a *liberum veto* upon *all* bills, or, to speak more correctly, had the right of sanction with respect to bills passed by the *Bundesrat* and *Reichstag*."

[3] See literature cited in Laband, II. p. 29, note 1.

passed by the *Reichstag*. It is the practice, therefore, — a practice growing out of this clause, — that the final action on all bills shall be taken by the *Bundesrat*. Even when a bill originates in the *Bundesrat* and is passed by the *Reichstag* without amendment, it is brought back a second time to the *Bundesrat* and is acted upon again by that body before it is sent to the Emperor for engrossment and publication. The Emperor cannot engross and publish a measure which has first passed the *Bundesrat* and then the *Reichstag*. All measures must go back to the *Bundesrat*. In each and every case, the final determination is had by that body, and all laws reach the Emperor for engrossment and publication only through the *Bundesrat*. This final action of the *Bundesrat* with respect to bills passed by the *Reichstag* gives the sanction to these measures.[1] However improbable from a political standpoint, it is nevertheless legally possible for the *Bundesrat* to sanction a bill originating in its own midst and already passed by it, when the measure is returned from the *Reichstag* accepted without amendment. In other words, the *Bundesrat*, as the body representing the sovereign power of the Empire in imparting the sanction, is not bound by its action as a legislative body in determining the content of the law.[2]

(3) *The Engrossment (Ausfertigung) of a Law.* — To the

[1] Meyer, *Antheil*, etc., p. 48. Where a bill originates in the *Reichstag*, it is first passed by that body and then transmitted to the *Bundesrat*. Should the bill pass the *Bundesrat* without amendment, the action of the *Bundesrat* in fixing the content of the law and in giving to the law its sanction takes place at one and the same time and *uno actu*.

[2] For a brief discussion and refutation of the views of Fricker and Gierke with respect to the interpretation of Art. 7, Cl. 1, see Meyer, *Antheil*, etc., pp. 48 ff.; Laband, II. p. 30, note 2. See also speech of the Secretary of the Imperial Treasury, Burchard, in sitting of the *Reichstag* of 11 June, 1883 (*Sten. Ber.* IV. p. 2996), in which the special sanction of a law by the *Bundesrat* even when returned without amendment is recognized.

Emperor, according to Art. 17 of the Constitution, belong the engrossment and publication of the imperial laws, together with the supervision of their execution. Every law is an act of will. A will which has not come to an expression that is sensibly cognizable has, however, no juristic existence. Every law, therefore, requires for its validity some form of declaration. What form that declaration shall assume depends on the positive provisions of the constitution under which it is made.[1] The consent of the *Bundesrat* and *Reichstag* to the draft of an imperial law and the sanction of the *Bundesrat* are the material conditions to the issuance of that law under the Imperial Constitution. The action of the *Reichstag* has no binding force in itself. The determination of the *Bundesrat* to sanction the law does not include the actual issuance of the legal command, but is a decision that this command shall issue in the name of the Empire.[2] The formal declaration is laid by the Constitution upon the Emperor.[3] It is he who engrosses and publishes the law.

By engrossment — *Ausfertigung* — of the law is meant the *solemnis editio legis*, the preparation of an authentic source, the solemn creation of a documentary original of the law.[4] When, therefore, the Emperor engrosses a law, he affirms in due form that the law so engrossed conforms in content to the bill passed by the *Bundesrat* and *Reichstag* and sanctioned by the *Bundesrat*, and in form to the provisions of the Constitution. In short, by the act of engrossment the Emperor guarantees the formal constitutionality of the law. "It presupposes, therefore, the right to test

[1] See discussion by Laband, II. pp. 11 ff. and Jellinek, *G. & V.* pp. 321 ff.

[2] Laband, II. p. 37.

[3] For discussion of the distinction between the engrossment and promulgation of the law and its publication, see Laband, II. p. 20, note 1.

[4] See Jellinek, *G. & V.* p. 321.

the manner in which the work of legislation has been accomplished. It is true that the Emperor, as such, has no right of veto against an imperial law, but he has a duty to investigate as to whether the law has received, in a constitutional manner, the consent of the *Bundesrat* and *Reichstag* and the sanction of the bearer of imperial sovereignty as represented in the *Bundesrat*. He has, therefore, to prove whether the vote in the *Bundesrat* was had in accordance with the rules laid down in Art. 7 of the Imperial Constitution, and as to whether the final action was had in conformity to Arts. 5, 37, or 78 of the Constitution; as to whether, in case the law touches the *jura singulorum*, it was assented to by the State affected; as to whether the *Bundesrat* and *Reichstag* handled the bill in accordance with the existing provisions; as to whether there is complete agreement between the drafts assented to by both bodies, etc. If this investigation leads to a negative result, the Emperor has not only the right, but also the duty, to refuse the engrossment until the defect is remedied. Even if the Emperor should err in his conclusions, nevertheless his decision is valid, for there is no higher instance which can hold him to the promulgation of the law. There is, therefore, a possibility that the Emperor, by refusing on a formal ground to promulgate the law, may exercise a veto power. There is hardly room here, however, for a political danger. The "*Ausfertigung*" of the law does not lie wholly in the arbitrary choice of the Emperor. Respect for the *Bundesrat* and *Reichstag*, for public opinion and for his own reputation, render a misuse of the power conferred on the Emperor quite impossible. When the Emperor therefore perceives that a law has come into being without defect so far as the provisions of the Constitution are concerned, he is constitutionally bound to engross it." [1]

[1] Laband, II. pp. 38, 39.

The engrossment of a law, then, on the part of the Emperor is a sort of judicial act. It involves, in proving whether a law has been constitutionally discussed, passed, and sanctioned, a determination of a question of fact and the application to the state of facts of certain legal rules made to govern such cases.[1] The "guarding of the Constitution," as that phrase is known in the constitutional law of the United States, the right of the judiciary in any instance to pass upon the constitutionality of an imperial law, or the right to raise the question of constitutionality in any suit brought under an imperial law, is absolutely unknown to German theory and to German practice.

The form in which the engrossment shall be effected is a matter of practice rather than of law. There is no imperial legislation regulating the subject. It is to be regarded, however, as essential that the law shall be engrossed in documentary form, textually accurate and complete, and provided with the autograph signature of the Emperor, together with the date and the imperial seal.[2] The counter-signature of the Imperial Chancellor is also necessary.[3] In affixing his counter-signature, the Imperial Chancellor assumes the responsibility for the absolute literal accuracy of the text, its complete correspondence with the bill actually passed by both legislative bodies, and its formal constitutionality. No responsibility is assumed by the Chancellor for the material content of the law, nor may he, by withholding or delaying his counter-signature, defeat or obstruct the engrossment.

(4) *The Publication of a Law.*—The order for the publication of a law issues from the Emperor, in conformity to the provisions of Art. 17 of the Imperial Constitution, and is

[1] Jellinek, *G. & V.* p. 402. [2] *Ibid.* p. 327.

[3] *RVerf.* Art. 17. Laband, II. p. 47, citing in note 2 the decision of the *RGer.* of 13 June, 1882, *Entsch. in Civilsachen*, Bd. 8, p. 3.

directed to the Imperial Chancellor. So clearly is this command to publish associated with the "*Ausfertigung*" of the law, that both are practically included in one and the same act; for the engrossment is an essential condition to publication, and the publication is the necessary result of engrossment. The Emperor has no option in the matter. Possessing no veto, he must engross a law passed in due form, and a law engrossed must be published. For, in the publication of the law, the Emperor does not act as an independent factor in the legislation of the Empire, but only as an organ to which the publication of the law is intrusted. When the publication of a law is conferred on an organ which has no material right of assent to the law, the acceptance of the bill by the legislative factors has as its necessary result that the publication must follow. This obligation does not arise out of the law, which has not yet acquired binding force, but out of the Constitution of the State.[1]

The actual publication of the law is effected through an Imperial Gazette (*Reichsgesetzblatt*), in conformity with the provisions of Art. 2 of the Imperial Constitution, and is an official act of the imperial government. The issues of the Imperial Gazette furnish a complete collection of the imperial laws, — and the only authentic collection. No law possesses binding force which is not printed in the Gazette.[2] The Gazette is issued from the Department of the Interior, and the Imperial Chancellor is responsible for the content of it. So far as the various imperial officials are concerned, the Imperial Gazette is the final authority as to the existence and authenticity of a law.

Article 2 of the Constitution declares that "the imperial laws receive their binding force through their publication at

[1] See Meyer, *Antheil*, etc., p. 63, *Staatsr.* p. 507; Laband, II. p. 27, note 1.
[2] *RVerf.* Art. 2.

the hands of the Empire, which takes place through the medium of an Imperial Gazette." As to this clause Laband says: "In truth, the binding force of imperial laws rests not upon their being printed in the Imperial Gazette, but upon their having received the sanction. But this sanction carries with it the imperial engrossment and the order to publish; and this latter results in the publication by the Imperial Chancellor through the printing of the law in the Imperial Gazette. This publication, which takes place under the responsibility of the Imperial Chancellor, is a logical deduction from the constitutionally conferred sanction, and no law acquires binding force without publication in the Gazette. The *apparent* effect is, therefore, as if the law actually obtained its binding force through publication in the Imperial Gazette."[1]

Unless otherwise provided in the law itself, an imperial law goes into effect at the expiration of fourteen days from the date of its publication in the Imperial Gazette. Laws issued for the Colonies or Protectorates, however, where no specific provision is made in the laws themselves, go into effect in from two to four months after date of publication in the Imperial Gazette in Berlin, the more distant regions being allowed the longer period.[2]

[1] Laband, II. pp. 51, 52. For the method whereby mistakes in the Gazette are corrected, see *ibid.* pp. 52 ff.

[2] *RVerf.* Art. 2. See also Law of 26 July, 1867 (*BGBl.* p. 24); *Konsulargerichtsbarkeitsgesetz*, 7 April, 1900 (*RGBl.* p. 213), § 30; and *Schutzgebietsgesetz*, 9 November, 1900 (*RGBl.* p. 1005), § 3.

CHAPTER VII

THE IMPERIAL CHANCELLOR[1]

THE office of Imperial Chancellor finds its legal foundation in Arts. 15 and 17 of the Imperial Constitution, more particularly in Article 15, Cl. 1, which reads, "The Chairmanship (*Vorsitz*) in the *Bundesrat* and the conduct of business belong to the Imperial Chancellor, who is to be appointed by the Kaiser." Article 17 declares that "the ordinances and decrees of the Kaiser . . . require for their validity the countersignature of the Imperial Chancellor, who thereby assumes the responsibility for them." In determining the position of the Imperial Chancellor in the constitutional system of Germany, the second clause of Art. 15 is also of importance. According to the provisions of this clause, the "Imperial Chancellor may, in writing, deputize *any other member* of the *Bundersat* to represent him," *i.e.* to act as his substitute. The word "other" here is significant. The direct inference is that the Imperial Chancellor must be a member of the *Bundesrat,* otherwise the word has no meaning and is wholly superfluous. The "prevailing theory" among German jurists is that under the wording of the constitution the Imperial Chancellor not only presides over the *Bundesrat,* but must also be a *member* of that body. The Chancellor, it is to be noted, is appointed by the Kaiser. But the Kaiser,

[1] The following literature may be referred to: Joël, "*Die Substitutionsbefugniss des R. K. nach deutschem Staatsr.*," Hirth's *Annalen,* 1878, pp. 402 ff.; Hänel, *Studien,* II. pp. 24 ff., 31 ff.; Hensel, "*Die Stellung des R. K.*, Hirth's *Annalen,*" 1882, pp. 1 ff.; material collected in Hirth's *Annalen,* 1886, pp. 321 ff., also Laband, Meyer, Zorn, etc. *in loco.*

as *Kaiser*, has no power to appoint a member to the *Bundesrat*. He can do this only in his capacity as king of Prussia. It follows that in his selection of a Chancellor for the Empire, the Kaiser must either restrict his choice to some member of the *Bundesrat* already appointed, or must, as *king of Prussia*, appoint to membership in the *Bundesrat* the man whom he wishes, as Kaiser, to make Imperial Chancellor. Even if it should be conceded that there is no legal or constitutional reason why the Kaiser in his selection of Chancellor should be limited to the choice of a Prussian delegate to the *Bundesrat*, nevertheless political expediency would compel such self-limitation on the part of the Kaiser. For the members of the *Bundesrat* act only under instructions from their home government, and may be recalled by that government at any time. It would, therefore, certainly place the Kaiser in an awkward position as head of the imperial administration, should his Chancellor be subject to the instructions of any government other than that of Prussia, or exposed to a recall at any moment. Such power to disturb the activities of the imperial administration could scarcely be left to the whims or to the discretion of the several governments. It would seem, therefore, that the Imperial Chancellor must be not only a member of the *Bundesrat*, but also a Prussian member of that body.[1]

On reading carefully Arts. 15 and 17 of the Imperial Constitution, it becomes at once apparent that the Imperial Chancellor occupies a dual position, or plays a double rôle, in the Empire. As a member of the *Bundesrat* by Prussian appointment, he serves as an organ through which the king of

[1] See Laband, I. p. 350; Meyer, *Staatsr.* Sec. 124, note 7; Seydel, *Comm.* p. 169, also his refutation of the contrary position assumed by Hensel, — *op. cit.* pp. 10 ff. — in *Kritische Vierteljahrschrift f. Gesetzgeb. und Rechtswiss*, N. F. V. pp. 273 ff.; Grassmann, in *Archiv f. d. öff. Recht*, 1896, pp. 309 ff.

Prussia exercises his rights as a member of the *Bund*. As Chancellor, appointed by the Kaiser, he is the chief official of the Empire, the responsible imperial minister. As such imperial minister, the Imperial Chancellor forms the apex of the system of administrative authorities in the Empire. He is the "*höchste Reichsbehörde.*"[1] A failure to keep steadily in mind the twofold character of the Chancellor will inevitably lead to confusion. The Imperial Chancellor, as a member of the *Bundesrat* and the presiding officer of that body, is the plenipotentiary of the king of Prussia, bound by his instructions and responsible to the Prussian king. He is responsible neither to the *Bundesrat* nor to the *Reichstag* for the manner in which he acts as a Prussian delegate. As a member of the *Bundesrat* from Prussia, the Imperial Chancellor is not an imperial official, nor does he come within the provisions of the "Law governing Imperial Officials." In his capacity as a member of the *Bundesrat*, therefore, he is not an imperial administrative authority. While, from the standpoint of constitutional law, it is not necessary for the Chancellor to be at the same time a member of the Prussian Ministry, yet there are certain political reasons which make it imperative that the Imperial Chancellor should be a Prussian minister, and should take part in the deliberations and counsel of the Prussian Ministry.[2]

The functions of the Imperial Chancellor, as an imperial

[1] It is difficult to translate the German word "*Behörde.*" The word "authority" is here used as its equivalent. A word from Laband will make the meaning clearer. "An office is a sphere of State activity defined by public law. . . . There belongs to an office not only a sphere of State activity but also a corresponding measure of legal authority. An office may be personified and regarded as the permanent subject of rights and duties, in distinction from the official who temporarily occupies it. It is in this sense that the office (*Amt*) is called an 'authority' (*Behörde*). The term '*Behörde*' does not signify an individual, but an institution." Laband, I. pp. 338, 339.

[2] Laband, I. pp. 351, 352.

official, lie wholly outside the sphere of his activities as a Prussian delegate to the *Bundesrat*.[1] The Imperial Chancellor is the sole responsible minister of the Empire, the supreme administrative authority. In other words, so far as the administrative *authority* is concerned, the administrative system of the Empire is based upon a principle of extreme centralization. Though the Chancellor, while acting as a Prussian delegate to the *Bundesrat*, is not within the provisions of the "Law governing Imperial Officials," yet he does come within the provisions of that law when acting as an official organ of the Kaiser.[2] As the supreme administrative authority of the Empire and the chief imperial official, the Chancellor acknowledges only the Kaiser as his superior, and receives orders and commands from him alone. The direction of imperial policy and the conduct of imperial affairs lie in the hands of the Kaiser. The actual work in matters of this sort is done by the Chancellor, but in performing such functions he is acting merely as the instrument and assistant of the Kaiser. The fundamental principle is this: the Imperial Chancellor as the instrument and assistant of the Kaiser has to conduct all those activities which constitute the prerogative of the Kaiser.[3]

As presiding officer of the *Bundesrat*, the Chancellor has extensive duties to perform, regulated in detail by the Standing Orders (*Geschäftsordnung*) of that body. The Chancellor fixes the date of the meeting of the *Bundesrat*.[4] All communications from the *Reichstag*,[5] and the proposals of

[1] The Imperial Chancellor may, however, as a member of the *Bundesrat*, introduce into the *Bundesrat* measures emanating from the *Kaiser*, measures which could not otherwise be brought before that body, since the *Kaiser*, as such, has no right of initiative. Measures introduced in this way directly by the *Kaiser* are regarded as Prussian bills.

[2] Hänel, *op. cit.* pp. 5 ff.

[3] Laband. I. p. 352.

[4] *Geschäftsord.* § 13.

[5] *Ibid.* § 8.

the various States,[1] together with all other matters addressed to the *Bundesrat*, pass through his hands. He keeps the Committee of the *Bundesrat* on Customs and Taxes constantly informed of the reports from the several imperial officials,[2] and lays before the Committee on Accounts a draft of the Budget and an annual statement of the imperial income and expenditures.[3] Further, as the official representative of the *Bundesrat* outside that body, the Imperial Chancellor publishes the appointment of the members of the *Bundesrat* in the Imperial Gazette, and issues the decrees necessary in carrying out the resolutions of the *Bundesrat*.[4] All bills passed by the *Bundesrat* are transmitted to the *Reichstag* by the Chancellor, in the name of the Kaiser.[5] The Chancellor has no discretion in the transmission of these measures. Should he chance to find himself in disagreement with the contents of a bill, he must transmit it to the *Reichstag* notwithstanding. The only alternative is a demand for his dismissal from office.[6] As Imperial Chancellor he may not appear on the floor of the *Reichstag* to utter his views on any proposed legislation. This he may do, however, as a member of the *Bundesrat*. The Imperial Chancellor may not be at the same time a member of the *Reichstag*.[7]

As the highest administrative authority in the Empire, the Chancellor has under his control all the other administrative officials in so far as they are imperial officials. They are simply "bureaus" of the Imperial Chancellor, and enjoy, in the conduct of their offices, only such independence as the Chancellor may grant to them. In most branches of the

[1] *Geschäftsord.* § 9. [2] *Ibid.* § 21. [3] *Ibid.* § 23.

[4] *Ibid.* § 27. These resolutions are published in the Imperial Gazette, or in the *Centralblatt*, and the necessary "proclamation" is signed by the Chancellor.

[5] *RVerf.* Art. 16. [6] *Ibid.* Art. 9. [7] *Ibid.* Art. 9.

imperial administration, there are "Chiefs" of this administrative hierarchy, about whom the administration in that particular line is centralized, and who act as supreme "authorities" in matters of administrative discipline. At the present time the following imperial administrative departments are immediately subordinated to the Chancellor: The Department of the Interior; the Foreign Office; the Admiralty; the Department of Justice; the Treasury Office; the Imperial Railway Department; the Imperial Post-office Department; the Imperial Office for the Administration of the Imperial Railways. Further, the administration of the Imperial Bank comes under the control of the Imperial Chancellor, since the various bank officials, including the curators and the directors, are subjected to his direction. In short, there are no administrative authorities of the Empire which are not compelled to yield implicit obedience to the commands of the Imperial Chancellor. The heads of the various departments, therefore, are not coördinates of the Imperial Chancellor, but his subordinates. According to the constitutional law of the Empire, the Imperial Chancellor has no colleagues.[1] The financial boards of the Empire, — the Administration of the Imperial Debt and the Administration of the Imperial *Invalidenfonds*, — while subjected to the superior direction of the Imperial Chancellor, nevertheless, so far as the legal conduct of their official duties is concerned, are independent and unconditionally responsible. Furthermore, the various judicial Boards of the Empire are wholly independent, and are subjected only to the laws. While the imperial officials are appointed, theoretically, by the Kaiser, yet, through various laws and decrees, the actual appointment and the issuance of certain regulations to them take place through the Imperial Chancellor.[2]

[1] Hänel, *Studien*, II. p. 19.

[2] *Ibid.* pp. 19 ff.

The Imperial Chancellor is the organ through whom transactions between the States, on the one side, and the Kaiser, *Bundesrat*, and *Reichstag*, on the other, are affected. While the Chancellor is the highest imperial authority and the supreme imperial official, he is in no sense the superior of the various State authorities and officials. Where an imperial law is properly carried into execution by the State officials, these are not the subordinates, but the coördinates, of the Imperial Chancellor. The peculiar relation of the Chancellor to Prussia has already been noted. According to a provision of the *Schlussprotokoll* to the Treaty of 23 November, 1870, Bavaria has the right to preside in the *Bundesrat*, should the Imperial Chancellor be prevented from so doing, and no Prussian delegate be available.

According to Art. 5 of the Imperial Constitution, the legislation of the Empire is carried on by the *Bundesrat* and *Reichstag*, a majority vote of both bodies being necessary and sufficient for the passage of a bill. This article of the Constitution would seem to stand in contradiction to Art. 2, which declares that a law comes into force by publication in the Imperial Gazette, and Art. 17, which states that all laws shall be published by the Kaiser and that all orders and decrees of the Kaiser need for their validity the counter-signature of the Imperial Chancellor. While a majority vote of the legislative bodies is therefore necessary, it would not seem to be sufficient. Article 5 is perfectly true, however, so far as the *material content* is concerned. The determination of the material content of a bill requires the majority vote of both legislative bodies. The publication of the law and the counter-signing of the Imperial Chancellor are matters of formal necessity, without which the law has no binding force. The Imperial Chancellor has no lot nor part, as Chancellor, in fixing the content of a law, though his political influence may be, and

usually is, considerable. A measure, therefore, placed in the hands of the Chancellor for his signature, or for transmission, may not be in any wise modified or amended by him, or by his subordinates. It is his duty to transmit the bill to the *Reichstag*, although he may not agree to its provisions. Nor has the Imperial Chancellor, as such, any function in imparting the sanction to the law. Further, though a law comes into force only when published, it is the duty of the Kaiser to order its publication when it has received the sanction of the *Bundesrat*. This duty is imperative, not discretionary, and when the Kaiser has ordered the Imperial Chancellor to publish a law, this latter official may not refuse so to do. Although the Imperial Chancellor, therefore, is an essential organ in bringing a law into formal operation, yet he acts, in a way, automatically. Should a law, as to its content, be such an one as the Chancellor disapproves, he may not "kill the bill" by withholding either its transmission or his signature. His only alternative in such a case would be to resign, or to persuade the *Bundesrat* to withdraw the obnoxious measure.[1]

Article 17 of the Imperial Constitution, in laying down the rule that the ordinances and decrees of the Kaiser require the counter-signature of the Chancellor, declares also that in thus counter-signing the measure the Chancellor assumes the responsibility therefor. Among German writers there has been no little discussion as to whether this responsibility was a legal one or merely political in its nature. So far as the practical consideration of this responsibility is concerned, the discussion is of small moment. Whether legal or political, there is no legal means by which the Chancellor can be reached as a responsible minister. So far as any ministerial responsibility, in the sense of constitutional law, is concerned, Art.

[1] See Hänel, *Studien*, I. pp. 49 ff.

17 is a *lex imperfecta*. For there is no provision made with reference to the matter of bringing a complaint against the Chancellor to the *Reichstag*, nor is there any legal process set forth by which this responsibility shall be made effective. Ministerial responsibility, therefore, so far as the Chancellor is concerned, is not a legal institution.[1] The responsibility of the Imperial Chancellor is, as Laband observes, only a political principle that still awaits its realization through legal forms, but which, nevertheless, is not wholly without effect. It lays the foundation for a sort of parliamentary responsibility, inasmuch as the Imperial Chancellor cannot escape attacks of the *Bundesrat*, in the meeting of that body, on his conduct of affairs, and he must stand up against the speeches of the *Reichstag*. "Responsibility is coextensive with competence. Within the sphere of his own administration of imperial affairs, therefore, the Imperial Chancellor is responsible for the conduct of the whole official activity of the imperial departments, in conformity to the laws of the Empire and in harmony with its foreign and internal policy. Touching the autonomy of the States, the responsibility of the Chancellor goes only to the supervision assigned to the Empire in such matters. Further than this in State affairs the Imperial Chancellor may not go."[2]

By the terms of Art. 15 of the Imperial Constitution, the Chancellor has the right to delegate to any other member of

[1] Laband, I. p. 355; Seydel, *Comm.* p. 178.

[2] "Ich bin meines Erachtens dafür verantwortlich, dass an der Spitze der einzelnen Zweige der Reichsverwaltung Leute stehen, die ihre Verwaltung im Grossen und Ganzen in der Richtung des Stromes führen, den das deutliche politische Leben nach der augenblicklichen Richtung des deutschen Geistes und der deutschen Geister zu laufen genöthigt ist . . . im Wesentlichen aber dafür, dass an jeder Stelle, die zu besetzen ist, Jemand steht, der nach dem gewöhnlichen Ausdrucke *tanti* ist, diese Geschäfte zu besorgen." Bismarck, im Reichstag, 1 December, 1874.

the *Bundesrat* the power to represent him as the presiding officer of the *Bundesrat* in conducting its business. As a matter of course, the Chancellor may also assign the performance of the duties laid upon him to subordinate officials. In all such cases, the Imperial Chancellor remains responsible for acts done in his stead, since the Constitution recognizes but one responsible head of the administration — the Imperial Chancellor. By an agreement with Bavaria, as already noted, it was stipulated that when the Chancellor felt the necessity for choosing a substitute to represent him as presiding officer of the *Bundesrat*, and to take his place in conducting the business of the *Bundesrat*, should no Prussian member be available, the choice must fall upon a Bavarian delegate. This provision of the treaty is, as a matter of fact, a mere empty honor for Bavaria. The occupation of the chair of the presiding officer in the *Bundesrat* does not give Bavaria any advantage in the settlement of public questions. Prussia is still *Praesidium*, and the votes assigned to the *Praesidium* by the Constitution still belong to Prussia, no matter who occupies the chair of presiding officer in the *Bundesrat*.

The law of 17 March, 1878,[1] provides for another form of substitute for the Imperial Chancellor, not in his capacity as presiding officer of the *Bundesrat*, but as imperial minister. This law does not affect Art. 15 of the Constitution. It provides for the appointment of a substitute for the Imperial Chancellor, the appointment to be made by the Kaiser, and not, as in the other case, by the Chancellor himself. In making such appointment, however, the Kaiser is not left wholly to his own discretion, for the law reads, in § 1, that the appointment of a substitute for the Imperial Chancellor, in the exercise of the duties laid upon him by the Constitution and laws of the Empire, may be made by the Kaiser

[1] *RGBl.* p. 7.

"upon motion of the Imperial Chancellor in cases where he is hindered from performing his functions." It is the Chancellor himself, then, who decides whether he is hindered from performing his functions; and in making the appointment, it is the Imperial Chancellor, not the Kaiser, who makes the initial move in the matter. In other words, the Chancellor may ask for a substitute if he chooses, but is under no compulsion to do so. Moreover, the law recognizes two kinds of responsible substitute: a general substitute, or Vice-Chancellor, who assumes the general duties and functions of the Imperial Chancellor; and the special substitute, or substitute in special departments of the administration of the Empire, who is appointed to carry on the functions of the Imperial Chancellor in some one of the particular branches of the administration. In choosing a Vice Chancellor, the Kaiser is not restricted in his choice; but in the selection of the departmental substitutes the law confines the choice of the Emperor to the heads of the administrative branches of the government under the Chancellor.

These substitutes may counter-sign the various orders and decrees of the Kaiser and may perform the functions and assume the obligations laid by law and by the Constitution on the Chancellor. The substitutes are responsible politically for their governmental acts, and the Imperial Chancellor is therefore released from the responsibility.[1] The Imperial Chancellor is, however, given authority by the law [2] to interfere at any time and to resume control of matters at any stage of the official business. Hence, as Laband observes, all the departments, in spite of the appointment of a substitute, remain subject to the direction and immediate interference of the Chancellor, and for that reason he also remains to a certain degree responsible.

[1] Laband, I. p. 358. [2] § 1.

CHAPTER VIII

CITIZENSHIP UNDER THE GERMAN CONSTITUTION[1]

"THE modern State rests upon the idea of association (*Genossenschaft*). It is a corporative society whose members are human beings. In this capacity, these members are called '*Staatsangehörige*' — those who belong to the State. As respects rights and duties, they are sharply distinguished from the individuals who dwell in the State, or reside there, without belonging to it, — the *foreigners*. The content of this membership consists of the totality of rights and duties which they possess as over against the State. From the side of duty, their relation is best indicated by the word 'subject'; from the side of rights it is best designated by the word 'citizen' (*Staatsbürger*)."[2]

Theoretically, the task of differentiating the foreigners from the subjects and citizens of a State would seem to be an easy task, in fact, almost a mechanical act. This is particularly true of the unitary State. Here there arises a single question: What is the relation of this person to this State as against any and all foreign States? In a Federal State the matter is complicated by the fact that every individual stands in a dual relationship: on the one hand, he sustains certain relations to the Federal State as a whole; and on the other, he sustains certain relations to the State in which he may reside, or in which he may, in whatever way, have

[1] For an extensive literature, see Laband, I. p. 122, note.

[2] Anschütz in *Holtzendorff's Encyclop.* 6th edition, 1904, II. p. 527.

obtained citizenship. The moment an attempt is made to define the status of a person in a Federal State, therefore, not one question, but several, must be answered: What is the relation of this person to the Federal State, as against any and all foreign States? What is the relation of this person to the State in which he resides? What is his relation to the other federated States in the Union? Further, is it possible to be, or to become, a citizen of one of the States and not a citizen of the Federal State? Are there two independent citizenships, coördinate, but each occupying a distinct sphere; or is there a double citizenship of such a nature that the one is dependent on the other, exists because of the other, not coördinate, but subordinate? If this be the case, which is the primary citizenship? Does citizenship in one of the federated States exclude citizenship in another at the same time? These, and many other questions, grow out of the very nature of the Federal State. As a type of such State, the German Empire must needs answer them. The answers given by the various German jurists are affected by the views which they hold with respect to the nature of the Federal State in general and of the German Empire in particular.[1]

The Federal State was regarded by the earlier jurists as a political or legal duality: on the one side, the collective or joint State, the Federal State as a whole; and on the other side, the individual State or States. Each member of this duality moved in its own well-defined sphere, and exercised

[1] These views as to the nature of citizenship range from that of Seydel, on the one extreme, who denies the existence of any citizenship of the Empire, to that of Le Fur, who denies the existence of any State citizenship. Seydel's theory is based on his conception of the Empire as a "*Staatenbund*," which, of course, cannot have citizens of its own (see *Comm.* p. 50; *Bayr. Staatsr.* I. p. 294); while Le Fur (*État federal*, p. 692 ff.) maintains that the members of the Union have lost the character of *States*, and hence cannot have citizens.

its own well-defined powers. Sovereignty was possessed in full by neither, but was parted between them. The relation existing between the Federal State and the federated States was not one of subordination, but of coördination. Citizenship, therefore, was a relation established between the individual and two coördinated States, and this relation was an immediate one in both instances. Moreover, the two citizenships were independent of each other. This view has prevailed among a majority of writers on German constitutional law, — that besides the citizenship of the individual State, there exists also an independent citizenship of the Empire, palpably different therefrom.[1]

Against this view Laband argues somewhat at length, basing his reasoning upon a divergent view of the nature of the Federal State.[2] To state his position briefly, Laband declares that every attempt to define the two citizenships and to delineate them, setting the one over against the other, has proven impossible. "There are not two spheres of State life, the one of which is occupied by the citizen of the Empire, and the other by the citizen of the State. Upon whatever field in the political life one may direct his gaze, almost at no point can one determine where the individual is a citizen of the State and where he is a citizen of the Empire. As a rule, he is both at the same time." The correct relation between citizenship of a State and citizenship of the

[1] So Von Mohl, *Bundesstaatsrecht der Vereinigten Staaten*, p. 380, says: "Since the *Bund* consists of two different sorts of States, the Federal State and the members of the *Bund*, so each inhabitant has a twofold citizenship, — that of the special State in which he lives, and also the general citizenship of the *Bund*." Waitz, *Politik*, p. 200, writes: "The members of a Federal State constitute one people, which has received a double political (*Staatliche*) organization. In the one, they take part in whatever individual State they dwell, since not through the individual State but independently of it are they citizens of the collective State."

[2] Laband, I. pp. 123 ff.

Empire grows out of the nature of a Federal State. Laband's view of the nature of the Empire, therefore, determines his view of this relationship. The Federal State (*Bundesstaat*), he argues, is a composite State, whose members are the several individual or federated States. The power of the Federal State over the individual States is sovereign power. The individual States cannot be separated from that which constitutes their *substratum*, that is, from their people, in determining the subordination of those States to the Empire. They come, both as land and people, under the sovereign power of the Empire. The jurisdiction of the Empire over the State involves, therefore, jurisdiction over the citizens of that State, no matter in what form such jurisdiction may assert itself. "Because the individual is a citizen of Prussia or of Saxony, and because the State of Prussia and the State of Saxony belong to the Empire, and are subject to the power of the Empire, therefore is the Prussian and the Saxon a member of the Empire and subject to the power of the Empire. The members of a federated State are not independent of it, but through it are members of the Federal State." The individual has not two State powers over him, one of which is coördinate with the other, each of which possesses a part of the magisterial rights; but he has over him two State powers, one of which is subordinate to the other.[1] Citizenship in the Empire is no independent relation, but it expresses in a single word two united characteristics: membership in a State which is a member of the Empire. The relation of a subject to the Empire is not immediate, it is mediate. The individual State is the medium.

[1] "One may compare the Empire to a number of houses over which a common dome is arched. The inmates do not dwell partly under the separate roof of their house and partly under the common dome, but under both at the same time."

From this position, certain consequences logically flow. In the first place, the answer to the question, Which citizenship is primary? is at once suggested. The primary citizenship must be the State citizenship, since it alone is immediate. Further, State citizenship carries with it citizenship of the Empire. No supplementary act is necessary in order to convert State citizenship into imperial citizenship. State citizenship is the essential condition to the acquiring of the citizenship of the Empire.[1] No one can become a citizen of the Empire without first becoming a citizen of a State. There is no naturalization immediately by the Empire. In like manner the loss of State citizenship carries with it the loss of citizenship in the Empire.

In the second place, citizenship of a State may change without in any wise affecting the citizenship of the Empire, provided the individual retains his citizenship in some State within the Empire. A change of State citizenship dissolves certain relations which exist between a citizen and the State from whose citizenship he withdraws, and creates certain new relations between him and the new State into whose citizenship he is received, but it does not disturb his rela-

[1] As to the application of this principle to Alsace-Lorraine, see Laband, I. p. 126, note 1; Meyer, *Staatsr.* p. 199, note 11. Cahn, *Das Reichsgesetz über die Erwerbung und den Verlust der Reichs- und Staatsangehörigkeit vom 1 Juni, 1870*, Berlin, 1896, p. 12, says: "Das in Gemässheit des § 1 des Reichgesetzes vom 9 Juni, 1871 (*RGBL.* 212), mit dem Deutschen Reiche für immer staatsrechtlich vereignigte Elsass-Lothringen ist erst auf Grund des Art. 2 des Reichgesetzes vom 25 Juni, 1873 (*RGBl.* 161), dem Bundesgebiete eingetreten. Elsass-Lothringen ist jedoch kein mit eigener Staatshoheit bekleideter selbstständiger Bundesstaat, sondern unmittelbares Reichsland 'in welchem die Staatsgewalt durch den Kaiser ausgeübt wird' (§ 3 des Reichgesetzes vom 9 Juni, 1871). Die angehörigkeit in Elsass-Lothringen heisst auch nicht 'Staatsangehörigkeit,' sondern 'Landesangehörigkeit.' Nachdem das Gesetz vom 1 Juni, 1870, in Elsass-Lothringen eingeführt ist finden die in dem Gesetze vorkommende Worte 'Bundesstaat' und 'Staatsangehörigkeit' auf das Reichsland und die elsass-lothringischen Landesangehörigkeit anwendung."

tionship to the Empire. In other words, while an individual becomes a citizen of the Empire by reason of his citizenship in one of the States, his citizenship in the Empire, once acquired, does not depend for its continuance upon the retention of his citizenship in that particular State, but merely upon the retention of his citizenship in *some* State belonging to the Empire.

I. *The Acquirement of Citizenship in the German Empire.* — The Imperial Constitution makes no provision with reference to the acquirement or loss of citizenship, leaving the matter, under Art. 4, 1, to imperial legislation. Such legislation was had 1 June, 1870, in the form of a "Law on the Acquirement and Loss of Federal and State Citizenship."[1] By the passage of this law, all the inequalities and peculiarities of the legislation hitherto existing were done away with, and a uniform system was introduced for the whole imperial territory.[2] Under the present law in Germany, citizenship may be acquired in four ways.

1. *By Birth.* — All children born to German parents are German citizens, whether they are born on German soil or abroad; whether born in the State wherein the father — or mother — has citizenship, or in one of the other federated States. In any and all cases, a child born in wedlock acquires, through birth, the citizenship of the father; a child born out of wedlock acquires the citizenship of the mother.[3]

[1] *RGBl.* p. 355. See also Triepel, pp. 74 ff.

[2] For an interesting brief account of the situation prior to the passage of the law, see *Sten. Ber. d. Reichstags*, for 1870, I. p. 6, and III. pp. 153–160. Found also in Cahn, *op. cit.* pp. 1 ff.

[3] Law of 1 June, 1870, Sec. 3. As to the determination of the question whether a child is sprung from a valid or invalid marriage, and whether, therefore, it is to be given the citizenship of the father or that of the mother, see Laband, I. pp. 150, 151; Cahn, *op. cit.* notes 2 and 3 to § 3; Arndt, *Staatsr.* pp. 53, 54. Compare *Bürg. Gesetzb.* §§ 1591–1600, 1565–1569, 1323–1347, 1699, 1303–1322.

In determining the question of citizenship by birth the principle of *jus sanguinis* is held, not that of *jus soli*. Hence children of foreign parents, born on German soil, do not from that fact alone acquire German citizenship. Moreover, in determining the question of the State citizenship of a child born of German parents, the domicile or residence of the parents at the time of such birth has no influence or effect whatever. For, unlike the principle which prevails in the United States, where the primary citizenship is citizenship of the Union and not that of the State, citizenship in the State is not changed in Germany when the domicile is removed from one State of the Empire to another. State citizenship is retained until the relationship is dissolved on the motion of the party himself, by a judgment rendered by a competent authority, or in one of the other ways in which citizenship may be lost under the law. It is possible, therefore, for a person to have a domicile in one State of the Empire, and citizenship at the same time in another State of the Empire. In fact, as Laband points out,[1] it is possible for a family, which had removed from their home State to another, and there settled, to retain for countless generations the citizenship of the State from which they had originally migrated, through this principle of acquiring citizenship by birth, and in time the determination of citizenship might be attended with great difficulties.

[1] Laband, I. p. 150. He adds: " In Verbindung mit der Freizügigkeit, welche innerhalb des ganzen Reichsgebietes besteht, wird dieses Grundsatz es daher im Laufe der Zeit immer schwieriger machen, die Staatsangehörigkeit festzustellen, und an grossen Verkehrsmittelpunkten mit schnell wechselnder Bevölkerung wird bald in verhältnissmässiger kürzer Zeit auch die ansässige Bevölkerung aus Staatsangehörigen der verschiedensten Bundesstaaten zusammengesetzt sein, von denen Jeder seine Staatsangehörigkeit in alle Ewigkeit vererben und in jedem beliebigen Bundesstaat mitnehmen kann. So muss dies nothwendig dahin führen, die Staatsangehörigkeit immer mehr der Reichsangehörigkeit gegenüber zurücktreten zu lassen."

The adoption of a child by a German citizen does not confer upon that child the citizenship of the adoptive father.[1]

2. *By Legitimation.* — "If the father of an illegitimate child is a German, and the mother does not possess the State citizenship of the father, the child acquires, through legitimation effected in accordance with the legal provisions covering such matters, the State citizenship of the father." [2] As to the explicit method of legitimation the law is silent. It is sufficient for the purpose of conferring the State citizenship of the father upon the legitimized child that the legitimation takes place in conformity with the legal provisions in force in the State of which the father is a citizen. The various State codes, however, have been superseded by the Code of Civil Law for the Empire, which provides for the legitimation of children born out of wedlock. Such legitimation may be effected by *marriage*,[3] or by *declaration* of legitimacy by the competent State authority in the State to which the father belongs, as citizen, or, in case the father is at the time a citizen of no State, the declaration may be made by the Imperial Chancellor.[4] In legitimation through declaration, it is not the domicile of the father, but the State citizenship of the father, which determines the question as to the authority competent

[1] Law of 1 June, 1870, § 2; Cahn. *op cit.* p. 16.

[2] Law, § 4. In such case, the child loses the citizenship of the mother, which it had possessed up to the time of legitimation. If, however, from any cause, the child had acquired, prior to the legitimation, a citizenship different from that of the mother, the legitimation, while conferring upon the child the citizenship of the father, does not carry with it the loss of such acquired citizenship. The state citizenship of the father is added, and the child becomes possessed of citzenship in two States. Only the citizenship based on illegitimacy is lost.

[3] *BGB.* §§ 1719 ff.

[4] *Ibid.* § 1723. See also Laband, I. p. 152; Cahn, *op. cit.* p. 36; Arndt, *Staatsr.* p. 44.

to make such declaration.[1] When the father is a citizen of the Empire, no matter where his domicile may be, the legitimation must take place in accordance with German law.[2] In order to legitimation by declaration, the consent of the child is necessary. If the child has not completed the twenty-first year of his life, the consent of the mother, or of the person who stands legally *in loco parentis*, must be obtained.[3] This rule holds in case the father is a citizen of a foreign State, and the legitimation take place under the laws of the foreign State. The legitimation is not recognized as valid if the consent, required under the Civil Code of the Empire, has not been obtained.[4]

The effect of legitimation is not retroactive. The child acquires the State citizenship of the father from the day of legitimation. In this regard, it matters not whether the legitimation takes place through marriage or by declaration. In the one case, the citizenship of the child becomes that of the father from the day of marriage, in the other, from the day of the legal declaration.[5]

3. *By Marriage.* — "Marriage with a German invests the wife with the State citizenship of the husband."[6] It

[1] *BGB.* § 1723, Cl. 2. When the father is a citizen of several States, the competence to declare the child legitimate on the motion of the father belongs to each of them. See Planck, *Bürg. GB.* note 2 to § 1723 of the *BGB.*

[2] Law introducing the *BGB.* Art. 22, Cl. 1. This holds also where the father is at the time a citizen of no State, but his last citizenship was German. *Ibid.* Art. 29. Planck, *Komm. zum Einf. G. zum BGB.* Art. 22, note 2.

[3] See *BGB.* §§ 1726, 1727, 1728.

[4] *Einf. G. zum BGB.* Art. 22, Cl. 2. A legitimation, therefore, obtained without the required consent, whatever effect it may have in the land where the father is domiciled and of which he is a citizen, does not, according to German law, effect the loss of German citizenship on the part of the child, if the child has already acquired such citizenship.

[5] Cahn, *op. cit.* p. 32, note 3. Planck, *op. cit.* note 3 to § 1719, *BGB.* Opposite view, Von Bar, *Lehrb. d. Internat. Privatr.* p. 37.

[6] Law, § 5.

need scarcely be added that the marriage, in order to produce such effect, must be a valid one. The question of validity is determined by the laws of the place where the marriage is contracted.[1] This effect of the marriage upon the citizenship of the wife does not in any wise depend on the wishes or will of either of the contracting parties, and therefore cannot be blocked by the will of either or both of them. A reservation of her former citizenship by the wife, upon entering into the marriage, is not recognized in German law. For the acquisition of citizenship by the wife, through marriage, does not rest upon the same principle as the acquisition of citizenship through conferment or grant on the part of the State, of which something will be said in the next paragraph. That is, the investment of the wife with the citizenship of the husband is not a "judicial act" on the part of the State,[2] but rests upon a principle of German common law.[3]

Through marriage with a citizen of the German Empire, the citizenship of the husband passes to the wife alone, and not to her illegitimate children, should such exist, unless

[1] In Germany this question is settled in conformity with the provisions of the Law of 6 February, 1875 (*RGBl.* p. 23), and the *BGB.* §§ 1303 ff. With respect to marriage contracted between Germans in foreign countries, see Law of 4 May, 1870 (*RGBl.* p. 599); Law of 17 April, 1886 (*RGBl.* p. 75); Law of 7 July, 1887 (*RGBl.* p. 307); Law of 15 March, 1888 (*RGBl.* p. 71); and Law of 7 April, 1900 (*RGBl.* p. 213), § 36. In general, see Planck, *Einf. G. zum BGB.* notes to Art. 13. Cahn, *op. cit.* pp. 38 ff., note to § 5, says: "Im Allgemeinen wird die Verheiratung eines Deutschen im Auslande als gesetzmässig anerkannt, wenn sie unter Berücksichtigung der *Nationalgesetze* der Eheschliessenden und in der durch die *Gesetze des Aufenthaltsorts* der Eheschliessenden *vorgeschriebenen Form*, gleichviel ob diese in dem bürgerlichen oder kirchlichen Akt besteht, in gültiger Weise abgeschlossen ist." Planck also declares that, in accord with Art. 13, Cl. 1, of the *Einf. G. zum BGB.*, it must be held that "Die Ehe nur gültig ist, wenn sie sowohl nach den Gesetzen des Staates, dem der Mann gehört, als nach den Gesetzen des Staates dem die Frau gehört gültig ist."

[2] Laband, I. p. 152.

[3] See *Motive* to § 5 of the Law; Cahn, *op. cit.* p. 38.

these children be legitimized at the same time by the contraction of the marriage.[1] Citizenship acquired through marriage does not revert on the death of the husband. A declaration of invalidity carries with it, of course, the nullity of all acts based on such marriage, hence the citizenship of a woman whose marriage is declared void is not changed. A divorce, on the contrary, has no effect on citizenship acquired through marriage.[2]

A German who has lost his citizenship in one of the States without acquiring citizenship in another or in a foreign State is "*staatlos*." He is a citizen nowhere. His marriage would place his wife and any children begotten in wedlock, or legitimized by the marriage, in the same status. On the other hand, a German who has acquired citizenship in several States transfers such citizenship, by his marriage, to his wife and their children.[3]

4. *By Grant or Conferment.* — Citizenship may be granted or conferred by an administrative act, performed by an administrative authority of the State, competent under the law.[4] Inasmuch as State citizenship is not acquired, as in the United States, by the mere securing of a domicile, on the part of a citizen of the Union, in another State, it follows that the acquiring of citizenship in one of the German States by a

[1] *Motive* to § 5 of the Law; Cahn, *op. cit.* p. 42, note 3 *b*; Arndt, *Staatsr.* p. 55. Citizenship does not pass to children by a former marriage.

[2] Cahn, *op. cit.* p. 42; Meyer, *Staatsr.* p. 200; Arndt, *op. cit.* p. 55.

[3] Cahn, *op. cit.* p. 42, note 4, in which is also an interesting discussion of the case of Prince Alfred, Duke of Edinburgh, who succeeded to the throne of the Duchy of Coburg and Gotha.

[4] The Law, § 6, states that such conferment takes place through a certificate issued by one of the "higher administrative boards." In general, therefore, it must be inferred that by the term "higher administrative board" is meant such as have other administrative boards subordinated to them, *i.e.* boards of second instance. See Cahn, pp. 45 ff.; Laband, I. p. 153. Local police boards are not competent, therefore.

citizen of another German State must be attended by some formal act, performed by the State into whose civic fellowship he is to be received. It is true that Art. 3 of the Imperial Constitution declares that there shall be a common denizenship (*Indigenat*) for the whole Empire; and provides, further, that the citizens of one State shall, in certain important relations, be treated in every other State no less favorably than that other State treats its own citizens. This Art. 3, however, does not break down the lines of State citizenship, nor does it reverse the order of things and make citizenship in the Empire, rather than citizenship in the State, primary. If, under the terms of Art. 3, the citizens of one State may secure a domicile and carry on the activities of life in every other State on equal terms with the citizens of those States, yet they do not become, by reason of these privileges, citizens of those States in which such domicile is acquired, no matter how long such domicile may be maintained.[1] The citizen of one State becomes a citizen of another State only by means of a dual transaction between the State, on the one side, and the individual, on the other; by a grant of citizenship on the part of the State through its competent administrative board, and by the acceptance of such grant by the party on whom citizenship is conferred. Such acceptance is implied in the application of the party.[2]

[1] It is true that among the privileges mentioned in Art. 3 of the Imperial Constitution, the "acquiring of State citizenship" is one. The awkward construction of the clause which includes the "acquiring of State citizenship" among the privileges to which the citizens of every State in the Empire are to be admitted in every other State on the same conditions as the citizens of that other State, makes an interpretation difficult; but it is certain that Art. 3 was not intended to, and does not, establish the principle that the acquirement of a domicile and the enjoyment of large civil privileges, if continued long enough, would ever confer citizenship.

[2] See Laband, I. p. 153, citing Seydel, *Bayr. Staatsr.* I. p. 275, note 13; Von Sarwey, *Württ. Staatsrecht*, I. p. 165; Löning, *Verwaltungsr.* p. 246;

A citizen of one State does not become a citizen of another State against his will.[1]

It is a recognized principle in public law that every State has a right to define its own membership. It may, therefore, refuse a place in its civic fellowship to citizens of another and a foreign State, or it may permit citizens of foreign States to become a part of its citizen body, and may stipulate the conditions under which this may take place. The grant of citizenship, therefore, must be considered in two aspects, both of which are expressly recognized in German law: (1) the conferring of citizenship by one German State upon a citizen of another German State, — a change of State citizenship, the imperial citizenship remaining unaffected; and, (2) the conferring of State citizenship upon a citizen of a foreign State, which carries with it the conferring of citizenship in the Empire. The conferment of citizenship in both these cases is recognized by the Law of 1 June, 1870. In the first instance the grant is termed "reception," in the second, "naturalization."

(1) *Reception.*— The conditions controlling the reception of citizens of one German State into the citizenship of another German State are laid down in § 7 of the Law of 1 June, 1870: "A certificate of reception shall be granted to every member of another federated State[2] who makes application for it and proves that he has settled in the State in which he makes such application, provided no ground exists, which,

Rehm, Hirth's *Annalen*, 1885, p. 118; Jellinek, *System.* pp. 199 ff.; Contrary opinion, Meyer, *Staatsr.* p. 200, note 8; Zorn, *Staatsr.* I. p. 357; O. Mayer, *Archiv f. d. ö. Recht*, III. p. 47; Radnitzky, *Parteiwilkur im öffentl. Recht*, 1888, pp. 59 ff.; Sartorius, *Der Einfluss der Familienstande auf die Staatsangehörigkeit*, 1899, p. 55; Bornhak, p. 251; Anschütz, in *Holzendorff-Kohler*, II. p. 530.

[1] Whether citizenship can be claimed against the will of the State under Art. 3 of the Imperial Constitution is a wholly different question.

[2] This also includes Alsace-Lorraine. See Cahn, *op. cit.* p. 53, note 5.

under §§ 2–5 of the Law of Free Migration, 1 November, 1867 (*RGBl.* p. 355), justifies a refusal to admit the newcomer, or to permit a continuance of residence."

In this matter of granting a certificate of citizenship to a citizen of another State of the Empire, the State to which such application is made has no discretion, provided certain conditions laid down by imperial law are met. The certificate must issue.[1] It is a general principle of public law that no person, being a citizen of one State, has a right or claim to naturalization in another State. Such a claim would conflict with the idea of political independence, in conformity with which every State has free discretion with respect to whom it will receive into its citizen body. Leaving out of discussion the question whether Art. 3 of the Constitution, in including the "acquiring of State citizenship" among the privileges incident upon the "common *Indigenat*," has set up for every citizen of the Empire an immediate right to reception in any and every State of the Empire to which he may apply, it must be recognized, as the *Motive* to the Law suggests,[2] that, in any case, it would be contrary to the whole tendency of the Constitution, in providing for the uniform regulation of the matter of denizenship (*Indigenat*), to treat the members of one of the federated States on the same footing with the citizens of foreign States, so far as the acquiring of citizenship is concerned. This consideration is back of the provision of § 7 of the Law, which declares that reception into citizenship shall not be denied by one State of the Empire to citizens of another State of the Empire, provided certain conditions are met. This law is certainly a restriction of the independent right of each State in the Union to exercise its choice as to whom it will receive into its body politic

[1] The certificate must issue free of charge. See Law, § 24.

[2] See Cahn, *op. cit.* p. 50.

and to determine its own citizenship; but it is a restriction upon each State in the interests of all the States, and is made necessary by the very nature of the federation.[1]

The conditions under which a citizen of one State in the Empire may claim reception into the citizenship of another, are as follows: —

(1) He must furnish proof of his citizenship in one of the States of the Empire, by producing the proper certificate (*Staatsangehörigkeitsanweise*), made out in his name. It is not at all necessary that he obtain a release or dismissal from the citizenship of his home State, for, under German law, the acquiring of citizenship in the new State does not work the dissolution of the citizenship hitherto held. A German may be a citizen of several States, in fact, of *all* the German States, at one and the same time.

(2) If the applicant is under parental control, or under a guardian, in other words, if he is legally in a state of dependence, the consent of his legal representative must be proven.[2]

(3) Reception follows only on the application of the party.[3] In the debate over § 7 of the Law of 1 June, 1870, it was moved that a citizen of any State in the Empire might transfer his citizenship from one State to another by mere removal to that State. This motion was rejected.[4] It was held that a direct expression of will on the part of the citizen should be required, as to whether he desired to become a citizen of the State in which he had secured a domicile. Moreover, such an expression of will was made necessary by § 12 of the Law, which provided explicitly that residence (*Wohnsitz*)

[1] See the speech of the Federal Commissioner in opening the debate on the granting of citizenship by reception, *Sten. Ber.* 1870, Bd. I. p. 82.

[2] Law of Free Migration, § 2. See *Einf. G. zum BGB.* Art. 37.

[3] This application need not be made to one of the "higher administrative boards," but may be presented to one of the subordinate boards.

[4] Motion of Delegate Von Bockum, *Sten. Ber.* 1870, Anl. IV. Nr. 251.

within a State or within the Imperial Territory did not, of itself, establish citizenship therein.

(4) The applicant must prove that he has acquired an abode in the State into whose citizenship he wishes to be received.[1] By "abode" is meant the actual possession of a dwelling or lodging in the Commune, coupled with the *animus manendi*. No restriction is imposed beyond those contained in the Law of Free Migration. In other words, the principle obtains, that by the conditions under which a *residence* is permitted, a claim to *reception* is established. The fact, therefore, that the applicant has provided himself with a dwelling or lodgings creates the presumption of a right of residence and consequently of a right to reception, and must, for that reason, be proven. Says Laband:[2] "Under 'abode,' according to the fixed terminology of imperial legislation, is to be understood the establishment of a domicile, in distinction from a mere residence. Just as it is beyond doubt that a domicile, once established, can continue in spite of a change of residence, and that domicile and place of residence may, therefore, be distinct from one another; on the other hand, it is equally certain that the establishment of a new domicile cannot take place without residence, and that he who has no right to reside in a locality, whose residence would not be tolerated there, cannot, therefore, take up his abode in that place. Hence, so far as a State is empowered to deny to the

[1] Law, § 7. The acquiring of a domicile is not a *sine qua non* for the *granting* of citizenship. It is a condition essential to the grounding of a *claim* to reception. It is not, therefore, a restriction on the power of the State, but on the right of the individual. In other words, where domicile is not acquired, the State is not *bound* to receive the applicant, but nevertheless has the *right* to do so. See Meyer, *Staatsr.* p. 202; Laband, I. p. 164, note 4; Cahn, *op. cit.* p. 55; Seydel, in Hirth's *Annalen*, 1883, pp. 585 ff.; *Bayr. Staatsr.* I. pp. 277–278; Zorn, *Staatsr.* I. p. 266; Von Sarwey, I. p. 162.

[2] Laband, I. p. 155.

members of another State a residence within its territory, to that extent can it refuse them an abode there, and thus block the entrance to the presumption on which the law grounds the right to grant of citizenship in that State."

The grounds on which one State of the Empire may refuse a residence to citizens of another State are set forth in § 25 of the Law of Free Migration, and are as follows:—

(*a*) If the applicant is legally dependent, and has not obtained the consent of his legal representative.[1]

(*b*) If the applicant has been subjected to police restriction in the matter of residence, or has been convicted of repeated begging or of repeated vagrancy.[2]

(*c*) If it is proven that the applicant does not possess sufficient capacity to provide the necessary means of living for himself and for those dependent upon him who are incapable of labor, or if he cannot meet such expenses out of his own property, and his relatives will not pledge themselves for his support.[3]

(*d*) If, after the arrival of a newcomer, and before he has already gained such residence as entitles him to public support at the hands of the Commune, the necessity for such public support becomes manifest, and it can be proven that support has become necessary on other grounds than a temporary incapacity for labor. In such case a continuation of such residence may be denied.[4]

These grounds may be set up by a State as a defence against the claim of a citizen from another State to reception into its civic body. They do not, however, obligate the State to refuse the application. The *duty* of the State is limited, not the *right*. The State may lighten the conditions under which it will receive citizens from other States of the Empire, but

[1] Law of Free Migration, § 2. [2] *Ibid.* § 3. [3] *Ibid.* § 4.
[4] *Ibid.* § 5. Compare Cahn, *op. cit.* pp. 57–67.

it cannot lay upon them added burdens, unknown to the law.[1]

Reception goes into effect at the moment when the certificate has been placed in the hands of the applicant or of his legal representative.[2] The citizenship acquired by reception extends also to the wife of the recipient and to his minor children still under his care and control.[3] Daughters who are married or who have been married are excepted.

(2) *Naturalization.* — The conditions which foreigners must meet before they can be granted a certificate of citizenship by naturalization are laid down in § 8, of the Law of 1 June, 1870. This section reads as follows: —

"A certificate of naturalization may be granted to foreigners only when they

"1) are capable of disposing of their property under the laws of their home land (*Dispositionsfähig*), unless the lack of such capacity be supplemented by the consent of the father, guardian, or the curator of the person of the party to be naturalized;

"2) have led an unblemished life;

"3) find a dwelling or lodging of their own in the place where they propose to settle;

[1] With respect to settlement of controversies over the refusal of a State to receive, see Meyer, *Verwaltungsr.* I. p. 154, note 15; also Laband, II. pp. 190 ff.

[2] Law, § 10. That is, the certificate must not only be issued, but be actually placed in the hands of the party. See Cahn, *op. cit.* p. 106, note 2; Laband, I. p. 153, note 4.

[3] Law, § 11. This rule, however, is not rigid. The law means that "the grant of citizenship extends to the family, *so far as an exception is not therein made.*" By agreement, upon whatever ground, the citizenship acquired by the husband and father may not extend to all who are legally subject to his authority. The initiative in such case may come from the father or from the administrative board. Cahn, *op. cit.* p. 108, note 3; Laband, I. p. 154.

"4) are in a position to sustain themselves and those belonging to them in the place where they purpose to settle, under the conditions existing there.

"Before the granting of a certificate of naturalization, the Higher Administrative Board must hear the Commune, as well as the Poor Association of the place where the party to be naturalized proposes to locate, with reference to the requirements 2), 3), and 4), mentioned above, and must receive their explanation and declaration."

These conditions, the *Motive* to the Law states, are limited to the minimal requirement necessary to protect the State and the Commune from being flooded with dependent, immoral, or industrially incompetent persons. There is no intention whatever of founding any right to naturalization on the part of any foreigner, nor, by setting forth the conditions under which naturalization *may* be granted, is there any idea of establishing a basis for a *claim* to the acquirement of citizenship in a State of the Empire. While it is true that no State is at liberty to waive any one of these conditions and to admit foreigners into the citizenship of the Empire upon a requirement less than those fixed in the law, on the other hand, no State is compelled to receive a foreigner into its civil fellowship, even when all the conditions imposed by the law are met by him.[1] The wording of the first clause of § 8, "a certificate of naturalization may be granted to foreigners *only*," etc., gives to the law the form of a prohibition upon the States, not the form of a command.

[1] See Cahn, *op. cit.* p. 70. "The States are not deprived of the right to render the conditions of naturalization more severe, by means of special State laws or administrative regulations, or to reject the application of foreigners without assigning reasons for so doing, since no foreigner has a right to naturalization and no State is obliged to grant naturalization." Laband, I. p. 156 and note 3. See Cahn, *op. cit.* pp. 475, 476, for a table of stamp fees and taxes for the granting of naturalization in the various German States.

It rests with the applicant to prove that in his case all the conditions required by law as indispensable to naturalization are fully met. But, as noted in the final clause of § 8 of the Law, before the Board renders its decision upon the application, it must hear the declaration of the Commune and the Poor Association as to the moral character of the applicant, as to his having secured a dwelling in the place where he proposes to locate, and as to his ability to support himself and family in the conditions of industry that exist in the place of his intended domicile.[1] The certificate of naturalization goes into effect, with all the accompanying rights and obligations of citizenship, from the moment in which it is placed in the hands of the applicant.[2]

(3) *Installation.* — A third mode of acquiring citizenship is provided by law: the acquiring of citizenship through installation. Strictly speaking, this is a substitute for reception and naturalization. It may properly be called a *tacit* reception, or naturalization,[3] *i.e.* reception or naturalization without the granting of a certificate in regular form. Section 9 of the Law of 1 June, 1870, reads: —

"A commission issued or confirmed by the government, or by one of the central, or higher administrative boards of a State, to a foreigner, or citizen of another federated State, who has entered into the immediate or mediate service of the State or into the service of the Church, a school, or Commune, takes the place of a certificate of naturalization or of reception, so far as a reservation to the contrary is not expressed in the commission.[4]

[1] See, in this connection, the remark of Cahn, *op. cit.* p. 82, note 14.

[2] Law, § 10.

[3] Laband, I. p. 159; Arndt, *Staatsr.* p. 58.

[4] This reservation may be made by the appointing board or by the appointee. It may be complete, including the whole family of the appointee, or partial, including certain members only. See Cahn, *op. cit.* p. 97, note 18.

"If a foreigner is appointed to the service of the Empire, he acquires the citizenship of the State in which he has his service domicile."[1]

The Law of 1 June, 1870, does not cover the case of a foreigner, domiciled abroad and yet appointed to service of the Empire. In order to meet such a case, a law was passed 20 December, 1875,[2] which runs: —

"A certificate of naturalization must not be refused, by that federated State to which they may apply for citizenship, to foreigners who are appointed to the imperial service, draw a salary from the imperial treasury, and have their domicile of service in a foreign land."[3]

The conferment of citizenship, by whatever method, extends at the same time to the wife and to the minor children still under parental control,[4] so far as an exception is not made expressly in the certificate.[5]

[1] This second clause was added as an amendment to the original draft. It fills a gap made by the omission of a provision for the case of a foreigner domiciled in Germany and appointed to the imperial service. See also Laband, I. p. 159, note 2.

[2] *RGBl.* p. 324.

[3] See Cahn, *op. cit.* p. 103, note *b*. This does not include the *consules electi*, or *Wahlkonsuln*. It will be noted that the mere act of appointment does not carry with it the conferring of citizenship, nor does it lay upon the appointee any obligation to become a citizen of Germany. It does, however, bind the State to grant citizenship if applied for. For a discussion of the reasons which prompted the drafting of this law, see *Sten. Ber. Anl.* 3, 1875–1876, *Aktenstück*, Nr. 73, p. 279.

[4] Illegitimate minor children, whose mother thus becomes naturalized as a German, do not by that act alone acquire the same citizenship, for the tacit expansion of citizenship applies only to the case of legitimate minors. If the mother would naturalize her illegitimate children, she must petition for a special naturalization under the conditions provided for in § 8 of the Law of 1 June, 1870. Cahn, *op. cit.* p. 109, note 5.

[5] The exception may be moved by the party or by the administrative board. Such a reservation, however, must be made by the applicant before the appointment to office is perfected, and by the Board before the granting of citizenship. Cahn, *op. cit.* p. 108, note 3.

II. *The Loss of Citizenship in the German Empire.* — Citizenship in the German Empire may be lost in any one of several ways laid down in the Law of 1 June, 1870.

1. *By Legitimation.*[1] — As already stated, illegitimate children acquire at birth the citizenship, not of the father, but of the mother. Where legitimation is effected in conformity with the provisions of law, and the father is a citizen of a State other than that to which the mother belongs, the legitimized children lose the citizenship acquired by birth and become vested with the citizenship of the father. Should the father be "*staatlos*" at the time of legitimation, the legitimized children will also become "*staatlos*." If the mother of illegitimate children marry a foreigner, the children do not, *ipso facto*, lose the citizenship acquired by birth, although the mother becomes a foreign citizen through the marriage, unless, by the marriage, the children become legitimized.[2]

2. *By Marriage.* — Upon marriage with a citizen of another State, or with a citizen of a foreign land, a German woman loses her citizenship.[3] No certificate of dismissal is needed to attest this fact, though such a certificate may be granted should the country to which the husband belongs require it.[4]

3. *By Dismissal.* — A German citizen may be released from citizenship in a State or in the Empire, through an act analogous to that by which a citizen of a foreign land acquires citizenship in the Empire, or a citizen of one of the German

[1] Law of 1 June, 1870, § 13, Nr. 4.

[2] Cahn, *op. cit.* p. 114, note 6.

[3] Law, § 13, Nr. 5.

[4] Cahn, *op. cit.* p. 119, note 9. In the circular of 16 February, 1872 (*Ministerialbl. f. d. innere Verw.* p. 166), instructions were issued to the officials to the effect that in all cases where a German woman married a foreigner, they should inform the bride of the effect of such marriage upon her status as a citizen.

States acquires citizenship in another. The juristic nature of the act is the same in both cases.

Dismissal from citizenship may be granted upon the request of the party, and takes the form of a certificate issued by one of the higher administrative boards of the home State.[1] The person making application for dismissal must be legally competent, otherwise the request must be made by his legal representative, who must first obtain the consent of the Court of Guardianship. This consent is not necessary, however, where the father or mother requests dismissal, including in the request the dismissal of a child still under parental control. Where a mother seeks dismissal for a child on the ground of parental authority, and an adviser (*Beistand*), whose competence extends to the case of the person of the child, has been appointed for her, she must obtain the consent of the *Beistand* to the making of the application.[2]

Two cases must be distinguished in discussing the subject of dismissal from citizenship in a German State: (1) the case where a party breaks his civic relation with one German State in order to migrate into another German State, citizenship in the Empire thus remaining wholly unaffected; and (2) the case where a party seeks dismissal from the citizenship of a German State in order to emigrate to a foreign land, the release from State citizenship carrying with it the release from citizenship in the Empire as well. As to the first case, the law provides that dismissal shall be granted to every citizen who proves that he has acquired citizenship in another State of the Empire.[3] Such a dismissal is not discretionary with the board to which application is made. It must be granted upon

[1] Law, §§ 13, 1; 14; 18, Cl. 1.

[2] See *EG. zum BGB.* Art. 41, II.; Law of 1 June, 1870, § 14. Compare also *BGB.* §§ 1847 and 1827.

[3] Law, § 15, Cl. 1.

the request of the party, where the request is accompanied by a certificate of citizenship in another German State.[1] Nor can the board hinder the making of an application by imposing a fee upon the issuance of the certificate,[2] or by making the granting of the dismissal conditional upon the fulfilment of the military obligations in the home State, since, under the "Law Respecting the Obligation to Military Service," of 9 November, 1867 (*BGBl.* p. 131), § 17, every German is summoned to fulfil his military service in that State in which he has his domicile, or to which he may have removed before the final decision with respect to his active service is made, irrespective of whether that State is his home State or not.

So far as the second case is concerned, *i.e.* where the appli-

[1] In a note to p. 161, Vol. I. Laband calls attention to a curious state of affairs arising under the German theory that the acquirement of new citizenship, whether in or out of the Empire, does not, *ipso facto*, effect a release from the former citizenship. He says: "If a party does not make this request, — *i.e.* for dismissal, — he remains a citizen of his home State. A German, therefore, may belong to several, indeed, to *all* of the States in the Empire at one and the same time. If, for example, a person is appointed in several States, one after the other, to service in the State or Church or school or Commune, he acquires a cumulative citizenship in all these States, in addition to the citizenship of the State in which he was born, and he hands down these citizenships to his descendants *ad infinitum*. The same process may repeat itself in the case of his sons and grandsons, and State citizenships may accrue in this way to persons who have no suspicion of their existence. These latent citizenships, as a rule, are without visible effect, but they continue, and when a person, possessing several citizenships without knowing it, obtains a dismissal from that State in which he is domiciled and to whose citizen body alone he is conscious of belonging, such a dismissal does not annul his citizenship in the Empire. This fact may lead to very peculiar results, especially in matters of criminal law. So, too, the authorities of the foreign State granting him naturalization on the strength of his certificate of dismissal would be led into the wrong conclusion that he had been freed from his German citizenship, when, in fact, it persists without the knowledge and against the will of all parties."

[2] Law, § 24, Cl. 1.

cation is not accompanied by a certificate of citizenship in another German State, but is made for the purpose of emigration rather than migration, the Board, under the Law of 1 June, 1870, § 15, may not issue a certificate of dismissal to three specified classes of persons:

(*a*) Persons between the ages of seventeen and twenty-five and liable to military service, unless they present a statement from the proper military authority of the Circle, to the effect that the application for dismissal is not made with a view merely to avoid the obligation to military service in the standing army or in the navy.

(*b*) Military persons, belonging to the standing army or to the fleet; officers on leave of absence, and officials not released from service.

(*c*) Persons belonging to the reserves of the standing army and to the *Landwehr*, or to the naval reserves and to the *Seewehr*, not appointed as officers, after they have been called to active service.[1]

Where, however, the above restrictions do not apply, a request for dismissal, in time of peace, may not be refused,[2] nor may the State impose restrictions not found in the imperial law.[3] In time of war, or of threatened hostilities, the Emperor is authorized to issue special regulations in the form of ordinances.[4]

A dismissal from citizenship takes effect at that moment

[1] See also Military Law of 2 May, 1874 (*RGBl.* p. 45), § 60; 6 May, 1880 (*RGBl.* p. 103), Art. 1. See also Cahn, *op. cit.* pp. 182 ff. As to a prohibition of the transportation abroad of persons liable to military service, see Law respecting Emigration, 9 July, 1897 (*RGBl.* p. 463), §§ 23, 24, 40, 41, 43.

[2] Law, § 17. Refusal may not be made on the ground that back taxes remain unpaid. Decision of *Oberverwaltungsgericht*, 14 November, 1887, *Entscheidungen*, Bd. XV. p. 405.

[3] § 24, Cl. 2, of the law permits the imposing of a stamp due and an issuance fee of not more than 3 marks (*ein Thaler*).

[4] Law, § 17.

in which the certificate is placed in the hands of the applicant. If, however, the person to whom the certificate is issued does not remove his domicile from the territory of the Empire, or acquire citizenship in another State of the Union, within six months from the day on which the certificate is delivered into his hands, the dismissal becomes inoperative.[1] No special declaration to that effect is necessary. The dismissal becomes void of itself, and the person to whom it was issued retains the status he would have had if no dismissal had ever been granted. In other words, the citizenship of the person revives, and he is liable for the subsequent fulfilment of all the civic obligations which have been left unperformed during the period of six months.[2]

The dismissal affects also the wife and minor children of the applicant unless exceptions are made in the certificate itself. This effect of a dismissal does not extend to the daughters who are or have been married, nor to children under the parental authority of the mother, if, under § 14 *a*, Cl. 2, of the law, noted above, the mother must obtain consent of the *Beistand*, or legal "adviser," in order to make application for a certificate of dismissal.[3]

4. *By a Decision of the Authorities.* — Germans may be deprived of their citizenship, by an act of their home government, in two special cases. (1) "Germans who reside in a foreign country may be declared to have lost their citizenship, when, in case of war or of threatened hostilities, they refuse to obey, within a specified time, a call to return, issued by the Emperor for the whole federal territory."[4] The loss of

[1] Law, § 18.

[2] See Seydel, Hirth's *Annalen*, 1876, p. 148; Cahn, *op. cit.* p. 138; Laband, I. p. 160, note 5; Arndt, *Staatsr.* p. 63, note 1.

[3] Law, § 19, with the revised wording in conformity with Art. 41, III. of the *EG. zum BGB.*

[4] Law, § 20. The call, that is, is a general one, affecting the citizens

citizenship in such case partakes of the character of a penalty for violation of the duty of a citizen to be loyal to his State. Whether such a declaration shall issue lies within the discretion of the central board of the home State. The issuance is not compulsory. No authority other than the central board of his home State is competent to deprive a recalcitrant citizen of his citizenship.[1] (2) "Germans who, without the permission of their government, enter the service of a foreign State, may be declared deprived of their citizenship, if they do not obey, within a specified time, an express request to withdraw from such foreign service."[2] In this case, also, the declaration can be made only by the central board of the home State, and the issuance of it lies wholly within the discretion of the board.

A question may be raised at this point as to the effect of such a declaration upon the status of a person possessed of citizenship in more than one State of the Empire. Does a declaration by the central board of one State effect the loss of citizenship in all the other States, or does it affect the relation of the person concerned to his home State alone? Three possible answers may be given: that the decree of the central board of the one State does work the loss of citizenship in all the others — the view of Laband,[3] and Zorn;[4] that the decree

of the whole Empire, not a special one addressed to individuals or to the citizens of a single State who may be resident in a foreign land. See, in this connection, Laband, I. p. 135.

[1] A difference of opinion seems to exist among German jurists as to whether in such a case of *penal* deprivation, the loss of citizenship extends to the wife and minor children. The affirmative view is held by Cahn, *op. cit.* p. 143, note 2; Seydel, Hirth's *Annalen*, 1876, p. 151. The negative side is supported by Zorn, *Staatsr.* I. pp. 367 ff.; Von Sarwey, *Württ. Staatsr.* I. p. 170, note 5; Meyer, *Staatsr.* p. 209; and Arndt, *Staatsr.* p. 64.

[2] Law, § 22. This section does not apply to citizens engaged in such service with the permission of their government, Law, § 23.

[3] Laband, I. p. 167.

[4] Zorn, *Staatsr.* I. p. 368. See also Von Stengel, *Wörterb.* p. 343.

does not effect the loss of citizenship in any State but the one issuing the declaration — the view of Meyer,[1] Seydel,[2] and Arndt;[3] or, finally, that a distinction must be made between § 20 of the law, the section imposing the loss of citizenship as a penalty for disobeying a command to return in case of war or threatened hostilities, where the declaration must be regarded as involving the loss of citizenship in all the States, and § 22, the section imposing loss of citizenship as a penalty for refusal to withdraw from the service of a foreign State, where the declaration must be held to effect a loss of citizenship only in that State whose central board issues the decree. This is the view of Cahn.[4] The correct answer to the question raised would seem to be the first, and for the following reasons: In the first place, so far as § 20 is concerned, the loss of citizenship is imposed as a penalty for disloyalty, manifested in the form of disobedience of a command of the Emperor in his capacity as *Bundespraesidium*, or President of the Federation. This disloyalty is not directed against the State, but against the Empire. "A state of war and the danger of war threaten the Empire as a whole. The residence of Germans abroad, at such a time, can therefore collide only with the allegiance of the subject toward the Empire and not toward a single State. For this reason the call to return issues from the Emperor and not from the individual State."[5] For this reason, too, the call is a general one, to citizens of all Germany who may be abroad. If the offence to be punished by loss of citizenship is an offence against the Empire, it may well be assumed that the penalty meted out is intended to be commensurate with the offence, that is, to affect the relation of the offender to the *Empire*,

[1] Meyer, *Staatsr.* p. 212, note 4.
[2] Seydel, *Bayr. Staatsr.* I. p. 288.
[3] Arndt, *Staatsr.* p. 63.
[4] Cahn, *op. cit.* p. 144, note 3.
[5] Laband, I. p. 135.

and, further, that it is intended to be effectual. The mere loss of citizenship in the home State would accomplish neither of these ends, in the case of a person possessed of citizenship in one of the other German States. For, his citizenship in the Empire would be in no wise affected by the loss of citizenship in the home State, while, under § 7 of the Law, the very State depriving him of citizenship would be compelled to receive him back again upon request, which would render the whole proceeding farcical in the extreme, and absolutely nugatory. Again, so far as § 22 is concerned, it may be asserted that if the deprivation of citizenship under § 20 means the loss of citizenship in the Empire, that is, in every State of the Empire, the same must hold good for § 22, as well, for the two are not to be distinguished. Cahn bases his contention upon the claim that a sharp distinction is to be drawn between the effect of these two sections. He argues for the general loss of citizenship under § 20, along the lines just laid down, viz. upon the ground that the act of disobedience is an act of disloyalty to the whole Empire, and should be punished by a loss of citizenship in the Empire. With respect to § 22, however, he maintains that a difference exists which affects the operation of the law. "The acceptance of service in a foreign State without permission of the home government affects only the individual State concerned, and, so long as the interests of the Empire do not require it, as they do require it under § 20, there is no reason why a person who resists the call of the government of a single State should be punished with the loss of citizenship in that State and with the loss of such other citizenship as he might possess in other States of the Union." [1] It may be conceded, in reply to Cahn, that cases where the interests of the State might be affected without affecting the interests of

[1] Cahn, *op. cit.* p. 145.

the Empire are thinkable, yet where the Empire is merely the sum-total of the several States corporately conceived, it is altogether improbable that the interests of the State and the interests of the Empire can be distinguished from each other without considerable difficulty. No such distinction as Cahn insists on is provided for, or suggested, in the law itself. The loss of citizenship under § 20 and under § 22 is authorized in identical language, and, on the face of it, the wording admits of no different interpretation in the one part of the law than in the other. To make such a distinction where none is implied in the language of the law is to do violence both to the law and to the canons of legal interpretation. It must be assumed that whatever the loss of citizenship, as provided for in the law, involves in the one case, it involves, for lack of all exception in the law itself, in the other case also. If, therefore, the law in § 20 imposes the complete loss of citizenship as a penalty for refusal to obey a general recall of the Emperor, it also imposes complete loss of citizenship, in § 22, as a penalty for refusal to obey a specific demand of a State government, that one of its citizens, who is at the same time a citizen of the Empire, shall withdraw from the service of a country foreign to the Empire. Moreover, as urged with reference to the effect of § 20, the depriving of a citizen of his citizenship in a State would degenerate into a mere mockery, if, immediately after the decision of the central board of the State ousting him from its civic body, he could apply to a subordinate board for reception into the civic body and force that board to accept him. It can scarcely be assumed that we have here a contradiction in the terms of the one law, — a conflict between § 7 and §§ 20 and 22. Where two interpretations of a statute are possible, one of which renders the law inconsistent and nugatory, while the other conforms to the letter of the law and at the same time does

no violence to the canons of common sense and of logic, the second interpretation must be assumed to correspond to the intent of the framers of the law.

5. *By Long-continued Residence Abroad.* — Germans who leave the territory of the Empire and reside abroad for a continuous period of ten years lose thereby their citizenship.[1] The lapse of citizenship requires no specific act or declaration of the person residing abroad, in order to become effective. The loss of citizenship follows of itself, at the end of the period fixed, from the mere fact of uninterrupted residence in a foreign land. This rule does not apply, however, to Germans residing abroad who are in possession of passports or certificates of citizenship (*Heimatsschein*), so long as these papers are still valid; nor does it apply to Germans, resident in a foreign land, who are registered with the German consul in the district in which they locate.[2] The rule is inoperative.

[1] Law, § 21, Cl. 1. With respect to the nature of this loss of citizenship, Laband, I. p. 163, says: "Dieser Erlöschungsgrund qualificirt sich juristic als *Nicht-gebrauch*. Ganz unrichtig ist die vielfach vertretene Meinung, den Gesichtspunkt eines *Verzichts* auf die Staatsangehörigkeit einzumengen. Die Staatsangehörigkeit ist kein subjectives Recht, sondern ein Status, dessen Voraussetzungen das objectives Recht festsetzt. Man kann auf die Reichsangehörigkeit ebensowenig verzichten wie auf die Grossjährigkeit, Geschäftsfähigkeit, etc." The German Protectorates are not "foreign" within the meaning of this law. See Law of 15 March, 1888 (*RGBl.* p. 71), § 6, Cl. 3.

[2] Law, § 21, Cl. 1. According to the Law on the Organization of the Imperial Consulate, of 8 November, 1867 (*BGBl.* p. 137), § 12, "Every imperial consul shall keep a register of those citizens of the Empire who live in his official district and report themselves to him for the purpose of registration. So long as a citizen of the Empire is registered in the consul's books, he retains his citizenship, even when the loss of it would ordinarily follow as a result of his residence abroad." According to the "General Instructions issued to Consuls," 6 June, 1871, only those persons are to be registered who are actually dwelling — not temporarily residing — in the consular district, and who request such registration. They must also convince the consul by means of a passport or certificate that they are *bona fide* citizens of the Empire.

moreover, in the case of Germans who are occupying official positions abroad in the service of their government, or who are engaged in the service of a foreign government, with the permission of their own State. The ten-year period is reckoned from the date upon which the party removes from the territory of the Empire. If the party possesses a passport or certificate, the period is reckoned from the date on which these papers expire.[1] This period may be interrupted by registration in the consular list. In such case, it is reckoned from the day following the expiration of the term of registration.[2] Loss of citizenship under the above conditions extends also to the wife and to those minor children who are under his parental control, excepting daughters who are or have been married, provided the wife and children are also abroad with the husband and father.[3]

For Germans who have resided continuously, for five years, in a foreign State, and have acquired citizenship (*Staatsangehörigkeit*) therein, the ten-year period may be reduced, by treaty, to five years, no distinction being made as to whether the parties have passports and certificates or not.[4] Ger-

[1] Law, § 21, Cl. 1.

[2] This term ends with the permanent removal of the party out of the district, with the loss of citizenship in the Empire, or on the request of the party. General Instructions of 6 June, 1871. Cahn, *op. cit.* 171.

[3] Law, § 21, Cl. 2. This clause has provoked much discussion, and one may find a division not only between jurists, but between the decisions of the authorities. See Cahn, *op. cit.* pp. 154 ff., 170 ff.; Laband, I. pp. 163, note 2, 164; Meyer, *Staatsr.* p. 210; Arndt, *Staatsr.* p. 64.

[4] Law, § 21, Cl. 3. This clause was framed to meet certain conditions touching the relations between Germany and the United States. No little friction had been occasioned by reason of the difference in theory and practice with respect to the acquirement and loss of citizenship. A treaty was concluded between the North German Confederation and the United States on 22 February, 1868 (*BGBl.* p. 228), Art. 1 of which declares that "citizens of the North German Confederation who become citizens of the United States of America and shall have resided uninterruptedly within the United States

mans who have lost their citizenship by reason of a ten-year residence abroad, and who have not acquired citizenship in another State, may, at the discretion of the State of which they were formerly citizens, be reinvested with citizenship by that State, even though they may not have again secured a domicile there.[1] The law is permissive and in no sense obligatory. The significance of the provision seems to lie in the fact that in the case of former German citizens who have lost their citizenship, by long residence abroad, without having acquired citizenship elsewhere, the competent administrative authorities of the State to which they formerly belonged may revive their citizenship, and in so doing are not bound by the regulations laid down in § 8 of the Law of 1 June, 1870. The effect of this law may not necessarily be a lightening of the conditions under which such restitution takes place. In fact, it may be the imposition of considerable burdens, which could not be laid upon a person seeking citizenship under the provisions of § 8 of the law.[2]

"Germans who have lost their citizenship by a ten years' residence abroad, and who afterward return to the territory of the Empire, may acquire the citizenship of that State in which

five years, shall be held by the North German Confederation to be American citizens and shall be treated as such." The *Motive* to § 21, Cl. 3, says with reference to the treaty: "It would transgress the limits of necessity and fail of any sufficient reason, should the provisions of this treaty be raised to a general rule of law and should the ten-year period be wholly abandoned. On the other hand, it would not do, in retaining this period, to make an exception in the case of the United States of America alone. The way must be held open also for similar agreements with other States. Upon this consideration does the third clause of § 21 rest." The United States made similar treaties with Bavaria, 26 May, 1868 (*Reg. bl.* p. 2153); Württemberg, 27 July, 1868 (*Reg. bl.* 1872, p. 172); Baden, 19 July, 1868 (*Reg. bl.* p. 1869, 579); Hesse, for part outside the North German Confederation, 1 August, 1868 (*Reg. bl.*, 1869, p. 599).

[1] Law, § 21, Cl. 4.

[2] Cahn, *op. cit.* p. 184, note 30.

they have located, by means of a certificate of reception issued by the higher administrative authority. Such certificate must be granted upon their application for it."[1] Here is an essential lightening of the conditions under which citizenship in a State and in the Empire may be regained after it has lapsed by reason of non-use. This reinstatement is not optional with the State in which the applicant formerly had his citizenship, but is mandatory upon every State of the Empire. The conditions to such restitution are that application must be made by the party, and that he shall have acquired a domicile in the State to which he applies. Nor may he be hindered in securing such a domicile.[2] The status of the returned German is summed up thus by Cahn: "The former German, who has lost his citizenship through ten years' residence abroad and has not acquired a foreign citizenship, cannot, on his return to Germany, be placed in a more favorable position than that German who has remained in the country. Hence, as in the case of the latter, reception into another State of the Union takes place 'only so far as no ground exists, which, according to §§ 2–5 of the Law of Free Migration, justifies the rejection of a newcomer or the refusal of a continuance,' so in the case of the former citizen, a certificate of reception is to be granted only when the conditions laid down in §§ 2–5 of the Law of Free Migration do not stand in the way of his securing a domicile. The reception in *another* State, therefore, is not to be granted *under every condition* to the one who seeks it. On the other hand, reception into his former State cannot be refused."[3]

III. *The Common Indigenat.*[4] — The Imperial Constitu-

[1] Law, § 21, Cl. 5.

[2] Decision of the *RGer.* 22 May, cited by Laband, I. p. 165, note 1.

[3] Cahn, *op. cit.* p. 189, note 37.

[4] A clear and comprehensive treatment of this subject is found in a mono-

tion of Germany contains no "Bill of Rights," safeguarding the individual citizen of the Empire against the encroachments of the State, of the Empire, or of both. The protection of the citizen is left to the constitutions of the several States or to ordinary legislation. Only in the matter of protection abroad, against third powers, does the Imperial Constitution make specific provision. Art. 3 of the Constitution, however, contains certain declarations which appear at first sight to guarantee to every citizen of the Empire certain positive rights and privileges. This article reads, in part, as follows: "There shall be a common denizenation (*Indigenat*) for all Germany, with the result that the members (subjects, citizens) of each federated State shall be treated as natives (*Inländer*) in every other federated State, and accordingly are to be admitted to a fixed residence, to the pursuit of business, to public office, to the acquiring of real estate, to the securing of citizenship, and to the enjoyment of all other civil rights, under the same conditions as the native born, and are to receive equal treatment in matters of legal prosecution and of legal protection.

"No German shall be limited, in the exercise of this privilege, by the authorities of his native State or by the authorities of any other federated State.

"All members of the Union shall have an equal claim to the protection of the Empire as against a foreign land."

Article 3 creates no subjective right of the individual. It does not say that every German has the right to a permanent residence, to the carrying on of business, to public office, and so on, in the whole Empire. It merely says that whatever rights a State may grant to its citizens in these matters, shall

graph by Bockshammer, *Das Indigenat des Art. 3, RVerf.*, Tübingen, 1896. See also Laband, I. p. 167 ff.; Seydel, *Comm.* pp. 48 ff.

be enjoyed also by every German who may desire them. No attempt is made in the article to determine the conditions under which a German may secure a fixed dwelling, pursue his business, etc. It insures simply an equal treatment with respect to these matters to every German. Its declaration is not tantamount to the creation of positive rights for the citizens of the Empire. It is rather a negative proposition to the effect that no German, in legal relations, shall be subjected to more unfavorable regulations than the members of the State itself.[1] It grounds no claim for a German to be treated on more favorable terms than a foreigner, but only protects him against being treated worse than the citizens of the State.

"The scope of this equality of the outsider to the native born is exhaustively indicated by the enumeration introduced by the words 'and accordingly' (*und demgemäss*). In all the enumerated matters, and in these only, shall equality exist. If the territory staked out in the first clause of Art. 3 is thus legally limited, nevertheless it reaches, as a matter of fact, extraordinarily far. Above all, the general clause, 'and to the enjoyment of all other civil rights,' is important. 'Civil rights' means here, not mere rights at private law nor what may be styled subjective public rights, but, as the proper interpretation of the provision assumes, all the public and private rights which do not fall under the head of civic (*staatsbürgerlich*) or political rights. Only in the realm of political rights, particularly, therefore, with reference to the right to vote, and eligibility to election to the representative bodies of the State and of the Communes, is the State legislation at the present time still unhindered in granting preferences to its own citizens over those who are not its citizens, and especially in excluding these outsiders from the privilege

[1] Laband, I. p. 168.

of the franchise in State and communal elections. 'In no point is citizenship in the Empire and citizenship in a State more sharply differentiated than in the contrast between election of the *Reichstag* and election of the State Diet; here only are both actually separated.'"[1]

[1] Anschütz, in *Holtz. Encyclop.* II. p. 528.

CHAPTER IX

THE JUDICIAL ORGANIZATION OF THE EMPIRE

THE present judicial organization of the German Empire is based upon imperial law and not upon the Imperial Constitution. The preservation of legal rights and the administration of justice within the territory of the Empire form one of the fundamental purposes for which the Union was created. The Imperial Constitution, however, contents itself with reserving to the Empire the power to legislate with respect to the "whole domain of civil and criminal law, including judicial procedure."[1] In the exercise of its power to legislate, the Empire has passed a number of laws designed to secure uniformity in the administration of justice. The first of these laws, the Law of Judicial Organization, — *Gerichtsverfassungsgesetz*, — was enacted on the 27 January, 1877.[2] It was followed immediately by the Code of Civil Procedure, — *Civilprozessordnung*, — of 30 January, 1877,[3] and the Code of Criminal Procedure, — *Strafprozessordnung*, — of 1 February, 1877.[4] To these should be added the Bankruptcy Law, — *Konkursordnung*, — of 10 February, 1877,[5] and the law regulating the functions of the public prosecutors and of members of the bar,[6] of 1 July, 1878. All these laws went into effect simultaneously on 1 October, 1879, throughout the Empire. Laws were also passed regulating the costs of courts, the fees of court officials, the fees for witnesses and experts, the fees for attorneys, and laying down

[1] *RVerf.* Art. 4, 13.
[2] *RGBl.* p. 41.
[3] *Ibid.* p. 83.
[4] *Ibid.* p. 253.
[5] *Ibid.* p. 351.
[6] *Ibid.* p. 177.

rules for the exercise of the consular jurisdiction.[1] A uniform Criminal Code was enacted 26 February, 1876.[2] A uniform Civil Code was passed 18 August, 1896,[3] and a uniform Code of Commercial Law, 10 May, 1897,[4] both to go into effect 1 January, 1900.

It may be said, in brief, that Germany possesses a uniform Civil and Criminal Code, a uniform Commercial Code, and a uniform Bankruptcy Law, and that the administration of justice is effected under federal laws regulating the organization of the courts, establishing the rules of procedure, and fixing the various fees incident to judicial administration. The Empire has not taken away the jurisdiction of the several States. The exercise of this jurisdiction, in the most important matters, however, is regulated according to imperial norms. In order to secure effectiveness in the administration of justice by the various States, the Imperial Constitution further provides for imperial legislation respecting the reciprocal execution of judicial decisions in civil matters and the fulfilment of requisitions in general.[5] Such a law was enacted under the North German Confederation, 21 June, 1869,[6] and was declared part of the imperial law on the erection of the Empire.[7] Broadly speaking, then, the administration of justice in the German Empire is exercised by the individual States, in conformity with federal provisions and under mutual obligation to aid in the execution of all judicial decisions and decrees.

In carrying out this principle, the Empire has not abandoned its own jurisdiction. Before the founding of the Empire, the Law of 12 June, 1869, had erected a Superior Court of Commerce,—*Oberhandelsgericht*,—with competence

[1] *RGBl.* 1878, pp. 141, 166, 173; 1879, pp. 176, 197.
[2] *Ibid.* pp. 25, 40.
[3] *Ibid.* p. 195.
[4] *Ibid.* p. 219.
[5] *RVerf.* Art. 4, 11.
[6] *BGBl.* p. 305.
[7] Cf. *GVG.* §§ 157–169.

to sit as a court of last resort in certain specified matters. To the extent of its competence, this court removed jurisdiction from the several States and vested it in the Union. By the Law of 1 October, 1879, the Superior Court of Commerce was replaced by the *Reichsgericht*, or Imperial Court, created by the Law of Judicial Organization, 27 January, 1877. This court has its seat at Leipzig and is possessed of both original and appellate jurisdiction. In matters of contentious jurisdiction, therefore, the jurisdiction of the several States is not final in all cases, but in certain instances is subordinate to the jurisdiction of the Empire.

The whole field of the ordinary contentious jurisdiction — "*ordentliche streitige Gerichtsbarkeit*" — at private law, then, falls within the exclusive control of the Empire, and is exercised by a system of four grades of courts erected by the Law of Judicial Organization. These courts are the *Amtsgerichte*, the *Landgerichte*, the *Oberlandesgerichte*, and the *Reichsgericht*.[1] To the first three classes of courts named numerous matters of "voluntary jurisdiction" — *freiwillige Gerichtsbarkeit* — may be assigned by State law.[2]

[1] Section 8 of the *Einführungsgesetz zum Gerichtsverfassungsgesetz* provides that when in any State several *Oberlandesgerichte* are erected, a Supreme Court — *Oberstes Landgericht* — may be erected by State law, to which may be referred for decision civil cases which fall within the appellate and revisional jurisdiction of the *Reichsgericht*. The Law of 11 April, 1877, fixing the seat of the *Reichsgericht* at Leipzig, has excluded Saxony from taking advantage of this privilege. Württemberg and Baden have erected but one *Oberlandesgericht*. The smaller States could not support more than a single *Oberlandesgericht*, so that Prussia and Bavaria alone are in a position to avail themselves of this privilege of erecting a court of this nature. Prussia has declined to make use of the right. Bavaria, therefore, is the only German State in which an *Oberstes Landgericht* exists at present. By the State Law of 23 February 1879 (*Bayr. G. und Verord. Bl.* 1879, p. 273), Abt. 42 ff., a court of this description was erected in Munich. See Laband, III. p. 378.

[2] Matters relating to guardianship, the probating of wills, the registration of land titles, etc.

I. *The Amtsgerichte.* — The organization of these courts is left wholly to the individual States, who determine the number of judges to be appointed to each *Amtsgericht.* In case several judges are assigned to a single court, the judicial business is divided between them either locally or according to the nature of the matter, each judge acting singly, the division of business for the fiscal year having been previously determined by the *Praesidium* of the *Landgericht,* or next higher instance, in conformity to provisions laid down by the State Minister of Justice.[1]

For the trial and decision of criminal cases there are erected in connection with the *Amtsgerichte* what are known as *Schöffengerichte,* consisting of a judge of the *Amtsgericht* and two laymen, called *Schöffen,* the three forming a single collegiate court. The *Schöffengericht* is not regarded as a separate and independent judicial authority, but as a "processual form of the *Amtsgericht.*"[2] During trial, the *Schöffen* possess all the rights and privileges of the learned judge, with equal voice and vote, and they take part in all decisions which may be necessary in the course of the trial and which do not relate to the fixing of the penalty. All decisions relating to the case, outside the trial itself, are made by the learned judge.

The office of *Schöffe* is an honorary one,[3] and can be held

[1] It does not invalidate the proceedings should the case be heard by a judge other than the one assigned to that particular district or to that particular class of judicial business. Where there are several judges assigned to an *Amtsgericht,* one judge is designated as supervising judge. It is his duty to transact such business as may come before the court as a collective authority, especially administrative matters, and to supervise generally the subordinate court officials. *GVG.* § 22.

[2] Laband, III. p. 407, citing also *Motiven zum GVG.* p. 31. Where there are several judges in one *Amtsgericht,* the State Administration of Justice is free to regulate the selection of a judge to preside over the *Schöffengericht.*

[3] *GVG.* § 31.

only by a German.[1] Not every German, however, is eligible to serve as *Schöffe*. Three classes may be distinguished: those who are incompetent; those who, though competent, must not be summoned; and those who, though competent and summoned, may refuse service. To the first class belong persons who have lost their capacity to serve as *Schöffen* by reason of a criminal judgment; persons against whom trial has begun on a charge which may result in a sentence removing civil honors or taking away the capacity to hold public office; and persons who, through order of court, are restricted in their right to dispose of their property.[2] To the second class belong persons who, at the time the list of *Schöffen* is published, have not completed the thirtieth year of their life, or who have not lived two full years in the Commune; persons who have received public charity for themselves or for their family during the three years immediately preceding the publication of the list; persons who, on account of mental or physical infirmity, are not fit to perform the functions of the office, and, further, servants, certain officials, persons in religious service, teachers in the public schools, active military persons, etc. The State laws may also designate certain higher administrative officials who shall not be summoned to serve as *Schöffen*.[3] To the third class belong the members of the legislative assemblies; persons who, during the last fiscal year, have served as jurors or have sat at least five days as *Schöffen;* physicians, apothecaries without assistants; persons over sixty-five years of age; persons who give reasonable evidence that they are unable to bear the expense connected with *Schöffen* service.[4]

[1] No fee is attached to the office. The *Schöffen* may, however, receive compensation for travelling expenses. *GVG.* § 55.

[2] *Ibid.* § 32.

[3] *Ibid.* §§ 32–34.

[4] *Ibid.* § 35. Should a person falling within any of these categories

The *Vorsteher*, or presiding officer of the Commune, makes out a list of the persons in a district who may be summoned as *Schöffen* and exposes it for a week to the inspection of the public, then sends it, together with such objections as may have been raised against its completeness or correctness, to the judge of the *Amtsgericht*. Each year there assembles at the *Amtsgericht* a committee, made up of the judge of the court, an administrative official appointed by the president of the *Regierung*, — the administrative body of the district (*Bezirk*), — and seven men elected by the representative body of the Circle (*Kreis*). This committee passes upon the objections laid against the list and chooses out of the list as finally corrected the number of *Schöffen* for the ensuing year, as well as a number of alternates to serve in case of need. The *Schöffen* thus selected, and the alternates, are kept in separate lists, from which the president of the *Landgericht* is to select the *Schöffen* for the specific sittings. The days upon which the *Schöffengericht* is to sit are fixed beforehand for the whole year, and the order in which the *Schöffen* are to serve in the several sittings is determined by lot. The lots are drawn by the judge of the *Amtsgericht* in open court.[1] This precludes the possibility of an arbitrary summons or a selection of the *Schöffen* to sit in a particular case.

At their first appearance for service, the *Schöffen* are sworn for the period of the fiscal year.[2] *Schöffen* who fail to appear at the proper time, without sufficient excuse, or who avoid their obligation to serve, are liable to a fine in contempt. This fine may run from five marks to a thousand marks together with the costs.[3] The statement of an untruth in excuse of

be placed upon the list and be regularly summoned, he must establish within a week his right to refuse service, else the right becomes invalid.

[1] *GVG.* §§ 36–45.

[2] *Ibid.* § 51.

[3] *Ibid.* § 56.

failure to appear subjects the delinquent to imprisonment for two months in addition to the fine in contempt.[1]

Schöffen, like jurors, are pledged to secrecy as to what transpires in the deliberations and votes of the court. No penalty, however, is provided for the violation of this pledge, even should such violation be the result of a bribe. While the *Schöffen* hold an "office" (*Amt*) in German law, they are not "officials" (*Beamten*) within the meaning of the "Imperial Law Concerning Imperial Officials" (*Reichsbeamtengesetz*). Hence the penal provisions of that law touching corruption do not apply to the *Schöffen*.[2]

The *Amtsgericht* is a court of first instance only. Its civil jurisdiction extends to suits involving property claims whose value in money or its equivalent does not exceed three hundred marks; to suits between a renter and tenant or subtenant of dwellings or other quarters, or between the tenant and subtenant with reference to the use of such space, the vacating of it, the disposition of articles brought to the rented quarters by the tenant or subtenant, etc.; to suits between master and servant, employer and employee; to suits between travellers and landlords, common carriers, emigrant agents at the port of departure, with reference to hotel bills and charges, transportation charges, freight charges, damages to property forwarded, etc.; to suits touching defects in cattle; to suits over damages inflicted by game; to claims arising from cohabitation outside of wedlock; and to proceedings in forced sale, levy, etc.[3] Certain controversies in bankruptcy, not assigned to the *Landgericht*, also fall within the jurisdiction of the *Amtsgericht*.[4] The competence of the *Amts-*

[1] *StGB.* § 138.

[2] *Rechtsanwalt* Kann, in *Deutsches Recht*, edited by W. Göetze, Berlin, 1903, II. p. 535.

[3] *GVG.* § 23.

[4] See §§ 112–114, 129, Law of 1 May, 1889, revised wording of 20 May, 1898 (*RGBl.* p. 810).

gericht is further regulated, in civil matters, by a number of provisions of the Law of Judicial Organization and the Code of Civil Procedure, which bring various matters within the jurisdiction of this court.[1]

The great majority of criminal cases within the jurisdiction of the *Amtsgericht* is tried by the *Schöffengericht*, yet in certain cases where the charge is mere trespass, and the act is confessed, the *Amtsgericht* may, with the consent of the prosecuting attorney for the State, try the case and decide it without summoning the *Schöffen*. The same holds with reference to cases of simple stealing under the forestry laws.[2] Moreover, there is a great mass of business connected with the preliminary proceedings in criminal matters, which is transacted by the judge of the *Amtsgericht* without reference to the lay members of the *Schöffengericht*. The *Schöffengericht* is erected purely for criminal matters and its competence extends to all misdemeanors and petty offences, the penalty for which does not exceed three months' imprisonment, or a fine of six hundred marks, or both; slander; bodily injury; thievery; embezzlement; destruction of property; where the value of the thing stolen, embezzled, or destroyed does not exceed twenty-five marks; the receiving of stolen goods; infraction of the police regulations respecting field and forest; etc. Certain criminal cases may also be assigned to the *Schöffengericht* by the Criminal Chamber of the *Landgericht*, on motion of the public prosecutor at the opening of trial,[3] where it is to be assumed from the circumstances of the case that no penalty will be imposed exceeding three months' imprisonment, or a fine of six hundred marks, or both.

[1] See *GVG.* § 24; *CPO.* §§ 645, 675, 680, 685, 609, 689, 764, 828, 848, 899, 919, 942.

[2] *StPO.* § 211, Cl. 2.

[3] See *GVG.* §§ 29, 75.

II. *The Landgericht.* — The *Landgerichte* are collegiate courts, composed of a president and a number of associate judges.[1] The number of judges and the extent of the territorial jurisdiction of the court are determined by State law. Each *Landgericht* must be divided into civil and criminal chambers.[2] The president of the court presides over the full bench. A director presides over each chamber. The president of the court, however, presides over one of the chambers as well as over the full bench, and makes his choice as to which chamber he shall preside over before the opening of the fiscal year. The assignment of the directors to the various chambers is made by a majority vote of the president and directors in joint meeting. Should there be a tie, the vote of the president decides.[3] The president, the directors, and the oldest member of the court in term of service constitute the *Praesidium.* It is the task of the *Praesidium,* before the fiscal year opens, to distribute the business of the year among the chambers, to assign the several members of the court to the various chambers, and to appoint alternates in case necessity for them should arise.[4] Every judge of the court must be a member of some chamber. He may be a member of more than one. The assignment of judicial business within the chamber is made by the director of that chamber. The Civil Chamber must be made up of at least three members, including the judge, while the Criminal Chamber must have five members in order to proceed to trial, though as a court of appeal in misdemeanors and in private complaints it may sit with three members.

On the nomination of the president of the *Oberlandesgericht,* certain members of the *Landgericht* may be appointed by the State Administration of Justice as "examining judges" (*Untersuchungsrichter*). The number appointed is determined

[1] *GVG.* § 58. [2] *Ibid.* § 59. [3] *Ibid.* § 61. [4] *Ibid.* §§ 62, 63.

by the needs of the court. The appointment is for the fiscal year. The examining judge is competent to open and conduct the preliminary investigation in criminal matters.[1] Appointment to the position of examining judge does not exclude membership at the same time in one of the Civil or Criminal Chambers of the *Landgericht*.

When an *Amtsgericht* is located at a considerable distance from the *Landgericht*, by order of the Minister of Justice a Criminal Chamber may be constituted in connection with the *Amtsgericht*, and may be territorially competent for the district covered by that particular *Amtsgericht* or by several *Amtsgerichte*. This Criminal Chamber is made up of members of the *Landgericht* or out of the judges of the *Amtsgerichte* in the district. A judge is summoned by the Minister of Justice permanently to preside over the chamber. The determination of the number of judges of the *Amtsgerichte* or of the *Landgericht* who shall sit, in addition to the presiding judge, as members of the chamber, as well as the specific summons of the judges for such service, is regulated by the laws of each several State. The appointments are for the year. To these Criminal Chambers may be assigned the jurisdiction of a regular chamber of the *Landgericht*, either wholly or in part. The fixing of the limits of competence and of the boundaries of its territorial jurisdiction lies with the State Administration of Justice.[2]

When the State Administration of Justice holds a need to

[1] *GVG.* § 60; *StPO.* § 182.

[2] In Prussia the activity of these Chambers extends as a court of first instance to all cases within the jurisdiction of the *Landgericht*. So far as the actual trial is concerned, all decisions outside the actual trial are reserved for the *Landgericht*. As an appellate court, the detached chambers are limited to those cases which may be heard by the Criminal Chambers of the Landgericht with only three members, *i.e.* to misdemeanors and private complaints.

exist, Chambers for Commercial Matters (*Kammer für Handelssachen*) may be erected in connection with the *Landgerichte* for the whole district covered by the *Landgericht* or for limited portions of the same.[1] These Chambers for Commercial Matters are simply a species of Civil Chamber of the *Landgericht* with a special material competence; in other words, the erection of these Chambers involves merely a legal distribution of the legal business within the same court of first instance.[2] The activity of the Chamber for Commercial Matters is *always the exception*. It arises only when, in regular procedure before the Civil Chamber of the *Landgericht*, a motion is made by one of the parties to refer the case to the Chamber for Commercial Matters. There is no special procedure for suits tried in these Chambers. Their competence extends to those civil suits at law assigned to the *Landgericht* as court of first instance, in which complaint is made against a merchant as defined by the Code of Commercial Law, with respect to transactions which are commercial transactions for both parties; suits arising out of matters of exchange within the meaning of the Law of Bills of Exchange, or suits growing out of certain specified papers;[3] suits based on certain legal relations in commercial matters;[4]

[1] For literature on the subject of Commercial Courts, see Voigtel, *Uebersicht der Literatur des Handelsgerichts*, pp. 196 ff.

[2] The authority to erect these Chambers for Commercial Matters is found in *GVG.* § 100. The original proposal was to create *Handelsgerichte* — Commercial Courts — as a peculiar kind of regular judicatory, with a considerably wider competence. A sharp opposition developed in the debate on the draft of the *GVG.*, and after much discussion the present arrangement was adopted.

[3] See § 363, *Handelsgesetzbuch*. Such papers as mercantile instructions and obligations, freight-bills, warehouse-bills, etc.

[4] For example, legal relations between the members of a commercial company, or between the company and its members, etc.; matters pertaining to the use of the firm name, trade-marks, samples, models, etc.; transactions with agents, etc.

and suits over the rebate of dues collected by reason of the Imperial Stamp Tax Law.[1] Whatever the nature of the suit, the Chamber for Commercial Matters becomes possessed of it only on motion of one of the parties.[2]

The Chambers for Commercial Matters may have their seat within the territorial jurisdiction of the *Landgericht*, and may be located even in places where the *Landgericht* is not seated. The erection of such chambers is determined by the judicial administration of the State according to its estimate of the need. The State also fixes the number of such chambers to be created and establishes the bounds of their local jurisdiction. While, therefore, the territorial jurisdiction of the chamber cannot exceed that of the *Landgericht*, it may be much less. The Chamber for Commercial Matters may be located at the seat of the *Amtsgericht*. In such case, however, the chamber acquires no vital connection with the *Amtsgericht*. It still remains a division of the *Landgericht*.

The Chamber for Commercial Matters is composed of a presiding judge, appointed from the *Landgericht*, and two laymen, known as *Handelsrichter* or commercial judges. All members of the chamber possess the same right of vote. The office of *Handelsrichter* is an honorary one. No salary is attached to it, nor do these commercial judges receive any recompense or remuneration for travelling expenses. The commercial judges are appointed for a term of three years and are eligible for reappointment. They are nominated by those bodies which are organized to represent the mercantile classes. The State decides by law what bodies shall be permitted to make nominations and what organ of the State shall

[1] *GVG.* § 101; *RStempelges.* § 43.

[2] No such chambers are found in the higher courts. Appeals from the chambers go to the *Oberlandesgericht* and *Reichsgericht* and follow the course of other civil suits on appeal.

make the appointments.[1] While no imperial law makes the acceptance of the office compulsory, as in the case of the *Schöffen*, there is no imperial legislation forbidding the State to make the acceptance compulsory. In fact, Prussia and Hamburg have made laws to that effect. Any German is eligible to the office who is, or has been, registered as a merchant or the superintendent of a stock company in the Commercial Register, has completed the thirtieth year of his age, and lives in the district in which the Chamber for Commercial Matters is located. Persons who, by reason of a judicial decree, are restricted in the administration of their property cannot be appointed to the office of commercial judge. Before entering upon his duties the *Handelsrichter* must take the oath of office. During the term of their service the commercial judges have, with respect to their office, the same rights and privileges which are accorded to udicial officials. They are State officials [2] and as such are subject to discipline. Unlike the *Schöffen*, they may be tried as officials under the Code of Criminal Procedure.[3] Should a commercial judge lose one of his qualifications to office during his term of service, he is to be removed by the Civil Senate of the *Oberlandesgericht* after due hearing.[4]

For the trial and decision of criminal matters, *Schwurgerichte*, or jury courts, meet periodically "*bei den Landgerichten.*" Although, according to the system of courts, these *Schwurgerichte* belong to the *Landgerichten*, nevertheless the connection is a very loose one.[5] They are not per-

[1] In Prussia the nominations are made by the Chambers of Commerce and Merchants' Associations. The king makes the appointments.

[2] See Laband, III. p. 458.

[3] They are not, however, *professional* servants of the State, and the rules touching the promotion, transference, and retirement of State officials do not apply.

[4] *GVG.* § 117.

[5] Laband, III. p. 410.

manent courts, but meet at stated periods fixed by the laws of the State or by the State Administration of Justice.[1] The *Schwurgerichte* are composed of three learned judges, including the presiding judge, and twelve jurors — *Geschworenen* — summoned to decide the question of guilt. The presiding judge is appointed for each session by the president of the *Oberlandesgericht*, and is selected from the members of the *Oberlandesgericht* or from the members of the *Landgericht* located in jurisdictional territory of the *Oberlandesgericht*. The *alternate* presiding judge as well as the remaining judicial members of the court are appointed by the president of the *Landgericht* from the members of the *Landgericht*.[2]

The office of juror is an honorary one and can be assumed only by a German.[3] The rules governing the competence to serve and the summoning of *Schöffen* apply also to jurors.[4] The fixing of the number of jurors to be assigned to each *Schwurgericht* and the distribution of the jurors among the various *Amtsgericht* districts is the work of the State Administration of Justice.[5] The list of persons eligible for duty as *Schöffen*, as made out by the committee to which reference has been made in discussing the selection of these officials, serves also as a list from which the jurors are chosen. Out of the list from which the *Schöffen* are to be selected, the committee chooses a number of persons competent to do

[1] In Prussia the time for beginning a sitting of the *Schwurgerichte* is fixed by the president of the *Oberlandesgerichte*. As a rule a session of the *Schwurgerichte* shall not exceed two weeks (*Allgem. Verfug.* of 22 May, 1882, *JMBl.* p. 146).

[2] *GVG.* §§ 81–83.

[3] *Ibid.* § 84.

[4] *Ibid.* § 85. For qualifications of *Schöffen* see above, p. 175.

[5] *Ibid.* § 86. No one shall be compelled to serve as juror and *Schöffe* in the same fiscal year. *GVG.* § 97.

jury duty. The number thus chosen must be three times that fixed by the State Administration of Justice as needed for the district. The selection of the committee is not final. The names chosen by the committee form what is known as the "list of nominees"—*Vorschlagsliste*. This list, together with such objections as may have been raised respecting the names thereon, is sent to the president of the *Landgericht*. From this list there is selected finally, in a sitting of the *Landgericht* consisting of five members, including the president and directors, the requisite number of jurors and *alternate* jurors,[1] the jurors and alternate jurors being recorded in two separate "year lists." From the year list the president of the *Landgericht*, in an open sitting of the *Landgericht* at which two members besides himself are present, and in the presence of the State attorney, chooses by lot thirty jurors, who form the "verdict list" for the single session of the *Schwurgericht*.[2] Out of this verdict list a jury of twelve men is chosen, also by lot, certain rights of challenge being given to both prosecutor and defendant at the opening of trial.[3] Jurors who fail to appear are liable to the same punishment as *Schöffen* in the same circumstances, and, like *Schöffen*, may be imprisoned should an untruth be set forth in excuse for delinquency.[4] The Criminal Chamber of the *Landgericht* may also decide that single sessions of the *Schwurgericht* shall be

[1] In every trial before the *Schwurgerichte*, one or more alternate jurors are chosen at the time the regular jury is made up. These alternates sit in the case and have all the privileges of jurors. Should a juror be incapacitated, his place is taken by an alternate who has heard the evidence, and the trial proceeds. The alternate has, of course, no active part in the determination of the question of guilt unless called upon thus to take the place of an incapacitated juror.

[2] *GVG.* §§ 89–92.

[3] See *StPO.* §§ 278–288. See article by the writer in *Pol. Sci. Quart.* for December, 1904.

[4] *GVG.* § 96; *StGB.* § 138.

held in places other than the seat of the *Landgericht.*[1] The Minister of Justice may also decree that the districts of several *Landgerichte* shall be united in one *Schwurgericht* district, and that the sessions of the *Schwurgericht* shall be held at the seat of one of the *Landgerichte.*[2]

So far as the competence of the *Landgericht* is concerned, broadly speaking, it extends in civil matters to all suits which are not assigned to the *Amtsgericht.*[3] The *Landgericht* has exclusive jurisdiction, irrespective of the value of the object in dispute, in certain claims against the Imperial Fiscus and in claims against imperial officials where these officials are charged with overstepping the bounds of their authority or with neglect of official duty. Further, the laws of the State may assign exclusively to the *Landgericht* certain claims of State officials against the State, based on official service, administrative decrees, etc., irrespective of the amount involved.[4] The *Landgericht* serves as an appellate court for civil suits tried before the *Amtsgericht.*[5] Complaints in bankruptcy proceedings are also brought before the *Landgericht.* The State may assign to the *Landgericht,* as a court of first and second instance, numerous matters of "voluntary" jurisdiction.

The Criminal Chambers of the *Landgericht* are competent as court of first instance for the trial of crimes which do not fall within the jurisdiction of the *Schwurgericht:* crimes entailing a penalty of imprisonment in the penitentiary of not more than five years, with or without additional penalty; crimes committed by persons under eighteen years of age; indecent conduct with persons under fourteen years of age;

[1] *GVG.* § 98. [2] *Ibid.* § 99.

[3] *Ibid.* § 70, Cl. 1. The Chamber for Commercial Matters is here included.

[4] *Ibid.* § 70. [5] *Ibid.* § 71.

graver cases of thievery, etc. As a court of second instance the Criminal Chambers of the *Landgericht* are competent to hear appeals from the judgment of the *Schöffengericht* and of the *Amtsgericht* in certain cases.[1] The competence of the *Schwurgericht* extends to the trial of crimes which do not fall within the jurisdiction of the Criminal Chambers of the *Landgericht* or the *Reichsgericht*.[2] An appeal may be taken from the judgment of the *Schwurgericht* to the Criminal Senate of the *Reichsgericht*.[3]

III. *The Oberlandesgericht.*— The *Oberlandesgerichte* are courts of appellate jurisdiction only. They are collegiate courts, divided into Civil and Criminal *Senates*. The number of justices and of senates, the distribution of business among the various senates, and the assignment of the members of the court to the several senates are determined by State law. At the head of the court stands a president of the *Oberlandesgericht*. Each senate is also provided with a president.[4] The president of the court, the senate presidents, and the two oldest members constitute the *Praesidium*.[5] In order to hear cases brought before them, the Senates must be composed of at least five members, including the presiding judge.[6]

In civil matters, the *Oberlandesgericht* hears appeals from the judgment of the *Landgericht*, where the *Landgericht* is the court of first instance, and complaints arising out of decisions of the *Landgericht*.[7] It also decides certain questions

[1] See *GVG.* § 76, and *StPO.* § 211, Cl. 2.

[2] *GVG.* § 80. The *Schwurgericht* is also competent to try crimes committed by the press, where such competence had been assigned to it by State law prior to the introduction of the *GVG.*, *e.g.* in Bavaria and Württemberg, and to a certain extent in Baden and Oldenburg. Laband, III. p. 403.

[3] *GVG.* § 136, 2. [4] *Ibid.* §§ 119, 120. [5] *Ibid.* § 121. [6] *Ibid.* § 124.

[7] *Ibid.* § 123, 1, 4. It may hear complaints against the decision of the *Landgericht* in certain bankruptcy matters. *Konkursord.* §§ 72, 73, Cl. 3.

and conflicts with respect to jurisdiction in the lower courts. In criminal matters the *Oberlandesgericht* has the power of revision as to judgments of the Criminal Chambers of the *Landgericht* rendered as an appellate court, and as to judgments of the Criminal Chambers of the *Landgericht* rendered as a court of first instance, so far as the revision is based exclusively upon the infraction of a legal principle contained in the laws of the *State*. The *Oberlandesgericht* also hears complaints against criminal judgments of a court of first instance, where the Criminal Chambers of the *Landgericht* are not competent, and complaints against the decisions of the Civil Chambers of the *Landgericht* rendered as a court of second instance.[1]

IV. *The Reichsgericht.* — The *Reichsgericht* is the sole *imperial* court, and has its seat at Leipzig. It is collegiate in its organization, is divided into Civil and Criminal Senates, and is composed of a president, the senate presidents, and associate justices. The members of the *Reichsgericht* are imperial officials, and are appointed by the Kaiser, upon nomination by the *Bundesrat*.[2] The appointments are for life, with a fixed salary. The members of the *Reichsgericht* are entirely exempt from State control. The number of senates into which the court shall be divided is determined by the Imperial Chancellor.[3] Seven members of a senate, including the president of it, must be present in order to render the proceedings valid.[4] Where the decision of the full court is to be had, or a decision of several combined senates, two-thirds of the membership of the court or of the

[1] *GVG.* § 123, 2, 3, 5. For further competence of the *Oberlandesgericht* see *StPO.* §§ 4, 12, 13, 14, 15, 19, 27, 170.

[2] *GVG.* § 127, Cl. 1.

[3] At present there are 7 Civil and 4 Criminal Senates, 10 senate presidents, and 81 justices. See *GVG.* § 126.

[4] *GVG.* §§ 132, 140.

combined Senates must be present. The number of members must be an uneven one. Should this chance not to be the case, the judge youngest in term of service — should there be more than one of the same length of term, the youngest in *age* — has no vote in the decision.[1] The assignment of the members to the various senates, the distribution of business among the several senates, the arrangement of substitutes, etc., are determined by the *Praesidium*. The *Praesidium* consists of the president of the *Reichsgericht*, the presidents of the senates, and the four oldest justices. Judges who are not regularly appointed members of the *Reichsgericht* may not be called in to serve as assistant justices.[2] The proceedings of the *Reichsgericht* are conducted in conformity with an "Order of Business," drawn up by the full court and ratified by the *Bundesrat*.[3]

In civil suits, the Civil Senates of the *Reichsgericht* are competent to hear and decide complaints against the decisions of the *Oberlandesgericht*.[4] They may also revise final judgments of the *Oberlandesgericht* rendered as a court of second instance.[5] In order to support a revision it must be shown that the decision is based upon an infraction of an *imperial* law or a law whose operation extends beyond the jurisdiction of the court from whose decision the appeal is made.[6] The

[1] *GVG.* § 139. [2] *Ibid.* §§ 133, 134.

[3] *Ibid.* § 141. Compare Proclamation of the Imperial Chancellor, 8 April, 1880 (*Centralblatt*, p. 190), and Proclamation of 25 July, 1886 (*Centralblatt*, p. 300).

[4] *GVG.* § 135. Cf. *CPO.* § 568, Cl. 2, 4.

[5] In suits involving property claims, a revision is permissible only when the value of the property thus involved exceeds 1500 marks, unless a question of lack of jurisdiction arises, or a question of the regularity of the remedy or of the allowableness of appeal, or unless the suit touches a matter within the exclusive jurisdiction of the *Landgericht*, no matter what the value of the property in dispute may be.

[6] See *CPO.* §§ 545, 546, 547, 548. For certain exceptions, see *Kais.*

Civil Senates may also decide certain questions which may arise touching the subordinate courts: controversies over local jurisdiction, questions as to what court is competent in cases where the regularly competent court is prevented from hearing the matter, conflicts of competence between several courts, etc.[1]

The Criminal Senates of the *Reichsgericht* are competent to hear, as court of *first* and *last* instance, cases of high treason and treason against a State, so far as these crimes are directed against the Kaiser or Empire, as well as cases of betrayal of military secrets.[2] Further, the Criminal Senates have the power of revision as to judgments of the Criminal Chambers sitting as courts of first instance, so far as the revision is not based exclusively upon the infraction of a State law. They may also revise the judgments of the jury courts.[3]

The *Reichsgericht* is also competent to hear appeals from the Consular Courts in both civil and criminal matters,[4] and appeals from the decisions of those officials in the Protectorates who are invested with judicial powers.[5] It sits as a court of first and last instance in certain matters of con-

Verord. of 28 September, 1879 (*RGBl.* p. 299), in connection with the Proclamation of 11 April, 1880 (*RGBl.* p. 102), also laws of 15 March, 1881 (*RGBl.* p. 38), 24 June, 1886 (*RGBl.* p. 207), and 30 March, 1893 (*RGBl.* p. 363). *RGer.* has also jurisdiction, as appellate court, in certain matters of "voluntary" jurisdiction.

[1] See *CPO.* §§ 45, Cl. 1; 36, 650, 651, 676.

[2] See Law of 3 July, 1893 (*RGBl.* p. 205), §§ 1 and 3. In such cases the First Criminal Senate conducts the preliminary examination, and the trial is had before the Second and Third Criminal Senates. *GVG.* §§ 136, Cl. 1, 1; 138, and § 12 of the Law of 3 July, 1893.

[3] *GVG.* § 136, Cls. 1, 2. See also *GVG.* § 136, Cl. 2. A revision can be supported only on the plea that the judgment is based upon an infraction of law. *StPO.* § 376. For certain other matters which come before the Criminal Senates, see *StPO.* §§ 12, 13, 14, 19, 15, 27.

[4] *Konsulargerichtsbarkeitgesetz* of 7 April, 1900 (*RGBl.* p. 213), § 14.

[5] *Schutzgebeitsgesetz* of 25 July, 1900 (*RGBl.* p. 813), § 2.

sular jurisdiction, where the consul refuses judicial assistance provided in the Law of Judicial Organization, or where a person, acquitted in certain proceedings, sues for damages.[1] The *Reichsgericht* is also an appellate court with respect to decisions of the Imperial Patent Office as to the invalidity of a patent or as to its withdrawal.

When one Civil Senate wishes to dissent from the decision of another Civil Senate or from a decision of the united Civil Senates on a question of law, or where one Criminal Senate wishes to dissent from the decision of another Criminal Senate or from the decision of the united Criminal Senates as to a point of law, the matter in dispute is to be brought in the one instance before the united Civil Senates and in the second instance before the united Criminal Senates. Where, however, a Civil Senate wishes to dissent from a decision of a Criminal Senate, or from a decision of the united Criminal Senates, or where a Criminal Senate wishes to dissent from a decision of a Civil Senate or from the decision of the united Civil Senates; or where a Senate, Civil or Criminal, wishes to dissent from a decision of the whole court, the question of law is determined by the court *in plenum*.

V. *The Judiciary.* — The judicial institutions of Germany are based upon imperial law: the *Gerichtsverfassungsgesetz* of 27 January, 1877, with the revision of 20 May, 1898. All judges in the four classes of courts already considered are *appointed*, and certain qualifications are demanded by law of those who would exercise the functions of the judicial office.[2]

[1] *Konsularg. G.* § 18, in connection with *GVG.* § 160, Cl. 1, and § 159, Cl. 2.

[2] For literature on the subject of the judicial office in Germany, see *Jahrbuch der Preussischen Gerichtsverfassung*, 24 Jahrg. 1900, §§ 7, 10, 28 ff. The best discussion from the standpoint of constitutional law is found in Laband, *Staatsrecht des Deutschen Reichs*, 4th edition, 1901, III. pp. 335 ff.

In fixing by imperial legislation the requirements for eligibility to a judgeship, instead of leaving the matter to the determination of each several State, the Commission of Justice for the *Reichstag* simply carried to a logical conclusion certain ordinances already placed upon the statute book. A uniform procedure, both civil and criminal, had been provided for the whole Empire, in the *Civilprozessordnung* of 30 January, 1877, with the amendments of 17 May, 1895, and in the *Strafprozessordnung* of 1 February, 1877. The Commission therefore argued that the law regulating the judicial institutions of the Empire, while it made no attempt at a complete organization, but sought rather to lay down the principles necessary to a harmonious operation of the laws of procedure, could not well dispense with general provisions touching the professional training and position of the persons in whose hands were to be placed, to a preëminent degree, the administration and application of those laws of procedure. The Report of the Sixth Commission of the *Reichstag*, 1898, says: "Agreeing with the views expressed by the various speakers in the general debate of the *Reichstag*, the Commission has well-nigh unanimously held it to be a logical necessity arising out of the ordinances establishing the civil and criminal procedure, to lay down, under the title 'The Judicial Office,' at least the minimal requirements for eligibility to the office of judge in the German Empire, and to prescribe those indispensable guarantees of judicial independence, which no German judge may ever be without. Sections 1–11 (of the *Gerichtsverfassungsgesetz*), adopted by the Commission,

See also Von Rönne, *Staatsrecht des Deutschen Reichs*, 2d edition, II. pp. 9 ff.; Zorn, *Staatsr. d. D. Reichs*, II. pp. 365 ff.; Schulze, *Deutsches Staatsr.* § 199; Hänel, *Deutsches Staatsr.* I. pp. 711 ff.; Von Rönne-Zorn *Staatsr. d. Preuss. Mon.* 5th edition, I. § 12, III. A, § 43. Also Rintelen, *Gerichtshof und Justizverwaltung*, 2d edition, 1889; Müller, *Preuss. Justizverwaltung*, 5th edition, 1901; Pfafferoth, *Jahrb. d. D. Gerichtsverfassung*, 7 Jahrg., 1898.

make no attack on the judicial sovereignty of the individual States; at any rate, they go no farther in the organization of the judiciary than the ordinances regulating procedure require. They attach themselves to legal principles that have existed in Germany from old time, and they are essentially borrowed from the prevailing law of the greatest German State. . . . If imperial legislation is called upon to map out for the judge the civil and criminal procedure which he must follow, and to define the judicial authority, it cannot possibly leave the several States free to settle, perhaps in ways wholly variant, the question of the preparatory training of the judge, and his place in the life of the State over against the governments and the people."[1]

In the *Gerichtsverfassungsgesetz*, therefore, imperial legislation has fixed the *minimum* of requirement for exercising the functions of a learned judge. The law, in other words, has drawn the line below which the qualifications of that person may not fall who would be eligible to the judicial office in any one of the regular courts in Germany. According to the provisions of this law the German judge reaches the bench only after passing two rigid examinations.[2] The first examination must be preceded by a three years' study of law in a university, out of which period three semesters at least must have been devoted to legal study in a German institution. The *Gerichtsverfassungsgesetz* does not prescribe the conditions of the examination nor stipulate the particular subject upon which the candidate is to be tested.

[1] *Bericht der 66 Kommission d. Reichstags* (*Drucks. d. Reichstags*, 9 Leg. Per. 5 Sess. Nr. 240).

[2] *GVG.* § 2, Cl. 1. Attorneys must also pass these examinations before they are admitted to practice. Of course the passing of the examinations determines merely the question of eligibility. It creates no claim to the office of judge as of right.

These matters are left to the legislation of each individual State.[1]

Between the first and second examinations at least three years must intervene. This period is to be spent in service at court, with an attorney, and, if so desired, with the Public Solicitor. Such service is not optional with the candidate. It is compulsory. It will be at once apparent that an embarrassing situation might arise for an ambitious young "jurist," who, however zealous he might be, could find no attorney disposed to set him at work. This point was brought up by representatives of the *Bundesrat* in the debate over the draft of the proposed *Gerichtsverfassungsgesetz*. These gentlemen declared that the provisions of the law could not be carried out with any degree of certainty owing to the fact that there was no compulsory legislation attached which would force the attorney to take the embryo lawyer as his assistant. It was proposed, therefore, by the representatives of the *Bundesrat* that service with an attorney should not be required of the candidate, but should be optional. This proposition was rejected by both the *Reichstagskommission* and the *Reichstag*. The awkwardness of the situation has been relieved, however, by incorporating into the law regulating

[1] In Prussia the law provides that the first examination shall take place before a commission of the *Oberlandesgericht* in Königsberg, Berlin, Stettin, Breslau, Naumburg, Kiel, Celle, Cassel, or Cöln. The subject-matter covers both public and private law, as well as the general principles of political science. The examination also aims to test the positive knowledge of the applicant, his insight into the nature and historical development of legal relations, as well as to determine whether the candidate, on the whole, possesses that general legal and political training requisite in his future profession. In Prussia, one who has passed the first examination is appointed "*Referendar*" by the president of the *Oberlandesgericht* in whose district he is to be employed, and, since his position is now an official one, the oath is administered. One who has passed the second examination is known as an "*Assessor*." On the training of the *Referendar* see Daubenspeck, *Der juristiche Vorbereitungsdienst in Preussen*, Berlin, 1900.

matters pertaining to attorneys — the *Rechtsanwaltsordnung* of July 1, 1878 — a section which declares that an attorney is bound to furnish opportunity for practical work, as well as guidance, to "jurists" who are engaged in their preparatory service.[1]

It has been remarked that the *Gerichtsverfassungsgesetz* determines only the *minimal* requirements for eligibility to the judicial office. While no State, by its legislation, may demand of its candidates less than the law of the Empire lays down as the minimum, any State may demand more, and as much more as it pleases. Each State may increase the length of time to be spent in university study prior to the first examination, or the period to be passed in service preparatory to the second.[2] Prussia, for example, requires an intervening period of *four* years between the first examination and the second, this time to be spent in service connected with the courts, with an attorney and with the attorney of the State. The work of the *Referendar* is to be so distributed that he shall gain an insight into the operation of all branches of judicial activity, and such a practical facility therein as may be requisite for the independent and efficient administration of the office to which he is looking forward.[3]

[1] *Rechtsanwaltsordnung*, § 40. See comments on this ordinance by Sydow, 4th edition, Berlin, 1900. See also Volk, *Die Rechtsanwaltsord. für d. D. Reich. Nördlingen*, 1878.

[2] But no State may require a greater *number* of examinations than *two*. Struckmann and Koch, *Komm. z. Civilproz-Ord.* II. p. 479, note 7.

[3] The employment of the *Referendar* in Prussia is as follows: 9 months' service with an *Amtsgericht* having not more than 3 judges, 1 year in the *Landgericht*, 4 months with the attorney for the State, 6 months with a lawyer and notary, 9 months in an *Amtsgericht* and 6 months in an *Oberlandesgericht*. *Referendäre* who, by their conduct, prove themselves unworthy, or who do not make proper progress in their training, may be dismissed from service by the minister, without further procedure, after the chairman of the Board of Provincial Service has been heard. See § 84, Law of 21 July, 1852 (*GS.* p. 465).

The time devoted to preparation in one State of the Empire may be counted in every other State, whether it be spent in university study looking toward the first examination or in service with a view to the second examination. Further, he who has passed the first examination in one State may be admitted in every other State to the intermediate service in anticipation of the second examination and, when that service is fulfilled, to the examination itself.[1] There is no compulsion, however, upon one State to give credit for the period of service or study spent in another. The wording of the law is "may," not "shall." The *Gerichtsverfassungsgesetz* merely empowers the Administration of Justice in any State to admit the validity and sufficiency of the work done, and examinations held, in other States. As a matter of fact, several States make the passing of the examinations within their own territory an absolute condition to the assumption of the judicial office. A proposition to the effect that there should be compulsory reciprocity between the States in this respect was rejected by the Commission of the *Reichstag* on the ground that, owing to the lack of a uniform law regulating the whole subject of examinations, there could be no adequate guarantee that the examinations required by the different States would be of equal value. Accordingly, the recognition by one State of the examinations held in another, and the estimate to be put upon the preparatory service performed there, lie wholly within the discretion of the State Administration of Justice.[2]

[1] *GVG.* § 3. Attempts toward securing a uniform system of examinations in all the States, made in the *Reichstag* of 21 May, 1878 (see *Sten. Ber.* p. 1476), and in the commission appointed to draft the new *GVG.* (see *Kom. Ber. d. RTK. von 1898*, pp. 2 ff.), were without result. See also Schmidt, *Lehrb.* § 39.

[2] See Struckmann und Koch, p. 480, notes 2 and 3 to § 3, *GVG.*

Every regular public teacher of law in a German university is eligible to the judicial office.[1] In other words, the installation of a man as full professor of law in a German university is regarded as equivalent to the required preparation and examination.[2] Moreover, "whoever has acquired eligibility to the judicial office in one of the States is also eligible to every judicial office within the German Empire, so far as the law (*i.e.* the imperial *Gerichtsverfassungsgesetz*) makes no exception."[3] An important doctrine is here laid down. In some of the States, notably Prussia,[4] promotion to the higher positions on the bench was made contingent on certain conditions: a specified length of service in the lower courts, the attainment of a certain age, the passing of special examinations, etc. All State laws of this nature are wiped out by the imperial legislation which declares that a man eligible in one State to the judicial office is eligible to every judicial office within the German Empire. The *Gerichtsverfassungsgesetz* has made a single exception. In addition to his having attained eligibility to the judicial office in one of the States a judge of the *Reichsgericht* must have completed the thirty-fifth year of his age.[5]

Two general principles are laid down by law for the avowed purpose of securing the independence of the judiciary: (1) the judicial power shall be exercised only by *courts*, and (2) these

[1] *GVG.* § 4. Compare also § 138, *StPO.*

[2] "*Ausserordentliche Professoren*" and "*Privatdozenten*" do not come within the provisions of the law.

[3] *GVG.* § 5. There is no contradiction here to what has been discussed in the text with reference to crediting work done in another State. While no State is compelled to declare a man eligible on the basis of work done elsewhere, yet when one State has pronounced a man eligible, no other State can question its action.

[4] Law of 12 March, 1869 (*Preuss. Gesetzsamml.* 482), §§ 2, 3, and 5.

[5] *GVG.* § 127, Cl. 2.

courts shall be subject only to the law.[1] As to the significance of these clauses in the law, the *Motiven* say:[2] —

"The assignment of the jurisdiction to courts, by imperial legislation, has, over against the existing rights of the individual States, a negative significance in two directions: first, the meagre traces, still existing in Germany, of the customary influence of the *Landesherr* upon the course and decision of suits at law, are wholly extinguished, and, in the second place, the administration of justice is fundamentally separated from administration in general.

"(1) That judicial supremacy, by force of which State power has to establish and maintain legal order within its territory and administer legal authority, appertains to the several States themselves. The new legislation (referring to the *Gerichtsverfassungsgesetz* then being debated) would make no breach in this judicial supremacy so far as exercise of rights on the part of the individual State is concerned. After the passage of this law, as before it, the judicial power is to be referred back, for its source, to the supreme authority of the State. The State courts must operate as deputized by, and under the authority of, the ruler of the State. But every active personal interference of the sovereign in the administration of justice, all 'cabinet justice' — which political science has long regarded as unpermissible and which, in fact, has been actually done away with in almost the whole of Germany — is excluded by the declaration that the ordinary jurisdiction is exercised by courts, and by courts alone. . . .

"(2) In more recent times it has been a generally recognized

[1] *GVG.* § 1. See *Protokoll der Justizkommission d. D. Reichstags*, Berlin, 1876, pp. 73–76; *Kom. Ber.* pp. 7–9; *Sten. Ber.* 2 Leg. Per., 2 Sess. 1874–75, pp. 275 ff. Also Wach, *Handb. d. D. Civilprozessordnung*, I. p. 309 H.; Schmidt, *Lehrb. d. D. CPO.* § 25; Bunsen, *Lehrb. d. D. CPO.* § 2.

[2] *Begründung des Entwurfs III* (*Drucks. d. Reichstags*, 2 Leg. Per., 2 Sess. 1874–75 zu No. 6).

principle that the judicial office, whose duty is the administration of law and equity, and which, from its very nature, can have no authority above it other than that of the law, should not be administered by officials who, at the same time, are called upon to exercise that kind of rule over the citizens of the State which must have regard for considerations of governmental policy, and who cannot be guaranteed, in like measure, that security of position through unremovability from office, which is desired in a judicial official."[1]

Two or three provisions of the *Gerichtsverfassungsgesetz* are intended to secure the *personal* independence of the judiciary. In the first place, the judges are appointed for life.[2] With respect to the members of the *Reichsgericht* — the only one of the regular courts which is purely *imperial* — the appointments are made by the Kaiser on nomination of the *Bundesrat*.[3] The matter of the appointment of the judges of the other courts, as well as the determination of the mode of installation, is left to the constitutional law of the several States.[4] Moreover, the judges receive a fixed salary, that is to say, a permanent, irrevocable salary, which cannot be subjected to arbitrary withdrawal or diminution. The receiving of fees is absolutely barred.[5] If, however, the judge is permitted to hold another office at the same time, in addition to the judgeship, the receiving of some form of remuneration other than that of the fixed salary attached to the judicial office is not excluded. Whether, and to what extent, a judge may assume such a "*Nebenamt*," is, with respect to

[1] Compare Von Rönne, *op. cit.* p. 15; Von Rönne-Zorn, *op. cit.* § 12, III. A, § 43, I. 1; Zorn, *op. cit.* p. 412.

[2] *GVG.* § 6.

[3] *Ibid.* § 127, Cl. 1.

[4] In Prussia and Bavaria, *e.g.*, it is provided by the *Ausführunggesetz z. GVG.*, that all judges shall be appointed by the king.

[5] *GVG.* § 7.

the members of all courts other than the *Reichsgericht*, a matter for the State legislation to decide. So far as the judges of the *Reichsgericht* are concerned, the matter is settled by the *Reichsbeamtengesetz* of March 31, 1873, § 16: "No imperial official shall, without the previous consent of the highest imperial authority, assume an additional office or additional employment to which a continuous remuneration is attached, or carry on a business. The same consent is required for the entry of an imperial official into the directorate, or into the administration or supervisory council of any company operated for gain. Such consent will not be granted, however, in so far as the position is directly or indirectly bound up with a reward. A concession once granted may be revoked at any time."[1]

Perhaps the strongest guarantee for the personal independence of the judiciary is found in that section of the law which declares that "no judge shall, against his will, be permanently or temporarily removed from office, transferred to another place, or retired, except by judicial decision and on grounds and according to forms prescribed by law."[2] If the State Administration of Justice, however, changes the organization of the courts, or defines anew the districts of the same, it may also provide for such involuntary transfers

[1] *Reichsbeamtengesetz*, § 16 (*RGBl.* p. 61). See *Gesetzsammlung für d. D. Reich.* 4 Aufl. I. 342. Compare for Prussia, *Kab. Ord.* 13 July, 1839 (*GS.* p. 235); Law of 30 April, 1856 (*GS.* p. 297); *AG. z. GVG.* 24 April, 1878, § 11; *Gewerbe-Ord.*, 17 January, 1854 (*GS.* p. 41), § 19; *Verord. für d. neuen Landesteile*, 23 September, 1867 (*GS.* p. 1610); *Reichsgew.-Ord.* of 26 July, 1900 (*RGBl.* p. 871), § 12, Cl. 2; Law of 10 June, 1874 (*GS.* p. 244); Turnau, *op. cit.* I. pp. 42 ff.; Von Rönne-Zorn, *op. cit.* § 43, II.

[2] *GVG.* § 8, Cl. 1. This section is drawn in imitation of Art. 87, Cls. 2 and 3, of the Preuss. Verf. Urkunden, and contains the principles which the German jurists designate as the "*Unabsetzbareit*" and "*Unversetzbarkeit*" of the judiciary.

as the reorganization necessitates, or even for involuntary removals under grant of full salary.[1]

The conditions of the law requiring that removals, transfers, or retirements shall be made only by judicial decision, on legal grounds and according to legal forms, are not met when such action is based on ordinances of the ruler, or on decrees of the State Administration of Justice. There must be actual legislation, imperial or State, behind the transaction. On the other hand, it is apparent that such a matter should not be left exclusively to the discretion or good pleasure of the judiciary. Hence, in those States where no law on the subject exists, the judiciary cannot take the matter into its own hands. It would seem that State legislation must step in.[2] This section of the *Gerichtsverfassungsgesetz* covers cases of removal as a disciplinary measure (*Enthebung*), as well as mere removals with no disciplinary character (*Entfernung*). The arbitrary ousting of a judge from his office by an administrative authority on the vague ground that "the interests of the service" require it — which, as Laband observes, means "according to the pleasure of the administrative

[1] *GVG.* § 8, Cl. 2. On motion of the chairman of the *Reichstags-Kommission* of 1875, it was expressly declared that those provisions in the laws of the several States whereby a judge on reaching a certain age may be pensioned on full or partial salary, should remain undisturbed.

[2] This is the view of Struckmann and Koch, note 5 to § 8, *GVG.* Laband, however, III. p. 454, note 5, says: "So lange in einem Bundesstaat ein solches Gesetz nicht erlassen ist, bleibt die Geltung des § 8 suspendirt." § 13, *Einführunggesetz*, *GVG.*, says: "Die Bestimmungen über das Richteramt im § 8 des *GVG.* treten in denjenigen Staaten, in welchen Vorschriften für die richterliche Entscheidung über die Enthebung eines Richters vom Amte oder über die Versetzung eines Richters an eine andere Stelle oder in Ruhestand nicht bestehen, nur gleichzeitig mit der landgesetzlichen Regelung der Disciplinarverhältnisse der Richter in Wirksamkeit." This section owes its existence to the *Reichstagskommission* of 1875 and was occasioned by the arrangements in some German States, especially Bayern, where no regular disciplinary process before judicial authorities exists.

board," is made impossible. No mere considerations of policy can be set up as a justification for such a removal or retirement. While any change may be made with the consent of the judge, none can be made against it, save by orderly judicial process, based on law and not on ordinance.[1]

The judges are protected, therefore, from the arbitrary action of the State Administration of Justice, and, in all cases of disciplinary prosecution, have a claim to a legal hearing and to a judicial decision. No norm is laid down by imperial legislation, however, with respect to the infliction of disciplinary penalties, nor is there any uniform regulation of the disciplinary law touching judicial officers. Not even the most general principles are laid down by imperial legislation determining the grounds on which suspension, removal, or dismissal may be permissible, establishing the rules of disciplinary procedure or fixing the constitution and composition of the disciplinary boards. In all these matters the autonomy of the several States is practically unrestricted, being bound only by the formal limitation that action shall follow the way of legislation, not that of mere arbitrary decree or ordinance.[2]

The members of the *Reichsgericht* occupy a different position from that held by the other judges, so far as their relation to the disciplinary laws of the States is concerned. A temporary suspension from office takes place, according to law, when a member of the *Reichsgericht* is arrested pending investigation, and continues during the period of such detention. Moreover, a member *may* be temporarily suspended from office by the full bench of the *Reichsgericht*, after hearing the attorney for the Empire, if trial has been begun against

[1] The only exception to this rule has already been mentioned in a preceding paragraph.

[2] See Laband, III. pp. 454 ff.

such member on a criminal charge.[1] The removal of a member, together with loss of salary, may be effected by a pronouncement of the full bench of the *Reichsgericht*, the attorney for the Empire having been heard, if such member has been sentenced to punishment for a disgraceful act, or to imprisonment for more than a year.[2] If a member of the *Reichsgericht*, because of bodily infirmity or weakness of physical or mental power, becomes permanently incapacitated for office, but nevertheless does not apply for a retirement, nor, though requested to do so, sees fit to comply within a specified period, such member may, after both he and the attorney for the Empire have had a hearing, be retired by the action of the full bench of the *Reichsgericht*.[3]

[1] *GVG.* § 129. That is, if the member is charged with a crime or misdemeanor, not merely with a trespass. Such a temporary suspension does not involve loss of salary.

[2] *Ibid.* § 128.

[3] *Ibid.* §§ 130, 131. In case of retirement, the member receives a certain portion of his salary as yearly pension. This pension, up to the completion of the tenth year of service, amounts to $\frac{20}{60}$ of his salary, and increases at the rate of $\frac{1}{60}$ each succeeding year up to the completion of the fiftieth year of service. The period of service is reckoned from the day on which he entered the public service, whether of the Empire, of a State or Commune, or in the State, as attorney.

CHAPTER X

ALSACE-LORRAINE AND ITS RELATION TO THE EMPIRE

In the Peace Preliminaries between the German Empire and France, on the 26 February, 1871, the cession of Alsace-Lorraine definitely fixed the international status of that territory and determined its relation to all other States, including France. Article 1, Cl. 1, of the Peace Preliminaries declares that "France renounces, in favor of the German Empire, all her rights and title to the territory lying east of a boundary line hereafter designated." Clause 2 fixes the lines referred to, while Cl. 3 adds: "The German Empire shall possess this territory forever, in full sovereignty and with all the rights of ownership." By this act all the interests of France in Alsace-Lorraine passed to Germany, and the actual possession of the territory effected by conquest in August, 1870, was formally recognized.

The settlement of the question as to the status of Alsace-Lorraine with respect to international law served merely to raise the question as to its status with respect to constitutional law. The terms of the Peace Preliminaries determined the relations of the territory to third Powers, but it did not, and could not, determine its relations to the German Empire. Here was a problem which touched the internal organization of the Empire. By the fortunes of war, Germany found herself possessed — one might well say, *re*possessed — of a considerable territory, for the disposition and administration of which the Imperial Constitution made no provision. The adjustment of the new fact to the theory of the Constitution,

the mortising of the new acquisition into the old order of things, was the task laid upon German jurists and statesmen.

In the solution of the problem, three ways were open: to erect the new territory into a State with powers and rights equal to those possessed by the other federated States; to incorporate Alsace-Lorraine into the territory of one of the existing States; or to hold it as a pure imperial territory — not a State, but a territory under the sovereign control of the Empire and administered by organs of the imperial government, wholly independent of any and all of the federated States as such.[1] At no time was the idea held, at least to any extent, of making Alsace-Lorraine the twenty-sixth State in the Union. Too many political objections stood in the way, though such a proceeding could have been carried out by means of a constitutional amendment. The third solution of the problem seemed to present the fewest number of difficulties, — the retention of the territorial status, under the immediate control of the Empire. It was therefore chosen. For such a relationship, however, the Imperial Constitution made no provision. It recognized no part of the Empire which was immediately subject to the central authority or which was to be looked upon as simply the *object* of imperial powers. The Constitution, on the contrary, assumed that between the individual territories with their people and the imperial power, a State power was interposed, and that each State into which the territory of the Empire or its population was organized, was a *subject* of rights, a member of the Empire, and as such had a share in the Empire itself.[2] It is evident that the theory upon which the federal organization of the German Empire is builded — the theory of *mediate* government through the States — could find no application to

[1] Hänel, *Staatsr.* I. p. 824; Anschütz, in *Holz-Kohler*, II. p. 559.
[2] Laband, II. p. 198.

Alsace-Lorraine unless that territory should be erected into a State. But where a territory is governed wholly and exclusively by the central authority; where self-government and autonomy, in the sense in which these words apply to federated States, are wanting; where the laws are not laws *by* the territory, but laws *by* the central government *for* the territory, the federal idea fails. This is precisely the situation in Alsace-Lorraine. The relation between the Empire and Alsace-Lorraine is not that of a federal government to one of its member States, but that of a unitary State toward one of its provinces. And this must always be the relation between a federal State and its territories. True, a territory may be *granted* large powers of self-government, but, unlike the powers of self-government exercised by a State under a federal form of government, these powers are not original, but derivative. The federal government gave and the federal government may take away.

The German jurists and statesmen harbored no fond delusions with respect to the newly acquired territory and the Imperial Constitution. The Constitution did not extend to these annexed districts *ex proprio vigore*. It had no footing or operation there, until it was carried there expressly by imperial legislation. This fact is clearly recognized in the "Law concerning the Union of Alsace-Lorraine with the German Empire," of 9 June, 1871.[1] This law, after declaring that the land acquired from France by cession was forever united to the German Empire, fixed a date on which the Imperial Constitution should go into effect there. It says: "The Constitution of the German Empire shall go into effect in Alsace-Lorraine on 1 January, 1873.[2] By order of

[1] *RGBl.* p. 212.

[2] Afterward extended to 1 January, 1874, by the Law of 20 June, 1872 (*RGBl.* p. 208).

the Emperor, with the consent of the *Bundesrat*, individual parts of the Constitution may be introduced earlier.[1] The amendments and additions which may be necessary require the consent of the *Reichstag*. Article 3 of the Imperial Constitution shall go into effect at once."[2] In other words, "the Constitution was made for the States, not for the territories," and it enters the territories only when carried there by federal law. Under the German system of federal government, the extension of the Constitution, as an *Imperial* Constitution, into Alsace-Lorraine, would be illogical in the extreme, unless the territory were erected into a State or incorporated in the territory of one of the States already existent. The introduction of the Imperial Constitution into Alsace-Lorraine took the form of an imperial law. This law can be amended or repealed at any time without the consent of Alsace-Lorraine.[3]

The introduction of the Imperial Constitution into Alsace-Lorraine did not simplify the relations of that territory, either with respect to the Empire or to the several States of the Union. Many difficulties have arisen in determining the exact position of Alsace-Lorraine and in administering the territory. A federal State which recognizes no part of its territory as existing in any form other than that of one of the federated States, acquires territory which is not a State at the time of its acquisition and which the central government has no intention of erecting into a State. The pivotal theory of the German federal system demands organization into States which shall serve as the medium through which the central government acts. Nevertheless, the new territory is administered and governed immediately by the

[1] See Triepel, *Quellensammlung*, p. 111, note 5.
[2] Law of June 9, 1871 (*RGBl.* 212), § 2.
[3] See in this connection Hänel, *Staatsr.* p. 834.

federal government; the Constitution, intended only for "States," extends there, and in many respects the annexed territory is treated as if it were actually a "member of the *Bund*." As a matter of fact, of course, Alsace-Lorraine is not a State, nor is it, like the Territories in the United States, a "State in the making." "Neither with respect to the Empire, nor with respect to foreign States, is Alsace-Lorraine an independent subject of sovereign rights, with constitutional powers and obligations. It is logically no State, but a part (*Bestandteil*), an administrative district, of the Empire. . . . The contrast between the territory and the member States of the Empire coincides exactly with the contrast between a decentralized unitary State and a federal State." [1]

A glance at the historical development of the organization of this acquired territory will serve to make its position in the Empire more clear. In considering the evolution of its territorial government five periods may be distinguished, each of which must be briefly discussed.

1. The period of military dictatorship from August, 1870, to June, 1871. This period must also be subdivided into two minor ones: (*a*) from the date of occupancy by the German troops, 14 August, 1870, to the cession of the territory by France to the German government, 26 February, 1871; (*b*) from 26 February, 1871, to the Law of Annexation, 9 June, 1871, which went into effect 28 June, 1871.

(*a*) During this time the government of Alsace-Lorraine was administered by a military governor-general, appointed by the king of Prussia, and acting, not in accordance with the principles of the North German Constitution, but with the principles of international law touching such cases. Alsace-Lorraine did not cease to be French territory through

[1] Laband, II. p. 199.

the mere act of occupation by hostile troops and through the assumption of military control by the commanding officer of those troops. The power of France was suspended in the territory and French legislation for the territory was excluded, in the districts actually occupied. In such districts, the commander-in-chief of the German army, or his appointee, had the right to exercise the authority usually exercised by the State, subject only to the limitations fixed by international usage.[1] Nor was the occupied territory, during the war, subjected to the German State, the Empire, which was erected only on 1 January, 1871. It was simply in the military power of the allied German forces. "In the invested districts, therefore, the king of Prussia, as commander-in-chief of the German forces, exercised authority based not on constitutional law, but on international law. So far as the government of this French territory was concerned, he did not exercise the power of the German State, but of the French State. Hence the ordinances issued during the occupation are to be regarded, not as acts of the German Empire, but as acts of the German commander-in-chief, carried out in place of the French sovereignty at that time suspended." [2]

(*b*) On the conclusion of peace between Germany and France, no immediate change took place in the governmental organization of the ceded districts. The government of Alsace-Lorraine was, however, put upon a different legal foundation. It no longer rested upon a military basis, but upon a legal basis created by the transfer of the territory,

[1] The occupation, therefore, did not, *ipso facto*, annul the French laws in force, nor dissolve the general organization of the territory occupied. It did not destroy private obligations. A new power took the place of the French State, and carried on the government as already organized, so far as it could be done consistently with the conditions.

[2] Laband, II. p. 237 and note 2 to same.

with all rights and title therein, by treaty to Germany. Through this treaty the status of Alsace-Lorraine with respect to third Powers was definitely fixed. Its status with respect to the Empire was a matter of German constitutional law. By the terms of the treaty Alsace-Lorraine did not become a State, nor was it even incorporated into the German system of States. Prior to the conclusion of the treaty it had been simply an integral part of a unitary State. The mere act of signing the treaty did not give it a character which it did not possess before. The sovereignty of France was exchanged for the sovereignty of Germany, but Alsace-Lorraine was not raised thereby from a province to a State. The government which had been temporarily set up during the period of military occupation, continued after the conclusion of peace, until, on 28 June, 1871, Alsace-Lorraine became formally annexed to the German Empire by imperial legislation.

2. The second period, from 28 June, 1871, to 31 December, 1873, may be termed the period of *imperial dictatorship*, or the dictatorship of the Kaiser. The key to this period is furnished by the Law of 9 June, 1871, — the Law of Annexation. By the terms of the Peace Preliminaries, 26 February, 1871, the full sovereignty over the ceded territory, as that term is understood both in international and constitutional law, passed to the German Empire. The Peace Preliminaries could not determine the relations of the ceded territory to the Empire except so far as those relations fell within the scope of international law. The Law of 9 June, 1871, did not determine the position of Alsace-Lorraine in the Empire in explicit terms which gave no room for dispute. The law is silent upon the direct question of the status of the new territory with respect to the imperial system. If, as we have seen, Alsace-Lorraine was no State prior to the

cession, it could scarcely be assumed that the bare act of cession gave to this territory, *ipso facto*, a constitutional character which it did not before possess. By the transfer of sovereignty from France to Germany, Alsace-Lorraine did not become the subject *of* new powers, but it became *subjected to* a new power, which possessed the sole right, at its own discretion, to determine what the organization and status of the territory should be. It became subject to imperial authority. Whatever governmental powers are exercised in Alsace-Lorraine are imperial powers, rooted in the sovereignty of the Empire and derived from it. In this respect, Alsace-Lorraine stands upon a footing wholly different from that upon which the several States of the Empire rest. The relation of Alsace-Lorraine to the Empire after its annexation was precisely that which it bore to France before annexation. That is, the relation was not federal in its nature, but unitary. By the Law of 9 June, 1871, Alsace-Lorraine did not become a member of the Empire, for the members of the Empire are *States*, and Alsace-Lorraine was not a State. It became possessed of none of the rights belonging to the several States and growing out of their membership in the Empire. The fact that the Law of Annexation fixed also a date at which the Imperial Constitution should go into effect in the acquired territory, showed conclusively that the Constitution did not extend to the annexed districts *ex proprio vigore*, and that such rights as did exist were rights based on law, not on the Constitution; were rights granted, not reserved.

The first clause of § 3 of the Law of 9 June, 1871, declares the State-power in Alsace-Lorraine shall be exercised by the Kaiser. Under this provision the government of Alsace-Lorraine immediately took on a strongly monarchistic aspect. The power, both legislative and executive,

was concentrated in the hands of the Kaiser. It must be borne in mind, however, that as wielder of the State-power in Alsace-Lorraine, the Kaiser was not acting at all in his own name or in his own right. The power was delegated power, and the Kaiser exercised it solely as an organ of the Empire. Alsace-Lorraine was *imperial* territory, and whatever authority was exercised there was *imperial* authority, carried into effect by *imperial* organs. The Kaiser is not the ruler of Alsace-Lorraine, in the sense in which he is ruler of Prussia, nor is Alsace-Lorraine in a "*Personalunion*" with the Prussian State.[1] The Kaiser is simply an imperial organ, exercising imperial power, in an imperial territory.

In centralizing the legislative and administrative powers in Alsace-Lorraine in the hands of the Kaiser, the Law of 9 June placed certain limitations or checks upon its exercise. These limitations were operative both in the sphere of administration and legislation. Thus, for example, Cl. 2 of § 3 says: "Up to the time when the Imperial Constitution shall go into effect, the Kaiser shall be bound by the consent of the *Bundesrat* in the exercise of the legislative power, and in the contracting of loans or the assumption of guarantees for Alsace and Lorraine, which shall involve any burden upon the Empire, he shall be bound by the consent of the *Reichstag* also." Moreover, by the provisions of § 4 of the law, "the ordinances and decrees of the Kaiser need for their validity the counter-signature of the

[1] Laband, II. p. 203. "Elsass-Lothringen ist demnach keine Monarchie, denn es hat keinen persönlichen Landesherrn, und es ist ebensowenig eine Republik, denn die Gesammtheit der Elsass-Lothringer ist nicht das Subject der Staatsgewalt. *Es ist ein Bestandteil oder Provinz des Reiches.* Das Subject der Staatsgewalt in Elsass-Lothringen ist das Reich, d. h. die Gesammtheit der zum Reich vereinigten Staaten in ihrer begrifflichen Einheit, in ihrer staatlichen Persönlichkeit." *Ibid*, pp. 203–204.

Imperial Chancellor, who assumes thereby the responsibility." The Imperial Chancellor became, through this provision, the sole, supreme head of the administration in the imperial territory in all branches, and with him, of course, the Chancery Office, with its various departments, became charged with the regulation of matters pertaining to the territorial administration.

By the Law of 30 December, 1871, § 4,[1] a new feature was added to the administrative organization of Alsace-Lorraine, in the person of the president (*Oberpraesident*), whom the law designates as the "highest administrative authority in Alsace-Lorraine, with his official seat in Strassburg." Section 6 of the law assigned to this president a large sphere of activity in the immediate administration of the internal affairs of the territory, in addition to which the Imperial Chancellor was "empowered to hand over to him, wholly or in part, the authority which was exercised by the ministers under the French laws still in force." Moreover, § 5 of the law grants to the president the supervision of the various administrative boards in the territory, as well as of the officials subordinate to them, together with the task of seeing that the laws and ordinances are executed and the administration properly carried on. The president, further, acted in the capacity of an administrative court in deciding differences arising between the boards subordinated to him and in passing upon complaints and decisions of inferior administrative authorities, or in submitting such complaints or decisions to the Imperial Chancellor. The president had under him, of course, such a number of counsellors and assistants of various sorts as the business laid upon him seemed to require.

As to the legal position of the president, Laband says:

[1] *GBl. für El.-Loth.* 1872, No. 2, p. 49.

"He was occupying the constitutional position held by a minister; he was not in a constitutional sense responsible; he had no power to act as the representative of the Imperial Chancellor; he could countersign no ordinances of the Emperor; he was bound to obey the instructions of the Imperial Chancellor relating to the administrative service, and stood under his supervision. The law, § 4, calls him the highest administrative authority *in* Alsace-Lorraine. He was not, however, the highest administrative authority *of* Alsace-Lorraine in any single department, but was subordinate, in every relation, to the Imperial Chancellor, as the actual head of the administration. . . . He was a higher instance for the whole internal administration; he was competent for almost every ordinance which belonged, under the existing law, to the jurisdiction of the Ministry; upon him was laid the fixing of the territorial budget, the preparation of the drafts of laws and ordinances, the communication of instructions and service-notices to the district presidents and other district authorities. But he was intrusted with the greater part of these functions only by an administrative order of the Imperial Chancellor. Legally he was without any responsibility of his own, and, as regards the Imperial Chancellor, he was not independent. As a result, the Chancery retained its full significance in all matters which were reserved by special ordinance to the jurisdiction of the Imperial Chancellor, or which, on account of their importance, must be brought to his knowledge and decision. There were, accordingly, two Ministries at the same time, the one superimposed upon the other: the *presidency*, whose advantage lay in its mastery of details and in its more accurate knowledge of local persons and relations, and the *Imperial Chancery*, whose advantage lay in its larger legal power and in its closer touch with the central

Boards of the Empire, as well as with the *Bundesrat* and *Reichstag*." [1]

On the 27 May, 1871, the *Bundesrat* created a special committee for Alsace-Lorraine, which to-day forms the ninth of the Standing Committees of that body.

Like the period of military dictatorship, the dictatorship of the Emperor was also a transition period, and was so intended. The law which provided for it fixed also the date on which the strongly concentrated, monarchical form of organization in Alsace-Lorraine should give place to another arrangement, by the introduction of the Imperial Constitution into the territory.

3. The third period extends from 1 January, 1874, to 28 May, 1877, at which time the Law of 2 May, 1877,[2] went into effect. With the introduction of the Imperial Constitution into Alsace-Lorraine on 1 January, 1874, in accordance with the provisions of the Law of 25 June, 1873,[3] an essential change took place in the constitutional position of the Kaiser. The monarchical concentration of power in Alsace-Lorraine came to an end. The legislative power no longer lay in the hands of the Kaiser alone, with certain requirements as to the consent of the *Bundesrat* and *Reichstag*, but it passed to the hands of those organs which, under the Constitution, were competent to legislate in matters falling within the jurisdiction of the Empire as such, viz. the *Bundesrat* and *Reichstag*. The power of the Kaiser was no longer dictatorial. It dwindled to the mere engrossment and publication of the laws. With the introduction of the Constitution, the right of the Kaiser to sanction the laws vanished, and his veto power, which he had possessed in the second period, disappeared also. From this

[1] Laband, II. pp. 218, 219.
[2] *RGBl.* p. 491; Triepel, p. 213.
[3] *RGBl.* p. 161; Triepel, p. 156; *GBl. fur El.-Loth.* p. 131.

time on, the sanction of the laws lay in the hands of the *Bundesrat* alone.[1] The Kaiser retained one right, however, which was not conferred upon him by the Imperial Constitution. This right is set forth in the Law of 25 June, 1873, § 8: "Even after the introduction of the Imperial Constitution, and until such time as the matter shall be otherwise regulated by law, the Kaiser may, with the consent of the *Bundesrat*, and while the *Reichstag* is not in session, issue ordinances which shall have the force of law." Such ordinances could not conflict with the Constitution or with the imperial laws in force at the time, they could be issued while the *Reichstag* was not in session, and must be laid before that body at its next session for its action. Moreover, the Law of 25 June provided for the election of fifteen members to the *Reichstag* from Alsace-Lorraine.

So far as legislative competence is concerned, the introduction of the Imperial Constitution into Alsace-Lorraine removed the line of division which had split the general territory of the Empire into two spheres of legislation. The general legislation of the Empire extended to *all* the affairs of the new imperial territory, not only to those matters which fall within the general competence of the Empire, but also to those which, in the several States, are reserved for State legislation. No line of demarcation was drawn between the legislative competence of the Empire and the legislative competence of the territory. For in the imperial territory there existed no power but imperial power, and hence there was no lawgiver for Alsace-Lorraine save the Empire itself. As the Law of 9 June, 1871, § 3, Cl. 4, says, "After the introduction of the Imperial Constitution, until such time as the matter is otherwise regulated by impe-

[1] Laband, II. p. 250, note 1; Hänel, *Staatsr.* p. 827; Ströber, in *Archiv f. d. ö. Recht*, I. p. 662, note 68; Meyer, *Staatsr.* p. 429.

rial law, the power of legislation, even in those affairs which, in the several States, are not subjected to the legislative authority of the Empire, shall belong to the Empire." No limitation, therefore, such as was laid upon the legislative action of the Empire with respect to the individual States, bound it with respect to Alsace-Lorraine.

No change was wrought in the administrative organization of Alsace-Lorraine by the introduction of the Imperial Constitution. On the 29 October, 1874, however, the Kaiser issued a decree[1] having for its subject-matter the erection of an advisory Territorial Committee for Alsace-Lorraine. By the provisions of this decree, the Imperial Chancellor was authorized to construct a Territorial Committee by calling upon the three District Assemblies — Upper Alsace, Lower Alsace, and Lorraine, — each to elect ten of their number, as well as three substitutes, to serve on the committee. The term was fixed at three years, but should a member lose his seat in the District Assembly in the meanwhile, his membership in the committee also lapsed. The sessions of the committee were not to be public, and the Kaiser reserved the right to determine the time and place of its meeting. As the opening paragraph of the decree explained, the purpose for which the committee was created was to give expert advice on such drafts of laws as might be laid before it, touching matters concerning Alsace-Lorraine, which were not reserved by the Imperial Constitution to the legislation of the Empire. The territorial budget was submitted to this committee. Bills to be presented to this committee were brought to its notice by the president (*Oberpraesident*), who was authorized to attend its meetings either in person or by representative. The president, or his representative,

[1] *GBl. f. El.-Loth.* p. 37; *BGBl.* for 1877, p. 492, as appended to Law of 2 May, 1877. Also Triepel, p. 213.

must be heard at any time upon their request. The advice of the committee was had before a bill was laid before the competent legislative bodies for final determination. It should be noted, however, that this securing of the advice of the Territorial Committee was purely *permissory*. It was not obligatory. The competence of the Committee was merely *advisory* and in no degree legislative. As Laband puts it: "This decree has created no principle of law (*Rechtsatz*); it has primarily the significance of an instruction merely. Even without the decree, the government would not have been restrained from securing expert advice on drafts of laws, and on the other hand, the obtaining of such advice was not raised to the character of a legal requirement in territorial legislation."[1] It is very evident, however, that the creation of such a committee, even though it possessed no legal powers, served to strengthen the position of the president.

4. The fourth period begins with the Law of 2 May, 1877,[2] which marks a significant step toward a larger degree of independence on the part of Alsace-Lorraine, particularly in legislative matters. By the provisions of this law, the Territorial Committee, which up to this time had possessed advisory powers only, became a fixed and important factor in the legislation of the territory. "Territorial laws for Alsace-Lorraine, including the annual territorial budget, shall issue from the Kaiser, with the consent of the *Bundesrat, when the Territorial Committee*, erected in accordance with the imperial decree of 29 October, 1874, *shall have consented to the same.*"[3]

[1] Laband, II. p. 219.

[2] Law respecting the Territorial Legislation of Alsace-Lorraine, *RGBl.* p. 491; Triepel, p. 213.

[3] Law of 2 May, 1877, § 1.

Several things should be noted with respect to the Law of 2 May, 1877. In the first place, a distinction, hitherto non-existent, is drawn between imperial competence and territorial competence in territorial legislation. Perhaps it were more accurate to say that two distinct fields were recognized in which the legislative power of Alsace-Lorraine operated. The passage of the Law of 2 May, 1877, did not in any wise affect Cl. 4 of § 3 of the Law of 9 June, 1871, which declared that after the introduction of the Imperial Constitution into Alsace-Lorraine, the legislative power in that territory, even in matters which, in the several States, did not fall within the competence of the Empire, belonged to the Empire, until otherwise provided for by imperial law. For § 2 of the Law of 2 May, 1877, expressly states that the issuance of territorial laws in the form of imperial legislation is reserved. The competence of the Empire is, therefore, in no wise limited by this law. A form of legislation is, however, introduced, other than that provided for by the Imperial Constitution, *in matters affecting the territory*. Laws passed by the regular legislative factors of the Empire, for the Empire at large, would extend also to Alsace-Lorraine; but, by the terms of the Law of 2 May, 1877, a line of demarcation was drawn between the affairs of the Empire in general and those of Alsace-Lorraine in particular. No change was effected in the State-power operating in the territory. It was still the power of the Empire alone. But under the new juristic character of the Territorial Committee, a distinction arose between the laws touching the internal affairs of Alsace-Lorraine, and those concerning the Empire as a whole, and, therefore, concerning Alsace-Lorraine as a part of that whole. In other words, a distinction was made beween laws made *in* Alsace-Lorraine, and laws made simply *for* Alsace-Lorraine. As to the nature of these laws, Laband

has this to say:[1] "Territorial laws for Alsace-Lorraine are at present still imperial laws, *i.e.* laws sanctioned by the Empire. Territorial laws for Alsace-Lorraine are *provincial laws of the Empire* for Alsace-Lorraine, in matters which, so far as the rest of the Empire is concerned, are excluded by the Imperial Constitution from the competence of the Empire. For territorial laws of this sort, the Law of 2 May, 1877, prescribes a special form, but, so far as the nature and constitutional significance of those laws are concerned, they are not, like the laws of the several States, an expression of autonomy, but a manifestation of imperial power. 'Autonomy' does not consist of a peculiar *form* in which laws come into being, but in the independent *right* to issue laws. Such a right presumes a subject to whom it belongs. In the imperial territory such a subject is wanting." All laws for Alsace-Lorraine, therefore, are *imperial laws*, but, under the Law of 2 May, 1877, two ways are provided by which they may be issued: the usual way of imperial legislation, which was the only way up to the passage of the Law of 2 May, 1877; and, secondly, the method set forth in § 1 of that law, already noted above. This latter method became the regular mode of legislating for the territory, while the ordinary method of imperial legislation was merely a right reserved by the Empire for exceptional use.[2]

The new mode of legislation introduced by the Law of

[1] Laband, II. p. 251.

[2] Hänel states the matter thus: "Alle *Reichsangelegenheiten* werden auch für Elsass-Lothringen durch diejenigen Organe, in denjenigen Formen und mit denjenigen Rechtswirkungen von Reichs wegen geordnet und verwaltet, wie dies gemeingültig die Reichsverfassung vorschreibt. Dagegen die elsass-lothringischen *Landesangelegenheiten* werden von den Organen des Reiches in den *besonderen* Ordnungen, in den Formen und mit den Rechtswirkungen wahrgenommen, welche die Reichsgesetze oder das Partikularrecht für Elsass-Lothringen *besonders* vorschreiben." *Staatsr.* I. p. 828.

2 May, 1877, deviated from the ordinary method of imperial legislation in several particulars. The consent of the *Reichstag* was no longer necessary even in matters pertaining to the territorial budget. In its place stood the Territorial Committee, a body elected out of the territory itself, thus giving Alsace-Lorraine a positive voice in territorial legislation. The factors of territorial legislation now were the Kaiser, the *Bundesrat*, and the Territorial Committee. Another deviation manifested itself in the rôle played by the Kaiser in territorial legislation. Prior to the Law of 2 May, 1877, following the method of ordinary imperial legislation, the laws for Alsace-Lorraine were sanctioned by the *Bundesrat* in accordance with Art. 7 of the Imperial Constitution. Under the provisions of § 1 of the Law of May 2, 1877, legislation was not had, as stipulated by Art. 5 of the Imperial Constitution, through the *Bundesrat* and *Reichstag*, but through the *Kaiser*, with the consent of the *Bundesrat* and Territorial Committee. The territorial laws were sanctioned by the Kaiser, just as they had been sanctioned by him under the Law of 9 June, 1871, while the *Bundesrat*, no longer the law-giver proper, was reduced to the level of the Territorial Committee, — a body whose consent is necessary to the issuance of a law by the Emperor, but whose determinations the Kaiser was not *bound* to engross and publish.[1]

While the Law of 2 May, 1877, did not affect the administrative organization of the imperial territory, certain changes which were taking place in the Imperial Chancery

[1] "Zwar unterscheidet die Fassung des § 1 die Zustimmung des Bundesrats von derjenigen des Landesausschusses durch eine verschiedene Art der Erwähnung; wirklich entscheidend aber ist allein der Satz, dass dem Kaiser das Placet der Landgesetze zusteht und er nicht rechtlich *verpflichtet* ist, ein vom Bundesrate beschlossenes Gesetz auszufertigen und zu verkündigen." Laband, II. p. 252. The publication of the laws takes place by means of a special *Gesetzblatt für Elsass-Lothringen*.

were making themselves felt in Alsace-Lorraine. The Imperial Chancery began, in 1873, to raise what had hitherto been mere "Divisions" of one general office which had developed under the Imperial Chancellor, into separate "Departments," with a State secretary at the head of each.[1] On 1 January, 1877, "Division III.," which had been occupied with the affairs of Alsace-Lorraine, became a separate Department, known as the "Imperial Chancery Department for Alsace-Lorraine." At the same time "Division IV." was raised to the "Imperial Department of Justice." Each of these Departments had a Secretary of State at its head. On 17 March, 1872,[2] a law was passed enabling the Imperial Chancellor to appoint a substitute, or deputy, who might sign for him and assume other responsibilities imposed upon the Imperial Chancellor by the Imperial Constitution or by law. The heads of the Departments, moreover, were made competent to act as such deputies within the jurisdiction of the Department of which they were chief. As a result of this law, a new instance, so far as the administrative affairs of the territory were concerned, was thrust in between the Imperial Chancellor and the president. This complicated the position of the president very considerably. "The three instances which had been created under the laws of the territory and of the Empire, had become five. Furthermore, the Departments of Administration and of Justice were torn apart and assigned to two entirely distinct and separate Boards." [3]

In order to remove the difficulties arising out of this state of affairs, a law was passed 4 July, 1879,[4] with the going into effect of which, on 1 October, 1879, begins the

5. Fifth period in the development of the territorial or-

[1] See, *e.g.*, Law of 27 June 1873 (*RGBl.* p. 161; *GBl. f. E.-L.* p. 131); Ordinance of 22 December, 1875 (*RGBl.* p. 379).

[2] *RGBl.* p. 7. [3] Laband, II. p. 220. [4] *RGBl.* p. 165; Triepel, p. 219.

ganization, the system under which Alsace-Lorraine is at present governed. The changes made by this law were sweeping. The administration of the imperial territory was wholly revolutionized. It was entirely dissociated from the person of the Imperial Chancellor, the Department of the Imperial Chancery for Alsace-Lorraine was abolished, together with the office of president, and the seat of all the governmental organs of the territory was transferred to the territory itself. In order to carry the functions of the Department for Alsace-Lorraine as well as of the Department of Justice, so far as they touched territorial matters, and in order to perform the duties which had been laid upon the president, a board was erected in Strassburg, under the name of "Ministry for Alsace-Lorraine," with a Secretary of State at its head.[1]

The Law of 4 July, 1879, made no change in the relation of the Emperor to the territory. On the other hand, the transfer of the seat of the central administrative authorities from Berlin to Strassburg made a severing of the relations between those authorities and the Imperial Chancellor necessary, if the evils which the law was designed to correct were to be eliminated. Accordingly, § 1 of the law empowers the Kaiser to transfer the authority vested in him as "*Delegatar*" of the State-power, in Alsace-Lorraine, to an official to be known as the "*Statthalter*," who should be appointed and, if needs be, dismissed by the Kaiser, and who should have his residence in Strassburg. Moreover, the scope of the authority to be thus delegated to the *Statthalter* was to be determined by ordinance of the Kaiser.[2] Upon

[1] Law of 4 July, 1879, § 3.

[2] See the following ordinances: 23 July, 1879 (*RGBl.* p. 282); 28 September, 1885 (*RGBl.* p. 273); 15 March, 1888 (*RGBl.* p. 130); 20 June, 1888 (*RGBl.* p. 189); 11 December, 1889 (*RGBl.* 1890, p. 2); 14 March, 1893 (*RGBl.* p. 137); 5 November, 1894 (*RGBl.* p. 529).

the *Statthalter* were to rest also all those powers and duties which had been conferred by law or ordinance upon the Imperial Chancellor in matters pertaining to Alsace-Lorraine, as well as the extraordinary powers assigned to the president by the Law of 30 December, 1871.[1] At the same time the number of members in the Territorial Committee was increased and its powers enlarged. A Council of State was added to the organization of the territory, with advisory powers, while the competence of the *Bundesrat* was restricted by the transfer of certain powers heretofore exercised by that body to the new ministry.

The institutions of the imperial territory, as at present organized, are the following: —

1. *The Kaiser.* — While the State-power in Alsace-Lorraine rests in the Empire, the exercise of that power is placed in the hands of the Kaiser. The legal title by which the Kaiser exercises that power is the Law of 9 June, 1871. The Kaiser is not the ruler, or monarch, of Alsace-Lorraine in the sense in which the king of Bavaria is monarch of Bavaria, for example. Alsace-Lorraine is not an appurtenance of the imperial crown. Whatever authority is exercised by the Kaiser, in the territory, is exercised by him "in the name of the Empire," never in his own name.[2] The "*Landesherr*" of Alsace-Lorraine is the Empire. The Kaiser is the "*Delegatar*" of the Empire.

2. *The Statthalter, or Imperial Deputy.* — The legal title of the *Statthalter* rests upon the Law of 4 July, 1879, §§ 1 and 2. He is appointed by the Kaiser and is removable by

[1] Law of 4 July, 1879, § 2. For Law of 30 December, 1871, see *GBl. f. E.-L.*, 1872, p. 49. Section 10 of this law grants certain military powers to the president in case the public safety is threatened. This section was repealed by the Law of 18 June, 1902 (*RGBl.* p. 281).

[2] Laband, II. pp. 221, 222; Meyer, *Staatsr.* p. 431, note 1; Stöber, *op. cit.* pp. 650 ff., 653, 658.

him. The appointment is countersigned by the Imperial Chancellor,[1] as is also the ordinance transferring to him the powers of the Emperor. The *Statthalter* acts in two capacities: —

(*a*) He is the *personal representative* of the Kaiser, when the Kaiser sees fit to invest him with the powers exercised by himself in the imperial territory. The Kaiser is not bound to transfer his powers to the *Statthalter*. The matter is purely optional with him. But when the *Statthalter* has been invested with the governmental powers of the Kaiser in Alsace-Lorraine, he becomes, until such time as these powers may be resumed by the Kaiser, the vice-Kaiser. The powers thus transferred by the Kaiser attach to the *person* of the *Statthalter*, not to the office. Hence, when the *Statthalter* is hindered in the exercise of his imposed duties, these functions revert to the Kaiser. When acting as the representative of the Kaiser, the *Statthalter* stands in a position similar to that of a ruler, and is, therefore, not responsible constitutionally nor is his relation a disciplinary one. He is, of course, responsible to the Kaiser for the proper fulfilment of his duties. The decrees and ordinances issued by the *Statthalter* in his capacity as representative of the Kaiser have the same force as imperial ordinances and decrees, and require for their validity the countersignature of the Secretary of State, who thereby assumes the responsibility therefor.[2]

(*b*) The *Statthalter* is also an *imperial official*. He holds the legal position in Alsace-Lorraine which was occupied earlier by the Imperial Chancellor and the president.[3] As

[1] As to whether the appointment of a *Statthalter* is optional with the Emperor see Laband, II. pp. 229 ff., who declares with right that only the transfer of the Kaiser's authority is optional. The appointment of a *Statthalter*, on the contrary, is obligatory.

[2] Law of 4 July, 1879, § 4, Cl. 1.

[3] "On the *Statthalter* are laid, at the same time, the powers and duties

an imperial official the *Statthalter* is not merely a deputy of the Imperial Chancellor within the meaning of the "Law respecting the Appointment of Deputies for the Imperial Chancellor." [1] "The *Statthalter* takes the place of the Imperial Chancellor, not as his *Delegatar*, but as his successor. The competence of the Imperial Chancellor was divided into two spheres by the Law of 4 July, 1879: the competence in general affairs of the Empire, and the competence in matters pertaining to the imperial territory. The latter has been taken away from the Imperial Chancellor and handed over to the *Statthalter*. The principle of the Imperial Constitution that there is but *one* Imperial Minister has been changed by the Law of 1879. Since then there have been two: the *Statthalter* is the Imperial Chancellor for Alsace-Lorraine, just as the Territorial Committee is the *Reichstag* for Alsace-Lorraine." [2] While acting in the capacity of an imperial official, in other words, as the successor of the Imperial Chancellor, as provided in the Law of 1879, § 2, the *Statthalter* is responsible. He is responsible, however, not to the Territorial Committee, but to the *Reichstag*, at least in theory. In practice, nevertheless, his responsibility would seem to be directed to the Territorial Committee. "The *Statthalter* has no relations whatever with the *Reichstag*, while the Territorial Committee, in fixing the budget, auditing the accounts, and discussing measures, petitions, etc., is in a position to criticise the action of the government, and to it alone can the government justify its acts and establish its propositions." [3] Theoretically, the

imposed by law and ordinance upon the Imperial Chancellor in the affairs of Alsace-Lorraine, as well as the extraordinary powers imposed on the president by Sec. 10 of the Law of 30 December, 1871." Law of 4 July, 1879, § 2.

[1] Law of 17 March, 1878 (*RGBl.* p. 7).

[2] Laband, II. p. 229.

[3] *Ibid.* p. 231.

Statthalter should countersign the ordinances of the Emperor touching the territorial affairs of Alsace-Lorraine, that is, touching those matters which in the division of powers under the Imperial Constitution would fall within the competence of the several States.[1] Here again theory and practice do not coincide. A law affecting the territorial affairs of Alsace-Lorraine, passed, under the reservation contained in § 2, Cl. 1, of the Law of 2 May, 1877, by the *legislative organs of the Empire*, is signed by the *Statthalter and* Imperial Chancellor, the latter assuming the responsibility and the supervision of the law's execution.[2] In all those matters indicated in § 2 of the Law of 4 July, 1879, *i.e.* in all matters wherein the *Statthalter* acts as an imperial official and as the successor of the Imperial Chancellor, the State Secretary has the rights and responsibility of a deputy of the *Statthalter*, to that degree in which, under the Law of 17 March, 1878, such rights and responsibility are possessed by the deputy of the Imperial Chancellor. The right of the *Statthalter* himself to perform any official function which falls within this sphere is reserved.[3]

3. The *Ministry in Alsace-Lorraine*, no longer located in Berlin as a division of the Imperial Chancery, but, as already noted, transferred to Strassburg, still maintains the character of an *imperial* board, equally with the other imperial Departments, such as the Department of the Interior or the Department of Justice, not, however, under the Imperial Chancellor, but under the *Statthalter*. At the head of the ministry is a

[1] Law of 4 July, 1879, §§ 2 and 4. Compare also Law of 9 June, 1871, § 3, Cl. 4, and Law of 2 May, 1877, §§ 1 and 2. See Laband, II. p. 230; Meyer, *Staatsr.* p. 432; Arndt, *Staatsr.* p. 754; Kayser, in Holzendorff's *Rechtlexikon*, III. p. 405; Leoni, *Das öff. R. d. Reichlands El.-Loth.* pp. 89, 167 ff.

[2] See examples cited by Laband, II. p. 230, note 5.

[3] Law of 4 July, 1879, § 4, Cl. 2.

State Secretary, who, as noted in the preceding paragraph, in matters where the *Statthalter* acts as the successor of the Imperial Chancellor, stands to that official as the deputy of the Imperial Chancellor, under the Law of 17 March, 1878, stands to his chief. The ministry falls into various divisions, at the head of each of which is placed an Under Secretary of State. Both the State Secretary and the Under Secretaries are appointed by the Kaiser. These appointments are countersigned by the *Statthalter*, to whom is assigned the appointment of the other high ministerial officials.[1] The details of the organization of the ministry are fixed by ordinance of the Kaiser.[2] The activities of the ministry extend to all the duties laid upon the former Imperial Chancery Office for Alsace-Lorraine and upon the Imperial Judicial Office for the administration of Alsace-Lorraine, as well as to those duties which fell to the president prior to the passage of the Law of 4 July, 1897, together with such further enlargement of competence as may have been granted since by territorial legislation.[3] From the ministry proceed the various administrative and judicial institutions of the territory, with the exception of those which are concerned with matters such as the post and telegraph, imperial railroads, and the Imperial Bank, which belong to the competence of the Empire, and military matters, which are administered by Prussia.[4]

[1] Law of 4 July, 1789, § 6. The subordinate officials are appointed by the State Secretary. As to the legal relations of these officials, see Law of 4 July, 1879, § 6, Cl. 3; also Laband, II. pp. 233 ff.; Hänel, *Staatsr.* p. 831; Meyer, *Staatsr.* p. 440, note 4; also Leoni, pp. 128 ff.

[2] Law of 4 July, 1879, § 5; Ordinance of 23 July, 1879 (*GBl. f. E.-L.* p. 81), with amendments of Ordinance of 29 July, 1881 (*GBl.* p. 95); 21 April, 1882 (*GBl.* p. 67); 25 April, 1887 (*GBl.* p. 43); 16 January, 1895 (*GBl.* p. 3).

[3] Law of 4 July, 1879, § 3.

[4] See Leoni, *Das Verfassungsrecht von El.-Loth.* (1892), pp. 92 ff.

4. By the terms of § 9 of the Law of 4 July, 1879, a *Council of State* was created, consisting of the State Secretary, the Under Secretaries, the President of the Supreme Court of the territory, the Chief Attorney attached to the Supreme Court, and from eight to twelve members appointed by the Kaiser for a term of three years. Three of these members to be appointed by the Kaiser are nominated by the Territorial Committee. The meetings of the Council of State are presided over by the *Statthalter*, and in case he be hindered, by the State Secretary.[1]

The functions of the Council of State are purely advisory in their nature, and in no sense legislative or judicial.[2] It is called upon to give an opinion on the drafts of all proposed laws and of general ordinances issued for the execution of the laws, as well as on matters which may be submitted to it by the *Statthalter*. The Law of 4 July, 1879, requires that all laws and general ordinances, without exception, shall be laid before the Council of State. Should such submission of a law or ordinance to the Council of State be neglected, the omission would in no wise affect the validity of the measure.[3] The Council of State is no innovation in the organization of Alsace-Lorraine. It was rather the revival of an institution long and favorably known there — the *Conseil d'État*, whose functions seemed specially needed in the peculiar conditions existing in Alsace-Lorraine.[4] "It will hardly be doubted," say the *Motiven* to § 9 of the Law of 4 July, 1879, "that a comprehensive and thorough consideration of the propositions to be laid by the government before the legislative factors is better secured, if the preparation of those

[1] Law of 4 July, 1879, § 10. The order of business is fixed by the Emperor.

[2] Legislative and other special functions may, however, be granted to it by territorial legislation. Law of 4 July, 1879, § 9.

[3] Leoni, *op. cit.* p. 96.

[4] *Ibid.* p. 95.

propositions is not left to the individual ministerial departments alone, but is handed over for discussion to a body in which a knowledge of law and of business, an insight into the needs of the territory, and an assured position in life removed as far as possible from the struggles of political parties are combined. The initiative and preliminary draft would naturally fall to the minister of the department concerned, as a rule, but the necessary testing as to whether the law would be useful and practicable, whether it harmonizes with existing legislation, what reaction it might have upon interests of the territory administered by other departments, and, finally, whether the idea has come to the desired expression in the wording of the law, — these go beyond the scope of the individual department."

5. The *Bundesrat* is an organ of the legislative power in Alsace-Lorraine. According to the Law of 2 May, 1877, §§ 1 and 2, — sections which were not repealed by the Law of 4 July, 1879, — laws for Alsace-Lorraine are issued by the Kaiser with the consent of the *Bundesrat*, provided the consent of the Territorial Committee has been obtained to the desired measure. It is expressly provided, however, that the power to legislate for the imperial territory through the usual organs of imperial legislation is specially reserved. Like laws of the Empire, therefore, the territorial laws of Alsace-Lorraine need for their validity the consent of the *Bundesrat*. It must not be inferred, however, that the position of the *Bundesrat* is the same in both modes of legislation. According to Art. 5 of the Imperial Constitution, the legislative power of the Empire is exercised by the *Bundesrat* and *Reichstag*, and the consent of a majority in both bodies is necessary and sufficient. Such consent being had, the Kaiser is bound to engross and publish the law.[1] The pre-

[1] *RVerf.* Art. 17.

vailing view is that the *Bundesrat* is the organ in the Empire in which legislative power rests, from which the command in the law proceeds, and to which the ordinance power is assigned. In the legislation of Alsace-Lorraine, on the contrary, *i.e.* in territorial legislation, the "*placet*" belongs to the Kaiser. He it is who, as bearer of the State-power in Alsace-Lorraine, exercises the legislative power, as § 1 of the Law of 2 May, 1877, explicitly declares. In territorial legislation, therefore, the *Bundesrat* has no authority other than that possessed also by the Territorial Committee. The requirement of its consent in territorial legislation is a constitutional check upon the power of the Kaiser. Its functions are those of a parliamentary body, or "Upper House." [1]

The coöperation of the *Bundesrat*, moreover, is necessary in certain administrative business. The government is bound to lay the accounts of the territorial budget before the *Bundesrat*, from which body the discharge issues.[2] The compulsory retirement — pensioning — of an official who has become permanently incapacitated, by reason of bodily infirmity or on account of physical or mental weakness, for the fulfilment of his duties, can, in case the official has been appointed by the Kaiser, be ordered by the Kaiser only with the consent of the *Bundesrat*.[3] Ordinances of the Kaiser respecting the erection of disciplinary chambers and the delineation of disciplinary districts, are to issue with the consent of the

[1] See Stenographic Reports of the *Reichstag*, 1879, II. p. 1631. It is in accord with this idea that the power to issue ordinances for the execution of laws belongs to the Kaiser, and not to the *Bundesrat*. So far as territorial laws are concerned, Art. 7, Cl. 2, of the *RVerf.* does not operate. Leoni, *op. cit.* p. 54.

[2] Law of 2 May, 1877, § 3.

[3] Law of 31 March, 1873, § 66. With respect to the other officials the *Statthalter* decides the question of retirement, and his decision may be appealed from to the *Bundesrat*. See Leoni, *op. cit.* p. 54.

Bundesrat. Moreover, the *Bundesrat* selects the members of the disciplinary chambers, and the order of business in the disciplinary boards is subjected to its approval.[1]

6. *The Territorial Committee*, like the whole constitution of Alsace-Lorraine, is a creation of imperial law. An imperial law called it into being, and so long as the Empire reserves to itself the power to give a constitution to Alsace-Lorraine, an imperial law may wipe it out of existence. In this respect a sharp distinction is drawn between the Territorial Committee and the *Landtag*, or Chambers, of the several German States. Moreover, a further difference is found in the fact that the powers usually exercised by the Assemblies of the States are not exercised by the Territorial Committee alone and exclusively, but are granted to the *Reichstag* also by the reservation in the Law of 2 May, 1877. As a result, the coöperation of the Territorial Committee in territorial legislation is not a necessary one, but an optional one. The Territorial Committee is not an integral part of the constitutional structure of the territory, like the Assemblies of the States, since it can be put out of operation with no amendment of the Constitution, at the good pleasure of the government.[2] On the other hand, the legal position of the Territorial Committee is not identical with that of a Provincial Assembly. It has, under the law, a full right of coöperation in legislation and in fixing the budget. It exercises all the rights which usually pertain to the representative body in a constitutional State. The territory is not a State, and can, for that reason, have no State organs. The powers of the

[1] Law of 31 March, 1873, §§ 87, 91, 92, 93. See also Law of 4 July, 1872, § 8. In appeals touching ecclesiastical matters, "*Rekurse wegen Misbrauchs*," the *Bundesrat* decides after examination by its Judicial Committee. In this respect it takes the place of the French *Conseil d'État*. Law of 30 December, 1871, § 9.

[2] Leoni, *op. cit.* p. 60.

Territorial Committee are derived wholly from the Empire, and its whole existence rests, as already stated, upon imperial legislation. It is therefore an organ of the Empire, or, to use the words of Laband, a "special substitute *Reichstag*, which functions in the affairs of Alsace-Lorraine in place of the regular *Reichstag*." It does not represent a "people of Alsace-Lorraine." It is "the constitutional representative of the German people of the Empire so far as that people is domiciled in Alsace-Lorraine, and interested for that reason in the special affairs of the territory. It is accordingly, in contrast with the *Reichstag*, a special representative of the population of Alsace-Lorraine, but just as the *Reichstag* is, so is it also, an organ of the Empire." [1]

The Territorial Committee is composed of fifty-eight members, thirty-four of whom are elected by the District Assemblies out of their own midst,[2] four are chosen by the Communal Councils of the cities of Strassburg, Kolmar, Metz, and Mulhausen, one from each city,[3] and twenty chosen by indirect ballot from the various Circles into which the territory is divided.[4] The Kaiser has the exclusive right to call, adjourn,

[1] Laband, II. p. 225. Jellinek, on the contrary, "*Staatsfragmente*," published in *Festgabe*, Heidelberg, 1896, p. 287, declares that the Territorial Committee is not an organ of the Empire, but of the territory, as a corporation which has itself received its organization through this very Territorial Committee. He further claims that the Territorial Committee, by reason of its share in the function of legislation, is not the organ of a provincial corporation, but a State organ.

[2] That is, 10 by the District Assembly of Upper Alsace, 11 by the District Assembly of Lower Alsace, and 13 by the District Assembly of Lorraine. Should a member thus elected cease to be a member of the District Assembly during the period of his membership in the Territorial Committee, his membership in the committee ceases at the same time. Decree of 29 October, 1875, Cl. 2.

[3] The Communal Council elects from its own body, and membership in the committee ceases with the loss of membership in the council.

[4] The *city Communes* of Kolmar and Mulhausen are excluded from voting in election of members from the Circles of Kolmar and Mulhausen. Law of 4 July, 1879, § 13. Election is for three years, *ibid.* § 15.

and dissolve the Territorial Committee.[1] The ministers, or their representatives, have a right to be present during the transaction of business by the Territorial Committee, and, on their own request, must be heard at any time.[2] The general provisions of the imperial law protecting the members of representative bodies apply also to the members of the Territorial Committee.[3] The special provisions, however, which concern the members of the *Reichstag* particularly, have no application.[4]

Legislation in Alsace-Lorraine

In Alsace-Lorraine laws may come into being in any one of three ways: (1) through the decree of the Kaiser with the consent of the *Bundesrat* and Territorial Committee; (2) through the decree of the Kaiser with the consent of the *Bundesrat* and *Reichstag;* and (3) through the decree of the Kaiser with the consent of the *Bundesrat,* in the form, that is, of an ordinance having the provisory force of law. The first method is the one generally employed.

(1) In legislation with respect to matters pertaining to Alsace-Lorraine, in what may be termed territorial legislation, in other words, the right of initiative belongs not alone to the government, but also to the *Bundesrat* and Territorial Committee.[5] Before a bill is submitted to the action of the legis-

[1] Law of 4 July, 1879, § 19. Dissolution of Territorial Committee carries with it dissolution of District Assemblies. New elections of District Assemblies must be held within three months and of Territorial Committee within six months.

[2] Law of 4 July, 1879, § 21.

[3] Law of 30 August, 1871, Art. 1. See also Laband, II. p. 227; Leoni, *op. cit.* p. 72; Meyer, *Staatsr.* p. 426, note 17.

[4] The members of the Territorial Committee may and do receive compensation. This is at present fixed at 20 Marks per diem with mileage, and is paid out of the Territorial Treasury.

[5] Law of 4 July, 1879, § 21.

lative bodies, it is laid before the Council of State for its expert opinion, and then is introduced into the *Bundesrat*. From the *Bundesrat* it passes to the Territorial Committee. The result of the deliberation in the *Bundesrat* is communicated to the *Statthalter* by the president of the *Bundesrat*, while the action of the Territorial Committee is brought to the knowledge of the government by the president of the committee. The government is not bound by the action of the *Bundesrat* or Territorial Committee, but may withdraw the measure at any time. Nor is there any period fixed within which the government, after the *Bundesrat* has acted upon a bill, must submit the bill to the Territorial Committee for its action or to the Kaiser for his sanction. Nothing stands legally in the way of submitting bills which have received the consent of the *Bundesrat* before the beginning of, or during, the session of the Territorial Committee, to the action of the Territorial Committee only, at a later session.[1]

Both *Bundesrat* and Territorial Committee may amend bills submitted to them. If, however, amendments are made in the Territorial Committee, no matter what the nature of the amendment may be, or how unimportant seemingly, the bill must be returned to the *Bundesrat* for its consent, since, as Leoni observes, "the activity of the *Bundesrat* may not at any time be made contingent upon the views of the government as to the importance or unimportance of the amendments." When a bill is accepted by the Territorial Committee without alteration, a further action on the part of the *Bundesrat*, such as is both customary and necessary in imperial legislation, is not required, nor is it the practice in territorial legislation.

The sanction of a law is imparted by the Kaiser, not, as in imperial legislation, by the *Bundesrat*. In territorial legis-

[1] Leoni, *op. cit.* p. 162.

lation, the *Bundesrat* stands upon the same level with the Territorial Committee, possessing no authority which is not also possessed by the territorial body. "It is not the proper lawgiver. Its consent is simply a condition to the issuance of a law on the part of the Emperor." [1] In deciding whether a bill shall become actual law, the Kaiser is perfectly free to exercise his own discretion. He is not in any sense bound by the majority vote of the *Bundesrat*,[2] nor does the fact that the bill has passed both legislative bodies lay upon him any legal obligation whatever to impart to that bill his sanction. Bills which have received the sanction of the Kaiser are engrossed by him (*ausgefertigt*), countersigned by the *Statthalter*, or by his representative, the State Secretary in Alsace-Lorraine, and published in the *Gazette* for Alsace-Lorraine.

(2) In § 2 of the Law of 2 May, 1877, the right of passing laws for Alsace-Lorraine *in the way of ordinary imperial legislation* is specially reserved. Under the provisions of this law, a measure affecting territorial matters in Alsace-Lorraine may be passed by the *Bundesrat* and *Reichstag* with the sanction of the Emperor, with no reference whatever to the Territorial Committee. In fact, in territorial affairs legislation may be had in the production of which the Territorial Committee is wholly ignored, and the ordinary legislative organs of the Empire alone are active. In such cases bills might arise in the *Reichstag* as well as in the *Bundesrat*, and such bills as would be passed in the way of imperial legislation would not be submitted to the Council of State for its opinion. Moreover, bills passed in the form of ordinary imperial legislation, though the subject of these measures be purely terri-

[1] Laband, II. p. 252; Leoni. *op. cit.* p. 161.

[2] "The Kaiser may sanction a bill although the Prussian delegates in the *Bundesrat* have voted in the negative, and may refuse sanction although the Prussian votes in the *Bundesrat* are in the affirmative." Leoni, *op. cit.* p. 162.

torial matters, do not lose thereby their character of *imperial* laws.[1] The fact that matters pertaining to the imperial territory may be affected by legislation in two different modes might well lead to serious complications. It is not at all unthinkable that legislation which could not be had, for various reasons, with the coöperation of the Territorial Committee, might be had by a legislative circumlocution which would bring the matter directly before the legislative factors of the Empire with no reference whatever to the Territorial Committee. Moreover, delicate questions might arise as to the status of a measure which, voted down in the Territorial Committee, was thereupon introduced into the *Reichstag* by the *Bundesrat* for adoption in the way of imperial legislation.

What, now, is the relation of laws passed in the form of territorial legislation to those passed in the form of imperial legislation? According to Art. 2 of the Imperial Constitution, imperial laws take precedence of State laws. The decisive fact is not the date of publication. The later law does not repeal the earlier. The principle is this: an expression of will on the part of a higher power supersedes an expression of will on the part of a subordinate power. In Alsace-Lorraine, however, there is but one State-power, — the power of the Empire. Imperial laws for Alsace-Lorraine and territorial laws for Alsace-Lorraine passed in the way of imperial legislation are both expressions of the will of this one State-power. Here, accordingly, the principle would hold that the later law repealed the earlier. With respect to laws passed in the form

[1] Laband, II. p. 251; Hänel, I. p. 828; Stöber, *op. cit.* pp. 652 ff. The statement of Leoni, *op. cit.* p. 163, "The coöperation of the *Reichstag* in place of the Territorial Committee does not make the law an imperial law; it remains in every case a territorial law under the sanction of the Kaiser, where a matter not regulated by force of the *RVerf.* or the Territorial Constitution forms the subject-matter," is a strained construction of § 2 of the Law of 2 May, 1877.

of territorial legislation, — in distinction from imperial legislation for Alsace-Lorraine, or territorial laws passed in the way of imperial legislation — the principle does not apply, so far as the relation of such territorial legislation to imperial legislation is concerned. Laws passed in the form of territorial legislation, that is, laws issued by the Emperor with the consent of the *Bundesrat* and Territorial Committee, do not take precedence of imperial legislation touching the same subject, and can neither amend or repeal it. For, in § 2, Cl. 2, of the Law of 2 May, 1877, it is expressly declared that laws affecting territorial affairs, passed in the way of imperial legislation, can be amended or repealed only through imperial legislation. This clause corresponds to the legal relation between the legislative factors in both forms of legislation. An imperial law for Alsace-Lorraine, a law touching matters purely territorial passed in the form of imperial law, issues, like every imperial law, from the *Bundesrat* and *Reichstag*, or, to be more accurate, from the *Bundesrat* with the consent of the *Reichstag*. The sanction is imparted by the *Bundesrat*. A law in Alsace-Lorraine passed in the form of territorial legislation issues from the Kaiser, with the consent of the *Bundesrat*, the consent of the Territorial Committee having been previously obtained. In the first case, the legislation for Alsace is *immediate*. In the second case, it is mediate. That is to say, in the first instance we have an immediate expression of the will of the State-power. In the second, we have a mediate expression of that will through the Kaiser, into whose hands the State-power, with the reservation contained in § 2 of the Law of 2 May, 1877, has been placed. The two forms of legislation, therefore, rest upon two distinct bases: the one upon original, the other upon derivative, power. Where, as in this case, the delegated power is limited by an express reservation, the exercise of the reserved power by the

imperial legislative body must take precedence of all action on the same subject by the "*Delegatar.*"

(3) By the provisions of the Law of 25 June, 1873, § 8,[1] the Kaiser is empowered, until such time as the matter may be regulated by imperial legislation, to issue, with the consent of the *Bundesrat*, ordinances having the force of law.[2] In the exercise of this right the Kaiser is subjected to certain limitations. In the first place, such ordinances may contain nothing contrary to the Constitution or to the imperial laws in force in Alsace-Lorraine, nor may they relate to such matters as require, by the provisions of § 3, Cl. 2, of the Law of 9 June, 1871,[3] the consent of the *Reichstag* for their determination. In the third place, such ordinances must be laid before the *Reichstag*, at its next meeting, for its action. Should ratification be refused by the *Reichstag*, the ordinance goes out of force. The assent of the *Reichstag*, on the other hand, raises the ordinance to the dignity of a law, which cannot be amended or repealed by subsequent ordinance, but by law only.[4] This power of issuing ordinances having the provisory force of law may be exercised only while the *Reichstag* is *not* in session. The fact that the Territorial Committee may be in session has absolutely no effect.[5]

The Law of 7 July, 1887,[6] provides that where an imperial law has been introduced into Alsace-Lorraine, and such law is subsequently amended, through imperial legislation, the amendment may be made effective in Alsace-Lorraine by

[1] *RGBl.* p. 160; *GBl. für E.-L.* p. 131.

[2] "*Verordnungen mit interimistischer Gesetzeskraft.*"

[3] Matters involving the assumption of loans or guarantees for Alsace-Lorraine through which a burden is laid upon the Empire.

[4] Compare Leoni, *op. cit.* p. 164; Laband, II. p. 257.

[5] See in this connection the Stenographic Reports of the *Reichstag*, 1877, Bd. I. p. 281. Compare remarks of Laband, II. p. 57.

[6] *RGBl.* p. 377.

ordinance of the Kaiser, with the consent of the *Bundesrat*, and the date from which such amendment shall go into force may be fixed in the ordinance. The power of the Kaiser to issue ordinances of this nature is not subjected to the provisions of § 8 of the Law of 25 June, 1873. These ordinances may be issued while the *Reichstag* is in session and need no subsequent ratification by that body. They are not in any sense provisional — "*Verordnungen mit interimistischer Gesetzeskraft.*"

CHAPTER XI

THE CONSTITUTION AND IMPERIAL FINANCE

THE German Empire, like every other State, is a juristic person, and, being a juristic person, is capable of acquiring, holding, and disposing of property.[1] As the subject of property rights, the Empire is known in German law as the Imperial Fiscus — "*Reichsfiskus.*"[2] The Imperial Fiscus is not something different from the Empire, it is the Empire itself, viewed from the standpoint of private law. For, like every other State, the Empire is a juristic person possessed not only of certain public law capacities and relations, but also

[1] On the general subject of the finances of the Empire, see Laband, *Das Finanzrecht des D. Reiches*, Hirth's *Annalen*, 1873, pp. 405 ff.; *Id.*, article "*Reichsfinanzwesen*," in Von Stengel's *Wörterbuch d. D. Verwaltungsrechts*, II. pp. 359 ff.; *id.*, *Staatsr.* IV. pp. 332 ff.; Zorn, article "*Reichsfinanzwesen*," in Holzendorff's *Rechtslexikon*, III. pp. 375 ff.; Von Mayr, article "*Reichsfinanzwesen*," in Conrad's *Handwörterbuch der Staatswissenschaft*, 2d edition, 1901, VI. pp. 360 ff., and the literature cited on p. 383 therein.

[2] On the "*Reichsfiskus*" see Laband, in Hirth's *Annalen*, 1873, pp. 408 ff.; *id.*, article "*Reichsfiskus*," in Von Stengel's *Wörterb.* II. pp. 363 ff.; *id.*, *Staatsrecht*, IV. pp. 332 ff.; Seydel, article "*Das Deutsche Reich als Privatrechtssubject*," in *Zeitschrift für die D. Gesetzgebung*, 1874, VII. pp. 266 ff.; Reincke, article "*Betrachtungen über die Entstehung und Rechtstellung d. D. Reichsfiskus*," in Gruchot's *Beiträge zur Erläuterung d. D. Rechts*, XXIII. 1879, pp. 481 ff.; Scholz, article "*Die Prozessverteilung des Reichspost- und Telegraphenfiskus*" in Gruchot's *Beitrage*, etc., XLVII. 1903, pp. 556 ff.; Meyer, *Verwaltungsrecht*, II. pp. 308 ff.; Zorn, *Staatsr.* II. p. 220; Hänel, *Staatsr.* I. pp. 364 ff.; Von Mayr, in Conrad's *Handwörterb.* VI. p. 361; Otto Mayer, *Verwaltungsrecht*, I. pp. 142 ff.; Hatschek, article "*Die rechtliche Stellung des Fiskus im Bürgerlichen Gesetzbuch*," in *Verwaltungsarchiv*, VII. pp. 424 ff.

of certain private law capacities and relations. It is with reference to the latter that one speaks of the Imperial Fiscus.

As a subject of property rights, the Imperial Fiscus is a unit. It is not to be sharply differentiated from the various "Fisci" of the several administrative branches of the government, — the Postal Fiscus, the Marine Fiscus, etc., which are simply different modes in which the Imperial Fiscus distributes its activity; but it stands over against the "State Fisci," from which it is distinct and separate. The Fiscus in Alsace-Lorraine is also distinct and separate from the Imperial Fiscus. For, though the State-power in Alsace-Lorraine belongs to the Empire, yet the financial administration of the territory is wholly severed from that of the Empire.[1]

Notwithstanding the fact that the Imperial Fiscus is distinct from the State Fisci, and that the financial administration of the States is separate from that of the Empire, it is not always a simple matter to define the competence of the Empire and that of the individual States so far as the relation of the Imperial Fiscus to the several State Fisci is concerned. That the Imperial Fiscus and the State Fisci should exist side by side, each operating within its own sphere, grows out of the very nature of a federal State. Where, however, as under the German Constitution, certain of the States are granted special privileges, the demarcation of spheres of competence and the determination of the exact relations between the Empire and the various States are not a little difficult.

It may be laid down, however, as a general principle, that the rights and duties of the Empire and of the several

[1] See Laband, IV. pp. 334 ff., 213 ff. By the Law of 30 March, 1872 (*RGBl.* p. 369), the Fisci of the several Protectorates (*Schutzgebiete*) are now separated from the Imperial Fiscus.

States, so far as property matters are concerned, follow the lines of administrative competence. All matters to which the self-government of the States extends, fall, so far as relations touching property rights are concerned, to the Fiscus of the State, while the rights and duties growing out of legal matters concluded by the imperial authorities, so far as these affect property, fall to the Imperial Fiscus.[1]

As a general rule, *i.e.* unless otherwise provided, the Imperial Fiscus is represented by the Imperial Chancellor. In actual practice, the representation of the Imperial Fiscus is determined by the organization of the imperial boards and the competence assigned to these boards and officials by law and ordinance.[2] In suits at law the representation of the Imperial Fiscus is regulated by the provisions of administrative law. As a rule the higher authorities are designated to conduct the proceedings.

Although the imperial treasury is in Berlin, and the seat

[1] Laband, IV. p. 334; Von Mayr, *op. cit.* p. 361. It is unquestionably the province of the Imperial Fiscus to control the administration of all property relations immediately affecting the Empire; for example, the administration of the "active" imperial property, of the imperial debt, of foreign affairs and consulates, of the marine, the imperial court and other boards so far as property relations are concerned. So the operation of the imperial railroads. The "Postfiskus" is State Fiscus in Bavaria and Württemberg, but Imperial Fiscus in the rest of the Empire. The property affairs of the Insurance Office, on the contrary, do not fall within the sphere of the Imperial Fiscus. The Customs and Tax Fiscus is State Fiscus pure and simple, even where the revenues flow into the Imperial Treasury. As to the Military Fiscus, there is a division of opinion. The prevailing view is that the Military Fiscus is Imperial Fiscus. Laband holds a different view and seems to have the stronger argument. See Laband, IV. pp. 335 ff., especially the references in note 3 to p. 341.

[2] For discussion of the representation of the Imperial Fiscus in military matters, see Laband, IV. pp. 341, 342, note 1; also Scholz, in Gruchot's *Beiträge*, XLVII. pp. 556 ff.

of the Imperial Chancellor is also in the same city, yet the status of the Imperial Fiscus before the court is not determined by that fact. Section 18 of the Code of Civil Procedure (*Civilprozessordnung*) lays down the principle that "the general status of the Fiscus before the court is determined by the seat of that board (*Behörde*), which is summoned to represent the Fiscus in the suit at law."[1]

The Imperial Fiscus, then, is the Empire itself manifesting its activity as the subject of property rights. The determination of the board which shall represent the Fiscus, the standing of the Fiscus before the courts, the question whether it shall submit to the application of private law and the regular method of procedure, as well as the privileges which it may claim, — all these matters are regulated by imperial legislation, and such legislation, when had, is exclusive. In all matters concerning the Imperial Fiscus, the Empire takes precedence of the State, and may be subjected to regulation by State legislation only by its own consent. Where there is no imperial law controlling the matter, the following principle holds: if the Imperial Fiscus, in the adjustment and distribution of powers incident upon the creation of a federal State, has taken the place of the State Fiscus, the general legal principles which are valid for the State Fiscus find application to the Imperial Fiscus as well. Whatever privileges, whether in the form of processual advantages, privileges at private law, or exemptions from taxation, are enjoyed in the State by its own Fiscus, are, therefore, enjoyed

[1] "Der allgemeine Gerichtsstand des Fiskus wird durch den Sitz der Behörde bestimmt, welche berufen ist, der Fiskus in dem Rechtsstreite zu vertreten." See also Gaupp, *Komm. zur CPO.* 4 Aufl., 1901, I. pp. 56 ff.; Scholz, *op. cit.* pp. 556 ff.; Reincke, *op. cit.* pp. 481 ff.; Wach, *Lehrb. der CPO.* I. pp. 406, 567; Fritze, *Zusammenstellung der Behörden, welche den preuss. Landfiskus und den D. Reichsfiskus im Prozesse zu vertreten befugt sind.*, 1891; Seuffert, *Komm. z. CPO.* 8 Aufl., 1902, pp. 19 ff.

by the Imperial Fiscus also. But there is no ground upon which the Imperial Fiscus can claim a *more* favorable position than is conceded to the State Fiscus in that same territory.[1]

I. *The Working Capital of the Empire*

German writers on the constitutional law of the Empire are wont to divide the property of the Empire into two classes: the *administrative* means (*Verwaltungsvermögen*) and the *financial* means (*Finanzvermögen*). Under the head of administrative means are classed "all those objects of value which constitute the apparatus required in accomplishing the constitutional purposes and tasks of the State, and which belong, therefore, to the service of the authorities and to the management of the public institutions of the State. The characteristic feature of this sort of property is that it is not *free, disposable* capital, but is limited by the object for which it is to be spent. The financial means, on the contrary, do not serve the ends of the State directly, but, through its capital value (*Kapitalswerth*) or the revenue from it, puts the government in a position where it can meet a part of the costs incidental upon carrying out State ends. It is the *productive* (*werbendes*) or *economic* (*wirtschaftliches*) means of the State. The acquisition, possession, and administration of this means does not constitute an end of the State, but is simply designed to lighten indirectly the accom-

[1] See Law of 25 May, 1873 (*RGBl.* p. 113), § 1, Cl. 2; *Kriegsleistungsgesetz vom* 13 June, 1873 (*RGBl.* p. 129), § 34. Compare *Einführungsgesetz z. CPO. vom* 30 Jan., 1877 (*RGBl.* p. 244), and Law concerning changes in the *CPO.* of 17 May, 1898 (*RGBl.* p. 332), § 15, 3); Hänel, *Staatsr.* I. p. 366; Laband, *Annalen*, p. 411; Seydel, *Zeitschrift*, VII. pp. 236 ff., *Comm.* p. 384; Meyer, *Staatsr.* p. 692; Reincke, *op. cit.* pp. 486 ff. See also Stamp Law of 1 July, 1881 (*RGBl.* p. 185), § 29, and Law Relating to the Consular Jurisdiction, of April 7, p. 1700 (*RGBl.* p. 213), § 24, Cl. 1.

plishment of the State's tasks. The investment and administration of this capital, then, is free, *i.e.* determined purely by political and financial considerations."[1] The administration of the financial means of the Empire, so far as no other provision is made, falls to the Treasury Office of the Empire, while the administration of the administrative means is carried on by the various administrative boards within whose province it may lie.

1. *The Administrative Means of the Empire.* — Every State, no matter what its form may be, requires a vast amount of property, movable and immovable, devoted to the service of the various branches of the government. This array of property forms the administrative equipment of the State. It consists of buildings, office furnishings, apparatus; in short, it covers the thousand and one things *in use* in the administrative work of the State. From this property no revenue is expected or realized. It is this characteristic which distinguishes it, as already suggested, from the purely financial operations of the State.

Like most federal States, the German Empire was erected out of commonwealths, each of which possessed its own independent administrative organization and, as a matter of course, its own independent administrative equipment. On the formation of the Empire, or, more properly, on the formation of the North German Confederation, certain branches of the administration were handed over, either wholly or in part, to the federal government, with no clear line of demarcation between the rights of the *Bund* and the rights of the individual States in the property employed in such administrative service after the transfer was made. No definite principle was laid down as to the rights of the Empire itself in property used by the Empire for the general

[1] Laband, IV. p. 346. See also Meyer, *Verwaltungsrecht*, II. § 240.

ends of imperial administration. Nothing was said on the subject in the Constitution of the *Bund* or in the Imperial Constitution. The exceptions made in favor of the South German States with reference to certain branches of administration rendered the situation still more complicated and confusing.

In the Empire two distinct groups of administrative property could be distinguished: first, the property which belonged undoubtedly to the Empire, since it was acquired by the Empire itself and had never formed any part of the equipment of a State; and, second, property which belonged with equal certainty to the several States, since it had never been transferred, in whole or part, to the Empire. But between these two groups there was a great mass of property which had belonged, some of it wholly, to some one of the States, and all of which had received repairs, additions, and so on, at the hands of the Empire. To whom did this property belong, and what would be its status should it cease to be used for purposes of imperial administration? The property furnished by the Empire belonged undoubtedly to the Imperial Fiscus. The property employed in the administrative service of the States belonged beyond all question to the State Fiscus, in those branches of administration which had not been transferred to the Empire. But here was a great bulk of property created by the State and in use in the service of the Empire. Did the title pass with the use? Did the Empire, with the assumption of the administration, succeed also to the property rights in the equipment of these administrative functions? This question, which provoked no little discussion among German jurists,[1] was finally settled by the "Law on the Legal Relations of Objects

[1] See discussion in Laband, IV. pp. 355 ff.; *Annalen*, p. 426; Seydel, *Zeitschrift*, pp. 230 ff.

Devoted to the Service of the Imperial Administration" (*Gesetz über die Rechtsverhältnisse der zum dienstlichen Gebrauche einer Reichsverwaltung bestimmten Gegenstände*).[1] This law vests the *property*, in the administrative equipment taken over from the various States, in the Empire, but with a reversionary right of the individual State with respect to objects no longer in the service of the imperial administration. This law, as Laband observes, did not fuse all the administrative equipment of the Empire into a single mass. It was parted, as before, into two masses, the one distinctly and solely imperial and the other originating in the States, but it did remove the uncertainty by denominating this property no longer as belonging to the Imperial Fiscus *and* the State Fiscus, but as "*dominium perpetuum* and *dominium revocabile* of the Empire."

The Law of 25 May, 1873, extends not only to the objects actually on the inventory of the imperial administration, but it includes also all objects which are devoted to any constitutional administrative service supported by imperial means.[2] Under the decentralized form of administration in vogue in the Empire, no small part of the public business is carried on by the administrative organization of the several States. The administration, in such cases, is not imperial, but State administration. This is specially true of the military administration, to which by far the greater part of the administrative means of the Empire is devoted. There is no imperial military administration. Had the Law of 25 May, 1873, extended only to objects in the actual

[1] Law of 25 May, 1873 (*RGBl.* p. 113).

[2] Section 1 of the law reads: "An allen dem dienstlichen Gebrauch einer verfassungsmässig aus Reichsmitteln zu unterhaltenden Verwaltung gewidmeten Gegenständen, stehen das Eigenthum und die sonstigen dinglichen Rechte, welche den einzelnen Bundesstaaten zugestanden haben, dem Deutschen Reiche zu."

service of the imperial administration, all the objects devoted to the military administration would have still remained the property of the several States. The same is true of the postal and telegraph administration in part, the administration of which is divided between the Empire and the individual States. But in the case of the military administration, and of the administration of the post and telegraph, the *cost* is borne by the Empire, though the actual administration is carried on by the States, either in whole or in part. By the terms of the law, therefore, which vests in the Empire the property in all objects devoted to any constitutional administrative service supported by imperial means, the equipment of the military administration, as well as of the postal and telegraph administration, has become and remains the property of the Empire.[1]

Although no general distinction is made in the law between movable and immovable property, certain pieces of real estate (*Grundstücke*) are exempted from the law's operation.[2] The exceptions are as follows: —

(1) Real estate which, while employed in the service of the imperial administration, is devoted by the State to the use of the ruler or to the maintenance of the members of the ruling House.

(2) Real estate which, at the time the costs of administration were assumed by the Empire, had been transferred to

[1] As to the military administration, an exception must be made in the case of Bavaria, owing to her peculiar position in the Empire and her special privileges, and as to the postal and telegraph administration an exception must be made in the case of Bavaria and of Württemberg. Bavaria administers her army at her own expense, though in accord with the general regulations laid down for the rest of the German army. The cost of the postal and telegraph administration in Bavaria and Württemberg, are borne by the States themselves. They do not fall under the Law of 25 May, therefore.

[2] Law of 25 May, 1873, § 2, 1), 2), 3), 4), 5).

the administration of the Empire only for a specified term, or on recall, or by way of rent.

(3) Real estate out of whose proceeds the expenditures made by the State, for the acquiring of, or the erecting of, buildings upon a piece of land in the possession of the same imperial administration, are to be replaced, according to the arrangements made on the subject.

(4) Real estate which at the time of the transfer to the imperial administration was not in the immediate use of a branch of the service, but only connected with it to the extent that the revenue accruing from the real estate was placed to the account of that branch of the service.

(5) Real estate which is partly in use of the Empire and partly in use of the State, in so far as the joint use enjoyed by the State is not granted merely for a specified term, or upon recall, or by way of rent. The Empire does not hold a *condominium* in such property, but the imperial administration holds the right of use to the extent granted, until such time as an agreement may be made with the State administration with respect to a division of the property, or some other arrangement.

When a piece of land has become no longer indispensable to the imperial administration, or is no longer serviceable, and there seems to be no need for a substitute to replace it, then is such real estate, in the condition in which it may be at the time, without expense and without compensation for any improvement or damages, to be returned to that State from the possession of which it was transferred to the Empire.[1] The fact that a reversionary right belongs to the

[1] Law of 25 May, 1873, § 6. This reversion does not take place when a piece of land is no longer needed by the particular branch of the administration which has been using it, but only in case the imperial administration can find no further use for it at all. See Law of 25 May, 1873, § 4. Laband, IV. p. 363, note 6.

State does not act as a bar to the alienation of such property by the Imperial Fiscus, should it become unserviceable or no longer needed; but, in such case, the Imperial Fiscus must use the proceeds to secure another piece of real estate, or to erect another building or other buildings in the territory of the same State as a substitute for the property which has become unserviceable or superfluous.[1]

When a fortification is abandoned, the land reverts to the State in whose territory it is located, but only after the necessary grading and levelling have been done and the costs of the same repaid.[2] These costs are fixed by the highest authority (*Behörde*) in that branch of the imperial administration in whose possession the real estate may be.[3]

2. *The Financial Means of the Empire.* — By "financial means" is meant, as already suggested, the productive capital of the Empire, that is, such means as brings in an income for the Empire. At the time of their founding, neither the North German *Bund* nor the German Empire possessed property of this description. The immense war indemnity demanded of France at the close of the War of 1870 furnished the opportunity for the creation of means of this kind.

(1) By the Law of 11 November, 1871,[4] it was provided

[1] Law of 25 May, 1873, § 5. When, however, real estate which has been in the service of the military becomes no longer serviceable or is no longer needed, it reverts to the State, and the provisions of this § 5 have no application. It is not necessary to provide a substitute for it or to utilize it for the purposes of the navy. See Law, § 7. Such pieces of real property cannot be devoted to some other branch of the administration.

[2] Law of 25 May, 1873, § 7, Cl. 2. See also Law of 30 May, 1873 (*RGBl.* p. 123), with respect to the transformation and equipment of German fortifications.

[3] Law of 25 May, 1873, § 8. In this case, the decision would be made by the highest authority in the Administration of Fortifications.

[4] *RGBl.* p. 403.

that, on condition of the abolishment of the Prussian State Treasure, the amount of 40,000,000 thalers — about $28,500,000 — might be appropriated out of the French war indemnity for the creation of an imperial war treasure.[1] This money was to consist of gold coin. It could be used *only* for the mobilization of the army.[2] For the expenditure of this money, of any part of it, an order from the Kaiser must be obtained. This order must issue with the consent of the *Bundesrat* and *Reichstag*, or their ratification of it must be subsequently obtained.[3] It is not easy to see, however, since there is no provision by law for such a contingency, what the legal result of a refusal to ratify such expenditure of the War Treasure would be. The administration of the War Treasure is under the control of the Imperial Debt Commission, which reports annually to the *Bundesrat* and *Reichstag* at their regular meeting, declares that the yearly inspection and inventory of the War Treasure have been made, and certifies to the presence of the 120,000,000 marks in "gold coin of the Empire."[4]

[1] Law of 11 November, 1871, § 1, Cl. 1. This amount was accordingly set aside in gold coin of the Empire and deposited in the *Juliusthurm* at Spandau, where it is most carefully guarded. The Prussian State Treasure was abolished by the Prussian State Law of 18 December, 1871 (*Gesetzsammlung*, p. 593).

[2] This does not necessarily imply that a war must have already broken out before the Treasure can be used, nor does it mean, of necessity, that war is even imminent. Any mobilization of the army, though it be only partial, is sufficient to justify a draft on the funds in the *Juliusthurm*. The fact that Bavaria occupies a peculiar position in the organization of the German army does not shut that State out from a proportionate amount of the War Treasure, should the Bavarian contingent be mobilized. See Laband, IV. pp. 348, 349.

[3] Law of 11 November, 1873, § 1, Cl. 2.

[4] On the administration of the War Treasure see Law of 11 November, 1873, § 3, and, in connection therewith, the Ordinance of 22 January, 1874 (*RGBl.* p. 9), amended by the Ordinance of 31 March, 1897 (*RGBl.* p. 169), § 16 of

The War Treasure, then, consists of a fixed and dead deposit in the vault of the Julius Tower. No current revenue can be derived from it, and it cannot exceed the amount set by law — 120,000,000 marks. Nor does the law provide any definite means of bringing the amount up to the sum legally fixed, should the treasure be diminished.[1]

Speaking strictly, the War Treasure cannot be classed as productive funds, and, for that reason, hardly falls within the definition of "financial means." It is, however, *acquired* means, and, for the sake of convenience, has been considered under the general head of the financial means of the Empire.

(2) In order to meet the expenditures made necessary by the law pensioning and otherwise providing for persons who had served in the army or navy during the war of 1870–71, as well as their surviving families,[2] the sum of 187,000,000 thalers — 561,000,000 marks, or about $133,000,000 — was set aside by law out of the French War Indemnity.[3] This fund is called the Imperial Invalid Fund, or Fund for the Disabled (*Reichsinvalidenfond*) This fund was to be invested in such wise that there should be a return therefrom in the way of interest, and, in order to cut off the possibility of speculation in these moneys, the law fixed the nature of

which places the auditing of the accounts of the administration of the War Treasure in the hands of the Court of Accounts (*Rechnungshof*) of the Empire.

[1] The Law of 11 November, 1873, § 2, provides that in case of a diminution of the amount of the Treasure, such deficit is to be made up out of the income of the Empire *other* than that flowing into the imperial treasury from those sources of imperial revenue which are made part of the imperial budget. The raising of the Treasure to the fixed sum, therefore, would depend on fortuitous events such as gifts, etc., by which the *Reichsfiskus* might obtain money, or, through special enactment, from the funds incorporated in the *Reichshaushaltsetat.*

[2] Law of 27 June, 1871 (*RGBl.* p. 275), to go into effect 1 January, 1873.

[3] Law of 23 May, 1873 (*RGBl.* p. 117). At the end of March, 1902, this fund amounted to 335,253,900 marks. *Statist. Jahrb.* for 1903, p. 221.

such investments. The beneficiaries were specified in the Military Pension Law of 27 June, 1871, to which reference has already been made, and which was supplemented by the Laws of 4 April, 1874,[1] 21 April, 1886,[2] and 22 May, 1893,[3] transferring to this Fund the payment of certain costs hitherto laid on the imperial treasury.

The theory upon which the Invalid Fund was established and according to which it has been administered, seems to be that not only the interest on the capital should be expended, but that the principal itself should gradually be consumed.[4] Finding that the proceeds from the invested funds were considerably more than enough to meet the demands made upon them, the number and class of beneficiaries have been extended by legislation covering a period of years, until at present the expenditures exceed the income.[5] Should the interest on the invested fund show a surplus at any time, however, such surplus does not and cannot, under the law, flow into the Invalid Fund, but it is deposited in the imperial treasury.[6] On the other hand, should an estimate made for the ensuing

[1] *RGBl.* p. 25.

[2] *Ibid.* p. 78.

[3] *Ibid.* p. 171.

[4] Laband, IV. p. 532.

[5] Law of 11 May, 1877 (*RGBl.* p. 495), § 1; 2 June, 1878 (*RGBl.* p. 100), § 4; 17 June, 1878 (*RGBl.* p. 127); 30 March, 1879 (*RGBl.* p. 119), §§ 2, 3; 21 April, 18 6 (*RGBl.* p. 78), Arts., 5, 6; 22 May, 1893 (*RGBl.* p. 171), Arts. 25, 26; 14 January, 1894 (*RGBl.* p. 107), §§ 1, 8; 22 May, 1895 (*RGBl.* p. 237); 1 July, 1899 (*RGBl.* p. 339); 31 May, 1901 (*RGBl.* p. 193), § 24.

[6] See Law of 23 May, 1873, § 7. The theory of pensions, according to the German "*Finanzpolitik*," is that the payment of pensions is to be considered the same as the payment of active salaries, so far as the nature of the matter is concerned. It is simply a part of the regular current expense, and the Invalid Fund is a special and exceptional affair, covering certain pensions obligations by a certain amount of special capital. These obligations, however, are not created by, or because of, the Fund, but, had no Fund been existent, they would have been met out of the regular budget of the Empire.

year, part of which was to be met by drawing on the principal of the fund, prove too high, such part of the principal as was appropriated, but not used, is not transferred to the treasury of the Empire, but is returned to the fund itself. Should the time ever come when the fund would be no longer needed, it would not even then become, *ipso facto*, part of the treasury funds of the Empire, but would remain a free fund at the sole disposal of the legislative bodies of the Empire. The duties and obligations arising out of the fund are duties and obligations of the Imperial Fiscus, and the income and expenditure of the fund must be assumed annually in the imperial budget.

The administration of the Invalid Fund is regulated by the Law of 23 May, 1873,[1] which provides for the creation of a board which shall bear the name of the "Administration of the Imperial Invalid Fund." This board consists of three members and a chairman, the latter appointed by the Kaiser, and has its seat in Berlin. The members of the board are held unconditionally responsible for the investment, accounting, and administration of the fund, and are to be sworn into office at an open session of the *Reichsgericht*.[2] The oath contains an affirmation "that they will not allow themselves to be hindered in the discharge of the duties laid upon them, and for which they are responsible, by any instructions or ordinances of any sort whatever."[3] This board is wholly independent of and separate from the general financial administration of the Empire, but is subjected to the "superior guidance" of the Imperial Chancellor, so far as may be done without infringing on the independence laid down in the section

[1] Law of 23 May, 1873 (*RGBl.* p. 117), § 11.

[2] This law originally read "*Reichsoberhandelsgericht*," but was changed to "*Reichsgericht*" by the Law of 16 June, 1879 (*RGBl.* p. 157), §§ 1, 3.

[3] Law of 23 May, 1873, § 12.

of the law above quoted. This "*obere Leitung*" of the Chancellor, however, empowers him to make binding orders and decrees which the Administration of the Imperial Invalid Fund must obey,[1] but at the same time the "unconditional responsibility" of the Administration authorizes it and, in fact, obligates it, to prove, independently, these orders and decrees, to see whether they are in accord with the legal regulations governing the investment, accounting, and administration of the fund. The orders and decrees of the Imperial Chancellor are to be executed only when this testing results affirmatively.[2]

The members of the Administration of the Imperial Invalid Fund are elected by the *Bundesrat* for a term of three years. The office of chairman is a salaried position, and the incumbent may not hold any other office at the same time, or conduct any business from which he receives remuneration.[3] The members of the Administration of the Imperial Invalid Fund are members of the *Bundesrat*, who carry on the work as a salaried side office.[4]

The permanent control and supervision of the administration is assigned to the Imperial Debt Commission, which may at any time satisfy itself as to the manner in which the funds are invested. The Commission receives monthly and annual reports from the Administration of the Imperial Invalid Fund, and must make at least one examination (*Re-*

[1] See Law of 23 May, 1873, §§ 5, 8; also *Bekanntmachung* of 11 June, 1874 (*RGBl.* p. 104), §§ 10, Cl. 2, 11, 12, 13, 14, Cl. 3.

[2] Laband, I. pp. 379, 380. The responsibility of the Imperial Chancellor with respect to the Administration of the Imperial Invalid Fund is the same as his responsibility with respect to the Administration of the Imperial Debt. See below.

[3] Law of 23 May, 1873, § 11.

[4] Laband, I. p. 380. That is, the members of the Administration are elected by the *Bundesrat* out of their own number.

vision) each year, and report to the *Reichstag* at its annual session. Every third year the Commission must also lay before the *Reichstag* a statement particularly setting forth the assets and liabilities of the fund.[1]

(3) By the terms of the treaty of peace concluded between Germany and France in 1871, the German government took over the railroads in Alsace-Lorraine, formerly the property of the French government, at a valuation of 325,000,000 francs, which sum was to be deducted from the war indemnity imposed on France.[2] By this act these roads became the property of the German government and their administration a part of the administration of the Empire. Improvements and extensions made by the German government, for the most part out of funds granted by the Empire, have brought the total investment in these railroads up to about 600,000,000 marks.[3]

The administration of the imperial railroads belonged originally to the sphere of the Imperial Chancellor, but by the Decree of 27 May, 1878,[4] the administration was removed from the immediate supervision of the Imperial Chancellor and assigned to a special imperial office. The Prussian Minister of Public Works was made head of this board, thus bringing the administration of the imperial railroads into closer connection with the administration of the Prussian railways. The actual administration of the roads of Alsace-

[1] Law of 23 May, 1873, § 14. For carrying on this work, the Commission has been enlarged by the addition of five members, two of whom are elected by the *Bundesrat* and three by the *Reichstag*. These members, however, take no part in the ordinary business of the Commission. Law of 23 February, 1876 (*RGBl.* p. 24), § 3.

[2] See Supplement to Treaty of Frankfurt, 10 May, 1871, Art. 1, §§ 2, 6 (*RGBl.* p. 234); Martens, *Nouveau Recueil des Traites*, XIX. pp. 695–696.

[3] Considerable contributions have been made by Alsace-Lorraine itself for the improvement and extension of the roads.

[4] *RGBl.* 1879, p. 193.

Lorraine is carried on by the "General Directory of Railroads in Alsace-Lorraine," with its seat in Strassburg. This directory was created by the Decree of 9 December, 1871.[1] A report of the amount spent on the imperial railroads is given annually as an appendix to the draft of the Budget Law.

In connection with the administration of the railroads in Alsace-Lorraine, the imperial government has also assumed the operation of the Wilhelm-Luxemburg railroad in the Duchy of Luxemburg, under an agreement which runs till 31 December, 1912.[2] Several other small sections of railroad in Luxemburg are also operated by the Administration of Imperial Railroads.

(4) Certain funds, the general working funds of the imperial administration, constitute what is known as the "*eiserne Bestände*," or permanent funds of the Empire. They were created by the Budget Law of 1872, and have been increased as need has demanded. These funds are moneys which have not been absorbed by the imperial administration, in fact, they are a treasury surplus, at the free disposal of the Empire. This sum, the "*Betriebsfonds*," as it is called, is divided into five sub-funds: the *Imperial Treasury Fund*, for meeting imperial operations for which no special fund is designated, the *Legation Fund*, the *Imperial Printing-office Fund*, the *Fund for Postal and Telegraph Administration*, and the *Fund for the Equipment of Troops*.

(5) Certain special property of the Empire must also be mentioned,[3] to wit, (*a*) the *Deutscher Reichs- und Preussischer Staats-Anzeiger*, a daily paper, published in Berlin,

[1] *RGBl.* p. 480. See also Decree of 27 May, 1878 (*RGBl.* 1879, p. 193).

[2] See Treaty of Frankfurt, Supp. Art. 1, §§ 2, 6 (*RGBl.* p. 234); Martens, *Nov. Rec. des Trait.* XIX. pp. 695, 696. Law of 15 July, 1872 (*RGBl.* p. 329). For further particulars as to the terms on which these railroads are operated by the German government, see Treaty of Frankfurt, § 12.

[3] Certain funds, formerly of importance, but whose significance in the

and serving as the medium through which official proclamations are brought to public notice. Up to 1889 the proceeds from the publication of this paper were divided between the Empire and Prussia, two-thirds going to Prussia and one-third to the Empire. Since 1889 the division has been equal.

(*b*) The Imperial Printing-office (*Reichsdruckerei*), which was created under the Law of 23 May, 1877,[1] in which the Imperial Chancellor was authorized to purchase a certain private printing establishment in Berlin. To this establishment was added, by the Law of 15 May, 1879, the Printing-office of Prussia, and the two were consolidated into the Imperial Printing-office. While this office is designed primarily for the service of the Empire and of Prussia, yet it is permitted to publish private works, the issuance of which may be regarded as an aid to science or art.[2] The Imperial Printing-office is administered by a board which is placed under the control of the Imperial Post-office. This Board is called the Directory of the Imperial Printing-office.[3]

II. *The Imperial Income.* — In speaking of the income of the Empire, Art. 70 of the Imperial Constitution does not use the phrase "imperial income" or "income of the Empire," but prefers to employ the term "common income" or "community income" or "join income." The word is "*gemeinschaftliche.*" At any rate, what is meant is that revenue which flows from various sources into the treasury of the Empire,

finances of the Empire is now little or nothing, are omitted from consideration. These funds were created out of the French war indemnity, and with one exception — aside from the *Invalidenfond* — have already been consumed. See Laband, IV. p. 384, note 1; Von Mayr, in Conrad's *Handwörterbuch*, VI. p. 365; Meyer, *Verwaltungsrecht*, II. p. 314.

[1] *RGBl.* p. 500.

[2] "Die Bestimmungen über den Umfang des Betriebs der Reichsdruckerei werden alljährlich durch den Reichshaushaltsetat getroffen." Law of 15 May, 1879 (*RGBl.* p. 139), § 3.

[3] Proclamation of 29 July, 1879 (*Centralbl. d. D. R.*, 1879, p. 493).

is used for imperial purposes under the laws and Constitution of the Empire, and lies wholly outside the financial system and financial control of the several States. This common income, spoken of in Art. 70 of the Constitution, includes the following: (1) the revenues from the tariff, or customs, and from the five great "Consumption Taxes," the tax, that is, on salt, tobacco, sugar, beer, and brandy; (2) the profits from the postal and telegraph service; (3) the profits from the operation of the imperial railroads, including the leased lines in Luxemburg; the profits from the Imperial Printing-office and from the publication of the *Reichs- und Staats-Anzeiger;* the profits from coinage and the net earnings of the Imperial Bank; (4) the interest and extras from the Invalid Fund and from moneys invested by the Empire; (5) fees from various imperial offices and boards, *e.g.* the fees from the Imperial Court, the Patent Office, consulates, etc.; (6) returns from the leasing or renting of administrative buildings, etc., and the proceeds from the sale of property no longer needed or serviceable for administrative purposes; (7) the contributions of individual States to certain imperial expenses, such as the Prussian contribution to the North Sea Canal, and that of Alsace-Lorraine to the Imperial Treasury Office and the Court of Accounts; (8) the revenue from the Imperial Stamp Tax and from the so-called Statistical Tax, as well as from the tax on bank-notes; (9) the surplus, if any, from the preceding year; (10) imperial loans.[1]

It should be noted that Bavaria has no share in the income from the administration of the imperial army and of the general military pension fund, for the reason that the financial administration of military affairs is not "joint" between Bavaria and the other States. Further, Bavaria and Württemberg have no share in the profits of the postal and telegraph

[1] See Laband, IV. p. 383.

administration. Bavaria, Württemberg, Baden, and Alsace-Lorraine do not share in the revenue from the tax on beer, nor from the transit dues on beer, nor do these States share in the "*aversa*" paid in lieu of this tax by those districts of the Empire excluded from the *Zollgebiet*, or general Customs District. The "special privileges" conceded to certain States operate also with respect to any surplus which may exist from a preceding year, for those States cannot profit by a surplus arising out of revenues in part affected by these "*Sonderrechte*," or, in other words, those States enjoying special privileges have no share in the distribution of a surplus which has arisen, at least in part, from revenues in which they have no rights. A discrimination is made, therefore, based on the source of the surplus. The same principle obtains also with respect to loans assumed by the Empire.[1]

1. *The Customs and the Consumption Taxes.*[2] — In the realization of German unity, in the creation of the North German *Bund* and of the Empire, the rôle played by the *Zollverein*, or Customs Union, can hardly be overestimated. Long before the North German *Bund* had welded the greater part of Germany into a political integer, the adoption of identical tariff laws, a similarity of customs administration, and a community of revenue had paved the way for that mighty event. "The German *Zollverein* was not only a powerful bond that held together the majority of the German States during the time when they were sovereign; it was not only,

[1] See Laband, IV. p. 384.

[2] See on this subject Aufsess, *Die Zölle und Steuern des D. Reiches*, in Hirth's *Annalen*, 1893, also in new form, Aufsess-Weisinger, *Die Zölle und Steuern d. D. R.*, 5 Aufl., München, 1900; Von Mayr, *Zollabgaben*, in Stengel's *Wörterb.* II. pp. 937–955; Delbrück (Rudolf), *Artikel* 40 *der D. RVerf.*, Berlin, 1881; Laband IV. pp. 384 ff.; Hänel, *Staatsr.* I. pp. 389 ff.; Seydel, *Comm.* 2 Aufl., pp. 218 ff.; Wagner, *Finanzwissenschaft*, IV. 4, 2), pp. 655 ff.; Meyer, *Verwaltungsrecht*, II. pp. 319 ff.

from an economic and political viewpoint, a preparatory stage, out of which the reconsfruction of Germany proceeded along State lines; but the institutions built up in the *Zollverein* were, in great measure, taken over into the Constitution of the *Bund*, and form to this day a permanent part of the constitutional law of the Empire. The history of the *Zollverein* may be called with right the antecedent history of the German Empire." [1]

Article 40 of the Imperial Constitution declares that "the provisions of the Customs Union Treaty (*Zollvereinigungsvertrag*) of 8 July, 1867, shall remain in force, so far as they are not amended by the provisions of this Constitution and so long as they are not altered in the manner prescribed in Art. 7 or Art. 78 of this Constitution." This declaration maintains the continuity between the former *Zollverein* and the tariff system of the Empire. The fundamental principles of the imperial tariff organization are borrowed directly from the *Zollverein*, and the provisions of the Customs Union Treaty still have, for the most part, material force.

Notwithstanding the fact that the content of the treaty of 1867 remains in force to such an extent, it must not be inferred that the tariff organization of the Empire rests, for that reason, upon a mere contractual basis. This point is argued clearly by Laband,[2] from whose discussion the following somewhat lengthy paragraphs are quoted: "By the founding of the North German *Bund*, the *Zollverein*, as it was finally constituted by the Treaty of 16 May, 1865, was certainly trans-

[1] Laband, IV. pp. 384–385. On the history of the Zollverein, see Treitschke, *Deutsche Gesch. im* XIX *Jahrh.*, 3 Aufl., III. pp. 603 ff., IV. pp. 350 ff.; Von Festenberg-Packisch, *Gesch. des Zollver.*, Leipzig, 1869; Weber, *Gesch. d. Zollver.*, 2 Aufl., Leipzig, 1872; Thudichum, *Verfassungsrecht des Nordd. Bundes und des Deutschen Zollver.*, Tübingen, 1870; Hoffmann, *Deutsches Zollrecht*, Bd. I., Leipzig, 1900.

[2] Laband, IV. pp. 385 ff.

formed very considerably, so far as the States entering the North German *Bund* and the South German States were both concerned. With respect to the former, a collective relation was replaced by a State relation. A constitution took the place of an agreement. Instead of the right of withdrawal after giving due notice, instead of the formation of an association to run for a definite time, there was created a permanent relation which could not be terminated upon notice. In place of the requirement of unanimous consent to all amendments of the tariff laws or changes of tariff arrangements, there was introduced the method of law and ordinance. Instead of distributing the revenue from the tariff, and from the consumption taxes, among the members of the *Verein*, the income was now applied to settling the expense account of the *Bund*. Although the North German *Bund* retained, in the main, the principles in accordance with which the administration of the customs and the levying of customs duties and taxes were regulated, yet the *Verein*, as such, no longer existed between the members of the *Bund*. It was absorbed by the political unity of the Confederation. A practical and specially important result of this doctrine is seen in the fact that the unitary regulation of the customs was applied to those States also, and to those sections of the North German *Bund*, which had not belonged to the *Zollverein*, so far as the Constitution of the *Bund* itself did not make an exception.[1] So far as the South German States were concerned, although it actually continued during the war of 1866, the *Zollverein* was legally dissolved by the outbreak of hostilities and by the political collapse of some of its members. In the individual treaties with Prussia (Art. 7 of these treaties), this was generally recognized by the South German States, but it was agreed at the same time that the Customs Union Treaties should again

[1] See *Verf. N. G. B.* Art. 40, Cl. 2.

come into force, with the reservation that either party to the contract might dissolve it at any time upon six months' notice. This right of notice Prussia used as a handle to bring about a reform in the *Zollverein*, and the Prussian government succeeded in carrying through the '*Zollvereinigungsvertrag*' of 8 July, 1867. This treaty was concluded between five contracting parties: the North German *Bund* and the four South German States. It created a *union* with a determinate limit — to 31 December, 1877, which could be extended, however, tacitly, by periods of twelve years. It preserved the agreements of the old Customs and Commercial Union treaties in force, so far as they were not altered by the new treaty itself. For transacting the business of the Union, the forms and organs of the North German *Bund* were adopted.[1]

" With the founding of the Empire, this Union also came to an end. The legal relation of its members was transformed just as the relation of the members of the older Union was transformed by the erection of the North German *Bund*. It is true that the express wording of Art. 40 of the Imperial Constitution provides that the regulations of the Customs Union Treaty of 8 July, 1867, shall remain in force so far as they are not altered by the Constitution itself; but the fundamental principle that the Empire shall constitute a single customs and commercial district, the exclusive authority of the Empire to legislate in matters touching the customs and the consumption taxes laid down in Art. 38 of the Constitution, the right of the *Bundesrat* to issue ordinances, the supervision of the authorities of the several States by the Kaiser, etc., are *constitutionally fixed*, and have nothing to do with a term limit, made dependent on the will of the individual States.[2] The reference to the provisions of the Customs Union Treaty in Art. 40 of the Imperial Constitution must not mislead one into

[1] See Thudichum, *op. cit.* pp. 581 ff. [2] See Hänel, *Studien*, I. pp. 123 ff.

the mistaken notion that, in addition to the constitutional bond which unites the Empire, there exists also a special tariff connection between the German States, based on contract. The content of these provisions is of small moment, so far as this point is concerned. Everything that may become the content of a law may also be made the content of a treaty between States, and *vice versa*. The legal ground upon which the binding force of the provisions rest is alone decisive, — whether upon the mutual pledges of equal contracting parties or upon the order of a superior State-power, — and this legal ground has been changed by the precise fact that it is the *Constitution* which has retained the provisions of the Customs Union Treaty in force. The important practical result from this fact is drawn by Art. 40 itself, viz. that these provisions remain in force 'so far as they are not changed by the provisions of this Constitution and so long as they are not amended in the way prescribed in Art. 7 or Art. 78.' Hence, for the amendment of these provisions of the Treaty, the consent of all the States is not necessary, nor, in case the *Reichstag* refuses its consent, is the consent of all the States sufficient. The extension of these provisions to Alsace-Lorraine by way of ordinary legislation confirms the fact that here we have to do with imperial law, not with treaty rights. But the possibility is not excluded, however, that certain provisions contained in the Customs Union Treaty may create special rights for individual States, whose amendment can be secured only with the consent of the State affected" (*RVerf.* Art. 78, Cl. 2).

The simple declaration of Art. 40 involves far more than at first appears. And for this reason: the Treaty of 8 July, 1867, does not contain an explicit statement of the laws and regulation which it itself covers. Article 1 of the Treaty says: "The Customs Union Treaties of 22 and 30 March and 11 May, 1833, of 12 May and 10 December, 1835, of 2 January, 1836,

of 8 May, 19 October, and 13 November, 1841, of 4 April, 1853, and 16 May, 1865, as well as the separate articles between the contracting parties which belong to these treaties, shall remain in force so far as they were still in force and are not amended by the article following." Further, Art. 1 of the Final Protocol of the Treaty of 8 July, 1867, declares that "the agreement made in Art. 1 of this Treaty, with respect to the operation of the treaties therein named, shall extend also to those more particular provisions and agreements contained in the protocols belonging to each of those treaties, as well as to all agreements whatever made in pursuance of the Customs Union Treaties, for the execution of the same and for the further development of the Union." [1]

It will be seen, then, that in order to a definite and clear understanding of the scope of Art. 40 of the Imperial Constitution, a detailed study of the various treaties cited must be made. For, according to Art. 40, each and every agreement made by the members of the Customs Union since 22 March, 1833, not specifically amended by subsequent treaty or legislation, is still in force. The final appeal in questions arising under Art. 40, therefore, is not to Art. 40 itself, nor to the Treaty of 8 July, 1867, to which it makes specific reference, but to all the treaties, protocols, and enactments of the General Conference of the Customs Union since 1833.[2]

The effect of Art. 40 is to change the character of those

[1] The Treaty of 8 July, 1867, together with the Final Protocol, is found in *BGBl.* 1876, p. 81; also in Triepel, p. 23. The other treaties mentioned in Art. 1 of this Treaty may be found in the *Verträge und Verhandlungen über die Bildung und Ausführung des Deutschen Zoll- und Handelsvereins*, Berlin, 1845–72, I. pp. 1, 112, 177; II. pp. 1, 200, 269; III. pp. 1, 214, 284; IV. p. 1; V. p. 43.

[2] The Treaty of 16 May, 1865, contains, fortunately, a codification of the most important provisions of the preceding treaties and agreements in force, which much simplifies the matter.

provisions which remain in force. What had rested upon a basis of contract hitherto, a basis of international law, now rests upon a basis of constitutional law. These provisions can no longer be amended by mutual agreement between the members of the Union, — that Union ceased to exist with the founding of the Empire, — but only by the method of legislation as prescribed by Art. 7 of the Imperial Constitution, or, if their amendment involves also an alteration of the Constitution itself, by the method laid down in Art. 78. What, therefore, had been an agreement between contracting parties, sanctioned by international law, has become, in some instances, a part of the law of a State, and in other instances, an integral part of the Constitution of that State. It would far transcend the scope and limits of this study, should an attempt be made to specify the particular articles which come under consideration and to classify them according to their legal character.[1] It may be said, in general terms, that so far as the provisions of the various treaties which are maintained in force contain regulations touching matters which do not fall within the legislative competence of the Empire, constitutionally, they must be regarded as incorporated into the Constitution as part and parcel of it, and any amendment is an amendment of Art. 40 itself and may be accomplished only in the method constitutionally provided for such amendment. Further, provisions regulating the rights of the several States as against the Empire in matters of customs must also be regarded as constitutional regulations.[2] So far as the provisions of the Customs Union Treaties touch matters

[1] This has been done exhaustively by Delbrück, in his monograph already cited, and by Hänel, *Studien*, I. pp. 120 ff.

[2] See in this connection Delbrück, *op. cit.* pp. 80 ff.; Hänel, *op. cit.* p. 136. Compare, however, Hänel, *Staatsr.* p. 55, and Meyer, *Verwaltsr.* II. p. 321, note 6, as to the relation of Arts. 18 and 19 of the Treaty of 8 July, to Art. 36 of the *RVerf.* Laband, IV. p. 390.

which lie within the legislative competence of the Empire under the Constitution, they may be amended or repealed in the way of ordinary legislation. They constitute a group of regulations, therefore, with the force of simple law.[1] In reading the Treaty of 16 May, 1865, it will be noted that a classification has therein been made with respect to the adopted regulations. This classification falls into two groups and has been made on the following principle: all stipulations which have been invested by the contracting governments with a formal legislative character are incorporated into the body of the Treaty, while regulations of an administrative nature are placed in the Final Protocol. This arrangement is also found in the Treaty of 8 July, 1867. The effect of this arrangement is simply this: those stipulations which are incorporated into the body of the Treaty of 1867, together with those provisions which are therein declared to be a part of that Treaty, have the force of formal law; while the stipulations relegated to the Final Protocol have the force of administrative ordinances.[2]

From this continuity between the Empire and the *Zollverein* have arisen the principles which underlie the general tariff system of the Empire: the territory of the Empire constitutes a single customs and commercial district, bounded by a common customs boundary, within which all traffic and trade shall be free;[3] all tariff legislation is unitary and falls within the exclusive competence of the Empire;[4] and, finally, the collection and administration of the customs duties and con-

[1] Laband, IV. p. 390; Hänel, *Studien*, I. 131.

[2] Laband, IV. p. 391; Hänel, *Studien*, I. pp. 126 ff.; Delbrück, *op. cit.* pp. 5 ff.

[3] *RVerf.* Art. 33.

[4] *Ibid.* Art. 35. This includes also the ordinances and provisions respecting the administration of the tariff laws and their execution, issued by the *Bundesrat*. See Art. 37, also Art. 7 of the *RVerf.*

sumption taxes, under imperial laws and ordinances, are left to the several States, the right of supervision being reserved to the Emperor.[1] These three principles must be briefly discussed.

(1) Section VI. of the Imperial Constitution, which deals with matters of tariff and trade, opens with the following statement, which constitutes the first sentence of Art. 33: "Germany forms a single customs and commercial district, bounded by common tariff limits." In other words, according to the intention of the Constitution the boundary of the customs jurisdictions coincides with the boundary of the Empire. In actual practice, however, this rule is modified, since territory which does not belong to the Empire is included within the tariff district, and territory which does belong to the Empire is excluded. To the former category belong portions of foreign territory, to wit, Luxemburg and the Austrian Communes of Jungholz and Mittelberg, the so-called "*Zollannexe.*"[2]

[1] *RVerf.* Art. 36. Compare Treaty of 8 July, 1867, Art. 3, § 6; Art. 19; also Art. 20, and the Final Protocol, No. 15.

[2] The Grand Duchy of Luxemburg enjoys the benefits of the German States so far as the tariff is concerned, by reason of the Treaty of 20–25 October, 1865 (*Pr. G. S.* 1866, p. 207), concluded with Prussia, acting in the name of all the members of the Union. On the founding of the Empire the continuance of this relation was recognized in the Agreement of 11 June, 1872, § 14 (see Law of 15 July, 1872, *RGBl.* p. 329), relative to the taking over by the Empire of the Wilhelm-Luxemburg railroad operation. This relation is to continue so long as the administration of the road remains in the hands of the Empire, that is, under the terms of the agreement, at least to 31 December, 1912. The Commune of Jungholz, belonging to Austria, was included in the tariff and indirect tax system of Bavaria by a treaty between Bavaria and Austria, 3 March, 1868. That is to say, its relations were directly with Bavaria and only indirectly, or mediately, with the Empire. (See *Bav. RegBl.* 1868, pp. 1183, 1241.) There is no treaty between the Empire and Austria over the matter. In the case of the Austrian Commune of Mittelberg, however, its inclusion with the German tariff district is based on a treaty between the Empire and Austro-Hungary, of 2 December, 1890 (*RGBl.* 1891, p. 59). Mittelberg is treated, so far as the customs duties are

To the second category belong what are known as "*Zollexclaven*," that is, certain portions of the Empire excluded from the tariff jurisdiction. These *Exclaven* are expressly recognized by the Imperial Constitution, and fall into two classes. The first class is described in Art. 33 of the Constitution, the first clause of which reads: "Those peculiar portions of the territory, which, on account of their location, are not adapted to incorporation within the tariff boundaries, remain excluded." These *Exclaven* are listed in Art. 6 of the Customs Union Treaty of 1867, but most of them have since been included in the tariff district.[1] The basis on which any territory may be excluded from the general tariff jurisdiction of the Empire is, as the wording of Art 33, Cl. 2, indicates clearly, the question of expediency pure and simple. It is a matter of administrative technique. The decision of the question of exclusion, as well as of the withdrawal of such exclusion, rests, therefore, with the *Bundesrat*. No act of formal legislation is necessary. As Laband well says, not only the unity of Germany as a tariff district is recognized by the Constitution, but the permissibility of *Exclaven* is also recognized, and the rule laid down, that such exclusion is "on account of their situation." The actual exclusion of a certain territory, therefore, involves simply the application of this rule to a

concerned and the indirect taxes as well, as if it belonged to Bavaria. According to Laband, IV. p. 394, note 1, the treaty with respect to Mittelberg was concluded with the Empire rather than with Bavaria, because Art. 2 of the Customs Union Treaty of 1867, dealing with the matter of annexed territory, refers only to territory annexed at that time.

[1] The list at present includes certain Communes in the Badish Circles of Konstanz and Waldshut, the free harbor district in Hamburg, certain houses in Cuxhaven with the seafaring folk, a small district in Bremerhaven with the seafaring folk, the harbor, constructions at Geestemünde, with the seafaring folk of the same, and the adjoining storage places for petroleum, and the island of Heligoland. See Aufsess-Weisinger, *op. cit.* p. 68; also Triepel, p. 28, note 2.

particular case. In other words, it involves the carrying out of the law, not an amendment of it.[1]

The second class of *Exclaven* recognized by the Constitution is indicated by Art. 34, which reads: "The Hanse Cities of Bremen and Hamburg, together with such portion of their district or surrounding territory as may be suitable for such purpose, may remain as free havens, outside the common tariff boundaries, until such time as they may request incorporation into the same."[2] This second class of *Exclaven* stands on a different footing from that of the first class in a very important respect. It has just been pointed out that the decision with reference to the exclusion of places, whose location may render the administration of the tariff and certain taxes too costly or too inconvenient, rests with the *Bundesrat,* which may include or exclude those districts according to its own discretion. Whatever action the *Bundesrat* may take in the matter infringes no constitutional right of the State whose territory is affected, and raises no right of resistance on the part of that State. Not so with Bremen and Hamburg. By the express terms of the Constitution, they are made free havens, whose status in this regard cannot be changed except on their own motion. Inclusion within the boundaries of the general tariff jurisdiction, therefore, cannot be brought about without their consent. That consent being given, the assumption of these cities into the tariff district of the Empire would carry with it an amendment of Art. 34 of the Constitution no more than an action with reference to the *Exclaven* mentioned in Art. 33, Cl. 1, involves an amendment of that part of the Constitution.

On the basis of a treaty concluded between the Imperial

[1] Laband, IV. p. 394.

[2] Article 34 of the *Verf. d. N. G. B.*, includes Lübeck. Lübeck, however, has been incorporated in the general tariff district since 11 August, 1868.

Chancellor and the Senate of Hamburg, 25 May, 1881,[1] and in pursuance of the law of 16 February, 1882,[2] touching the annexation of Hamburg to the tariff district of the Empire, the Hamburg Senate requested the reception of the Hamburg district, with the exception of its own harbor, into the tariff district of the Empire, and the *Bundesrat* granted its request. The actual incorporation took place on 15 October, 1888. At the same time, the territory, till then outside the common tariff boundaries, on the basis of a resolution of the *Bundesrat*, 6 November, 1884, was annexed to the tariff district of the Empire, with the exception of the harbor constructions at Bremerhaven and the adjoining storage place for petroleum, and a free district was established near Bremen on the right bank of the Weser.[3] The territories of Hamburg and Bremen, still lying outside the boundaries of the common tariff jurisdiction, fall within the operation of Art. 34 of the Constitution. The status of these districts cannot be changed by any unilateral act of the *Bundesrat*, but only on the express request of Hamburg and Bremen.

The streams of the Empire are considered a part of the federal territory, and hence fall within the tariff boundaries. Considerable discussion arose respecting the status of the lower Elbe, from Hamburg to the mouth of the river, under the Elbe Navigation Act of 1821.[4] By a resolution of 8 December, 1881, the *Bundesrat* included the lower Elbe, together with the islands therein, in the common tariff dis-

[1] This agreement, after its ratification by the *Bundesrat*, was laid before the *Reichstag* and appears in the printed matter of that body: 5 Legislaturperiode, 1 Session, 1881–82, Nr. 4, *Anlageband zu den Sten. Ber.* pp. 3–6.

[2] *RGBl.* p. 39.

[3] See Law of 31 March, 1885 (*RGBl.* p. 79).

[4] See *Pr. G. S.* for 1822, Nr. 2; also Martens, *Nov. Rec.* Bd. 5, pp. 714 ff. On the discussion, see Laband, IV. p. 397, and the literature there cited in note 5.

trict,[1] with a provision freeing the ships to and from Hamburg from any action on the part of the customs officials. The lower Weser was also added to the common tariff territory at the same time the Bremen territory was absorbed.[2]

The second clause of Art. 33 of the Imperial Constitution reads as follows: "All articles, traffic in which is free in any one of the several States, may be imported into every other State, and in the latter shall be subjected to dues only so far as similar domestic products are subjected to an internal tax there." Here the principle that Germany shall form a single tariff district finds its practical significance. Several points, however, must be noted. In the first place, the power of the several States to lay and collect taxes on articles of consumption is not unconditionally taken away from them, but it is subjected to a number of limitations. No further tax may be laid by the States upon articles imported from a foreign land, on which the Empire imposes a duty of more than three marks per kilo. Where, however, articles are imported upon which further work is done in Germany, or where liquors are imported, a tax by the States on the *improvement* of the one or on the *circulation* of the other is not prohibited, provided such tax is a general one and makes no distinction in its application between articles as to whether they are of foreign or of domestic origin.[3] With respect to foreign importations which do not pay more than three marks duty per kilo, and with respect also to domestic products, the States may tax the

[1] *Centralbl. d. D. R.* p. 464. [2] *Ibid.* 1888, p. 915.

[3] Treaty of 8 July, 1867, Art. 5, p. 1. This article is modified by § 1 of the Law of 27 May, 1885 (*RGBl.* p. 109), which provides that the prohibition of a further tax on foreign products already taxed to the extent of three marks by the Empire "shall not apply to flour, and other mill products, bakers' wares, meat, meat provisions, and fats, and further shall not apply to beer and brandies so far as taxation for the account of the Commune and Corporation is concerned."

production, preparation, or consumption of such articles at their own discretion. In other words, they may levy new taxes, amend or repeal taxes already laid, or retain the taxes in existence at the time the Customs Union of 1867 was created, but "for the present,[1] — *für jetzt*," — such taxes may be levied only on the following domestic products, *i.e.* products of the particular State and products of the common tariff district: brandy, beer, vinegar, malt, wine, must, cider, flour, and other mill products, bakers' wares, meat, meat provisions, and fats.[2] Further, the limitation upon the States extends also to the lesser divisions, *i.e.* the Communes and Corporations. No State may grant to a Commune or Corporation the right to levy a tax to meet its expenses, except on articles designed for local consumption.[3] The articles upon which such a communal tax may be laid are the following: beer, vinegar, malt, cider, products liable to the milling tax and the slaughter tax, as well as combustibles, provisions, and feed. A tax on wine is permissible in those parts of the tariff district "which belong to the wine-growing section proper."[4] Finally, for whatever purpose the tax is levied,

[1] That is, until modified by competent legislation.

[2] Cust. Un. Tr. Art. 5, II. § 2. Compare the reserved rights of Bavaria, Württemberg, and Baden with reference to the taxation of beers. *RVerf.* Art. 35, Cl. 2.

[3] It is not necessary, says Laband, IV. p. 400, note 5, that the articles be actually consumed in the Commune. They need only be *intended* (*bestimmt*) for local consumption. When, therefore, a Commune taxes beer within its district, it is not under obligation to refund the tax in case the beer is exported. Its own interest would prompt a Commune to deal with its own products no less favorably than with foreign products. But nothing in the Customs Union Treaty stands in the way of such action. On the other hand, the Communes cannot burden foreign products more heavily than domestic products, or grant to the domestic product an export premium exceeding the communal tax.

[4] See Cust. Un. Tr. Art. 5, II. § 7. Compare Law of 25 June, 1873 (*RGBl.* p. 161), § 5, which provides that the limitations of Art. 5 of the Treaty of 1887 shall not apply to Alsace-Lorraine and the system of octroi there in vogue.

whether for the expenses of the State or of the Commune, the products of another State can, under no pretence, be taxed more highly than the products of the State into which they are brought, or than the products of the rest of the States.[1]

Certain modifications of the principle of free commerce within the territory of the Empire grow out of the right conceded to the States to lay a consumption tax. The Customs Union Treaty of 1867, Art. 5, II. § 3, *d*, provides that "those States which have levied internal taxes on the production or preparation of an article of consumption may collect the legal amount of the same in full on the importation of the article from other States of the Union."[2] The Treaty further provides that in the States of the *Bund no* transit tax shall be collected on wine and grape-must produced in the other States of the Union.[3] Further, the Treaty[4] provides that those States which have levied a tax upon the purchase and sale, the consumption, production, or preparation of an article of consumption, *may*, on the exportation of the article to another State of the Union, leave the tax uncollected, or may refund the lawful amount of the same in whole or in part. But the refunding shall take place only so far as a compensation for taxes is guaranteed on the exportation of said article to a foreign land, and only, as a maximum, to the amount of such compensation. The authorities also shall especially see to it that in no case more than the amount of the

[1] See Cust. Un. Tr. Art. 5, II. §§ 3 and 7. The same principle holds with respect to goods imported from a foreign land, so far as the States may tax at all. Cust. Un. Tr. Art. 5, I. Cl. 1.

[2] This is the so-called "transit tax," which is to be distinguished from the "equalization tax" in that the former is collected in full, while the latter is collected only to the amount of the difference in favor of the importing State between its taxes and that of the exporting State. See Von Mayr, in Stengel's *Wörterb.* II. pp. 630–634, as to the "*Uebergangsabgaben.*"

[3] Cust. Un. Tr. Art. 5, II. § 3, *e*. Also § 7, with reference to the communal taxes.

[4] *Ibid.* § 4.

tax actually paid in shall be returned, and this compensation shall not have the nature or effect of an export premium.[1] Moreover, the release from obligation to pay the tax shall not be effective, nor shall the refunding of the tax take place, before the entrance of the taxed product into the bordering State of the Union, or into the land of its destination, shall have been proven in such way as may be agreed upon by the States concerned. A schedule of transit taxes and compensations is specially fixed, in accord with §§ 3 and 4 of the Treaty, by the proper authorities in each State. Any change whatever in the rate of taxation on domestic products must be brought to the notice of the *Bundesrat*, and proof submitted that the amount of the tax which shall be levied as a result of the effected or intended amendment, upon the products of the States of the Union, and the amount of rebate upon the exportation of the taxed articles, correspond to the principles laid down.[2] No State may, in any circumstances or under any conditions, levy a tax on the transportation of goods through its territory.[3] Finally, the several States have not the power to prohibit the importation of goods into their territory, nor to hamper it with burdensome conditions. Nor may they forbid exportation, since such action would conflict with

[1] By the last clause of Cust. Un. Tr. Art. 5, II. § 7, similar regular regulations are laid down for the Communes and Corporations.

[2] Cust. Un. Tr. Art. 5, II. § 5. For legislation on the subject see Proclamation of 15 January, 1877 (*RGBl.* p. 9); Proclamation of 29 December, 1883 (*RGBl.* 1884, p. 3); Proclamation of 29 May, 1890 (*RGBl.* p. 69); Proclamation of 9 July, 1897 (*RGBl.* p. 597). Should a difference of opinion arise as to whether a rate is properly in harmony with the provisions of the Treaty, the decision is rendered by the *Bundesrat* on the ground of Art. 7 of the Imperial Constitution. Laband, IV. p. 402, citing Delbrück, *op. cit.* pp. 36, 37. At present transit taxes are levied only on beer and crushed malt; in Saxony and Baden, on meat.

[3] Cust. Un. Tr. Art. 3, § 1, Cl. 2; Art. 5, II. § 1. The Tariff Law of 1 July, 1869 (*RGBl.* p. 317), § 6, says: "Von der Durchfuhr werden Abgaben nicht erhoben."

Art. 33, Cl. 1, and Art. 35, of the Imperial Constitution.[1] The State may, however, impose limitations upon traffic in certain conditions, where sanitary precautions justify it, as, for instance, an ordinance on the part of the proper authorities against the introduction of diseased cattle or of infected clothing or wares.[2]

(2) Article 35 of the Imperial Constitution reads: "The Empire shall have the exclusive power to legislate with respect to all matters concerning the tariff; the taxation of salt and tobacco produced in the territory of the Union; the taxation of prepared brandies and beers as well as of sugar and syrup made from beets or from other domestic products. It shall have exclusive power to legislate with respect to the mutual protection of the consumption taxes levied in the several States against fraud, as well as with respect to the measures required in the *Exclaven*, for the security of the common customs boundaries." By thus centralizing the exclusive power of imposing customs duties and of taxing the five great articles of consumption, the unity of legislation with reference to these matters is fully assured.

In legislating upon these topics, the competence of the Empire is unlimited. It covers the whole subject of the customs, fixes the rate, specifies the articles to be subjected to duty, provides for the collection of the customs dues and the supervision of that collection, establishes police regulations concerning warehouses, as well as the import, export, and transport of goods, organizes the necessary boards of officials and defines their powers, punishes frauds and determines the procedure in the trial of persons accused of such defraudation, and enacts any and all measures required to accomplish the

[1] See Laband, IV. p. 402.

[2] *Ibid.* pp. 402, 403; Law of 7 April, 1869 (*RGBl.* p. 105); Law of 1 May, 1894 (*RGBl.* p. 410); Customs Un. Tr. Art. 4, Cl. 5.

ends for which the customs duties are imposed. It need scarcely be added that in none of these matters are the several States competent to legislate, nor may they conclude treaties affecting these subjects with foreign States. A discussion of the laws touching the customs or the taxes laid upon articles of consumption would hardly fall within the scope of this present work.[1]

Like so many of the provisions of the Imperial Constitution, Art. 35 suffers exception. Clause 2 of the article reads: "In Bavaria, Württemberg, and Baden, the taxation of domestic beer and brandy is reserved for the legislation of each State. These States, however, shall direct their efforts toward bringing about uniform legislation respecting the taxation of these articles." Under this provision of the Constitution, therefore, these three States were not included in the general scope of the imperial taxation upon brandies and beers. They paid an *aversum*, or lump sum, into the imperial treasury, a sum based upon the proportion which their population bore to the whole population of the Empire, and the revenue from the taxation upon brandies and beer flowed into the treasury of each State. As the clause stood, the competence of the Empire to legislate with reference to the taxation of these two commodities was, therefore, excluded from these three States. So far as beer is concerned, this exclusion still holds.[2] A radical change has been effected, so far as respects the taxation of brandy, by the Law of

[1] A good summary of the imperial tax laws is found in Von Rönne, *Verfassung des D. R.*, 9 Aufl., Berlin, 1904, pp. 200 ff. There is as yet no imperial salt tax. The collection of the salt tax rests upon an agreement made by the States of the Customs Union, 8 May, 1867, and upon identical laws of the several States based upon it. For a good sketch of tariff legislation down to 1901, see Wagner, *op. cit.* pp. 667 ff.

[2] See Aufsess, *op. cit.* pp. 295 ff.; Wagner, *op. cit.* pp. 686 ff.; Appelt, *Die Brausteuer-Gesetzgebung*, 2 Aufl., Halle, 1885.

24 June, 1887,[1] or, more accurately, by the action of these three States making this law operative within their own territories. As a result of such action, the three South German States have been brought within the general tax jurisdiction of the Empire, so far as the taxation of brandy is concerned, and the *aversum* hitherto paid into the imperial treasury has been abolished. These States now share in the proceeds of the general tax on brandy, according to their proportionate population. Their "special right" with reference to the brandy tax, granted under Cl. 2 of Art. 35, no longer stands. The situation may be thus summed up in the words of Laband: "By the consent of the South German States to the introduction of the Law of 24 June, 1887, the principle of Art. 35 — that the Empire has the exclusive legislative power with respect to the taxation of brandies made within the imperial territory — became operative also for them. So far as the imperial law itself contains no delegation of power to the individual States, they have no authority to issue any legal regulation whatever with reference to the taxation of brandies, either in the way of State law or in the form of ordinance. Moreover, the power of the *Bundesrat* to issue general administrative ordinances necessary for the execution of the brandy tax law, and to take action with respect to defects which make themselves apparent in the execution of the law, or of its own ordinances, extends to the South German States. The supervision of the execution of the law even in the South German States belongs to the Kaiser. The amendment of the Law of 24 June, 1887, can take place according

[1] *RGBl.* p. 253. Note amendments of this law, 7 April, 1889 (*RGBl.* p. 149); 8 June, 1891 (*RGBl.* p. 338); 16 June, 1895 (*RGBl.* p. 265). Text of revised law is found in Proclamation of Imperial Chancellor, 17 June, 1895 (*RGBl.* pp. 276 ff.). See also Proclamation of the Imperial Chancellor, 28 July, 1898 (*RGBl.* p. 1018), and Law of 7 July, 1902 (*RGBl.* p. 243).

to the rules governing imperial legislation, without any right on the part of the South German States, individually or collectively, to object thereto. This is especially true of the fixing of the rate of taxation." [1]

(3) Article 35, Cl. 1, as already seen, gives to the Empire the exclusive competence in tariff and tax legislation. Article 7, Cl. 2, empowers the *Bundesrat* to pass ordinances essential to the execution of these laws. Notwithstanding this, the Empire has no authority to *collect* the taxes which it levies. "The collection and administration of customs duties and of taxes on articles of consumption (Art. 35) within its own territory, are left to each several State, so far as this has been its practice heretofore." [2] In other words, the Empire has the right to regulate and supervise the administration of the customs and the taxes on articles of consumption, but the work is actually carried on by the individual States. The phrase, "so far as this has been its practice heretofore," does not imply a reservation of competence on the part of the Empire. It merely continues in force those limitations upon the several States which are based upon the Customs Union Treaties and the separate agreements concluded between the members of the Union.[3]

The authority granted to the several States by Art. 36, Cl. 1, extends to the organization of the boards by which the customs and taxes are to be collected, as well as to the control of those boards. This authority, however, is exer-

[1] Laband, IV. p. 417. [2] *RVerf.* Art. 36, Cl. 1.

[3] Laband, IV. p. 423; Hänel, I. pp. 405 ff.; Meyer, *Verwaltungsr.* II. p. 328. The Thüringian States, including the Thüringian part of Prussia, form the so-called Thüringian Customs and Tax Union, based on the Treaties of 10 May, 1833, 26 November, 1852, 3 April, 1853, 27 June, 1864, 20 November, 1889. Here the administration is common. The administration of Lippe, Schaumburg-Lippe, and Waldeck, as well as of certain places in Mecklenburg, Oldenburg, Lübeck, and Hamburg, has been assumed by Prussia.

cised under the regulations and limitations of imperial legislation.[1]

There is no Imperial Board of Customs and Tax Administration. The customs and tax officials receive their instructions from and report to the highest State authorities in tariff and tax matters. These State authorities stand wholly outside the imperial official system. They do not receive their salaries from the imperial treasury. They do not take the oath of loyalty to the Kaiser or to the Empire on assuming their duties, nor do they come under the operation of the laws affecting imperial officials.

The supervision exercised by the Empire in accordance with the provisions of the Imperial Constitution is carried on by officials appointed by the Kaiser, with the consent of the Committee on Tariff Matters in the *Bundesrat*. These officials occupy a peculiar position with reference to the tax and customs officials of the States, and are of two classes: the "*Stations-Kontroleure*," or "*Kontroleure*" as they are more briefly called — officials associated with the customs and tax officers of the State, and the "*Reichsbevollmächtigte für Zölle und Steuer*," or "Imperial Customs and Tax Deputies," officials associated with those boards of the State having the direction of matters of customs and taxation. Laband styles these officials "Officials extraordinary for the administration of the customs and taxes." In the performance of their functions, the first class are subordinate to and receive their instructions from the second. These imperial "officials extraordinary" have no legislative or judicial powers and no vital connection with the officials of the States.[2] Their work is peculiarly that of supervision and inspection. To this

[1] See Cust. Un. Tr. of 8 July, 1867, Art. 3, § 6; Art. 16, § 4; Art. 19. Also Law of 1 July, 1869 (*RGBl.* p. 317), §§ 128–133.

[2] See Cust. Un. Tr. Art. 20, Cl. 3.

end, they have the right of attending meetings of the directive boards of the State, to inspect all books, to audit accounts, and to assure themselves that the service rendered by the officers at the frontier is both efficient and sufficient. Further, all decrees and instructions respecting the administration of the common taxes, sent to their subordinates by the directive Boards of the State, receive the *visé* of the imperial deputy, if he be in the place, before such orders are promulgated.[1] By such means as this the Empire is kept fully informed of the administration of the customs and taxes in the several States of the Empire.

Should a difference of opinion arise over some administrative question between the imperial deputy and the State officials, the deputy has no right to force his views upon the State authorities or to interfere with them in the exercise of their duties. Any such conflict must be carried before the highest administrative authority of the State for its decision. As a matter of general principle, the Empire cannot interfere in any judicial process, so long as the means of prosecuting the case by appeal to the State courts has not yet been exhausted. When, however, a decision is finally had in the State tribunals, and such decision is, in the opinion of the imperial deputy, contrary to the law or to the interests of the Empire, or when the remedy, in case a defect has been discovered by the deputy, is not forthcoming in due time, or when there is a disagreement between the several high authorities of the State, the deputy may bring the matter before the *Bundesrat*.[2]

[1] The deputy is not invested with any power of *veto*. He may not withhold his *visé*. It is for the most part a mere attest of the fact that he has inspected the document in question. Nor may he issue orders to the customs and tax officers with respect to the curing of defects detected in the administration of the laws. He may simply bring these matters to the attention of the directive board of the State and request that they be remedied. Cust. Un. Tr. Art. 20, Cl. 4.

[2] Laband, IV. p. 428; *RVerf.* Art. 36, Cl. 3.

In matters of criminal action touching the customs and the taxes, each several State has the right of pardon and of commutation of sentence within its own territory.[1] All fines and confiscations belong to that State whose court has rendered judgment in the first instance.[2] The three Southern States and Alsace-Lorraine are not subjected to this system of inspection and supervision just discussed, so far as the administration of the tax on beer is concerned.

(4) Something should be said at this point with reference to the principles controlling the imposition of customs duties in German law. In the German Empire, customs duties are laid only upon articles imported. The exportation and transportation of goods are not taxed.[3] So far as their liability to duty is concerned, it is immaterial whether the articles are of foreign or domestic *origin*,[4] nor does it matter whether they have already been subjected to duty or tax. The duty must be collected as often as the goods cross the customs frontier from a foreign land.[5] The liability to duty arises the

[1] Cust. Un. Tr. Art. 18.

[2] According to the provisions of the Cust. Un. Tr. Art. 18, and of a determination of the *Bundesrat*, 26 June, 1880, the directive boards of the several States must furnish the Board of Statistics, each fiscal year, information as to the confiscation of goods because of revenue frauds, and the report is to be published.

[3] *Vereinszollgesetz* of 1 July, 1869 (*BGBl.* p. 317), §§ 3–6. In conformity to Art. 7, Cl. 2, of the Cust. Un. Tr., this law was published in the South German States as State law, and was introduced into Alsace-Lorraine by the Law of 17 July, 1871 (*GBl. f. E.-L.* p. 37). On the general subject of the liability of articles to duty, see Von Mayr, in Stengel's *Wörterb.* II. pp. 945 ff.; Meyer, *Verwaltungsr.* II. pp. 331 ff.; Laband, IV. pp. 430 ff.

[4] *VZG.* § 4.

[5] To this rule there are certain exceptions under the *VZG.*: (*a*) goods which, in being shipped from one part of the Empire to another, pass through a foreign land, are exempted on proof of their identity (*VZG.* § 111); (*b*) goods sent abroad to fairs or public expositions, goods shipped for sale upon commission, for inspection, or for temporary use, and are returned, are exempted upon proof of their identity (*VZG.* §§ 112–114); (*c*) goods shipped

moment the goods have passed the boundary line. Where, however, goods are passing through the territory, and from the time of their entry up to the time of their exit are in the control of the revenue officials, the liability to duty is not created. Moreover, goods brought across the line and stored in warehouses under the supervision and control of the revenue officials, while dutiable, are not called upon to pay the customs dues until their release for circulation.[1] The general presumption is that all goods coming from a foreign land are free of duty.[2] Only those wares are subject to customs dues which are included in the classification of the tariff law. That is to say, all goods may enter the country free of duty, unless the law specifically declares to the contrary.

As to the nature of the liability to customs duties, from a juristic standpoint, Laband says that "the obligation to pay duty is, so far as its juristic nature is concerned, no *obliga-*

to a foreign land may, in special cases, be freed from duty upon their return in improved condition (*vervollkommendem Zustande*) (*VZG.* § 105, Cl. 2); (*d*) The *Bundesrat* may, by enactment, decide whether and under what conditions an exemption may be granted in other cases, on grounds of fairness or equity, to goods returned from a foreign land, or to goods imported from a foreign land and afterwards exported (*VZG.* § 118, Cl. 2); (*e*) goods brought into the territory of the Empire for purposes of repair or for completion or other improvement, but which are designed to be again taken out of the country, in other words, goods upon which certain German labor is to be expended, but which are not intended for circulation in the Empire, may be exempted from the payment of customs duties (*VZG.* § 115, Cl. 1).

[1] *VZG.* §§ 97–100.

[2] See *VZG.* § 3, which reads: "Die aus dem Vereinsauslande eingehenden Gegenstände sind zollfrei, soweit nicht der Vereinszolltarif einen Eingangszoll festsetzt." The Law of 15 July, 1879, and the later wording found in the Proclamation of the Imperial Chancellor of 24 May, 1885 (*RGBl.* p. 3), both open with the words "Bei der Einfuhr von Waaren werden Zölle nach Massgabe der nachstehenden Zolltarif erhoben." Zorn, *Staatsr.* II. p. 249, claims that § 3 of the *VZG.* is repealed by § 1 of the later laws. This view is combated by Laband, IV. p. 432, note 7, and Meyer, *Verwaltungsr.* II. p. 332.

tio ex lege, but a charge upon the dutiable article. The State does not allow the goods to circulate unless the duty has been paid. The payment of the duty is the condition under which the State permits commerce with the wares, and the obligation arises only in the sense that everyone who wishes to bring goods into free circulation must first of all fulfil the condition. The liability, therefore, does not rest, as a species of obligation, upon a certain debtor, but as a kind of '*dingliches Recht*,' upon a certain ware."[1] The goods, therefore, are held liable for the duty laid upon them and may be detained or attached by the Customs Administration.[2] An attachment takes away every right of disposition from the holder of the goods, and creates a lien in favor of the Fiscus, who may eventually sell the wares and apply the proceeds to the payment of the same.[3] An attachment of this sort takes precedence of every other claim against the goods, nor is the liability of the goods for the payment of the duty excluded by the rights which third parties may have in the dutiable articles. The attached goods may not be pursued in the courts, nor by creditors or administrators in bankruptcy, before the duty has been paid thereon.[4]

In certain cases the imperial government may, by ordinance, increase the duty fixed in the tariff schedule. Such an increase may be made, for instance, in the case of goods from States which treat the ships or products of Germany more unfavorably than the ships and wares of other nations.[5] An

[1] Laband, IV. 433.

[2] *VZG.* § 14, also 100.

[3] The proceeds satisfy the lien, even if insufficient to pay in full. Laband, IV. p. 437.

[4] *VZG.* § 14.

[5] Law of 15 July, 1879, revision of 24 May, 1885 (*RGBl.* p. 111). This Law of 15 July, 1879, fixed the amount of increase permissible at 50 per cent. This was raised to 100 per cent by the later revision. See Law, § 6. Goods therefore from States discriminating against German ships or products

ordinance of this sort has the character of a retaliatory measure. It may take the form of an ordinance issued by the Kaiser with the consent of the *Bundesrat*. This ordinance must be laid before the *Reichstag* at once, or, if that body be not in session at the time, at its next sitting. Should the *Reichstag* refuse its assent, the ordinance immediately goes out of force.[1]

Complaints with respect to the application of the tariff laws in individual cases may not be prosecuted in the courts, but are decided by the administrative authorities.[2] This rule holds with reference to the interpretation of the tariff itself, *i.e.* to the determination of the question whether a certain article falls within the scope of the law, or to the decision as to rate of duty which should be imposed. But questions as to whether the legal assumptions, on which liability to duty is based, are present; whether, in case of a change of tariff, the old or the new law shall be applied; whether a person is subjected to a subsidiary liability; whether the statute of limitations applies, etc., may properly be brought before the courts.[3]

The entry of certain articles into the country is absolutely prohibited. Such articles are contraband. The introduction of contraband goods is not, strictly speaking, an infraction of the tariff laws, for these articles do not come under the

may be subjected to an increase of duty up to 100 per cent of the regular amount fixed in the schedule, and wares ordinarily duty free may be subjected to an *ad valorem* duty of 20 per cent. The usual duty in Germany, even in the case of fluids, is based on weight.

[1] Law of 24 May, 1885, § 6. The right to pass retaliatory measures arises when German goods are treated less favorably than those of any third State. Meyer, *Verwaltungsr.* II. p. 332, note 2.

[2] *VZG.* § 12.

[3] Laband, IV. p. 439, citing decision of the *RGer.*, 1 July, 1881, and 21 May, 1889 (*Entsch. in Civilsach.* V. pp. 43 ff., and XVI. pp. 37 ff.). The permissibility of a judicial settlement of contentions of this sort is determined by State law.

operation of the schedule, but it is a breach of the police regulations.[1] Contraband goods found in the country are confiscated, and the person introducing them is fined, the fine being cumulative. A tariff duty, on the other hand, is a conditional prohibition of the entry of the goods into the country. Fraud or evasion of the payment of duty is properly an offence against the customs laws. The penalty for fraud consists in the confiscation of the goods, and the *payment of the duty* plus four times the amount of the same, which fine is cumulative in case of repeated offence. The fact that the smuggler of goods is not their owner does not exempt such goods from confiscation.[2]

2. *The Statistical Fee.* — In connection with the ordinary customs duties may be mentioned a species of dues known as the "Statistical Fee." In order that statistics may be obtained with respect to the circulation of goods, — a Royal Statistical Office was erected for this purpose in 1872, — a declaration of all goods which cross the frontier is required, whether such goods are imported, exported, or merely transported across the country. This declaration must be in writing, special blanks being furnished for the purpose, and dues are collected in the form of imperial stamps which must be affixed to these declarations.[3] The receipts from the Statis-

[1] Meyer, *Verwaltungsr.* II. p. 347.

[2] On contraband and fraud see *VZG.* §§ 134–167.

[3] See Law of 20 July, 1879 (*RGBl.* p. 261). Strictly speaking, this is not a "fee," but virtually a petty import and export duty. See Meyer, *Verwaltungsr.* II., p. 349; Laband, IV. p. 446, note 5. In the case of petty trade between frontier villages not more than 15 kilometers distant from the tariff boundaries, such a declaration may be made orally. The tax is very light, *e.g.* 5 pfennigs per 500 kilos for packed goods, 5 pfennigs per 1000 kilos for unpacked goods, 10 pfennigs per 10,000 kilos for certain goods shipped in bulk, such as coal, wood, potatoes, grain, etc., and 5 pfennigs per head for live stock. There are certain exemptions: (1) goods sent under control of customs officials or stored in warehouses for unentered wares; goods dis-

tical Fee flow into the imperial treasury. The several States, however, receive a compensation for the costs connected with the collection of the fees.[1] The amount of the compensation is fixed by the *Bundesrat*. For the sale of the stamps, the three postal administrations — the Empire, Bavaria, and Württemberg — receive a commission of two and one-half per cent of the gross receipts.

3. *The Imperial Stamp Taxes.* — The Empire derives certain revenues from what are known as the "Stamp Taxes." These taxes are (1) the tax on playing-cards, and (2) the tax on various instruments or documents. The imperial tax on playing-cards was laid by the Law of 3 July, 1878.[2] This tax is, in character, an indirect tax, a consumption tax, in fact. It is not collected, however, from those who use the cards, but from those who manufacture them and from those who export them. The tax is levied in the form of a stamp affixed to all packs of playing-cards made in Germany and upon all cards imported for use in the country. The word "import" as used in the law, covers not only the territory comprised within the actual "Tariff District," but makes the customs

charged into free circulation through the payment of customs duty; goods exported under official control for the purpose of compensation or release from excises; (2) goods accompanied by direct pass-bills (*Begleitpapiere*) are carried free through German territory or out of the same through a foreign territory back again into Germany; (3) goods sent by mail.

[1] Law of 20 July, 1879, § 11, Cl. 1, and 14.

[2] *RGBl.* p. 133. This is an old form of taxation, familiar in Germany since the beginning of the eighteenth century, and found in nearly all the German States. In some States the traffic in playing-cards takes the form of a State monopoly. The Law of 3 July, 1878, was an imperial law, and the tax levied by the Empire naturally superseded all legislation by the States on the same subject. See, on the imperial tax on playing-cards, Jacob, article "*Spielkartenstempel*," in Stengel's *Wörterb.* II. pp. 470 ff.; and article "*Spielkartensteuer*," by Von Heckel, in Conrad's *Handwörterb.* 2 Aufl., VI. pp. 894 ff. Also Laband, IV. pp. 447 ff.; and Meyer, *Verwaltungsr.* II. pp. 394 ff.

frontier, so far as the tax on playing-cards is concerned, identical with the boundary of the Empire. The tax is collected, therefore, upon all playing-cards brought into those parts of the Empire excluded from the Tariff District, and need not be collected in those parts of foreign territory which are included within that district.[1]

The stamp tax on various instruments or papers[2] may be classified as follows: (*a*) the tax on bills of exchange, drafts, promissory notes, and other promises to pay on demand, circulating in the Empire; (*b*) the tax on domestic shares of stock, and on foreign shares of stock which are delivered, sold, or hypothecated in the Empire, and on mining stock; (*c*) the tax on negotiable domestic stocks and bonds, as well as on foreign securities of the same kind, when they are delivered, sold, or hypothecated in the Empire; (*d*) the tax on certain kinds of brokerage transactions, in which certain forms provided with a government stamp must be used; (*e*) the tax on lottery tickets and on the statement of the prizes or stakes in public lotteries; (*f*) the tax on bills of lading and on the way-bills of ships plying between domestic and foreign ports, so far as these papers are made out in the Empire or are presented there in connection with the reception or delivery of the consignment. All papers thus subjected to a stamp tax by the imperial law or exempted from such tax under imperial law may not be taxed by the individual States. An excep-

[1] Meyer, *Verwaltungsr.* II. p. 395.

[2] See Law of 14 June, 1900 (*RGBl.* p. 275). This law is a revision of the Law of 10 June, 1869 (*RGBl.* p. 193), with the modifications of 4 June, 1879 (*RGBl.* p. 151), 1 July, 1881 (*RGBl.* p. 185), 29 May, 1885 (*RGBl.* p. 171, also in Proclamation of 3 June, 1885, *RGBl.* p. 179), and 27 April, 1894 (*RGBl.* p. 381). See also Laband, IV. pp. 449 ff.; and Meyer, *Verwaltungsr.* II. pp. 383 ff. This tax is imposed in the form of a stamp which must be attached to the various papers in accordance with certain fixed regulations laid down by the *Bundesrat.*

tion is made in the case of papers relating to registration in the Land-book, and of notarial or court fees in acceptances and attestations. The general supervision over the administration of this tax, which, according to Art. 17 of the Imperial Constitution, is delegated to the Kaiser, is exercised through the Imperial Treasury Office.[1] The collection and administration of the tax are conducted by the individual States, whose officials are bound to see that the provisions of the law are properly executed.

III. *Empire and State in the Administration of Finances.* — Article 38 of the Imperial Constitution provides that the income from the customs and from the taxes on articles of consumption mentioned in Art. 35, so far as they are subject to imperial legislation, shall flow into the imperial treasury, after deducting certain costs incident upon their collection and administration, as well as certain repayments provided for by law.[2] The administration of the taxes is carried on by the individual States to the account of the Empire. In other words, the taxes are collected *by* the States *for* the Empire, and the costs of collection and administration are repaid.[3] Article 38, 3, *a*, also provides that so far as the tariff is concerned those costs necessarily incurred in the collection of the duties on the tariff frontier between the Empire and a foreign land, and incurred also in protecting the collection in the border districts, shall be deducted from the receipts. This reim-

[1] The control of the imperial stamp taxes is not placed in the hands of the Imperial Tax deputies. The reason, Laband suggests, is found in the fact that the collection of these dues in many States, notably Bavaria, is administered by finance boards, whose control by imperial officials is not desired. Laband, IV. p. 460, note 2.

[2] With reference to these repayments, see Cust. Un. Tr. Art. 13–15.

[3] All losses occurring through the unfaithfulness or other fault of the State officials must be borne by the State, not by the Empire. See Cust. Un. Tr. Art. 16, Cl. 2. In other words, the States are liable for the amount of the taxes, to be delivered over or accounted for.

bursement was formerly made in the form of a lump sum, the amount due each State being fixed by the *Bundesrat.* In 1882, this system having proven unsatisfactory, it was replaced by a "*Zollverwaltungsetat,*" or "Estimate for the Customs Administration," fixed by the *Bundesrat.*[1] This estimate is made every year by the *Bundesrat* Committee on the Tariff and Taxes and by the Committee on Accounts, in conformity with a draft drawn up by the Directive Boards of the border States and passed upon by the Imperial Deputies. With respect to the salt tax, according to Art. 38, 3, *b*, those costs "which are paid as salaries to the officials charged with the collection and control of this tax at the salt works" are to be deducted by the individual State. It will be noted that only a part of the officials connected with the administration of the tax, viz. those connected with the works, are mentioned. The salaries of these officials are to be borne by the Empire, or, in other words, deducted from the gross receipts. A change was introduced, however, by the same act of the *Bundesrat* in 1882, mentioned above, and the expenses of the administration of the salt tax were also fixed by the *Bundesrat* in the form of an "*Etat*" or estimate, which took the place of the "lump sum system," and a scheme was adopted which adjusted the payment more nearly on the basis of service actually rendered. Article 38, 3, *c*, empowers the *Bundesrat* to fix the amount which may be granted to the States from time to time as a remuneration for the administration of the tax on beet-sugar and on tobacco. The same article, 3, *d*,

[1] See discussion by Laband, IV., pp. 462 ff., especially p. 465, where he calls attention to the fact that, in the present arrangement, it is the *Bundesrat* alone which fixes the *Etat* as against the State, and that the part given, under the Constitution, to the Kaiser and *Reichstag* in fixing the Budget is eliminated here. While neither the Constitution nor Art. 16 of the Cust. Un. Tr. affords a sufficient base for the assumption of this power by the *Bundesrat,* the *Reichstag* has not, as yet, raised an objection.

also provides that the amount deducted for the cost of administration shall be 15 per cent of the total receipts, in the case of the other taxes. This covers the administration of the tax on beer and on brandy. The reimbursement for the costs in administering the tax on playing-cards and on various instruments and papers is fixed by the laws levying these taxes.[1]

The States are held to a strict application of the imperial tax and tariff laws. No State can claim any right to favor the importation of raw material by concessions of free entry, or to encourage the export of manufactured goods by drawbacks or bounties. Certain articles may be introduced into the States without payment of duties, when the articles are intended for the household of the ruler or for ambassadors of foreign countries.[2]

Each State having a customs and tax administration must render account of the business transacted by it to the Empire. It must have a system of bookkeeping and of auditing the amounts collected within its borders to the account of the imperial treasury, and it must balance accounts with the Empire. No imperial law has been passed regulating the details of this matter. The principle laid down in the time of the *Zollverein*, and now become a part of the constitutional system of the Empire, was that the collection and adminis-

[1] For the stamp tax on playing-cards, see Law of 3 July, 1878, § 23; for the stamp tax on other articles, Law of 10 June, 1869, § 27; to which may be added the *Schaumweinsteuergesetz* of 9 May, 1902, § 28 Cl. 1.

[2] These articles must pass through the hands of the customs officials, however, who shall enter them in the Free Register. The amount which would have been collected on these articles is to be reckoned against the account of that State by which the free pass is furnished, at the next balancing of the receipts. Cust. Un. Tr., Art. 16. In this way the exemption of articles designed for the ruler or for ambassadors in one State does not have to be borne by the other States. Any exemption of articles intended for ambassadors accredited to the *Empire* is charged to the account of the Empire itself.

tration of the tariff and of the taxes on articles of consumption should be left to each State, so far as it had hitherto performed this service. The details both of administration and of collection are regulated by instructions issued by each several State. Most of these regulations have been in operation for many years and have undergone numerous changes at the hands of the various ministers and Directive Boards. The Prussian Instructions of 28 May, 1818, have served as a model after which the larger number of these instructions have been patterned.[1] In the case of the taxes on articles of consumption, however, the *Bundesrat* has passed certain ordinances touching the system of bookkeeping and the control, and certain blank forms have been provided. The Imperial Stamp Taxes have been regulated sharply by the *Bundesrat* in the matter of their collection and with respect to their accounting.

The settlement of accounts between the Empire and the several States is regulated by Art. 39 of the Imperial Constitution,[2] which provides that an "abstract" shall be made out at the end of each quarter, and a "final statement" at the end of each year, covering the revenues due the imperial treasury from the customs and taxes. These abstracts and final statements are to be made out by the State authorities charged with the collection of the revenues, and, after having been audited by the Directive Boards, are to be

[1] See Von Mayr, in Stengel's *Wörterb.* II. p. 968. Also the agreement laid down in the *Münchner Vollzugsprotokol* of 14 February, 1834, § 25, found in *Verträge und Verhandlungen über die Bildung und Ausführung des deutschen Zoll- und Handelsvereins*, Berlin, 1845–72, II. p. 271, more particularly the "*Anweisung Zur Geschäftsführung eines Hauptzollamtes*," "*Regulativ über die Erhebungsbefugnisse der Nebenzollämter 1 und 2 Klasse*," and "*Anweisung Zur Geschäftsverwaltung der Nebenzollämter 2 Klasse.*"

[2] Compare with Cust. Un. Tr. Art. 17.

combined into general summaries. Each separate tax in these summaries is to be authenticated, and the summaries are then to be laid before the *Bundesrat's* Committee on Accounts. These summaries are made out on blank forms prescribed by the *Bundesrat*. After a careful inspection of these summaries, the Committee on Accounts fixes provisionally, every three months, the amount due the imperial treasury from the treasury of each State, informing both the *Bundesrat* and the States themselves as to the result of its calculations. The committee also lays before the *Bundesrat* annually a final determination of the amounts due, together with such remarks as it may see fit to append. The *Bundesrat*, taking the report of the committee and such remarks as may be appended thereto as a guide, definitively fixes the amount due for the year from each several State. These provisions of the Imperial Constitution have been supplemented somewhat by a proclamation of the Imperial Chancellor, issued 13 January, 1872, based on an agreement with the Committee on Accounts.[1] In order to meet the change made in the fiscal year, in 1877, this proclamation was further amended by a resolution of the *Bundesrat*, 3 April, 1878.[2] In accord with these enactments, provisional summaries are to be made *monthly*, in addition to the quarterly and annual summaries provided for by the Constitution.

IV. *The Expenses of the Empire.* So far as the expenditures and expenses of the Empire are concerned, the general theory prevails that, inasmuch as the activity of the Empire is directed toward securing and advancing the interests of all its members, the expenses of the Empire should be borne in common by all the States. But, owing to the peculiar

[1] See Hirth's *Annalen*, 1872, pp. 1489 ff.

[2] *Preussicher Ministerialblatt für die Innere Verwaltung*, 1878, p. 146.

position occupied by some of the States in the Empire, this theory receives considerable wrenching when it comes to be practically applied. Notable exceptions to the general principle have been made in favor of the States enjoying the so-called "*jura singulorum*." These exceptions may be briefly mentioned. The expenses of the Federal Office for Citizenship — *Bundesamt für das Heimatswesen* — are not shared by Bavaria. This office operates under the Law of 6 June, 1870, and by the express terms of the Imperial Constitution and of the Treaty of Versailles of 23 November, 1870, this law does not apply to Bavaria.[1] This law has not yet been extended to Alsace-Lorraine, hence that territory also contributes nothing to the expenses of the office. Only about 25 per cent of the expenses of the Railroad Office are borne by the States in common, and Bavaria is exempted from the remaining 75 per cent under Art. 46, Cl. 2, of the Imperial Constitution, which frees Bavaria from the control of this office in most essential matters. Moreover, the peculiar privileges of Bavaria, Württemberg, Baden, and Alsace-Lorraine, with reference to the taxation of beer, and the transit tax on it, exempt them from all share in the expenses connected with the regulation of those taxes. Bavaria and Württemberg, enjoying "*jura singulorum*" with respect to the administration of the post and telegraph, contribute a small amount to the expenses of the central administration. The fact that the Court of Accounts does not operate equally in all the States disturbs the uniformity of contribution to the expenses of that court. Some States enjoy special privileges of self-administration in certain matters. In these States the expenses of the Court of Accounts are borne only in a certain proportion based upon the extent to which

[1] See *RVerf.* Art. 4, 1; also Treaty with Bavaria, 23 November, 1870, III. § 1, and *Schlussprotokol* of the same I.

the activity of the court extends to the other branches of their administration. In those branches of administration where the activity of the court extends to all the States, each State contributes its proportion to the expenses. Alsace-Lorraine pays a lump sum, — an *aversum.*

Under the Imperial Constitution, the power to send ambassadors to foreign courts is not taken away from the individual States of the Empire. This fact has an effect upon the finances of the Empire, so far as the contribution of the States to the expenses of maintaining imperial ambassadors is concerned. Where a State maintains an ambassador at a foreign court at which the Empire also maintains a representative, the State receives a rebate of one-half the amount of the contribution which it is ordinarily required to make to the expenses of the imperial ambassador at that same court. In consideration of Bavaria's diplomatic service, and in view of the fact that in those places where Bavaria maintains an embassy the duties of the imperial embassy in caring for Bavaria's interests are relieved, Bavaria, by reason of concessions made at the time of its entrance into the Empire, enjoys a rebate which amounts to the whole of the contribution which Bavaria should be expected to make to the expenses of those ambassadors of the Empire who are stationed in lands where Bavaria also maintains her own representatives. The imperial ambassadors, in the course of their duties, attend to many special matters for Prussia. As an equivalent for these services, Prussia pays annually into the imperial treasury an *aversum* of 90,000 marks.

Bavaria enjoys certain special privileges in matters military. This fact affects Bavaria's share in the expenses of the Imperial Military Court. In the organization of this court, Bavaria has been granted a special senate. The special expenses of the Bavarian senate are borne by Bavaria

alone, but that State makes no contribution to the special expenses of the other senates. The Imperial Military Court, however, is the highest criminal court for the navy. Bavaria, therefore, is required to contribute a proportionate share to the general expense based upon the effective naval force furnished by that State.

The "*Sonderrechte*" — special rights — play a prominent part, also, in so far as the contribution of the various States to the payment of the interest and principle of the imperial debt is concerned. The debt was contracted by the Empire and the Empire is responsible for it. But the obligations laid upon the several States, with respect to their share in the liquidation of the debt and the meeting of the interest, are not equal. The loans out of which the debt arose were used largely for military purposes and for expenses connected with the administration of the post and telegraph. But, under the special rights which Bavaria enjoys, that State is exempt from all obligation to contribute to either of these objects, and for that reason Bavaria has no share in that portion of the debt created for these ends. Württemberg is, for the same reason, exempt so far as the expenditures for post and telegraph are concerned. All States contribute to the liquidation of, and to the payment of the interest on, that part of the imperial debt which does not concern matters with respect to which certain States enjoy special privileges. All States, save Bavaria, contribute to that part of the debt contracted for military purposes, while all States except Bavaria and Württemberg share in the debts arising from the postal and telegraph administration.

This same system of grouping is seen in the matter of covering deficits. Whether a State shall contribute to the meeting of a deficit which may occur in any branch of the administration of the Empire, depends on the relation of

that State to the branch of the service in which the deficit is found.[1]

V. *The "Proportional Assessments" of the Several States.* — In no part of the imperial governmental system of Germany has so little real skill been displayed as in the development of imperial finance. The handling of this matter has not only been unsatisfactory, but it has been no less contrary to the Constitution than it has been inconsistent with the principles of sound financiering. The difficulty has certainly not been due to any lack of a scientific understanding of the principles of finance on the part of German economists and statesmen, but rather to the conflict of political theories and the clash of economic interests. The best that can be said of the system pursued for a generation in Germany, is that it is both clumsy and inadequate. The legislation respecting the customs and the taxes has been marked by vacillation and superficiality. It has been a system of "patchwork and tinkering," rather than of sober, thorough revision and construction on definite and sound lines.

Before Germany, as before every federal State, two ways lay open in the organization of the imperial finance: either to create a unitary system, an independent system of imperial taxation, where the taxes should be fixed and levied by imperial law, where the revenues should flow into the imperial treasury and be disbursed for the sole use of the Empire; or, to develop a federal system, where the fixing and levying of taxes should become matters of State legisla-

[1] Thus, Bavaria would not contribute to the covering of a deficit in the military administration. Bavaria and Württemberg would be exempt from sharing in the payment of a deficit in the postal and telegraph administration. A deficit in the brewing tax would not affect Bavaria, Württemberg, Baden, or Alsace-Lorraine, while so far as a deficit in the payment of the imperial debt is concerned, the States would fall into the three groups noted in the preceding paragraph of the text.

tion and where the expenses of the Empire should be met by a system of assessments upon the several States. The Empire adopted the more centralized method, though with a temporary modification of a federalistic nature.[1] Article 70 of the Imperial Constitution provides that in so far as the imperial expenses are not met by the imperial revenues, together with such surplus as may remain from the preceding year, the deficit shall be covered by an *assessment upon the several States in proportion to their population.*[2] It is to be specially noted, however, that this scheme of assessment was to be resorted to only so long as imperial taxes were not yet introduced to meet the expenses. These assessments are known as *Matrikularbeiträge,* or proportional assessments.[3]

Although it is plain, from the wording of Art. 70, that this system of assessments upon the several States in order to cover deficits in imperial finances was designed merely as a temporary expedient, two things served to prolong its existence. One was the development of the various State groups, in the matter of receipts and expenditures, already referred to in the preceding section,—the groups occasioned by the entry of the South German States and Alsace-Lorraine with their peculiar exemptions. The system of proportional assessments serves to equalize these differences in the relation of the various groups to the Empire in financial matters, increasing the assessment of those States which have no share in the common receipts and decreasing the assessment

[1] See Meyer, *Verwaltungsr.* II. p. 396; Laband, IV. pp. 375 ff.; Hänel, I. pp. 361 ff.; Wagner, *op. cit.* pp. 646 ff., 792 ff.

[2] For a sharp criticism upon the manifest unfairness of this system, see Wagner, *op. cit.* pp. 806 ff., also p. 655, last paragraph of § 201.

[3] See Von Heckel, in Conrad's *Handwörterb.* V. pp. 737, and literature therein cited; Laband, IV. pp. 474 ff.; Meyer, *Staatsr.* pp. 698 ff.; *Verwaltungsr.* II., pp. 396 ff.; Kirchenheim, *Staatsr.* pp. 414 ff.

of those which do not share in the common expenses.[1] The second thing which has tended to preserve the system has been the passage of the so-called "Frankenstein Clause," and subsequent legislation down to 1904. It will be recalled that Art. 4 of the Imperial Constitution draws within the competence of the Empire legislation on customs duties and on taxes to be applied to imperial ends. Article 33 of the Constitution declares that Germany shall constitute a single tariff district, while Art. 35 places the legislation on matters of tariff and with respect to the taxation of salt and tobacco manufactured within the Empire, as well as with respect to the taxation of beer, brandy, and sugar, and syrup made from beets or other domestic products, exclusively in the hands of the Empire. In 1879 a law was passed increasing the tax on tobacco and raising the customs duties.[2] The Imperial Stamp Tax Law was enacted in 1881,[3] while in 1887 the law regulating the taxation of brandy was passed.[4] These three laws increased the revenue of the Empire. What is known as the "Frankenstein Clause" is § 8 of the Law of 15 July, 1879. This clause reads as follows: "When in any year the revenue from the customs duties and the tax on tobacco shall exceed the sum of 130,000,000 marks, the surplus shall be handed over to the States according to the ratio of population upon which their proportional assessment is reckoned."[5] Similarly, according to § 32

[1] Meyer, *Verwaltungsr.* II. p. 397; Von Heckel, *op. cit.* p. 738.

[2] *RGBl.* p. 207. Revised by Proclamation of 24 May, 1885 (*RGBl.* p. 111).

[3] *Ibid.* p. 185. Revised 27 April, 1894 (*RGBl.* p. 381), and 14 June, 1900 (*RGBl.* p. 260).

[4] *RGBl.* p. 253.

[5] This clause was a compromise measure, introduced by the Centrum Party. For a brief discussion of the proceedings in the *Reichstag*, with the speech of Bismarck, see Schulthess, *Geschichts-Kalendar* for 1879. For general debate, see *Sten. Ber. des Reichstags*, 1879, pp. 927 ff., 2179 ff., and 2241 ff.

of the Law of 1 July, 1881, the receipts from the Imperial Stamp Tax were to flow into the imperial treasury, and, after certain costs were deducted, the remaining amount was to be handed over to the States on the same basis.[1] Section 39 of the Law of 24 June, 1887, also provides that the net revenue from the consumption tax on brandy should be distributed among the States belonging to the district in which the tax operated on the same principle. The "Frankenstein Clause" expressly defeated the plain intent of the Constitution that the "proportional assessments" should be a temporary expedient. This was the aim and purpose of the clause, and subsequent legislation, as seen, was dominated by the same idea.[2] The system of "*Matrikularbeiträge*" was retained, and another system, a system of rebates or donations, was erected beside it. If the Imperial Constitution, by the introduction of "proportional assessments" upon the several States, aimed to make a deficit impossible, subsequent legislation seemed bent on making a surplus, or at least a reserve fund, equally impossible. Nowhere in the Constitution is there any authority for this system of "donations" to the several States.[3] This system created a close reciproc-

[1] § 32 of the Law of 1 July, 1881, is § 45 in the revision of 1894, and § 55 in the revision of 1900.

[2] See also Law of 16 April, 1896 (*RGBl.* p. 103); 24 May, 1897 (*RGBl.* p. 95); 31 March, 1898 (*RGBl.* p. 138); 25 March, 1899 (*RGBl.* p. 189); 30 March, 1900 (*RGBl.* p. 173). By this legislation, in some instances the amount fixed by the "Frankenstein Clause" at 130,000,000 marks was raised considerably, and in addition a certain proportion of any surplus which, under the clause, would fall to the several States was retained by the Empire and applied to the payment of the imperial debt. The proportion ranged from one-half to three-fourths.

[3] See Hänel, I. p. 383; Laband, IV. pp. 378, 476. The fact is that the Constitution has been practically amended, not in the manner prescribed by the Constitution itself, but by ordinary legislation. It differs from a regular amendment in conferring no constitutional or "well-earned" right on the part of the States to a continuance of these donations. See Hänel, *op. cit.* p. 384.

ity between the Empire and the States in financial matters. On the one hand, certain imperial receipts were to be distributed among these States, while, on the other hand, the States were obligated to cover, by their proportional contributions, the difference between the revenues and the expenditures of the Empire. Speaking of the system under the "Frankenstein Clause," Adolf Wagner, the greatest writer on finance in Germany, says: "This is a financial system which appears thoroughly mechanical, is in every respect a doubtful one, works after the manner of a poll-tax, disturbs the finances of the individual States, is inconsistent with the character of a federal State, smacks of the old *Staatenbund*, seriously impairs the clearness of the financial relations, veils the true portrait of financial conditions. It is true that through the distribution of the surplus according to the number of the population the poll-tax-like working of the system of "proportional assessments" is at least balanced, but this solitary advantage is not of sufficient weight to justify this whole system of contributions on the one hand and donations on the other."[1]

[1] Wagner, *op. cit.* p. 655. See also Laband, IV. pp. 378 ff. It may be interesting to note the result of this system. The following table is taken from Wagner, *op. cit.* p. 654, and from the *Statist. Jahrbuch für das Reich*, 1903:—

Year	Donation	Contribution	Difference in + and −
1880	32,243	81,671	− 49,428
1881	68,024	103,288	− 35,264
1882	83,456	103,684	− 20,228
1883	85,503	92,719	− 7,216
1884	105,027	84,445	+ 20,582
1885	115,792	122,437	− 6,645
1886	137,057	139,218	− 2,161
1887	176,324	186,937	− 10,613
1888	277,801	219,375	+ 58,426
1889	355,034	228,183	+ 126,851
1890	378,914	312,415	+ 66,499

The bad effect of such a vacillation upon the finances of the individual States will be at once apparent.

On the 14 May, 1904, a law was passed which reads as follows: —

"§ 1. The provision respecting the handing over of a part of the proceeds of the customs duties and of the tobacco tax to the individual States (§ 8 of the Tariff Law, published through the Proclamation of 24 May, 1885, *RGBl.* 111), is repealed.

"The net revenue from the mash-vat tax, and from the tax on materials out of which brandy is prepared, is to be handed over to the several States in the proportion which their population sustains to the whole population of the territory included in the jurisdiction of the brandy tax.

"§ 2. Art. 70 of the Constitution shall receive the following wording: —

"*Article* 70

"For meeting all the common expenditures there shall be used, first of all, the general revenues which flow in from the customs duties and common taxes, from the Railroad, Postal and Telegraph Administration and from all other adminis-

Year	Donation	Contribution	Difference in + and −
1891	383,377	326,734	+ 56,643
1892	358,925	327,360	+ 31,565
1893	338,759	380,064	− 41,305
1894	382,860	397,497	− 14,637
1895	400,126	396,000	+ 4,126
1896	414,568	399,374	+ 15,194
1897	433,115	419,899	+ 13,216
1898	467,586	454,859	+ 12,727
1899	476,738	489,954	− 13,216
1900	514,940	527,662	− 12,722
1901	555,704	570,933	− 15,229
1902	544,235	580,640	− 36,405
1903	542,092	565,856	− 23,764

trative branches. In so far as the expenses are not covered by these receipts, they shall be met by contributions of the several States, on the basis of their population, which contributions shall be imposed by the Imperial Chancellor in the amount required by the budget. Should these contributions not be covered by the amounts to be handed over to the several States, they are to be refunded to the several States in such measure as the other ordinary income of the Empire may exceed its needs.

"Any surplus from former years shall be employed, so far as the law fixing the budget does not provide otherwise, to meet the common extraordinary expenses.

"*Sec.* 3. This law shall go into effect from the first of April, 1904." [1]

While this law removes much that was objectionable in the imperial financial system, it has not eliminated all the awkwardness and clumsiness which has hitherto characterized that system, and there still remains much to be desired.

So far as their nature is concerned, the "proportional assessments" are taxes levied by the Empire upon the individual States by reason of its sovereignty.[2] In fixing the amount of the tax, the population of the State is taken as a basis. Opinions have differed as to the meaning of the word "population" in this connection. The *Bundesrat*, however, on 28 March, 1882, declared by resolution that the definitive fixing of the "proportional assessments" as well as the settlement of accounts with respect to the general customs and tax receipts, should be based on the number of *inhabitants*, irrespective of State citizenship.[3]

[1] *RGBl.* p. 169.

[2] Meyer, *Verwaltungsr.* II. p. 399; Hänel, I. p. 375; Laband, IV. pp. 474 ff.

[3] Laband, IV. p. 479.

The amount of the proportional assessments is determined by the budget of the Empire, and can be definitely fixed only at the close of the fiscal year. The levying of the assessments is made by the Imperial Chancellor, who may not exceed the amount required by the budget,[1] even in cases where the losses or deficits in other receipts of the Empire would indicate a necessity for such increase.[2] Such an increase would require a new fixing of the budget.

VI. *The Imperial Budget.*[3] — By "Budget," "*Staatshaushaltetat*," "*Hauptfinanzetat*," or simply "*Etat*," is meant a complete, systematically arranged, and balanced estimate, or summary, of the receipts and expenditures incident upon the administration of a State for a certain fixed future period. In other words, it is the periodic forecast of the fiscal needs of a State and the provision for meeting those needs. The budget, therefore, is a matter of *calculation*, — not a calculation of the receipts already collected or of the expenditures already made, but a prior computation of the income and of the anticipated liabilities.[4]

Article 69 of the Constitution provides that "all the receipts and expenditures of the Empire must be estimated for each year and brought into the imperial budget. This latter shall be fixed by law before the beginning of each year." The establishment of the budget, therefore, takes place within the forms of ordinary legislation, and the coöperation of the

[1] *RVerf.* Art. 70.

[2] See discussion with respect to the attempt of the Imperial Chancellor to increase the amount of the assessment in 1868, in Hirth's *Annalen*, 1869, pp. 274 ff.; Laband, IV. p. 475; Meyer, *op. cit.* II. p. 399.

[3] For the most important literature upon the subject, see Laband, IV. p. 481, note; also his discussion of recent literature in appendix to IV. pp. 532 ff. See also bibliography appended to Jellinek's article "*Budgetrecht*," in Conrad's *Handwörterb.* II. p. 1164.

[4] Hänel, *Studien*, II. p. 215, takes exception to the designation of the Budget as a "*Rechnung*." Compare Laband, IV. p. 482.

popular branch of the legislature in determining the most important question of imperial finance is assured. Further, the provisions of the Constitution with respect to all other proposed legislation find application also to the bill fixing the budget.[1]

The fiscal period of the Empire is one year, then, according to the wording of Art. 69 of the Constitution.[2] This necessitates the fixing of a special budget each year, covering the receipts and expenditures of the whole twelve months. This principle harmonizes with Art. 71, Cl. 1, of the Constitution, which provides that the general expenditures shall, as a rule, be granted for a single year, but that in special cases they may be granted for a longer period. When a sum is granted for a special work, the accomplishment of which will cover a number of years, the amount to be expended in each year is taken up into the budget law for that year as an integral part of it.[3]

The budget must be fixed *before* the beginning of the fiscal year,[4] how long before is not stated in the Constitution. Article 69 merely sets the latest time up to which the budget may be fixed. Nor is there anything to prevent the fixing of the

[1] Such a bill, that is, requires the consent of a majority of the *Bundesrat* and *Reichstag* in order to become a law. It is also subject to the restrictions laid down in Art. 5, Cl. 2, and in Art. 78, Cl. 2, of the *RVerf.* Art. 7, Cl. 4, however, is not applicable. Meyer, *Staatsr.* p. 701, note 4; Laband, IV. p. 484. The budget law is to be promulgated and published by the Kaiser in the usual form, and the Chancellor assumes responsibility. There is no provision in the Constitution that all "money bills" shall originate in the popular branch of the legislature.

[2] Up to 1 April, 1877, the fiscal year coincided with the calendar year. By the Law of 29 February, 1876 (*RGBl.* p. 126), the fiscal year was changed, so that since 1 April, 1877, it has begun on 1 April and ended 31 March.

[3] Laband, IV. p. 485. Art. 69 requires that *all* the receipts and expenditures shall be included in the estimate in order that a complete summary of the whole financial schedule may be had.

[4] Art. 69 of the *RVerf.*

budget for two or more consecutive years, as Laband observes, provided that the budget of each year is kept separate and distinct, and each is fixed by a special law for the one year.[1]

VII. *The Granting of Expenditures.*[2] — While Art. 70 of the Constitution lays down the broad principle that the general expenditures shall be granted for one year, it does not lay down a rule as to how far the granting of these expenditures may be regarded as purely discretionary on the part of the *Reichstag*, and how far it must be looked upon as an obligation. May certain expenditures, then, be refused, constitutionally? One of the most fundamental principles of constitutional law is that existing rights and institutions of the State, founded in law, may be amended and changed only with the consent of the sovereign and of the representatives of the people, and not by a one-sided act of either of these organs alone. It follows as an irrefutable consequence, that the *Reichstag* cannot suspend or repeal existing laws by a one-sided refusal to furnish the means necessary to the execution of them; that the continuance in force of the imperial laws and the permanence of imperial institutions shall not be put annually into the hands of the *Reichstag*, to be granted or suppressed at pleasure.[3] It follows that the right of the *Reichstag* to grant expenditures is limited and bound by the existing laws and institutions of the Empire, and that the expenditures which are necessary to the carrying out and maintenance of the same may not be

[1] See Meyer, *Staatsr.* p. 700, note 3; Laband, IV. p. 486. This actually took place in the session of the *Reichstag* for 1882–83. See Law of 2 March, 1883 (*RGBl.* p. 5), and of 2 July, 1883 (*RGBl.* p. 125). This action was vigorously contested in the *Reichstag* on the ground of unconstitutionality. See *Sten. Ber.* I. pp. 659 ff. (1882).

[2] On this topic the argument of Laband is followed, IV. pp. 490 ff.

[3] This is the general position of German jurists. See Laband, IV. p. 490, note 2.

refused. The budget is not a law organizing the whole Empire for each year. It is a plan of administration, a programme. It presumes, therefore, a legally established organization as a fixed foundation.

So far, then, as the right of the *Reichstag* to grant them is concerned, the expenditures fall into two categories: those which may be designated as discretionary, and those which may be classed as necessary from the standpoint of constitutional law. The first group may be refused by the *Reichstag* at pleasure, and its consent has the character of an actual grant, without which the imperial government is not authorized to make the expenditures at all. The second group, however, may not be stricken from the budget by either *Bundesrat* or *Reichstag* alone, without the consent of the other. The granting of these expenditures is the constitutional duty of the *Reichstag* and does not partake of the character of an authorization of the government to pay, but of a recognition of the necessity or appropriateness of the expenditures. The proper legal ground on which the expenditures rest is found in the imperial law or treaties. *Formally*, all these expenditures are also subject to the grant of the *Reichstag*, since the budget law, like all other laws, can contain nothing which has not the consent of the *Reichstag;* but *materially* this is no true grant, for the reason that the *Reichstag* is not empowered to refuse it. The Imperial Constitution contains no provision from which a free, unrestricted right of grant on the part of the *Reichstag* may be derived. Article 69 declares that all receipts and expenditures shall be estimated for each year and brought into the imperial budget, giving to the budget, thereby, the nature and significance of a forecast. Article 69 further declares that the budget shall be fixed by a law, and lays down, thereby, the *form* in which the forecast shall take definite shape and the

share which falls to the *Reichstag* in the matter. Article 71, finally, lays down the principle to be followed in fixing the budget, viz. that expenditures shall be granted for one year, as a rule, but that in special cases they may be granted for a longer period. This principle relates, however, only to the *time* for which an expenditure shall be granted. The *duration* of the grant forms the *sole* object of the provision of Art. 71. On the other hand, this article says nothing about the conditions under which an expenditure needs a grant, still less does it contain, presuppose, or hint at a rule to the effect that the grant of the *Reichstag* is the necessary and indispensable condition to the right of the government to make any expenditures at all.

The receipts of the Empire from the various sources out of which its income is derived flow into the imperial treasury. This is a matter entirely distinct and separate from any item or items in the budget, and is in no wise dependent on anything contained therein. These receipts, therefore, require no grants from the *Reichstag*. They rest on legal foundations of a permanent character and need no annual grant. New sources of revenues, however, whether in the form of new taxes or loans or what not, or whether arising from the sale of property belonging to the Empire, can be created only by and with the consent of both branches of the legislature.[1]

An interesting question arises as to the method to pursue when, from whatever cause, a budget law is not passed before the beginning of the fiscal year. Such a situation might arise from a variety of causes. So far as the solution of the question is concerned, the cause is wholly irrelevant and im-

[1] See *RVerf.* Art. 73. Also Law of 25 May, 1873 (*RGBl.* p. 115), § 10, which reads, "All receipts from the sale of real estate, materials, implements, or other objects belonging to the imperial administration, shall be estimated for each year and brought into the imperial budget."

material. In the cases which have occurred in the history of the Empire, the problem has been solved by extending for one month, by law, the Budget of the fiscal year just ended.[1] This does not satisfy the provisions of Art. 69 of the Constitution, but it is justified on general grounds, both constitutional and political. The declaration of Art. 69 that the budget shall be fixed annually by *law*, releases the administration from all responsibility in the fixing of the budget. It is not released, however, from its obligation to perform the functions of government in conformity with the legal organization of the Empire, and in conformity with the institutions resting on permanent laws. The integrity and efficiency of the Empire cannot be made to hang upon the passage of a fiscal programme in the form of law. The administration is therefore justified in carrying on the necessary and permanent branches of government, with the expenditures involved in so doing, on its own responsibility, until the proper and regular budget may be forthcoming. As Laband puts it:[2] "As necessary in a political sense may be designated those expenditures to which the government is *legally* obligated. . . . The right and duty to meet these expenditures exist without a budget law, and hence it cannot be regarded as a breach of the Constitution when the government meets these expenditures although no budget law has constitutionally come into being. The doctrine may be formulated thus: expenditures which the *Bundesrat* and *Reichstag*, in fixing the budget, may not on legal grounds refuse, are to be made by the government even in case the legal fixing of the imperial Budget does not occur." Laband also holds that expenditures which may be termed

[1] See Law of 26 March (*RGBl.* p. 407); Law of 30 March, 1878 (*RGBl.* p. 9).

[2] Laband, IV. pp. 510, 511.

discretionary, *i.e.* such as are not legally binding on the government, *may* be made on the government's own responsibility, in case of failure to pass a budget law, if the interests of the State demand it. "For it is nonsense to subject the administration of a State to the fiction that no State interest can be pressing, no expenditure necessary, whose urgency and necessity have not been previously recognized by a law."

The receipts of the Empire would be but little affected by the omission to pass a budget law, since they spring from sources independent of the budget grant.[1]

VIII. *The Auditing of Accounts.*[2] — "The checking of a State's accounts," says Laband, "is as indispensable a requirement of the financial administration, as is the fixing of the budget. The State needs an organ, independent of the administrative authorities, which shall review their work periodically, in order to ascertain whether they are collecting the revenues and making the expenditures according to the instructions given them, and in such ways as the interests of the State demand; and, further, whether they are administering the property of the State carefully and systematically. Moreover, in a constitutional State, the representatives of the people cannot take that effective part in the regulation of the financial management and in the administration of the State, and their share in the fixing of the budget must be illusory and without result, unless the whole administration shall be subjected to a comprehensive checking by an independent authority and made accountable to the popular

[1] An exception must be made with respect to the "proportional assessments," which are to be levied by the Chancellor "as the budget may require," and with respect, also, to the income from the sale of real estate. Such receipts must be expended, under the Law of 25 May, 1873 (*RGBl.* p. 115), § 11, only with the consent of the *Bundesrat* and *Reichstag*.

[2] For literature on the subject, see Laband, IV. p. 515, note.

representative body, in carrying on the business of the State, for the actual observance of those norms laid down under its coöperation."

Article 72 of the Constitution of the North German *Bund* provided that a "yearly accounting with respect to the expenditure of all receipts of the Bund should be made by the *Praesidium* to the *Bundesrat* and to the *Reichstag* for their discharge." The Constitution did not state how the accounts of the administration were to be proven or how the discharge was to be prepared. This did not seem necessary, perhaps, in view of the real conditions then existent. For, the great majority of the boards whose accounts were to be audited were made up of Prussian authorities or were themselves wholly Prussian, such, for instance, as the marine and military boards, the embassies, and the consulates. Since the king of Prussia in his character as president of the *Bund* was also head of the financial administration of the whole federation, it was perfectly natural that the Prussian arrangements should simply be extended to the financial administration of the *Bund*. But Prussia had not as yet carried out the plain intention of her own constitution regarding this matter of auditing the general accounts. The constitution of Prussia, Art. 104, says that "a special law will determine the organization of the powers of the Auditing Office." Such a law had not yet been passed on the erection of the *Bund*. Prussia, however, had a system of auditing her own accounts, and, by the Law of 4 July, 1868,[1] the *Bund* handed over to the Prussian authorities the auditing of the accounts of the Federation for 1867–69. This arrangement was extended from year to year. On 27 March, 1872, Prussia passed a special law in conformity to Art. 104 of her constitution,[2] and the foundation for a federal law was thus laid.

[1] *RGBl.* p. 433. [2] *Preuss. Gesetzsammlung*, p. 278 ff.

Several attempts were made by the Chancellor to pass a bill providing for the erection and organization of a Court of Audits (*Rechnungshof*), but it was impossible to secure an agreement between the *Bundesrat* and *Reichstag* with respect to the matter.[1] It is only since 1875[2] that the provisions of the Prussian Auditing Office, as regulated by the Prussian Law of 27 March, 1872, have taken the place of the provisions of the Law of 4 July, 1868.[3] "Up to the present time, therefore, a definite fixing of the legal principles which shall govern the auditing of the imperial accounts, as well as a definite organization of the board to which such an examination of accounts shall be intrusted, is wanting, and should the extension of the arrangements hitherto made be not continued, in any year, from whatever cause, a veritable legislative gap would ensue. There would be no legal provision by which the Imperial Chancellor could fulfil the duty laid down in Art. 72 of the Constitution, requiring him annually to lay before the *Bundesrat* and *Reichstag* the imperial accounts for their discharge."

The Auditing Court of the Empire is, then, simply the Auditing Office of the Prussian State, acting, under an annual imperial law, for the Empire, in that capacity in which it

[1] See Hirth's *Annalen*, 1874, pp. 214 ff.; *Zeitschrift f. d. gesammt. Staatswis.* XXXIII (1877), pp. 23 ff.; also Joël, in Hirth's *Annalen*, 1895, pp. 81 ff.

[2] Law of 11 February, 1875 (*RGBl.* p. 61).

[3] These provisions are made part of a yearly law regulating the control of the imperial budget and the budget of Alsace-Lorraine for the preceding year. The law reads: "Die Kontrolle des gesammten Reichshaushalts, des Landhaushalts von El.-Loth. und des Haushaltes der Schutzgebeite für das Rechnungsjahr . . . wird von der Pr. Oberrechnungskammer unter der Benennung 'Rechnungshof d. D. Reiches' nach Massgabe der im Gesetze von 11 Feb., 1875 (*RGBl.* p. 61), betreffend die Kontrolle des Reichshaushaltes und des Landeshaushaltes von El.-Loth., für das Jahr 1874 enthaltenden Vorschriften geführt."

ordinarily acts for Prussia. Nevertheless, when acting in the capacity of Auditing Court for the Empire, it becomes possessed of an entirely distinct character in law. Its members may be increased, should it seem necessary, by new members elected by the *Bundesrat* and commissioned by the Emperor. Its sessions are entirely separate from those of the Auditing Office, and it is presided over by a special director, who is officially subordinated to the president of the Auditing Office. The Auditing Court exercises its control over the finances of the Empire in accordance with those regulations which are in force in the Prussian Auditing Office, and its members enjoy the same rights and are bound by the same obligations, as members of the Auditing Court, as attach, under the Prussian laws, to the members of the Auditing Office.[1] The Auditing Court is immediately subordinate to the Emperor. With respect to the Chancellor and the other administrative authorities, it occupies a position of absolute independence. Its members enjoy the independent position of members of a court. The Auditing Court is unconditionally responsible for its own acts, so that, so far as its work is concerned, the responsibility of the Imperial Chancellor is excluded. Its organization, and order of business, as well as the relation of the director to the president of the Auditing Office and to the members of the court, are regulated by instructions issued by the Imperial Chancellor with the consent of the *Bundesrat*.[2] The work of the Auditing Court includes the checking of the following accounts: the whole budget for the Empire, the acquiring and disposal of imperial property,

[1] Law of 4 July, 1868, § 3, and continued in force by all subsequent legislation.

[2] Law of 4 July, 1868 (*RGBl.* p. 533), § 5. Such instructions were issued on 28 May, 1869, and afterward replaced by the Instruction of 5 March, 1875 (*Centralbl.* p. 157).

the administration of the imperial debt, the Invalid Fund, the Imperial War Treasure, the Imperial Bank, the whole budget of Alsace-Lorraine and of all the protectorates. In short the whole administration of the Empire, so far as it can be ascertained from the books of account, is subjected to the examination and critical inspection of the Auditing Court. The work of the court is essentially critical rather than judicial. It does not possess the authority of a supreme administrative board, nor have its judgments the force of judicial decisions. Differences of opinion which may arise between the Auditing Court and the Imperial Chancellor, as head of the imperial administration, with reference to a state of facts, where the court has seen fit to impose a censure, are, as a rule, decided by the *Bundesrat*. When, however, the censure touches an order with respect to military or naval affairs, the matter is to be decided by a cabinet order of the Kaiser. On the other hand, should the censure be passed upon a matter in the regulation of which the *Reichstag* had coöperated, the decision of that body is to be had as to the granting or refusing of a discharge.[1]

The work of the Auditing Court is incident to the fulfilment of Art. 72 of the Imperial Constitution, which requires the Imperial Chancellor to lay before the *Bundesrat* and *Reichstag*, annually, a statement of the disposition of all the receipts of the Empire, for the discharge of those bodies. To this end, the report of the Auditing Court, together with such remarks as they may see fit to append, is laid before the *Bundesrat* and *Reichstag*, and a particular discharge is granted by each of these bodies. Neither can refuse such discharge, if there is no well-grounded fault to be found with the accounts, "since, corresponding to the duty laid upon every administrator of another's money, to render an account

[1] Laband, IV. pp. 524, 525.

of the same, is the right to a discharge when the accounts are found to be in order." The effect of a discharge is, of course, in private relations that of a quittance. Constitutionally it releases the Imperial Chancellor from the responsibility resting upon him with respect to the administration of the finances.[1]

IX. *The Imperial Debts.*[2] — In discussing the indebtedness of a State, a distinction is to be drawn between those obligations which arise out of the ordinary administration of the government, or which are the necessary outgrowth of previous legislation, and those debts which are created by specific loans or by the assumption of guarantees. The obligations of the first sort, which may be termed, with the German jurists, administrative debts, arise in the natural operation of the government and require no special authorization for their contraction. Loans, on the contrary, or finance debts, to still follow the German phraseology, can be contracted only by reason of a particular law authorizing them, since the exploitation of the State's credit lies entirely outside the ordinary expenditures of the administration.[3]

Article 72 of the Imperial Constitution declares that "in all cases of extraordinary need, a loan may be contracted, or a guarantee assumed, by the Empire, through imperial legislation." The plain purport of this article, as drawn from the context, is to grant the right to utilize the credit of the

[1] Laband, IV. p. 532. He adds, "This responsibility is certainly at present a mere political principle, no developed and practically applicable legal institute; and at that point in the law of the German Constitution, where the very corner-stone of the whole administrative law — especially of the budget law — should stand, there is to-day a gap which needs to be filled."

[2] See Laband, IV. pp. 364 ff.; Hirth's *Annalen*, 1873, pp. 435 ff.; Meyer, *Verwaltungsr.* II. pp. 404 ff.; Von Heckel, article "*Staatsschulden*," in Conrad's *Handwörterb.* VI. p. 752, and the literature therein cited on page 968.

[3] Laband, IV. p. 365.

Empire in order to meet any unusual demands, should the ordinary receipts of the Empire prove inadequate for the purpose. The credit of the Empire is safeguarded by insisting that no exploitation of that credit shall be made except through an imperial law.

Loans are contracted in the form of a number of agreements made with the creditors of the Empire. These contracts may assume the character of mere loans, with an obligation to repay the capital borrowed, or they may take the form of the purchase of annuities with an obligation to pay only an annual rent. The conditions of the contracts are fixed partly by the law and partly by the Imperial Chancellor at the time the loan is secured. Such terms, when fixed by the Chancellor, are regarded as an integral part of the individual contracts.[1] The relation between the Empire and its creditors, arising out of these contracts, is a relation at private law, and the rights and obligations springing therefrom may be asserted by legal proceedings.

The greater part of the debt of the Empire forms what is known as the "funded" or "consolidated" debt.[2] It includes the totality of those debts which the Empire has assumed for a long period of time in order to obtain means for meeting the extraordinary expenses. These obligations are covered by imperial bonds. The imperial debts, hitherto contracted, belonging to the bonded debt, have altogether the character of annuity debts. The Empire binds itself to pay an annual interest, but does not undertake to pay the principal within a definite period. Moreover, the Empire reserves the

[1] Meyer, *Verwaltungsr.* II. pp. 405, 406.

[2] The principal legislation with reference to loans consists of the Law of 9 November, 1867 (*BGBl.* p. 157); 6 April, 1870 (*BGBl.* p. 65); Law of 27 Jan., 1875 (*RGBl.* p. 18). To these must be added the *Reichsschuldenordnung* of 9 March, 1900 (*RGBl.* p. 129), found also in Triepel, p. 293.

right to repay the loan upon giving due notice, the term of such notice to be fixed by law.[1]

Where the matter is not provided for in the law authorizing the loan, the Imperial Chancellor is to fix the rate of interest which the loan shall bear.[2] Changes in the rate, or the conversion of the loan, require the assent of the legislative organs, because of the effect such conversion may have on the budget.[3]

The floating debt of the Empire consists of those obligations which the Empire has assumed for a short period of time in order to strengthen the imperial treasury or to balance the receipts and expenditures for a single fiscal year. This usually takes the form of treasury warrants (*Schatzanweisungen*), issued by the Chancellor, on the authority of a legislative act embodied in the budget law. These treasury warrants have the character of mere loans, not of annuities. They are usually non-interest bearing.[4]

The administration of the imperial debt is regulated by the Law of 19 June, 1868,[5] the provisions of which, originally applying to the marine loan of the North German *Bund*, were extended to all later loans of the Empire, by subsequent legislation. According to the terms of the *Reichsschuldenordnung* of March 19, 1900, §§ 9 ff., the administration of the imperial debt is regulated as follows: until some further action, the administration of the imperial loans is carried on by the chief administrative authorities handling the State debt of Prussia. In their function as an organ of the Empire this body is called the Imperial Debt Administration. The

[1] See Law of 6 April, 1870, §§ 3, 4, and Law of 27 January, 1875, § 2. These laws have been also made applicable to recent loans.

[2] *Reichsschuldenordnung* of 19 March, 1900, § 2.

[3] Meyer, *Verwaltungsr.* II. p. 406.

[4] The paper money of the Empire may also be included among the imperial debts. See Meyer, *Verwaltungsr.* II. pp. 478 ff.

[5] *BGBl.* p. 339.

conduct of it is placed in the hands of the Chancellor so far as this is compatible with the independence of the administration. The Imperial Debt Administration is unconditionally responsible for its own acts, and its activity is regulated by the provisions of the Prussian Law of 24 February, 1850.[1] The supervision of the administration of the imperial debt is placed in the hands of the "Imperial Debt Commission," made up of six members of the *Bundesrat*, viz., the chairman and five members of the Committee on Accounts, together with six members of the *Reichstag*.[2] The president of the Prussian Auditing Office is also a member. His connection with it continues until the Empire shall have created its own Board of Accounts. The president of the Auditing Office acts in his capacity of president of the Imperial Auditing Court, and is to be specially sworn. The supervisory power of the Commission extends to the administration of the imperial debt, the administration of the Imperial War Treasure, the management of the Imperial Invalid Fund, and to the issuance, withdrawal, and cancellation of the notes of the Imperial Bank and of the treasury warrants.

Whatever business is to be transacted in the administration of the finances by the Imperial Chancellor, is carried on through the Imperial Treasury Office, which is subordinate to the Chancellor.[3] Further, it is prescribed in all the laws authorizing loans, that an account of the negotiation of the same be made to the *Reichstag* at its next meeting.[4]

[1] *Pr. G.S.* p. 57. Found also in App. I., Triepel. The administration is responsible only to the *Bundesrat* and *Reichstag*.

[2] These members are annually elected by the bodies from which they come.

[3] Ordinance of 14 July, 1879 (*RGBl.* p. 196).

[4] *Reichsschuldenordnung*, § 1.

CHAPTER XII

THE ARMED FORCES OF THE EMPIRE[1]

It is a generally accepted principle that the armed forces of a State should constitute a unit, no matter what the form of the State may be. In a federal no less than in a unitary State, in a democracy no less than in an absolute monarchy, the organization of the army and navy and the supreme command over the armed forces should fall within the competence of the central government. This is not a principle of law, but

[1] The following literature may be cited: *Die Militärgesetze des Deutschen Reiches mit Erläuterungen*, etc., 2 Bde., Berlin, 1888; Von Helldorff, *Dienstvorschriften der königlichen preussischen Armee*, 3 Aufl., 11 Bde., Berlin, 1873–1884; Fröhlich, *Die Verwaltung des deutschen Heeres*, 4 Aufl., 2 Bde., Berlin, 1875, with two supplementary parts, 1876–7; Von Briesen, *Das Reichskriegswesen und die preussische Militärgesetzgebung*, Düsseldorf, 1872; Von Lobell, *Jahresberichte über die Veränderungen und Fortschritte im Militärwesen*, Berlin, 1874 ff. (see particularly Bd. 1, pp. 1 ff.); Thudichum, "*Die Grundlagen der heutigen deutschen Kriegsverfassung*," in Von Lobell's *Jahresberichte*, Bd. 2, pp. 87 ff.; also the discussion by the same author in his *Verfassungsrecht des norddeutschen Bundes*, Tübingen, 1870; Seydel, "*Das Kriegswesen des Deutschen Reiches*," in Hirth's *Annalen*, 1874, pp. 1035 ff.; 1875, pp. 53 ff., 1081 ff., 1393 ff.; Brockhaus, *Das deutsche Heer und die Contingente der Einzelstaaten*, Leipzig, 1888; Gümbel, in Hirth's *Annalen* for 1899, pp. 131 ff.; Laband, *Staatsrecht des Deutschen Reiches*, Bd. IV. pp. 1 ff.; same author in *Archiv für das öffentliche Recht*, Bd. III. pp. 491 ff.; Meyer, *Staatsrecht*, §§ 195 ff., and *Verwaltungsrecht*, II. pp. 30 ff. Schultze, *Staatsrecht*, II. pp. 235 ff.; Zorn, *Staatsrecht*, I. 189 ff., II. §§ 37 ff.; Seydel, *Komm.* pp. 310 ff.; Hänel, *Staatsrecht*, I. 472 ff.; Arndt, *Staatsrecht*, pp. 446 ff.; Anschütz, "*Staatsrecht*," in *Holzendorff-Kohler, Encyclopädie der Rechtswissenschaft*, II. pp. 619 ff.; Hue de Grais, *Handbuch der Verfassung und Verwaltung*, 16 Aufl., Berlin, 1904; Steidle, *Komm. zum Reichsmilitärgesetz*, Würzburg, 1898.

of expediency. In theory, this principle is specifically recognized in the Imperial Constitution. Article 53 declares that the "navy of the Empire is an united one under the supreme command of the Emperor." Article 63 reads: "The entire land force of the Empire shall constitute a united army, which, in war and in peace, shall be under the command of the Emperor." Article 53 states a fact. Article 63 partakes of the nature of what the German jurists are wont to call a "*legislativer Monolog.*" Strictly speaking, the German army is not a unit. Indeed, it may be quite properly said that there is, as yet, no *imperial* army, but simply contingents of the several States.[1] With respect to the general principle of unity, the army and navy do not stand on the same footing. The reason for this difference is not to be sought in any juristic or technical consideration, but in the historic conditions out of which both these branches of the armed might of the Empire have developed. When Art. 53 of the Imperial Constitution declares that the navy is a unitary one, it not only creates an organic law, but records a condition actually existent. The navy has never been other than unitary. When the North German Confederation was formed in 1867, no State entering the Union, save Prussia, possessed a navy. When she became part of the new federal State, Prussia took her navy with her into the *Bund*, but the command over that navy remained still in the hands of the king of Prussia, where it had always been. This was not true of the army. Each member of the *Bund*, prior to the organization of the Union, had regarded itself as a sovereign State. Each had its own army, organized and

[1] See Laband, IV. p. 5. This is a hotly contested point in German constitutional law. Laband is stoutly opposed by Meyer, Zorn, Schultze, Brockhaus, and Bornhak. Comp. also Seydel, *Comm.* pp. 310 ff. (2d edition). See also Laband, *Archiv f. d. öff. Recht*, III. pp. 491 ff.; Gümbel, in Hirth's *Annalen*, 1899, pp. 131 ff., esp. 157 ff.; Auschütz, pp. 619 ff. in *Holzendorff-Kohler*.

equipped under its own laws. When they entered the North German Confederation, these States brought with them their armed forces and contributed them as contingents to the fighting strength of the Union. That the same principle of solidarity should obtain in both the army and navy is apparent. It is equally apparent that, so far as the German army is concerned, this principle has not been fully carried out. It cannot be denied that there is a *practical* unity in the army, but it is a different kind of unity from that which characterizes the organization of the navy. "The unity of the navy is an internal, indivisible one, set forth in the very idea and nature of it. The imperial army, on the contrary, is a collective unity. The 'unity' of the land forces of the Empire does not cancel the separate existence of the State contingents. It signifies simply the bond which holds these various contingents together."

The principle of unity in the military organization of the Empire is carried out in three ways: (1) by placing the supreme command, both in war and peace, in the hands of the Kaiser; (2) by introducing a uniform organization, equipment, and set of tactics in all the contingents; and (3) by meeting the expenses of the army out of the common treasury. From a military standpoint, as Laband concedes, the different contingents may be regarded as parts of a wholly unified army, but from the standpoint of constitutional law, which is the only point from which the jurist can view the matter, it is a fundamental fact that there is no imperial army; these words are simply a collective symbol under which the contingents of the several States may be comprehended.[1]

If it be true that the imperial army is but a name for the combination of the various contingents, what is the relation of the Empire to these contingents and what rights have the

[1] Laband, IV. p. 5.

several States over their own armies? The answer grows out of the nature of the Empire as a federal State. German jurists are generally agreed upon two points with respect to the nature of the Empire: first, the Empire is not a mere international arrangement based on contract, but a true State based on a constitution; second, the individual States, on entering into the federal relation ceased to be *sovereign*, but did not cease to be *States*.[1] In no department of their organization was sovereignty more completely lost than in military affairs. Each State has its own army, to be sure, but that army is recruited, organized, equipped, and drilled, not in conformity to rules and regulations laid down by the military authorities of the State, but the laws and ordinances of the Empire. The matter of liability to military service, the recruiting of the various contingents, the qualifications and duties of officers, the establishment of a criminal code for the army and the code of procedure in military trials, the maintenance of discipline, the whole arrangement of the military organization, the fitting out of the troops, etc., — all fall within the competence of the imperial legislation. The States, indeed, possess military supremacy formally, but the material content and extent of this supremacy are determined by the Empire.[2] The rulers of the several States are the heads of the various contingents, that is, the officers and men of the various contingents stand in a relation of immediate service to the ruler of the State to which their contingent belongs. They take the oath of allegiance to him and owe him their personal loyalty. Nevertheless, they are all under the supreme

[1] The "State-rights" theory, for which Max von Seydel fought so tenaciously and masterfully, is practically dead in Germany. A recent attempt to galvanize the corpse has been made by Von Jagemann, sometime member of the *Bundesrat* for Baden. See his book, *Vorträge über die deutsche Reichsverfassung*, Heidelberg, 1904.

[2] Laband, IV. p. 7.

command of the Emperor, as head of the united armed forces of the Empire, and, in taking the oath of allegiance to their own ruler, they swear obedience to the Emperor at the same time. The Emperor has the right of inspection at any and all times, and he may order the remedying of any defects which such inspection may discover. Further, in the administration of their own contingents, the States, while actually conducting the work of administration, must keep within the bounds set by imperial law, the command of the Emperor, and the amount assigned to them out of the general budget. Any balance which may remain after the expenses of the military administration of any State are paid, does not fall to the State, but flows into the imperial treasury.

It will be seen that two principles are at work in the military organization and administration of the Empire, the two principles which are always asserting themselves and seeking adjustment under the federal form of government, viz. the principle of *unitarianism*, or centralization, which is constantly aiming to gather the whole power of the State into the hands of the Empire; and the *federalistic* principle, or principle of State supremacy, which seeks to preserve to the individual members of the Empire the largest measure of independence and control compatible with the efficiency of the whole. The very necessities of effective military organization demand that the supreme power and control be located at a single centre and that all the members shall be subordinate to this central authority. To reconcile this demand, which is vital to any successful military organization, with the justifiable desire on the part of the States and their rulers to retain and assert their own supremacy, is a delicate task and presents the problem which the Imperial Constitution attempts to solve.

So far as Prussia is concerned there is no problem. The king of Prussia is the Kaiser of Germany. Commander-

in-chief of the Prussian contingent, he is also commander-in-chief of all the contingents by reason of the authority vested in him by the Imperial Constitution. In the very nature of the case, therefore, there can be no conflict and no fine question over the partition of power between king and Kaiser, between State and Empire. The theory is dissolved in the condition of fact. Or, as Laband puts it, the powers which are separated *quoad jus* flow together again *quoad exercitium*.[1]

The position of Bavaria, however, under the terms of the "November Treaty," mark a clear deviation from the theory of the Constitution. To Bavaria are conceded certain special privileges, reserved rights, with respect to the command and administration of her contingent. In this regard, Bavaria enjoys an independence beyond that contemplated in the theory of the Constitution. The division of powers between the Empire and the States set forth in that document suffers considerable modification in favor of the States. So far as the other States are concerned, leaving Saxony and Württemberg one side for the moment, the problem of reconciling the claims of the States with the demands of military organization has been solved by the action of the States themselves. By a series of conventions with Prussia, these States have ceded whatever powers may have belonged to them under the Constitution regarding military matters to the king of Prussia, and their contingents have been incorporated into the Prussian contingent. These military rights, it is noted, were not handed over to the Kaiser, but to the king of Prussia. The troops of these several States, therefore, did not become troops of the Empire, but an integral part of the Prussian army. In actual practice, it is only in Saxony and Württemberg that the theory of the partition of powers laid down in the Constitution finds

[1] The same is true in Alsace-Lorraine, where the Emperor exercises the supreme power of the State.

application. Even in these two States, this application has sustained some slight modifications through military conventions.

Whatever may have been the theory underlying the Imperial Constitution, so far as the actual facts are concerned, the armed force of the Empire is not made up of twenty-five contingents, one from each State in the Empire, but of *four contingents*, those of Prussia, Bavaria, Württemberg, and Saxony.[1] The fundamental principle on which the military organization constitutionally rests may be summed up in this sentence of Laband's, "To the Empire belongs the military organization and arrangement of the army, the supreme command in war and peace, the fixing of the requirements as to recruits and as to the budget of expenditures; to the States is left the formal supremacy over the contingents and self-administration."

From this brief sketch of the general principles on which the military organization of the Empire is based, we may proceed to a more detailed examination of the question: How are these principles carried out in the actual organization and administration of the armed forces of the Empire?

I. *The Navy.* — The German navy is an imperial institution pure and simple. Naval "contingents" do not exist, nor could they well exist from the very nature of things. At the erection of the North German Confederation, each State possessed an army of its own, but no State, save Prussia, could boast of a marine force. The Prussian navy, too, was more of a possibility than a fact. Such as it was, however, the navy of Prussia became the navy of the Union, but the supreme command over it remained in the hands of the Prussian king. From the very beginning, therefore, the naval

[1] For the historical reasons for this deviation of the facts from the theory of the Constitution, see the brief, clear statement in Laband, IV. p. 10.

force of Germany has been organized on a unitarian principle. The Constitution, Art. 53, recites a state of facts when it declares that "the navy of the Empire is a unitary one, under the supreme command of the Kaiser." With a logical regard for this state of facts, Art. 53 further provides that the organization and composition of the navy, as well as the appointment of officers and naval officials, shall fall to the Kaiser, and that the expenses incident upon the creation and maintenance of the navy shall be borne by the imperial treasury. The imperialistic nature of the navy thus comes into bold relief, and the competence of the Empire over against that of the several States is sharply defined. In naval matters, the powers of the Empire include not only that general right of legislation and supervision conceded to it by Art. 4 (14) of the Constitution, but the sum total of sovereign rights, legislative and administrative, and the right of legislation, is inclusive.[1]

The power to organize and control does not of necessity carry with it the power to create and maintain. The general authority with respect to naval matters, granted by the Constitution to the Kaiser, is not sufficient of itself to secure the creation and perpetuation of a complete naval system. The building and equipment of fighting ships require vast sums of money, and the maintenance of a sea-power necessitates a regular source of income devoted to that purpose. No authority is given to the Kaiser, under the Constitution, either to raise or to expend moneys. The Kaiser may command the navy when it is created, but he can neither create a navy nor support it after it is brought into being. The power to raise money and the power to appropriate it to public ends lie within the competence of the legislative bodies of the Empire. In the making of laws, however, both Kaiser and the legisla-

[1] Anschütz, *op. cit.* p. 620.

tive branch of the government take part. By making the organization of the navy a matter of law, an equilibrium is secured between the two factors essential to the development and maintenance of an efficient naval system; between the Kaiser, in whose hands the Constitution places the control and composition of the navy, and the *Bundesrat* and *Reichstag*, without whose consent a budget were impossible. The determination of the number and kind of ships, the fixing of the official roster, and the number of men in the naval service affect materially the determination of the budget. On the other hand, the determination of the budget affects materially the exercise of the authority in naval matters vested in the Kaiser by the Constitution.

It was not until the law of 10 April, 1898,[1] that adequate legislation was had on the organization of the navy. This law specified the number and class of ships, aside from torpedo boats, school ships, special ships, and gunboats, provided for the construction of vessels together with the required budget, regulated the matter of commissions and provided for officers and crews. In view of certain political and commercial conditions, this law was soon regarded as insufficient, and it was repealed by the law of 14 June, 1900, which provides for a larger sea force, and appropriates the funds necessary for its creation.[2]

The same general rules that prevail respecting the liability of German subjects to service in the army apply also to service in the navy. The entire seafaring population of the

[1] *RGBl.* p. 165; Triepel, p. 274. Prior to this date the "plans for the creation of a fleet," on which the budget estimates were made, had not force of law, and the provisions for the naval organization were contained in the "*Organisatorischen Bestimmungen für die kaiserliche Marine*," Berlin, 1888, granted by imperial decree of 14 June, 1888, and afterward much enlarged and amended. Laband, IV. p. 119, note 1.

[2] *RGBl.* p. 255; Triepel, p. 311.

Empire, including machinists and ship laborers, is liable for naval service. Those who are liable to service in the navy are exempt from liability in the army.[1] Further, the obligation to serve in the land forces of a State is fulfilled by service in the navy. Service with the fleet corresponds to service in the active army, while service in the naval reserves is equivalent to service in the land defence.

The Kaiser is supreme commander of the navy in law as well as in fact.[2] An "Admirals' Staff of the Navy" (*Admiralsstab der Marine*), with a staff commander at its head, has its seat in Berlin, and is immediately subordinate to the Kaiser, as are also the commanding officers of the naval stations, the commanding officers of the squadrons, and the Inspector of Naval Instruction. The administration of naval affairs is entirely distinct from what one might call the "hierarchy of command" in the navy itself.[3] This administration is carried on under the control of the Imperial Naval Office (*Reichsmarineamt*), at the head of which is a Secretary of State. The office is under the immediate control of the Imperial Chancellor, who is responsible for its acts. All naval officers and naval officials are appointed by the Kaiser. Officers and officials, as well as the men in naval service, take the oath of allegiance to the Kaiser,[4] not, as in the army,

[1] *RVerf.* Art. 53, Cl. 4.

[2] *Ibid.* 53, Cl. 1: "unter den oberbefehl des Kaisers." By imperial decree of 30 March, 1889 (*RGBl.* p. 47) the Kaiser announced that the "chief command of the navy shall be distinct from the administration of the navy, and shall be carried on under my orders by the commanding admiral appointed by me. The duties and rights of the commanding admiral shall correspond to those of a commanding general in the army." This arrangement was set aside by the Cabinet Order of 14 March, 1899 (*Marineverordnungsblatt*, p. 37), in which the Kaiser assumed the direct command himself.

[3] See Imperial Decree of 30 March, 1889, §§ 1 and 2. Also Decree of 17 March, 1893 (*Marineverordnungsblatt*, p. 37).

[4] *RVerf.* 53.

an oath of obedience merely incorporated in the primary oath of allegiance to the ruler of the State to which the individual belongs.

Naval service, therefore, is imperial service. No symbols indicating the supremacy of the particular States are recognized there. No ship floats any but the imperial flag. The standard of a State has no place at the masthead. All the apparatus of the navy, the fleet, the naval harbors, the docks and yards, etc., belong to the Empire. The naval fiscus is an imperial fiscus. The naval budget is part of the imperial budget. It is fixed and administered only by organs of the Empire. In the sphere of naval activity the individual States have no share, nor has the individual State a right to a sea force of its own. On the sea the armed force of the Empire is that of a unitary State.[1]

II. *The Army.* — When the twenty-two States of North Germany were united into the North German Confederation, Prussia contained 80 per cent of the total population and 85 per cent of the total area.[2] This preponderance of Prussia is a fact which must never be lost sight of in considering the development of the German Empire. It serves to explain arrangements which might seem unjust in a federation of States more nearly equal in political and economic significance. It makes clear certain seeming peculiarities in the military organization and administration of the Empire. Each State, on its entry into the North German Confederation, had an army of its own controlled by its own military laws. In comparison with the strength and the perfection in organization and equipment of the Prussian army, these

[1] Anschütz, *op. cit.* 620.

[2] The total population was, in round numbers, 30,000,000. Of this number Prussia contained 24,000,000 and Saxony 2,000,000, leaving the remaining 4,000,000 to be distributed between 20 States and free cities.

diminutive armies of the remaining States were of minor consideration, so far as fighting power is concerned.

Attention has been already called to the general principle that the armed force of a State, no matter what the form of that State may be, must be under the supreme control of the central government. Here the federal principle finds the least play. This fact was recognized in the Imperial Constitution when, in Art. 4 (14), legislation with respect to military matters was placed within the competence of the Empire. Prussia, however, could scarcely be expected willingly to expose her military organization and the system of legislation which had grown up touching military affairs to the varying moods of a legislative body, and put herself in a position where her splendid military arrangements could be changed against her will by a majority vote in the *Bundesrat* and *Reichstag*. Prussia's military prestige demanded, not only consideration, but conservation. To this end Art. 5, Cl. 2, gave to the *Praesidium* — the king of Prussia — a veto on all proposed legislation which effected a change in the existing order.

"The land forces of the Union shall constitute a uniform (*einheitliche*) army, which in war and peace shall be under the command of the king of Prussia."[1] This uniformity must naturally be gained by means of legislation. The framers of the Constitution of the North German Confederation recognized two facts: that the particularistic military arrangements of the individual States could not be continued if the federal army were to be made a complete unit, and that some provision must be made for guaranteeing this desired uniformity until such time as federal legislation could be had. It was perfectly natural that a provision of this kind be made in the Constitution. It was just as natural that the Constitution, in providing for the emergency, should turn to the

[1] *Bundesverfassung*, Art. 63, Cl. 1.

Prussian army as a model. That army had recently proven itself in a brilliant campaign. For an effective military organization no search need be made beyond the borders of Prussia. What more natural and more logical than the extension of the military law and military system of Prussia to the whole federal military organization, especially in view of the fact that the Prussian army itself constituted the far larger part of the whole fighting force of the Union? This is precisely what was done. Article 61 of the Constitution of the Union declares that "after the promulgation of this Constitution, the entire military legislation of Prussia, not only the laws, but also the regulations, instructions, and rescripts issued with reference to the execution, explanation, and extension of the same, shall be immediately introduced into the whole territory of the Union."[1] Upon the erection of the Empire and the revision of the Constitution made necessary thereby, this Art. 61 was changed merely by substituting the word "Empire" in place of the words "territory of the Union." The extension of the military legislation of Prussia and of the Union to the new States from the South on their entry into the Empire took place through certain military conventions: the convention with Hesse, for that part of her territory lying south of the Main, 7 April, 1867, Art. 2; the Treaties of Versailles, 15 November, 1870; and of Berlin, 25 November, 1870, with Baden and Württemberg.[2]

The position of Bavaria differs from that of the other

[1] The Military Church Rules are excluded.

[2] These treaties are found in *BGBl.* p. 650 ff., also in Triepel, pp. 82, 99. See also certain modifications in favor of Württemberg in military convention between the Union and Württemberg, dated Versailles, 21 November, 1870, and Berlin, 25 November, 1870 (*BGBl.* p. 658), Triepel, 102 ff. The introduction of the Prussian military law and the imperial law touching military matters into Alsace-Lorraine took place under the Law of 23 June, 1872 (*Gesetzblatt für El.-Loth.* p. 83).

States which entered the Union under the treaties of 1870. Bavaria enjoys certain special privileges on the basis of a rather long and explicit treaty made on 23d November, 1870.[1] By the express terms of this Agreement, Art. 61 of the Imperial Constitution does not apply to Bavaria, and the Prussian military legislation is not introduced into Bavarian territory. Bavaria retains the legislation and regulations respecting military affairs which were in force at the time of her entrance into the Empire. The general obligation to perform military service which is imposed by the Constitution upon every German subject[2] rests, however, upon every Bavarian subject by express stipulation in the Treaty of 23 November, 1870.[3] Further, the competence of Bavaria in military legislation suffers no restriction whatever in the treaty, but is full and complete. But while the Prussian military legislation does not extend to Bavaria under Art. 61 of the Imperial Constitution, all imperial legislation with respect to the army and navy does so extend under Art. 4 (14). That is to say, all legislation of the Union prior to the entry of Bavaria extends to that State only with her consent; all legislation subsequent to that time extends *ex proprio vigore* to Bavaria as well as to the other States of the Empire.[4]

It should be remarked, perhaps, that Art. 61, Cl. 1, of the Imperial Constitution does not enlarge the scope of Prussian legislative competence in military matters by giving Prussia

[1] See Treaty of 23 November, 1870 (*BGBl.* 1871, p. 5, also Triepel, 89 ff.), III. § 5.

[2] *RVerf.* Art. 57, 59.

[3] See Treaty, III. § 5.

[4] Juristically, therefore, the legislation of the Empire is uniform only so far as those laws are concerned which have been passed since the erection of the Empire. But while it is true that the Empire is divided theoretically into two spheres, the one governed by Prussian military law and the other by Bavarian law, yet in fact there is little variation, since the enactments of Bavaria practically conform to those of Prussia. See Laband, IV. p. 13.

the right to legislate directly for the whole Empire. The Prussian military law was introduced into the several States in accordance with the provision of the Imperial Constitution, not as Prussian law, but as the law of the respective States, *i.e.*, as an identical law of the several States. It differed from ordinary State legislation, however, in this respect: it could not be amended by the legislative bodies of the State. It had the force of imperial legislation, and denied to the several States the power to legislate in any manner in the field covered by the laws and regulations of Prussia. In other words, there was developed here an imperial legal unity in military matters, a provisory unity which the second clause of Art. 61 designed to have replaced by a definite and permanent unity through the codification of the military law of the Empire. This codification has not been effected by the enactment of a comprehensive imperial law, such as this clause intended, but piecemeal, by the enactment of a series of laws beginning with the Law of Military Service of 9 November, 1867, and extending to the Law of 25 November, 1899.[1]

Military Ordinances. — Military affairs may be regulated in three different ways: by formal law, by ordinance, and by express command. The distinction between law and ordinance need not here detain us. A command is an order issued directly by a superior officer to his subordinate, and differs from a law or an ordinance — which are also "orders" — in that it requires for its validity the counter-signature of no minister who shall assume the responsibility therefor.

Art. 4 (14) declares that military affairs fall within the legislative competence of the Empire. No limitation is laid upon this competence, either with respect to the army or navy, nor is the field divided in such wise that the sphere of law is distinguished from that of ordinance. Art. 61, Cl. 2,

[1] Anschütz, *op. cit.* 62.

speaks of a comprehensive military law for the Empire, which law shall be laid before the *Bundesrat* and the *Reichstag*. This clause, however, covers the field of legislative competence only so far as the enactment of a formal law is concerned. It neither includes nor excludes the sphere of ordinance. Further, Cl. 1 of the same article, which extends the Prussian military legislation to the whole Empire, speaks expressly, not only of laws, but also of the various *ordinances*, regulations, etc., and declares that the *ordinances* respecting ecclesiastical affairs in the army shall not be included. Article 61, Cl. 1, does not raise all these Prussian laws, ordinances, instructions, etc., to the same level of imperial *laws*. It merely extends their operation in the character they already possess, whether law or ordinance or other, to the whole Empire. It has no direct bearing on the question as to what matters shall be regulated by law and what by ordinance.

In default of an explicit definition of the matter in the Imperial Constitution, the general principles of constitutional law must be applied. Laband [1] lays down two legal dogmas with respect to determining the boundaries of the right to issue ordinances: (1) An administrative ordinance is operative only within the sphere of administration and can regulate, therefore, only the *interna* of the military and naval administration. As soon as a provision lays upon the subjects in general, or upon certain classes of them, or upon the Communes, Corporations, railroad contractors, etc., obligations respecting the armed forces, or interferes in judicial matters, the taxes, or the communal organization, and so on, then so far as its material content is concerned, this provision ceases to be a *res interna* of the military or naval administration. As a rule such regulation should take the form of law. (2) Administrative regulations may be issued in the form of

[1] Laband, IV. pp. 16, 17.

law and thereby receive the force of law, *i.e.*, they cannot be repealed or amended by a mere ordinance but only through formal legislation. In so far, therefore, as an imperial law contains regulations of matters ordinarily falling within the sphere of ordinance, the issuance of ordinances in conflict therewith is not permissible, even though the subject-matter concern only the internal administration of the army or navy.

Who may issue military ordinances? [1] That the *Bundesrat*, in certain circumstances, may issue military ordinances is beyond dispute. The provisions of Art. 7, Cl. 2, which grant to the *Bundesrat* the power to issue such general administrative regulations as may be required in carrying out an imperial law, suffers no restriction as to the subject-matter of such regulations. They may apply to military laws as well as to others. The only limit on the power of the *Bundesrat* to pass such ordinances is laid down in Cl. 2 itself, in the words, "so far as is not otherwise determined by imperial law." The authority vested in the *Bundesrat* by Art. 7, Cl. 2, is confined to the issuance of ordinances required to carry out an imperial law. It does not cover that vast field of military and naval affairs which is not regulated by imperial law. Here the right of the *Bundesrat* to interfere by way of ordinance for any purpose whatever is excluded.

To whom, then, does the ordinance power belong in such matters? So far as the navy is concerned, there is little difficulty in answering the question. From the very nature of the naval organization under the Imperial Constitution, such ordinances issue from the Kaiser or from the imperial authorities.[2] When, however, the power to issue ordinances

[1] See the excellent article by Hecker in Stengel's *Wörterb.* I. p. 64.

[2] This may be inferred from Art. 53, Cl. 1. See also Laband, IV. p. 18. On this point there is general agreement among the German writers on constitutional law.

for the army is discussed, a difference of opinion is immediately developed among the German jurists. This difference of opinion is due to the conflicting theories concerning the nature of the army. For the answer to the question as to whether the imperial army is unitary or simply uniform, in other words, whether there is an *imperial* army in fact or simply a combination of contingents, affects radically the answer to the question as to the location of the ordinance power. If the army is a unitary one rather than a merely uniform one, then the Emperor is empowered to issue ordinances for the army as well as for the navy. That he is, in any case, empowered to issue commands and orders in his capacity of commander-in-chief is, of course, understood. If, on the other hand, the army is not unitary, but uniform, not a unit, but made up of contingents,—a "*Kontingentsheer*," —then the power to issue ordinances for it does not fall logically to the Emperor as is the case with the navy. It must lie elsewhere. This is the position of Laband, also of Anschütz. The argument which Laband advances in support of his contention is here reproduced.

1. When a matter is regulated by *imperial law*, the right of the *Bundesrat* to issue ordinances necessary to the carrying out of such law, as recognized in Art. 7, Cl. 2, of the Imperial Constitution, finds application so far as the law itself makes no provision otherwise.[1]

2. The exercise of the *Bundesrat's* power to issue ordinances under Art. 7, Cl. 2, of the Constitution is made

[1] In actual practice the law does provide otherwise, assigning the power to issue the required ordinances to the Kaiser, and for Bavaria, to the king of Bavaria. For list of such provisions see Laband, IV. p. 18, note 2. These ordinances are issued by the Kaiser as head of the Empire, not as king of Prussia, and are countersigned by the Imperial Chancellor and published in the proper imperial "*Blatt*." By reason of this publication they acquire binding force in all the Empire except Bavaria. Laband, IV. pp. 18, 19, note [1].

contingent upon the enactment of an imperial law, to the execution of which such ordinances are necessary. When the North German Confederation was formed, no such legislation existed on military affairs, save what was contained in the Constitution itself. In view of the demand for a uniform military organization, it was impossible to continue in force the multiform military legislation of the several States or to permit the issuance of military ordinances at the discretion of the different rulers. It seemed to be the best expedient, though merely a provisory arrangement, to extend the existing Prussian military legislation over the whole federal territory, until such time as the matter could be taken up and covered by a comprehensive imperial law. For this reason Art. 61, Cl. 1, provides that "after the promulgation of this Constitution, the entire Prussian military legislation, not only the laws themselves, but also the regulations, instructions, and rescripts issued for the execution, explanation, or extension of the same, shall be introduced without delay in the whole Empire."[1] The phrase "Prussian military legislation" was intended to be comprehensive, including both formal military laws and military ordinances.[2] The Constitution, however, failed to state how this legislation should be made operative in the whole Empire, *i.e.*, by what method the legislation of Prussia on military matters should become effective for the rest of the imperial territory. Three theories have been advanced. According to one view, Art. 61, Cl. 1, is a command directed to the several States. This is Hänel's position.[3] A second view, held originally by Seydel[4] and

[1] With the entire exclusion of Bavaria and the partial exclusion of Württemberg.

[2] See speech of Von Roon in *Reichstag* debate on draft of Constitution, *Sten. Ber.* p. 581. Also in Bezold, II. pp. 384, 385.

[3] Studien, II. p. 70.

[4] *Comm.* 1st edition, p. 233. Hirth's *Annalen*, 1875, p. 1418. Cf. *Comm.*, 2d edition, p. 328.

supported by Georg Meyer,[1] maintains that the command is issued to the *Bundespraesidium*, while according to the third view, that of Arndt,[2] the command was laid upon both, *i.e.*, it is a matter of indifference whether the Prussian legislation on military matters is introduced by the several States or by the king of Prussia as *Bundespraesidium*, the important thing being its introduction. The position of Laband is identical with that of Hänel. If it had been the intention, he argues, to introduce the Prussian military legislation into the whole Empire by imperial action, the Constitution would have made an immediate declaration to that effect, and would not have limited itself to the mere order that this legislation "is *to be* introduced."[3] Had the Constitution intended to leave the introduction of this legislation to the discretion of the *Bundespraesidium*, there would have been no sense in prescribing its introduction without delay and, at the same time, specifying in detail what was to be introduced. Nor is it easy to see why the competence of the Emperor was not expressly mentioned in Art. 61, Cl. 1, if it was the intention to recognize it. On the other hand, if the introduction of the Prussian military legislation was laid as a duty upon the several States, then the wording of Art. 61, Cl. 1, is correct and it makes good sense as well.[4]

[1] In Hirth's *Annalen*, 1880, p. 340.

[2] *Verordnungsrecht*, pp. 126 ff., *Staatsrecht*, p. 459.

[3] The original draft of the Constitution, submitted by Prussia, ran: "the entire military legislation of Prussia, etc., *is introduced*." This wording was, therefore, purposely amended so as to read: "is to be introduced without delay."

[4] In actual practice both the *Bundespraesidium* and the several States have been considered competent to publish "*Einfuhrungsverordnungen*." See Laband, IV. p. 20, note 6. The question has no permanently practical value, owing to the temporary character of the provisions of the Article under discussion. It is of interest only as it touches the general theory underlying the organization of the army.

3. Article 61, Cl. 1, relates only to such legislation and regulation as was in force at the time the Constitution was published. It does not carry with it the application of any future legislation by the Prussian authorities affecting the Prussian army. Nor does this article guarantee, therefore, a permanent uniformity in the military organization and administration. In order to insure such a permanent uniformity, the introduction of the future legislation and regulations of the Prussian army must be provided for.[1] To this end, Art. 63, Cl. 5, makes the following declaration, "For the sake of maintaining the indispensable unity in the administration, provisioning, arming, and equipment of all the troops of the German army, the orders for the Prussian army with respect to these matters, which shall be issued in the future, shall be communicated to the commanders of the other contingents by the Committee on the Army and Fortifications, for their proper observance." Thus the ordinance power of the various rulers, as heads of their contingents, is preserved, and at the same time uniformity in the military arrangements is secured. While, therefore, the issuance of military ordinances is still the prerogative of the several rulers, yet the Emperor stipulates what the material content of those ordinances shall be. If, now, the Emperor possessed the ordinance power for the whole imperial army, there could be no "orders for the Prussian army" at all in the connection considered in Art. 61, but orders for the imperial army only, and these would be effective *ipso jure*, without requiring the interposition of the federal committee to communicate them to the commanders of the several contingents, for their proper observance. "If Art. 63, Cl. 5, would insure 'indispensable unity' it cannot proceed from the standpoint that the ordi-

[1] Of course uniformity would be secured by imperial legislation, but this would not reach the great body of matters outside the legislative field.

nance power belongs fundamentally to the Kaiser, since, in that case, an endangering of the unity would be quite unthinkable."[1] The express prominence given to the fact that the orders are issued as orders for the Prussian army, and the specific distinction of the Prussian army from the remaining contingents, show that we are dealing here with orders issued by the king of Prussia as head of the Prussian contingent, not by the Kaiser as such. For what need of the mediation of the federal committee, in order to make these orders effective in the other contingents, if they are issued by the Kaiser, and within his competence, for the one, indivisible imperial army? The notion that the committee, in transmitting these ordinances to the several commanders, acts under commission of the Kaiser, contradicts both the Constitution and the actual status. The committee is made up of deputies of the rulers, particularly of the heads of contingents. The transmission of these ordinances to the committee is therefore a communication of them to the rulers and governments, imposing upon the latter the obligation to carry these matters through. The Constitution proceeds on the hypothesis that every ruler is at the same time head of a contingent. In order to avoid the roundabout route which the communication of the Prussian ordinances to all these rulers would necessitate, the federal committee was intended to serve as an intermediary, or means of forwarding these ordinances handed over to it. But after almost all the contingents had annexed themselves, by military conventions, to the Prussian contingent, there was no need more for this medium of communication.[2] In Württemberg, which still preserves its own contingent, by the military convention already referred to, Art. 15, a direct

[1] Hecker, article "*Armeebefehl und Armeeverordnung*," in Stengel's *Wörterbuch d. D. Verwaltungsrechts*, I. p. 64.

[2] See Gümbel, *op. cit.* p. 162.

exchange of documents between the War Ministry of Prussia and that of Württemberg was agreed upon. By this means the Württemberg Ministry of War was to receive all the rules, etc., then in force or later issued for their execution. This same method was also actually followed in the case of Saxony. The mode recognized by the Constitution did not import the issuance of ordinances by the Kaiser with binding force for the whole German army, but the Constitution does say, in effect, that all the heads of contingents are in duty bound to make all the orders issued to the Prussian army and brought to their notice by the king of Prussia, in due manner, effective for their own troops.[1] The exclusive right of the Kaiser, therefore, to issue military ordinances is maintained neither in the Imperial Constitution, where the military powers of the Kaiser are enumerated, Art. 63, Cl. 3 and 4, and Art. 64 ff.; nor is it recognized in the Military Law of 2 May, 1874, in §§ 7 and 8 of which the power to issue certain orders is handed over to him.

The actual procedure bears out what has been said. The ordinances do not issue in the name of the Empire, nor are they countersigned by the Imperial Chancellor, but by the Prussian Minister of War. Only when they affect the budget are they doubly signed, — by the Imperial Chancellor, for the financial administration, and by the Prussian Minister of War, for the "Commando-board." Further, these ordinances are not published in the Imperial Gazette, but in the Prussian *Armeeverordnungsblatt*. In Saxony and Württemberg, likewise, they are published in the *Armeeverordnungsblatt* of those States, — not as a proclamation of the Kaiser, nor of the federal committee, nor of the commanding general, but, precisely as in Prussia and Bavaria, by the ruler

[1] See Hänel, *Studien*, II. p. 70; Seydel, *Comm.* p. 360; Hecker, *op. cit.* p. 64.

of the State or by the Minister of War at the ruler's command. There is no Imperial Army Gazette for the Empire, but only the Official Army Gazette of the four States which have maintained their contingent system — a clear indication that there are also just so many ordinance-issuing powers.[1]

4. Those States whose contingents have been incorporated in the Prussian army through the military conventions, have also handed over to the king of Prussia the exercise of their right of issuing military ordinances. Article 63, Cl. 5, has no application to these States.[2]

So far as Bavaria is concerned, the application both of Art. 61 and of Art. 63, Cl. 5, is excluded. The introduction of those laws and regulations published prior to the entry of that State into the Union is made dependent on "free agreement," *i.e.* on the decision of Bavaria herself. The exercise of the ordinance power belongs to the king of Bavaria, both as to form and matter. Bavaria has specially reserved the right to conform to the practice of the other federal troops as to arms, equipment, and insignia of rank. In short, Bavaria is guaranteed the right of self-determination in these matters. On the other hand, Bavaria is obligated to conform completely to the norms laid down for the other federal troops with respect to the organization, formation, instruction, and fees, as well as to mobilization.[3]

[1] See also here Laband, IV. p. 23, note 2.

[2] Nor to Alsace-Lorraine, where the exercise of the rights of head of the contingent belongs to the Kaiser.

[3] See Treaty of 23 November, 1870, III. § 5 (1) and (3). Also the *Schlussbestimmung* to *Abschnitt* XI of the *RVerf.* The military ordinances of Bavaria are published in the *Verordnungsblatt des königl. bayerisch. Kriegsministerium.*

The Supreme Command over the Armed Forces of the Empire [1]

While military commands (*Armeebefehle*) and military ordinances (*Armeeverordnungen*) both fall within the general category of orders issued in the regulation of service, and both find their legal binding force in the obligation to obey which rests upon all who assume, in any capacity, a part in the public service, yet there is a sharp distinction to be drawn between the two forms of command, a distinction which has occasioned no little debate among writers on German constitutional law. It is a fundamental principle in all monarchical governments, that is, in all constitutional monarchies, that all acts done by the head of the State, acting in an official or governmental capacity, require for their validity the countersignature of a minister, who thereby assumes responsibility for them. Military ordinances are not exempt from this general rule. They, too, require the signature of a responsible minister.[2] Military commands, however, are not so countersigned. The reason for this difference of treatment grows out of the fact that while military commands and military ordinances are special or general orders within the sphere of military administration — using the word "administration" here in its widest sense, — yet they flow from different powers. In the one case, they proceed from the ruler in the direct exercise of his functions as *commander of the army*. They are military commands in the strict sense. In the other case, while they issue from the ruler also, yet it is not from the ruler in his

[1] This subject is thoroughly discussed by Gümbel in Hirth's *Annalen*, 1899, pp. 157 ff.

[2] This is true also in Prussia, where the matter is regulated by the Proclamation of 18 January, 1861 (*Min. Bl. für die innere Verwaltung*, 1861, p. 73). See also Hecker's article in Stengel's *Wörterbuch*, I. p. 63; Laband, IV. p. 33.

capacity as head of the army, but rather as head of the *Government*. These orders, therefore, issued in the sphere of administration in the narrower sense, are military ordinances.[1] As such they must be countersigned by a responsible minister, like other governmental acts.

The same principle holds also with respect to the Empire and the powers of the Emperor. Some confusion is apt to arise from the fact that the wording of the present Constitution does not sufficiently indicate certain distinctions brought out in the Constitution of the North German Confederation, of which the present Constitution is a revision. Article 17 of the Constitution of the North German Confederation, — the last sentence of the article, — reads, "The orders and decrees of the *Bundespraesidium* require for their validity the counter-signature of the Chancellor," etc. Here the *Bundespraesidium* acted in a governmental capacity. Article 63, on the other hand, dealing with the military system of the *Bund*, declares that "the total land force of the Union shall constitute a single army, which, in war and peace, stands under the command of the king of Prussia as commander-in-chief of the *Bund* [*Bundesfeldherr*]." Article 53 reads: "The navy is a united one, under Prussian supreme command," the organization, etc., being given over to the king of Prussia. In the use of these different expressions — "*Bundespraesidium*," "*Bundesfeldherr*," and "*König von Preussen*," — which are employed throughout the Constitution of the North German Confederation, the various functions of the head of the *Bund*, whether acting in a governmental capacity or as supreme commander of the armed

[1] Army orders which contain matters affecting the budget and those which affect other branches of the military administration, take thereby the character of military ordinances and are to be so treated. Hecker, *op. cit.* p. 63. See also Gneist, *Verwaltung, Justiz, Rechtsweg.* p. 258.

forces, are clearly differentiated. The Constitution demanded the countersigning of all the acts of the *Bundespraesidium* by the Chancellor of the *Bund*. Nothing of the sort was required for the acts of the *Bundesfeldherr*, although the acts of the *Bundespraesidium* and the acts of the *Bundesfeldherr* were acts of one and the same physical person. In the revision of the Constitution of the Confederation, at the time the Empire came into being, the word "Kaiser" was everywhere substituted for the words "*Bundespraesidium*," "*Bundesfeldherr*," and "*König von Preussen*," in order to make the phraseology of the Constitution conform to the new conditions. In making these changes in the wording of the Constitution, there was not the slightest intention of making any amendment to the substance of that instrument. No change in the constitutional law of the Union was contemplated by the revision,[1] nor was the idea entertained of requiring the signature of the Imperial Chancellor to those military orders with respect to which no such regulation had hitherto existed either in the Prussian or federal law.[2] Just as little did the substitution of the word "Kaiser" for the word "*Bundespraesidium*" release the governmental acts of the Kaiser from the operation of Art. 17 of the Constitution of the North German Confederation. In fact, the counter-signature of the Chancellor as required by that article was expressly retained in the revised Imperial Constitution. The present status, therefore, is this: all orders issued by the Kaiser, acting in a *praesidial* capacity, even though they touch military matters, must be countersigned by the Imperial Chancellor. All orders issued in his character of commander-in-chief — *Bundesfeldherr* — do not need such counter-signature for

[1] See debates of the constituent *Reichstag*, especially the speech of Lasker and that of Bismarck, *Sten. Ber.* p. 95.

[2] Laband, IV. p. 33. Cf. also *id.* I. pp. 193 ff.

their validity. The decisive point is not the form in which these orders are issued nor the officials to whom they are issued, but the character in which the Kaiser is acting in the issuance of such orders.[1]

The Kaiser does not stand in the relation of a monarch to the German people or to the imperial territory. The doctrine of monarchical government, that the head of the State is bearer of the power of the State, — *Träger der Staatsgewalt*, — with its various implications, does not apply to him. Nevertheless, under the Imperial Constitution, the Kaiser is vested with a very important part of the State's power, the power of supreme military command, — the *Kommandogewalt*, — and he exercises this power under special provisions of the Constitution, independently of his rights and authority as the incumbent of the praesidial office. If political science demands that, as president of the *Bund*, he be subjected to a certain restraint through the necessity of the counter-signature of all his governmental acts by a responsible minister, military science no less demands that as commander-in-chief of the imperial forces he be given wide latitude, and be exempt from that restraint which would follow the assumption, by another, of official responsibility for his orders and commands.[2]

The rights and duties of the Kaiser, which grow out of his power of supreme military command, may be summed up as follows: —

I. *The right to obedience on the part of all the German troops.* This right is expressly laid down in Art. 64, Cl. 1, of the Constitution: "All German troops are bound (*verpflichtet*) to

[1] Brockhaus, *op. cit.* p. 82, makes the curious statement that "ordinances are commands *with* counter-signature, commands are ordinances *without* counter-signature." Failing, however, to lay down any norm by which one may decide when orders are to be countersigned and when not, his dictum is absolutely worthless.

[2] Laband, IV. p. 35.

obey the commands of the Kaiser. [The word was *Bundesfeldherr* in the constitution of the North German Confederation.] This obligation is to be assumed in the military oath [*Fahneneid*]."

II. *The right of appointing the highest commanding officers of the contingents.* This right is conferred by Art. 64, Cl. 2, of the Constitution: "The highest commanding officers of a contingent, as well as all officers who command more troops than a contingent, and all the commandants of fortifications, are appointed by the Kaiser [*Bundesfeldherr*, in the constitution of the North German Confederation]. The officers appointed by him to take the oath of fealty to him [*Fahneneid*]. The appointment of generals or of officers performing the duties of generals, shall, in every instance, be subject to the approval of the Kaiser."[1]

III. *The right of inspection.*[2] It is the duty and right of the Kaiser to see to it that the armed forces of the Empire are properly organized, equipped, and instructed. In the language of Art. 63, Cl. 3, of the Imperial Constitution: "It shall be the right and the duty of the Kaiser to see that throughout the German army all divisions have their full numerical strength and are fit for active service; that uniformity is established and maintained with respect to the organization and formation, the equipment and command, the training of the men and the qualifications of the officers.

[1] Art. 5 of the military convention with Württemberg, 21–25 November, 1870, reads: "The appointment, promotion, and transfer of officers and officials in the Württemberg army corps shall take place through His Majesty, the King of Württemberg; in the case of the highest commanding officers, after the consent of His Majesty, the King of Prussia, as *Bundesfeldherr*, has been previously obtained."

[2] See article of Gümbel, already cited, pp. 157 ff. So far as Prussia and the contingents incorporated with it by military conventions are concerned, this right belongs to the king of Prussia as *Kontingentsherr*, irrespective of this clause in the Imperial Constitution.

To this end the Emperor is authorized to satisfy himself at any time, by inspection, as to the condition of the several contingents, and to order the cure of all defects thereby discovered."[1]

IV. *The right to determine the effective strength of the army, and the division and classification of the contingents.* This right is based on Art. 63, Cl. 4, of the Imperial Constitution: "The Kaiser shall determine the effective strength, division, and classification of the contingents of the German army, as well as the organization of the land defence [*Landwehr*]." Certain limitations have been placed upon the exercise of this right by the provisions of the military law and the additions made to it.

(1) With respect to the standing army in time of peace, the authority of the Kaiser extends only to those "tactical and administrative units, as well as to those special formations," which are not mentioned in the military law.[2]

(2) While the Emperor has the right to determine the organization, division, and classification of the land defence,

[1] "Since all the troops must render unconditional obedience to the Kaiser, it follows that these orders may issue directly and immediately from the Kaiser to the respective officers and officials of the troops. It has been agreed, however, by military convention with Saxony, Art. 4, Cl. 2, and with Württemberg, Art. 9, Cl. 2, that the Kaiser shall communicate the criticisms resulting from his inspection to the kings of Saxony and of Württemberg respectively, who, on their part, are pledged to cure the defect and inform the Emperor of the same. By this means, the collision which might arise from the distinction between the right to issue military ordinances and to issue military commands is avoided. With respect to military commands, the principle holds that the Emperor fixes the material content of the order and the formal issuance takes place through the king. In the other States which have bound themselves to Prussia such a collision is impossible, since the Emperor exercises the rights of *Kontingentsherr*." Laband, IV. p. 36, note 3.

[2] In the military agreements with Saxony, Württemberg, Hesse, the two Mecklenburgs, Baden, Oldenburg, the Thüringian States, Anhalt, and Braunschweig, certain agreements are drawn up with respect to the formation of the individual contingents.

yet § 5 of the Military Law of 1874, — revised wording of 25 March, 1899, — lays down the principle on which the land defence shall be organized. "The territory of the German Empire shall be divided, so far as military affairs are concerned, into 22 army corps districts. . . . As a basis for the organization of the land defence, as well as for the purpose of increasing the army, these army corps districts shall be divided into division and brigade districts, and these again, according to area and population, into land defence and control districts." Aside from the provisions of this Section, the authority of the Kaiser in this matter is not limited.

(3) "The Emperor determines the war formation of the army as well as the organization of the *Landsturm* [last reserve].[1] Here the law imposes no limitation upon the Kaiser.

(4) According to Art. 53, Cl. 1, of the Constitution, the Kaiser has also a free hand in the organization and constitution of the navy, except in so far as the budget law lays upon him certain restrictions in time of peace.[2]

V. *The right of "dislocation."* By authority of Art. 63, Cl. 4, of the Constitution, the Kaiser may determine the garrisons within the federal territory. In the exercise of this right, the Emperor may assign parts of the several contingents to garrison duty outside the bounds of their own State. The military conventions concluded with the various States, however, have contained certain stipulations covering the matter.

(*a*) It is guaranteed to several of the States that so long as peace exists their troops shall remain in their own territory.[3]

[1] Military Law, § 6 (*RGBl.* p. 45).

[2] See Law of 10 April, 1898 (*RGBl.* p. 165), and Law of 14 June, 1900 (*RGBl.* p. 255).

[3] Convention with Saxony, Art. 5. If the Kaiser considers a transference of the Saxon troops called for by the interest of the country, such disposition of the troops may be made on agreement with the king of Saxony. The

The disposition of the Saxon and Württemberg troops within their own boundaries belongs to the kings of the respective States as heads of the contingents (*Kontingentsherren*).

(*b*) Some of the States are assured that unless the military or political interests specially demand it, the troops of other contingents shall not be assigned to garrison duty within their territory.[1]

(*c*) Other States have been guaranteed the assignment of Prussian garrisons to certain places within their borders.[2]

VI. *The right of mobilization*, that is, the right, under Art. 63, Cl. 4, of the Constitution, to order any part of the whole German army to put itself in readiness for war. This includes the calling out of the reserves, both the land defence and the sea defence, as well as the *Landsturm*, if necessary.[3]

So far as Bavaria is concerned, the legal provisions touching the rights and duties of the Kaiser have no force. This fact is expressly recognized in the "Final Resolution" appended to Sec. XI. of the Imperial Constitution.[4] The troops of Bavaria are pledged to obey the commands of the Emperor

assignment of the Württemberg troops to fortifications outside of Württemberg, unless to those of South or West Germany, can take place only with the consent of the king of Württemberg, Convention with Württemberg, Art. 6. See also Convention with Hesse, Art. 6; Baden, Art. 4; Oldenburg, Art. 4, Cl. 2; Thüringian States, Art. 2; Anhalt, Art. 2.

[1] Saxony, Military Convention, Art. 5; Württemberg, with exception of Ulm, Art. 6; Hesse, with exception of Mainz, Art. 6; Baden, with exception of Rastat, Art. 4; Oldenburg, with exception of city of Birkenfeld, Art. 4, Cl. 2.

[2] Convention with Schwarzburg-Sonderhausen, Art. 2; Lippe-Detmold, Art. 2; Schaumburg-Lippe, Art. 2; Lübeck, Art. 2, 3; Hamburg, Art. 2, 3; Bremen, Art. 3, 4; Waldeck, Convention of 1877, Art. 2.

[3] According to § 6, Cl. 1, of the Military Law of 2 May, 1874, the Kaiser is empowered to take such measures, even in time of peace, as may be necessary to put the army speedily on a war footing, should it seem demanded by the conditions.

[4] This "Final Resolution" provides that the terms of the Imperial Con-

only in time of war.[1] In time of peace they remain under the exclusive command of the king of Bavaria. Not until the mobilization of the troops has begun does the supreme military command of the Emperor extend to the Bavarian soldiery.[2] But, says Laband, one must not conclude, from the fact that in war the Emperor exercises the right of supreme command over the Bavarian troops, that therefore the Bavarian contingent in time of war constitutes an indistinguishable part of the imperial army, and that all the military rights of the king of Bavaria are fully suspended.[3] For time of peace, the Treaty of 23 November, 1870, lays down certain provisions designed to secure the uniformity of the imperial army so far as the Bavarian contingent is concerned, and at the same time guarantee the rights of the king of Bavaria.[4] These provisions declare that the Bavarian contingent shall constitute a part of the German federal army, complete in itself, with an independent administration, under the military supremacy of His Majesty, the king of Bavaria. With respect to the organization, formation, instruction, and fees, as well as to the preparedness of the troops for mobilization, Bavaria shall bring her army into full harmony with the standards adopted for the federal army. Further, the right and duty of the "*Bundesfeldherr*" to satisfy himself, by means of inspection, that the Bavarian contingent is up to its full numerical strength, that it is ready for active service, and that its organization, etc., harmonize with the rest of the federal army are ex-

stitution touching military affairs shall be applied to Bavaria in conformity to III. § 5, of the Treaty of 23 November, 1870. Section 5 expressly declares that "Arts. 61 to 68 of the Imperial Constitution have no application to Bavaria."

[1] See Treaty of 23 November, III. § 5 (IV).

[2] Treaty of 23 November, III. § 5 (III), Cl. 1.

[3] See discussion by Laband, in *Archiv f. d. öff. Recht*, Bd. III. p. 528.

[4] Treaty of 23 November, 1870, III. § 5 (III).

plicitly recognized. So far as the method of carrying out this inspection is concerned, and with respect to the cure of any defects which may be discovered, the Emperor is to come to an understanding with the king of Bavaria. It follows also from the terms of the treaty that the Kaiser cannot exercise his right of inspection without the consent of the king of Bavaria so far as the Bavarian troops are concerned, and that there is no obligation upon the king of Bavaria to cure the discovered defects, except in so far as these defects may touch the organization, formation, etc., of the troops, as noted above. In other words, the obligation is limited to the terms of the treaty affirmatively expressed.[1] The mobilization of the Bavarian army, or any part of it, is ordered by the king of Bavaria, at the instance of the "*Bundesfeldherr*." By the terms of the treaty the king of Bavaria cannot refuse to issue such an order, and on its issuance, the Bavarian troops pass under the control of the Kaiser as commander-in-chief of the German army.

VII. *The right to declare martial law, or the introduction of military rule*, is granted by Art. 68 of the Imperial Constitution, in the following words: "If in any part of the federal territory the public safety is threatened, the Emperor may declare the same to be under martial law. Until the publication of an imperial law regulating the conditions under which such declaration may be made, the form of announcement, and the effects of the same, the provisions of the Prussian law of 4 June, 1851 (*G.S. für 1851*, pp. 451 ff.) shall be in force." [2] By the terms of this article the Kaiser, in his character of com-

[1] Laband, IV. p. 40.

[2] From the fact that this article occurs in Sec. XI of the Constitution, which bears the title "Imperial Military Affairs," and from the further fact that, according to the wording of the Constitution of the North German Confederation, this right was given to the *Bundesfeldherr* and not to the *Bundespraesidium*, it may be safely concluded that this right, under the Constitution,

mander-in-chief of the federal army, has the exclusive right to declare any part of the federal territory to be under military rule, has the exclusive right, that is, under certain conditions, to establish what virtually amounts to a military dictatorship. So far as it determines the conditions under which this may be done, the form of announcement and the effects thereof, the Prussian Law of 4 June, 1851, becomes, for the territory affected, imperial law.

By the terms of this Prussian law, martial law may be declared (*a*) in case of war, in those parts already invested by the enemy or threatened with such investment; (*b*) in case of an insurrection, whether in war or peace, when there is pressing danger to the public safety.[1] In either case it is the Kaiser who decides whether the conditions exist which justify the declaration of martial law. The State governments have no right either of assent or of dissent, nor is the question to be submitted to the action of *Bundesrat* or *Reichstag*, as falling within such jurisdiction or competence as they may claim under the Constitution or laws of the Empire.[2]

The ordinance of the Kaiser declaring martial law must be published in the Imperial Gazette. Further, it must be brought to the general knowledge of territory affected, and in all the communes thereof. This proclamation must take place "without delay" and in the following manner: by reading the ordinance aloud, accompanied by drum beat or the

flows out of the supreme "Commando-power" of the Kaiser and is part thereof. Laband, IV. p. 40.

[1] Prussian Law of 1851, Secs. 1, 2.

[2] Laband, IV. p. 41. See also Article by Seydel, in Stengel's *Wörterbuch*, I. pp. 158 ff., on the "*Belagerungszustand*." The ordinances of the Kaiser need the counter-signature of the Imperial Chancellor and are to be published in the *RGBl.* Military commanders and civil authorities cannot declare a state of siege. Seydel, *op. cit.* p. 159; Hänel, *Staatsrecht*, I. pp. 442, 443.

blast of trumpet, *and* either by a notice communicated to the officials of the commune, by placards in public places, or by publication in the public print. Such proclamation *must* be made with drum beat or trumpet blast, and *must* be accompanied by *one* of the three other forms of announcement. It is not necessary, though it is permissible, to use all three modes of supplementary notification. The raising of a state of siege is also effected by ordinance of the Kaiser, and is brought to general knowledge through notices addressed to the communal authorities and through the public print.[1]

The effects of the proclamation of a state of siege are as follows: (1) "With the declaration of martial law, the executive power passes to the military commander. The civil administrative authorities and the communal authorities have to obey the orders and mandates of the military commander. The military commanders are responsible personally for their respective military orders." [2] In other words, the civil authorities become subordinate to the military commanders and act as their executive organs.[3] The orders of the commanders are to be carried out without regard to their permissibility under the law, nor is the question of such legality to be raised. In yielding the implicit obedience required, the civil and communal authorities are released from all responsibility for the legality of the measures executed.

(2) All military persons, during the period of the military

[1] Prussian Law, 1851, § 3 ; Seydel, *op. cit.* p. 159.

[2] Hänel, *op. cit.* I. 439, says: "With the declaration of a state of war on the part of the Empire, the executive power, in the sense and to the extent in which, according to the Prussian law, it passes over to the military commander, passes from the individual state to the Empire, from the individual ruler to the Kaiser. For the Kaiser is possessor (*Inhaber*) of the military power of command, and every military commander is subordinated to him in a relation of unconditional obedience in all his functions."

[3] Military Criminal Code, § 9, (2), (3).

rule, are subject to the laws passed for the state of war, and the commander of the garrison (*Besatzung*) has jurisdiction over all persons belonging thereto.[1]

(3) Certain of the more heinous crimes, which, if committed under normal conditions, would be punished by imprisonment for life in a penitentiary, are, when committed in a place or district declared in a state of war, visited with the death penalty.[2] For certain other crimes mentioned in § 9 of the Prussian Law, where the existing code imposes no higher penalty, imprisonment up to one year is inflicted.

(4) The provisions of Book I, §§ 8 and 9, of the Code of Criminal Procedure, relating to seizures and searches and to arrests and preliminary detentions,[3] the provisions of the imperial Press Law of 7 June, 1874, as well as the State laws respecting the right of assembly and of association, and the

[1] Prussian Law, §§ 6, 7.

[2] See Law introducing the Criminal Code of 31 May, 1870, § 4. This section replaced § 8 of the Prussian law touching this subject. The crimes which, if committed under a state of siege, may be visited with the death penalty, are those dealt with in the following sections of the Criminal Code: 81, high treason; 88, treason against a State; 90, treason in war; 307, arson; 311, destructive use of explosives; 312, endangering human life by flooding the country; 315, destruction of railroad property, or the use of false signals, etc., resulting in the destruction of human life; 322, destruction of beacons, etc.,or the use of false signals by which ships are deceived and human life destroyed; 323, the stranding or sinking of a ship, resulting in the destruction of human life; 324, the poisoning of wells or reservoirs of water, or of articles designed for public sale or use, so that human life is taken thereby. The death penalty is inflicted only upon those crimes for the commission of which a life penalty is imposed in a time when a state of war does not exist. With respect to crimes of a less degree, committed in territory under a state of war, the death penalty may not be imposed, but the provisions of the Criminal Code remain in force, and are not affected by the fact that a state of military rule has been introduced. See Oppenhoff, *Kommentar zum Strafgesetzbuch*, Berlin, 1901, p. 9, note 7 to § 4 of the *Einführungsgesetz*. Also John, in Holzendorff's *Handbuch*, III. p. 58; Laband, IV., p. 43.

[3] Comprising §§ 94 to 132 of the *Strafprozessordnung*.

interference of armed forces, may be suspended in time of such military rule. Should such a suspension be regarded as necessary, "a declaration to such effect must be expressly made in the proclamation announcing a state of siege, or in a special ordinance to be promulgated according to the prescribed form." [1]

(5) Under the same conditions, *i.e.*, by express declaration through proclamation, etc., courts-martial may be erected,[2] which shall be competent to try cases of high treason, treason against a State, murder, riot, violent resistance, destruction of railroads and telegraphs, release of prisoners, mutiny, robbery, plundering, extortion, seducing soldiers to unfaithfulness in duty, as well as cases mentioned in § 9 of the Prussian Law, already referred to.[3]

The question whether the ruler of a State has also the right to declare his territory in a state of war — at least in time of peace — is denied by Laband, on the following grounds:[4] the declaration of a state of war flows out of the Kaiser's supreme power of military command. The individual States are not authorized to interfere therein. Especially is it to be emphasized that they are not empowered to hand over to the military commandants the whole control of the civil administration, with the responsibility thereof, and to alter arbitrarily

[1] Prussian Law, § 5.

[2] *Ibid.* § 5, Cl. 1.

[3] See note 1, preceding page; Prussian Law, § 10, Cl. 1. These courts-martial are not to be confounded with the military courts mentioned under the same name (*Kriegsgerichte*) in § 49 of the *Mil.Str.Ger. Ord.* of 1 December, 1898 (*RGBl.* p. 1189). The composition of the courts-martial in time of military rule, as well as the procedure, is provided for in the Prussian Law of 1851, §§ 11–13, modified by §§ 20, 27 of the *Mil.Str.Ger. Ord.* of 1898.

[4] The same position is taken by Hänel, I. p. 440 ff., especially note 19. See also Brockhaus, *op. cit.* pp. 73 ff.; Seydel, *op. cit.* p. 158, and in *Zeitschr. f. d. R.* VII, p. 619 ff.; Zorn, *Staatsr.* I. pp. 313 ff.; Bornhak, *Pr. Staatsr.* III., pp. 131, 132.

the organization of the military courts (*Militargerichtsverfassung*). But these are precisely the legal consequences of the declaration of a state of siege, mentioned in §§ 4, 6, and 7 of the law. No commandant of a fortification, no commanding general, would dare carry out an order of such a nature unless it proceeded from the Kaiser. Most certainly not against the will of the Kaiser. In the second place, the several States have no authority to set aside arbitrarily, or to amend, imperial law. The declaration of a state of war, however, involves a temporary amendment of the Criminal Code, and, so far as courts-martial are set up, an amendment also of the Law of Judicial Organization and of the Code of Criminal Procedure. When § 4 of the law introducing the Criminal Code states that crimes therein enumerated shall be visited with the death penalty only when the Kaiser has declared a state of war to exist in the locality where the said crimes were committed, it is not within the power of any State ruler to set this law in operation. Article 68 of the Imperial Constitution empowers the Kaiser alone to suspend temporarily existing rights and laws.[1]

What has been said with respect to the declaration of a state

[1] Von Mohl argues from the right of the State rulers to "requisition" the "*dislocirten*" troops in their territory, for police purposes, under Art. 66 of the *RVerf.*, that they have also the right to declare a state of war. Laband says that Art. 66 implies the very opposite. In case of a requisition the troops interfere only on request of the civil authorities and for their support. In a state of war, the military commander is lord. *He* requisitions the civil authorities and gives them orders when he needs their assistance. The requisition for police purposes postulates a continuance of the common law; a state of war is a temporary suspension of it. The *RVerf.*, therefore, with good reason distinguishes between them, when, in Art. 66, it grants to the State the right to requisition troops, but in Art. 68 gives to the Kaiser the right to declare a state of war, and precisely because of this distinction it may be justly concluded that the States have not the right mentioned in Art. 68.

of war has no application to Bavaria. By the express terms of the November Treaty, as has already been remarked, Arts. 61–68 of the Imperial Constitution have no operation in this State. Since the Kaiser, in time of peace, is not commander-in-chief of the Bavarian troops, and since troops from other States may not be assigned to Bavarian garrisons, it follows that in time of peace the Kaiser has no power to declare Bavaria, or any part of it, in a state of war. The November Treaty, however, does not affect the competence of the Empire to pass a law with respect to the declaring of any part of the federal territory in a state of war. Should such a federal law be passed, it would be effective also in Bavaria.[1] Since the right of the Emperor to declare military law in Bavaria is excluded, such right must belong to the king of that State.[2]

The Military Supremacy of the Individual States

Under the old German Empire, the imperial army was made up of contingents from the various States. The size of these contingents was determined on a basis of population, computed from a certain imperial list, or "*Reichsmatrikel.*" The imperial army, therefore, did not consist of the sum

[1] This competence is based on Art. 4. (14) of the *RVerf.* and is recognized in the November Treaty, III. 5, VI. Such a law has not yet been passed.

[2] The Law of 22 April, 1871 (*RGBl.* p. 87), § 7, says: "An Stelle der Vorschriften des § 4 gedachten Einführungsgesetzes (*i.e.* Law introducing the Criminal Code), hat es für Bayern bis auf Weiteres bei den einschlägigen Bestimmungen des Militärstrafrechts sowie bei den sonstigen gesetzliche Vorschriften uber das Standrecht sein Bewendens." Section 16 of the *GVG.* also declares that in prohibiting exceptional courts and in guaranteeing to every man his legal judge, the provisions of the law with respect to a state of war are not thereby affected. For a brief outline of the question of declaring a state of war in Bavaria, see Seydel, in Stengel's *Wörterb.* p. 163, and in Bayr. *Staatsr.* Bd. 3, pp. 44 ff. For the declaration of a state of war in Alsace-Lorraine, see Law of 30 May, 1892 (*RGBl.* p. 667). See also Laband, IV. pp. 46, 47.

total of all the land forces of the several States, but was made up of parts of these State armies, contributed for the purpose.[1] This system continued under the German Confederacy. With the erection of the North German Confederation and the German Empire, a problem arose: how to concentrate all the troops of all the States into one great imperial army, and at the same time preserve the military supremacy of the individual commonwealths, if possible, intact. Each State laid jealous claim to the possession of sovereignty. How could there be sovereignty without military supremacy? Military supremacy was regarded as the most prominent feature of State power, and the very sign and symbol of State sovereignty. In the settlement of this problem, — which is simply one phase of the general problem of the partition of powers between the Empire and the several States, — the same principle holds good that obtains in other departments of the federal organization: all powers not expressly withdrawn from the several States by the Imperial Constitution, or by imperial law within the Constitution, remain vested in the States. The theory, therefore, on which the military powers are distributed, is this: every State has its own troops, and is in possession of military supremacy. This supremacy is to be limited only so far as may be required in order to secure the unity of the federal army, which is composed of these State troops.[2]

In the military organization under the Imperial Constitution, the word "contingent" has come to have a broader meaning than it hitherto had possessed. The imperial army

[1] Mejer, *Einleitung*, p. 95. In time of peace the Kaiser had no control whatever over these contingents. In time of war his power to assemble the troops and to appoint generals was conditioned upon the consent of the Diet.

[2] Laband, IV. p. 54.

is no longer made up of *parts* of the State troops, but includes the whole armed force in the imperial territory. It embraces all the troops of all the States. These soldiers are bound to obey the Emperor as "*Bundesfeldherr*," and the expenses and burdens incident to the maintenance and utilization of the military organization are borne in common by all the States. The word "contingent" is synonymous to-day with the expression "state army," and is so used in the Imperial Constitution.[1] There are no longer any "contingents" in the sense in which the word was used under the old Empire and the German Confederacy.

The logical situation, then, would seem to be this: each State has its own troops, or contingent, in whose ranks its citizens are to fulfil their military obligations, and these troops are, also, to be distributed and located in its own territory. And, indeed, this is the theory upon which the Imperial Constitution and the Military Conventions proceed.[2] But this theory has suffered a considerable wrench. While, according to the Imperial Constitution, "every German is bound to perform military service," he is not bound to perform this service, either in the territory or within the troops of his own State.[3] Military service may be performed in any State and in any troops, or in the navy, and such service, when so performed, is credited to him as fulfilment of his "*Wehrpflicht*" to his own State. Further, the troops of one State may be sent out of its territory and assigned to garrison duty in another State, while troops not its own may be stationed in its

[1] The word "*Kontingentsherr*" in the *RVerf.*, therefore, designated the ruler of the State to whom the military service of the State troops is due, and the word "*Kontingentsherrlichkeit*" means simply the rights which belong to the ruler in respect to military matters.

[2] Laband, IV. p. 55.

[3] That is, he is not bound to serve out his military obligation in that State of which he is an "*Angehörige*," or citizen.

garrisons. These deviations from the simple theory complicate matters somewhat, and render the determination of the rights of the several States, and their rulers, over their own troops, and over the troops which may be stationed in their territory, not always easy.

In discussing the military supremacy of the individual States the rights which each State possesses with respect to its own troops must be defined and determined. The military system in any State of the Empire is a State institution, regulated by imperial law. Each State possesses all those rights which accompany and flow out of military supremacy, save the right of legislation on military matters. This power, in accordance with Art. 4 (14) of the Constitution, is vested in the Empire, and is exclusive.

Moreover, in the exercise of their rights the several States are subjected to certain important limitations. Article 66 of the Constitution stipulates that where special conventions[1] do not provide otherwise, the rulers of the several States appoint the officers of their contingents. Such appointments are not made in the name of the Kaiser, nor do the rulers, in making these appointments, act as deputies of the Kaiser. The officers, therefore, so far as the military conventions do not provide otherwise, derive their authority from the ruler of the State. The power of command which may be exercised by the rulers of the States is limited, however, by Art. 64 of the Constitution, the first clause of which places all the German troops under the supreme command of the Emperor, and the second clause of which gives to the Emperor the appointment of the highest officers of each contingent, as well as the appointment of all officers whose command con-

[1] These Conventions, as elsewhere noted, may be found in *Die Militärgesetze des d. Reiches mit Erläuterungen*, I. Neue Bearb., Berlin, 1890, pp. 1–55 ff.

sists of more than a contingent, and of the commandants of fortifications. In other words, while theoretically the power of the ruler to command his own contingent still exists and persists, yet, in view of the restrictions put upon it in favor of the supremacy of the Kaiser, that power is not an independent one. It is free up to that point where the exercise of it might militate against the unity and efficiency of the imperial forces as a whole.

The officers of the various contingents stand in a relation of service to the ruler of the State by whom they were commissioned. There are no "imperial" officers, but only "Prussian," "Saxon," "Württemberg," and "Bavarian" officers.[1] Moreover, the officers take the oath of fealty to the *Kontingentsherr*, swearing loyalty to him, and, at the same time, obedience to the Kaiser.[2] This relation of service begets certain rights which accrue to the ruler of the State with respect to those who occupy that relation. Among these rights may be cited the right of disposition, the granting of military office or command, the transference, promotion, removal, and dis-

[1] Laband, IV. p. 59, note 1, says: "In the contingents of Hesse and the two Mecklenburgs the officers receive, in addition to the royal Prussian commission, the Grand Ducal commission, and so long as they belong to these contingents they have exclusively the title 'Grand Ducal.'" Hesse Military Convention, Art. 4; Convention with the two Mecklenburgs, 1872, Art. 9.

[2] In Bavaria only in time of war. Article 7 of the Military Convention with Saxony — 7 February, 1867 — requires the Generals at the head of commands to swear to obey the orders of the *Bundesfeldherr*, which oath shall be in writing, subscribed in their own hand, and sent to the king of Prussia. This is a direct promise. In the case of Prussia and the contingents annexed to that of Prussia, the oath is taken directly to the king of Prussia. In several cases the conventions provided for an oath to be taken at the same time, "das Wohl und Beste des betreffenden Landesherren zu fördern, Schaden und Nachteil von Allerhöchstdemselben und Seinem Hause und Lande abzuwenden." Hesse, Art. 4; Baden, Art. 3, Cl. 4; Oldenburg, Art. 3; Two Mecklenburgs, Art. 5; Thüringian States, Art. 10, Cl. 2; Braunschweig, Art. 5; Anhalt, Art. 10.

missal of such officers and officials. These rights may be exercised by the *Kontingentsherr* with respect to his officers and military officials within the contingent, excluding, of course, those officers who, under Art. 64, Cl. 2, of the Constitution, are appointed by the Kaiser.[1] The broad powers conferred upon the Kaiser in Art. 64, Cl. 3, of the Constitution, however, materially affect the rights of the *Kontingentsherr*, and might lead to considerable friction were it not for the provisions of the military conventions. Clause 3 of Art. 64 reads: "In the making of transfers, with or without promotion, the Kaiser has the authority to make his selection from the officers of all the contingents, for the posts to be filled by him in the imperial service, whether in the Prussian army or in other contingents." Thus the Emperor is in a position to summon officers from the service of the ruler of the State, the *Kontingentsherr*, into the service of the empire, not only without the consent of the *Kontingentsherr*, but also against his will. This matter has been adjusted, however, by various conventions.[2]

[1] Laband, IV. p. 59. These rights are exercised by the kings of Prussia, Saxony, Württemberg, and Bavaria.

[2] By the terms of the treaty with Bavaria, this Art. 64 has no application there. See reference to exception by special protocol with respect to certain officers in Ulm, found in Laband, IV. p. 59, note 2. As to Württemberg, it is agreed, in the Mil. Conv. Art. 7, Cl. 1, and Art. 8, that before such an appointment an understanding will be had with the king of Württemberg. In Saxony, by a protocol appended to the Treaty of 7 February, 1867, — the date of the protocol being 8 February, 1867 — it is agreed that the words "or without," in what is now Art. 64, Cl. 3, of the Imperial Constitution, shall not apply to Saxony. As a result, the Kaiser can summon officers from the service of the king of Saxony to the imperial service only when such a summons carries with it a promotion. In Prussia, of course, with the combined contingents, no conflict can arise. The rulers of the various States in military union with Prussia are assured, however, for the most part by conventions, that in the matter of transfers and appointments of officers and military officials which affect their contingents, their wishes, so far as may be practicable, shall be respected. This Laband calls "a remnant of their right of appointment."

As head of the contingent, the ruler of the State has military jurisdiction over his troops.[1] He not only appoints the judges of the Military High Court and of the Military Courts,[2] but also determines by whom the order ratifying a judgment shall be issued.[3] The administration of military justice (*Militärjustizverwaltung*) is carried on by the War Office in Prussia, Saxony, Württemberg, and Bavaria.[4] Article 4 of the Law introducing the system of Military Courts[5] reads: "The competent *Kontingentsherr*, in the meaning of the law organizing the military courts, and of this law, is, so far as military conventions do not provide otherwise, that ruler whose Ministry of War exercises the administrative functions with respect to the military organization in question." Where, under the law organizing the military courts, ordinances are to be issued,[6] aside from those which touch naval courts, they are to issue from the ruler or from the Administration of Military Justice of his State.[7] The Imperial Military Court,[8] whose function is to sit as a court of highest instance, is competent to try and decide questions of legal remedy in revision. It stands in the same relation

[1] This jurisdiction is exercised by the king of Prussia for the Prussian contingent, including the contingents of the smaller States joined with it by military conventions.

[2] *Mil.Straf.Ger. Ord.*, 1 December, 1898 (*RGBl.* p. 1189), § 93. As before remarked, these courts are not to be confounded with the military courts erected in localities where a state of war has been declared. The Kaiser appoints the judges (*Räte*) for the naval courts.

[3] *Mil.Straf.Ger. Ord.* § 418. In a naval court the Kaiser decides who is to make the order ratifying the judgment.

[4] *Mil.Str.Ger. Ord.* § 111.

[5] *Einführungsgesetz zur Mil.Str.Ger. Ord.* of 1 December, 1898 (*RGBl.* p. 1289).

[6] See *Mil.Str.Ger. Ord.* §§ 28, 37, 65, Cl. 2; 114.

[7] *Mil.Str.Ger. Ord.* §§ 7, 8.

[8] See *Mil.Str.Ger. Ord.* §§ 71–92.

to the Military Courts that the Imperial Court stands in to the State Courts.[1]

Possessing disciplinary power and disciplinary jurisdiction with respect to his own troops, the *Kontingentsherr* has also, logically, the right of pardon corresponding thereto. This right belongs to that *Kontingentsherr* whose military court has passed the judgment. The pardoning power has been modified to some extent by the military conventions.[2]

The administration of military affairs is not conducted by the Empire, but by the several States. *There is no Imperial Ministry of War.* Each of the States possessing contingents — Prussia, Bavaria, Saxony, and Württemberg — has a War Ministry whose function it is to administer the affairs of its own contingent. In carrying on the military administration, these War Offices are not independent, acting at their own discretion, but are limited by the imperial ordinances as has been already suggested. This fact has given rise to considerable discussion as to the exact legal status of the officials engaged in the military administration of the several contingents. It is contended, on the one side, that this military administration is really imperial administration, for which, however, no imperial board exists. This is the view, for example, of Meyer[3] and Brockhaus.[4] Laband, on

[1] For a reply to Brockhaus, who asserts, *op. cit.* p. 128, that "the military courts do not function for the individual States, but for the empire," see Laband, *Archiv f. d. öff. Recht*, III. p. 525.

[2] Laband, IV. p. 62.

[3] Meyer, *Verwaltungsrecht*, II. p. 41. "Aber alle diese Organe fungieren bei Ausübung ihrer Befugnisse nicht als Representanten des betreffenden Einzelstaates, sondern als Representanten des Reiches."

[4] Brockhaus, *op. cit.* pp. 127 ff. "In Wahrheit ist die Contingentsverwaltung eine durch Contingentsoffiziere und einzelstaatliche besorgte Reichsverwaltung." Hänel, *Staatsr.* I pp. 523–524, also says, "Im Sinne der Reichsgesetzgebung sind denn aber auch die *particularen Kriegsministerien* — das sächsische, das württembergische, wie das preussische — *Reichsbehörde.*"

the other hand, maintains that the Ministers of War are State officials, and, as such, responsible neither to the Kaiser nor to the *Reichstag*, but to their own ruler and to the *Landtag* of their own State. So far as the administration of the contingents is bound by the imperial laws, by the orders of the Emperor, by the resolutions of the *Bundesrat*, or by the items in the imperial budget, the responsibility of the Ministries of War extends to seeing that the administration is carried out in conformity to these provisions. Only in so far as room is left for the exercise of their own discretion, are the Ministers responsible for the content of their decrees. In this respect the military administration does not differ in principle from any other branch of the general administrative system. The bare fact that the War Ministers must observe the imperial laws and ordinances and carry them into execution does not prove with any degree of conclusiveness that these officials are *imperial* officials. The other State Ministries — the Ministry of Justice, of Finance, and of the Interior — have to do the same thing. Each Minister is limited in his power of free determination and in the scope of his responsibility. The difference is merely one of degree.[1]

So far as the military officials are concerned, they are State officials to whom the "Law respecting Imperial Officials" applies. This Law of 31 March, 1873,[2] § 1, reads, "Every official appointed by the Kaiser or bound to obey the orders of the Kaiser under the provisions of the Imperial Constitution, is an imperial official within the meaning of this law."

[1] Laband, IV. p. 63, citing in note 1: *Denkschrift des Reichskanzlers*, in *Archiv f. d. öff. Recht*, Bd. 4, pp. 10 ff.; *RGer. Decis.* in *Civilsach.* 9 March, 1888, Bd. 20, pp. 150 ff.; also *Bericht der Rechnungskommission des Rtags.*, Session of 1889–90, No. 126, pp. 7 ff. and 12 ff.; Seydel, in Hirth's *Annalen*, 1875, p. 1398; Joël, Hirth's *Annalen*, 1878, p. 786, and 1888, pp. 837 ff.; Hecker, article "*Militärbeamte*," in Stengel's *Wörterb.* II. p. 97.

[2] *RGBl.* p. 61; also in Triepel, p. 124.

It cannot be argued that, by the wording of this section, military officials are imperial officials because they are bound by the terms of the Constitution to obey the Kaiser. The law does not intend to determine the legal nature of their office. It only declares that, so far as the provisions of this law are concerned, all officials who are bound to obey the commands of the Kaiser under the Imperial Constitution shall be treated as if they were imperial officials. They are imperial officials *for the purpose of this law.* Or, to put it in another way, § 1 would say, "This law shall find application not only to imperial officials, but also to those officials of the several States who, by the provisions of the Imperial Constitution, are bound to render obedience to the orders of the Kaiser." [1]

By the express terms of Art. 4 (14) of the Imperial Constitution the military affairs of the several States are subject to the supervision of the Empire. This supervision of military affairs falls within the general lines of imperial supervision with respect to other matters mentioned in the same article. Its exercise belongs to the Imperial Chancellor.[2] In order to secure uniformity in the administration of the various contingents, Art. 8 of the Imperial Constitution provides for a "Committee of the *Bundesrat* on Army and Fortifications." In this committee Bavaria is assured a permanent seat, by special provision of the Constitution, while, by the terms of the military conventions with Saxony and Württemberg, each of these States is also guaranteed a seat.[3] This committee,

[1] Laband, IV. p. 63, note 2, also I. p. 416.

[2] Under the provisions of the Law of 17 March, 1878, § 2 (*RGBl.* p. 7), no special deputy of the Imperial Chancellor can be appointed for this purpose, since the representation of the Imperial Chancellor by special deputy is limited by the law to those single branches of the official organization which belong to the "peculiar and immediate administration of the Empire." The military administration does not fall within this category.

[3] Mil. Conv. with Saxony, 7 February, 1867, Art. 2, Cl. 3; Württemberg, 3–25 November, 1870, Art. 15, Cl. 2.

then, is made up of representatives of the four States possessing their own contingents. By this means the curing of defects in the administration of the contingents and the settling of differences is facilitated.

So much, briefly, for the rights which belong to the several States by reason of their military supremacy, so far as their own troops are concerned. What rights and powers have these various States with respect to these troops which may, at any time, be stationed within their borders? We are shifted here to another viewpoint. The main question now is not the relation of the troops to some contingent, but the relation of the troops to the *territory*. Or, to look at it from the other side, the territorial rights of the individual State with respect to the troops, of whatever contingent, that may be located within the State bounds. The Imperial Constitution recognizes, as do also the several military conventions, that the rulers of the individual States have certain rights as against the troops located within their territory, and that these rights are independent of the possession by the ruler of a contingent of his own. They belong to every ruler, whether he has a contingent or not, and may be claimed whether the troops are permanently or only temporarily in the territory, no matter to what contingent these troops may belong.[1]

The rulers of the several States, together with their families, enjoy the honors which, in accordance with the existing ordinances, are due to the "*Landesherr*."[2] It is evident that it is out of the question for a ruler to assume the command of his own troops in actual service. For, by so doing, he would in every case subject himself to the orders of superior officers,

[1] Laband, IV. p. 65; Brockhaus, *op. cit.* p. 95.

[2] Mil. Conv. with Württemberg, Art. 5; Hesse, Art. 7, Cl. 2; Baden, Art. 5, Cl. 1; Mecklenburg, Art. 9; Oldenburg, Art. 5, Cl. 1; Braunschweig, Art. 6, Cl. 1; Lübeck, § 4; Bremen, § 9; Hamburg, § 4.

and in some cases — in the case of those rulers whose contribution to the Prussian contingent forms only a small fraction of the Prussian army — to the commands of officers of subordinate rank. Moreover, as officers in the army, these rulers would be liable to transfer, removal, and dismissal. Such a situation would by no means comport with the dignity and functions of the head of the State. Nevertheless, the various rulers stand in a certain relation to their own troops and other troops which may be permanently or temporarily within their territory, not unlike that of a commanding officer in many respects. That is to say, the rulers enjoy the honors due such a commanding officer, and they exercise the disciplinary power which such a position carries with it. In this connection they issue their orders directly to the division commanders.[1] The rulers may appoint officers *à la suite*,[2] and select adjutants who shall be at the disposal of themselves or of the princes of their house.[3] Moreover, the royal symbols, or tokens of sovereignty, of the various States, may be reserved in the coats of arms and colors of the military posts and garrisons, so far as the federal insignia and colors do not take their place.[4]

[1] Mil. Conv., with Hesse, Art. 7, Cl. 2; Baden and Oldenburg, Art. 5, Cl. 2; Thüringian States and Anhalt, Art. 8; Braunschweig, Art. 6; Waldeck, Schwarzburg-Lippe, Art. 7; Schaumburg-Lippe, Art. 6. A certain power of disposition over the troops is also granted. This power, however, concerns only matters of internal service, such as the location of sentries, guards, escorts of honor, etc.

[2] The salaries of these officers and their pensions do not come out of the imperial funds.

[3] Mil. Conv. Hesse, Art. 9, together with *Schlussprotokoll*, Art. 2; Mecklenburg, Arts. 11, 12; Baden, Art. 6, with *Schlussprotokoll*, Art. 3; Oldenburg, Art. 6, with *Schlussprotokoll*, Art. 10; Thüringian States and Anhalt, Art. 11; Lippe, Schwarzburg, and Waldeck (1877), Art. 9; Schaumburg-Lippe, Art. 8; Braunschweig, Art. 7.

[4] Mil. Conv. with Hesse, Art. 3, Cl. 6; Mecklenburg (1872), Art. 9; Baden and Oldenburg, Art. 5, Cl. 3; Braunschweig, Art. 8, Cl. 1; Schwarz-

In accord with Art. 66, Cl. 2, of the Imperial Constitution, the rulers of the several States "have the right to utilize, for police purposes, not only their own troops, but also to requisition all other troops of the imperial army which may be located in their territory."[1] This right may be exercised not only when the public peace is disturbed, but also at other times in order to insure the public safety and maintain the public security.[2] Article 66 of the Constitution has no application to Bavaria.

At this point we are met by a question which cannot be intelligently discussed, until we have taken up, as briefly as may be done without sacrificing clearness, the subject of that general liability to military service which is a fixed principle of the German military system. "Every German is under obligation to perform military service, and in the discharge of this duty no substitute will be accepted."[3] In other words, every German subject, his capacity for such service being

burg, Lippe, and Waldeck (1877) Art. 7, Cl. 3; Schaumburg-Lippe, Art. 6; Lübeck and Hamburg, § 4, *c*; Bremen, § 6.

[1] The question has arisen as to whether a distinction is to be made as to the use of the words "utilize" and "requisition" in this Article. Brockhaus, *op. cit.* pp. 107, 108, says, No. See, however, Laband, in *Archiv f. d. öff. Recht*, Bd. III. pp. 515 ff.

[2] Laband, IV. p. 66. See also Mil. Conv. with Hesse, Art. 13; Baden, Art. 13; Oldenburg, Art. 16; Braunschweig, Art. 8, Cl. 2; Waldeck, Art. 7, Cl. 4; Lübeck, § 4; Hamburg, §§ 5, 7; Bremen, §§ 10–12. The conditions under which the troops may be called upon to preserve the public peace and safety are laid down in the Prussian Ordinance of 17 August, 1835 (*Pr. G. S.* p. 170), and in the Prussian Law of 20 March, 1837 (*Pr. G. S.* p. 60). These laws have also been introduced into Württemberg by the Decree of 27 May, 1878 (*Reg. Bl.* p. 125). In Bavaria the matter is regulated by the Bavarian Law of 4 May, 1851 (*GBl.* p. 9), and the Garrison Instructions of 5 April, 1855. See Van Calker, *Das Recht des Militärs zum administrativen Waffengebrauch*, München, 1888. In regard to the rendering of military assistance in case of public necessity, see also *Kabinetsordre* of 6 January, 1899 (*Armeeord. bl.* p. 28).

[3] *RVerf.* Art. 57.

assumed, must serve for a specified time in the armed forces, if called upon for such service, and this service, if demanded, must be rendered in his own person. This principle applies both to the army and navy.

The duty to perform military service, or, to translate the German word "*Wehrpflicht*," more literally, the duty to defend his country, is based upon citizenship, and is the correlate of the right which each citizen has to claim the protection of the State. In Art. 57 of the Imperial Constitution, quoted above, an implicit recognition is given to the general sovereign right of every State to demand from its citizens the performance of personal military service.[1] This covers not only the active service of those capable of bearing arms, but, in the case of those who are not able to bear arms, the performance of such services connected with the military as may fall within the competence of these persons and may be adapted to their civil calling.[2]

While the duty to perform military service is a general

[1] Laband, IV. p. 126, claims that the system of "general military duty" is distinguished juristically from the "enlistment system," in that the former recognizes the sovereign right of the State to demand personal military service from its subjects, while the latter does not recognize the right, or, at least, does not put it into execution, but secures the performance of military service through *contract*. It can scarcely be argued, however, that because a right is not exercised, the existence of it is either denied or overlooked. Nor does it follow, because a State chooses to employ the method of enlistment, or contract, that it neither possesses nor claims the right of demanding personal military service from every able-bodied citizen. As a matter of fact, the right of "draft" or "conscription" is held by those States which employ the contract system, but the exercise of the right is reserved only for seasons of pressing need. In both systems the basic principle is the duty of every competent citizen to defend his country. Such juristic difference as may exist is formal rather than material.

[2] Law of 9 November, 1867 (*BGBl.* p. 131), § 1, Cl. 2. This would include those capable of doing office work or manual labor of various kinds. Such persons may be summoned to this service, and their whole time claimed, under the law above cited.

one, the specific content of that duty is determined by law. "The governmental authorities may demand from those who are liable to military duty no greater measure of service than the law decrees, and no grounds for exemption from military service exist, other than those recognized by law."[1] The Law of 9 November, 1867, § 1, exempts from the general liability to military service: "(*a*) the members of the ruling houses; (*b*) the members of the mediatized houses, those who formerly belonged to the *Reichsstände*, and those houses to whom such exemption is secured by treaty or through special legislation."[2]

The liability to military service is based upon citizenship. It affects citizens only, therefore, and vanishes when citizenship ceases. Foreigners may be admitted to military service, but are never subjected to liability to it. Their entry into the armed forces of the Empire, therefore, is always voluntary, never compulsory.[3] The liability of every German to military service begins with the completion of the seventeenth year of his age, and ends with the completion of the forty-fifth year of his age.[4]

Article 59 of the Imperial Constitution reads as follows: "Every German capable of bearing arms shall serve for

[1] Laband, IV. p. 127. In addition to the Law of 9 November, and Art. 59 of the *RVerf.*, see also Law of 11 February, 1888 (*RGBl.* p. 11); Law of 3 August, 1893 (*RGBl.* p. 233); Law of 25 March, 1899 (*RGBl.* p. 213).

[2] With respect to those mentioned under (*b*), see discussion by Seydel, *Comm.* 2 Aufl., pp. 315 ff. By the Law of 23 January, 1872 (*RGBl.* p. 31), § 2; Law of 11 February, 1888, Art. II. § 34, Cl. 1, an exemption is also granted to those citizens of Alsace-Lorraine born before 1851, and by the Law of 15 December, 1890 (*RGBl.* p. 207), § 3, persons native of the island of Heligoland, and their children born before 11 August, 1890, are also freed from liability to military service.

[3] With reference to permission to emigrate and the questions arising with respect to the effects of such emigration, see Laband, IV. pp. 129 ff.

[4] Law of 11 February, 1888, § 24.

seven years in the standing army, — as a rule from the end of his twentieth to the beginning of his twenty-eighth year. The following five years he shall belong to the first reserve of the land defence, and then, up to the 31st March of that calendar year in which he shall complete the thirty-ninth year of his life, to the second reserve of the land defence. During the period of service in the standing army, cavalrymen and mounted artillerymen are pledged to uninterrupted service with the colors the first three years, all others the first two years."[1] Prior to 1 April, 1905, the period of service was so divided that each German capable of bearing arms served the first three years with the colors, the last four years with the reserves. By the Law of 3 August, 1893, the period of service with the colors was reduced, between the dates 1 October, 1893, and 31 March, 1899, to two years. The Law of 25 March, 1899,[2] extended the operation of the Law of 3 August, 1893, to 31 March, 1904. A further extension, until 31 March, 1905, was had through the Law of 22 February, 1904,[3] when the matter was definitely fixed by constitutional amendment, by the Law of 15 April, 1905.

In declaring every German liable to military service, Art. 57 of the Imperial Constitution leaves one very important question wholly unanswered. It does not state whether this "*Wehrpflicht*" is a duty owed to the Empire or to one of the States of the Empire. It is content with merely laying down a principle of general obligation to do military service. This failure of an explicit pronouncement on the part of the Constitution has led to considerable debate between the two schools of thought in Germany with respect to the legal nature of the federal army. Those who contend that there

[1] As amended by the Law of 15 April 1905 (*RGBl.* Nr. 16).
[2] *RGBl.* p. 213. [3] *Ibid.* p. 65.

is no imperial army in the strict sense of that phrase, maintain that the obligation to military service is due to the individual State to which the person in question belongs, and to the ruler of that State as representing in himself, according to the general principle of German constitutional law, the power of the State. They hold that the particular duty to render military service is simply one side of the broad, comprehensive duty of citizenship; that the very status of "subject" carries with it, as part of the "*Untertanenpflicht*," or general obligation which a subject owes to his sovereign, the duty to defend the State and its ruler. Under the German system of government, the primary relation of every German is to the State and not to the Empire. Citizenship is primarily a relation between the individual and his own particular State. He owes, therefore, his allegiance first and foremost to his own State and its ruler. The wording of Art. 3, Cl. 5, of the Imperial Constitution expressly recognizes this fact, "Whatever is necessary so far as the fulfilment of the military obligation with respect to the home State [*Heimatstaat*] is concerned, will be regulated by imperial legislation [*im Wege der Reichsgesetzgebung*]." It is objected, by those who insist that the German army is a legal unit, that the very fact that the matter of military obligation is regulated by imperial legislation is proof conclusive that the obligation is due the Empire rather than to the home State. But it can hardly be successfully maintained that the mere fact of imperial regulation is in itself sufficient to determine the fundamental character of the relation under consideration. The material content of the law, rather than the bare fact of it, must be decisive.

One of the rights guaranteed to every German is the right of migration, that is, the right freely to remove from one State to another, from one part of the Empire to another part.

If, now, the military obligation of every German is primarily an obligation toward his home State, how does the fulfilment of that obligation affect the right of migration, and how is the right of the State to the military service of its subjects affected by the law of free migration? The Law relating to Military Service, of 9 November, 1867,[1] § 17, Cl. 1, says, "Every North German is called upon to fulfil his military service in that State in which he resides at the time when he reaches the age of liability to military service, or into which he removes before a final decision is had as to his obligation to active service." Further, this same law permits volunteers (*Freiwillige*) to choose the division of troops in which they will serve.[2] It is possible, therefore, that the citizen of one State may perform his military duty in the contingent of another State, or in the navy. Nevertheless the *obligation* of every German is still an obligation toward his own home State. It does not change the nature of this obligation that the *fulfilment* of it takes place outside the borders of the State. Service in another contingent or in the navy is simply a mode of meeting that obligation, permitted by imperial law.[3] By performing his military service in another contingent he fulfils his duty to his own State. And this fact is recognized by both States and by the Empire. The same legal status exists between the States of the Empire that existed by treaty before the founding of the Empire, between the North German Confederation and Baden and Hesse. According to Art. 2 of the treaty of 25 May, 1869, between the

[1] *BGBl.* p. 10. Also Triepel, pp. 55 ff. Cf. Law of 2 May, 1874 (*RGBl.* p. 45; Triepel, 162 ff.), § 12.

[2] Law of 9 November, 1867, § 17, Cl. 2. For a definition of "volunteers," see §§ 10, 11 of the Law.

[3] See Laband, IV. p. 67.

Bund and Baden,[1] "the citizens of Baden are free to perform their military service in the North German Confederation, and the citizens of the latter in the Grand Duchy of Baden, with the effect that thereby they satisfy their obligation with respect to active military service to their own State." The position of Brockhaus, therefore, is hardly a fair one when he maintains that, "since the obligation to military service cannot be possibly due to a State in which a man has his domicile but of which he is not a citizen, and since, further, according to the terms of the imperial law, this obligation is not to be fulfilled toward his home State, only one subject remains toward which this obligation can be directed, — the Empire."[2] Brockhaus bases his conclusion upon Art. 3, Cl. 5, of the Constitution, which provides for regulating the fulfilment of military duty through imperial legislation. But Brockhaus seems to miss the main point of the article.[3] It is true that no military obligation is due a foreign State, but it is not true that military service rendered in another State is not, under the law, the fulfilment of an obligation to the home State. Art. 3, Cl. 5, of the Constitution implicitly recognizes two great rights: the right of the State to the military service of its citizens, and the right of the individual German to free migration; and because it recognizes the existence of these two rights side by side, it provides for an adjustment of them through imperial legislation — the only way by which such an adjustment could be properly made. Logically, the right of the individual State to the fulfilment of military duty on the part of its subjects can be satisfied only by a direct service to the State itself. On the other hand, the right of the individual to free migration gives the subjects

[1] *BGBl.* p. 676. See in this connection Bornhak, *Preuss. Staatsrecht*, III. p. 37.

[2] Brockhaus, *op. cit.* p. 113.

[3] See also Gümbel, *op. cit.* p. 149.

of the State the liberty of removing beyond the jurisdiction and out of the territory of the State. The imperial law makes an equation between the several States in this regard by declaring that service rendered in any body of troops in the Empire shall avail as service rendered to the home State. This is facilitated by the fact that the various contingents are wholly similar institutions. It is not to be doubted, from a juristic standpoint, that the fulfilment of an obligation due to one party by service rendered to another party effects no change in the legal relations between the debtor and creditor. "If," says Seydel, "I am permitted to discharge my indebtedness to *A* by payment to *B*, I do not become debtor to *B*, much less to *C*."[1] If it does not seem desirable to deal with a matter of constitutional law in terms of private law, one may find an analogy in the obligation to attend school — the "*Schulpflicht*."[2] The duty to attend school is an obligation unquestionably due the home State. But this obligation can be fulfilled by attendance upon school in any other State in the Empire. It will hardly be maintained, however, that for this reason the obligation to attend school is a duty toward the Empire rather than toward the home State, since it cannot possibly be a duty owed to another State and as a matter of fact is not fulfilled in the home State itself. Whoever attends school in another State fulfils his obligation as a citizen toward his own State. The analogy holds with respect to the military obligation. Moreover, that this idea with respect to the military obligation lies at the bottom of the imperial law regulating the matter is shown by a certain peculiar practice which has developed between the various contingents. If the citizens of one

[1] Seydel, *Comm.* p. 313.

[2] See Laband, *Archiv für öff. Recht*, III. pp. 519 ff. Also Gümbel, *op. cit.* p. 149.

State serve in the contingent of another State, it is plain that the first State receives services due the second. In a certain sense it receives this service to the account of the second State and is therefore bound to render an equivalent, *i.e.*, to give as many of its citizens to serve in the contingent of the second State as it has received citizens from that State. It was the custom, therefore, for those States which had separate contingents to balance accounts by handing over, each to the other, a sufficient number of recruits to equalize their differences. This proceeding was originally founded upon an agreement between the States, but was later sanctioned by the Law of 2 May, 1874, § 9, Cl. 4. In order to meet the changed conditions incident upon the annexation of the smaller contingents by Prussia, this § 9 was replaced by Art. 11, § 1, of the Law of 26 May, 1893 (*RGBl.* p. 185; Triepel, 260). Under the provisions of this section, such an accounting takes place no longer between Prussia and the States whose contingents have been absorbed in the Prussian contingent, but it does take place between the States which still retain their independent troops. The matter is adjusted by the Ministers of War of these States.

That the legal obligation to military service is a duty toward the home State is shown very clearly and decisively in the "military oath" — "*Fahneneid.*" This oath is sworn to the *Landesherr*, to the ruler of the State, not to the Kaiser. The *Fahneneid* does not create the duty to render military service, but it does give to that obligation its most solemn and most personal expression. In taking the oath, each man swears to his ruler "to serve him as a true soldier." Even where the ruler is not at the same time the head of the contingent, it is to the ruler, not to the *Kontingentsherr*, that the oath is taken. Prussian citizens who serve in a

Bavarian or Saxon or Württemberg contingent take the oath to the king of Prussia.[1] By the provisions of Art. 64, Cl. 1, of the Imperial Constitution, an obligation to obey implicitly the orders of the Kaiser is taken at the same time the oath of fidelity to the *Landesherr* is sworn. This obligation is included in the military oath. It is an obligation to obey the Kaiser, not as Kaiser, but as commander-in-chief of the German troops.[2] Those officers who are appointed by the Kaiser take the oath directly to him.

[1] The oath of fidelity is taken also to those rulers who do not exercise the rights of *Kontingentsherren*, no matter in which troops the military service may be rendered. The various military conventions have express stipulations on this point. See Hesse, Art. 3, Cl. 3; Baden, Art. 3, Cl. 3; Oldenburg, Art. 2, Cl. 2; Thüringian States, Art. 6; Anhalt, Schwarzburg, Lippe, Waldeck, Art. 6; Braunschweig and Schaumburg-Lippe, Art. 5; Lübeck, § 2; Hamburg, § 2; Bremen, § 3. The citizens of Alsace-Lorraine, no matter in what contingent they may serve, take the oath of fidelity to the Kaiser alone. Laband, IV. p. 70, citing Rescript of 28 May, 1872, and *Kabinetordre* of 4 December, 1878.

[2] In the Constitution of the North German Confederation the word is "*Bundesfeldherr*." Meyer, *Annalen*, 1880, p. 345; Brockhaus, *op. cit.* pp. 117 ff.; and Hänel, *Staatsr.* I. p. 507, in support of their theory that the German army is legally a unitary army, hold that in taking the military oath fidelity is sworn to the *Landesherr*, but obedience is sworn to the Kaiser, and that this oath of obedience alone has any considerable juristic content. They maintain that the oath of fidelity to the *Landherr* is nothing more than a wholly superfluous emphasizing or fortifying of the loyalty due him from every subject, a loyalty which is constant and is not impaired by entry into active military service. It is a general loyalty which continues during the period of military service. To this position Laband objects on the ground that it robs the military oath of loyalty or fidelity to the *Landherr* of its content. In taking this oath the citizen does not solemnly promise his *Landesherr* to be a true subject to him, — that were indeed superfluous in the extreme, — but he does promise to "serve him as a soldier true." In other words, he swears to him true *soldier* service. This service he renders his *Landesherr* in whatever body of troops he may find himself. See Laband, IV. p. 69, note 3, also in *Archiv f. d. öff. Recht*, Bd. III. pp. 552 ff.; Hecker, article "*Fahneneid*" in Stengel's *Wörterbuch*, I. p. 375; Gümbel, *op. cit.* p. 151; also Seydel, *Comm.* pp. 368 ff.

It is stipulated in all the military conventions that the soldiers shall wear the military cockade of their own State, and in case they serve in contingents other than that of their home State, the cockade of the home State shall be worn beside that of the *Kontingentsherr*.[1] The relation of personal supremacy in which the *Landesherr* stands to his subjects, aside from the rights which grow out of his relation to his soldiery as *Kontingentsherr*, is seen in his pardoning power. The right to pardon is the correlate of the right of jurisdiction. In military matters it belongs logically to the *Kontingentsherr*. Assurances have been given, however, in the various military conventions, that in the exercise of this power by the King of Prussia, the wishes of the *Landesherren* with respect to their subjects will be deferred to as far as possible.[2] In cases where a military judgment has been rendered upon crimes which are not military the right of pardoning their subjects has been reserved to certain of the rulers.[3]

Military Fortifications

As Laband observes, "The legal regulations touching the fortifications and naval ports situate within the federal territory have a peculiar character, from the fact that not only the principles of military organization, but also those of territorial supremacy, come into consideration, and that the

[1] Mil. Conv. with Hesse, Art. 3, Cl. 5; Oldenburg, Art. 2, Cl. 2; Thüringian States, Art. 7; Braunschweig, Art. 2, Cl. 5; Waldeck, Art. 1, Cl. 2; Schwarzburg, Art. 6; Lippe, Art. 6; Schaumburg Art. 5; Lübeck, § 2, Cl. 3; Hamburg, § 2; Bremen, § 3.

[2] Mil. Conv. with Baden, Art. 14; Mecklenburg, Art. 6; Oldenburg, Art. 17; Thüringian States, Art. 8; Anhalt, Art. 8; Schaumburg, Art. 6; Lippe, Art. 7; Schwarzburg, Art. 7; Waldeck, Art. 7; Braunschweig, Art. 6, Cl. 4.

[3] Mil. Conv. with Baden, *Schlussprotokoll*, 8; Oldenburg, *Schlussprotokoll*, 8. See also Mecklenburg (1868), Art. 6, Cl. 3; and Hesse, Art. 14, Cl. 3.

legal relations between the Empire and the several States are thereby defined." In entering into the Union, the individual States have retained all their territorial rights and supremacy, save such as have been explicitly conceded to the Empire by the terms of the Constitution or withdrawn from the States by legislation within the competence conferred by that instrument. The erection of the Empire and the adoption of the Imperial Constitution, together with the organization of the imperial means of defence and offence, did not vest in the Empire such immediate territorial rights in the fortifications and naval ports that the territorial rights of the several States therein were annihilated. The fortifications and naval ports are, therefore, an integral part of the territory of the several States, and the Empire is not empowered to withdraw them from the territorial sovereignty of those States.[1]

Article 65 of the Constitution declares that "the right to construct fortifications within federal territory shall belong to the Kaiser, who, so far as the ordinary grant does not provide the necessary means, shall apply for an appropriation in accordance with Sec. XII."[2] The Kaiser therefore has the right under the Constitution to erect fortifications within the federal territory, or to enlarge or strengthen those already in existence, as may be necessary, limited only by the constitutional requirement that the financial means for such undertakings be granted by imperial legislation. The exercise of this right is in no wise dependent upon the consent of the State in which such fortifications are to be constructed, nor may that State use its own territorial suprem-

[1] Laband, IV. p. 72.

[2] Sec. XII of the *RVerf.* deals with the imperial finances. The words "ordinary grant" refer to the temporary provision in Art. 62, Cl. 1. See also Art. 71, Cl. 2. It has no practical meaning now.

acy to hinder or to prevent, by means of local regulation, the carrying out of such construction, modification, or enlargement.[1]

The possession of a right carries with it the subsidiary right to employ such means as may be necessary to make that right effective. The right to construct fortifications and to enlarge or to strengthen those already in existence involves the further right to apply the means necessary to secure the end sought, within the limits of the original grant of power. In exercising the right conceded to him by the Constitution, therefore, the Kaiser has the right also to go so far as to expropriate land,[2] and to restrict the rights of disposition with respect to land within a certain radius of the fortifications.[3] Nor may any State thwart the exercise of this right on the part of the Kaiser to erect fortifications or to modify those already erected, by such interference, through the exercise of its own territorial powers, as may directly or indirectly impair, or otherwise disadvantageously affect, the value or capacity

[1] Bavaria and Württemberg occupy a peculiar position in this regard. By the terms of the November Treaty, Art. 67 of the Imperial Constitution does not apply to Bavaria. In place of Art. 65, it is provided, "Die Anlage von neuen Befestigungen auf bayerischem Gebiete in Interesse der gesammtdeutschen Vertheidigung wird Bayern im Wege jeweiliger Vereinbarung zugestehen" (Treaty, III. § 5, V. Cl. 1). In other words, when the consent of Bavaria is withheld, the erection of fortifications must wait. Nor is Bavaria denied the right to erect fortifications within her own territory. As a matter of fact, however, this is a matter of no practical consequence. Seydel, *Comm.* p. 373. So far as Württemberg is concerned, it is agreed in the Military Convention, Art. 7, that the right of the Kaiser to erect fortifications within the territory of that State shall be exercised after the Kaiser has previously obtained the consent of the king of Württemberg. See Laband, IV. p. 73; Seydel, *Comm.* p. 374.

[2] The expropriation of land may be regulated by imperial law. Where this is not done, *i.e.* where there is no special imperial regulation of the matter, the laws of the State governing expropriation shall apply. Laband, IV. p. 72, note 2; Seydel, *Comm.* p. 372; Gümbel, *op. cit.* p. 190.

[3] See *Rayongesetz* of 21 December, 1871 (*RGBl.* p. 459; Triepel, p. 117).

of those fortifications as means of defence.[1] No State may erect fortifications of its own, thus disturbing the unity of the defensive system of the Empire, even though the expenses for such construction are borne by the State. Where, however, the gates and bridges approaching fortified places of the Empire, and designed for public travel, become in the course of time inadequate for such traffic, the Communes affected have the right to demand that these gates and bridges, so far as the interests of fortification do not oppose it, be widened at the expense of the Empire. The decision as to whether such alteration is necessary, and if so, to what extent it shall be carried out, is made, in the last instance, by the Committees of the *Bundesrat* for Trade and Commerce and on Army and Fortifications, acting jointly.[2]

The military administration of the fortifications and naval ports belongs to the Kaiser. He may determine the kind and number of the garrisons, and in the exercise of his right of "dislocation" may select the garrisons from any and all contingents, without respect to the State in which the fortification to be occupied is located. This right is not restricted by the military conventions. The Kaiser's general right of supervision and inspection, with the removal of defects found as a result of such inspection, extends not only to the troops within the fortifications, but also to all equipment and arrangement which may in any wise affect the military

[1] No State, *e.g.*, may reduce the defensive efficiency of a fortification by changing a water-course, or diverting lines of railway or canals in its vicinity, even where these may not fall within the immediate "*Rayon*" of the fortification. Laband, IV. p. 73.

[2] Law of 30 May, 1873 (*RGBl.* p. 124), Art. IV. Cl. 2. These provisions do not apply to Bavaria, since the fortifications in Bavaria are not "imperial fortifications," but "state fortifications," and hence do not fall within the terms of the law.

effectiveness of the fortification. The commandants of the various fortifications are appointed by the Kaiser.[1]

By the terms of the November Treaty, none of the rights growing out of Art. 64 and Art. 63, Cl. 3, of the Imperial Constitution apply to Bavaria. In time of peace the powers of the Kaiser as commander-in-chief of the German army do not operate in Bavarian territory.[2] The sole right of the Kaiser with respect to the Bavarian troops in time of peace is the right of inspection. In the *Schlussprotokoll* of the November Treaty, Bavaria agrees to keep the fortifications of Ingolstadt and Germersheim, and all fortifications constructed in future at imperial expense within Bavarian territory, in a condition of complete efficiency. In a time of war, however, from the very moment when the mobilization of the Bavarian troops begins, the military command of the Bavarian fortifications as well as of the Bavarian troops passes to the Kaiser.[3]

[1] *RVerf.* 64, Cl. 2. In Württemberg, with the consent of the king, Mil. Conv. Art 7. With reference to New Ulm, see note 3 below.

[2] With reference to New Ulm, see note 3 below.

[3] A rather complicated legal relation exists with respect to the fortified town of Ulm. Ulm lies partly in Württemberg and partly (New Ulm) in Bavarian territory. It occupies a position of such strategic importance, however, that the special rights of Württemberg and Bavaria have suffered a limitation. This limitation is based on an agreement between Prussia, Bavaria, and Württemberg, dated at Ulm, 16 June, 1874, with an additional *Schlussprotokoll* between Prussia and Bavaria and between Prussia and Württemberg. (See *Militärgesetze d. D. Reiches*, I. pp. 175 ff.) By the terms of this agreement, Ulm, on both sides of the river, is declared to be a single fortified place under the sole command and administration of the Empire, with a recognition, however, of the territorial supremacy of the States and the existing property relations. The governor of the fortification is named by the Emperor, as are also the commandant and officers of the staff. The other positions are filled by the States, in accord with the budget. All the officers, etc., engaged in the imperial service take the oath to the Emperor. The service is regulated by the Prussian rules, and the administration of the total expenditure is carried on by the Prussian Ministry of War. See Laband, IV. p. 76; Seydel, *Comm.* p. 374.

Under the Law of 25 May, 1873, § 1 (*RGBl.* p. 113), — the law determining the legal relations of objects employed in the service of the imperial administration, — all fortifications, whether existing at the time of the founding of the North German Confederation and of the Empire, or whether erected later, together with all the buildings, lands, and equipments belonging thereto, are the property of the Empire.[1] Here also Bavaria oocupies an exceptional position. In the *Schlussprotokoll* of the November Treaty, XIV. § 2, it is declared that *new* fortifications built at federal expense, so far as their "*res immobiles*" are concerned, become the property of Bavaria, while the *res mobiles*, on the contrary, become the property of the Union. All the material for fortifications already in existence in the territory of Bavaria, however, whether movable or immovable, is Bavarian property, since the equipment, maintenance, and administration of these fortifications are at Bavarian expense and are entirely outside the circle of imperial appropriation and expenditure.

So far as the costs and financial burdens connected with the military organization of the Empire are concerned, the general principle obtains that the stress shall be equitably distributed over the several States. Where the expenses are borne by the general budget, Bavaria shares in the ratio which the Bavarian troops bear to the numerical strength of the whole army. On the basis of this ratio the amount to be spent on military affairs in Bavaria is estimated in a lump sum. In the expenditure of this sum Bavaria has a free

[1] When these fortifications are no longer of use and this fact has been determined by the proper authorities, the property is returned to the State after the completion of the grading necessary to prevent them becoming a menace to the country and on payment of the cost of such grading. Law of 25 May, 1873, §§ 7 and 8. Compare with Art. IV. Cl. 1, and Art. V. of the Law of 30 May, 1873 (*RGBl.* p. 123).

hand. In the construction of new fortifications, wherever located, Bavaria also shares in like ratio.[1]

The Imperial Constitution contains but one reference to naval ports. Art. 53, Cl. 2, reads: "The harbor of Kiel and the harbor of Jade are imperial naval ports." By imperial *Kabinetsordre* of 15 February, 1873,[2] these ports are classed as fortified places and in general with respect to military and territorial matters fall under the administration of the Imperial Board of Admiralty.[3]

The Distribution of Military Burdens and Expenses

Article 58 of the Imperial Constitution reads, "The costs and burdens of the whole military system of the Empire shall be borne equally by all the States and their citizens, so that neither special privileges nor exactions shall be permitted to individual States or classes." The plain intent of this article is that whatever demands are made upon the States with respect to the military organization, those demands shall be made equitably. The contributions of the several States must take two forms: the providing of men, and the furnishing of money. These may be discussed separately.

I. *The Furnishing of Recruits.* — An attempt is made in the Constitution to deal with the matter of furnishing recruits to the imperial army. Article 60 provides that up to 31 December, 1871, the number of the German army shall be fixed at one per cent of the population of 1867, and shall be

[1] See Treaty of 23 November, 1870, III. § 5, V. Cl. 2; also Law of 8 July, 1872 (*RGBl.* p. 289); and of 30 May, 1873 (*RGBl.* p. 1231); Seydel, *Comm.* 373.

[2] *Marineverordnungsblatt*, p. 37.

[3] See also Law of 19 June, 1883 (*RGBl.* p. 165) for certain police regulations.

furnished by the several States in the ratio of their population. After 31 December, 1871, the numerical strength of the army on a peace footing was to be fixed by imperial law. Such a law was had in the Military Law of 2 May, 1874 (*RGBl.* p. 45), § 9 of which adopted the principle laid down in the Constitution. Nineteen years later, the Law governing the Distribution of Recruits changed this principle in such wise that the number of men to be furnished was no longer determined according to the ratio of population, but according to the ratio of men liable to military duty and *fit* for such service.[1]

By the Law of 2 May, 1874, the Empire was divided into seventeen Army Corps Districts. This number was subsequently increased to nineteen,[2] and finally to twenty-two,[3] where it now stands. While the active strength of the army in time of peace and the standing organization of the army are fixed by imperial law, the Kaiser is, by the Law governing the Distribution of Recruits, given authority to determine the number of recruits to be levied annually, both in the army and in the navy.[4] The distribution of these recruits is not based on the State as a unit, but on the Army Corps District. In these districts the actual distribution is made by the War Ministries of the four States possessing their own contingents, and not, as formerly, by the Committee of the *Bundesrat* for the Army and Fortifications. The distribution in the navy is made by the Prussian Ministry of War.[5] In Bavaria, the need of recruits is determined by the

[1] Law of 26 May, 1893 (*RGBl.* p. 185), Art. II. §§ 1 and 2. In this ratio the seafaring folk are excluded. Law, § 1, Cl. 2.

[2] Law of 27 Jan., 1890 (*RGBl.* p. 7).

[3] Law of 25 March, 1899 (*RGBl.* p. 215), Art. I.

[4] Law, § 1: "Der Kaiser bestimmt für jedes Jahr die Zahl der in das Heer und in die Marine einzustellenden Rekruten."

[5] Law of 26 May, 1893, Art. II. § 1, Cls. 1 and 2.

king of Bavaria, but such regulations as may be made by the Kaiser for the federal army operate also here.

When an Army Corps District is not able to muster its full share of recruits, the deficiency is made up out of the surplus men in other Army Corps Districts of the same contingent.[1] That is to say, each contingent covers the deficiency in recruits which may arise in the Army Corps Districts within that contingent. No contingent may, ordinarily, draw upon the surplus of another contingent to make good its deficiency. Should necessity arise, however, in time of peace, the Army Corps Districts in the four independent contingents may be called upon to furnish recruits to the army corps of other imperial contingents in proportion to the number of recruits from States lying within those contingents, found in the ranks of those army corps. No greater demand, however, may be made.[2]

The distribution of recruits throughout the various divisions of the army, after such recruits have been furnished, is determined wholly by the needs of the army.[3] Such question of need is decided by the Emperor or by the military authorities in command. Troops, therefore, no matter in what district or State they may have been levied, may, by order of the Kaiser, be placed in any division of the whole imperial army, and the government of the individual State has no right of interference or of objection. Like most rules, this, too, has suffered an exception. No troops recruited in

[1] Law of 26 May, 1893, Art. II. § 1, Cl. 4.

[2] See Law of 26 May, 1893, Art. II. § 1, Cl. 5. The Law of 2 May, 1874, § 12, provides that every man liable to military service must present himself for such service in the levying district in which he has his residence. Many therefore are found in the troops of a contingent within whose jurisdiction their home State does not lie. As elsewhere noted, the regulation of this matter is in the hands of the four Ministries of War.

[3] Law of 26 May, 1893, Art. II. § 1, Cl. 6.

another State may be assigned to the Bavarian contingent, nor can Bavarian recruits be claimed by other contingents. This exemption of Bavaria is a constitutional one, based on the addition to Art. 58 of the Imperial Constitution, contained in the November Treaty, whereby Bavaria assumes the sole burden of her own military organization, and also on the exclusion of the supreme military command of the Emperor over the Bavarian troops in time of peace. It takes the character of a constitutional "*Sonderrecht*," which cannot be changed save in the method prescribed by Art. 78 of the Imperial Constitution. A similar relation exists in time of peace with respect to Saxony and Württemberg, inasmuch as both these States levy such additional recruits as may be needed in their own territory, and recruits levied by them may not be assigned to other contingents.[1] In the military conventions made between Prussia and those States whose contingents have been absorbed into the Prussian contingent, certain assurances have been given with respect to the disposition of the troops levied within their territory.[2]

II. *The Financial Burdens.*—Article 53, Cl. 3, of the Imperial Constitution provides that "the expenditure required for the establishment and maintenance of the navy and the institutions connected therewith shall be defrayed out of the imperial treasury." Article 62, Cl. 3, provides, in like manner, that the expenses of the army are to paid out of the imperial treasury, and that such expenditures shall be fixed by law. So far as the income of the Empire is not sufficient to meet these expenses, they are to be met by means of a contribution

[1] Laband, IV. p. 51.

[2] Mil. Conv. with Baden, Art. 9, Cl. 2; Hesse, Art. 10, Cl. 2; Oldenburg, Art. 4, Cl. 1; Thüringian States and Anhalt, Arts. 1 and 3; Mecklenburg, see *Heerordnung*, § 2, (6); Waldeck, Art. 2; Schwarzburg, Arts. 1–3; Schaumburg-Lippe, Arts. 1 and 2; Lippe-Detmold, Arts. 1–3; Lübeck, § 2; Hamburg, § 2; Bremen, § 2.

made by the several States in the ratio of their population.[1]

With respect to the financial burdens for military purposes, Bavaria occupies, as in many other things, a special and peculiar position. The provisions of Art. 58 of the Imperial Constitution, to the effect that all costs and burdens of the entire military system shall be borne equally by all the States, apply to Bavaria also. Nevertheless, a certain modification has been introduced by the terms of the November Treaty. It is declared in that instrument — III. § 5 — that "Art. 58 is equally valid for Bavaria. This article, however, shall receive the following addition, 'The obligation indicated in this article shall apply to Bavaria in such wise that Bavaria shall bear, exclusively and alone, the costs and burdens of her military system, including the fortified places and other fortifications situate in her territory.'" This article, as Seydel well observes, is unhappy in its wording, and misleading. It is by no means intended by this article that Bavaria shall *support exclusively and alone her military system*, and stand outside the general obligation to share equally in the whole financial burden of the federal military organization. Bavaria shares with the other States the general financial obligation. So far as the financial *administration* of her military system is concerned, however, Bavaria occupies an independent position. In the general budget, the amount to be expended by Bavaria is fixed in a *lump sum*, which stands to the sum total to be expended for imperial military purposes as the numerical strength of the Bavarian contingent stands to that of the rest of the imperial army. The expenditure of this lump sum is left wholly to Bavaria. The special items are fixed by Bavaria, not by the Empire. Bavaria is bound, nevertheless, in making up the items of her military budget,

[1] *RVerf.* Art. 70.

to have respect to the norms and standards set up in the imperial military budget.[1]

The expenditures for military purposes are made by the States having their own military administration, and are made in conformity with the items fixed in the budget and with the provisions of the laws and ordinances on the subject. All such expenditures, being in fact imperial disbursements, are under the control of the Imperial Auditing Court, and must be submitted annually by the Imperial Chancellor to the *Bundesrat* and to the *Reichstag* for their discharge.[2] No deviation from the items fixed in the budget may be made without the express permission of the Chancellor.[3] This principle does not operate, of course, in Bavaria. The *Bundesrat* and *Reichstag* have merely to satisfy themselves that the sum set aside in the budget for the uses of the Bavarian army has actually been handed over to the proper Bavarian authorities. The control and discharge so far as this sum is concerned are matters of Bavarian constitutional law.[3]

Any surplus that may exist after the military administration of a contingent has been closed for the year, any saving that might accrue, does not flow into the treasury of the State in whose contingent the saving has been made, but into the imperial treasury.[4] Here, again, Bavaria forms an exception, inasmuch as, according to the express declaration of the Treaty of Versailles, Art. 67 of the Imperial Constitution does not apply to Bavaria. A formal guarantee that Bavaria will

[1] See November Treaty, III. § 5, II. Also Seydel, *Comm.* pp. 320, 345. Seydel, *op. cit.* p. 320, remarks: "Die Hauptbedeutung des Zusatzes ist die, klar zu stellen, dass die bayerische Heersverwaltung zwar eine Verwaltung *aus* Reichsmitteln, nicht aber *von* Reichsmitteln ist."

[2] *RVerf.* Art. 7.

[3] See *Schlussbestimmung zum Abschnitt XII. der RVerf.*

[4] See Art. 67 of the *RVerf.*

not save, in the administration of its military affairs, at the expense of the efficiency of its contingent, is found in the Kaiser's right of inspection.[1]

Württemberg is also conceded the right to administer independently the moneys to be expended for the maintenance of her army.[2] Should there be a surplus after all the obligations of her military administration have been fully met, such savings remain at the disposal of Württemberg. The position of Württemberg is not, however, identical with that of Bavaria. The special items in her military budget are not fixed by Württemberg, but by the Empire, and all her military accounts are audited by the Imperial Auditing Court. Further, in Württemberg the provisions made in the budget for the imperial army must be completely carried out; they do not form, as in Bavaria, the "general norm" merely, for the administration of military affairs.[3]

The Military Conventions. — Numerous references have been made, in the foregoing discussion, to various "military conventions." A brief treatment of these instruments remains to be made. In discussing the military conventions, a distinction is to be drawn between those concluded with Saxony, Württemberg, and Bavaria, and those concluded with the other States and Free Cities.[4] These two groups of conventions do not belong in the same category, nor have

[1] See also Seydel, *Comm.* p. 346.

[2] See Mil. Conv. of 21–25 November, 1870, § 12, Cl. 1.

[3] With respect to the furnishing of forage, teams, the quartering of soldiers, and the thousand and one things of a similar sort which may be included under the head of military burdens, see the extended discussion by Laband, IV. pp. 258 ff.

[4] There is not, properly speaking, a military convention between the *Bund*, or the Empire, and Bavaria. That part of the November Treaty included in Art. III. § 5, however, practically amounts to the same thing.

they the same significance in constitutional law. We take up the more numerous group first.[1]

It is an indisputable principle in constitutional law that the Imperial Constitution cannot be amended, or in any wise changed, by any agreement made by the several States or their governments among themselves, — not even by an agreement in which all should join. The Constitution recognizes but one mode of amendment and that mode is not by contract or convention. But an amendment of the Constitution is precisely what these conventions, at first sight, appear to effect. It remains to be seen whether this is actually the case, whether these conventions are, in the last analysis, unconstitutional and therefore void. For the provisions of the Imperial Constitution take precedence not only of State laws, but also of all agreements between the States touching the same subjects.

Upon examining the conventions, it will be found that they all contain provisions by which the exercise of the rights of military supremacy belonging to the States which made these conventions are wholly or in part handed over to the *king of Prussia*. These instruments contain stipulations with respect to the administration and maintenance of the contingents, the appointment, commission, and dismissal of officers and officials, the recruiting of troops, the establishment of military courts, the enforcement of discipline, in short, they touch the whole circumference of military activity affected by the military supremacy of the several States. In other words, these conventions are a recognition of the fact that the Im-

[1] On the subject of the military conventions, see Laband, IV. pp. 24 ff.; also in *Archiv f. d. öff. Recht*, III. pp. 729 ff.; Hänel, *Studien*, I. pp. 244 ff., also *Staatsr.* I. pp. 490 ff.; Brockhaus, *op. cit.* pp. 163 ff.; Tepelmann, *Die rechtliche Natur der Militärconventionen im Deutschen Reiche und ihr Einfluss auf die Einheitlichkeit des Reichsheeres*, Hannover, 1891; Seydel, *Comm.* pp. 375 ff.

perial Constitution did not withdraw, *ipso jure*, from the several States the right to govern themselves in military matters, but that a considerable measure of autonomy still remains at the disposal of these commonwealths. This is the basal principle upon which these conventions rest,[1] — a principle which is none the less effective for coming to expression by way of a renunciation rather than of an assertion on the part of the States. A right cannot be renounced unless previously possessed. A right may be asserted, however, which never existed. So far as these conventions relate to matters well within the autonomous rights of the States, no difficulty is presented with respect to the relation they sustain to the Imperial Constitution. They do not affect it in any wise. They simply confer on the *king of Prussia* the exercise of certain rights belonging to the States themselves, or their rulers, — rights which do not fall within the scope of the Constitution.

But the conventions do not stop at this point. The king of Prussia is also Kaiser and commander-in-chief of the federal forces. Any agreement which might be made between the States, Prussia not excluded, affecting the *rights of the Kaiser*, either limiting them or enlarging them, would manifestly exceed the powers of the contracting parties. Nor could the Kaiser himself, by his own individual act, divest himself of any of the rights vested in him by the Constitution, or delegate the exercise of them to another without the express authority of the Constitution. Such an act would be an amendment of the Constitution and would therefore lie wholly beyond the power of the Kaiser. Nevertheless, the military conventions contain certain concessions on the part of the Kaiser in return for certain concessions made to the king of Prussia — concessions which seem to place direct

[1] Laband, IV. p. 25.

limitations upon the rights conferred upon the Kaiser by the Constitution, notably the right of "dislocation" and the right to determine the formation and organization of the contingents. Here the conventions touch matters which are wholly outside the sphere of State autonomy and also wholly beyond the power of the Kaiser to divest himself of. It is at this point that a difficulty arises in determining the status of these instruments in constitutional law. "The relation of the several States to the Empire, more particularly the exercise of the rights conferred upon the Kaiser by the Imperial Constitution, cannot be regulated by a State treaty made by the king of Prussia, but only by an act of will on the part of the Kaiser. On the other hand, the assumption of the troops of a German State into the Prussian military organization and administration, and the fixing of the manner in which this shall be done, is the act, not of the Kaiser, but of the king of Prussia alone." [1] In determining the status of these conventions, therefore, one must first ascertain with exactness who are the contracting parties, or, since the States themselves are always the "parties of the first part," one must definitely discover the "party of the second part." Further, the contents of the conventions must be scanned in order to determine whether the specific items in those instruments fall within the power of the parties to contract, in other words, the question of the competence of the parties to contract with reference to these particular matters must be raised.

As to the first point, no uniformity exists. The treaty with Baden is made with "the king of Prussia, as federal commander-in-chief"; the Mecklenburg treaties of 1867, 1868, as well as the treaties of Oldenburg, Braunschweig, and Waldeck of 1867, 1877, with the "king of Prussia"; the

[1] Laband, IV. p. 26. See also Brockhaus, *op. cit.* p. 164.

treaty of the three Hanse Cities with the "Royal Prussian government"; all the rest with the "German Kaiser and the king of Prussia."

As to the second point, two principles emerge as governing the question of the validity of the conventions and their legal effect. So far as the matters touched upon in the conventions lie within the competence of the State, the consent of the *Bundesrat* and of the *Reichstag* is not required in order to give validity to the agreement, since the rights of the Empire are not disturbed. The consent of the *Landtag* of the State, however, must be obtained in such form as the constitution of the State may provide, if the proposed convention amends the existing law or affects in any wise the sovereign rights of the State. As a matter of fact, none of the conventions limit the sovereign rights of Prussia at all, nor do they subject the Prussian State to any financial burdens.[1] These conventions, therefore, did not require the consent of the Prussian *Landtag* for their validity, and they became effective upon securing the consent of the contracting State alone, after proper publication. Where, on the other hand, the conventions touch the relations of the several States to the Empire, the consent of the *Landtag* of the contracting State is necessary when the rights of the State are affected or financial burdens assumed, and the consent of the *Bundesrat* and *Reichstag* is necessary if imperial rights are disturbed or imperial laws modified. Should the Constitution of the Empire be affected by the convention, the provisions of Art. 78 — relating to the mode of amending the Constitution — must be observed, and the convention must also be published in the Imperial Gazette. But where the conventions do not affect the Constitution or laws of the Empire, but touch only the exercise of certain authority conferred by the Imperial Con-

[1] Laband, IV. p. 27, note 1.

stitution and laws upon the Kaiser, then these conventions require only the consent of the Kaiser, not that of the *Bundesrat* and *Reichstag*, nor need they be published in the Imperial Gazette. It is enough if the convention be communicated to the *Bundesrat* and *Reichstag*, as evidence that the instrument does not intrude upon the sphere of legislation.[1] The conventions we have been considering are of this sort. Their content reaches only to the manner in which the authority conferred upon the Kaiser by the Imperial Constitution shall be exercised. They involve no infringement or abandonment of the rights of the Kaiser, but are simply an agreement as to the method of their exercise. "That the legal principles as such, laid down in the Imperial Constitution and in the imperial laws are not disturbed by the military conventions, comes clearly to light in the fact that these conventions may be repealed by the consent of the contracting parties,[2] and, with respect to many of the States, by a unilateral notice.[3] Should use be made of this reservation, the State would again acquire, *ipso facto*, the sovereign military rights which constitutionally belong to it." [4]

[1] "Diese Conventionen reichen an das Niveau der Gesetzgebung, insbesonders der Verfassung, gar nicht hinan; sie lassen die verfassungsmässig oder reichsgesetzlich sanktionierten *Rechtsätze* völlig unberührt, sie äussern ihre Wirkungen ausschliesslich auf dem Gebiet der Verwaltung, *in specie* des militärischen *Oberbefehls*, welches der freien Entschliessung des Kaisers unterstellt ist." Laband, IV. p. 28. See also Hänel, *Studien*, I, 246, *Staatsr.* I. p. 490; Brockhaus, *op. cit.* pp. 166 ff.

[2] That the conventions may be repealed by *mutual* consent is self-evident. It is specially stipulated in the convention with Baden, Art. 21; Oldenburg, Art. 54; Hamburg, Art. 34; Lübeck, Art. 24; Bremen, Art. 42. The object of the stipulation was to exclude the right of repeal by a unilateral notice.

[3] The right of repeal by unilateral notice is recognized in the convention with the Thüringian States, Art. 16; Schwarzburg-Sonderhausen, Art. 14; Lippe-Detmold, Art. 14; Schaumburg-Lippe, Art. 13; Waldeck, Art. 12; Braunschweig, Art. 10.

[4] Laband, IV. p. 28.

The conventions with Saxony, Württemberg, and Bavaria, as already stated, rest upon a different basis, and possess a peculiar juristic character. What has been said of the more numerous conventions discussed above has no application to these instruments. The subject has been handled so ably and succinctly by Laband, in his master work, that I venture to translate a page or two.

"The convention with Saxony was concluded on the 7 February, 1867, hence *before* the Constitution of the North German Confederation came into force. In the preamble to the agreement, it was remarked that the convention was drawn to fit the provisions of the Constitution of the North German Confederation, with respect to military matters, to the special relations sustained by the kingdom of Saxony, and was designated as a special agreement based upon the principles of the Treaty of Peace, of 21 October, 1866, which should go into effect and remain in force, independently of all further transactions with reference to that same treaty. According to the wording of this convention, both parties to the contract were apparently agreed, first, that the instrument should have validity even if the anticipated union under a federal constitution was not consummated; and, second, that so far as Saxony was concerned, it should remain in force even though the federal constitution might contain certain provisions touching military matters, which would stand in contradiction to its terms. This idea comes to explicit expression in an appended *Protokoll* of 8 February, 1867, in which it is agreed that the words 'or without,' inserted in Art. 61 of the proposed draft of the constitution — Art. 64, Cl. 3 of the Imperial Constitution — by the Conference of Plenipotentiaries of 7 February, 1867, 'should have no application to the kingdom of Saxony, since they went beyond the intent of the convention between Saxony

and Prussia.' The fact is also to be emphasized that of all of the conventions made with the States of the North German Confederation, the convention entered into with Saxony is the only one which contains no limitation upon, or diminution of, the rights constitutionally reserved to the several States, and which confers none of these rights upon Prussia, but which simply deals with the relation of the Saxon contingent to the '*Bund*' and to the '*Bundesfeldherr*.' In the preamble, one of the contracting parties is referred to as the 'king of Prussia, as *Bundesfeldherr*,' although at the time the convention was concluded no other relation existed than that created by the Treaty of 18 August, 1866. It may be deduced from all this, that, in the intention of the parties to the contract, the Convention of 7 February, 1867, should contain a *special* regulation of the military organization with respect to Saxony, which should take precedence of the *general* regulation of the federal military organization as provided for by the Constitution. This character of a special constitutional law was, however, not given it eventually. To have done so, would have necessitated the incorporation into the Constitution of the North German Confederation of some such reservation as that contained in the '*Schlussbestimmung*' to Sec. XI with respect to Bavaria and Württemberg. Inasmuch as Saxony, however, notwithstanding the fact that this did not take place, accepted the Constitution of the North German Confederation and entered into the Union, she has renounced the declarations contained in the convention as a constitutional reserved right — *Sonderrecht* — and has contented herself with the general rights established by the Constitution. This is conclusively shown also in the conduct both of Saxony and of the Empire, in that no use was made of the opportunity presented at the revision of the Imperial Constitution, to embody the Saxon convention

also in the *Schlussbestimmung* to Sec. XI. In so far, therefore, as the provisions of the Saxon convention may stand in conflict with the provisions of the Imperial Constitution or of the imperial laws, the convention must yield the precedence. No such conflict has taken place, since the Imperial Constitution grants to the Kaiser certain powers which he may exercise according to his own discretion, while the convention insures a certain definite exercise of these powers on the part of the Kaiser. Precisely here is found one application of that freedom of disposition which is guaranteed to the Kaiser by the Imperial Constitution."[1]

The convention with Württemberg was concluded at the same time with the treaty of federation and by Art. 2 (5) of the same was declared to be an integral part of the treaty.[2] It has this in common with the Saxon convention: it does not limit the rights of military supremacy guaranteed to the several States by the Constitution, nor does it confer any of them upon Prussia. It touches exclusively the relation of Württemberg to the Empire and to the Kaiser, and it contains agreements as to the special manner in which the constitutional provisions shall be applied to the Württemberg army corps. It differs from the Saxon convention only in containing far wider reaching and more considerable modifications of the constitutional norms. The general trend of the Württemberg convention harmonizes with that of the Saxon convention in that it aims to set up a *singular* right over against the common constitutional rights, and to take precedence of them. While this aim was not attained in the

[1] For a divergent view, see Hänel, *Studien*, I. 247; *Staatsr.* I. 492, note 5. See also Seydel, *Comm.* p. 381.

[2] The convention is dated from Versailles 21 November, 1870, and from Berlin 25 November, 1870, and was published in the *BGBl.* 1870, as part of the Treaty of Federation.

case of Saxony, it was fully realized in an incontestable legal form in the case of Württemberg. The stipulations of the Württemberg convention are declared by the *Schlussbestimmungen* of Sec. XI of the Imperial Constitution to be an integral part of the organic law. They form a *constitutional "Sonderrecht"* which can be taken away only in the manner prescribed in Art. 78 of the Imperial Constitution.[1] While, in the Saxon convention, the Kaiser has voluntarily imposed upon himself certain limits to the exercise of the powers constitutionally belonging to him, so far as Württemberg is concerned these powers *legally* belong to the Kaiser only to the extent in which they are recognized in the Convention. The limit upon the exercise of them does not root itself in the free will of the Kaiser, but in the constitutional provisions of the Empire.

"No military convention has been concluded with Bavaria, in a special instrument, since the Federal Treaty of the 23 November, 1870, contains such an agreement in III. § 5, with the *Schlussprotokoll* thereof. All that is carried out in the convention with Württemberg is given force in this agreement. The provisions of this section of the Federal Treaty are declared to be a special constitutional right, and Bavaria has a special right — *Sonderrecht* — to the maintenance of these provisions. So far as the matter of it goes, the '*Sonderrecht*' of Bavaria differs from that of Württemberg very considerably, for in the Württemberg convention the main point is the *application* of the provisions of the Imperial Constitution, while in the agreement with Bavaria it is the *exclusion* of those provisions."[2]

[1] Compare Zorn, *Staatsr.* p. 526; Brockhaus, *op. cit.* p. 166; also Hänel, *Studien*, I. pp. 115 ff.

[2] For a list of the military conventions in force at present, see Laband, IV. pp. 31, 32.

CHAPTER XIII

THE IMPERIAL CONSTITUTION

His Majesty the King of Prussia, in the name of the North German *Bund*, His Majesty the King of Bavaria, His Majesty the King of Württemberg, His Royal Highness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse and by Rhine for those parts of the Grand Duchy lying south of the Main, do conclude an everlasting *Bund* for the protection of the federal territory and of the rights valid within the same, as well as for the furtherance of the welfare of the German people. This *Bund* shall bear the name of the German Empire and shall have the following Constitution:—

I. Federal Territory

Article 1

The territory of the *Bund* shall consist of the States of Prussia with Lauenburg, Bavaria, Saxony, Württemberg, Baden, Hesse, Mecklenburg-Schwerin, Saxe-Weimar, Mecklenburg-Strelitz, Oldenburg, Brunswick, Saxe-Meiningen, Saxe-Altenburg, Saxe-Coburg-Gotha, Anhalt, Schwarzburg-Rudolstadt, Schwarzburg-Sonderhausen, Waldeck, Reuss älterer Linie, Reuss jüngerer Linie, Schaumburg-Lippe, Lippe, Lübeck, Bremen, and Hamburg.

II. Imperial Legislation

Article 2

Within this federal territory the Empire shall exercise the right of legislation in accordance with the content of this Constitution, and with the effect that imperial law shall take precedence of State law. The laws of the Empire shall receive their binding force through their publication by the Empire, which shall take place through the medium of an Imperial Gazette. So far as no other time is indicated in the published law for the going into effect of the same, it shall take effect on the fourteenth day following the expiration of the day on which it was published in the Imperial Gazette in Berlin.

Article 3

For all Germany there shall exist a common citizenship — *Indigenat* — with the effect that the members (subjects, citizens) of each State in the *Bund* shall be treated in every other State of the *Bund* as natives and shall accordingly be admitted to permanent domicile, to the pursuit of trade, to public office, to the acquiring of land, to the obtaining of citizenship, and to the enjoyment of all other civil rights, under the same conditions as the native born, and with reference to the prosecution of their rights and the protection of their rights they shall be treated like the native born.

No German shall be limited in the exercise of these rights by the authority of his native State or by the authority of any other State of the *Bund*.

The regulations which have reference to the care of the poor and their reception into the local communal associations, will not be affected by the principle enunciated in the first paragraph.

Likewise, until further action, the treaties in force between the individual States with reference to the taking charge of persons to be exported, the care of the sick, and the burial of deceased citizens, shall stand.

With regard to the fulfilment of military duty in relation to the home State, the necessary steps will be ordered in the way of imperial legislation.

As against foreign lands, all Germans have an equal claim upon the protection of the Empire.

Article 4

The following matters shall be under the supervision of the Empire and subject to the legislation of the same: —

(1) Regulations with respect to free migration; matters of domicile and settlement; citizenship, passports, and the police surveillance of strangers; the pursuit of trade, including insurance, so far as these matters are not already provided for in Art. 3 of this Constitution, — in Bavaria, however, with the exclusion of matters of domicile and settlement — likewise, matters pertaining to colonization and emigration to foreign lands;

(2) Legislation with respect to the tariff, commerce, and those taxes to be applied for imperial purposes;

(3) The fixing of a system of weights, measures, and coinage; and the laying down of principles for the emission of funded and unfunded paper money;

(4) General regulations with reference to banking matters;

(5) Patents for inventions;

(6) The protection of intellectual property;

(7) The organization of a common protection for German trade in foreign lands, for German navigation and for the flag upon the high seas, and the arrangement of a common

consular representation, which shall be maintained by the Empire;

(8) Railway matters, subject to the reservations, so far as Bavaria is concerned, in Art. 46, and the construction of roads and waterways in the interest of public defence and of the general traffic;

(9) Rafting and navigation upon waterways common to several States and the condition of the same, as well as the river and other water dues; likewise the navigation marks — beacons, barrels, buoys, and other marks;

(10) Postal and telegraph matters, — in Bavaria and Württemberg, however, only in accordance with the provisions in Art. 52;

(11) Regulations with respect to the reciprocal execution of judgments in civil matters and the fulfilment of requisitions in general;

(12) Also with respect to the accrediting of public documents;

(13) General legislation with respect to the whole domain of civil and criminal law and legal procedure;

(14) The imperial military establishment and the navy;

(15) The regulations governing the medical and veterinary police;

(16) The laws relating to the press and the right of association.

Article 5

The legislative power of the Empire is exercised by the *Bundesrat* and the *Reichstag*. The consent of a majority vote of both assemblies is necessary and sufficient for the passage of a law.

In bills relating to military affairs, to the navy and to the imposts specified in Article 35, the vote of the *Praesidium*

shall decide in case of a difference of opinion in the *Bundesrat*, if said vote is cast for the maintenance of the existing arrangements.

III. The Bundesrat

Article 6

The *Bundesrat* consists of representatives of the members of the *Bund*, among whom the votes shall be divided in such wise that Prussia, with the former votes of Hannover, Kur-Hesse, Holstein, Nassau, and Frankfurt, shall have 17 votes; Bavaria, 6; Saxony, 4; Württemberg, 4; Baden, 3; Hesse, 3; Mecklenburg-Schwerin, 2; Saxe-Weimar, 1; Mecklenburg-Strelitz, 1; Oldenburg, 1; Brunswick, 2; Saxe-Meiningen, 1; Saxe-Altenburg, 1; Saxe-Coburg-Gotha, 1; Anhalt, 1; Schwarzburg-Rudolstadt, 1; Schwarzburg-Sonderhausen, 1; Waldeck, 1; Reuss älterer Linie, 1; Reuss jüngerer Linie, 1; Schaumburg-Lippe, 1; Lippe, 1; Lübeck, 1; Bremen, 1; Hamburg, 1, — total, 58 votes.

Each member of the *Bund* may appoint as many plenipotentiaries to the *Bundesrat* as it has votes, but the vote accredited to each State shall be given only as a unit.

Article 7

The *Bundesrat* shall take action upon

(1) Propositions to be made to the *Reichstag*, and the resolutions passed by the same;

(2) The general administrative provisions and arrangements necessary for the carrying out of the imperial laws, so far as it is not otherwise provided for by law;

(3) Defects which may come out in the execution of the imperial laws, or of the provisions and arrangements heretofore mentioned.

Every member of the *Bund* is empowered to make propositions and to speak to them, and the *Praesidium* is bound to submit them to deliberation.

Decisions shall be had by simple majority, with the exceptions provided for in Arts. 5, 37, and 78. Votes not represented or not instructed shall not be counted. In case of a tie the vote of the *Praesidium* shall decide.

When action is taken with reference to a matter which, according to the provisions of this Constitution, is not common to the whole Empire, the votes of those States alone shall be counted which the matter jointly concerns.

Article 8

The *Bundesrat* shall appoint from its own members permanent Committees:—

(1) On the Army and Fortifications.
(2) On Marine Affairs.
(3) On Customs Duties and Taxes.
(4) On Commerce and Traffic.
(5) On Railways, Post, and Telegraph.
(6) On Judicial Affairs.
(7) On Accounts.

In each of these Committees at least four States shall be represented, besides the *Praesidium*, and within the same each State shall have but one vote. In the Committee on the Army and Fortifications, Bavaria shall have a permanent seat; the remaining members of the Committee, as well as the members of the Committee on Marine Affairs, shall be appointed by the Kaiser; the members of the other Committees shall be elected by the *Bundesrat*. The composition of these Committees is to be renewed at each session of the *Bundesrat*, *i.e.*, each year, whereupon the retiring members shall be reëligible.

In addition there shall be formed in the *Bundesrat*, out of the plenipotentiaries of the kingdoms of Bavaria, Saxony, and Württemberg, and two plenipotentiaries to be elected each year from the other States, a Committee on Foreign Affairs, in which Bavaria shall have the chair.

The necessary officials for carrying out their work shall be placed at the disposal of the Committees.

Article 9

Every member of the *Bundesrat* has the right to appear in the *Reichstag*, and must be heard there at any time upon his request, in order to represent the views of his Government, even when the same shall not have been adopted by a majority of the *Bundesrat*. No one shall be at the same time a member of the *Bundesrat* and of the *Reichstag*.

Article 10

It is incumbent upon the Kaiser to guarantee to the members of the *Bundesrat* the usual diplomatic protection.

IV. The Praesidium

Article 11

The *Praesidium* of the *Bund* belongs to the King of Prussia, who shall bear the title *German Kaiser*. It shall be the duty of the Kaiser to represent the Empire among the nations, to declare war and conclude peace in the name of the Empire, to enter into alliances and treaties with foreign States, to accredit and receive ambassadors.

For the declaration of war in the name of the Empire the

consent of the *Bundesrat* is required, unless an attack is made upon the federal territory or its coasts.

So far as treaties with foreign States relate to matters which, according to Art. 4, belong to the sphere of imperial legislation, the consent of the *Bundesrat* is required for their conclusion and the approval of the *Reichstag* is necessary for their validity.

Article 12

It is the right of the Kaiser to convene, to open, to adjourn, and to close the *Bundesrat* and the *Reichstag*.

Article 13

The convening of the *Bundesrat* and of the *Reichstag* shall take place annually, and the *Bundesrat* may be summoned for the preparation of business without the *Reichstag;* but the latter shall not be convened without the *Bundesrat.*

Article 14

The *Bundesrat* must be convened whenever a meeting is demanded by one-third of the total number of votes.

Article 15

The chairmanship in the *Bundesrat* and the conduct of business belongs to the Imperial Chancellor, who is to be appointed by the Kaiser.

The Imperial Chancellor has the right to delegate the power to represent him to any other member of the *Bundesrat.* This delegation shall be made in writing.

Article 16

The necessary bills shall, in accordance with the resolutions of the *Bundesrat*, be laid by the Kaiser before the *Reichstag*, where they shall be represented by members of the *Bundesrat* or by special commissioners appointed by them.

Article 17

It is the business of the Kaiser to engross and publish the imperial laws and to supervise the carrying out of the same. The orders and decrees of the Kaiser shall be promulgated in the name of the Empire, and require for their validity the counter-signature of the Imperial Chancellor, who thereby assumes the responsibility.

Article 18

The Kaiser appoints the imperial officials, administers the oath for the Empire, and orders their dismissal should such case be necessary.

State officials called to an imperial office shall enjoy, so far as has not been otherwise determined by imperial legislation prior to their entry into the imperial service, the same rights in the Empire which belonged to them in their own State by virtue of their official position.

Article 19

When members of the *Bund* do not fulfil their constitutional duties as members of the federation, they may be compelled to perform them through an "execution." This execution is to be determined upon by the *Bundesrat* and carried out by the Kaiser.

V. The Reichstag

Article 20

The *Reichstag* is the result of a general and direct ballot with secret vote.

Until the legal regulation, which is reserved in § 5, of the Election Law of 31 May, 1869 (*Bundesgesesetzblatt*, 1869, p. 145), there shall be elected in Bavaria 48 delegates; in Würtemberg, 17; in Baden, 14; and in Hesse south of the Main, 6; and the total number of votes shall accordingly amount to 382.[1]

Article 21

Officials shall not require a leave of absence in order to enter the *Reichstag*.

When a member of the *Reichstag* accepts a salaried office under the Empire, or in one of the States of the *Bund*, or enters the service of the Empire, or of a State, in an office with which a higher rank or higher salary is connected, he thereupon loses his seat and vote in the *Reichstag*, and can acquire his place in the same only through a new election.

Article 22

The transactions of the *Reichstag* are public.

Truthful reports of the proceedings of the *Reichstag* in the public sittings remain free from every responsibility.

Article 23

The *Reichstag* has the right to propose laws within the

[1] This number is now 397, counting in the delegates from Alsace-Lorraine.

competence of the Empire, and to transmit to the *Bundesrat* or to the Imperial Chancellor petitions directed to it.

Article 24

The legislative period of the *Reichstag* lasts for five years. For the dissolution of the *Reichstag* during this period a resolution of the *Bundesrat* is required together with the consent of the Kaiser.

Article 25

In case of a dissolution of the *Reichstag*, the voters shall be called together within a period of sixty days after the dissolution, and the *Reichstag* shall be assembled within ninety days after the dissolution.

Article 26

Without the consent of the *Reichstag*, an adjournment of that body shall not exceed a period of thirty days, and shall not be repeated during the same session.

Article 27

The *Reichstag* shall prove the legitimation of its own members and decide thereon. It regulates its own procedure and its discipline through its order of business, and elects its president, vice-presidents, and secretaries.

Article 28

The *Reichstag* shall decide questions by absolute majority. For the validity of any action the presence of a majority of the statutory number of members is required.

Article 29

The members of the *Reichstag* are representatives of the whole people, and are not bound by propositions and instructions.

Article 30

No member of the *Reichstag* shall be prosecuted, either legally or by way of discipline, at any time, because of his vote, or because of any utterance made in the exercise of his functions, or in any other manner be held responsible outside the assembly.

Article 31

Without the consent of the *Reichstag*, no member of it, during the session, shall be brought to trial or arrested, because of a penal offence, unless he is taken in the commission of the act or during the course of the following day.

Like consent is required in the case of arrest for debt.

At the request of the *Reichstag*, all criminal proceeding against one of its members, and all detentions for judicial inquiry or civil action, shall be suspended during the session.

Article 32

The members of the *Reichstag* as such, shall draw no salary or compensation.

VI. Customs and Commerce

Article 33

Germany forms one territory for customs and commerce, defined by a common tariff boundary. Those parts of the territory which, by reason of their situation, cannot

properly be embraced within the customs frontier, shall be excluded.

All articles of free commerce in any State of the Union may be brought into any other State of the Union, and in the latter shall be subjected to an impost only in so far as similar domestic productions are subject to an internal tax there.

Article 34

The Hanse cities, Bremen and Hamburg, together with a part of their own or of the surrounding territory suitable for such purpose, shall remain free ports outside the common tariff borders, until such time as they shall request admission into the same.

Article 35

The Empire has the exclusive right of legislation as to all tariff matters; as to the taxation of salt and tobacco produced in the federal territory; as to prepared brandy and beer, and sugars and syrups produced from beets or other domestic sources; as to the mutual protection, against fraud, of the consumption taxes levied in the several States of the *Bund*, as well as to the regulations which may be required in the excluded districts for the security of the common customs boundaries.

In Bavaria, Württemberg, and Baden, the right to tax the domestic brandies and beers is reserved to the legislation of the State. The States will, however, use every effort to bring about uniform legislation with regard to the taxation of these articles also.

Article 36

The collection and administration of the customs duties and of the taxes on articles of consumption (Art. 35) is left to

each State, within its own territory, so far as these functions have heretofore been exercised by each State.

The Kaiser supervises the observance of the legal conduct of affairs, by means of imperial officials, whom he appoints, with the consent of the Committee of the *Bundesrat* on Customs Duties and Taxes, to act in conjunction with the officials and Directive Boards of the several States.

Reports made by these officials as to defects in the carrying out of the joint legislation (Art. 35), shall be laid before the *Bundesrat* for action.

Article 37

In taking action with reference to the administrative provisions and arrangements for carrying out the joint legislation (Art. 35), the vote of the *Praesidium* decides when it is cast in favor of maintaining the existing provision or arrangement.

Article 38

The revenues from the customs and from the other taxes mentioned in Art. 35, so far as these latter are subject to imperial legislation, flow into the treasury of the Empire.

This amount consists of the total income from the customs and from the other taxes, after deducting therefrom: —

(1) The tax allowances and reductions resting upon the laws or general administrative provisions.

(2) Reimbursements for taxes unlawfully collected.

(3) The costs of collection and of administration, viz.: —

(*a*) In the department of customs, the costs required for the protection, and for the collecting, of the duties on the borders of a foreign country and in the district adjacent thereto.

(*b*) In the department of the salt tax, the costs which are

applied toward the salaries of the officials charged with the collection and control of this tax at the salt works.

(*c*) In the department of the beet-sugar tax and the tobacco tax, the compensation which, according to the regulations of the *Bundesrat* at the time, are to be guaranteed to the governments of the several States of the Union for the costs of administering these taxes.

(*d*) In the other tax departments, fifteen per cent of the total receipts.

The territories lying outside the common customs borders contribute to the expenses of the Empire by the payment of a lump sum (*Aversum*).

Bavaria, Württemberg, and Baden have no share in the revenues flowing into the imperial treasury from the taxes on brandy and beer nor in that part of the aforementioned *Aversum* corresponding to this amount.

Article 39

The quarterly abstracts to be made by the collection officials of the States at the end of each quarter, and the final statement, to be drawn up at the end of each year, and after the closing of the books, of the receipts which have fallen due during the quarter or during the fiscal year, as the case may be, from customs and from the taxes on articles of consumption which, according to Art. 38, flow into the imperial treasury, shall be grouped by the Directive Boards of the States, after a preliminary audit, into general summaries, in which each impost is to be separately indicated, and these summaries are to be sent in to the *Bundesrat's* Committee on Accounts.

The latter fixes provisionally, every three months, on the basis of these summaries, the amount due the imperial treasury from each State in the *Bund*, and informs the

Bundesrat, and the States, of the amount fixed; it also lays its final determination of these amounts, with its remarks, annually before the *Bundesrat*. The *Bundesrat* takes action on the fixing of the amounts.

Article 40

The stipulations in the Customs Union Treaty of 8 July, 1867, remain in force, so far as they have not been amended by the provisions of this Constitution, and so long as they shall not have been amended in the manner provided for in Arts. 7 and 78.

VII. Railway Matters

Article 41

Railways, which are considered necessary for the defence of Germany or in the interests of general traffic, may be constructed at the expense of the Empire, even against the opposition of that member of the *Bund* through whose territory the railway cuts, without prejudice to the sovereign rights of the State; or may be granted as a concession to private persons for construction and furnished with rights of expropriation.

Every existing railway is bound to grant connection with it of newly constructed lines, at the cost of the latter.

The legal regulations which grant to existing railway undertakings a right of injunction against the laying of parallel or competing lines, are hereby repealed for the whole Empire, without prejudice to the rights already acquired. Such a right of injunction cannot be further granted, even in concessions to be given in the future.

Article 42

The governments of the several States bind themselves to administer the German railways in the interest of the general traffic, as a single system, and to this end shall cause the railways newly to be constructed to be built and equipped according to a uniform standard.

Article 43

To this end there shall be made, as speedily as possible, uniform traffic regulations, and especially shall identical railway police rules be put in force. The Empire shall see to it that the railway administrations shall keep the roads always in a condition which shall guarantee the necessary safety, and shall furnish them with such equipment as the needs of traffic may demand.

Article 44

The railway administrations are bound to furnish passenger trains of suitable speed, necessary for through traffic and for the securing of connecting time tables; in the same way to provide trains necessary for the conduct of freight business, as well as to arrange for the direct forwarding of passengers and of freight, providing a system of transfer from one train to another for the usual remuneration.

Article 45

The control of the tariff charges shall be in the hands of the Empire. It shall work to this end: —

(1) That at the earliest possible moment uniform regu-

lations governing the business shall be introduced on all German railways.

(2) That the tariff charges be minimized and equalized as speedily as possible, especially that, in the long distance transportation of coal, coke, wood, ore, stone, salt, pig-iron, manures, and similar articles, a tariff shall be introduced suitably modified to the needs of farming and of industry, and indeed, at the first practicable moment, the one pfennig tariff.

Article 46

When conditions of distress shall arise, especially an unusual rise in the price of provisions, the railroads shall be bound to introduce temporarily a low special tariff, suited to the necessities of the case, and to be fixed by the Kaiser on motion of the competent Committee of the *Bundesrat*, for the transport of grain, flour, legumes, and potatoes, which price, however, shall not be less than the lowest existing rate for raw products over the said line.

The aforesaid provisions, as well as those found in Arts. 42 to 45, have no application to Bavaria.

The imperial government has the right, however, even as against Bavaria, to lay down by law uniform standards for the construction and equipment of railways which may be of importance in the defence of the country.

Article 47

All the administrative authorities of the railways shall yield implicit obedience to the demands of the imperial authorities, with respect to the use of the railways for the purpose of the defence of Germany. Especially shall troops and all materials of war be forwarded at uniform reduced rates.

VIII. Post and Telegraph

Article 48

The post and telegraph systems shall be arranged and administered throughout the entire German Empire as uniform institutions of public intercourse.

The legislation of the Empire in post and telegraph matters, as provided for in Art. 4, shall not extend to those matters whose regulation is left to governmental determination and administrative ordinance, in accordance with the principles which have been authoritative in the administration of the post and telegraph in the North German *Bund*.

Article 49

The revenues from the post and telegraph systems for the whole Empire shall belong to a common fund. The expenses shall be paid out of the joint income. The surplus shall flow into the imperial treasury (§ XII.).

Article 50

To the Kaiser shall belong the supreme control of the post and telegraph administration. It shall be the duty and the right of the authorities appointed by him to see to it that uniformity in the organization of the administration and in the conduct of the business, as well as in the qualification of the officials, is established and maintained.

The Kaiser shall have power to issue governmental decisions and general administrative ordinances, as well as the exclusive supervision of the relations with other post and telegraph administrations.

All officials of the post and telegraph administration are bound to obey the imperial orders. This obligation is assumed in the oath of office.

The appointment of such superior officers in the various districts as may be required by the administrative authorities of the post and telegraph, for instance, the directors, counsellors, superintendents, and, further, the appointment of the officials of the post and telegraph who shall act in the capacity of organs of the aforesaid authorities in maintaining the supervisory and other service in the several districts, such as inspectors, controllers, shall be made throughout the Empire by the Kaiser, to whom these officials shall take the oath of office. Due notice shall be given to the several State governments, of the aforementioned appointments, so far as they may affect their territory, in order that they may be ratified and published by the ruler thereof.

The other officials required by the post and telegraph administrative authorities, as well as those destined for the local and technical work, including those officials acting at the stations proper, and so forth, shall be appointed by the State governments concerned.

Where an independent State post and telegraph administration does not exist, the provisions of special treaties shall be decisive.

Article 51

In consideration of the differences hitherto existent with respect to the net income received from the State postal administrations of the several districts, the following method of procedure shall be observed in assigning the surplus of the postal administration for general imperial purposes (Art. 49), to the end that a corresponding equalization may be had during the transition period fixed below.

From the postal surpluses which have accumulated in the several postal districts during the five years, 1861–1865, a yearly average shall be computed, and the share which each individual postal district has had in the postal surpluses for the whole Empire resulting therefrom shall be fixed according to percentage.

On the basis of the ratio thus determined, the quota ascribed to the several States, out of the accumulated postal surpluses of the Empire, shall, for the eight years following their entry into the imperial postal administration, be credited to the contributions which they would otherwise make for imperial purposes.

At the end of eight years this distinction shall cease, and the postal surpluses shall flow into the imperial treasury, without division, in accordance with the principle laid down in Art. 49.

Of the quota of postal surpluses arising in favor of the Hanse cities during the aforesaid eight years, one-half shall be placed at the disposal of the Kaiser, at the beginning of each year, chiefly for the purpose of meeting the expense involved in providing regular postal arrangements in the Hanse cities.

Article 52

The provisions of the foregoing Arts. 48 to 51 do not apply to Bavaria and Württemberg. In place of them the following provisions shall be valid for both these federal States.

Legislation with respect to the privileges of the post and telegraph, the legal relations of both institutions to the public, the franking privileges and the post charges, as well as the fixing of the fees for telegraphic correspondence, shall belong exclusively to the Empire, with the exception, however, of the administrative regulations and the determination of

tariffs for the internal communication within Bavaria and Württemberg.

Likewise the regulation of the postal and telegraphic communication with foreign lands shall belong to the Empire, with the exception of Bavaria's and Württemberg's own immediate traffic with neighboring States not belonging to the Empire, the regulation of which is governed by the provisions of Art. 49 of the Postal Treaty of 23 November, 1867.

In the income from the post and telegraph flowing into the imperial treasury, Bavaria and Württemberg have no share.

IX. Marine and Navigation

Article 53

The navy of the Empire is a unitary one under the supreme command of the Kaiser. The organization and composition of it shall be the duty of the Kaiser, who appoints the officers and officials of the navy, and to whom they, together with the crews, take an oath of obedience.

The harbor of Kiel and that of Jade are imperial war ports.

The requisite expense for the establishment and maintenance of the fleet and the arrangements connected therewith shall be defrayed out of the imperial treasury.

All the seafaring male population of the Empire, including the machinists and ship laborers, is exempt from service in the army, but is liable to service in the imperial navy.[1]

[1] Article 53 contained another paragraph, which was omitted by the amendment of 26 May, 1893. The paragraph read:—

"Die Vertheilung des Ersatzbedarfes findet nach Massgabe der vorhandenen seemännischen Bevölkerung statt, und die hiernach von jedem Staate gestellte Quote kommt auf die Gestellung zum Landheere in Abrechnung."

Article 54

The merchantmen of all the federated States shall constitute a united commercial marine.

The Empire shall determine the process for ascertaining the tonnage of sea-going vessels, shall regulate the making out of certificates of admeasurement as well as of ship certificates, and shall fix the conditions on which permission to sail a sea-going ship shall be granted.

The merchantmen of all the federated States shall be granted like access to, and accorded similar treatment in, the seaports and all natural and artificial watercourses of the several States of the *Bund*. The taxes which shall be levied upon the ships or their cargoes in the harbors, for the use of the institutions of navigation, shall not exceed the cost necessary for the maintenance and ordinary repairs of these establishments.

On all the natural watercourses, taxes may be levied only for the use of special establishments which are designed for the facilitating of traffic. These taxes, as well as the taxes for the navigation of such artificial watercourses as may belong to the State, shall not exceed the cost necessary for the maintenance and the usual repairs of these institutions and establishments. These provisions apply to rafting, in so far as it is carried on upon navigable watercourses.

The power to lay other or higher taxes upon foreign ships, or their cargoes, than upon the ships of the federated States or their cargoes, belongs only to the Empire and not to any one of the States.

Article 55

The flag of the navy and of the merchant marine is black, white, red.

X. Consular Affairs

Article 56

All consular affairs are under the supervision of the Kaiser, who appoints the consuls, after hearing the Committee of the *Bundesrat* on Commerce and Traffic.

In the official districts of the German consuls, no new State consulates may be erected. The German consuls exercise all the functions of a State consul for the federated States not represented in their districts. All the State consulates now existent shall be abolished as soon as the organization of the German consulates shall be completed in such manner that the representation of the particular interests of all federated States shall be recognized by those States as secured through the German consulate.

XI. Military Affairs of the Empire

Article 57

Every German is liable to military duty and in the discharge of this duty no substitute can be accepted.

Article 58

The costs and burdens of the entire military system of the Empire are to be borne by all the federated States and their subjects equally, in such manner that neither preference nor special burden upon any individual State or class shall be in principle permissible. Where an equal distribution of the burdens cannot be brought about *in natura* without injury to the public welfare, the equalization is to be effected by legislation according to principles of fairness.

Article 59

Every German capable of bearing arms shall belong for seven years to the standing army, as a rule from the completion of his twentieth to the beginning of his twenty-eighth year. During the next five years he shall belong to the "national guard (*Landwehr*) of the first call," and then, up to the 31 March of that year in which he shall have completed his thirty-ninth year, to the national guard of the "second call."

During the period of service in the standing army the cavalrymen and the mounted artillerymen are bound to uninterrupted service with the colors the first three years, all others the first two years.[1]

In those States of the *Bund* in which heretofore a longer term of total service than twelve years was required by law, the gradual reduction of the term of liability to service shall take place only so far as this is compatible with due regard for the readiness of the imperial army for war.

With reference to the emigration of men belonging to the reserves, simply those provisions shall be authoritative which control the emigration of members of the national guard (*Landwehr*).

Article 60

The number of men in the German army in time of peace shall be fixed, up to 31 December, 1871, at one per cent of the population of 1867, and shall be furnished by the several States of the *Bund* in proportion to their population. After that date the effective force of the army in time of peace shall be fixed by imperial law.

Article 61

After the publication of this Constitution, the entire Prussian military legislation shall be introduced without

[1] Amendment of 15 April, 1905.

delay throughout the entire Empire, — the laws themselves as well as the rules, instructions, and rescripts issued for their execution, explanation, or completion, to wit, the Military Penal Code of 3 April, 1845, the Military Code of Criminal Procedure of 3 April, 1845, the Ordinance respecting Courts of Honor of 20 July, 1843, the provisions for recruiting, time of service, matters of allowances and the commissariat, the quartering of troops, compensation for injury done to fields, for the mobilizing of troops, etc., in peace and in war. The military ordinance with respect to religious observances is, however, excepted.

On the completion of a uniform military organization of the German army, a comprehensive imperial military law shall be laid before the *Reichstag* and the *Bundesrat* for their action, in conformity to the Constitution.

Article 62

For meeting the expenses of the entire German army and the arrangements incident thereto, there shall be placed annually at the disposal of the Kaiser, up to 31 December, 1871, as many times 225 thalers, — in words, two hundred and twenty-five thalers, — as the numerical strength of the army on a peace footing, according to Art. 60, amounts to. See § XII.

After the 31 December, these contributions must be paid by the several States of the *Bund* into the imperial treasury. In computing the same, the peace footing of the army, temporarily fixed in Art. 60, shall be adhered to until it is altered by imperial law.

The expenditure of these sums for the entire imperial army and its arrangements shall be fixed by the budget.

In determining the budget of military expenditure, the

organization of the imperial army legally fixed according to the principles of this Constitution shall be taken as a basis.

Article 63

The total land force of the Empire shall constitute a uniform army, which, in peace and in war, is under the command of the Kaiser.

The regiments, etc., throughout the entire German army shall bear continuous numbers. As to the uniform, the ground-colors and the cut of the Prussian army shall be authoritative. The determination of the external marks of distinction (cockades, etc.) is left to the heads of the respective contingents.

The Kaiser has the right and the duty to see to it that all divisions of the troops are in full muster and fit for war, throughout the whole German army, and that uniformity in organization and formation, in equipment and command, in the training of the men, and in the qualification of the officers, shall be brought about and maintained. To this end, the Kaiser has the authority to satisfy himself at any time, by inspection, of the condition of the several contingents, and to order the abolishing of any defects thereby found.

The Kaiser determines the numerical strength, the organization, and the division of the contingents of the imperial army, as well as the organization of the national guard, and has the right to determine the garrisons within the federal territory, as well as to order the putting of any part of the imperial army in a state of readiness for war.

To the end that the indispensable uniformity in the administration, commissariat, arming, and equipment of divisions of the German army may be preserved, the orders issued to the Prussian army in the future with reference to such

matters shall be communicated to the commanders of the other contingents by the Committee on the Army and Fortifications mentioned in Art. 8 (1) for their proper observance.

Article 64

All German troops are bound to render unconditional obedience to the commands of the Kaiser. This obligation is to be included in the military oath.

The chief commanding officers of a contingent, as well as all officers who command troops of more than one contingent, and all commandants of fortresses, shall be appointed by the Kaiser. The officers appointed by him shall take the military oath to him. The appointment of generals and of officers performing the duties of generals, within a contingent, is made dependent in each case upon the consent of the Kaiser.

The Kaiser is authorized, with respect to the transfer of officers, with or without promotion, to positions to be filled by him in the imperial service, be it in the Prussian army or in other contingents, to make his choice from the officers of all contingents of the imperial army.

Article 65

The right of erecting fortifications within the federal territory shall belong to the Kaiser, who shall request the grant of the requisite means thereto, so far as the ordinary budget does not guarantee it, according to § XII.

Article 66

Where it is not otherwise provided for by special convention, the princes of the *Bund* and the Senates shall appoint

the officers of their contingents, subject to the restriction of Art. 64. They are the heads of all the divisions of troops belonging to their territory and enjoy the honors connected therewith. They have particularly the right of inspection at any time, and receive, besides the regular reports and notices of changes about to take place, timely information of promotions and appointments touching their respective divisions of troops, in order that the necessary publication of them may be made by the State.

They also have the right to employ for purposes of police, not only their own troops, but also to requisition all other divisions of troops of the imperial army which may be stationed in their territories.

Article 67

Unexpended portions of the military budget shall fall, in no circumstances, to an individual government, but at all times to the imperial treasury.

Article 68

Should the public safety of the federal territory be threatened, the Kaiser may declare any part of the same under martial law. Up to the publication of an imperial law regulating the occasions, the form of announcement, and the effects of such a declaration, the provisions of the Prussian law of 4 June, 1851 (*Gesetz-Samml. for 1851*, p. 451), shall be valid in such case.

Final Provision of Sec. XI

The provisions contained in this section are to be applied to Bavaria in conformity with the more detailed stipulations of the Treaty of alliance, of 23 November, 1870 (*Bundes-*

gesetzbl. 1871, p. 9) under III. § 5, and to Württemberg in conformity with the more detailed stipulations of the Military Convention of 21–25 November, 1870 (*Bundesgesetzbl.* 1870, p. 658).

XII. Imperial Finance

Article 69

All receipts and expenditures of the Empire shall be estimated for each year, and included in the imperial budget. The latter shall be fixed by law before the beginning of each fiscal year according to the following principles:—

Article 70

For the defraying of all common expenses there shall be used first of all the joint receipts from the customs and common taxes, from the railway, post and telegraph systems, as well as from the remaining branches of administration. In so far as the expenditures are not covered by these receipts, they are to be met by contributions from the several States of the *Bund* according to the measure of their population, which contributions are to be charged to them by the Imperial Chancellor, to the extent of the amount fixed in the budget. In so far as these contributions are not covered by the amounts handed over to the several States, they shall be returned to the States of the Bund at the end of the year in the same measure as the remaining regular receipts of the Empire exceed its needs.

Any surpluses from the preceding years shall be used, so far as the imperial budget law does not provide otherwise, for defraying the joint extraordinary expenses.[1]

[1] Amendment of 14 May, 1904 (*RGBl.* p. 169).

Article 71

The general expenditures shall, as a rule, be granted for one year, but may, in special cases, however, be granted for a longer period.

During the transition period laid down in Art. 60, the estimate of the expenditures for the army, arranged according to titles, shall be laid before the *Bundesrat* and the *Reichstag* for their information and as a memorandum.

Article 72

An annual report of the expenditure of all receipts of the Empire, shall be laid by the Imperial Chancellor before the *Bundesrat* and the *Reichstag* for their discharge.

Article 73

In cases of extraordinary need, a loan may be contracted, or a guarantee assumed as a burden on the Empire, by way of imperial legislation.

Final Provision of Sec. XII

As to the expenditures for the Bavarian army, Arts. 69 and 71 find application only according to the provisions of the Treaty of 23 November, 1870, mentioned in the Final Provision of § XI, and Art. 72 finds application only to the extent that the transfer of the sum required for the Bavarian army is to be reported to the *Bundesrat* and *Reichstag*.

XIII. Settlement of Disputes and Penal Provisions

Article 74

Every attempt against the existence, the integrity, the security or the Constitution of the German Empire; finally,

any affront offered to the *Bundesrat*, the *Reichstag*, a member of the *Bundesrat* or *Reichstag*, an authority or a public official of the Empire, while in the exercise of their calling, or in relation to their calling, by word, writing, print, drawing, pictorial or other representation, shall be adjudged and punished in the several States of the *Bund* according to the laws therein existing, or which shall hereafter go into effect, by which a similar act committed against the individual State of the *Bund*, its constitution, its chambers or estates, the members of its chambers or estates, its authorities, or its officials is adjudged.

Article 75

For those attempts against the German Empire, mentioned in Art. 74, which, if directed against the individual State, would be considered high treason or treason against the State, the common Superior Court of Appeals of the three free and Hanse cities in Lübeck is the competent deciding tribunal in first and last instance.

Detailed provisions with reference to the competence and the procedure of the Superior Court of Appeals shall follow in the way of imperial legislation. Until the passage of an imperial law, the competence of the courts in the individual States up to this time, and the provisions relating to the procedure of these courts, shall remain as at present.

Article 76

Disputes between different States of the *Bund*, so far as they do not partake of the nature of disputes at private law and accordingly are to be decided by the competent judicial authorities, shall be adjusted, on appeal of one of the parties, by the *Bundesrat*.

In disputes involving constitutional matters in those States of the *Bund* in whose constitution no authority is provided competent to settle such controversies, the *Bundesrat* shall, on appeal of one of the parties, effect an amicable settlement, or, if this does not succeed, shall bring about an adjustment in the way of imperial legislation.

Article 77

If, in any State of the *Bund*, a case of refusal of justice shall arise, and sufficient relief cannot be obtained by legal measures, then it shall be the duty of the *Bundesrat* to receive substantiated complaints respecting the denial or obstruction of justice, which shall be judged according to the constitution and existing law of the State concerned, and thereupon to effect judicial relief through the government of the State which shall have given occasion to the complaint.

Article 78

Amendments to the Constitution shall follow the regular course of legislation. They shall be considered rejected when they have against them fourteen votes in the *Bundesrat.*

Those provisions of the Constitution, by which certain rights are secured to individual States of the *Bund* in their relation to the whole, may be amended only with the consent of the States affected.

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