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# JUDICIAL CONTROL OF ADMINISTRATIVE AGENCIES IN INDIANA: II*

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*D. Prerequisites to Review Proceedings*

Assuming that a given administrative determination is of a kind which is subject to challenge in court on some justiciable ground and that one or more types of review proceedings exist in which such a challenge could be offered, it is still necessary for a given party to show, as a prerequisite to bringing one of these proceedings, that he occupies a position entitling him to invoke it. To do so, he must have an interest in the matter which (a) is of a kind entitled to protection in the particular proceeding sought to be invoked, and (b) is entitled to judicial protection at the time, because available administrative remedies have been exhausted.

As to the kind of interest entitled to protection, the courts start with the proposition that judicial proceedings may not be brought to vindicate interests that have not become legal rights residing in a party or parties who bring an action. Thus, the ordinary interest of property owners and the public in using a street is not a basis for a non-statutory injunction suit challenging the action of municipal authorities in vacating the street; but the peculiar interest of an abutting owner affords a basis for him to sue.[172] Perhaps for a similar reason, or because of statutory procedural provisions which cast the duty of going forward with medical license revocation upon administrative authority, the individual whose complaint led to the cancellation of a medical license was held not to be entitled to participate in an appeal to the Supreme Court from a lower-court decision reversing the revocation.[173] The question whether certain types of personal interests are deemed to rise to the

* Part I of this article appeared in the Fall Issue, p. 1, *supra*.

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172. City of Indianapolis v. Maag, 57 Ind. App. 493, 107 N.E. 529 (1915).

173. Board of Medical Registration v. Kaadt, 225 Ind. 625, 627, 76 N.E.2d 669 (1948).

level of civil or property rights entitled to equitable protection, as distinguished from mere privileges which are said not to be so entitled, has already been discussed.[174] Matters of a formal nature may enter into the substance of the right for which protection is sought, as is the case where the availability of a non-statutory action to recover money paid to the state turns on whether the payment was made under economic coercion and under protest. If it was, the action may be brought; if not, the money is beyond redemption.[175]

In this State political rights which an individual has in common with other citizens may be vindicated in mandamus proceedings.[176] In the case which originally announced this principle, the relator had a direct financial interest as a taxpayer in the performance of the duty sought to be compelled, since the amount of his assessment turned upon it;[177] but no such factor has been present as a basis for some of the later decisions.[178] Thus the validity of a legislative apportionment[179] and of a permanent registration law[180] could both be challenged judicially at the instance of voters affected. In the latter situation a declaratory judgment action was held to lie, apparently in the sensible view that the scope of this remedy should not be less than that of the traditional remedies which it supplements, including mandamus. An injunction suit, however, cannot be used for the same purpose, if only because mandamus is available and more appropriate.[181] In another declatory

174. See Part I, pp. 29-31 *supra.* See also Dep't of Financial Institutions v. Johnson Chevrolet Co., 228 Ind. 397, 92 N.E.2d 714 (1950). (A Concern having the intent to become a licensed seller of insurance, but not yet licensed, held lacking any "property right or interest" that might entitle it to challenge the validity of a regulation affecting licensed sellers).

175. Spring Valley Coal Co. v. State, 198 Ind. 620, 154 N.E. 380 (1926); State v. Mutual Life Insurance Co., 175 Ind. 59, 93 N.E. 213 (1910).

176. 2 GAVIT, INDIANA PLEADING AND PRACTICE 1793 (1942).

177. Hamilton, Auditor v. State *ex rel.* Bates, 3 Ind. 451 (1852).

178. The reason for the view which has been taken no doubt lies in the origin of mandamus as a writ whereby the King as head of the state could call his subordinates to account through the King's Bench. The restrictions upon the availability of the remedy, which resulted from this theory and rendered official permission necessary to the maintenance of a mandamus proceeding upon the initiative of a private party, have disappeared in this State; but a reminder of them resides in the requirement that the action of mandate be brought in the name of the State (see Part I, p. 18 *supra)* and in the public character of some of the interests that may be vindicated in such an action. See Part I, note 92 *supra.* In some other jurisdictions—although apparently a minority—a narrower view is taken. See Riesenfeld, Bauman and Maxwell, *Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota: I,* 33 MINN. L. REV. 569, 578-79 (1949), and authorities cited.

179. Brooks v. State *ex rel.* Singer, 162 Ind. 568, 70 N.E. 90 (1904); Denney, Clerk v. State *ex rel.* Basler, 144 Ind. 503, 42 N.E. 929 (1896).

180. Harrell v. Sullivan, 220 Ind. 108, 40 N.E.2d 115 (1942).

181. Greene v. Holmes, 201 Ind. 123, 166 N.E. 281 (1929). Here, in relation to the protection of strictly public rights, injunction yields to mandamus. Compare Part I, p. 20 *supra.*

judgment action taxpayers were permitted to challenge the validity of a statute permitting the State Board of Tax Commissioners to lower local tax assessments, upon which the Board had acted with prospective financial benefit to the plaintiffs.[182] The taxpayer's injunction suit to challenge the validity of official action which may increase public expenditures is a recognized remedy.[183]

The right to bring a statutory review action depends, of course, upon the statute. If its terms are not specific, their context and the practical considerations involved must determine what interests come within them. Thus, a user of public utility service is a party who may claim to be "adversely affected" by an order of the public Service Commission setting rates, even when it reduces them, so as to qualify for bringing a statutory review proceeding under a provision which entitles persons so affected to seek review.[184] A chamber of commerce, deeming itself similarly affected and "feeling aggrieved" by an order or by a court decree reversing an administrative order which permits a consolidation of utility companies, may bring review proceedings or take an appeal to a higher court in the matter.[185] The words "person aggrieved," employed in a statute to designate who might take an administrative appeal from the issuance of a building permit, were realistically held in one case not to contemplate the owners of property near to that involved, since they would ordinarily not know of the administrative action. Hence such persons might bring an independent suit to enjoin construction under a permit, without being open to the objection that their administrative remedy by appeal had not been exhausted.[186] It may be doubted, however, whether the same parties would have been preventd from taking an administrative appeal, if the question had arisen because of their effort to do so after gaining knowledge of the issuance of the permit. They would certainly have been entitled to participate in an appeal taken by someone else *(e.g.,* the applicant if a permit had been denied in the first instance), since the statute permitted remonstrances to be filed in the appeal proceedings.[187]

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182. Zoercher v. Agler, 202 Ind. 214, 172 N.E. 907 (1930).

183. Bennett v. Jackson, 186 Ind. 533, 116 N.E. 921 (1917); Ellingham v. Dye, 178 Ind. 336, 412-414, 99 N.E. 1, 28-29 (1912); Board of Comm'rs of Clay County v. Markel, 46 Ind. 96, 104-105 (1874); Harney v. Indianapolis, etc., R. R., 32 Ind. 244, 247-248 (1869).

184. Terre Haute Gas Corp. v. Johnson, 221 Ind. 499, 506, 45 N.E.2d 484, 486 (1942). See also State *ex rel.* Evansville City Coach Lines v. Rawlings, 229 Ind. 552, 560, 99 N.E. 597, 600 (1951).

185. *In re* Northwestern Indiana Telephone Co., 201 Ind. 667, 171 N.E. 65 (1930).

186. Fidelity Trust Co. v. Downing, 224 Ind. 457, 68 N.E.2d 789 (1946).

187. The statute governing the administrative appeal was not explicit on this point, although it authorized "any party" to appear [Acts 1921, c. 225, § 4, p. 660, as

In general, "person aggrieved" or similar words should be held to embrace at least anyone with a demonstrable economic stake in the outcome of the administrative proceeding sought to be reviewed. Such persons include business competitors of an applicant for a permit to do business, where the statute contemplates that public convenience and necessity shall be a governing consideration;[188] consumers of a product if its price or quality are to be affected by the administrative action;[189] and possibly suppliers of ingredients of a product which may be excluded from use in the product if administrative action setting standards for the product should be to a particular effect.[190] The present zoning statutes recognize neighboring property owners as proper parties to participate in administrative appeals and judicial review proceedings, in opposition to permission to erect structures.[191] If this procedural liberality seems inconsistent with the narrower doctrine of earlier origin respecting the right to challenge the closing of a street,[192] the reason may lie in the greater sensitivity of modern law to the need for protecting interests of which people are actually conscious. There is, however, this difference: The closing of a street involves a public decision as to a matter predominantly public, whereas an action as to zoning involves to a larger extent a balancing of conflicting private interests, through which the public interest becomes involved.[193]

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amended, IND. ANN. STAT. § 48-2304 (Burns 1933), superseded by *id.* § 53-780 (Burns 1951)]; but the following section, providing for judicial review, required notice to persons who had filed remonstrances in the administrative appeal.

188. Kosciusko County REMC v. Public Service Comm'n, 225 Ind. 666, 77 N.E.2d 572 (1948). See National Coal Ass'n v. Federal Power Comm'n, 191 F.2d 462 (D.C. Cir. 1951); Warehouse Distributing Corp. v. Dixon, 97 Ind. App. 475, 187 N.E. 217 (1933). See I. Duffey & Sons Co. v. Kemmer, 110 Ind. App. 116, 37 N.E.2d 274 (1941).

189. See Associated Industries v. Ickes, 134 F.2d 694 (2d Cir. 1943), dismissed as moot, 320 U.S. 707 (1943).

190. A. E. Staley Mfg. Co. v. Secretary of Agriculture, 120 F.2d 258 (7th Cir. 1941). Compare United States Cane Sugar Refiners' Ass'n v. McNutt, 138 F.2d 116 (2d Cir. 1943).

191. The statute provides for notice of judicial review to the adverse party or parties, who "shall be any property owner whom the record of the board of zoning appeals shows to have appeared at the hearing before the board in opposition to the petitioner." IND. ANN. STAT. § 53-784 (Burns 1951). The term "person aggrieved" has been dropped from the statute in relation to administrative appeals, *id.* § 53-779, but remains as a specification of who may seek judicial review, *id.* § 53-783. See Keeling v. Board of Zoning Appeals, 117 Ind. App. 314, 69 N.E.2d 613 (1947).

192. City of Indianapolis v. Maag, 57 Ind. App. 493, 107 N.E. 529 (1915).

193. So, although a competing power company, as a "party aggrieved," might be permitted to bring a statutory proceeding to challenge administrative action authorizing a new private installation, such a concern has been held not entitled to judicial relief in a non-statutory proceeding against action which would result in setting up new public competition for it. Alabama Power Co. v. Ickes, 302 U.S. 464, 481-485 (1938). The Federal Communications Act withholds a right to judicial review of radio license issuance at the instance of competitors unless electrical interference is involved, but permits competitors to bring review proceedings in order to urge

Under the Employment Security Act a special situation, somewhat analogous to that in taxpayers' suits, has resulted in the holding, clearly justified by the statute,[194] that the employer of a claimant of unemployment compensation, who has contributed through payroll taxes to the benefit fund and whose future contributions may be affected by the benefit payments chargeable to his account,[195] may seek review of a decision favorable to the claimant.[196]

The question of the nature of the interest entitling a private party to seek judicial review of administrative action suggests the question of the nature of the opposing interest and its representation in the review proceeding. Ordinarily the answer is clear: The administrative agency or the state is the proper defendant or respondent. In the *Northwestern Indiana Telephone Co.* case,[197] however, the Supreme Court came to the odd conclusion that the Public Service Commission was not a necessary party to a statutory "appeal" from one of its orders, where there had been opposing private interests before the Commission. In *Indianapolis Water Co. v. Moynahan Properties Co.,* under a later statute providing for review by injunction suit, the Court reversed a judgment granting an injunction against the utility's collection of increased rates authorized by the Commission, because the Commission had not been made a party to the suit. The Court stated that "it was the legislative desire and intention that the Public Service Commission should be a party, representing the public in all actions where its rate orders are questioned as unreasonable, unlawful, or void. . . ."[198] The order in the earlier case was not a rate order; but nothing turns on this difference. Unless an agency becomes an administrative court before which other officials prosecute claims, it should be given opportunity to fend for the public interest involved in its actions, if a challenge is offered in review proceedings.

The principle that administrative remedies must be exhausted before resort can be had to a court arises under various circumstances: (1) where available administrative review proceedings have not been invoked at all or have been dropped; (2) where administrative proceedings have resulted in an order but some supplementary step, such as a motion for

public interests which they possess the incentive to advance. See DAVIS, ADMINISTRATIVE LAW 697-701 (1951); Federal Communications Comm'n. v. WJR, 337 U.S. 265 (1949).

194. IND. ANN. STAT. §§ 52-1542j, 52-1542k (Burns 1951).

195. *Id.* § 52-1535b.

196. Carnegie-Illinois Steel Co. v. Review Board, 117 Ind. App. 379, 393, 72 N.E.2d 662, 668 (1941).

197. *In re* Northwestern Indiana Telephone Co., 201 Ind. 667, 675, 171 N.E. 65, 68 (1930).

198. 209 Ind. 453, 456; 198 N.E. 312, 314 (1935).

reconsideration, has not been taken; and (3) where there have been administrative review proceedings but some point, which it is sought to make upon judicial review, has not been urged when it might have been.

The general principle that exhaustion of administrative remedies is a prerequisite to judicial review has been recognized frequently in this State.[199] The Supreme Court has recently emphasized its importance. In the *Evansville City Coach Lines* case, two trade unions in behalf of their members as users of local transportation services sought to enjoin the enforcement of an order of the Public Service Commission, which had been entered without notice or opportunity for a hearing, permitting a local bus company to increase its fares. The Court made permanent certain writs of prohibition and mandate which had been issued on a temporary basis to prevent the trial court from giving further consideration to the suit. Its opinion pointed out that the Motor Vehicle Act permitted the plaintiffs to complain to the Commission against the fares at any time, to secure a hearing, and then to secure judicial review of adverse action by the Commission, if the administrative proceeding should fail to bring relief.[200] The administrative remedy so suggested would not prevent the increased fares from being collected during its pendency, and as a result the labor unions contended that due process of law would be violated if, without notice and opportunity for hearing, either before the agency or in court, the users of transportation services would become subject to the increased charges. As has been pointed out,[201] there are circumstances in which a threatened injury to private interest through administrative action may be prevented by resort to non-statutory judicial remedies in advance of the time when statutory relief can be obtained; and it is true that at times the administrative process itself may be superseded by this means. Where confiscation of a utility's property is threatened, for example, by low rates which the regulatory agency continues to enforce, immediate judicial intervention can be had.[202] The Court declined over vigorous dissent to regard the

199. *E.g.*, Wilmont v. City of South Bend, 221 Ind. 538, 48 N.E.2d 649 (1943) (discharged municipal employee); Culbertson v. Board of Comm'rs, 208 Ind. 22, 194 N.E. 638 (1935) (recovery of taxes).

200. State *ex rel.* Evansville City Coach Lines v. Rawlings, 229 Ind. 552, 99 N.E.2d 597 (1951). See note 184 *supra.*

201. See Part I, pp. 11-12 *supra.*

202. See Note, *Irreparable Injury in Constitutional Cases,* 46 YALE L.J. 255, 257 (1936); Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926); *Ex parte* Young, 209 U.S. 123 (1908). No similar case appears to have been reported in this state. Effect has recently been given in statutory review proceedings in this state to the view that confiscation may be prevented by the use of equitable powers. State *ex rel.* Public Service Comm'n 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 (1947), 225 Ind. 656, 76 N.E.2d 841 (1948).

threat to rate-payers as a ground for similar intervention. Its conclusion in this regard is predicated upon the statement that the Public Service Commission has "the exclusive power of regulating and fixing fares"; but behind its action is the view, which is supported by the authorities generally, that the protection of the consumer interest lies peculiarly in the administrative province, is of a different nature from a utility's property interest, and does not call for even occasional short-circuiting of the administrative process.

Because of the statute, which has been noted,[203] preserving pre-existing judicial remedies under the school laws despite the availability of statutory administrative appeals from township trustees to the county superintendents,[204] the doctrine of exhaustion of administrative remedies has been held not to apply with reference to actions of trustees which it is sought to challenge. Thus a school town and several taxpayers were held entitled to bring an action of mandate to control a trustee's action in terminating a joint school arrangement and refusing to furnish certain transportation, without previous resort to the county superintendent.[205] The Court drew a distinction between matters of "purely an administrative character," which may require resort to administrative appeals, and matters involving "a clear legal right to the relief sought and a clear legal duty on the part of the defendants to perform the thing demanded," which may be brought directly to court.[206] This distinction really relates, however, to the availability of mandamus which, as has been noted,[207] does not lie to control administrative discretion, and to the possibility of judicial relief at any stage, rather than to the question whether administrative remedies take precedence over judicial ones.[208] The point of the case is that mandamus is appropriate or not, according to the nature of the action sought to be challenged; and its availability is not affected by the statute providing for administrative appeals in township school affairs. The Court held subsequently, without qualification, that the party aggrieved by a trustee's action under the school laws "has the option of the procedure for the determination of his grievance before the school authorities, or he may maintain an action in court."[209]

203. See Part I, p. 30 *supra*. The provision is now IND. ANN. STAT. § 28-704 (Burns 1933).

204. The statutory provision for such appeals is contained in IND. ANN. STAT. § 28-2405 (Burns 1933).

205. Jackson School Twp. v. State *ex rel.* Garrison, 204 Ind. 251, 183 N.E. 657 (1932).

206. *Id.* at 267, 183 N.E. at 663.

207. See Part I, p. 17 *supra*.

208. See Wilkins v. Newkirk, Trustee, 85 Ind. App. 663, 670, 155 N.E. 516, 519 (1927).

209. Brumfield, Trustee v. State *ex rel.* Wallace, 206 Ind. 647, 190 N.E. 863, 865 (1934).

This decision was aided by the fact that the statute preserving judicial remedies was enacted later than the one providing for administrative appeals. As construed, this enactment invades seriously the principle that administrative action should run its course before courts intervene. The results include what appears to be a considerable body of litigation and, perhaps, a weakened power of control by the county superintendent over township trustees in school matters; but the fault, if there be one, lies with the legislature.[210]

The use of administrative rather than judicial proceedings is sometimes required by two other doctrines closely related to the principle that administrative remedies must be exhausted before resort to court can be had. Neither of these has been invoked explicitly in this State, but their substance has emerged. One of these requires that the question sought to be presented be "ripe" for review. It is not "ripe" if additional administrative steps are required before the administrative action becomes final.[211] In *Stone v. Fritts,* the plaintiff, a public school teacher, sought an injunction against the threatened revocation of his teacher's license by the defendant county superintendent, who had instituted threatened revocation proceedings before himself. If the decision of the defendant turned out to be adverse to the plaintiff, a statutory appeal to the state superintendent was available. In holding that the suit would not lie, the Court referred to the doctrine of exhaustion and also to the proposition that "[j]udicial officers, however wise, should not hastily usurp the prerogatives and functions" of school officials "and seek to substitute their own opinions and judgments for those of men held accountable for results in educational affairs." "Tribunals established by law," the Court said, "may not infringe upon the jurisdiction of each other."[212]

The other doctrine closely related to that of exhaustion of administrative remedies is that of "primary jurisdiction," which calls upon a court to decline to entertain a suit which is filed, not by way of invoking judicial review of administrative action, but independently of any administrative proceeding, where the matter involved is subject to administrative determination.[213] A contention that suit would not lie, based on this ground, was rejected in *Warehouse Distributing Corp. v. Dixon.*[214]

210. It is the more difficult under the statute for the courts to apply the principle of exhaustion to matters arising in school affairs, because of a clause in the appeal statute giving finality to the county superintendent's decision when an appeal has been taken to him. Although this clause is subject to exceptions (see Part I, p. 30 *supra*), it would cut deeply into the continued availability of judicial remedies which the later statute seeks to secure, were the use of the earlier one not optional.

211. See DAVIS, ADMINISTRATIVE LAW 652-663 (1951).

212. Stone v. Fritts, 169 Ind. 361, 369, 82 N.E. 792, 795 (1907).

213. See DAVIS, ADMINISTRATIVE LAW 664-673 (1951).

214. 97 Ind. App. 475, 187 N.E. 217 (1933).

There the plaintiff, a trucker possessing a certificate of convenience and necessity from the Public Service Commission, was successful in sustaining an injunction by the lower court against the continuance of a rival trucking operation which had not been authorized by the Commission. In holding that the controversy did not have to be brought before the Commission, the Court recognized that that body has exclusive jurisdiction of matters which belong to it under the statute. Here, however, the statute had been violated by the defendant in disregard of the Commission, which could only have gone to court to vindicate its authority if it instead of the court had been appealed to.[215] The decision is sensible, as is the Court's acceptance of the doctrine that matters requiring administrative determination cannot be carried off to court in independent actions.

Where an administrative remedy has been employed, but some supplementary step such as a motion for reconsideration has not been taken, the question of possible non-exhaustion of administrative remedies takes on a different aspect. The only issue is whether an effort must be made to give the agency a second opportunity to deal with the matters involved in the proceeding. Generally speaking, the answer is No.[216] The Federal Administrative Procedure Act now so provides, except as otherwise expressly required by statute or by agency rule which also renders the administrative action inoperative pending the disposition of the request for reconsideration.[217]

In Indiana under the Railroad Commission Act prior to its amendment in 1913, judicial review was held to be inappropriate at the instance of a party who had not attempted to secure a rehearing, perhaps because of the statute's specific inclusion of authority for the Railroad Commission to grant rehearing. "[W]e perceive no good reason," said the Supreme Court, "why the courts should be appealed to, in the first instance, to grant the relief that is within the power of the commission to give."[218] The words "in the first instance" suggest, as do the facts stated in the opinion, however, that the holding resulted from the circumstance that one of the contentions sought to be advanced on review in opposition to the Commission's order had not been urged in the administrative pro-

215. Administrative agencies seldom possess independent powers of enforcement. When resistance to their orders is encountered, either a judicial contempt proceeding, a suit for injunction, or a prosecution is necessary to compel compliance. Which of these means of enforcement is available depends ordinarily upon the governing statute.

216. Levers v. Anderson, 326 U.S. 219 (1945); DAVIS, ADMINISTRATIVE LAW, 636-638 (1951).

217. 60 STAT. 243, 5 U.S.C. § 1009(c) (1946).

218. Chicago, I. & L. R. R. v. Railroad Comm'n, 175 Ind. 630, 638, 95 N.E. 364, 367 (1911).

ceeding. If so, the decision is of course explicable on this ground. As amended in 1913, the Railroad Commission Act requires a rehearing as a condition of judicial review.[219] The Public Service Commission Act does not contain a similar requirement, nor is there mention in it of reconsideration or rehearing of non-railroad cases, to which the Act applies. It has been held, consequently, in accordance with the general view elsewhere, that judicial review may be had without attempted resort to any such procedure.[220] It was also held that a party wishing to obtain modification of a Commission order upon review, as distinguished from having it set aside altogether, need not have sought its modification by the Commission because of the latter's continuing power to reopen questions which have been before it.[221] The same view as to this point prevails under the Railroad Commission Act.[222]

The Supreme Court has indicated in a statement, not necessary to its decision of the particular case, that an agency has no power to accord rehearing procedure in the absence of statutory authority for it.[223] This view is of doubtful validity as a general proposition, at least as to situations where some practical reason exists for not requiring that the agency be bound by its first action; but it is reinforced under the adjudication act by a provision that a party aggrieved by an administrative order subject to the act may within 15 days file a petition with the agency for the right to introduce newly discovered evidence.[224] By inference, the authority to reopen a proceeding for other reasons is probably excluded, especially in view of the act's prior provision that "[e]very order or determination . . . shall be in full force and effect after it is duly entered and spread of record in the permanent records of the agency, provided, however, that the same may be reviewed as hereaftr provided."[225] The Act does provide that within the fifteen-day period during which judicial review may be sought, "every agency shall have authority

219. IND. ANN. STAT. § 55-112 (Burns 1951).

220. Greensburg Water Co. v. Lewis, 189 Ind. 439, 128 N.E. 103 (1920).

221. *Ibid.* The Commission's continuing power involves the institution of new proceedings rather than the revival of former ones by motions or petitions for amendatory relief. *Id.* at 444, 128 N. E. at 104. For an instance of statutory power to reopen and review a prior order which was subject to judicial review when made, see Peabody Coal Co. v. Lambermont, 220 Ind. 525, 44 N.E.2d 827 (1942).

222. New York Central R. R. Co. v. Public Service Comm'n, 191 Ind. 627, 632, 134 N.E. 282, 283 (1922). The contrary had been held under the unamended Railroad Commission Act. Northern Ind., etc., Cable Co. v. People's Mutual Telephone Co., 187 Ind. 486, 495-496, 119 N.E. 212, 214-215 (1918).

223. State Board of Tax Comm'rs v. Belt R.R., etc., Co., 191 Ind. 282, 130 N.E. 641 (1921).

224. IND. ANN. STAT. § 63-3015 (Burns 1951).

225. *Id.* § 63-3013.

to modify any order or determination," thereby starting a new fifteen-day period.[226] This provision, however, seems intended solely for the purpose of permitting the agency upon its own motion to strengthen its action if inadequacies are discovered. There is no provision for the suspension of the fifteen-day period within which judicial review must be sought, pending agency action upon a request for modification.

In *Park Improvement Co. v. Review Board,* the failure to raise a point in an administrative proceeding was held to be ground for judicial refusal to entertain it upon review.[227] The decision was based on reasoning with relation to judicial appeals, as to a contention which is made for the first time in the appellate court. This reasoning led to the conclusion that the contention had been waived by failure to make it in the lower court; but the result might equally well have been grounded upon want of resort to an available administrative remedy.[228] It should be noted, nevertheless, that in some types of administrative proceedings, in which the persons involved are inexperienced and perhaps without counsel, it would defeat the purpose of administration to insist upon a procedural formalism that deprives a party of the right to make a meritorious contention. If a substantial contention that was not made before the agency under these circumstances, even when it might have been, should be advanced upon judicial review, it ought to be entertained and lead either to a remanding of the proceedings if the matter calls for further administrative consideration or to a decision by the court upon the point presented if it raises an issue of law which the court is competent to determine.[229]

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226. *Id.* § 63-3026.

227. 109 Ind. App. 538, 36 N.E.2d 984 (1941). Slaubough v. Vore, 110 N.E.2d 299 (Ind. App. 1953), is illustrative of many cases that hold to the same effect with reference to evidentiary points which are argued for the first time before a reviewing court.

228. A leading case is *National Labor Relations Board v. Cheney California Lumber Co., 327* U.S. 385 (1946). There the refusal of the Court to permit judicial consideration of a point not raised before the agency rested upon a specific provision of the Nation Labor Relations Act, such as many federal statutes contain, which directed the courts not to consider any "objection that has not been urged before the Board . . . unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." It probably did not require this provision, however, to convince the Court that "Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. That is what the Board is for." *id.* at 389. See DAVIS, ADMINISTRATIVE LAW 615n. (1951).

229. The federal courts have recently recognized on numerous occasions in deportation and selective service cases, particularly if persons having difficulty with the English language are involved, that administrative procedural requirements which interfere with presentation of the merits should not be insisted upon. See, *e.g.,* Moser v. United States, 341 U.S. 41 (1951). As to the propriety of judicial decision in the first instance of questions of law that fall also within the competence of administrative

A special situation is presented under the Workmen's Compensation Act. The statute makes provision for hearing and decisions which in the first instance may be either by the full Industrial Board or by any of its members. If less than all the members act, an application for review by the full Board may be made within seven days. The Board must then either review the evidence or rehear the parties. In either event, it reconsiders the entire case. If review by the full Board is not sought within the prescribed period, the previous award becomes final and may not be reviewed at all.[230] Accordingly, resort to the administrative remedy of review by the full Board is a condition of judicial review.[231] When administrative review is invoked, the prior award is immediately rendered inoperative as to all parties[232] and any contentions of a party not then made before the full Board, whether previously urged or not, are foreclosed upon judicial review.[233] The reasoning is that the full Board must have an opportunity to pass on all points before they are taken to a court.[234] Although the procedural law thus evolved is a bit technical and might entrap a claimant unrepresented by counsel, the fact is that counsel are usually employed in compensation cases,[235] and the litigious nature of the proceedings in this respect seems not to present a particularly serious problem.

*E. Requirements as to Agency Procedure*

As has been indicated, the authority of the courts upon judicial review of agency action extends to determining the legality of agency procedures. If the procedure that has been followed in a particular instance has been illegal to the prejudice of a party invoking review, the resulting action may be set aside, enjoined, or made the basis of other appropriate relief.[236] The Supreme and Appellate Courts, however, while

agencies, when questions of fact or discretion might not be touched, see Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285 (1922).

230. IND. ANN. STAT. §§ 40-1510, 40-1511, 40-1512 (Burns 1951).

231. Eades v. Lucas, 107 Ind. App. 144, 23 N.E.2d 273 (1939); Galvin v. Brown, 71 Ind. App. 30, 121 N. E. 447 (1919); SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA 381 (1950).

232. Russell v. Johnson, 220 Ind. 649, 46 N.E.2d 219 (1943); Eades v. Lucas, 107 Ind. App. 144, 23 N.E.2d 273 (1939).

233. Rhoden v. Smith & Decker Electric Co., 107 Ind. App. 152, 23 N.E.2d 306 (1939), followed in Hays v. Joseph E. Seagram & Co., 222 Ind. 130, 52 N.E.2d 356 (1944), and Deszancsity v. Oliver Corp., 118 Ind. App. 504, 81 N.E.2d 703 (1948). See also Brooks v. International Furniture Co., 122 Ind. App. 300, 101 N.E.2d 197, 103 N.E.2d 220 (1952).

234. Rhoden v. Smith & Decker Electric Co., 107 Ind. App. 152, 23 N.E.2d 306 (1939).

235. SMALL, *op. cit. supra* note 231, at 378.

236. State Board of Medical Registration v. Scherer, 221 Ind. 92, 46 N.E.2d 602 (1943). As to the matters dealt with generally upon judicial review see Part I, p. 5,

asserting their authority to enforce constitutional and statutory requirements as to administrative procedure, have recognized that the legislature may confer discretion upon administrative agencies to determine their procedure within broad limits. When discretion of this sort has been exercised, the resulting procedural requirements become binding.[237] With respect to the Public Service Commission the Supreme Court has said, "the manner in which a question over which it has jurisdiction may be presented to it, as also the method by which it may be advised to correct action, is left almost entirely to the Commission."[238] The Railroad Commission Act provides that "[t]he commission may adopt and enforce such rules, regulations and modes of procedure as it may deem proper to hear and determine complaints and for the conduct of all investigations held by it. . . ."[239] The authority so conferred was held to include the power to require an advance petition to the Commission for leave to suspend a train, in connection with the power to regulate the railroads' service.[240] "If the commission lacked authority to make such rules under the law," said the Court, "there would be a condition existing that might become intolerable."[241] The procedural rule-making authority of the Industrial Board has been construed with similar breadth to embrace a regulation governing the method of obtaining from the Board those portions of the record in a case before the Board which it is desired to use in prosecuting a judicial review proceeding.[242] The power to prescribe procedures cannot be used, however, to impose an arbitrary requirement that a claimant of unemployment compensation appear at the hearing upon his request for an administrative review of the denial of compensation by a referee, where sufficient reason for his non-appearance is given in correspondence.[243] Similarly, the Public Service Commission's control over its procedures cannot be used to deny to a utility that consideration of its application for a rate increase to which the statute entitles it.[244]

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*supra;* p. 324 *infra.* As to the requirement of prejudice from procedural error, see I. Duffey & Sons Co. v. Kemmer, 110 Ind. App. 116, 37 N.E.2d 274 (1941).

237. Coleman v. City of Gary, 220 Ind. 446, 44 N.E.2d 101 (1942). This discretion is analogous to that which is exercised in substantive matters, Part I, pp. 2-3 *supra,* and is supported by some of the same considerations involving the specialized competence of the agencies.

238. *In re* Northwestern Indiana Telephone Co., 201 Ind. 667, 675, 171 N.E. 65, 68 (1930).

239. IND. ANN. STAT. § 55-101(e) (Burns 1951).

240. Illinois Central R.R. v. Public Service Comm'n, 225 Ind. 643, 75 N.E.2d 900 (1947).

241. *Id.* at 647, 75 N.E.2d at 902.

242. Russell v. Johnson, 220 Ind. 649, 46 N.E.2d 219 (1943).

243. Poulsen v. Review Board, 122 Ind. App. 484, 106 N.E.2d 245 (1952); See Part I, p. 9 *supra.*

244. Public Service Comm'n v. Indianapolis Railways, 225 Ind. 30, 72 N.E.2d 434 (1947).

Basic to the effective exercise of many administrative functions is the power to obtain information upon which agencies may decide whether to proceed and what their determination shall be.[245] Procedural problems arise when compulsion is among the means which may be employed to secure needed information. Three principal means of compelling disclosure could be used: (1) inspection or demand for information by administrative officers, backed by judicial sanctions for contumacious refusal; (2) similar inspection or demand, enforceable by administrative commitment for contempt upon refusal; and (3) application by administrative officers for court orders commanding disclosure, backed by judicial power to sentence for contempt. Of these means, the second has been declared unconstitutional in this State.[246] The first method has been sustained[247] and presents no important procedural problems. The third method has become the usual one where examination of books or papers is sought and where oral testimony is required. When this method is employed, important questions as to the occasions for its use and as to the permissible scope of the demand for information may arise, as they have under federal statutes;[248] but in Indiana the reported cases are few.

The entire history of the personal property tax in this state might have been different if the Supreme Court had received support for the position it took in 1895 on the question whether information as to possible tax evasion might be compelled in advance of proceedings against a specific taxpayer. In *Satterwhite v. State,*[249] the Court affirmed an order of the circuit court in a mandamus action, directing the officer of a bank to permit a county board of equalization to inspect the bank's books and to answer questions with respect to property shown on the books, which depositors might have omitted from their returns as taxpayers. The board did not allege that it had reason to believe particular taxpayers had omitted to declare property; its inquiry was exploratory. Over the dissent of Chief Justice McCabe, who contended that the governing statutes authorized compulsion to secure disclosure and testimony only when specific taxpayers were involved and had been notified, the Court held that the statute did authorize the inquiry and the use of compulsory process. It extended this holding to cover the authority of

245. State v. Wood, 110 Ind. 82, 10 N.E. 639 (1886).

246. Langenberg v. Decker, 131 Ind. 471, 31 N.E. 190 (1891).

247. Albert v. Milk Control Board, 210 Ind. 283, 200 N.E. 688 (1936); Shuman v. City of Fort Wayne, 127 Ind. 109, 26 N.E. 560 (1890). These cases sustain statutes under which the failure to permit access to information in the possession of regulated parties was punishable.

248. The problems and the law involved are analyzed in the opinion of the Court in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

249. 142 Ind. 1, 40 N.E. 654 (1895).

assessors under analogous statutes in two subsequent cases.[250] Later, however, in *Applegate v. State ex rel. Bowling,*[251] involving a county assessor's inquiry, the Court held that the assessor should at least be required to name the taxpayers whom he believed to have omitted property from their returns. In the interim the legislature amended the statutes to authorize a circuit court specifically to issue a writ requiring the production of records bearing upon the alleged omission of property from a tax return, but restricted this authority to situations where an affidavit had been filed with the court by a township or county assessor or member of a board, "setting forth his belief that certain property, to be named in the affidavit, has been unlawfully omitted from a certain specified tax return of a designated person, firm or corporation . . . and that some other person, firm or corporation, to be named in the affidavit, has in his or its possession certain specified books or papers containing evidence tending to show such unlawful omission of taxable property." The statute goes on to provide that "[n]o inspection of the books or papers of any person, firm or corporation by any tax officer shall be permitted or required except as specified . . . and all laws or parts of laws in conflict herewith are hereby repealed."[252] This statute, substantially unchanged, has been reenacted and is now in effect.[253]

Thus a specific statutory procedure for compelling disclosure has been provided, instead of the procedure by mandamus previously employed. The statute was applied and sustained not long after its enactment.[254] Under its provisions no previous demand need be made upon the party from whom information is desired. It could be argued that, because no controversy has arisen when the matter reaches a court, no judicial determination can be had.[255] The Court did not take cognizance of of this point, contenting itself with the observation that "the statute contemplates no previous notice to the person or corporation supposed to have" the desired evidence in its possession.[256]

Other statutes, such as the Employment Security Act, follow the federal method of compulsion by providing for judicial orders to enforce administrative subpoenas if disobedience is encountered.[257] Still others,

250. Cooperative Bldg. & Loan Ass'n v. State *ex rel.* Daniels, 156 Ind. 463, 60 N.E. 146 (1901); State *ex rel.* Morgan v. Real Estate Bldg. & Loan Ass'n, 151 Ind. 502, 51 N.E. 1061 (1898).

251. 158 Ind. 119, 63 N.E. 16 (1902).

252. Ind. Laws 1901, c. LXXI, p. 109.

253. IND. ANN. STAT. § 64-1026 (Burns 1951).

254. Washington National Bank v. Daily, 166 Ind. 631, 77 N.E. 53 (1906).

255. See Interstate Commerce Comm'n v. Brimson, 154 U.S. 447 (1894), in which, as is the universal practice under federal statutes of this sort, demand and refusal preceded the resort to court.

256. Washington National Bank v. Daily, 166 Ind. 631, 638, 77 N.E. 53, 55 (1906).

257. IND. ANN. STAT. §§ 52-1542f, 52-1542g (Burns 1951).

like the Public Service Commission and Railroad Commission Acts, provide penalties for disobedience to administrative subpoenas.[258] The adjudication act, which contains no procedural prescriptions for investigations, provides simply that "[w]henever the law applicable to the particular agency authorizes such agency to make investigations or inspections it may make the same as so authorized with or without notice."[259] By investigations without notice the act doubtless refers to general inquiries in advance of actual adjudicative proceedings.

Indiana decisions contain relatively little with regard to procedural requirements surrounding the formulation and issuance of general regulations by administrative agencies. The reason lies in the traditional absence of any such requirements, stemming from administrative convenience and the freedom of the legislature itself to frame its enactments without extending opportunities for appearances or other procedural courtesies to affected parties.[260] Under the act of 1945 governing rule-making, however, published notice and opportunity for hearings are mandatory in advance of the issuance of all regulations other than those relating to internal agency policy, organization, or procedure. Additional procedures, such as conferences with interested parties and written submissions by them, may be employed.[261] Before a regulation may issue it must be approved by the Attorney General for legality and by the Governor. It becomes effective upon filing with the Secretary of State, who is required to publish an official compilation of the regulations of state agencies currently in effect.[262] The law appears to be gravely defective because of the absence of any exception for emergency regulations, such as might be necessary to meet an acute health situation, similar to the exception which the adjudication act contains for temporary emergency orders.[263]

The hearing in connection with rule-making, pursuant to the Act of 1945, may be an informal legislative variety, since the requirement is simply "an adequate opportunity to participate in the formulation of the proposed rule or rules through the presentation of facts or argument or

258. *Id.* §§ 54-404, 55-116. The Public Service Commission Act provides also for enforcement orders from the courts. *Id.* § 54-416.

259. *Id.* § 63-3005.

260. The Final Report of the United States Attorney General's Committee on Administrative Procedure contains an account of the development of administrative rule-making and of rule-making procedure in the federal system. REP. ATT'Y GEN. COMM. AD. PROC. c. 9 (1941). See also Fuchs, *Constitutional Implications of the Opp Cotton Mills Case with Respect to Procedure and Judicial Review in Administrative Rule-Making*, 27 WASH. U.L.Q. 1 (1941), where account is taken of rule-making under state authority.

261. IND. ANN. STAT. § 60-1504 (Burns 1951).

262. *Id.* § 60-1505.

263. *Id.* § 63-3005.

the submission of written [data] or views."[264] In its historical context, the act clearly was not intended to require that the "presentation of facts," for which opportunity must be given, be of the variety which occurs in court. Rules of evidence, cross-examination, and other incidents of an adversary proceeding—even the swearing of persons appearing—need not have a place in what goes on.[265] The procedural requirements imposed by the act must be followed, however, and a published regulation which was not arrived at in the prescribed manner is invalid.[266] Neither may general regulations binding upon administrative authorities be established informally, without observance of the provisions of the act.[267]

Administrative adjudication is ordinarily set off from rule-making by the fact that it involves a process directed to disposing of the interests of particular persons, rather than the formulation of general regulations.[268] Among the requisites to valid adjudication is a tribunal free from prejudice as to the interests upon which it must pass.[269] Strongly-held views as to the merits of a case do not disqualify a tribunal so long as its members preserve an attitude of acting on the basis of evidence; but personal spleen indicative of a determination to reach a given result is an invalidating factor. Fraud, of course, also invalidates a proceeding and its outcome.[270] The matter of prejudice, apart from fraud, has arisen most often in this State in cases involving removals from office.

The fact that the official who must decide a removal case is also the principal witness against the person involved in the proceeding does not invalidate the hearing or the resulting order of removal.[271] It has

264. See note 259 *supra.*

265. See note 258 *supra;* Fuchs, *Procedure in Administrative Rule-Making,* 52 HARV. L. REV. 259 (1938).

266. State *ex rel.* Sights v. Edwards, 228 Ind. 13, 28-29, 88 N.E.2d 763, 89 N.E.2d 443 (1949).

267. State *ex rel.* Blair v. Gettinger, 230 Ind. 588, 105 N.E.2d 161 (1952).

268. Under the Indiana adjudication act it means "the administrative investigation, hearing and determination by any agency of issues or cases applicable to particular persons. . . ." IND. ANN. STAT. § 63-3002 (Burns 1951).

269. Prejudice in the invalidating sense must be distinguished from "bias" as to policy which stems from commitment to achieving the legislative purpose which an agency and its officials are there to serve. See DAVIS, ADMINISTRATIVE LAW c. 9 (1951).

270. Burridge v. Mishawaka, 75 N.E.2d 560 (Ind. App. 1947); See Part I, note 52 *supra.*

271. Stiver, Trustee v. State *ex rel.* Kent, 211 Ind. 380, 1 N.E.2d 1006 (1936). The reasoning clearly is that the dual capacity in which the official functions is made necessary by law and cannot in itself be a ground of invalidity. "It was the duty of the trial court, while examining the evidence introduced in the hearing before the trustee, not to consider any supposed interest of the trustee . . . in securing the cancellation of relator's contract." *Id.* at 386, 1 N.E.2d at 1008. "The common-law rule that nobody may be a judge in his own cause does not apply where members of the

been held, further, that a reviewing court does not even have "jurisdiction" to consider statements by a deciding officer which tended to show that he had prejudged the case in favor of removal;[272] but the decision is more properly explainable in terms of the insufficiency of such statements to show that the prejudgment was improperly motivated and that it could not be overcome by evidence favorable to the person under investigation. In an earlier case, similar statements were held to have been properly excluded from evidence by the trial court "as not being pertinent to the issue";[273] but statements of the deciding officers that it would be useless for the person under inquiry to offer any defense because it was their intention to dismiss him are relevant to the question whether the consideration given to his case was so unfair as to be invalid.[274] Similarly, evidence that the deciding officers acted in bad faith on the basis of trumped-up charges which they brought is sufficient, if believed, to warrant setting aside their action.[275]

When an administrative determination affecting particular persons is accompanied by proceedings in which those persons must be given an opportunity to participate,[276] notice to them is of course necessary.[277] Problems relating to the sufficiency of particular instances of notice have arisen frequently in the reported cases. The basic requirement is that the notice be adequate under the circumstances.[278] It may in some situations relate simply to the time and place of a meeting or hearing; in others the specification of issues may be required.

Quite rudimentary, but legally adequate in some situations, is the notice given by a statute which sets the time and place for a tribunal to meet. Notice of this type, however, is valid only where the persons

board . . . are performing their official duties. . . ." State *ex rel.* Szweda v. Davies, 198 Ind. 30, 38, 152 N.E. 174, 176 (1926). The situation is not different from what it would be if the deciding officer were authorized to proceed in a managerial capacity, without a hearing. See School City of Crawfordsville v. Montgomery, 99 Ind. App. 526, 187 N.E. 57, 188 N.E. 695 (1933).

272. School City of Peru v. State *ex rel.* Youngblood, 212 Ind. 255, 7 N.E.2d 176, 9 N.E.2d 80 (1937).

273. State *ex rel.* Szweda v. Davies, 198 Ind. 30, 152 N.E. 174 (1926).

274. State *ex rel.* Felthoff v. Richards, 203 Ind. 637, 645-647, 180 N.E. 596, 599 (1932). See also Colemon v. City of Gary, 220 Ind. 446, 44 N.E.2d 101 (1942).

275. Shira v. State *ex rel.* Ham, 187 Ind. 441, 119 N.E. 833 (1918); Keener School Township v. Eudaly, 93 Ind. App. 627, 175 N.E. 363 (1931).

276. Determinations which affect particular parties but are not accompanied by the right of participation include the summary abatement of nuisances and temporary orders under section 5 of the adjudication act. Whether these should be called adjudications is simply a matter of terminology. See Part 1, note 76 *supra,* with regard to whether nuisance abatement is adjudication within the meaning of the adjudication act of 1947.

277. Harmon v. Bolley, 187 Ind. 511, 120 N.E. 33 (1918); Fries v. Brier, 111 Ind. 65, 11 N.E. 958 (1886).

278. Falender v. Atkins, 186 Ind. 455, 114 N.E. 965 (1917).

affected have matters to bring up[279] or have reason to believe that questions of concern to them will arise—as is true, for example, if property tax assessments in a given area or for a given type of enterprise must be determined at a particular meeting.[280] The mere possibility that a taxpayer's assessment may be reviewed and changed is not enough to bind him by a statutory notice of the date of a meeting.[281] Notice by publication may sometimes suffice, if it specifies the matters to be considered.[282] Personal notice is of course adequate if it is timely and sufficiently precise in content. Failure to accord the notice required by law, unless cured in some manner, invalidates subsequent administrative action adverse to the party who was entitled to receive it.[283]

The well-known doctrine that notice which is not required by law is not legally effective even when it has actually been given has received impressive support in this State. In *Kuntz v. Sumption*[284] the Court concluded that a county board of equalization was without power to increase an individual's personal property tax assessment under a statute which was held invalid because it did not provide for notice to him that the matter would be considered by the board. The taxpayer had appeared before the board as a witness, pursuant to subpoena; but he did so under protest and the Court held that the actual notice so accorded was ineffective because it was not required to be given to the taxpayer in his capacity as such. Hence it rested in the discretion of the board whether to accord notice or not; and the statute failed for want of an essential provision. The Court noted, however, that had there been a basis in the statute for "an assumption of the right to give notice," and had there been some notice given which was effective even though "not . . . in strict conformity to law," the resulting administrative action might have been valid.[285] All of the pertinent cases cited by the Court in support of this observation involved statutes which made specific provision for notice, the adequacy of which was questioned or which had not been

279. Wilkins v. State, 113 Ind. 514, 16 N.E. 192 (1887) (license applicant).

280. Hyland v. Brazil Block Coal Co., 128 Ind. 335, 26 N.E. 672 (1890); Pittsburgh, C.C. & St. L. Ry. v. Backus, 133 Ind. 625, 33 N.E. 432 (1892), *aff'd* 154 U.S. 421 (1894); Cleveland, C.C. & St. L. Ry. v. Backus, 133 Ind. 513, 33 N.E. 421 (1892), *aff'd* 154 U.S. 439 (1894).

281. Kuntz v. Sumption, 117 Ind. 1, 19 N.E. 474 (1888).

282. *Id.* at 3, 19 N.E. at 475. See also International Bldg. & Loan Ass'n. v. Board of Comm'rs, 30 Ind. App. 12, 17, 65 N.E. 297 (1902). Eaton v. Union County National Bank, 141 Ind. 159, 40 N.E. 693 (1894).

283. Ropp v. Fulton, 183 Ind. 251, 108 N.E. 946 (1915); Kiphart v. Pittsburgh, C.C. & St. L. Ry., 7 Ind. App. 122, 34 N.E. 375 (1893); Gavin v. Board of Comm'rs, 104 Ind. 201, 3 N.E. 846 (1885).

284. 117 Ind. 1, 19 N.E. 474 (1888). This case is frequently cited in other jurisdictions and in the literature on the subject.

285. *Id.* at 3, 19 N.E. at 475.

followed precisely. Many years later in *Hdye v. Board of Commissioners,*[286] the Court held that the requirement of notice, which had actually been given, was implicit in a statutory provision for a hearing before the removal of a county highway superintendent from office. The conclusion that an implied provision for notice was valid rested in part on the ground that there is no constitutional requirement for notice and opportunity for hearing before a removal from office, but no logical or practical reason appears why a provision cannot be implied for constitutional reasons as well. It is true that the time and manner of notice must in such a case be determined administratively; but judicial review will be available as a remedy against inadequate notice not fulfilling the requirement of procedural due process of law.[287]

Where notice of a given variety is required and not given, but where actual knowledge comes to the attention of the person entitled to notice, who responds in the same way as he would have responded to the required notice, the omission is cured and the resulting administrative action is valid.[288] As to certain proceedings, furthermore, from which private rights may arise, a party who has not received notice or has received only defective notice may be estopped to take advantage of the omission or defect, even though he has not responded but has remained silent in the face of knowledge which he has. The estoppel arises if he has knowingly permitted others to rely upon the assumption that the proceedings are valid.[289]

Want of substantive injury to the party failing to receive notice will, at least, defeat his attempt to secure equitable relief against the resulting administrative action. Hence a taxpayer who has not been notified or has received defective notice of an increase in his assessment cannot

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286. 209 Ind. 245, 198 N.E. 33 (1935).

287. An excellent discussion of this whole problem will be found in GELLHORN, ADMINISTRATIVE LAW, CASES AND COMMENTS 352-361 (2d ed. 1947). In Vandalia R.R. v. Railroad Comm'n, 182 Ind. 382, 101 N.E. 85 (1913), the Court pointed to the notice and hearing administratively accorded to the railroad company before an order was issued requiring the installation by railroads of headlights conforming to certain specifications, as a basis for concluding that due process had been accorded. The notice and hearing were not in terms required by the statute. The proceeding was a rule-making one, however, and it is doubtful whether constitutional requirements as to procedure were applicable to it.

288. Deniston v. Terry, 141 Ind. 677, 41 N.E. 143 (1895); International Bldg. & Loan Ass'n v. Board of Commr's, 30 Ind. App. 12, 65 N.E. 297 (1902), *differentiating* Eaton v. Union County Bank, 141 Ind. 159, 40 N.E. 693 (1894).

289. *Cf.* Scudder v. Jones, 134 Ind. 547, 32 N.E. 221 (1893); Pretzinger v. Harness, 114 Ind. 491, 16 N.E. 495 (1887). These cases involved notice in relation to special assessments, in situations where a contractor had done work in reliance upon the validity of the proceedings. Bondholders might also be the persons protected by the estoppel.

bring an injunction suit against collection of the resulting tax without alleging that he does not actually owe the money.[290]

The constitutional requirement of notice and opportunity to be heard, where it applies, may be satisfied by a judicial proceeding, following the administrative action or before that action can take effect, even where there is no provision for administrative proceedings that satisfy the requirement.[291] The judicial proceeding should be held adequate, however, only where the merits of issues which the person affected is entitled to dispute are open to determination by the court; judicial review not extending to these issues would not be sufficient. In other jurisdictions the cases have at times overlooked this point.[292] In Indiana the question has been examined in cases involving special assessments for improvements, whose collection in the last analysis, if the obligor chooses to resist, can only be effected in a proceeding to foreclose a lien on his property. Whether the individual's assessment is justified by the benefits conferred is the principal matter upon which he should be entitled to a hearing. It has been held that the foreclosure proceeding, of which he is notified, satisfies the constitutional requirement of notice and opportunity for hearing. In *Kizer v. Town of Winchester,*[293] the statute specifically permitted the objector to litigate the question whether his property was "benefited to the amount assessed against the same."[294] In *Garvin v. Daussman,*[295] the Court concluded that the enforcement proceeding "could only be taken in pursuance of notice, and in a court in which ample opportunity would be afforded for questioning . . . all . . . matters respecting the legality and amount of the assessment, or

290. See Part I, note 49 *supra,* where the cited cases involve alleged administrative failure to accord the notice in assessment proceedings which is required by statute. See also People's Gas, etc., Co. v. Harrell, 36 Ind. App. 588, 76 N.E. 318 (1905); Fell v. West, 35 Ind. App. 20, 73 N.E. 719 (1905).

291. A leading case to this effect in the Supreme Court of the United States is Nickey v. Mississippi, 292 U.S. 393 (1934).

292. See DAVIS, ADMINISTRATIVE LAW 268 (1951).

293. 141 Ind. 694, 40 N.E. 265 (1895).

294. *Id.* at 645, 40 N.E. at 266.

295. 114 Ind. 429, 16 N.E. 826 (1888). The result in this case might have been rested also on the ground that the apportionment of the assessments was made by the common council of Evansville, a local legislative body. Where such a body acts, the prevailing view is that notice and hearing are not required, at least if some uniform rule (*e.g.,* apportionment according to area or value) is prescribed. See St. Louis S.W. Ry. v. Nattin, 277 U.S. 157 (1928); Browning v. Hooper, 269 U.S. 396 (1926); Hancock v. City of Muskogee, 250 U.S. 454 (1919). See also Potts, *Due Process in Local Assessments,* 12 A.B.A.J. 457 (1926); Note, 4 TEX. L. REV. 350 (1926). It is not intended that this discussion of problems of notice in special improvement situations, which arise under varying statutes and often become extremely complicated, shall serve as a guide to the subject, beyond indicating the general principles involved. For an indication of the nature of the problems involved see Kirsch v. Braun, 153 Ind. 247, 53 N.E. 1082 (1899).

which might cause a legitimate cause of grievance to the property-holder."[296] Accordingly these proceedings were held to be sufficient.

Another situation in which judicial proceedings might serve as a substitute for administrative notice and opportunity for hearing arose in two cases in which taxpayers, who resisted increased assessments of general property taxes, did so as non-resident executors of estates involved in local probate proceedings. The statutes did not provide for notice of increases in assessments to non-residents. In addition to sustaining the validity of increasing the assessments upon local property belonging to non-residents without notice to them, the Court pointed out that in these cases the taxpayers would be able to obtain hearings in the probate proceedings.[297]

A unique problem is presented by increases made by township or county tax assessors in the valuations of personal property in taxpayers' returns and by the addition of property not included in returns. In *Kuntz v. Sumption*,[298] the statement is made that "after a citizen has listed his property, no change in the list can be compulsorily made by an officer or tribunal whose decision is final, until, by due process of law, he has had an opportunity to vindicate the correctness of his list or resist an attempt to increase the valuation."[299] Under a different view, however, the taxpayer's return, being for the information of the assessor, contains no determination which requires any formality for its change.[300] The matter is covered by a statute which, taken literally, would seem to require notice to the taxpayer before a departure from the valuations shown in his return can be made. Its terms provide that "[w]henever the township assessor shall discover or receive credible information, or have reason to believe . . . that any person, company or corporation has for any cause omitted to list any part of his, her or their property, or has not returned the full value thereof . . . he shall proceed to correct his list. . . ." provided, however, that ten days' notice and an opportunity to appear and be heard shall be given to any resident owner of the property involved before the change is made.[301] This statute is

296. Garvin v. Daussman, 114 Ind. 429, 436, 16 N.E. 826, 830 (1888).

297. Gallup v. Schmidt, 154 Ind. 196, 56 N.E. 443 (1900); Buck v. Miller, 147 Ind. 586, 45 N.E. 647 (1896).

298. 117 Ind. 1, 19 N.E. 474 (1888).

299. *Id.* at 2, 19 N.E. at 474.

300. See Chicago & Erie R.R. v. John, 150 Ind. 113, 48 N.E. 640 (1897), where, however, the return of the railroad company was made, pursuant to statute, to the county auditor who transmitted it to the assessor. This procedure made it clear to the Court that "the assessor places the primary valuation upon property of the character of that in question here" and that, consequently, "notice to the owner could not be regarded as essential" to a departure from the return in making the assessment. *Id.* at 116, 48 N.E. at 641.

301. IND. ANN. STAT. § 64-1025 (Burns 1951).

said, however, to apply only to changes in completed assessments, presumably for earlier years, and not to departures from taxpayers' listings in making original assessments.[302] The absence of a requirement of similar notice to the taxpayer before his list can be departed from in the process of original assessment can perhaps be rationalized on the theory that the taxpayer has an interest which he knows he must protect before the assessor during the statutory assessing period and hence has all the notice to which he is entitled.[303] Even a decent minimum of efficiency in the tax laws would, of course, reject such a theory and require notice by mail to the taxpayer if his list is not to be accepted.[304]

The Supreme Court of the State has adhered, until recently, to the view that departures in a notice from the strict requirements of a statute specifying the contents and manner of the notice does not invalidate the notice if actual prejudice does not result.[305] The decision in *City of Ft. Wayne v. Bishop*[306] involves an apparent departure from this doctrine. There, after a statutory hearing had led to the dismissal of a policewoman from her position, the Court held the dismissal invalid because the statement of charges against her, which the Court held was required to be entered of record in advance of the hearing,[307] was inadequate in form, although the facts relied upon were entered. No facts were recited in the opinion or urged in the briefs to show that the officer was misled or handicapped in preparing her case by the want of com-

302. Chicago & Erie R.R. v. John, 150 Ind. 113, 48 N.E. 460 (1897). See also Hunter Stone Co. v. Woodard, 152 Ind. 474, 53 N.E. 947 (1899).

303. See p. 310 *supra.*

304. Notice of real property assessments, for which the taxpayer makes no return, is provided for in IND. ANN. STAT. § 64-1018 (Burns 1951). Notice of increases in the assessments of all taxpayers in an area, by way of equalization, is not constitutionally required, Hubbard v. Goss, 157 Ind. 485, 62 N.E. 36 (1901), but has been accorded by statute. State Board of Tax Comm'rs v. Jay County Farm Bureau Coop. Ass'n, 209 Ind. 281, 198 N.E. 777 (1935); Board of Comm'rs v. Western Electric Co., 198 Ind. 417, 153 N.E. 177 (1926).

305. See p. 312 *supra.* See also Klein v. Tuhey, 13 Ind. App. 74, 40 N.E. 144 (1895); Barber Asphalt Paving Co. v. Edgerton, 125 Ind. 455, 25 N.E. 436 (1890).

306. 288 Ind. 304, 92 N.E.2d 544 (1950).

307. The statutory provision containing the requirement, which is set forth in the opinion, prescribes that removal may take place after written notice has been given of the time and place of the hearing, "and after an opportunity for a hearing is given, if demanded, and the written reasons for such removal shall be entered upon the records" of the board of police commissioners. It is the last clause which the Court translated into the requirement that a statement of charges be entered in advance. It seems designed, rather, to require that the reasons for the determination, after it has been made, be entered. The written notice actually given in the case, instead of being confined to the time and place of the hearing, contained a statement of every statutory reason that could have been a ground of dismissal, whereas the facts disclosed only a single specific ground. The Court may well have been offended by this shotgun approach and have strained to find a basis for a requirement of greater precision in future cases. An admonition based upon an implied requirement of adequate notice, instead of a reversal of the dismissal, might have sufficed for this purpose.

pliance with the statute. The decision appears to be an unfortunate concession to formalism, which ought not be followed in the future

A somewhat earlier decision displays contrasting liberality toward an instance of possibly misleading notice in connection with a dismissal. There a teacher was notified of her discharge for cause but was given an opportunity, which she accepted, to resign instead. Apparently the school authorities claimed the right to dismiss without a hearing, although the law was otherwise. Upon the teacher's subsequent challenge to the dismissal in a mandamus action, the Supreme Court held that any misapprehension of law she might have been under, even if the school authorities contributed to it, could not overcome the waiver of procedural rights which was implicit in her letter of resignation.[308] The holding is technically defensible; but the question might be raised, as it was in the Court,[309] whether the situation created by the school authorities' wrongful action should not have been resolved in her favor by holding that no waiver resulting from her yielding to the desire to avoid public controversy.

The general requirements of a valid administrative hearing, where the right to a hearing is secured by constitution or statute, were stated by the Supreme Court in *Coleman v. City of Gary*.[310] The hearing requirement in that case was derived from a statutory provision for an appeal to a municipal civil service commission from the demotion of a patrolman by the police authorities, following a hearing by them. The commission's rules provided for a public hearing on appeal. The Court, noting that these rules were binding so long as they remained unchanged,[311] stated that the hearing "was for the purpose of determining whether the demotion had been justified by the facts" and that "[t]he rule required the hearing of evidence on which to base a decision," as well as that the hearing should, in general, be "fair."[312]

Administrative hearings actually vary from informal meetings, such those commonly held by officials administering the general property tax, at which interested parties may supply evidence and state conten-

308. Board of School Comm'rs v. State *ex rel.* Bever, 211 Ind. 257, 5 N.E.2d 307 (1936).

309. *Id.* at 263, 6 N.E.2d at 309 (Treanor, J., dissenting).

310. 220 Ind. 446, 44 N.E.2d 101 (1942).

311. Whether there is a general principle to this effect is debatable; but it has been applied in significant cases. See Bridges v. Wixon, 326 U.S. 135 (1945), and the excellent discussion in GELLHORN, ADMINISTRATIVE LAW, CASES AND COMMENTS 442-451 (2d ed. 1947). Where procedural rules must be published, as the Federal Administrative Procedure Act and other administrative procedure legislation requires, an additional reason is supplied why rules so published must be observed. See IND. ANN. STAT. §§ 60-1503, 60-1505, 60-1506 (Burns 1951).

312. Coleman v. City of Gary, 220 Ind. 446, 459, 44 N.E.2d 101, 107 (1942).

tions, to proceedings possessing the dominant characteristics of judicial trials. Perhaps the most significant classification of administrative hearings is that which distinguishes between those designed simply to supplement information already in the possession of the deciding authorities and those intended to establish a record which shall be the sole basis of decision.[313] Less fundamental variations involve such questions, among others, as whether witnesses shall be sworn, whether compulsory process to secure testimony is available, what principles of evidence shall apply, and whether briefs or oral argument shall be permitted.

The Federal Administrative Procedure Act contains different provisions for those hearings that constitute the sole basis for the resulting adjudications, from those applicable to hearings which do not constitute such a basis.[314] The Indiana adjudication act, on the other hand, which requires opportunity for a hearing in connection with every adjudication to which it applies,[315] provides also that a record shall be made at the hearing and that it "shall constitute the complete and exclusive record of such hearing and determination of such agency. . . ."[316] The hearing, however, may be conducted "in an informal manner and without recourse to the technical common law rules of evidence," but with the right of cross-examination.[317] The cumbersomeness and expense of record-type hearings, which might become burdensome in relation to many matters, is mitigated by the act's encouragement of wholly informal methods of disposing of "claims, controversies and issues" by consent of the parties.[318] License applications may be passed upon in the first instance without any right in the applicant to be heard; but a rejection does not become final before opportunity for a hearing.[319]

No statement is more common in judicial opinions dealing with the proper conduct of administrative hearings than that, as the adjudication act also provides, "the strict rule of evidence in court does not apply" to administrative proceedings.[320] Hence it might be supposed that administrative freedom in the admission of evidence deemed to have probative value for specialized purposes, without reference to the

313. This distinction corresponds to the classification of judicial review proceedings into those confined to the administrative record and those not so confined. See Part I, pp. 8-11 *supra*.

314. 60 STAT. 237, 239-242, 5 U.S.C. §§ 1004-1008 (1946). The provision for judicial review of fact determinations is similarly differentiated. *Id.* § 1009(e)(B)(5).

315. As to the meaning of adjudication under the act see Part I, note 76 *supra*.

316. IND. ANN. STAT. § 63-3009 (Burns 1951).

317. *Id.* § 63-3008.

318. *Id.* § 63-3007.

319. *Id.* §§ 63-3024, 63-3025.

320. Patton Park, Inc. v. Anderson, 222 Ind. 448, 457, 53 N.E.2d 771, 774, 54 N.E.2d 277 (1944); State *ex rel.* Byers v. School City of Evansville, 219 Ind. 288, 37 N.E.2d 934 (1941).

common law rules as such but, rather, with regard to logical principles of proof, including some aspects of the common law rules,[321] would be emphasized in the cases. Actually this administrative freedom is viewed more largely as a concession, using the common law rules as a point of departure. The concession is kept effective by holding that determination will not be set aside upon judicial review merely because incompetent evidence was admitted, so long as competent evidence also is present to support it.[322] In this State, nevertheless, judicial opinions in workmen's compensation cases continue to enjoin observance of many of the common law rules of evidence upon the Industrial Board. Thus, as to the Board, "[t]he rule against hearsay testimony has prevailed in Indiana for many years."[323] There is in fact an impressive body of appellate doctrine relating to the admissibility of evidence in workmen's compensation hearings.[324] That no similar body of doctrine has developed with reference to other administrative tribunals is perhaps due to the relative infrequency of cases involving their decisions and to the greater dissimilarity which prevails between their determinations and those of courts than exists between the decisions of the Industrial Board and judicial decisions.

Even in a proceeding leading to a determination which is required to be on the record of a hearing, the administrative agency may wish to take official notice of relevant facts without receiving evidence with regard to them. Where these facts are of general notoriety and a court might take judicial notice of them, no objection can arise. In addition, however, facts which are not generally known but fall within the agency's specialized competence may appropriately be noticed by it, subject to a

321. See the clear, informed discussion of problems of evidence in quasi-judicial administrative hearings in BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 170-181, 194-206 (1942). "The exclusion (under a technical exclusionary rule as to competency) of logically probative evidence whose actual probative value could be appraised with reasonable accuracy by the tribunal, is more likely to lead to the wrong result than the admission of such evidence would be. A trained hearing officer's experience, and his familiarity with the particular field of inquiry, should often enable him to appraise more accurately the weight properly to be accorded to such evidence than could a jury or even a judge unfamiliar with the field of litigation. The precautionary measures that are thought necessary in judicial proceedings would, in my judgment, often operate as an unwarranted hindrance to rational inquiry in a quasi-judicial proceeding." *Id.* at 175.

322. Warren v. Indiana Telephone Co., 217 Ind. 93, 116-117, 26 N.E.2d 399, 408-409 (1940). The scope of the requirement that there be competent evidence is discussed at p. 327 *infra*.

323. White Swan Laundry v. Muzolf, 111 Ind. App. 691, 693, 42 N.E.2d 391, 392 (1942). See also Asbestos Insulating & Roofing Co. v. Schrock, 114 Ind. App. 177, N.E.2d 395 (1943).

324. See SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA 384-392 (1950). The basic principle continues to be that the common law rules are not binding, with the restrictive doctrines operating by way of exception.

right in parties adversely affected to offer refutation. An example arose in this State recently in an unemployment compensation case in which the claimant was denied compensation because he had become unavailable for work. He objected because "official notice was taken by the Referee of the lack of work opportunities in Florida and the existence thereof in Indianapolis."[325] The Appellate Court, noting that "by express legislative mandate the rights of the parties in these cases need not be determined under the common law or statutory rules of evidence and other technical rules of procedure," approved the statement of a Pennsylvania court in a similar case, that administrative determinations may turn "upon specialized data and information peculiarly accessible to administrative agencies, and of which they may take official notice just as a court may take judicial notice." The information so noticed should, however, "be placed upon the record, and the parties apprised of it, so that the essentials of a fair hearing are preserved."[326] Since the referee's determination was reviewed by the Review Board after its communication to the parties, the requirement of opportunity for refutation had been met.[327] The Court's recognition of the validity of the notice device in administrative proceedings is a wise encouragement to administration which is efficient without becoming unfair.

The final stage in an administrative proceeding leading to a decision or order is, of course, the formulation of the agency's conclusions. A simple announcement of the decision or order may suffice for practical purposes, as is frequently the case in trial courts and with respect to appellate decisions in some jurisdictions, which are not accompanied by

325. Walton v. Wilhelm, 120 Ind. App. 218, 227, 91 N.E.2d 373, 377 (1950).

326. *Id.* at 227, 91 N.E.2d at 376, 377.

327. Two opposite theories are in vogue with regard to the validity of providing for the refutation of facts noticed by a tribunal. According to the one, such facts become indisputable; according to the other, the possibility of refutation continues, and, where necessary to secure opportunity for refutation, the facts noticed should be conveyed to the parties. See DAVIS, ADMINISTRATIVE LAW 477-478 (1951). As to the value of official notice and the various ways of communicating the facts noticed (statement in the course of a hearing, communication in an interim report, etc.) see BENJAMIN, *op. cit. supra* note 321, at 206-221; REP. ATT'Y GEN. COMN. AD. PROC. 71-73 (1941). The Model Administrative Procedure Act of the Commissioners on Uniform State Laws provides in section 9(4) that "[a]gencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed." The American Law Institute's Model Code of Evidence adopts the opposite theory, that facts noticed may not be disputed; but it provides in Rule 804 that "[t]he judge shall inform the parties of the tenor of any matter to be noticed judicially by him and afford each of them reasonable opportunity to present to him information relevant to the propriety of taking such judicial notice or to the tenor of the matter to be noticed." It may be doubted whether in practical operation any material difference is likely to arise between a dispute over the truth of facts noticed and one over the propriety of noticing them.

opinions. In other instances, agencies, like courts, have resorted to opinions to state their reasoning and conclusions. Of late, formal findings of fact which frequently are numbered, preceding the statement of conclusions and opinion, if any, have been used increasingly. The Supreme and Appellate Courts of this State, in common with courts elsewhere, have tended to impose a requirement that findings of this character accompany administrative decisions based upon the record of a hearing.

In 1948, the Supreme Court, relying upon decisions of the United States and Illinois Supreme Courts, held that an order of the Public Service Commission unaccompanied by enumerated findings could not stand;[328] in 1950, it rested the same conclusion on a 1941 statutory amendment which provided that the Commission should "in all controversial proceedings heard by it be an impartial fact-finding body and shall make its orders in such cases upon the facts impartially found by it."[329] It may be doubted whether the statute was directed to this point,[330] but the result is nevertheless desirable. A requirement of findings has been embodied in the Workmen's Compensation Act from the beginning.[331] The Employment Security Act requires the deputy before whom a claim is made in the first instance, and who does not conduct a hearing, to determine the claim "on the basis of the facts found by him." A referee, to whom the matter may then be taken, conducts a hearing and may "affirm, modify or reverse the findings of fact and decision of the deputy." The Review Board, which may then be invoked, is required to notify the parties of its decision, "together with its reasons therefor."[332] These provisions have been translated into a requirement that a decision of the Review Board be accompanied by findings when it is presented to a court for review.[333] The adjudication act requires that "informal findings of facts" be made either "by direct statement or by reference to the particular charges made in the complaint before [the] agency."[334]

328. Kosciusko County R.E.M.C. v. Public Service Comm'n, 225 Ind. 666, 77 N.E.2d 572 (1948).

329. Wabash Valley Coach Co. v. Arrow Coach Lines, 228 Ind. 609, 94 N.E.2d 753 (1950).

330. The provision in question, which is contained in IND. ANN. STAT. § 54-112 (Burns 1951), was part of an enactment that dealt with the functions of the Commission and of the Public Counselor in relation to each other. The requirement of impartiality, rather than that of findings, is what the legislature appears to have had in mind.

331. IND. ANN. STAT. § 40-1511 (Burns 1951); Inland Steel Co. v. Lambert, 66 Ind. App. 246, 118 N.E. 162 (1917).

332. IND. ANN. STAT. §§ 52-1542b—52-1542d (Burns 1951).

333. Allis-Chalmers Mfg. Co. v. Review Board, 121 Ind. App. 227, 98 N.E.2d 512 (1951).

334. IND. ANN. STAT. § 63-3010 (Burns 1951).

According to accepted theory, findings of fact should deal with basic or "ultimate" facts, and not with either evidentiary facts or conclusions of law.[335] These distinctions are difficult to apply, since they involve differences in degree rather than in kind; but they possess genuine substance. Whether a woman can qualify for statutory benefits of some sort may turn, for example, upon whether she is a decedent's widow; and this question may depend on whether she was validly married to the decedent. A finding that she is the widow will not be particularly helpful; a recital, on the other hand, of all the circumstances of her marriage shown by the evidence would be cumbersome and might fail to state the essential point. A statement that she became the wife of the decedent in a certain place on a certain day or that habit and repute in a particular place during a specified period established the marriage would, by contrast, state the essentials. It would give assurance that the agency had actually determined the issue, would acquaint the parties with the basis of the decision, and would enable a reviewing court to check whether the finding had adequate support in the record. Contemporary doctrine indicates that findings of this variety should in each instance accompany an agency's adjudicative decision[336] to which the requirement of findings attaches, although the exact meaning of the requirement has not emerged with the degree of clarity that might be desired.[337]

335. Guevara v. Inland Steel Co., 121 Ind. App. 390, 95 N.E.2d 714 (1950); Inland Steel Co. v. Lambert, 66 Ind. App. 246, 250, 118 N.E. 162, 163 (1917).

336. "The failure of the Public Service Commission to find specific facts upon which its order was based . . . makes it illegal and unlawful." Wabash Valley Coach Co. v. Arrow Coach Lines, 228 Ind. 609, 616, 94 N.E.2d 753, 756 (1950). See also Cole v. Sheehan Const. Co., 222 Ind. 274, 53 N.E.2d 172 (1944).

337. The current requirement as to findings in workmen's compensation cases, based on Cole v. Sheehan Const. Co., 222 Ind. 274, 53 N.E.2d 172 (1944), is that "[i]t is the duty of the Industrial Board to make a finding of fact on every issue presented to it." Guevara v. Inland Steel Co., 120 Ind. App. 47, 51-52, 88 N.E.2d 398, 400 (1949). See also Moore v. Staton, 120 Ind. App. 339, 92 N.E.2d 564 (1950). In the *Cole* case the Appellate Court subsequently held that the requirement of a finding as to the marriage of the claimant and the decedent was satisfied by the statement that they "were not husband and wife" and that the claimant "was not the common law wife of the deceased." Cole v. Sheehan Const. Co., 115 Ind. App. 303, 307, 57 N.E.2d 625, 627 (1945). In the *Guevara* case the Court later accepted as adequate a finding that "the common-law relationship of appellant and decedent did not exist openly and notoriously for a period of not less than five years immediately preceding the death of the decedent." Hence their relationship did not satisfy a statutory condition of the claimant's eligibility, that they have lived together for five years. Guevara v. Inland Steel Co., 121 Ind. App. 390, 396, 95 N.E.2d 714, 717 (1950). Previously the Board had erred because its findings covered only the parties' residence in Indiana, although they had previously resided together in Illinois. The new finding was attacked on the ground that it was not sufficiently specific, but the Court held that the deliberate omission of the words "in Indiana" rendered it sufficiently pointed and that it clearly covered the entire period during which the parties lived together. A finding which stated the length of their residence in each jurisdiction would have been preferable. See SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA 392-396 (1950), where it is pointed out that, in contrast to earlier holdings with respect to the Industrial Board, the more recent cases have on the whole

A further significant point with respect to some agency orders involves the extent to which they should be specific in requiring particular action on the part of persons addressed. This question may turn on the provisions of the governing statute. In *Southern Indiana Ry. v. Railroad Commission,*[338] the Commission was held not to be required to specify the division of a joint rate which it ordered two railroads to place in effect, since the statute permitted them to apply subsequently for an order covering this point in the event they could not agree between themselves. In *New York Central R.R. v. Public Service Commission,*[339] an order of the Commission was held to be deficient because it did not specify the manner in which an inter-connection between two railroads, which it required, should be constructed; for here the statute stated that the specifications should be laid down.[340] The problem involved is significant especially in statutory drafting, since under some circumstances it may be of advantage to have the details specified in an order, whereas under others freedom for the party regulated, or the imposition of responsibility upon that party, may be preferable.[341] If a statute is left indefinite, the courts must do the best they can with it.[342]

### F. *Scope of Judicial Review in General*[343]

Some aspects of the review which courts give to the determinations of administrative agencies have already been discussed. These include the governing philosophy as to the relation of courts to agencies[344] and the requirements as to agency procedure which have resulted from re-

accepted findings which amount to little more than legal conclusions. In Vendome Hotel v. Gibson, 122 Ind. App. 604, 105 N.E.2d 907, 106 N.E.2d 474 (1952), p. 326 *infra,* a clear-cut disposition of the case would have been aided by specific findings as to facts underlying the only stated conclusion of fact, that the accident arose out of and in the course of the employment.

338. 172 Ind. 113, 87 N.E. 966 (1909).

339. 191 Ind. 627, 134 N.E. 282 (1922).

340. In Pittsburgh, C.C. & St. L. Ry. v. Railroad Comm'n, 171 Ind. 189, 86 N.E. 328 (1908), an order under the same statutory provision was adequate in content and was sustained.

341. In general, perhaps, individuals and small businesses need guidance in such matters, whereas large concerns may be in a better position to determine their own course and accept the hazard of possible unintentional non-compliance. The needed assurance that the public interest will be served adequately must also be taken into account.

342. See Purnell v. Maysville Water Co., 193 Ky. 85, 234 S.W. 967 (1921); FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 149 (1928).

343. Time and space limitations prevent the detailed treatment originally planned for this topic. An adequate critique of the judicial review of substantive agency determinations must proceed field by field. Here, only limited aspects of the subject, possessing general significance, will be discussed.

344. Part I, pp. 2-8 *supra.*

ported judicial decisions.[345] The scope of judicial review is usually stated in terms of categories of matters which a reviewing court may make the basis of setting aside agency action, of disregarding it, of preventing or denying enforcement, or of awarding relief because of what the agency or its officers have done. These categories have varied historically and in relation to different kinds of proceedings in which review has been obtained.

The traditional non-statutory remedies were available simply to prevent action outside of an agency's jurisdiction,[346] to correct a usurpation of authority,[347] to compel action illegally withheld,[348] or to secure relief from the effects of action taken without jurisdiction.[349] If, today, statutory review of broader scope is available, non-statutory review of lesser scope may sometimes still be obtained independently in order to prevent administrative abuse.[350] Yet the traditional narrowly-stated bases for judicial action are capable of indefinite expansion.[351] A considerable part of the history of judicial review of administrative determinations has consisted of the development of such limited conceptions to the point where they might embrace whatever aspects of agency functioning were deemed to be in need of judicial correction. It is perhaps for this reason that the Supreme Court was led to say a few years ago that in addition to inquiring into the jurisdiction of the Industrial Board, "[a]ll the other powers of the judiciary with respect to the review of administrative orders may be said to be embraced in the duty to determine if the requirements of due process have been met."[352] Judicial review of the Industrial Board's decisions is statutory, however,[353] and it is un-

345. See p. 304 *supra.*

346. Prohibition, injunction, and, in most jurisdictions, certiorari.

347. Quo warranto, or information.

348. Mandamus, or mandate, and mandatory injunction.

349. Habeas corpus and damage actions.

350. See Part I, pp. 11-12 *supra.*

351. An outstanding example in the federal system is the expansion of the concept of jurisdiction in habeas corpus proceedings to review orders for the deportation of aliens. Commencing with the theory that unconstitutional procedure results in failure of jurisdiction and that the fact of alienage is jurisdictional and may therefore be inquired into by a court, the federal judiciary expanded their review of deportation orders by slow degrees until it came to embrace substantially the same categories of procedural and substantive questions as apply in the judicial review of many other administrative actions. Bridges v. Wixon, 326 U.S. 135 (1945); Kessler v. Strecker, 207 U.S. 22 (1939); Ng Fung Ho v. White, 259 U.S. 276 (1922); Kwock Jan Fat v. White, 253 U.S. 454 (1920). The new Immigration and Nationality Act enacts into statute substantially those procedural requirements that had previously been evolved judicially. 66 STAT. 209 (1952), 8 U.S.C.A. § 12526 (Supp. 1952).

352. Warren v. Indiana Telephone Co., 217 Ind. 93, 117, 26 N.E.2d 399, 409 (1940). See also Peabody Coal Co. v. Lambermont, 220 Ind. 525, 44 N.E.2d 827 (1942).

353. IND. ANN. STAT. § 40-1512 (Burns 1951): An award may be reviewed "for errors of law under the same terms and conditions as govern appeals in ordinary civil actions."

necessary to conclude that all of the matters which a court may make the basis of reversing the Board fall under the rubric of due process.[354] It is enough that the statute authorizes these matters to be reviewed and that it does not call upon a court to invade the administrative province in reviewing them.[355] Even in non-statutory review, some remedies involve avowed judicial determination of questions of legality, as distinguished from constitutionality.[356]

The scope of judicial review of administrative determinations that has come to be regarded as normal, both under statutes and in the application of the developed non-statutory remedies,[357] has been stated in various ways. The recent administrative procedure legislation, adopted and proposed,[358] contains the most significant formulations of this sort. None is preferable to that of the Indiana adjudication act, which provides that, on review of an adjudicative order or determination, the agency's "finding, decision or determination" may be set aside if the court finds it to be:

(1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or
(2) Contrary to constitutional right, power, privilege or immunity; or
(3) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or
(4) Without observance of procedure required by law; or
(5) Unsupported by substantial evidence. . . .[359]

354. It may be doubted, for example, whether an award based on a finding which is not supported by substantial evidence is a violation of due process. If there has been a determination untainted by fraud or abuse which would invalidate it for constitutional reasons, it may yet be infected by error which a reviewing court is supposed to correct. The distinction, of course, is merely one of words where the right to review is clear. Where the right is not clear and non-statutory means of review have been stretched to provide it, the concept of jurisdiction, equally with that of due process, has provided the basis for the extension. Cf. Board of Zoning Appeals v. Moyer, 108 Ind. App. 198, 210, 27 N.E.2d 905, 910 (1940): "It is the general rule that courts are inclined to treat defects that are not plainly jurisdictional as irregularities rather than as illegalities." This statement does not disclose why there may not be illegalities which, while calling for correction, are yet not jurisdictional in the sense that, for example, would subject the resulting order to collateral attack.

355. See Part I, p. 5 *supra*.

356. Wallace v. Feehan, 206 Ind. 522, 533-534, 190 N.E. 438, 443 (1934).

357. In Public Service Comm'n v. City of Indianapolis, 193 Ind. 37, 137 N.E. 705 (1923), the Court declined to extend its review in a non-statutory injunction suit beyond the questions of fraud and jurisdiction in the strict sense. Commission determinations of fact were taken as conclusive. In Public Service Comm'n v. City of LaPorte, 207 Ind. 462, 193 N.E. 668 (1935), the Court made the transition to a much broader scope of review in a statutory proceeding to enjoin the enforcement of an order.

358. FEDERAL ADMINISTRATIVE PROCEDURE ACT § 10(3), 60 STAT. 237, 5 U.S.C. § 1009(e) (1946); MODEL STATE ADMINISTRATIVE PROCEDURE ACT proposed by the National Conference of Commissioners on Uniform State Laws, §§ 6(2), 12(7) (1946).

359. IND. ANN. STAT. §§ 63-3014, 63-3018 (Burns 1951).

These categories, although reasonably clear,[360] are by no means entirely definite. For example, whether the objection to a given order or determination is based upon an alleged abuse of discretion, a departure from the governing law, or want of substantial evidence to support the facts found, may be difficult to determine or at least to state. In *New York Central R.R. v. Public Service Commission,*[361] the Commission's refusal to permit the discontinuance of an agency railroad station was attacked on the grounds that there was no substantial evidence to support it "and that the order was not rendered according to law." The facts appear to have been undisputed before the court; the character of the community, the volume of railroad business, and the cost of the station to the railroad were shown clearly and without contradiction. The real dispute was whether, upon these facts, the Commission made a defensible judgment in deciding that the agency station should be continued. The Supreme Court held that it did, pointing to the advantages enjoyed by the railroad, the obligations imposed upon it, and the needs of the community; yet the Court speaks also of the Commission as "the final arbiter of the facts involved" and of the Court's inability "to substitute its opinion for the opinion of the commission, upon evidence sufficient to justify the commission's finding."[362]

In *Klipsch v. Indiana Alcoholic Beverage Commission,*[363] the statute providing for judicial review of certain license refusals stated only, as to scope of review, that the Court should direct the Commission to issue a permit which it found to have been denied on "capricious, arbitrary, or political grounds." In the particular instance a beer wholesaler's license had been refused because the Commission found—justifiably, according to the Court—that the community would not support another such enterprise. The Court concluded that the statute did not confer authority upon the Commission to take economic factors into account and that the refusal was invalid. It would appear that an error of law was involved; but the Court held that the invalidity fell into the category of capricious or arbitrary action which could be set aside under the statute.[364]

Since a reviewing court is free to differ with the agency upon questions of law but is supposed to overrule a finding of fact only if it is

360. For a sound development of the distinction between questions of law and questions of fact see *e.g.,* Russell v. Johnson, 220 Ind. 648, 46 N.E.2d 219 (1943); Rhoden v. Smith & Decker Electric Co., 107 Ind. App. 152, 23 N.E.2d 306 (1939).

361. 212 Ind. 329, 7 N.E.2d 957 (1937).

362. *Id.* at 336, 7 N.E.2d at 959.

363. 215 Ind. 616, 21 N.E.2d 701 (1939).

364. See also Smith v. Lippman, 222 Ind. 261, 53 N.E.2d 157 (1944), holding that an order which failed to leave to a property owner the option, secured to him by the statute, to eliminate a fire hazard by either making repairs or razing the building which constituted the hazard, was "unlawful, arbitrary, and unreasonable."

unsupported by substantial evidence, the distinction between questions of fact and questions of law may represent the difference between affirmance and reversal of an agency order or determination. In *Vendome Hotel v. Gibson,*[365] the question was whether the loss of fingers by an employee who reached into an ice machine while it was operating, to secure ice for her own consumption while working, resulted from an accident arising out of and in the course of her employment. The evidentiary facts as to the nature and location of the machine, the custom of the employees in taking ice from it while it was not operating, and the absence of shop rules forbidding ice to be taken from it were clear and undisputed. The Court treated the issue as embracing the question of fact whether the machine while operating was obviously dangerous. It sustained the Industrial Board's implied finding that it was not, which was supported by evidence as to the appearance of the machine; and, in general, the Court sustained as a finding of fact the Board's stated conclusion that the injury did arise out of and in the course of the employment. Judge Achor, dissenting,[366] contended that the facts were undisputed and the only question to be determined was one of law.

In *Pollock v. Studebaker Corp.,*[367] the question arose whether death caused by the decedent's striking his head on the floor of his place of employment, when he fell in a faint, arose out of and in the course of the employment. The Court sustained as a finding of fact the Industrial Board's conclusion that the death did not arise out of the employment. Judge Draper, dissenting, argued that the question was one of law, as the Appellate Court had previously concluded.[368] It is perhaps significant that in the Vendome Hotel case the Court entered into considerable discussion of the merits of analogous factual situations, despite its deference to the Industrial Board, and rather clearly agreed with the administrative conclusion. If so, it may validly be argued that it should have accepted responsibility for the conclusion which it undertook to support. The *Pollock* case represents a frequent situation, involving the question whether death or injury, caused by certain factors which are common to

365. 122 Ind. App. 604, 105 N.E.2d 906, 106 N.E.2d 464 (1952). In Nelson v. Review Board, 119 Ind. App. 10, 82 N.E.2d 523 (1948), the judges took different views as to whether the issue involved was one of fact or of law, but agreed as to the result. In Blue Ribbon Pie Kitchens v. Long, 230 Ind. 247, 103 N.E.2d 205 (1952), the question involved was treated as one of fact; yet underlying it was the question whether in law a father may be a dependent under the workmen's compensation act upon the earnings of an unemancipated minor child, to which he is entitled, when he remains responsible for the support of the child. See also the same case in the Appellate Court, 96 N.E.2d 691 (1951); Vogel v. Williams, 118 Ind. App. 451, 79 N.E.2d 548 (1948).

366. Vendome Hotel v. Gibson, 122 Ind. App. 604, 616, 105 N.E.2d 906, 910 (1952).

367. 230 Ind. 622, 105 N.E.2d 513 (1952).

368. 97 N.E.2d 631 (Ind. App. 1951).

the place of employment and other locations, may be said to arise out of and in the course of the employment. If this question were squarely faced and decided as one of law, the successful administration of the Workmen's Compensation Act would probably be furthered.

The substantial evidence rule with regard to judicial review of fact determinations has been applied in workmen's compensation cases with variation in its phrasing.[369] All of these formulas represent an effort to insist that the factual conclusions of the Industrial Board must be rationally grounded in evidence; and it is precisely this which is the essence of the courts' duty. The courts insist, additionally, that an adequate portion of the supporting evidence must be "competent," *i.e.*, admissible under the legal rules of evidence.[370] Thereby they enter upon debatable ground; for legally incompetent evidence may at times be rationally convincing; while, on the other hand, the fact that evidence which forms a rational basis for a conclusion may also be legally competent does not necessarily add to its logical force.[371] Nevertheless significant authority elsewhere is in accord.[372] Since competent circumstantial evidence may support a finding, however, and incompetent evidence may predispose to its acceptance, it is doubtful how much practical effect the requirement to which the courts have adhered actually produces.[373]

An additional confusing factor in this State is the rule that an unsuccessful claimant may not prevail upon review of a finding of fact adverse to him unless "there is no substantial conflict in the evidence,

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369. The evidence is in harmony with the finding, Inland Steel v. Lambert, 66 Ind. App. 246, 118 N.E. 162 (1917); sufficient evidence, Blackfoot Coal & Land Corp. v. Cooper, 121 Ind. App. 313, 95 N.E.2d 639 (1950); Johnson v. P. R. Mallory Co., 117 Ind. App. 119, 69 N.E.2d 757 (1946); Schlechtweg v. McQuay-Norris Mfg. Co., 116 Ind. App. 375, 64 N.E.2d 664 (1946); any substantial evidence, Russell v. Johnson, 220 Ind. 649, 46 N.E.2d 219 (1943); evidence based upon a substantial factual foundation or evidence of probative value, Pollock v. Studebaker Corp., 230 Ind. 622, 105 N.E.2d 513 (1952); Blue Ribbon Pie Kitchens v. Long, 230 Ind. 257, 103 N.E.2d 205 (1952); Warren v. Indiana Telephone Co., 217 Ind. 93, 26 N.E.2d 399 (1940).

370. Any competent evidence, Kiddie Knead Baking Co. v. Bolen, 106 Ind. App. 131, 17 N.E.2d 477 (1938); Frazer v. McMillin & Carson, 94 Ind. App. 431, 179 N.E. 564 (1932); Hege & Co. v. Tompkins, 69 Ind. App. 273, 121 N.E. 677 (1919); competent or legal evidence, United Paperboard Co. v. Lewis, 65 Ind. App. 356, 117 N.E. 276 (1917); legitimate evidence, Indiana Bell Tel. Co. v. Haufe, 81 Ind. App. 660, 144 N.E. 844 (1924); some competent evidence, Consumers Co. v. Ceislik, 69 Ind. App. 333, 121 N.E. 832 (1919).

371. See DAVIS, ADMINISTRATIVE LAW 458-462 (1951); BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 181-194 (1942).

372. Sada v. Industrial Accident Comm'n of Calif., 11 Cal.2d 263, 78 P.2d 1127 (1938); Kadykowski v. Briggs Mfg. Co., 304 Mich. 503, 8 N.W.2d 154 (1943); Ptaszynski v. American Sugar Refining Co., 280 App. Div. 905, 115 N.Y.S.2d 543 (3d Dep't 1952); Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 612 (1940); Ogden Iron Works v. Industrial Comm'n, 102 Utah 492, 132 P.2d 376 (1942).

373. See Progress Laundry Co. v. Cook, 101 Ind. App. 235, 198 N.E. 807 (1935).

and it is sufficient to compel a finding in favor of the claimant."[374] This rule stems from the burden of proof which rests upon a claimant; but it is difficult to see why that burden is not sustained by a showing that the evidence on the other side of a particular issue of fact is insubstantial. Actually the rule seems to serve chiefly as a make-weight.[375]

Another proposition, often enunciated in workmen's compensation cases, is that on review a court "may consider only the evidence favorable to the award."[376] This statement runs counter to the increasingly-accepted theory that a reviewing court should consider the entire record and should judge the substantiality of the evidence supporting a finding in the light of opposing evidence.[377] Again, judicial opinions contain ample indications that the evidence on both sides is considered judicially, since it frequently is summarized and evaluated. In general, in keeping with the substantial evidence rule, the administrative findings of fact are permitted to prevail even when the court would have reached different conclusions if left to itself.[378]

The deference of the courts toward administrative determinations, apart from that which the substantial evidence rule enjoins with relation to findings of fact, applies principally to discretionary determinations. These frequently constitute the essence of an agency's work—the reason for its existence—and it is recognized for this reason that they should be respected.[379] Difficulty sometimes arises when a determination turns

374. Kemble v. Aluminum Co. of America, 120 Ind. App. 72, 74-75, 90 N.E.2d 134, 135 (1950). Variants of the rule appear in other cases. See Brooks v. International Furniture Co., 122 Ind. App. 300, 305, 101 N.E.2d 197, 199 (1950): "[U]nless the controlling facts are such that reasonable men are forced to a conclusion contrary to that reached by the Industrial Board." See also Wright v. Peabody Coal Co., 225 Ind. 679, 77 N.E.2d 116 (1948); Poulsen v. Review Board, 110 N.E.2d 746 (Ind. App. 1953).

375. In the *Kemble* and *Brooks* cases, note 374 *supra,* and Swing v. Kokomo Steel & Wire Co., 75 Ind. App. 124, 125 N.E. 471 (1919), the evidence was heavily in support of the finding of the Board.

376. Kemble v. Aluminum Co. of America, 120 Ind. App. 72, 90 N.E.2d 134 (1950); Leonard v. Kraft Foods Co., 122 Ind. App. 131, 102 N.E.2d 512 (1951); Reliance Mfg. Co. v. Ofcharchak, 119 Ind. App. 610, 88 N.E.2d 172 (1949); Jeffersonville Boat & Machine Co. v. Rager, 116 Ind. App. 521, 65 N.E.2d 638 (1946).

377. Stason, *"Substantial Evidence" in Administrative Law,* 89 U. OF PA. L. REV. 1026 (1941). See Note, *Effect of the Taft-Hartley and Administrative Procedure Acts on Scope of Review of Administrative Findings,* 26 IND. L.J. 406 (1951).

378. Kiddie Knead Baking Co. v. Bolen, 106 Ind. App. 131, 135, 17 N.E.2d 477 (1938): ". . . it was within the province of the Industrial Board to determine the ultimate facts in this case and if . . . it reached a legitimate conclusion from the evidential facts, this court cannot disturb that conclusion though it might prefer another conclusion equally legitimate." See also Lasear, Inc. v. Anderson, 99 Ind. App. 428, 192 N.E. 762 (1934); Lazarus v. Schere, 92 Ind. App. 90, 174 N.E. 293 (1931); National Biscuit Co. v. Roth, 83 Ind. App. 21, 146 N.E. 410 (1925).

379. Pittsburgh, C.C. & St. L. Ry. v. Railroad Comm'n, 171 Ind. 189, 86 N.E. 328 (1908); Southern Indiana Ry. v. Railroad Comm'n, 172 Ind. 113, 87 N.E. 966 (1909). See Part I, pp. 2-8 *supra.*

on a statutory phrase and is therefore one of law, if, at the same time, it involves policy considerations which may enter into the statutory interpretation. Whether an employee who is out of work is "available" for work so as to be entitled to unemployment compensation, for example, may be treated as a question of fact or as one of law.[380] If it is the latter, it involves more than the ordinary meaning of a word; for related to it is the question in many instances whether it will serve the statutory purpose to pay benefits under the circumstances. Such questions are sometimes called mixed questions of law and fact, or administrative questions.[381]

In *American Bridge Co. v. Review Board,*[382] the question was whether certain employees were involuntarily unemployed so as to entitle them to unemployment compensation. The employer, as its agreement with the union permitted, announced a shutdown for inventory purposes and stated that, so far as practicable, employees entitled to vacations would be expected to take them during this period. The claimants were employees who were not entitled to vacations and hence lost their wages during the period of the shutdown. Appellate decisions in other jurisdictions had held that a union agreement, such as the one in this case, made the shutdown and the resulting idleness voluntary as to all employees; but the Appellate Court affirmed the decision of the Review Board of the Employment Security Division in sustaining the claims in this case. Since the employer might have allowed vacations without a shutdown, the disadvantage to the claimants was imposed upon them and they fell within the legislative purpose "to provide for employees who are unemployed through no fault of their own." The Board's reasoning to this effect was "a proper interpretation to be placed as a matter of law upon the contract in question, upon the facts of this case, and the provisions of the . . . Act."[383] The opinion does not express deference to the administrative conclusions; but Judge Crumpacker, concurring, stated that "[i]t is noteworthy that administrative boards, in jurisdictions where the decisions of the courts have not decreed otherwise, almost universally grant relief to claimants under circumstances similar to those presently considered."[384] Judge Royse, dissenting, objected that "the views of such administrative boards have little weight when they conflict with the sound logic and reasoning of the able and respectable courts which have passed on this matter."[385]

380. Nelson v. Review Board, 119 Ind. App. 10, 82 N.E.2d 523 (1948).
381. See DAVIS, ADMINISTRATIVE LAW 874-914 (1951), and authorities cited.
382. 121 Ind. App. 576, 98 N.E.2d 193 (1951).
383. *Id.* at 581, 98 N.E.2d at 195.
384. *Id.* at 586, 98 N.E.2d at 197.
385. *Id.* at 586, 98 N.E.2d at 197.

In all probability, the Court was influenced to some extent by the administrative determination of a question of law, because of the agency's familiarity with the problems and relationships upon which it bore. If so, it acted in accordance with a strong tendency in the Supreme Court of the United States.[386] As to availability for work on the part of an unemployment compensation claimant in this state, however, the Appellate Court has overruled the Board.[387] In *News Publishing Co. v. Verweire,*[388] the Court differed with the Board on the question whether the claimant had been in employment subject to the act or fell within the statutory exception of a person who, although hired by another, "has been and will continue to be free from control or direction over the performance" of his work.[389] The specific nature of this exception differentiates the case from *N.L.R.B. v. Hearst Publishing Co.,*[390] where the United States Supreme Court deferred to the administrative conclusion that news vendors who exercised considerable independence in plying their trade were "employees" within the meaning of the National Labor Relations Act.

It is generally recognized that reviewing courts are most definitely within their own sphere, where maximum power exists to inquire into the merits of administrative determinations, when violations of constitutional right by administrative determinations are seriously alleged. Constitutional questions have arisen most prominently in cases involving public utility rate orders which are alleged to operate with confiscatory effect; yet the actual scope of the judicial power in such situations remains subject to considerable uncertainty. The doctrine which formerly prevailed that findings of fact, such as the value attributed to a utility's property, upon which constitutional rights turn, must be open to judicial reexamination in order to satisfy constitutional requirements, was recently declared thought to be moribund.[391] It has nevertheless been revived in some state decisions.[392]

386. See Dobson v. Commissioner, 320 U.S. 489, 502 (1943): "[W]hen the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court," which is to be treated like those of other administrative agencies, "must stand."

387. Nelson v. Review Board, 119 Ind. App. 10, 82 N.E.2d 523 (1948).

388. 113 Ind. App. 451, 49 N.E.2d 161 (1943).

389. *Id.* at 453, 49 N.E.2d at 162.

390. 322 U.S. 111 (1944).

391. DAVIS, ADMINISTRATIVE LAW 919-920 (1951).

392. State *ex rel.* Public Service Comm'n v. Marion Circuit Court, 230 Ind. 277, 100 N.E.2d 888 (1951), *dissenting opinion,* 103 N.E.2d 214 (1952); Public Service Comm'n v. Indianapolis Railways, 225 Ind. 30, 43, 72 N.E.2d 434, 440 (1947); Public Service Comm'n v. Indianapolis Railways, 225 Ind. 656, 661, 665, 76 N.E.2d 841, 843, 845 (1948); Opinion of the Justices, 106 N.E.2d 259 (Mass. 1952); Staten Island

Much abuse arose, prior to 1934 when the so-called Johnson Act[393] was adopted, from the federal courts' exercise of equity jurisdiction to enjoin the enforcement of the regulatory orders of state commissions in order to prevent alleged confiscation. That Act prohibited the exercise of federal judicial authority under these circumstances, provided the state order was grounded in due procedure and a "plain, speedy, and efficient remedy" might be had in the state courts. During this period, state courts, applying the judicial review provisions of state statutes, were less prone to substitute their judgment for that of the state agencies, even on constitutional questions, than the federal courts. In adopting the former federal practice now, courts find little support in the views of commentators.[394]

The principal objections to the ready substitution of judicial for administrative judgment on the issue of confiscation and to drastic injunctions based on judicial views are that the rate-making task requires expertness to as great a degree as any with which administrative agencies are concerned and that the essentially legislative character of the rate-making task requires its continued freedom from the substitution of judicial for legislative or administrative criteria. The Supreme Court of Indiana has continued to recognize the importance of these considerations.[395] Yet the process of determining whether a given rate order operates with confiscatory effect, and of devising a remedy if it does, tends easily to take the place of administrative control. A mere injunction against the enforcement of a commission order may seem inadequate, since it provides no guide to take the order's place. Even a court decree enjoining a commission order and requiring that future administrative action specify rates which secure a non-confiscatory return to the utility leaves many questions of detail unanswered until a new administrative order can be issued. To protect the utility and the public interests involved during the interim period a reviewing court is tempted

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Edison Corp. v. Maltbie, 296 N.Y. 374, 73 N.E.2d 705 (1947); DAVIS, ADMINISTRATIVE LAW 919-920 (1951).

393. 48 STAT. 775 (1934), as reenacted, 28 U.S.C. § 1342 (Supp. 1952).

394. DAVIS, *op. cit. supra* note 391; Barnes, *Federal Courts and Rate Regulation of Utility Rates,* 43 YALE L.J. 417 (1934); Benjamin, *Judicial Review of Administrative Adjudication: Some Recent Decisions of the New York Court of Appeals,* 48 COL. L. REV. 1, 19-36 (1948); Lilienthal, *The Federal Courts and State Regulation of Public Utilities,* 43 HARV. L. REV. 379 (1930); Segal, *Administrative Procedure in Massachusetts,* 33 B.U.L. REV. 1, 22-26 (1953); Note, *Administrative Finality and Due Process of Law,* 36 GEO. L.J. 337 (1948).

As to the meaning of confiscation see Beutel, *Valuation as a Requirement of Due Process of Law in Rate Cases,* 43 HARV. L. REV. 1249 (1930).

395. Public Service Comm'n v. Indianapolis Railways, 225 Ind. 30, 39, 72 N.E.2d 434, 438 (1947); Public Service Comm'n v. Indianapolis Railways, 225 Ind. 656, 661, 665, 76 N.E.2d 841, 843, 845 (1948).

to accompany its injunctive relief with affirmative prescriptions. If it does so, it must frequently receive new evidence and weigh all of the considerations which are involved in the administrative task. Only the most extreme urgency could justify such a course.

The judgment that confiscation is involved tends in itself to suggest that extreme urgency is indeed present. Yet "rate-making is not an exact science"[396] and there may be a vast difference between "confiscation" in some absolute sense, involving serious financial losses, and mere inadequacy of return upon a disputable property valuation. If the latter is all that is involved, justification for enlarged judicial review may be lacking. Even if actual hardship to the utility results from a commission order for a period that is not too long, counterbalancing gains at other times may avoid unconstitutional deprivation of property.[397]

It seems realistic to conclude that recent decisions in this State, approving drastic injunctions against rate orders of the Public Service Commission, lack adequate justification when measured by these criteria. In each case the injunction, temporary or permanent, prevented the Commission from establishing rates lower than those specified in the injunction, upon the theory that these were the minimum rates necessary to avoid confiscation. It is true that in the *Indianapolis Railways* case actual operating losses were established to the satisfaction of the trial court.[398] Even this factor, however, hardly justified the court in not only enjoining confiscatory rates but also prescribing those which should take their place. Although there is limited federal-court authority from the pre-Johnson Act period for such a decree,[399] the better practice would seem to be that adopted by the Supreme Court of Illinois in a recent case,[400] of leaving it to the Commission to establish the rates that would satisfy the terms of the injunction. The Indiana opinions, moreover, do not set forth the factual justification for the trial courts' conclusions that confiscation was threatened in a sufficiently serious sense to warrant overruling the administrative findings.[401] These decisions contrast with the

396. Hope Natural Gas Co. v. Federal Power Comm'n, 196 F.2d 803 (4th Cir. 1952).

397. *Ibid.*

398. Public Service Comm'n v. Indianapolis Railways, 225 Ind. 656, 76 N.E.2d 841, 845 (1947).

399. See Lilienthal, *supra* note 394.

400. People *ex rel.* Sprague v. Finnegan, 393 Ill. 562, 66 N.E.2d 690 (1946) (opinion on petition for rehearing).

401. The *Indianapolis Railways* case was complicated in its early stage by the Commission's apparently unjustified refusal to proceed for 90 days with a hearing upon a petition for an emergency fare increase. As the Court concluded, the Commission might have been mandated to grant the hearing; hence, the outcome on the merits should

sound relationship of judicial review to administrative action which has been generally maintained in this State. The record as a whole should be a source of satisfaction.

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not have been affected by this factor. Public Service Comm'n v. Indianapolis Railways, 225 Ind. 30, 36, 72 N.E.2d 434, 437 (1947).