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JUDICIAL CONTROL OF ADMINISTRATIVE AGENCIES IN INDIANA: I

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A. Administrative Law in the Courts.

Common professional learning assigns the problems of administrative law, defined as lawyers view the subject,¹ to two main areas: (1) the procedure of administrative agencies themselves; (2) the review of agency action by the courts. Following a half-century of development, both areas have become subject to general legislation, adopted by Congress² and a number of state legislatures,³ which lays down the broad principles to be observed.⁴ Whenever such statutes apply, the study of current problems must begin with them; but these acts are couched in general terms which acquire specific meaning only as they are interpreted and applied. Judicial decisions rendered prior to the enactment of the statutes continue to possess value, therefore, as indications of a jurisdiction's policies, insofar as these are not inconsistent with the new legislation.⁵ More recent decisions, of course, contain the most authorita-

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1. The lawyer's conception is usually limited to the law which determines the proceedings in matters affecting interests outside the government. Other conceptions embrace, in addition, the law governing such internal matters as fiscal and personnel administration. See DAVIS, *ADMINISTRATIVE LAW* 3 (1951). Compare PARKER, *ADMINISTRATIVE LAW* 1-2 (1952).

2. 60 STAT. 237, 5 U.S.C. 1001 *et seq.* (1946) (Federal Administrative Procedure Act).

3. Nathanson, *Recent Statutory Developments in State Administrative Law*, 33 IOWA L. REV. 252 (1948), and HEADY, *ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES* (1952), are excellent commentaries upon the state legislation, setting forth many of the statutory provisions.

4. See IND. ANN. STAT. §§ 60-1501 *et seq.* (Burns 1951) (regulations of state agencies); IND. ANN. STAT. §§ 63-3001 *et seq.* (Burns 1951) (administrative adjudication).

5. As to the persistence in other states of pre-statutory judicial holdings with regard to the scope of judicial review of agency action, sometimes in the face of an apparent legislative purpose to produce a change, see HEADY, *supra* note 3, at 113-115;

tive pronouncements available with reference to those policies. To the extent, moreover, that administrative procedure statutes exclude agencies from their provisions, as the Indiana legislation does in part,⁶ the previous case law with reference to these agencies remains in effect.

Except for later statutory changes, decisions which it is the purpose of this study to review, handed down by the Supreme and Appellate courts with reference to Indiana administrative agencies, set the limits within which these agencies must operate and establish the principles by which the courts of the State will be governed in reviewing agency actions. The controls thus established embrace the State's administrative law problems only partially, since many matters have not been covered in reported cases. An adequate treatment of administrative law requires first-hand study of the agencies themselves and of their regulations and pronouncements, both because the details of procedure cannot be covered fully in any other way and because many of the criteria for critical judgments emerge only as the agencies' work is observed.⁷ Nevertheless, the reported judicial decisions constitute the framework upon which other policies and methods must be built. For this reason a review of them has value.

B. The Relation of Courts to Agencies.

With the exception of aberrational departures and two recent disturbing decisions,⁸ Indiana cases are emphatic in espousing the basic proposition that the special competence of administrative agencies should have scope to operate and that the courts in reviewing agency actions should not attempt to supervise the agencies' work or do it over again. This view has been enunciated in a series of well-considered holdings, some of which have become leading cases frequently cited elsewhere.⁹

Note, *De Novo Judicial Review of State Administrative Findings*, 65 HARV. L. REV. 1217, 1219-1224 (1952).

6. Section 2 of the Indiana Act of 1947 governing administrative adjudication, *supra* note 4, excludes the Alcoholic Beverage Commission, the Industrial Board, and the Public Service Commission from its provisions. Benefit determinations under the Employment Security Act and determinations of eligibility and need under the welfare laws are also excluded. See note 73 *infra*.

7. Outstanding studies of the operation of state agencies include BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN NEW YORK* (6 vols., 1942); DODD, *ADMINISTRATION OF WORKMEN'S COMPENSATION* (1936); PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* (1927). An excellent local study in Indiana is STONER, *BUILDING REGULATIONS IN INDIANA* (1951).

8. *State v. Marion Circuit Court*, 100 N.E.2d 888 (Ind. 1951), 103 N.E.2d 214 (Ind. 1952); *Public Service Comm'n v. Indianapolis Railways*, 225 Ind. 30, 72 N.E.2d 434, 225 Ind. 656, 76 N.E.2d 841 (1947).

9. *Warren v. Indiana Telephone Co.*, 217 Ind. 93, 26 N.E.2d 399 (1940); *Financial Aid Corp. v. Wallace*, 216 Ind. 93, 23 N.E.2d 472 (1939); *Albert v. Milk Control Board*, 210 Ind. 283, 200 N.E. 688 (1936); *Wallace v. Feehan*, 206 Ind. 522, 190 N.E.

"The theory of the law creating the Public Service Commission," the Supreme Court has said, "is that it shall be conscientiously and impartially administered by a body composed of a personnel especially qualified by knowledge, training and experience pertaining to the subject-matter committed to it. . . ." ¹⁰ The question for a court to determine in reviewing the work of the Commission is whether its order "is reasonable or within its power to make"; and in reaching this determination the court must keep in mind that it is concerned only with "questions calling for judicial interpretation as distinguished from matters administrative." ¹¹

Even when, by legislative direction or as a result of the form of proceeding in which review is sought, a court undertakes a "trial *de novo*" in reviewing administrative action, judicial interpretation tends to narrow the issues to be determined. A frequent type of review proceeding is the injunction suit brought in a circuit or superior court to prevent the enforcement of an administrative determination. In such a suit, as in other actions, a trial is held so that evidence may be received and the issues determined. If there is an administrative record and it is to come before the court, it must either be introduced as evidence or be certified by the agency. It would not be unnatural for the court to treat such a proceeding like any other action, leading to determination of the issues on the basis of the court's appraisal of the evidence received, including, but not limited to, the administrative record, and without deference to the agency's conclusions. Such was, indeed, the conception adopted by the Supreme Court in one case ¹² with reference to review under the Public Service Commission Act of 1913, which provided for "an action . . . to vacate or set aside" an order of the Commission "or enjoin the enforcement thereof on the ground" that the terms of the order were "insufficient, unreasonable, or unlawful." The statute further provided that the case should "be tried and determined as other civil actions"; but it placed the burden of proof upon the "party adverse to" the Commission and it provided that, unless the parties stipulated to the contrary, the court should certify to the Commission any new evidence which it received, differing from that pre-

438 (1934); *In re Northwestern Indiana Telephone Co.*, 201 Ind. 667, 171 N.E. 65 (1930); *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900); *Keeling v. Board of Zoning Appeals*, 117 Ind. App. 314, 69 N.E.2d 613 (1946).

10. *In re Northwestern Indiana Telephone Co.*, *supra* note 9, at 674, 171 N.E. at 68.

11. *Ibid.* As will appear below, the prevailing formula which defines the role of the courts in reviewing administrative determinations has become somewhat more elaborate and precise than the quoted words. These, however, state the essence of the matter.

12. *Public Service Comm'n v. Cleveland, C., C. & St. L. Ry.*, 188 Ind. 197, 121 N.E. 116 (1918).

viously introduced before the Commission, and that the Commission should then reconsider the matter. The statute directed the Commission, in response to service of summons in such a review proceeding, to certify its record, including a transcript of the testimony, to the court in advance of the trial.¹³

In a later case, *New York, C. & St. L. R. R. v. Singleton*,¹⁴ the court, viewing these provisions in their totality, changed its position. It quoted with approval a passage from an earlier opinion¹⁵ which observed that “. . . it is to be remembered that the commission is the chosen agent of the General Assembly for the carrying out of its will, and that . . . the presumption in favor of the validity of an order made by the commission . . . is strong, and a clear case must be made out to justify the overthrow of its action”; and it went on to hold that “. . . before a court can say that a determination or order is unreasonable it must appear that there was no substantial evidence to support the findings of fact upon which the determination or order rested. If there is substantial evidence to support the findings, and if the order is one which the Commission has the power to make, in view of the findings, courts must uphold it.”¹⁶

The Court in the *Singleton* opinion differentiated the review in a case transferred from a justice of the peace court, which supersedes the previous proceedings altogether, from that in a case involving a Public Service Commission order where the suit “must be conducted upon the assumption that the order is valid unless and until the contrary is made to appear.”¹⁷ Under a different statute, however, the Appellate Court recently wavered from this view in a case involving the dismissal of a police officer by a municipal board of public safety. The statute there provided that, after an administrative hearing upon charges, the matter should, on review, “be heard *de novo*” in the circuit or superior court “upon the issues raised by the charges upon which the decision of the board was made. . . .” A jury might be had upon written request. The court, however, was to “review the record and decision of such board.”¹⁸ The Appellate Court concluded that under the statute an “motion from office” involves “a judicial process and not an administrative act,” and that the intention of the legislature was to provide for a complete re-

13. Ind. Acts 1913, c. 76, §§ 69, 78-86.

14. 207 Ind. 449, 190 N.E. 761 (1934).

15. *Pittsburgh, C., C. & St. L. Ry. v. Railroad Comm'n*, 171 Ind. 189, 205, 86 N.E. 328, 334 (1908).

16. *New York, C. & St. L. R.R. v. Singleton*, 207 Ind. 449, 458, 190 N.E. 761, 764 (1934).

17. *Id.* at 457, 190 N.E. at 764.

18. IND. ANN. STAT. § 48-6105 (Burns 1950).

determination in court of the merits of a dismissal, if judicial review were invoked.¹⁹ Since this conclusion conflicted with earlier holdings of the Supreme Court under the same statute,²⁰ the case was transferred to that court, which found it unnecessary to deal with the problem since the case could be decided on other grounds.²¹ The earlier holdings of the Supreme Court seem sounder, since it should be enough if careful procedure at the administrative level, accompanied by limited judicial review, is made available. It is arguable, however, that a dismissal from office on grounds of personal conduct presents issues which a court is qualified to determine for itself, as contrasted with the more technical matters involved in a public utility rate case, and that the legislature intended the courts to determine them under this statute.²²

In light of these authorities it is clearly the established view in Indiana that the courts are not ordinarily to supplant the conclusions of administrative agencies with their own determinations in reviewing administrative action. They are to determine only those limited issues, going to the legality of the administrative action, which are appropriate for judicial determination without invasion of the administrative province. These issues include questions of the legality of administrative procedure, of substantive law, and of abuse by the agency, as distinguished from questions of fact or of expert judgment. The Supreme Court has, indeed, rejected as unconstitutional some statutory provisions in which the legislature has sought to impose broader duties of review upon the courts.²³ Such duties, in the court's view, would violate the constitutional provision for separation of the powers of government.²⁴ "The power, duties and office of the assessing powers, which is a legislative and administrative function," the court said in a tax case,²⁵ "cannot bodily be transferred to the judicial department . . . where no judicial question is involved"; and the same is true of all other kinds of administrative functions. It is therefore surprising that the court, in the face of this

19. *Bishop v. Fort Wayne*, 91 N.E.2d 368 (Ind. App. 1950).

20. *Zellers v. South Bend*, 221 Ind. 452, 48 N.E.2d 816 (1943); *Lloyd v. Gary*, 214 Ind. 700, 17 N.E.2d 836 (1938).

21. *Bishop v. Fort Wayne*, 228 Ind. 304, 92 N.E.2d 544 (1950).

22. See Note, 26 IND. L.J. 397 (1951). In *Hyde v. Board of Comm'rs*, 209 Ind. 245, 198 N.E. 333 (1935), holding that the removal of a highway superintendent from office by the board of county commissioners was judicial and appealable to the circuit court (Treanor, C. J., and Roll, J., dissenting on this point, *id.* at 259, 198 N.E. at 338), the opinion distinguished the removal of a "mere employee, such as a teacher, policeman or fireman."

23. *Board of Medical Registration v. Scherer*, 221 Ind. 92, 96-97, 46 N.E.2d 602, 604 (1943); *Peden v. Board of Review*, 208 Ind. 215, 195 N.E. 87 (1935); *In re Northwestern Indiana Telephone Co.*, 201 Ind. 667, 171 N.E. 65 (1930).

24. IND. CONST. Art. I, § 3.

25. *Peden v. Board of Review*, 208 Ind. 215, 219, 195 N.E. 87, 88 (1935).

settled principle, has recently sustained the Circuit Court of Marion County in substituting its judgment, at least temporarily, for that of the Public Service Commission in a rate matter, not only, it would seem, to the extent necessary to guard against confiscation of the utility's property in any realistic sense, but to the extent of prescribing an interim rate schedule.²⁶

An exception to the requirement that judicial review of administrative action be restricted to issues of legality has been recognized with reference to those functions of local authorities which are regarded as judicial in character. It has been repeatedly held in this State that a board of county commissioners functions sometimes judicially and sometimes administratively, and the same is occasionally held with respect to municipal agencies. An action which is "judicial" in this sense may be subjected to full re-examination on statutory appeal to the circuit or superior court. The chief difficulty lies in determining what is a judicial function and what constitute, by contrast, local administrative actions. Probably the only basis for answering this question lies in historical and customary considerations, complicated by the fact that local governments perform many functions derived from the English justices of the peace, who combined judicial and administrative duties.²⁷ Once the determination has been made in a given case that a particular function is judicial, it follows logically that the circuit or superior court may subject the resulting local action to full re-examination on statutory appeal, if the governing statute so requires. Numerous cases so hold, but no consistent basis for the decisions has emerged.²⁸ The Supreme Court has stated that the basis lies in the procedure employed administratively: If it involves a hearing and determination on the basis of the evidence adduced, the proceeding is judicial; if it involves a determination on the basis of official knowledge or inspection, the proceeding is non-judicial.²⁹ Plainly,

26. *State v. Marion Circuit Court*, 100 N.E.2d 888 (Ind. 1951), 103 N.E.2d 214 (Ind. 1952). The case will be discussed further in the succeeding installment of this study.

27. See GOODNOW, *PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 179-184 (1905).

28. *Board of Comm'rs v. Droege*, 224 Ind. 446, 68 N.E.2d 650 (1946); *State v. Circuit Court*, 214 Ind. 323, 15 N.E.2d 624 (1938) (establishment of township); *Hyde v. Board of Comm'rs*, 209 Ind. 245, 198 N.E. 333 (1935); *Hastings v. Board of Comm'rs*, 205 Ind. 687, 695, 188 N.E. 207, 209 (1933) (removal from office) ("If the final conclusion of a proceeding permits the board to exercise a discretion, it will be judicial. . ."); *Falender v. Atkins*, 186 Ind. 455, 114 N.E. 965 (1917) (municipal board's vacation of street); *Board of Comm'rs v. Conner*, 155 Ind. 484, 495, 58 N.E. 828, 832 (1900) (road construction) (" . . . where in a proceeding the board . . . [has] no discretion . . . the decision . . . is judicial. . ."). Under various statutes the establishment of improvement districts is made subject to the judicial determination of the circuit court in the first instance. See *McKee v. Hasler*, 229 Ind. 437, 98 N.E.2d 657 (1951).

29. *Peden v. Board of Review*, 208 Ind. 215, 222, 195 N.E. 87, 89 (1935).

however, this criterion, if applied generally, would transform all of the more formal administrative proceedings into judicial ones and in large part eat away the principle that judicial review of administrative action must be limited. It is in fact a rationalization of something that cannot be explained logically.³⁰

In certain court proceedings which involve matters previously decided by an agency, but which can scarcely be denominated "review" proceedings at all, a complete re-trial of these matters by the court takes place. In relation to the recovery of reparation from a public utility, for example, where a customer or shipper seeks repayment of overcharges, it is common for statutes to provide that the shipper may bring an action in court if the respondent fails to pay a previous administrative award and that in such a proceeding the administrative order shall be "prima facie evidence of the facts therein stated." In other respects the suit proceeds "like other civil suits for damages."³¹ Here the matter being tried is traditionally judicial. It is noteworthy that, by contrast, except in a few states,³² workmen's compensation proceedings, although they replace tort actions, are viewed as non-judicial administrative proceedings, involving the application of statutory schedules of indemnity, and that only limited judicial review of the administrative determinations can be had.³³

With respect to judicial review of the usual scope given to the actions of administrative agencies, the premise that the courts are doing their own work and not supervising or repeating the work of the agencies leads to the conclusion that review proceedings, even when denominated

30. The same difficulty of distinguishing judicial from administrative functions has arisen in some jurisdictions in connection with the question whether certain proceedings are so inherently judicial that they cannot be entrusted to administrative agencies with power to determine the facts and the question whether a proceeding is judicial in the sense that it can be reviewed by a court upon certiorari. See Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory*, 47 YALE L.J. 538, 551-553 (1938).

31. IND. ANN. STAT. § 55-1406 (Burns 1951) (Reparation Act of 1913—applicable to carriers); *American Foundry Co. v. Chicago I. & L. Ry.*, 100 Ind. App. 111, 178 N.E. 295 (1935).

32. See Bear, *Workmen's Compensation and the Lawyer*, 51 COL. L. REV. 965 (1951).

33. *Warren v. Indiana Telephone Co.*, 217 Ind. 93, 26 N.E.2d 399 (1940). See *Grand Trunk-Western Ry. v. Industrial Comm'n*, 291 Ill. 167, 125 N.E. 748 (1919). It is sometimes suggested that the power to determine facts conclusively, even in a proceeding regarded as primarily judicial, may constitutionally be vested in an administrative agency. *Warren v. Indiana Telephone Co.*, *supra* at 104, 26 N.E.2d at 404. The Supreme Court of the United States took the same view in *Crowell v. Benson*, 285 U.S. 22 (1932), involving a federal compensation act, but held that in such proceedings, involving "private right," matters of "jurisdictional fact" must remain open to judicial determination by trial *de novo*. ✓

"appeals," are in reality newly-instituted judicial actions³⁴ rather than continuations of the administrative process. As such, they are subject to the constitutional principles applicable to judicial proceedings generally, including the principle that final review by the Supreme Court must remain possible. Legislative attempts to halt review proceedings in the Appellate³⁵ or circuit³⁶ courts have failed. The high court, accordingly, retains the authority to maintain a body of consistent principles of administrative law, subject to legislative variations within constitutional limits. It is fortunate that this is so, since conflicting policies otherwise might find expression in the decisions of different courts without possibility of correction.

C. Proceedings for Judicial Review of Agency Action.

Two principal ways of separating judicial proceedings for review of agency action into categories have been recognized. Each of them involves a dual classification. The first way distinguishes review proceedings in which the court is confined to the agency record from those which employ judicial trials to bring agency actions before the courts. The second classification divides review proceedings into "statutory" and "non-statutory," using these terms in a highly artificial sense.

Review proceedings in which the court is confined to the administrative record may involve procedural technicalities strikingly different from those in an ordinary case. In such a proceeding the Appellate Court recently dismissed an appeal of the Employment Security Division from a lower-court reversal of an administrative decision, where the appeal was predicated on the denial of a new trial in the court below. The appellate tribunal held that since there had been no trial in court, there could not be a new trial. The statute providing for judicial review clearly stated that the appeal to the Appellate Court should be directly from the lower court's initial action, based on an assignment of errors relating to that action, without the intervention of a motion for a new trial. The court might, it would seem, have looked through the charge of error in the denial of a new trial to the allegation of errors upon which the motion for a new trial was based, since the allegation appeared in

34. See *Board of Medical Registration and Examination v. Moore*, 224 Ind. 621, 625, 70 N.E.2d 354, 355 (1947); *Elkhart v. Minser*, 211 Ind. 20, 25, 5 N.E.2d 501, 502 (1937); *Ferner v. State*, 151 Ind. 247, 251, 51 N.E. 360, 361 (1898).

35. *Warren v. Indiana Telephone Co.*, 217 Ind. 93, 26 N.E.2d 399 (1940). In *Square Deal Co. v. O'Neal*, 225 Ind. 49, 72 N.E.2d 654 (1947), the court concluded that, contrary to the view taken in the *Warren* case, the legislature itself had provided a procedure for transferring workmen's compensation cases from the Appellate to the Supreme Court.

36. *Wilmot v. South Bend*, 221 Ind. 538, 541-542, 48 N.E.2d 649, 650-651 (1943).

the record; but it chose not to do so. It emphasized instead the dichotomy in methods of judicial review between reviews of records and review proceedings involving trials, which had been overlooked by the appellant.³⁷

The Appellate Court itself appears to have overlooked another aspect of the theory of judicial review in a recent case, with equally disastrous results to the party seeking review. An unemployment compensation claimant, having had his claim rejected by a referee, appealed to the agency's Review Board. That body dismissed the appeal because of his non-appearance at its hearing, notwithstanding a letter from him in response to the board's notice. In his letter he stated that because of age, troubles with his health and financial inability, he could not make the trip to Indianapolis for the hearing. He asked specifically that the board review the case in his absence. Under the statute, judicial review proceedings involving such an order lay in the Appellate Court, to which the claimant accordingly took his case. That court expressed the opinion that the board abused its discretion by its action but affirmed the board's order because the "appellant" had not brought his case to court properly. He had failed to present "a narrative statement of the evidence heard by the Referee" so as to demonstrate that he had a tenable claim on the merits and that, consequently, the procedural error of the Board was actually harmful. "It is a fundamental principle of *appellate* procedure," said the Court, "that a party cannot obtain a reversal unless he affirmatively shows he has been substantially harmed by the error of which he complains."³⁸ (emphasis added) As has been shown, a proceeding to secure judicial review of an administrative order, even when the review is to be based on the administrative record, is regarded as a new action in court.³⁹ To reach out for appellate theory in such a proceeding, with resulting detriment to a class of litigants likely to be unskilled in such niceties,⁴⁰ seems unfortunate.⁴¹

37. Gardner v. Lohnmann Construction Co., 116 Ind. App. 132, 62 N.E.2d 867 (1945).

38. Poulsen v. Review Board, 106 N.E.2d 245, 247 (Ind. App. 1952).

39. *Supra* p. 8.

40. See Fuchs, *The Task of Procedure When Social Needs Become Legal Rights*, 15 Soc. SERV. REV. 721 (1941).

41. It might be contended that if appellate procedure theory does not apply, some other theory must; and if the theory surrounding new actions applies, the question is whether the petition for review is sufficient. Whether on this issue or on that of negating harmless error, it seems unsound to say that a party, in order to get into court for the purpose of compelling administrative consideration of a claim, to which a statute entitles him, must show that he has a basis for his claim on the merits. This is, after all, one of the very matters to be determined by the administrative tribunal which, according to the court's own statement, is obligated to review his claim.

The dichotomy between review of a record and review by means of a trial, although conceptually fundamental, is not always as distinct as might be supposed. In a review proceeding which involves a trial, for example, the administrative record may be the only item of evidence received. If so, the proceeding resolves itself for all practical purposes into a review of the administrative record, as frequently happens.⁴² In the federal system, the statutory injunction proceeding in a three-judge district court, which was originally authorized by the Urgent Deficiencies Act of 1913 for review of orders of the Interstate Commerce Commission and was later extended to certain other agencies, evolved into a type of action in which evidence additional to the administrative record was seldom received. Such proceedings, it was widely recognized, differed only rarely from statutory review of administrative records in the courts of appeals, for which other legislation made provision.⁴³ The former method has now been supplanted, except as to the Interstate Commerce Commission, by the Review Act of 1950,⁴⁴ which authorizes proceedings in the courts of appeals to enjoin, set aside, suspend, or annul agency orders. In cases where evidence additional to the administrative record is required, the agency may be directed to receive it and, if need be, to reconsider its conclusions, as may also happen under statutes which provide for the record type of review.⁴⁵

Agency proceedings are affected in significant ways when judicial review is based solely upon the administrative record; for the proceedings must then be so conducted in all cases as to introduce the basis for the agency's action into the record with sufficient fullness to withstand possible attack. Official knowledge gained through investigation, for example, must be translated into evidence of record if it is to be relied on, even though convenience and speed might be served by leaving it in the minds of the officials who possess and use it. Many administrative functions cannot be well carried on through a record hearing, however, as in, for example, numerous instances of assessment of property for taxes, nuisance abatement, quarantining of diseased persons or

42. Notably in statutory injunction proceedings, such as those for the review of orders of the Public Service Commission.

43. See, for example, *Radio Corp. of America v. United States*, 95 F. Supp. 660, 669 (1950), *aff'd*, 341 U.S. 412 (1951); *National Broadcasting Co. v. United States*, 47 F.Supp. 940 (1942), *aff'd*, 319 U.S. 190 (1943). The district court in the former case perhaps overstated the matter when it asserted that "under *well-established* principles our function is to hear and determine the questions before us *solely* on the record made before the Commission" (emphasis added); but it can scarcely be doubted that there was a growing impression to this effect.

44. 64 STAT. 1120 (1950), 5 U.S.C. §§ 1032 *et seq.* (Supp. V, 1952).

45. It is so provided in § 5(c) of the Federal Trade Commission Act, the prototype of federal statutes of this sort. 38 STAT. 719 (1915), 15 U.S.C. § 45(c) (1946).

animals, issuance or refusal of licenses, or issuance of general regulations involve speedy decision, expert judgment, or extremely complex considerations. In such situations, the methods of a judicial trial would be inappropriate. Hence the administrative agency is traditionally free to proceed without building a record. Action which is taken in this manner must perforce be reviewed, if at all, on the basis of either an agreed statement or a trial in court, directed to those issues involved in the administrative action with which the court is concerned. Numerous reported cases involve judicial review of this type.⁴⁶

The other way of classifying review proceedings, as has been stated, divides them into "statutory" and "non-statutory" actions. These terms have reference to the authority for entertaining the various kinds of proceedings, but the words are not used in any exact sense. As used, they have reference to whether the proceedings are specifically authorized by statute in relation to agency action or whether they are available as general remedies (either by statute, such as a code of procedure, or under the common law) and may be used, among other things, for the review of agency action. The same distinction is made with reference to judicial review in the federal system; yet all federal judicial proceedings rest upon statute. Properly understood, the classification is useful, and it is stated frequently.⁴⁷

When statutory review procedures are provided, the use of other remedies is usually excluded by implication;⁴⁸ yet resort to generally available remedies to prevent usurpation or extreme abuse or to secure redress because of abuse may still be possible. Where these remedies are available the theory is often advanced that administrative jurisdiction to take the past or threatened action is lacking and that, accordingly, the procedures appropriate to correct errors in otherwise valid agency action are inapplicable. Perhaps the leading example is in tax cases. These permit an injunction suit to be brought for the purpose of preventing the collection of a tax if the alleged administrative error of substance or procedure is gross enough to render the tax void in the eyes of the court;⁴⁹ but the cases remit the taxpayer to his statutory

46. The federal review act, *supra* note 44, makes provisions for a trial in a district court in such a case.

47. REP. ATT'Y GEN. COMM. AD. PROC. 80-83 (1941); 42 AM. JUR. 665 (1942).

48. South Bend v. Marckle, 215 Ind. 74, 18 N.E.2d 764 (1939); Milk Control Board v. Crescent Creamery, 214 Ind. 240, 14 N.E.2d 588 (1938); State *ex rel.* Barnett v. State Board of Medical Registration, 173 Ind. 706, 1 N.E. 38 (1910); Stone v. Fritts, 169 Ind. 361, 82 N.E. 792 (1907). Parallel remedies contemplated by the statutes may sometimes be available. State *ex rel.* McCormick v. Superior Court, 229 Ind. 118, 95 N.E.2d 829 (1951); State v. Pigg, 221 Ind. 23, 46 N.E.2d 232 (1943).

49. Department of Treasury v. Ridgely, 211 Ind. 9, 4 N.E.2d 557 (1936). The plaintiff must also allege actual threatened injury by charging that the assessment is

remedies if the error is of lesser moment.⁵⁰ Discharged city employees have also been permitted to sue for damages for their wrongful dismissal or to bring actions of mandate to secure reinstatement where the statutory administrative procedures which should have been followed in dismissing them were disregarded;⁵¹ and it may be possible to enjoin further proceedings by an agency, or else its threatened action, where its members have become disqualified by interest or fraud.⁵² These exceptions do not materially weaken the general rule that statutory remedies, where they exist, are exclusive.

There may be priorities among non-statutory remedies too. These arise because of historical conceptions that some remedies are unusual and supplementary, whereas others belong in the normal order of things. Injunction, for example, is still supposed not to be available when adequate remedies at law exist.⁵³ An analogous doctrine has been followed with respect to the "extraordinary" legal remedy of mandate.⁵⁴ Here, however, the emphasis has been on the word "adequate"; and it has been held, for example, that the availability of penal actions against an officer for non-performance of duty does not foreclose an

really erroneous in substance. *Crowder v. Riggs*, 153 Ind. 158, 53 N.E. 1019 (1899); *Miller v. Vollmer*, 153 Ind. 26, 53 N.E. 949 (1899); *Schlosser Bros. v. Huff*, 75 Ind. App. 642, 128 N.E. 452 (1920).

50. *Thompson v. Travis*, 221 Ind. 117, 46 N.E.2d 598 (1943); *Board of Comm'rs v. Millikan*, 207 Ind. 142, 190 N.E. 185 (1934). See *McCreery v. Ijams*, 115 Ind. App. 631, 59 N.E.2d 133 (1945), commenting that it is "not an overstatement to say that the decisions are conflicting." New legislation governing the procedure for tax assessment and collection seems desirable for this, as well as other, reasons. Piecemeal amendments as to particular taxes have been adopted—e.g., the enactment of § 14(d) of the Gross Income Tax Act, Ind. Acts 1937, c. 117, § 14(d), now, as amended, IND. ANN. STAT. § 64-2614 (Burns 1951), overcame the effect of Department of Treasury v. Ridgely, *supra* note 49.

51. *Frankfort v. Easterly*, 221 Ind. 268, 46 N.E.2d 817 (1943); *Evansville v. Maddox*, 217 Ind. 39, 25 N.E.2d 321 (1940); *State ex rel. Shanks v. Common Council*, 212 Ind. 38, 7 N.E.2d 968 (1937). In the foregoing cases the required procedure was omitted altogether; but in *City of Peru v. State ex rel. McGuire*, 210 Ind. 668, 199 N.E. 151 (1937), the opinion of the court leaves it in doubt whether such was the situation there. The answer alleged, contrary to the complaint, that a hearing had been given, and the opinion states that "the evidence is such that the trial court was justified in deciding that the relator was not accorded a hearing as prescribed by the . . . statute." Compare *Wilmington v. South Bend*, 221 Ind. 538, 48 N.E.2d 649 (1943), where the plaintiff was held not entitled to bring a non-statutory action because he had not availed himself of the right to an administrative hearing. See also *Stone v. Fritts*, 169 Ind. 361, 82 N.E. 792 (1907).

52. See *Burridge v. Mishawaka*, 75 N.E.2d 560 (Ind. App. 1947), 225 Ind. 3, 77 N.E.2d 297 (1947), where the final decision rested on other grounds. Compare *Pippen v. Mishawaka*, 119 Ind. App. 397, 88 N.E.2d 168 (1949).

53. *State ex rel. Alcoholic Beverage Comm'n v. Superior Court*, 229 Ind. 483, 486, 99 N.E.2d 247, 248 (1951). See generally *Heugel v. Townsley*, 213 Ind. 339, 12 N.E.2d 761 (1938).

54. *State ex rel. Reichert v. Youngblood*, 225 Ind. 129, 73 N.E.2d 174 (1947); *State ex rel. Morgan v. Real Estate Bldg. & Loan Ass'n*, 151 Ind. 502, 51 N.E. 1061 (1898).

action of mandate to compel the duty to be performed.⁵⁵ The use of declaratory judgment proceedings to test the validity of past or threatened administrative determinations has been severely restricted by adherence to the view that the declaratory judgment remedy is not available if, under the facts, coercive remedies are.⁵⁶ The Appellate Court, however, has rather unaccountably, in the face of this view, regarded declaratory judgment proceedings as available equally with injunction suits to challenge the allegedly invalid imposition of taxes.⁵⁷

The effect of the restricted availability of declaratory judgments has been to relegate litigants to statutory methods of review where these have been provided and to the pre-existing "non-statutory" remedies where they have not. The difficulties connected with this haphazard collection of actions and the need of supplanting them altogether with simple statutory review proceedings have been strikingly stated.⁵⁸ In Indiana, however, these difficulties are less severe than elsewhere because of two factors, one long-standing and the other stemming from the adjudication act of 1947.⁵⁹ The first is the non-availability of certiorari to test the validity of administrative action.⁶⁰ The other is the adjudication act's provision for review proceedings, which excludes the "non-statutory" remedies to a considerable extent. This provision applies to the adjudicative determinations of state agencies with certain named exceptions. For most of the latter, including all those actions which give rise to considerable litigation, previous statutory methods of review exist.⁶¹

Certiorari, like the other "extraordinary" remedies deriving from the common law, is governed by statute in this State. The statute avoids the traditional term, certiorari, but provides that an appellate court may require an inferior court to certify a full and complete record in a pending cause. No mention is made of the issuance of any analogous order by a trial court or of any means to secure certification of a

55. *State ex rel. Cutter v. Kamman*, 151 Ind. 407, 51 N.E. 483 (1898).

56. *Hinkle v. Howard*, 225 Ind. 176, 73 N.E.2d 674 (1947); *Pitzer v. East Chicago*, 222 Ind. 93, 51 N.E.2d 479 (1943). See 2 GAVIT, INDIANA PLEADING AND PRACTICE 1757 (1942).

57. *Department of Treasury v. J. P. Michael Co.*, 105 Ind. App. 255, 11 N.E.2d 512 (1938).

58. DAVIS, ADMINISTRATIVE LAW c. 17 (1951).

59. See note 4 *supra*.

60. Except statutory certiorari to review the determinations of local zoning boards of appeals. IND. ANN. STAT. § 53-786 *et seq.* (Burns 1951). Unlike common law certiorari, this statutory proceeding may involve the reception of additional evidence in court to supplement, but not supplant, that in the administrative record. *Id.* § 53-788. See *O'Connor v. Overall Laundry, Inc.*, 98 Ind. App. 29, 183 N.E. 134 (1932).

61. IND. ANN. STAT. §§ 63-3014-3019 (Burns 1951).

record from an administrative tribunal to court.⁶² It has been concluded that the statute is exclusive and that common law certiorari, as such, has been abolished in this State.⁶³ No basis has been found for using the writ to review the decision of an administrative tribunal, and it has not been so used. Hence the difficulties experienced elsewhere,⁶⁴ of distinguishing between the proper uses of certiorari and those of mandamus, have not arisen in Indiana.

The adjudication act of 1947⁶⁵ specifically states that unless a review proceeding is commenced pursuant to its terms, "any and all rights of judicial review and all rights of recourse to the courts shall terminate."⁶⁶ Hence, at the least, all other proceedings initiated for the specific purpose of challenging agency action would seem to be excluded. There is a possibility, nevertheless, that remedies other than the statutory one may be recognized in some circumstances where the alleged infirmity in the administrative order or decision is deemed to render it "void" and that this concept of voidness may be expanded to an uncertain extent, as it has been in the tax cases where injunction has been used successfully. It is to be hoped that, for the sake of simplicity as well as to avoid harassment to administration, the courts will interpret the act so as to preserve the exclusiveness of the statutory remedy, except in rare cases of genuine usurpation of authority. A factor tending to render this course somewhat difficult may, however, be the short statutory time-limit for bringing review proceedings.⁶⁷ That limit is fifteen days from the order, decision, or determination being reviewed without addition, even, for possible delay in the receipt of notice.

A possible liberalizing amendment to provide, for instance, thirty days from the receipt of notice by the party seeking review would be desirable in the interest of fairness and of eliminating possible pressure for the recognition of alternative remedies in cases of hardship.

Whether the exclusiveness of the statutory mode of review extends beyond barring such non-statutory recourse to the courts as may be attempted on the initiative of persons seeking review, is not entirely

62. The statute originated in the Code of 1852. In its present form it is Ind. Acts Spec. Sess. 1881, c. 38, § 664, IND. ANN. STAT. § 2-3224 (Burns 1946).

63. *First Merchants National Bank v. Crowley*, 221 Ind. 682, 50 N.E.2d 918 (1943); *Ex parte Sherwood*, 41 Ind. App. 642, 84 N.E. 783 (1908). The opinion in the former case refrains from actually deciding "whether a writ of certiorari should ever be used as an independent method of reviewing the judgment or action of an inferior court in a case where no adequate statutory appeal is available."

64. DAVIS, ADMINISTRATIVE LAW 771-786 (1951).

65. See note 61 *supra*.

66. IND. ANN. STAT. § 63-3014 (Burns 1951).

67. *Ibid.*

clear. The act's provision excludes "all rights of judicial review" as well as "all rights of recourse to the courts"; and it would seem that it is intended to prevent defenses to enforcement proceedings,⁶⁸ based on alleged invalidity of the orders being enforced, as well as independent actions to challenge such orders. The adjudication act provides a new means of enforcement, in that an "agency may bring a proceeding in equity against any person against whom a final order or determination has been made to compel compliance therewith, and the court . . . in such action shall have jurisdiction to enforce such order or determination by prohibitory or mandatory injunction."⁶⁹ It would seem that if the court in such an enforcement proceeding were intended to have any power to review or refuse to enforce an order or determination, the grounds upon which it might do so would have been specified, as the scope of review in review proceedings has been; but there is no such specification. By implication, therefore, judicial scrutiny of orders in enforcement proceedings seems to be excluded, even though the exclusion has not been stated in express words. An informed discussion of the adjudication act states only, with respect to the provision for exclusiveness of the review provision, that it "in effect eliminates the prior practice of testing agency determination by injunction insofar as matters within the purview of the Act are concerned."⁷⁰

The Supreme Court of the United States has had before it an analogous question under the Emergency Price Control Act. That Act established statutory proceedings in the Emergency Court of Appeals for judicial review of price orders. These proceedings were available for sixty days after an order became effective. The Act provided that no court should have jurisdiction to consider the validity of such an order or to enjoin its effectiveness in whole or in part, except the Emergency Court in such a proceeding. The Supreme Court held that the Act precluded consideration of the alleged invalidity of a price order by a court in an enforcement proceeding; and it sustained the constitutionality of the Act so construed.⁷¹ Congress, subsequent to the principal decision to this effect, made provision for the review procedure

68. Review in enforcement proceedings should be discouraged, since such proceedings are often not well-adapted to this purpose, especially in a jury case. The administrative action may lie far back in time and it may be difficult to disentangle the issue of validity, the evidence with regard to it, and the manner of its determination from the trial of the alleged violation. See the discussion of *Wallace v. Feehan*, p. 23-26, *infra*, involving a damage suit against officials which involved similar problems.

69. IND. ANN. STAT. § 63-3018 (Burns 1951).

70. ROBERT HOLLOWELL, JR., ADMINISTRATIVE PROCEDURE (dittoed ms. 1950). Mr. Hollowell was one of the drafters of the Act of 1947.

71. *Yakus v. United States*, 321 U.S. 414 (1944). See also *Woods v. Hills*, 334 U.S. 210 (1948).

to become available after the normal sixty-day period, upon application by a defendant in an enforcement proceeding. Further enforcement action was stayed pending the review.⁷² Thus the harshness of the original provision was mitigated without opening price orders to attack in the enforcement proceedings themselves. An analogous change in the Indiana adjudication act is hardly called for, since the act applies to adjudications involving "particular persons," who will be notified of them, instead of to general regulations like price orders; but a clarification of the language and an extension of the period for review such as is suggested above would be desirable.

Even if review proceedings under the adjudication act and statutory review under other enactments⁷³ are held to be exclusive means of testing the validity of administrative determinations to the maximum extent, there remain other agency actions that can be reviewed only by "non-statutory" means. The act of 1947 applies solely to adjudications, and there is no provision for review of regulations in the corresponding rule-making act of 1945.⁷⁴ The adjudication act, moreover, does not apply to local administrative action.⁷⁵ There also is doubt whether it applies to state administrative action which is authorized to be taken in a summary manner.⁷⁶ Traditional means of review must be employed

72. See the account of this legislation in the opinion in *Woods v. Hills*, *supra* note 71.

73. The adjudication act excepts the Alcoholic Beverage Commission, Industrial Board, and Public Service Commission, as well as various executive agencies, from its coverage and also excludes unemployment compensation awards and determinations of eligibility and need under the welfare laws. The statutes governing the agencies involved, except the welfare laws, provide to a large extent for statutory judicial review of the administrative determinations they authorize. See IND. ANN. STAT. § 19-192 (Burns 1942); *id.* § 12-536 (Burns Supp. 1951) (manufacturers' and wholesalers' alcoholic beverage permit issuance and revocation, and cease-and-desist orders of Commission); *id.* § 40-1512 (Burns 1952) (workmen's compensation awards of Industrial Board); *id.* §§ 54-429 *et seq.* (Burns 1951) (orders of Public Service Commission); *id.* § 54-1542(k) (Burns 1951) (unemployment compensation awards).

74. See note 4 *supra*.

75. The act applies to administrative adjudication by "agencies." "Agency" is defined to mean "any officer, board, commission, department, division, bureau or committee of the State of Indiana," other than those excepted. If local governmental agencies were intended to be covered, they would undoubtedly have been included specifically. Mr. Hollowell states that the act applies to "all state agencies" with the exceptions named—in other words "to some thirty-five agencies." ROBERT HOLLOWELL, JR., ADMINISTRATIVE PROCEDURE (dittoed ms. 1950). However, school administrations have been held to be state agencies in Indiana. *Benton County Council v. State ex rel. Sparks*, 224 Ind. 114, 65 N.E.2d 116 (1946); *State ex rel. Osborn v. Eddington*, 208 Ind. 160, 195 N.E. 92 (1935); *Stone v. State ex rel. Bossong*, 208 Ind. 65, 194 N.E. 642 (1935).

76. "Administrative adjudication," to which the act applies, is defined as "the administrative investigation, *hearing* and determination of any agency of issues or cases applicable to particular persons" (emphasis added), with stated exceptions. The act then provides, "In every administrative adjudication in which the rights, duties, obligations, privileges or other legal relations of any person are required or authorized

where no statute applies, whenever review is sought. In Indiana the two principal means are mandate, or mandamus, and injunction.

Mandamus lies to compel the performance of official duty required by law,⁷⁷ such as the payment of money,⁷⁸ the issuance of a license,⁷⁹ reinstatement to a position,⁸⁰ or the commencement of a proceeding.⁸¹ The action sought to be compelled must be non-discretionary—as, indeed is inherent in the concept of legal duty. The exercise of discretion in a particular manner cannot be compelled,⁸² nor can action that would be required under facts which are asserted but which are different from

by statute to be determined," the provisions of the act shall be followed. It goes on to provide that "the final order or determination of any issue or case applicable to a particular person [presumably an adjudication] shall not be made except upon hearing and timely notice." IND. ANN. STAT. §§ 63-3002, 3003, 3005 (Burns 1951). The logic of these provisions appears somewhat circular, since they seemingly require a hearing in proceedings which, by definition, already involve one. The question arises whether this requirement applies to proceedings which did not previously require hearings, thereby making these proceedings adjudications within the meaning of the act, or whether the act applies only where a hearing is otherwise necessary, thus rendering its own hearing requirement cumulative. The former appears from the context to be the purpose. A sweeping requirement of hearings in adjudications is thus enacted. Mr. Hollowell states that the act "gives process and the right to a hearing in many instances where it did not exist before"; and the scope of the hearing requirement is indicated by a provision for temporary orders, which can be issued without hearings in "emergencies." ROBERT HOLLOWELL, JR., ADMINISTRATIVE PROCEDURE (dittoed ms. 1950); IND. ANN. STAT. § 63-3005 (Burns 1951). Yet there must be a limit to the act's applicability where summary proceedings are necessary. For example the only "order or determination" possible where immediate destruction of a dangerous nuisance is contemplated, is the destruction itself. If that were accomplished through a "temporary" order without a hearing, there would be no occasion for a hearing thereafter. It seems probable that administrative action of this type was not looked upon by the drafters as adjudication to which the act applies. The line between such action and adjudication remains to be drawn. Whatever agency action falls on the non-adjudication side will, then, be subject to judicial review in "non-statutory" proceedings, since the judicial review provision of the act, like the other provisions, will not apply.

77. *State ex rel. Rogers v. Davis*, 104 N.E.2d 382 (Ind. 1952); *Gruber, Trustee v. State ex rel. Welliver*, 196 Ind. 436, 148 N.E. 481 (1925); *State ex rel. Horne v. Beil*, 157 Ind. 25, 60 N.E. 672 (1901). See IND. ANN. STAT. § 3-2202 (Burns 1946).

78. *Rice, Auditor v. State ex rel. Drapier*, 95 Ind. 33 (1883); *Gill, Auditor v. State ex rel. Board*, 72 Ind. 266 (1880).

79. The availability of other remedies has made it unnecessary to resort to mandamus for this purpose in Indiana. See *State ex rel. Barnett v. Board of Medical Registration*, 173 Ind. 706, 91 N.E. 338 (1910). *But cf. Public Service Comm'n v. State ex rel. Merchants Heat and Light Co.*, 184 Ind. 273, 111 N.E. 10 (1916) (permission to issue bonds).

80. *Kostanzer v. State ex rel. Ramsey*, 205 Ind. 536, 187 N.E. 337 (1933); *School City of Elwood v. State ex rel. Griffin*, 203 Ind. 626, 180 N.E. 471 (1932).

81. *Hoess v. Whittaker, Auditor*, 207 Ind. 338, 192 N.E. 443 (1934); *State ex rel. Wyman v. Hall*, 191 Ind. 271, 281, 131 N.E. 821, 824 (1921).

82. *State ex rel. Alexander v. Stevens*, 228 Ind. 675, 686, 94 N.E.2d 660, 665 (1950); *Jackson Township v. State ex rel. Garrison*, 204 Ind. 251, 183 N.E. 657 (1932); *State ex rel. Julian v. Board of Metropolitan Comm'rs*, 170 Ind. 133, 138, 83 N.E. 83, 85 (1907).

those found by an agency, where it is the agency's function to determine the facts.⁸³ Mandamus can be used, however, if fraud or other abuse by an agency has led to a fact determination which is deliberately false⁸⁴ or if there has been an abuse of discretion through a refusal to reach the only result legally possible under the actual facts found.⁸⁵ When the action lies and fact issues are presented, a trial is had which in this State could be to a jury.⁸⁶ If there is an administrative record, it may, of course, come in as evidence.⁸⁷

As in other situations involving delicate distinctions, difficult problems connected with mandamus are raised by the necessity of drawing lines between discretionary and non-discretionary functions,⁸⁸ between fraud or abuse and mere error,⁸⁹ and between abuse of discretion and simple unwisdom.⁹⁰ Despite these difficulties, mandamus is a highly useful, much-used remedy. At common law its usefulness was somewhat diminished by procedural technicalities. The General Assembly of Indiana doubtless intended to eliminate these technicalities when, in 1911, it substituted the action of mandate in the circuit and superior courts for the pre-existing "writ" of mandate, which already had supplanted mandamus. To a large extent the legislature succeeded; but some of the technicalities remain. Notably, the statute requires that the proceeding be entitled in the name of the State on the relation of the plaintiff;⁹¹ and if it is not, the cause is dismissed.⁹² The utility of

83. *State ex rel. Szweda v. Davies*, 198 Ind. 30, 36-37, 152 N.E. 174, 176 (1926).

84. *State ex rel. Felthoff v. Richards*, 203 Ind. 637, 180 N.E. 596 (1932).

85. *Public Service Comm'n v. State ex rel. Merchants Heat and Light Co.*, 184 Ind. 273, 111 N.E. 10 (1916).

86. *Steiger v. State ex rel. Fields*, 186 Ind. 507, 116 N.E. 913 (1917); *State ex rel. McCalla v. The Burnsville Turnpike Co.*, 97 Ind. 416 (1884). The court in the *Steiger* case did not notice a change in the wording of the statute since the decision in the *McCalla* case which conceivably could have been made the basis for a changed interpretation. Probably no change was intended.

87. See *School City of Peru v. Youngblood*, 212 Ind. 255, 9 N.E.2d 80 (1937).

88. *Public Service Comm'n v. State ex rel. Merchants Heat and Light Co.*, 184 Ind. 273, 111 N.E. 10 (1916): "A duty is none the less ministerial because the person who is required to perform it may have to satisfy himself of the existence of a state of facts under which he is given his right or warrant to perform the required duty." The real difference between the Commission and the court in the case concerned the question whether the Commission was entitled to give effect to a policy embodied in other sections of the governing statute than the one immediately involved, which was not stated in the particular section. If the Commission had been so entitled, it would have had discretion to act as it did.

89. *School City of Peru v. Youngblood*, 212 Ind. 255, 9 N.E.2d 80 (1937).

90. See *Steiger v. State ex rel. Fields*, 186 Ind. 507, 116 N.E. 913 (1917). If the proper allegations are made, the action lies; but the difficulty of making the necessary distinction shifts then to the trier of fact.

91. Ind. Acts 1911, c. 223, § 1, IND. ANN. STAT. § 3-2201 (Burns 1946).

92. *Danker v. Dowd*, 101 N.E.2d 191 (Ind. 1951); *Board of Public Safety v. Walling*, 206 Ind. 540, 187 N.E. 385 (1933).

this bit of insistence on traditional form is difficult to perceive, unless it lies in a reminder that a judgment in mandamus cannot be had as of right.⁹³ Even when the applicable rules of law entitled the plaintiff to relief, the court may find reasons to deny it because of some overriding public policy.⁹⁴

Although it is a residual remedy, not available when others can be invoked, mandamus is foreclosed only when these remedies are adequate.⁹⁵ Adequacy, of course, is a matter of judgment and of degree. The resulting uncertainty of remedial law is inescapable so long as a multiplicity of forms of action prevails. Under any system, moreover, it would be necessary to determine from time to time whether specific relief, such as mandamus affords, should be available to persons adversely affected by administrative determinations. No simplified scheme of judicial review could avoid this problem in relation, for instance, to license issuance.⁹⁶

Injunction is too familiar a remedy to require discussion here. The line between it and mandamus is at times a thin one, and the two remedies are to some extent interchangeable.⁹⁷ The distinction between compelling action, as in mandamus, and forbidding it, as in the ordinary injunction, is of course fundamental;⁹⁸ yet an injunction to prevent unfavorable administrative action may often be a feasible alternative to compelling favorable action by means of mandamus,⁹⁹ or the two

93. "In a sense the State is allowing an individual to enforce in the name of the State a remedy which the individual, as such, is not entitled to have." Board of Public Safety v. Walling, *supra* note 92 at 546, 187 N.E. at 387. See also State *ex rel.* City of Hammond v. Foland, 191 Ind. 342, 349, 132 N.E. 674, 676-677 (1921). In the Walling case, an appeal by the defendants in an action of mandate failed because the appellants had omitted the name of the state in designating the appellees.

94. This doctrine seems not to have been actually applied in Indiana. See United States *ex rel.* Greathouse v. Dern, 289 U.S. 352 (1933).

95. State *ex rel.* Black v. Burch, 226 Ind. 445, 490, 81 N.E.2d 850 (1948); State *ex rel.* Slenker v. Burch, 226 Ind. 579, 82 N.E.2d 258 (1948); State *ex rel.* Reichert v. Youngblood, 225 Ind. 129, 73 N.E.2d 174 (1947); State *ex rel.* Morgan v. Real Estate Building and Loan Ass'n, 151 Ind. 502, 51 N.E. 1061 (1898).

96. See p. 28, *infra*.

97. A proceeding to secure the reinstatement of a wrongfully discharged policeman is said to be "an action in the nature of a mandatory injunction." Coleman v. Gary, 220 Ind. 446, 44 N.E.2d 101 (1942); Elkhart v. Minser, 211 Ind. 20, 25, 5 N.E.2d 501, 503 (1937). In Keener School Township v. Eudaly, 93 Ind. App. 627, 175 N.E. 363 (1931), where back salary but not reinstatement was sought, the action was stated to be one to "set aside" the dismissal.

98. State *ex rel.* Elliott v. Custer, 11 Ind. 210 (1858).

99. Compare Stone v. Fritts, 169 Ind. 361, 82 N.E. 792 (1907), where, however, the action was brought prematurely, with other cases involving alleged illegal removal of public employees, cited notes 50 and 80 *supra*. See also State *ex rel.* Alcoholic Beverage Comm'n v. Superior Court, 229 Ind. 483, 99 N.E.2d 247 (1951) (attempted injunction against continued suspension of a license).

remedies may be joined.¹⁰⁰ Which must yield to the other, under the rules that each is not available when another adequate remedy may be had, is a question that appears not to have arisen in this State. The doctrines surrounding injunction do not emphasize that administrative discretion may not be controlled by means of it, as do the rules governing mandamus; yet it is evident that a court cannot properly enjoin action which an agency has discretion to take.¹⁰¹ It is also true that, even when injunction is otherwise the proper remedy to guard against a particular instance of threatened illegal action, relief will be denied if the threatened harm to the plaintiff is not sufficiently immediate to warrant judicial intrusion into administration.¹⁰²

There are three other principal "extraordinary" remedies against administrative action: habeas corpus, quo warranto¹⁰³ and prohibition. The first two have largely potential significance in relation to administrative action in Indiana. The availability of habeas corpus to test the jurisdiction of police or health officers or the officials of state institutions to detain individuals is clear, however,¹⁰⁴ and quo warranto is one of two common means of contesting the results of elections, as well as other claims to public office.¹⁰⁵ The third additional "extraordinary" remedy, prohibition, has recently been given greater significance than heretofore in relation to administrative action, by a decision holding that it will lie in a circuit or superior court to prevent an administrative tribunal from continuing to entertain a quasi-judicial proceeding of which it does not have jurisdiction.¹⁰⁶ The agency there involved was the Review Board of the Employment Security Division which was considering whether to award benefits under a provision of the unemployment compensation statute. That provision, the Supreme Court concluded, was unconstitutional because it delegated legislative power to

100. See *Lee v. Browning*, 96 Ind. App. 282, 182 N.E. 550 (1932).

101. *Cason v. City of Lebanon*, 153 Ind. 567, 55 N.E. 768 (1899).

102. *Greathouse v. Board*, 198 Ind. 95, 106-107, 151 N.E. 411, 415 (1926).

103. Quo warranto is denominated "information" in the governing Indiana statute. IND. ANN. STAT. §§ 3-2001 *et seq.* (Burns 1946). Habeas corpus is provided for in *id.* at §§ 3-1901 *et seq.*, and prohibition in *id.* at §§ 3-2206, 2207.

104. *Dowd, Warden v. Sims*, 229 Ind. 54, 95 N.E.2d 628, (1950); *State ex rel. Reed v. Howard, Warden*, 224 Ind. 515, 69 N.E.2d 172 (1946); *Darst v. Forney, Sheriff*, 199 Ind. 625, 159 N.E. 689 (1928); *Roney v. Rodgers, Sheriff*, 190 Ind. 368, 130 N.E. 403 (1921). See IND. ANN. STAT. § 22-1223 (Burns 1946). In *Goldstein v. Daly, Warden*, 209 Ind. 16, 197 N.E. 890 (1935), an effort to use habeas corpus to test whether a prisoner was being detained by the warden under one sentence or under two running concurrently was unsuccessful, where it was conceded that he was lawfully in custody at the time under at least one of the commitments.

105. See *State ex rel. McCormick v. Superior Court*, 229 Ind. 118, 95 N.E.2d 829 (1951).

106. *State ex rel. Standard Oil Co. v. Review Board*, 101 N.E.2d 60, 64 (Ind. 1951).

the board.¹⁰⁷ The court relied for its procedural decision on an unsupported dictum in a previous case,¹⁰⁸ treatises and out-of-state authority, and an inference from two early cases. Each of these cases disallowed the use of prohibition on the ground that the agency had authority to proceed, without stating that the remedy was otherwise inappropriate. In one decision the court said that prohibition, "if proper in the case at all," could not be sought at that particular stage.¹⁰⁹ In the other case the court noted that normally prohibition lies "to command the judge and parties of a suit in an inferior Court" to cease the proceeding because jurisdiction is lacking and that the county commissioners in the case, against whom prohibition was sought, actually had jurisdiction.¹¹⁰ It has already been noted that for some purposes a board of county commissioners may be considered a court.¹¹¹ All things considered, the inference from these two cases that prohibition may be used against a state agency is extremely weak. The present statute with respect to prohibition lends no verbal support to the view that the remedy may be invoked against any other tribunal than a court, for it refers to the writ's command to "the court and party to whom it shall be directed" and to the final judgment addressed to "the court and party."¹¹² The Supreme Court, in its recent decision, also relied on the statute conferring the same powers on the superior courts to grant interlocutory relief, including writs of prohibition, as the circuit courts possess,¹¹³ but such an enactment throws no light on what the powers of the circuit courts may be. We are back to the original question. As to that, there is authority elsewhere for using prohibition to control quasi-judicial administrative agencies.¹¹⁴ The court further relied on the general statute rendering the common law part of the law of Indiana.¹¹⁵ It is at best doubtful whether this statute prevails over a specific statute

107. The constitutionality of conferring broad power, which might be considered "legislative," or power which could be considered "judicial," on administrative agencies has been the subject of much writing and of many decisions. Its consideration involves judicial review of statutes and not of administrative action as such. Therefore, it will not be treated in this article.

108. *Financial Aid Corp. v. Wallace*, 216 Ind. 114, 122, 23 N.E.2d 472, 476 (1939).

109. *Corporation of Bluffton v. Silver*, 63 Ind. 262, 266 (1878).

110. *Board of Comm'rs of Jasper County v. Spittler*, 13 Ind. 235, 240 (1859).

111. See p. 6, *supra*.

112. IND. ANN. STAT. §§ 3-2206, 2207 (Burns 1946). The previous statute, R.S. § 764 (1852), 2 Ind. Stat. 298 (Davis 1876), contained the same words as the present one. Gavit, cited by the court, expresses the view that "presumably the common-law grounds for a writ of prohibition will prevail and one may in this manner control the proper exercise of jurisdiction by inferior courts or administrative officers in an action of this character." 2 GAVIT, INDIANA PLEADING AND PRACTICE 1748 (1942),

113. IND. ANN. STAT. § 4-1418 (Burns 1946).

114. See DAVIS, ADMINISTRATIVE LAW 688-690 (1951).

115. IND. ANN. STAT. § 1-101 (Burns 1946).

like that relating to prohibition; certainly it would not as to remedies which, like mandamus, have been transformed by legislation. Be that as it may, the decision may have only narrow significance. Injunction would be an appropriate remedy if prohibition were not, since the threat of irreparable injury, which the court found to be present in the case, would support an injunction suit against non-judicial action. It is also undecided whether the court will permit prohibition to be used in a case where the alleged want of "jurisdiction" is less fundamental than the unconstitutionality of the statute upon which the agency authority must rest. All in all, there is likely to continue to be infrequent resort to this remedy against administrative action.

The most significant additional "non-statutory" means of judicial review of administrative action at the instance of a party aggrieved is the damage suit against the officers who took the action or were responsible for it. This remedy, of course, operates after the fact and may often be inadequate for this reason and also because the defendant may be unable to respond in damages if the action is successful. Nevertheless, it has been used with some frequency,¹¹⁶ and the possibility of its utilization may operate *in terroram* upon administration in important ways.

In Indiana the doctrines as to possible tort liability of officials are broader than in some other jurisdictions. They include answerability for malicious action, including malicious abuse of discretion which does not otherwise constitute a tort, such as withholding a license to one entitled to it,¹¹⁷ as well as liability for trespass, negligence, and other types of generally recognized tortious conduct. Officials who authorize or direct the tortious conduct of subordinates by regulations or orders are equally liable with the subordinates who engage in it;¹¹⁸ but the subordinates would be solely liable for conduct going beyond their instructions. In the federal system and in a number of states, by contrast, administrative officials performing discretionary functions share the immunity of judges from liability, extending even to malicious acts.¹¹⁹ Whether the theoretically broader liability in this State has practical significance is doubtful, since there do not seem to be reported cases which affirm recoveries by plaintiffs. Successful actions will in any case be rare because of difficulties of proof and the reluctance of

116. *Wallace v. Feehan*, 206 Ind. 522, 190 N.E. 438 (1934); *Branaman v. Hinkle*, 137 Ind. 496, 37 N.E. 546 (1893); *Fertich v. Michener*, 111 Ind. 472, 14 N.E. 68 (1887); *Elmore v. Overton*, 104 Ind. 548, 4 N.E. 197 (1885).

117. *Elmore v. Overton*, *supra* note 116.

118. *Wallace v. Feehan*, 206 Ind. 522, 190 N.E. 438 (1934); *Fertich v. Michener*, 111 Ind. 472, 14 N.E. 68 (1887).

119. DAVIS, *ADMINISTRATIVE LAW* 801-804 (1951).

courts to discover abuse on the part of officials presumed to be attempting to discharge their duties.¹²⁰

When, in a tort action against them, officials rely upon an administrative regulation to justify their conduct, the plaintiff may seek to test the validity of the alleged justification. A leading Indiana case, *Wallace v. Feehan*,¹²¹ which in this respect coincides with an earlier one,¹²² holds that the validity of a regulation may be so tested but that the question of validity is to be decided by the court, not by the jury. Such a review of the validity of an administrative measure will necessarily be of the non-record type, since the attack is collateral and there is no procedure whereby the administrative record, if any exists, may be certified to the court—although it may, of course, come in as evidence. If facts are to be ascertained as a basis for determining the question of validity, they must come in through a trial or be judicially noticed. If the former procedure is followed, there will then be in effect two trials—one to the court regarding the validity of the challenged regulation or order, the other to the jury (unless a jury is waived) with regard to the conduct complained of. Awkward procedural problems may well arise in such a situation, as will be the case also if the validity of a regulation is challenged by the defendant in a prosecution for its violation.¹²³ If judicial notice can be taken of facts bearing on the validity of the regulation, on the other hand, the parties can adduce these facts by references in briefs or memoranda to the court, which will thus be kept separate from the evidence going to the jury.

120. *Branaman v. Hinkle*, 137 Ind. 496, 501, 37 N.E. 546, 548 (1893). It is perhaps significant that in this case the court came in the end to judge the sufficiency of the complaint, which was in issue, on the basis of the law of libel rather than on any theory of malicious abuse of discretionary authority. The action was brought by a discharged school teacher for an alleged conspiracy to remove him from his position without just cause. See also the court's evident lack of conviction that the plaintiff could make out a case, in *Fertich v. Michener*, 111 Ind. 472, 14 N.E. 68 (1887).

121. 206 Ind. 522, 190 N.E. 438 (1934).

122. *Fertich v. Michener*, 111 Ind. 472, 14 N.E. 68 (1887).

123. See note 68 *supra*. Collateral attack on administrative regulations or orders may arise incidentally to other kinds of litigation also—*e.g.*, a damage suit in which one party relies on violation of a regulation by the other as negligence and the other attacks the validity of the regulation. State *ex rel.* *Benham v. Bradt*, 170 Ind. 480, 84 N.E. 1084 (1908), was a quo warranto action in which the eligibility of one of the parties for the office in question became an issue, turning on whether he held a valid teacher's license or not. His license certificate, said the court, "in the absence of fraud affecting it, is conclusive evidence" of the validity of the administrative action underlying its issuance. By inference, the question of fraud could be litigated in such a collateral proceeding. Clearly inquiry into questions of validity in such proceedings should be held to a minimum even when a jury trial is not involved, since otherwise extreme difficulties of proof may arise and matters long supposed to be settled may be reopened. Yet, if a party affected has not had occasion previously to concern himself with a regulation or order, it may be necessary to afford him an opportunity to do so when the actual need arises.

The precedent in *Wallace v. Feehan* is not clear as to the method which should be employed for testing a regulation in a damage suit. The regulations there involved were issued by the Division of Entomology of the Department of Conservation, quarantining certain townships and prescribing preventive measures to eliminate corn borer infestation and prevent its spread. Relevant to the validity of the regulations were certain facts regarding the nature and habits of the pest. The answer of the defendants in the case contained averments as to these facts,¹²⁴ which were placed in issue by the reply; and there was testimony by one of the defendants, the State Entomologist, to the same effect as the allegations in the answer.¹²⁵ In stating the duty of the trial court to pass upon the validity of the regulations, the Supreme Court opinion summarized the pertinent allegations of the answer without identifying them as such, as a statement of facts which the court below "was bound to consider." The opinion further asserted that "the court also knew" that the measures required by the regulations were "an effective method of checking" the spread of the corn borer—an inference which the court might have derived either from testimony in the case or from published sources.¹²⁶ The word "knew" might be taken to indicate that judicial knowledge, or notice, was the proper source of the information; but the indication is far from certain in light of the procedure below and the state of the record before the court.

Other cases involving the validity of regulations are inconclusive as to the procedure to be followed. *Wallace v. Feehan* was decided in the Appellate Court before transfer to the Supreme Court but since the opinion of the former court approves the method followed in the lower court, of submitting the issue of validity to the jury, it throws no light on the course to be pursued when this issue is withdrawn from the jury.¹²⁷ An earlier case in the Appellate Court involved the same regulations; but it was an injunction suit against their enforcement. Reversing the lower court, the Appellate Court held that, "[I]n view of the facts shown by the evidence in this case," the regulations were valid.¹²⁸ *Blue v. Beach*¹²⁹ was likewise an injunction suit against the enforcement of a regulation, in which the answer of the defendant officials contained allegations of fact in support of the regulation, which were

124. Brief of Appellants, pp. 94-95, *Wallace v. Feehan*, 206 Ind. 522, 190 N.E. 438 (1934).

125. *Id.* at 386-390.

126. 206 Ind. 522, 535-536, 190 N.E. 438, 444-445.

127. *Wallace v. Feehan*, 181 N.E. 862 (Ind. App. 1932).

128. *Wallace v. Dohner*, 89 Ind. App. 416, 165 N.E. 552 (1929).

129. See cases cited noted 9 *supra*.

placed in issue; but the appeal was based upon alleged error in rulings upon demurrers, and the evidence was not in the record before the Supreme Court.¹³⁰ Affirming the lower court's decision in favor of the defendants, the court made use in its opinion of general information concerning smallpox and the efficacy of vaccination, upon which the validity of the regulation turned, some of which had been supplied to it during the pendency of the appeal,¹³¹ as well as of facts alleged in the pleadings, the sufficiency of which was being determined. Presumably a trial court might do likewise, but the opinion does not say so and it is unlikely that there was enough difference between the facts noticed and the facts alleged to raise the issue sharply.

In *Blue v. Beach*, the opinion analogizes administrative regulations, when authorized by legislation, to statutes and municipal ordinances, but recognizes that they, like ordinances, must pass scrutiny as "reasonable" before they are entitled to enforcement.¹³² The analogy suggests that the methods of testing the constitutionality of statutes and the validity of ordinances may be applicable to similar determinations respecting regulations. As to the sources of factual information necessary to pass on the validity of statutes and ordinances, the Indiana Supreme Court has only recently spoken definitively. "The only extrinsic facts which will be considered," it has said, "are those of which the court will take judicial notice."¹³³ Since the case before the court was an injunction suit, the objection advanced in a previous decision to the same effect, upon which the court relied,¹³⁴ that otherwise the validity of legislative action would "depend upon the varying opinion of juries," was not directly applicable. By the same token, the authority of the more recent decision would be persuasive in the situation exemplified by *Wallace v. Feehan*, in which a court must pass upon the validity of an administrative regulation. In this view, judicial notice would be the approved means of bringing necessary facts into the case. This conclusion is not certain, however; for administrative regulations may be in a different category from statutes and ordinances. The court has recognized that fact issues may be raised and determined upon evidence by the trier of fact, where the validity of the application of a statute to a particular situation, such as is contained in an administrative order

130. *Blue v. Beach*, 155 Ind. 121, 124-125, 56 N.E. 89, 90-91 (1900).

131. *Id.* at 126, 56 N.E. at 91.

132. *Id.* at 130-131, 56 N.E. at 92-93.

133. *Department of Insurance v. Schoonover*, 225 Ind. 187, 190, 72 N.E.2d 747, 748 (1947).

134. *Pittsburgh, C., C. & St. L. Ry. v. Hartford City*, 170 Ind. 674, 684, 82 N.E. 787, 85 N.E. 362, 363 (1908).

fixing a rate for a utility, is to be determined.¹³⁵ The question is whether an administrative regulation, which is general in its terms but particularizes more than does the governing statute, is to be tested in the same manner as statutes and ordinances or in the way a court passes on the validity of an administrative order that applies only to a particular situation. Certainly from the standpoint of procedural simplicity the former alternative is to be preferred where a jury is to pass on other issues in the same case. The nature of the judicial task itself, where the validity of a regulation is to be determined, points to the same conclusion. The technical or general facts on which the matter is likely to turn, such as the characteristics of insect pests, the efficacy of measures to prevent disease, or the needs connected with a line of business, can ordinarily be determined more satisfactorily by resort to generally available information than by means of a judicial trial. There is, however, no consensus among the authorities as to the procedure to be employed.¹³⁶

To the extent that statutory methods of reviewing administrative action are provided and become exclusive, the foregoing difficulties connected with "non-statutory" remedies are avoided. Many different statutory methods exist in Indiana, although, as we have seen, important areas of administrative action are not covered by them.¹³⁷ Among them are the method of reviewing adjudications which is included in the adjudication act¹³⁸ and the methods prescribed with respect to a number of the most important state and local agencies. The latter include the action to vacate or enjoin the enforcement of orders of the Public Service Commission;¹³⁹ the "appeal" to the appellate court from awards of the Industrial Board;¹⁴⁰ the similar "appeal" from decisions of the Review Board of the Employment Security Division;¹⁴¹ lower-court review proceedings with respect to decisions of the liability referee of

135. *Department of Insurance v. Schoonover*, 225 Ind. 187, 191, 72 N.E.2d 747, 749 (1947).

136. See Note, 82 L. Ed. 1244, 1260-1261 (1938). As to the need for fact determinations in constitutional cases and the techniques for supplying information to the courts see, in addition, Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislation*, 38 HARV. L. REV. 6 (1924); Note, *The Presentation of Facts Underlying the Constitutionality of Statutes*, 49 HARV. L. REV. 631 (1936). The related question of the procedure suitable for the initial administrative fact determinations underlying regulations and other "legislative" actions of administrative agencies will be discussed in the succeeding installment of this study.

137. See p. 16, *supra*.

138. See p. 13, *supra*.

139. IND. ANN. STAT. §§ 54-429 *et seq.* (Burns 1951).

140. *Id.* § 40-1512.

141. *Id.* §§ 52-1542(j) *et seq.*

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the Employment Security Division;¹⁴² lower-court proceedings to enjoin and set aside safety regulations of the Commissioner of Labor;¹⁴³ proceedings in the circuit or superior court of Marion County to challenge orders of the Insurance Commissioner;¹⁴⁴ "appeals" to lower courts from property tax assessments¹⁴⁵ and from administrative refusals to refund overpayments,¹⁴⁶ as well as suits or appeals to recover overpayments of other types of taxes;¹⁴⁷ and proceedings to review dismissals from various public positions and offices.¹⁴⁸ The methods prescribed for the judicial handling of these various proceedings range from strict review of the administrative record, such as the adjudication act provides, to full trials in court. Equally varied provisions as to the issues upon review, or scope of judicial review, are stated in the statutes.¹⁴⁹

We have seen that these statutory methods are exclusive of "non-statutory" review,¹⁵⁰ with certain qualifications.¹⁵¹ In addition, the statutory methods must be followed strictly in order to avoid a total loss of remedy. The rationale behind the rule to this effect is sound: The legislative scheme for judicial review is part of the total scheme of administration provided in the governing statute. Presumably its various features were consciously designed to serve the legislative end. Hence they should be adhered to without deviation, so long as they accord due process, in order to effectuate the statutory purpose.¹⁵² Defendants in such proceedings are equally bound to comply strictly with the statutory procedural requirements.¹⁵³ In this connection as in relation to administrative procedure itself,¹⁵⁴ however, it is unsound to

142. *Id.* §§ 52-1557 (g) *et seq.*

143. *Id.* § 40-2143.

144. *Id.* § 39-5217. This provision is superseded as to adjudications by the adjudication act.

145. *Id.* § 64-1020.

146. *Id.* § 64-2821.

147. *Id.* §§ 64-2614, 907.

148. See pp. 4-5, *supra*.

149. The scope of review will be discussed in the succeeding installment of this study.

150. *Wilmont v. South Bend*, 221 Ind. 538, 48 N.E.2d 649 (1943); *Milk Control Board v. Crescent Creamery*, 214 Ind. 240, 14 N.E.2d 588 (1938); *Culbertson v. Board of Comm'rs*, 208 Ind. 22, 194 N.E. 638 (1935); *State ex rel. Barnett v. State Board of Medical Registration*, 173 Ind. 706, 91 N.E. 338 (1910). See note 48, *supra*.

151. See note 48, *supra*.

152. *Ballman v. Duffecy*, 102 N.E.2d 646 (Ind. 1952); *State ex rel. Brown v. St. Joseph Circuit Court*, 229 Ind. 72, 95 N.E.2d 632 (1950); *Culbertson v. Board of Comm'rs*, 208 Ind. 22, 194 N.E. 638 (1935).

153. *Michigan City v. Williamson*, 217 Ind. 598, 28 N.E.2d 961 (1940).

154. The same point in relation to administrative procedure will be discussed in the succeeding installment of this study. See the salutary conclusion of the appellate court in *Poulsen v. Review Board*, 106 N.E.2d 245 (Ind. App. 1952), that

insist upon strict adherence to procedural forms, as distinguished from more essential aspects of procedure such as time limits, where substantial justice may be defeated by the insistence. Especially is this true in relation to parties, such as social security claimants, who may be unrepresented by counsel at crucial times.¹⁵⁵

If a statutory scheme for making court review of agency action available were to be devised to take the place altogether of the "non-statutory" means, it would have to contain provisions with respect to the following: (1) suitable means of review (presumably confined to the administrative record) of agency action required to be based on the record of a hearing; (2) a somewhat different means of review (involving a trial in court when fact issues are raised) of agency action not required to be based on the record of a hearing;¹⁵⁶ (3) the occasions when, if at all, a suit may be brought to halt agency proceedings before the administrative process has run its course and the normal method of review has become available;¹⁵⁷ (4) the circumstances which warrant an action to secure specific judicial relief dictating final agency action, such as an injunction to prevent action altogether or a mandatory order to compel action to be taken in a particular manner;¹⁵⁸ and (5) the extent to which agency action may be attacked in collateral proceedings in light of the opportunity, or lack of it, which parties affected have previously had to challenge the action in review proceedings.¹⁵⁹ No such legislation has as yet been enacted in any jurisdiction, since administrative procedure legislation has contented itself with either retaining existing forms of review in force¹⁶⁰ or, like the Indiana adjudication act, establishing a new form of review proceeding which does not meet all contingencies.¹⁶¹

the Board should have treated a letter from an unemployment insurance claimant as an adequate substitute for appearance at a hearing.

155. The kind of decision to be avoided is illustrated in *Kravitz v. Director of Employment Security*, 326 Mass. 419, 95 N.E.2d 165 (1950), holding that a petition for judicial review of the denial of an unemployment benefit claim was properly dismissed because of failure of the claimant to deliver to the Director the number of copies of the notice of review and petition which the statute specified. Despite timely notice to the Director, he was, said the court, "... under no duty to act" until the requisite number of copies was supplied. Such a decision ignores wholly the proper function of an administrative agency to assist persons coming before it to obtain their essential rights under the law.

156. See p. 11, *supra*.

157. See pp. 11-12, *supra*.

158. See p. 19, *supra*.

159. See note 123, *supra*.

160. As does the Federal Administrative Procedure Act, 60 STAT. 237, 5 U.S.C. 1001 *et seq.* (1946).

161. See note 76, *supra*.

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An additional question as to the availability of judicial review, not heretofore discussed in this study, is whether certain administrative actions should be insulated altogether from review. A recent Indiana decision establishes one instance of apparently complete insulation. The Alcoholic Beverage Commission had suspended a retailer's beer and wine permit under a statute which provided that "[n]o person shall be deemed to have any property right" in such a permit and that "[n]o court shall have jurisdiction of any action, either at law or in equity, to compel the issuance of any such permit, or to revoke, annul, suspend or enjoin any action, ruling, finding or order of the commission suspending or revoking any such permit. . . ." The Supreme Court made permanent a writ of prohibition against the superior court's continuing to entertain an injunction suit against the suspension. The opinion points out that the statute was effective not only to foreclose jurisdiction but also to negate the existence of a "civil or property right" such as is necessary to secure protection by injunction.¹⁶² The decision does not specifically preclude a possible damage suit for the malicious exercise of the Commission's authority, but it is at best doubtful whether, even in such a case, the plaintiff could successfully allege damage to an interest which the action would lie to protect.¹⁶³ If not, the possibility of judicial review in any form and on any ground has apparently been foreclosed.

Dicta in other cases have been to the effect that ". . . the inherent right to a review of an order of an administrative board or commission is not statutory, but a right under the Indiana Constitution."¹⁶⁴ This proposition is correct in cases where the intervention of a court is guaranteed by constitutional provision, but it is not universally true. There are various matters as to which judicial review is withheld

162. *State ex rel. Alcoholic Beverage Comm'n v. Superior Court*, 229 Ind. 483, 99 N.E.2d 247 (1951).

163. The Court of Appeals for the Sixth Circuit held recently that the privilege of engaging in the liquor business may be protected against discriminatory denial under color of state law, by the Fourteenth Amendment and federal civil rights legislation. *Glicker v. Liquor Control Comm'n*, 160 F.2d 96 (6th Cir. 1947); see also the subsequent decision for the defendants on the merits, 75 F.Supp. 283. (E.D. Mich. 1947). It does not appear, however, that so clear a statutory negation of legal right as that in Indiana was present in the state law involved in the case. The statute, indeed, accorded judicial review in suspension and revocation cases. See MICH. COMP. LAWS § 436.20 (1948). Compare *Hornstein v. Comm'r*, 106 N.E.2d 354 (Ill. 1952).

164. *Ballman v. Duffecy*, 102 N.E.2d 646, 650 (Ind. 1952), citing *Warren v. Indiana Telephone Co.*, 217 Ind. 93, 26 N.E.2d 399 (1940), and *Joseph E. Seagram & Sons v. Board of Comm'rs*, 220 Ind. 604, 45 N.E.2d 491 (1943). Both cited cases involved the right of ultimate appeal to the Supreme Court in judicial proceedings. Only a dictum in the *Warren* case, *supra* at 104, 26 N.E.2d at 403-404, sustains the proposition for which the cases are cited.

altogether.¹⁶⁵ The problem thus becomes one of distinguishing between situations where judicial process is guaranteed and other situations where resort to court may be foreclosed. Indiana authorities are sparse. Oddly, one case which asserts the power of the courts to intervene involves a matter conventionally as far removed from legal right as the privilege of continuing in the position of public school teacher. The plaintiff had been dismissed by the township trustee and by the county superintendent of schools on appeal. Alleging bad faith, the plaintiff brought suit to have the dismissal set aside and for damages, in the face of a statutory provision that the decisions of county superintendents in such matters "shall be final." Another section of the statute, however, provided that nothing in the act "shall be construed so as to change or abridge the jurisdiction of any court in cases arising under the school laws of this state; and the right of any person to bring suit in any court, in any case arising under the school laws, shall not be abridged by the provisions of this act." The Appellate Court held that the alleged bad faith of the defendants was ". . . sufficient to take the case out of the general rule that the decision of such officer is conclusive and not subject to review."¹⁶⁶ The language of the statute conferring finality upon the administrative action was, obviously, less strong than that of the liquor control law.

The Supreme Court has held equitable intervention to be improper for the purpose of restraining the administrative suspension of a motor vehicle operator's license. The statute provided a method of judicial review in suspension cases and included a provision that there should be no stay of the administrative action during the review. The licensee having sought review in the circuit court, the judge issued a temporary restraining order. In making permanent a writ of prohibition against continuance of the injunction, the Supreme Court stated that the lower court's action not only violated the statute, but also exceeded equitable jurisdiction because "[a] license to operate a motor vehicle on the public highways is a privilege and not a property right."¹⁶⁷ Arguably, as under the liquor laws, judicial review might constitutionally be withheld altogether on the same ground; but the ground is a tenuous one. The line between privileges and rights is shifting and obscure. It results from conventional factors which often conflict with reality.¹⁶⁸

165. As to federal matters see DAVIS, *ADMINISTRATIVE LAW* c. 19 (1951).

166. *Keener School Township v. Eudaly*, 93 Ind. App. 627, 636, 175 N.E. 363, 366 (1931).

167. *State ex rel. Smith v. Circuit Court*, 108 N.E.2d 58, 59 (Ind. 1952).

168. The distinction has been more often made and criticized in relation to the requirements of administrative procedure than with regard to the necessity for judicial

Just as use of the postal service has come to be recognized as essentially a right, despite earlier holdings to the contrary,¹⁶⁹ so the use of the highways with motor vehicles, upon which the conduct of many of life's affairs depends, is surely a "civil," if not a "property," right which can become the subject of equitable protection.¹⁷⁰ It does not follow that a court should seek to intervene to protect this right in the face of a contrary statutory provision, where the statute accords a suitable remedy that also protects the public safety. The impropriety and danger involved in such intervention makes the court's decision clearly right; but whether all judicial relief might be withheld is another question. Branding the affected interest either a "privilege" or a "right" does not solve problems as to remedy. The answers should turn, rather, on the practical importance to the persons possessing them of the economic, personal, or political rights or privileges sought to be protected and the nature and importance of the public interests which have caused administrative regulation to be placed in effect.

In the federal scheme, executive action in some matters pertaining to military and foreign affairs or other political problems may not be questioned in court, but there are fewer matters of a similar sort in state administration.¹⁷¹ Where judicial review of state administrative action is sought, the significant questions as to the availability of relief are almost uniformly whether, on balance, a particular plaintiff has an interest that entitles him to invoke judicial review in a given form and, if so, what the scope of that review may be. Both of these questions will be treated in a subsequent portion of this study.

To be concluded in the Spring Issue

review. For an excellent criticism of the distinction see GELLHORN, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 273-283 (2d ed. 1947).

169. *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156 (1946); *Pike v. Walker*, 73 App. D.C. 289, 121 F.2d 37, 39 (D.C. Cir. 1941), *cert. denied* 314 U.S. 625.

170. See the able discussion in Johnston, *The Administrative Hearing for the Suspension of a Driver's License*, 30 N. C. L. Rev. 27 (1951).

171. Dodd, *Judicially Nonenforceable Provisions of Constitutions*, 80 U. OF PA. L. REV. 54, 84-92 (1931); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925). See *Clarke v. Board of Collegiate Authority*, 98 N.E.2d 273 (Mass. 1951). In *Hovey, Governor v. State ex rel. Schuck*, 127 Ind. 588, 27 N.E. 175 (1890), however, it was held that the Governor of this State cannot be compelled by mandamus to perform even a ministerial act. Compare *Elingham v. Dye*, 178 Ind. 336, 99 N.E. 1 (1912). Recently a mandamus action against the Governor and other officials was decided in their favor on the merits, the procedure not having been questioned when it might have been. *State ex rel. Cline v. Schricker*, 228 Ind. 41, 88 N.E.2d 746, 89 N.E.2d 547 (1949).